IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI
CASE NO. **14-CV-24517-KMM**

Edge Systems, LLC, a California Limited Liability Company; Axia MedSciences, a Delaware Limited Liability Company,
Plaintiffs
vs.
Ralph Newton Aguila, an Individual a/k/a Ralph Aguila, d/b/a Hydradermabrasion Systems,
Defendant.

Friday, December 19, 2014

MOTIONS HEARING
BEFORE THE HONORABLE **CHRIS M. McALILEY**,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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(The following proceedings were held in open court.)

THE COURT: Thank you, Everyone. You can have a seat.

10:22 **THE COURT SECURITY OFFICER:** Calling the case of Edge Systems LLC, et al., versus Ralph Newton Aguila, case Number 14-24517, Judge Moore.

THE COURT: All right. Good morning. Let's start with appearances first for the plaintiff.

10:22 **MR. BABCOCK:** Good morning, Your Honor. I'm Brent Babcock for the Edge Systems and Axia MedSciences. With me today as counsel is Ali Razai sitting next to me and our local counsel, Richard Guerra, from Feldman Gale here in Miami.

10:22 **THE COURT:** All right. Welcome.

MR. BABCOCK: Thank you.

THE COURT: And for the defendant?

MR. AGUILA: Thank you, Your Honor. My name is Raphael Newton Aguila. I'm the defendant, pro se.

10:22 **THE COURT:** **Welcome, sir.**

MR. AGUILA: Thank you.

THE COURT: Okay. So we are here today for a hearing on -- let me pull up -- actually, I don't have the docket number, but it's Plaintiff's Motion For a Preliminary

10:23 Injunction that was filed on December 1st. That motion, of

course, also asked for a temporary restraining order, which, Judge Moore had entered. And that restraining order, I think at the moment, is good through today?

MR. RAZAI: December 30th, Your Honor.

10:23 **THE COURT:** December 30th. Okay.

MR. BABCOCK: By stipulation, Your Honor.

THE COURT: By stipulation. Okay. Very good. I don't think your microphone is on, Mr. Babcock. Right here is a button, and a green light goes on when the microphone is 10:23 on. You might see it on the other side of the stem. You'll see the green light come on when you press the button, but you'll want to have that one on too, sir. You both will be welcome to be seated at counsels' table or use the podium, wherever you're comfortable. That's not important to me 10:24 where you are. I'd just like you to be comfortable. And be sure that you have a microphone very close to your mouths so that we get a recording which is a backup for our court reporter and so that I can hear you.

So have you made -- let me say this. I've read 10:24 through the motion and the defendant's response. I have read through as much of the exhibits as I've been able to. And my law clerk, who is a great lawyer representing me here, has read them very thoroughly and we've talked about it. So I want you to have a sense of the level of my knowledge. I've 10:24 done my best to read everything, but I still have some things

to read. I've certainly been reading the law. And I've been thinking about this and thinking about how we best get to the point, the points of dispute, and not spend time on matters that are not in dispute because it seems to me not every aspect of a claim for a preliminary injunction on trademark infringement, trade dress infringement, and patent infringement are in dispute.

10:25

So that's one thing I want to talk about at the moment, to see if we can get clear about where the real dispute lies. I have my sense of it, but you'll set me straight. And to check in and see if you've made any progress in perhaps narrowing the issues. So why don't I start with you, Mr. Babcock.

10:25

And then I'll hear from you, Mr. Aguila, too.

MR. BABCOCK: Yes, Your Honor. I feel uncomfortable sitting.

THE COURT: I want you to be comfortable. So you do you whatever works for you.

MR. BABCOCK: Just force of habit. Is this microphone working?

10:25

THE COURT: It is. Was the other one not working? It is working. It is, yeah.

MR. BABCOCK: So, Your Honor, we did spend last week working with Mr. Aguila back and forth, a number of e-mails, and I believe there's also a teleconference to

10:26

discuss potential resolution of the case or at least narrowing the issues. When we spoke with the Court a couple of weeks ago you asked us to do that, which I think was reasonable.

10:26 **THE COURT**: I always ask you to do that.

MR. BABCOCK: And to date, we don't have any narrowing of the issues. We believe there are still basically three serious issues here: trademark infringement, trade dress infringement and patent infringement. We have

10:26 not been able to reach any kind of resolution or narrowing that would eliminate any of those issues from the nature of the hearing today.

THE COURT: Okay. Okay. All right.

MR. BABCOCK: Mr. Aguila may have a different view.

10:26 **THE COURT**: Mr. Aguila, your thoughts about that, sir?

MR. AGUILA: Yes. And --

THE COURT: Your mic, it's on. It's on.

MR. AGUILA: Thank you.

10:27 **THE COURT**: And you can pull that down on the table if you want, and you might comfortably be able to sit and have it in front of you.

MR. AGUILA: Yes. Can you hear me, Your Honor?

THE COURT: Yes, I can.

10:27 **MR. AGUILA**: So we discussed for several weeks

possible settlement issues, but we have not been able to reach any accord as of yet.

THE COURT: Okay. All right. And obviously, you're here without counsel, and I gather that's your choice at this point.

MR. AGUILA: Well, involuntary. My business was shut down earlier this month so I wasn't able to make any sales since then. So -- and yeah, I don't have any savings for a $150,000 retainer.

THE COURT: Right. I understand. Well, I've read your response and let me tell you, you're doing pretty well for not being a lawyer in terms of articulating issues. And so we'll just do our best to -- you know, on the one hand, parties are expected to know the rules and to follow them. On the other hand, the Court doesn't ignore the fact when someone is without counsel. And so I'll try to reach a balance there that's fair to you, fair to everybody.

MR. AGUILA: Thank you, Your Honor.

THE COURT: So Mr. Aguila, my sense is that you're not really disputing the notion of confusion. You're not disputing the fact that you are operating a business that has essentially the same name as the Plaintiff's business, at least some of it, the Edge Systems. You have a website, has a hyphen between Edge and Systems, but to most people they wouldn't notice any difference. That your product has a same

or similar names, depending on the marks that are at issue. That's a little variation.

If I'm right, your dispute is really that while they're the same or similar, that you have the right to do it because you have a prior use. Your use of these marks and the product that's patented precedes the Plaintiff's and therefore you're entitled to do what you're doing. Am I reading your papers correctly?

10:29 **MR. AGUILA:** Your Honor, that would be a correct summary. If I can just elaborate for one second. I've been selling and producing microdermabrasion machines for 18 years now. And to have -- and I've been dealing with Mr. Ignon for a large amount of that time. And --

THE COURT: Who is Mr. Ignon? I'm sorry.

10:29 **MR. AGUILA:** He's the owner or the -- I'm not sure what he is now officially, but he's the --

THE COURT: Okay. He's the gentleman seated over there at Plaintiff's table.

MR. AGUILA: Yeah. He founded the Edge Systems LLC 10:29 in California. And so like I said, I started about 18 years ago and I've been dealing with Mr. Ignon and his company since then and other companies too. There's other microdermabrasion manufacturers, not just us.

THE COURT: That's one thing I do want to 10:30 understand in the course of today, but keep going.

MR. AGUILA: There are several. But -- and I consider myself to have initiated several -- I mean not discoveries. You can't call it a discovery for microdermabrasion machines, you know, anything, but I was the 10:30 first to initiate some things, for example, the liquid transdermal infusion. I was the first to -- well, several things. And to have Mr. Ignon little by little copy my company, especially in the preinternet, you know, 1997, 1998, '99, when there weren't many websites, especially for small 10:30 companies like ours, that was fine.

I mean, in California it was okay if a company would take your name. That would not be a big deal. Our sales were local, et cetera, et cetera. But as the internet age came and we were all competing nationally together, all 10:31 the microdermabrasion manufacturers, that became an issue. And there's nothing -- there was nothing I could do. Since the beginning, Mr. Ignon has had more resources, so I was not able to really legally defend myself, my company Edge Systems, or any of my technologies with patents.

10:31 **THE COURT:** Okay. But so -- and again, and you'll have a chance to testify if you want to do that, and we'll get there.

MR. AGUILA: Yes.

THE COURT: What I have to keep in mind is all this 10:31 needs to fit in certain boxes, if I -- that's the way I think

of it, in terms of what the plaintiff's burden of proof is to establish the right to a preliminary injunction on either claim of trademark infringement and/or trademark dress infringement and/or patent infringement.

10:32 So to prove trademark infringement, the first element of proof on the plaintiff's part is ownership of a valid and protected mark. And you're disputing ownership, is what I hear you saying.

MR. AGUILA: Well, there is an issue there. Their 10:32 machine is called the HydraFacial. That's what they sell it as, HydraFacial.com. The machine is called HydraFacial. In their lawsuit they use the term, the Edge machine, to refer to it. However, in 2000, when they received the trademark for Edge -- the Edge System, that was referring to an actual 10:32 machine. At that time --

THE COURT: I think we're getting into a level of detail that I wasn't trying to do right now. What I'm trying to break down is there are two issues for the plaintiff to prove on trademark infringement, ultimately, to win a 10:33 lawsuit; is ownership of a valid and protectable mark and that your unauthorized use -- they'd have to show it's unauthorized -- is likely to cause confusion. Okay? I don't think -- am I right, you don't have a big fight to pick about likelihood of confusion?

10:33 **MR. AGUILA:** No.

THE COURT: Okay.

MR. AGUILA: Yeah, that's -- we accept that. There is a likelihood definitely --

THE COURT: It is your actual confusion? Would you dispute that?

10:33

MR. AGUILA: I would dispute that because by using the term HydraDerm MD, the term derm in our industry is known to refer to dermatology, that type of stuff. Facial, the term facial in our industry, is connotated with salons and spa treatments. And so a HydraFacial, it would be something that you get at a salon, a facial, a hydrating facial. A HydraDerm, in our industry anyway, I would argue refers to a more medical-type treatment, which is what --

10:33

THE COURT: So let me stop you there because again we're get into a level of detail I wasn't trying to do right now. You don't dispute that there is a likelihood of confusion?

10:34

MR. AGUILA: In terms of trade dress, there would be a likelihood of confusion, I would say, yes.

THE COURT: And in terms of trademarks, that may be too broad a question to ask because there are a number of trademarks. We'll come back to that. But to some significant extent, you don't dispute likelihood of confusion. Certainly not on trade dress?

10:34

MR. AGUILA: Right.

THE COURT: And for some or all of the trademarks. Is that fair to say? We'll have to go through them.

MR. AGUILA: Yes, we have some disputes under trademarks and the validity and...

10:34 **THE COURT**: I'm not talk about ownership and validity, I'm talking about likelihood of confusion.

MR. AGUILA: Okay. Yeah. I mean the only confusion would be HydraDerm, HydraFacial, and the Edge System versus Edge Systems.

10:35 **THE COURT**: Okay. All right. So it's not black and white. I can't rule -- I can't say that there's a complete agreement on that -- on that element. But your primary focus is on the first element of Plaintiff's proof, that the plaintiff has ownership of the valid and protectable 10:35 mark. That's what I think I'm hearing.

MR. AGUILA: Of all their trademarks, yes.

THE COURT: Yes. Okay. And when I look at -- let me just find my place here -- trade dress, the elements are a little bit different. The plaintiff first would have to show 10:35 that trade dress is either inherently distinctive or is an acquired secondary meaning. And you were just saying to me...

MR. AGUILA: Well, their trade dress is -- that's not -- when they say HydraFacial, that's not the only 10:35 HydraFacial that they have. Their original machines -- maybe

I can show Your Honor --

THE COURT: You know what? What I'm finding out is this is going to take more detail.

MR. AGUILA: Yeah, there are different HydraFacials, so.

10:36

THE COURT: All right. You have some documents that you filed, and I believe you want to introduce some of them into evidence today. Am I right?

MR. AGUILA: I have several documents to introduce into evidence.

10:36

THE COURT: Okay. Are they anything in addition to what you've already filed with the Court?

MR. AGUILA: The only thing would be the pictures of their two HydraFacials, their original HydraFacial machines. I have not submitted that in any of my motions, but I would like to submit that. That's the only one.

10:36

THE COURT: Okay. We'll talk about that when we get there. So you have some documentary evidence. And then do you want to testify?

10:36

MR. AGUILA: Yes.

THE COURT: Okay. So you'll be testifying. And would that basically be your evidence that you would be putting on today?

MR. AGUILA: Right.

10:36

THE COURT: Okay. So Plaintiff, what evidence do

you want to put on today?

MR. BABCOCK: Yes, Your Honor. I think the only documentary evidence that the Court doesn't have is going to be a declaration from a Ms. Cantavespri regarding her nonattendance here today, one of our declarants. And also we have a witness, Dr. Duboys, who is sitting behind me, Dr. Elliot Duboys. And I believe --

Do we have any documents from him that need to be introduced?

10:37 **MR. RAZAI:** Yes. About five documents from Dr. Duboys in the form of e-mails that I believe they were correspondence with Mr. Aguila and his company, so he -- passing them --

THE COURT: All right. So Dr. Duboys is one witness.

MR. BABCOCK: So then we have -- I wanted to introduce the Court to two of the principles at Edge Systems. Behind me is Bill Cohen. Bill is one of the declarants on the motion. He is the president of Edge Systems, and is one of the founders of Edge Systems back in the 1997 time frame. On my far right, your far left, Roger Ignon. Roger is the VP of R and D, or engineering at Edge Systems and also one of the cofounders of Edge back to the 1997 time frame. So we have three witnesses. Those are the three witnesses.

10:37 **THE COURT:** Okay. All right. Very good.

All right. And there was something else I meant to bring up, but I'm forgetting what it is at the moment. It will come back to me.

Anything further on the plaintiff's part that you wanted to offer?

MR. RAZAI: Just one other thing. With respect to -- so there's about four documents that haven't been entered into evidence yet. We will be presenting --

THE COURT: Well, we don't have anything in evidence yet.

MR. RAZAI: I'm sorry. That haven't been submitted in this case in terms of filings with the Court. But we will also be entering into evidence documents that have been filed with various declarations, and we'll be referring to them based on the letter exhibit that they were filed because they're all numbered consecutively, so they're not staggered. We don't have Exhibit A four times. It's A through I believe WW at this point.

THE COURT: So what you want to do is when you introduce exhibits, call them by a letter?

MR. RAZAI: Yes.

THE COURT: And they will be the letter that already identifies them to the extent they've been filed on the Court's docket.

MR. RAZAI: Exactly, Your Honor.

THE COURT: Right. But it does -- just to be clear, particularly -- is it Aguila? Am I saying it right?

MR. AGUILA: Aguila.

THE COURT: Right. So even though you filed something with the court, the rules of evidence do apply in this hearing. And so we'll -- I'll expect you to actually move into evidence whatever you have, identify them, and I'll resolve whether they can be admitted or not. And if I am uncertain about it or there's -- I feel there's some more thought I'd like to give to you, I can admit it subject to my later review. So we don't have to spend too much time here watching me think and reading the rules of evidence if I need to think about.

So -- because whatever -- I'm going to have to end up writing up a report and recommendation and in doing so, I'll consider what evidence I rely upon. And if there's a question of admissibility, I can take another look at it. So that would be my thought on that. So Mr. -- how do you say your name?

MR. RAZAI: Razai, Your Honor.

THE COURT: Razai? Anything else?

MR. RAZAI: That's it. Thank you.

THE COURT: And anything else that the plaintiffs wanted to say in terms of -- well, here is one question I had. If the Court were to find that you're entitled to a

preliminary injunction on the trademark infringement and/or trade dress infringement, am I right that the Court would not have to reach the question of patent infringement for purposes of the PI?

10:40 **MR. BABCOCK:** I don't think that's correct, Your Honor, only because what we would be concerned about is -- and I'll walk you through the products here. But basically, an infringing -- a product that infringes the patents that maybe somehow modestly reconfigured to avoid the trade dress, 10:40 trademark issues. So let's say he came up with a company name called Aguila Systems.

THE COURT: Right.

MR. BABCOCK: And he no longer called the system HydraDerm but maybe called it the Aguila derm, for example. 10:41 So -- and he doesn't use our fluid trademarks. That would be a pretty easy change for him to make, I would think.

THE COURT: Right.

MR. BABCOCK: And then on the trade dress, changing the blue cover to a different color and maybe some other 10:41 modest modification to try to avoid the similarity of trade dress. But still infringing the patents would be a serious problem for us. In fact, that was the reason we initially approached Mr. Aguila, was the patent infringement was probably our most serious concern. It then evolved into a 10:41 trademark/trade dress issue shortly thereafter. So I -- we

would request that the Court, even if we do resolve trademark and trade dress in the plaintiff's favor, also look at the patent infringement case and --

THE COURT: Well, I'll do it if I have to. And what you're saying is making some sense to me. That even if you were to win all that you ask for on the trademark/trade dress infringement, it wouldn't completely support the full remedy that you're asking for in the preliminary injunction.

MR. BABCOCK: That's right. And for purposes of the PI, I will acknowledge, Your Honor, that we did try to narrow that issue for the Court. We recognize that patent infringement is probably the most complicated of the issues.

THE COURT: Yeah.

MR. BABCOCK: There are six patents, and the patents have many claims in each patent. Given that we want to try to make it simpler for the Court and also for Mr. Aguila, we focused on one patent and one claim which we think is a very representative claim. And so in that respect, I think the Court doesn't need to go beyond that particular patent issue. It doesn't need to look at the other patents. We'll talk about them briefly today, perhaps, but we haven't pled that in the -- for the purposes of the PI. It is part of the complaint. It's part of the case.

THE COURT: Right.

MR. BABCOCK: But for purposes of the PI, it is a

much more focused issue. And the claim we'll look at is very short, very -- we can walk through them. Mr. Ignon will walk through it, and you'll see it's a fairly straightforward issues.

10:42 **THE COURT:** Okay. All right. Those are my questions. Well, the plaintiff has the burden of proof -- ultimate burden of proof, so the plaintiff should begin.

MR. BABCOCK: And, Your Honor, what I thought we would do -- and I'm not sure what your schedule is today. We 10:43 have some opening remarks that we'd like to make, some introduction.

THE COURT: Sure.

MR. BABCOCK: And that might take maybe half an hour, 40 minutes. We have a slide show that will provide the 10:43 Court with some background. It sounds like, Your Honor, that you're fairly well up to speed. So to the extent this is too remedial, you can herd me along.

THE COURT: All right.

MR. BABCOCK: But I do want to make sure that we 10:43 have an overview, make sure that we provide the Court with the background that's necessary to understand the case. After we complete our opening, I would expect Mr. Aguila might have some opening remarks he would like to make.

THE COURT: Right.

10:43 **MR. BABCOCK:** And then I will turn the duties over

to Mr. Razai, who will then be examining our three witnesses and allowing Mr. Aguila, then, I assume to cross-examine if necessary.

THE COURT: Right.

10:44 **MR. BABCOCK**: And then I guess Mr. Aguila would take the stand, and he's indicated he would like to. Perhaps then he will be a witness after we finish ours. And then maybe some closing remarks at the end of the day.

THE COURT: Right. So I have the day.

10:44 **MR. BABCOCK**: Oh, good.

THE COURT: And we have a lunch break.

MR. BABCOCK: Okay. Understand. Understood.

THE COURT: Do you foresee any problem completing this?

10:44 **MR. BABCOCK**: Not at all.

THE COURT: By 4:00 o'clock today?

MR. BABCOCK: That's about what we were thinking.

THE COURT: Right. At the latest.

MR. BABCOCK: We were thinking maybe opening

10:44 remarks, we could probably finish before lunch. Maybe start -- begin our first witness and then we could finish -- come back at 1:30, maybe?

THE COURT: Yeah. We'll see.

MR. BABCOCK: And then finish up by 4:00. That's

10:44 sounds about right.

MR. AGUILA: Your Honor, I have a concern about equal time. They have many more witnesses than my side. I'm just afraid that you're going to hear double or triple the amount of information than I'll have a chance to.

10:44 **THE COURT:** Well, you have an equal opportunity to put on whatever evidence you want to put on. More is not necessarily better. And you may not have as much to establish. The plaintiff has to carry the burden of proof. So, you know, equal doesn't mean everybody gets the same

10:45 number of witnesses. And it's really your choice what evidence you want to put on.

So when you testify, sir, you'll be under oath. You can give a narrative testimony. You're not going to be questioned. You don't have to question and answer yourself.

10:45 That would be kind of silly. The plaintiff could object that something you're trying to testify to would be inadmissible and we'll address it. And then you would be cross-examined -- available for cross-examination assuming they want to ask you questions. And you could offer

10:45 objections to a question if you thought there was an evidentiary basis for them not to ask the question.

I don't want us to get too hung up in all of that. Particularly, you're not a lawyer. You're not going to know the rules of evidence. And they're complicated. So, you

10:46 know, I'll have my eye on it. I will certainly be thinking

about -- and I'm getting ahead here. But if Plaintiff's counsel were to ask you something that jumped out at me as completely impermissible under the rules of evidence, I'd raise the issue. So just so you know, I'm thinking here.

10:46 But anyway, that's kind of how the process will go for you offering testimony. I just thought I should mention that to you, too, so you have a forecast. Does that make sense?

MR. AGUILA: Yes.

10:46 **THE COURT:** Okay. So keep your opening remarks as concise as you can because I -- things have a way of taking longer than they should and I don't want us to run out of time today.

MR. BABCOCK: Very good, Your Honor. And can the 10:46 Court see the PowerPoint presentation behind us?

THE COURT: Yeah, I can.

MR. BABCOCK: So at the outset, of course, we appreciate the Court's time and --

THE COURT: You don't need to say that. Just go 10:47 for it. Thank you. But I'm paid to do this, and I'm happy to be here.

MR. BABCOCK: All right. So we thought to start off with, Your Honor -- am I allowed to approach in the well?

THE COURT: Yes, yes.

10:47 **MR. BABCOCK:** To go through the products here?

THE COURT: Yes.

MR. BABCOCK: Okay. Because we thought even though you've seen pictures in the pleadings and the papers, we thought it would be helpful to actually see the products at issue, do a little explanation. The witnesses, of course, Mr. Ignon and Mr. Cohen, are very familiar with our product. The product closest to you is the authentic Edge product. HydraFacial MD.

THE COURT: Okay.

MR. BABCOCK: The product closest to Mr. Aguila is his product.

THE COURT: Okay.

MR. BABCOCK: This is the Hydradermabrasion MD that became the reason why we're here. And then we learned after we filed the PI and the TRO motion about a -- kind of a hybrid product, that's why it's in the middle. And so what this hybrid product is is a HydraDerm system that Mr. Aguila sells.

MR. AGUILA: Objection, Your Honor. There's no foundation.

THE COURT: Okay. Right now what he's doing is making argument, which he can make. Argument is only that. It is not evidence. So it's meant to give me an overview. So it kind of lays a foundation for what evidence will be. Either they prove it up or they don't, and you'll have a

chance to do the same think.

MR. BABCOCK: And we learned about this product from Mr. Duboys, who will testify about this product. And essentially what it is, is the body came from a real Edge System product but it was reconfigured. The name was scratched out. A new name was put on it and new accessories were added to the system. So that it's kind of a refurbished system with new components. And there are problems with this particular system and in particular because it's no longer an Edge system. It's been remanufactured in many ways, including new handpieces that present problems on patent side.

10:48 10:49 10:49 10:49

So while you'll see the focus in the papers is about our product versus the knockoff product -- or excuse me -- the accused product, we also wanted to discuss this product today as well with Mr. Duboys which is also an infringing product.

THE COURT: So to be clear, the one in the middle, what are we going to call that?

MR. BABCOCK: We call it the -- we've been calling it the remanufactured HydraFacial.

10:49

THE COURT: Okay. So the remanufactured, the defendant's product, which has been remanufactured from yours.

MR. BABCOCK: Correct.

10:49

THE COURT: Almost I want to say cloned but that's not maybe the right -- that's not really an accurate term. Trying to come up with a short name for it.

MR. BABCOCK: Okay. Why don't we call it the hybrid.

THE COURT: The hybrid product. Okay.

MR. BABCOCK: I put it in the middle kind of for that reason. Because as you can see, like some of the parts were authentically made by Edge. So the base and the window, some of this was authentic. But then some of it is not including -- you can see this is like a plexiglas piece here as opposed to the -- our pieces, and also the handpieces are all new. You can see the --

THE COURT: Okay. So to be clear, the hybrid product and then the defendant's product on the left, which is called Hydradermabrasion MD, those are two machines which you say are examples of his violation of the trademarks, the trade dress and the patent.

MR. BABCOCK: Correct.

THE COURT: Am I right?

MR. BABCOCK: Correct. So you'll see trade dress is -- and we'll talk about this a little bit. But you'll see the basic configuration with the base being a light-colored rectangular base. The blue window is very distinctive. And then the name, you'll see it says here Edge Systems. That

says Edge Systems.

THE COURT: Right. Pointing to the hybrid machine. Okay.

MR. BABCOCK: And just a little bit about the operation, Your Honor. Essentially, these are for facials that are used in high-end spas. These are fairly high end treatment equipment for allowing patients to have their skin, typically their face, rejuvenated. And what's kind of unique about our system is a combination of a couple of things. But essentially you'll see there's a couple of tubes in the handpiece. And there is an abrasive tip at the top. And what this system does is it allows the user, the esthetician, to select a serum and the serums are in these bottles in here (indicating). And the serum is infused into the face.

THE COURT: I'm just thinking. Isn't your witness going to testify to all of this?

MR. BABCOCK: To some extent, yes.

THE COURT: Wouldn't that be appropriate in terms of how the machine works?

MR. BABCOCK: If you'd like, Your Honor.

THE COURT: I think so. I assume it's like your overview, but this sounds like something you're going to want to have evidence on. And it seems like you have very qualified people to testify --

MR. BABCOCK: We have excellent people that will do

that. So essentially, the systems here all have that same capability. And you'll see what we're looking at here is handpieces, abrasive tips and --

THE COURT: And tubing that pulls a serum or a liquid up to be used through that handpiece.

MR. BABCOCK: And at the same time, there's aspiration or vacuum that's allowing the systems to -- the skin that is removed during the process is then aspirated or sucked along with the serum through the other tube into a waste container in the back.

THE COURT: Okay.

MR. BABCOCK: So I wasn't trying to get into a whole lot of detail but just provide an overview about what the systems do.

THE COURT: Okay.

MR. BABCOCK: So starting on the trademark side, Your Honor, Edge Systems was founded in 1997. And we have used that mark continuously in commerce nationwide from that time. The evolution of the logo has changed slightly over the years, and you'll see on the slide behind me beginning in 1999 is when the -- what we call the Chevron logo. So the name Edge Systems 1997. The Chevron logo around 1999. And it began with the logo on the left to the logo in the middle, then the current logo is there on the right. But all very prominent use of the three triangles with the word Edge or

Edge Systems in the logo.

So here is the product that you have before you, Your Honor. This product is covered by our six U.S. patents. This is a revolutionary product that really is the leader in the field. It's highly touted and advertised prominently by Edge. And Edge has spent millions of dollars in advertising and research and development. The patent that we're focusing on here today will be the 620 patent, the one that's listed there in the upper left.

10:54 So we discussed just a few minutes ago about the trade dress. And you can see from the product or from the demonstration behind me that we have a light gray body on the system itself, that it has a translucent blue cover that covers the liquid bottles or the serum bottles, a darker gray base on wheels. There's also a monitor for the operator on top of what we call the tower. And then the four wheels on the corners to make the system maneuverable.

The registrations that we have are the two listed here, HydraFacial MD and HydraFacial. Both federal registrations, the trademark office. And then, in addition, we have many other trademarks. Some of these are common law marks, which basically establish -- are established through use in commerce.

THE COURT: I don't think you were suing on the HydraFacial marks.

MR. BABCOCK: No, that's not part of the preliminary injunction.

THE COURT: Okay. All right. Just trying to be clear.

10:56 **MR. BABCOCK:** The marks here that are at issue on the preliminary injunction, Edge Systems.

THE COURT: Right. I see that on page 3 of your memo. You've got that list.

MR. BABCOCK: Yes. And you see the first use in 10:56 commerce and continuous use thereafter started in '97.

THE COURT: Right. So three are registered and the others are all common law marks.

MR. BABCOCK: That's correct. And this identifies dates, first use, and registration numbers if applicable.

10:56 **THE COURT:** Got it.

MR. BABCOCK: And these are examples of the use in commerce of the trademarks that we just looked at on the list. And you can see they're listed either on the machine itself or they're on the serum bottles that are sold with the 10:56 system or in conjunction with the system.

THE COURT: Okay.

MR. BABCOCK: A little bit of a historical background, and this I do have personal knowledge of. In October of 2014, we first were surprised to learn that the 10:57 product that you see here that is accused was on a site that

was a site of one of our other industry competitors called Lumenis. Now they don't sell this type of machine --

THE COURT: So -- and I hate to interrupt, but this is what you've written in your memo and I've read it. And like you said, I could hurry you along. I'm interested in something new. But if it's in the memo, I think I'm on top of it.

MR. BABCOCK: Well, I think a little bit more detail here that I can provide, Your Honor, which is I personally called Lumenis and asked about the product that they were advertising on their website. I spoke to the vice president of regulatory affairs.

MR. AGUILA: Objection, Your Honor. Is he going to be a witness?

THE COURT: No. It's a fair question. Are you going to offer this as evidence, and do I need it?

MR. BABCOCK: I don't know if you need it or not, Your Honor, but I think certainly the background we thought would be helpful for the Court to have.

THE COURT: I really am inclined -- listen, I appreciate sometimes an overview is more about these are the legal issues and this is what we have to prove and we have these witnesses and this is how we'll do it. But I think you're kind of going in a different direction, and I am mindful of trying to fairly apply the rules of evidence here.

So I think this is the kind of thing that you can offer in testimony if you wanted to do so.

MR. BABCOCK: Okay, Your Honor.

MR. AGUILA: I'm afraid he might be leading the witnesses with this, quote/unquote, introduction.

THE COURT: You mean because the witnesses are sitting here?

MR. AGUILA: Yeah --

THE COURT: Well, that's a possibility. I mean, you can also ask that the witnesses wait outside. That's also a possibility.

MR. AGUILA: Could we do that until he's finished with his introduction.

THE COURT: You can invoke the rule. It's called the Rule of Sequestration and you can ask that witnesses wait outside.

MR. AGUILA: Could you gentlemen do that?

THE COURT: Well, you can ask the Court to do that. And that's a reasonable thing to do. And I think perhaps if you had a bunch of witnesses, I'm just guessing Mr. Babcock would have invoked the Rule of Sequestration.

So I will ask that your witnesses wait outside.

MR. BABCOCK: So Mr. Ignon, Dr. Duboys, Mr. Cohen.

THE COURT: And gentleman, just so you know, that's no reflection on -- it doesn't suggest anything about our

view of your integrity. It's really a basic rule that's applied pretty typically whenever we have a hearing. So we just want you to know that.

(Thereupon, the witnesses left the courtroom.)

10:59 **THE COURT**: All right. But your client can remain in the courtroom to the extent that this gentleman is your client.

MR. BABCOCK: Well, he is, but he's also a witness.

THE COURT: All right. Okay. So what else do you

11:00 have, sir?

MR. BABCOCK: So let's move on to the next slide. And so I think we probably had this in our brief as well, Your Honor, which is the timing. We thought the timing is important here with regards to Defendant's activities. And

11:00 we showed the cease and desist letter that went out to the defendant on October 27th.

THE COURT: Yeah.

MR. BABCOCK: From Edge. And the next day -- well, within -- shortly within a week, the website had been updated

11:00 from Lumenis, which is what the defendant was using, the Lumenis website saying he was part of Lumenis to then adopting an Edge Systems website.

THE COURT: Now, are you going to offer evidence on this, because I wasn't entirely clear on the Lumenis. I read

11:00 about Lumenis and that connection, but are you going to have

some testimony on that?

MR. BABCOCK: Yes. I think Mr. Cohen will be testifying about the Lumenis website.

MR. RAZAI: With respect to what the website looked like, Your Honor?

11:01

THE COURT: Well, just the connection between Lumenis. Lumenis is some third party.

MR. RAZAI: Yes, we'll have testimony.

THE COURT: Because I don't understand that. But let me just hear your evidence.

11:01

MR. RAZAI: Absolutely. That's the timing.

MR. BABCOCK: What's that?

MR. RAZAI: That was the timing.

MR. BABCOCK: Yeah.

11:01

And then within a day, we have a trademark application --

THE COURT: Right.

MR. BABCOCK: -- protection.

THE COURT: Which I don't think the defendant disputes, having filed that at that time.

11:01

MR. AGUILA: No.

MR. BABCOCK: And then the fictitious business name application shortly thereafter on October 29th.

THE COURT: Right. So I trust you're going to put all that in evidence.

11:01

MR. BABCOCK: Yes. And Dr. Duboys will be putting this into evidence. And this is the post-TRO communications.

MR. RAZAI: -- is not --

MR. BABCOCK: Oh, this one is pre-TRO. This is the initial communications to Dr. Duboys from the defendant representing that they are Edge Systems and offering to sell the accused product to Dr. Duboys.

THE COURT: Remind me who Dr. Duboys is.

MR. BABCOCK: Dr. Duboys is a dermatologist.

MR. RAZAI: Plastic surgeon.

MR. BABCOCK: Plastic surgeon in New York. Dr. Duboys was one of the confused customers who believed he was buying an Edge Systems product --

THE COURT: I see.

MR. BABCOCK: -- at a lower price. And he will be discussing the communications he had with the defendant believing he was buying an authentic Edge Systems product and then learning when he received his product that, in fact, it wasn't and Edge Systems product.

THE COURT: So he is here as a witness?

MR. BABCOCK: Yes. So he will be testifying about -- about that transaction.

THE COURT: Uh-huh. (Nodding affirmatively.)

MR. RAZAI: So, Your Honor, this is a slide where we had a hearing with Your Honor on December 5th, I believe

in the morning at about 1:00 o'clock your time.

THE COURT: The telephonic status conference?

MR. RAZAI: Yes, Your Honor. And the TRO was already in effect at that time, and we had actually agreed to extend it to December 30th. That same day at 6:48 p.m. I believe Eastern time, there was an e-mail sent to Mr. Duboys from somebody purporting to be Ralph Anderson from Edge Systems from the defendant's address regarding that machine, again representing itself to be Edge Systems even in spite of the TRO being in effect.

THE COURT: Okay. Well, you can introduce that into evidence.

MR. BABCOCK: We will.

THE COURT: Okay.

MR. RAZAI: This is more of the same evidence, Your Honor. It just on December 10th again there is an e-mail on the top. On the bottom it says, Hello, we are Edge Systems. And again, this is posted by the seller of the machine that Dr. Duboys purchased.

THE COURT: All right. So again, let's get that into evidence.

MR. RAZAI: Yes, Your Honor.

THE COURT: All right.

MR. BABCOCK: So, Your Honor, we'll also have some discussion today about the FDA issue and whether Defendant's

products are FDA registered, which we believe they're not. Our products, while as a whole they are exempt, we do have FDA clearance on portions of the products, including the light therapy systems as well as the tower system itself. We have FDA registrations for those.

11:04

MR. RAZAI: As a point of correction, Your Honor. I'm sorry, Mr. Babcock.

THE COURT: I think you got to be careful here with the two of you.

MR. RAZAI: Yes. The device itself is Class 1 exempt and it's listed with the FDA. The facilities are registered with the FDA. The handpiece is -- the light pieces like Mr. Babcock --

11:04

THE COURT: All right. You know what? Let's have this in evidence and let's -- it's too challenging for our court reporter, frankly, to have two counsel going at once. So one of you really just decide who's going to take the lead.

11:04

It did strike me that perhaps we don't need to fully engage in the dispute about whether the defendant's products could be harmful or not. I understand that that's an argument that the plaintiff makes. It goes to the element and the preliminary injunction of irreparable injury. That's the relevance of making that argument, right? That's why you make it.

11:05

MR. RAZAI: Well, that's part of. Yes, Your Honor. It's irreparable injury to our position.

THE COURT: Yes, I got it.

MR. RAZAI: But also to the public. It also goes to the public interest.

11:05

THE COURT: Public interest. Okay. So that's why it was made. However -- and I can understand why the defendant, he opened up his brief, his memorandum, focusing on that. My reaction was it's kind of not a particularly core issue here and whether the Court issues a preliminary injunction or not.

11:05

The Court -- I am not going to figure out today if the defendant's product is safe and effective or not. I'm not going to do that. And I don't need to do that, I don't think, to enter a preliminary injunction if the plaintiff otherwise proves what the plaintiff claims it's going to prove. And yet I understand why instinctively the defendant would react to that first and put a lot of energy into saying, My product really is safe and effective, which I think is directed -- my reaction is more for another audience than this Court. If that makes sense.

11:06

So I'm going to ask you all to think about that and just tell you that I am not interested in a full drilling deeply on whether your machine is -- could cause somebody harm or not because I -- unless it's just plain out

11:06

overwhelming evidence that it does. And I don't think the plaintiff has that. I don't think you have the nature of that kind of evidence from what I've read. I don't think we need to go there. Does that make sense to you, Mr. Babcock?

11:07

MR. BABCOCK: I understand what you're saying, Your Honor, yes.

MR. AGUILA: Your Honor, can I make a --

THE COURT: I'm going to turn to you in one second. I just want to check on Mr. Babcock.

11:07

So in principle, do you have a problem with that notion that -- I don't think you have to prove that his machine is -- could cause harm to otherwise get a preliminary injunction.

11:07

MR. BABCOCK: I wholly agree with that, Your Honor. I do expect that our witnesses -- to rebut the challenge that our machines are not FDA registered, we'll address that issue.

THE COURT: Right. And why is it even important

11:07

that your machines are FDA registered in terms of trademark, trade dress, patent infringement? Why does that matter?

MR. BABCOCK: Well, I think the reasons you identified, Your Honor. One is reparable injury. That we do have a product that has regulation by the FDA. So that's

11:07

important in this industry.

THE COURT: Oh, in terms of an investment of time, money, and effort --

MR. BABCOCK: Exactly. We spent a lot of time making sure that the product is safe and effective. And going through the proper channels of getting it registered so that the public and doctors will look at that and say, Okay, does this product meet minimum FDA standards or requirements? And for the extent that's the portions that are capable of being registered, have been registered, we've done that.

11:07 11:08

I think the other issue, too, is -- and maybe the issue more you're focusing on, Your Honor, which is -- maybe you're correct in the sense that as far as public safety, we don't have evidence established yet that someone has used this -- the defendant's product and has been harmed.

11:08

THE COURT: Okay.

MR. BABCOCK: So although having -- Mr. Ignon will testify about looking at this product, and we'll explain why he's thinks it's probably not a safe product to use as an engineer.

11:08

THE COURT: All right. All right. And so let me just finish with up with you and then I'm going to turn to Mr. Aguila on that point. Anything else you want to say in introduction? Because I really think we should get to the evidence.

11:08

MR. BABCOCK: Okay. Your Honor, with that, we will

let Mr. Aguila have his time, and we'll get through the other issues through the witnesses.

THE COURT: Okay. Very good.

So Mr. Aguila, again, the challenge here is just as you were pointing out rightly, let's lose some of Plaintiff's argument. Really, let's hear the evidence. So you're going to testify under oath, so I don't want you to really repeat what you -- you're going to get a full opportunity to testify. But in terms of just an overview --

11:09

MR. AGUILA: Sure.

THE COURT: -- you know, let me hear briefly from you.

MR. AGUILA: Well, just to touch on the point regarding FDA. I know that this is not the FDA or anything like that.

11:09

THE COURT: Right.

MR. AGUILA: The reason that I put such focus on that is because it goes to the heart of the believability of Mr. Cohen. In his declaration, Plaintiff's Exhibit B, he mentions very clearly a true and correct copy of an FDA 510(k) notification from Edge is attached.

11:09

THE COURT: Is Mr. Cohen going to be a witness?

MR. BABCOCK: Yes, Your Honor.

THE COURT: So when Mr. Cohen is a witness, that's the time for you to address that.

11:09

MR. AGUILA: Yes.

THE COURT: Okay. And I'll understand that's the relevance of it.

MR. AGUILA: One little issue that we're not FDA registered. And we are, in fact, but --

THE COURT: Your company.

MR. AGUILA: Our company. Well, yeah. Edge Systems, my company. Okay. So just to introduction, is there points that you would like me to focus on just because there's so much to --

THE COURT: I know. This is rather complex, the number of issues. Let me check here with my lawyer.

I'm not having any particular questions right now. I read through your memorandum. And I think when we get to testimony and your evidence, I may well. But I kind of feel like I'm getting ahead of myself by doing that, you know.

MR. AGUILA: Just to give a five-minute summary so we have plenty of time for the witnesses and the evidence. So the main reason we're here is because I'm a competitor of Mr. Ignon's company, the owner of Edge Systems. And he wants to be the only seller of HydraFacial, hydrating facial machines, to put it in a certain way, a wet microdermabrasion machines. I believe and I have evidence to show that he has copied many of my designs including this right here (indicating). And I also have evidence to show what his

original machines looked like before he turned it into what you see there. And I'll provide evidence on that and testimony. That's a big important part of the trade dress.

The trademarks, I believe I have enough evidence in the USPTO file that's online to show that they deceived the USPTO in receiving several of their trademarks and that their -- for example, the term hydrafacial, they mention that it's not a descriptive term in their original application in 2005, yet on their website it clearly says hydrafacial means a hydrating facial.

THE COURT: Right. I saw that point.

MR. AGUILA: And I think we will get into some points. The logo, I think it's important --

THE COURT: Yeah. The HydraDerm, HydraFacial, those are not marks that the plaintiff is trying to get an injunction on.

MR. AGUILA: Well, but --

THE COURT: So that's something we need to keep in mind.

MR. AGUILA: But it shows -- I'm sorry. It shows the believability of the law firm that represented them in the original USPTO application and their honesty in general.

THE COURT: Whether the law firm is honest or not, I mean what would be your point there?

MR. AGUILA: Well, to show that in the original

application in 2005 they lied.

THE COURT: For the trademark registration?

MR. AGUILA: For the trademark for HydraFacial.

THE COURT: But they're not seeking an injunction based on the HydraFacial trademark.

11:13

MR. AGUILA: But this is a confusing part on their part. They call this machine the Edge System.

Is this your machine? The first one? Yeah, this their machine, I believe. The first one.

11:13

THE COURT: Yeah.

MR. AGUILA: Here is says clearly HydraFacial.

THE COURT: Yep.

MR. AGUILA: In their brief, they say the Edge System -- the Edge machine. I'm sorry. So they're trying to use an old trademark that they had from 2000 -- an old trademark from 2000 called the Edge System.

11:13

THE COURT: I thought in their brief they were simply defining a term for purposes of the memorandum. They weren't saying -- and that's very common kind of legal writing. When you have a lot of different terms, you just give it a shorthand name. And so that's what I had understood in the memorandum, is that they were saying for purposes of our argument here, we're going to call it that. Not that it was a legal trademarked --

11:14

11:14

MR. AGUILA: The point of that is I don't call my

machines the Edge System or Edge Systems. I call our company Edge Systems, like there are hundreds of companies in the U.S. called Edge Systems for computer hardware. Many other things called Edge Systems. Very popular name. They don't
11:14 call their machine the Edge System either. They call their machine the HydraFacial, so that's sort of the reason --

THE COURT: Okay. So the machine that I'm looking at in the courtroom, the exemplar of Plaintiff's current product is -- has HydraFacial on it. And your point, it's
11:15 called that. And now you're looping back to the trademark application for what? Hydra --

MR. AGUILA: For the HydraFacial in 2005.

THE COURT: Which was -- since it's not part of the preliminary injunction, I don't know what that is. It's a
11:15 trademark for what?

MR. AGUILA: It's in my memo.

THE COURT: Right. I know you did mention it. But honestly, when I saw you talking about something that wasn't a subject to the preliminary injunction, to be honest, I
11:15 didn't give it close attention because I thought you were beyond the scope of what Plaintiff was trying to get an injunction for.

MR. AGUILA: But this is the point because this is the machine. If you go to their website, EdgeforLife.com or
11:15 HydraFacial.com, you will see the name HydraFacial. You will

not see the word the Edge System or the Edge machine to describe that.

And that goes back to the point to their logos. They never registered their logo, and they never registered the name Edge Systems as a company. The term the Edge System refers to an actual machine. And that's a point here. We're not selling any machines called the Edge machine. Our company is called Edge Systems but our machine is specifically called HydraDerm or Hydradermabrasion MD.

11:15 11:16 11:16 11:16

THE COURT: Well, when you put on your evidence you'll be able to make all that clear.

MR. AGUILA: Sorry about that. Just to finish, then. On the patent, we included an earlier patent that should --

THE COURT: Of a third party?

MR. AGUILA: Of a third party. Actually, of a party that sued us in 2004 and we won. But we're using their patent against them because they're a month earlier than their main patent.

THE COURT: Yeah, I saw that.

MR. AGUILA: That's, I believe, all.

THE COURT: Okay. All right. Thank you.

So why don't we start with the plaintiff's first witness.

11:16

MR. RAZAI: , Your Honor, could I have a two-minute

recess, grab my witness and come right back?

THE COURT: Yes. We'll make it a five-minute recess.

(Thereupon, a brief recess was taken from 11:17 a.m., to 11:24 a.m.)

11:24

THE COURT: Does the plaintiff have a first witness?

MR. RAZAI: Plaintiff would like to call Mr. Roger Ignon.

11:24 Thereupon,

ROGER IGNON,

having been duly sworn by the Court, testified as follows:

THE WITNESS: I do.

THE COURT: Please have a seat and state your name for the record, and spell your last name.

11:24

THE WITNESS: Roger Ignon, I-G-N-O-N.

THE COURT: Mr. Ignon, you'll want to stay close to that microphone if you can. I know it's not the greatest setup there but you'll make it work.

11:25

DIRECT EXAMINATION

BY MR. RAZAI:

Q. Good morning, Mr. Ignon.

A. **Good morning.**

11:25 Q. Mr. Ignon, are you currently employed at Edge Systems?

A. **I am.**
Q. And what's your title at Edge Systems?
A. **Vice president of Engineering and Product Development.**
Q. What are your duties as the vice president of engineering and product development?
11:25
A. **I direct the design of new products that are designed and manufactured by Edge Systems.**
Q. And how long have you been at Edge Systems?
A. **Since incorporation. I was one of the founders in 1997.**
11:25
Q. So there were other founders as well?
A. **Yes.**
Q. Who is the other founders?
A. **Bill Cohen.**
Q. Any others?
11:25
A. **No.**
Q. So Mr. Ignon, have you held any other titles at Edge Systems besides vice president of engineering and product development?
A. **Initially I was president and CEO of the company.**
11:26
Q. Mr. Ignon, can you briefly tell us about the history of Edge Systems?
A. **Well, Edge -- I'll go back a little bit. Edge Systems was founded by Bill and myself. We had worked for a company called Bird Technologies and Stackhouse. And when they were**
11:26
sold, we decided to start our own business. So we started in

September of 1997 in California. We did everything wrong. We started the company with our own money. We went without salaries for about a year, year and a half, and have put most of the money back -- in the early years back into the company to do the marketing and research and development we do today.

Q. What type of products does Edge sell currently?

A. **We sell primarily facial products for rejuvenation of the skin.**

Q. And is that a dermabrasion machine?

A. **Yes.**

Q. Can you briefly tell the Court what different types of dermabrasion methods are out there right now?

A. **Sure. Yeah, there's a lot of smoke and mirrors going in so far already in this hearing. Basically, to make it very brief, the chronology of dermabrasion goes like this: In the early days, a nurse would use a scalpel to scrape the skin to remove tissue.**

And then along came microdermabrasion, and that was a way of exfoliating the skin without using a scalpel. And it was really sandblasting the skin, if you will. And then we came up with a hydrafacial, which is we coined the word hydradermabrasion. I'm sorry. Hydradermabrasion, which is a combination of exfoliating with liquids and a abrative (ph.) surface to remove tissue. Those are the three basic chronological events that happened with exfoliation to the

skin.

MR. AGUILA: Objection, Your Honor. He has no evidence of the word hydradermabrasion being founded by him.

THE COURT: Well, he didn't testify it was founded by him so I'll overrule that.

BY MR. RAZAI:

Q. Mr. Ignon, does Edge currently sell hydradermabrasion machines?

A. **Yes, we do.**

Q. And what trademark do you guys use for the hydradermabrasion machines?

A. **We use HydraFacial MD.**

Q. So one of the questions that I have is, Mr. Ignon, does Edge manufacture the machines itself too?

A. **Yes. We design, manufacture, and sell our own machine in Signal Hill California.**

Q. So it's all done in Signal Hill?

A. **Yes.**

Q. So earlier you talked about the HydraFacial. So Edge sells products under the name HydraFacial?

A. **It does.**

Q. And how many different types of products are sold under the HydraFacial moniker?

A. **Currently three, but in -- there have been a total of five.**

Q. And what are those different models?
A. **We have -- the first one that started was a HydraFacial MD as you see here. Then we had the HydraFacial Wave. Then the HydraFacial Nectar. We also had the Core, and the Allegro.**
11:29
Q. And Mr. Ignon, looking at the photograph on the screen, is this a correct depiction of what the HydraFacial MD looks like today?
A. **Correct.**
11:29 **THE COURT:** And can I just be clear about something? The five names that the witness just gave, they're referring to different iterations or -- of the machine?
MR. RAZAI: Yes, Your Honor. They're different
11:30 models.
THE COURT: But HydraFacial, that term, the plaintiff uses to describe the machine?
MR. RAZAI: It's a -- so HydraFacial itself is an umbrella term. HydraFacial MD is this particular machine.
11:30 And we'll get into that --
THE COURT: Okay. I'm not clear on that yet.
BY MR. RAZAI:
Q. And which machine is this, Mr. Ignon.
A. **That's the HydraFacial MD.**
11:30 Q. Is there any other product that's called HydraFacial MD

that looks different than this product?
A. **No. Except for the defendant's that we're here today to talk about.**
Q. But at Edge, is there any other product that Edge makes that's called the HydraFacial MD that looks different than the product we see on the screen?
11:30
A. **No.**
THE COURT: The product we see on the screen, what I'm looking at here in the courtroom?
11:31
A. **Yes.**
BY MR. RAZAI:
Q. To redirect the question that Her Honor asked, so the product that you see on the far right, is that an Edge machine?
11:31
A. **Correct.**
Q. And is that the HydraFacial MD?
MR. AGUILA: Objection, Your Honor. He said the Edge machine, and it's actually called the HydraFacial as the witness said.
11:31
THE COURT: No. I'll overrule that. I understand -- I don't think that's a proper objection.
BY MR. RAZAI:
Q. And so I guess focusing your attention on the product instead of the screen since we have a live one, when did you
11:31
begin selling products -- when did Edge begin selling

products that looked like that?
A. **2005.**
Q. And has Edge been continuously selling this design since 2005?
11:31 A. **It has. It's the most successful product we have.**
Q. And does it still look -- has it always looked like that?
A. **Yes, it has.**
Q. So since 2005, it's always looked like that?
A. **Yes.**
11:31 Q. Okay. Now, going to -- if you'll take a look at the screen, do you recognize this product, Mr. Ignon?
A. **Yes.**
Q. And what product is that?
A. **That's a HydraFacial Wave.**
11:32 Q. And when did Edge begin selling the Wave?
A. **2006.**
Q. So -- but you said the HydraFacial MD you started selling in 2005, correct?
A. **Correct.**
11:32 Q. So you're saying that the Wave was introduced after the HydraFacial MD?
A. **Correct.**
Q. Now, is the HydraFacial --
MR. AGUILA: Your Honor, hearsay. There's no
11:32 evidence on any of this.

THE COURT: Well, he's testifying from his personal experience, so that's not hearsay.

A. **Your Honor, we actually have controlled serial numbers so we can defend all of this with.**

11:32 **THE COURT:** Right. No, I understand. But you're telling me as the vice president for engineering and product development you have personal knowledge of the facts that you're testifying to right now.

A. **Yes.**

11:32 **THE COURT:** I understand.

BY MR. RAZAI:

Q. And is the HydraFacial Wave still being offered by Edge Systems?

A. **No, that's been discontinued.**

11:32 Q. Do you know when it was discontinued?

A. **2012.**

Q. Going to the next photograph, Mr. Ignon, do you recognize this product?

A. **That's the HydraFacial Nectar.**

11:33 Q. And when did Edge begin selling the HydraFacial Nectar?

A. **2008.**

Q. So again, going back, the HydraFacial MD, you started selling that in 2005?

A. **Correct.**

11:33 Q. So the HydraFacial Nectar was sold --

A. **2008.**
Q. So three years after the HydraFacial MD?
A. **Absolutely correct.**
Q. Does Edge still sell the HydraFacial Nectar?
11:33 A. **No.**
Q. When did you stop selling --
A. **Discontinued in 2013.**
Q. So for about five years they were being sold at the same time?
11:33 A. **Yes.**
Q. Mr. Ignon, looking at the next line, when did Edge start selling -- started using the Edge logo?
A. **1999.**
Q. And there's three different logos on the screen. Are
11:33 these different iterations of the logo?
A. **Yes.**
Q. And have you used different logos at different time?
A. **Yes.**
Q. But has Edge always used what I'm going to term the
11:34 Chevron-E logo since 1999?
A. **Yes. I might point out that it has a three dimensional look. The far left-hand, it's hard to see, but it has a three dimensional look in the center and also on the right. So it's kept that throughout.**
11:34 Q. Mr. Ignon, when did Edge Systems begin using the name

Edge Systems?

A. **1997.**

Q. Has Edge Systems gone by any other name besides Edge Systems since 1997?

11:34 A. **No.**

Q. Looking at the logo again, Mr. Ignon, who created this logo?

A. **I did.**

Q. And is the logo on the right the current Edge logo?

11:34 A. **Correct.**

Q. Do you know if anyone else has used that Chevron-E logo in connection with the sale of dermabrasion products in the United States?

A. **No. Other than the defendant.**

11:34 Q. What do you mean other the defendant? Do you mean --

A. **Mr. Aguila.**

Q. And when you say other than the defendant, do you mean the defendant's recent activity?

A. **Yes.**

11:35 Q. Do you have any evidence of the defendant using this product prior to October of 2014?

A. **Yes.**

Q. So to restate the question. Do you know whether Defendant used the Chevron-E logo before October 2014?

11:35 A. **I'm not sure of that.**

Q. When you said -- so have you -- a second ago I asked you whether anyone else has used the Chevron-E logo --

THE COURT: You asked him if the defendant had used the product is what I had heard.

11:35 **BY MR. RAZAI:**

Q. Let me restate the question. Has anyone else used the Chevron-E logo in connection with dermabrasion products --

A. **No.**

Q. -- besides Edge?

11:35 **MR. AGUILA:** Objection, Your Honor. He's leading the witness.

THE COURT: No, that's not leading. If it's capable of a yes or no answer, it's not a leading question.

MR. RAZAI:

11:35 Q. Mr. Ignon, did Mr. Aguila contact you in 2000 alleging that he owned the rights to the name Edge Systems?

A. **No.**

Q. Has Mr. Aguila ever contacted you saying that he has the rights to the name Edge Systems?

11:36 A. **Not me personally, no.**

Q. Do you know if Mr. Aguila has contacted anyone at Edge alleging that he has prior rights to the name Edge Systems?

A. **Give me a time, date.**

Q. Ever?

11:36 A. **Not to my knowledge.**

Q. Did Mr. Aguila contact you in 2000 alleging that he owned the rights to the Chevron-E logo?
A. **No.**
Q. Do you know if Mr. Aguila ever contacted you alleging that he owned the rights to the Chevron-E logo?
A. **No.**
Q. To your knowledge, has Mr. Aguila contacted anyone at Edge alleging that he has the rights to the Chevron-E logo?
A. **No.**
Q. Looking at the tower HydraFacial MD products, again the HydraFacial MD all the way in the far right, who designed that product, the look of it?
A. **I did with my design team.**
Q. Do you know when you began designing the HydraFacial MD product?
A. **In 2004.**

MR. RAZAI: Your Honor, permission to approach the witness with an exhibit?

THE COURT: Yes.

MR. RAZAI: Permission to approach the bench?

THE COURT: Yes. Those are your exhibits?

MR. RAZAI: This is exhibit --

THE COURT: So give it to my clerk. And do you have your exhibits marked?

MR. RAZAI: Yes, they're marked on the front but

not with a sticker.

THE COURT: Okay. Let's do a sticker.

THE COURT SECURITY OFFICER: There's stickers right there. I put it on the plaintiff's sign for --

11:37 **MR. AGUILA**: Your Honor, can I have a copy of this?

THE COURT: Yes. Well, I expect that they do have a copy for you.

I'm hoping you've got a copy for the witness and for me and for the defendant.

11:38 **MR. RAZAI**: (Nodding affirmatively.)

THE COURT: Perfect.

MR. RAZAI: Permission to approach?

THE COURT: Yes. You don't have to ask.

BY MR. RAZAI:

11:38 Q. Mr. Ignon, you've been handed what's been marked as Exhibit SS. Do you recognize this document, sir?

A. **Yes.**

Q. And what is it?

A. **It's a three-dimensional CAD depiction of the tower**

11:39 **HydraFacial MD system.**

Q. And you located this document, correct?

A. **Yes.**

Q. And where was this document kept?

A. **I'm sorry?**

11:39 Q. Where was this document kept?

A. **At the Edge Systems engineering files.**
Q. So it's a document that Edge keeps in its normal -- in its ordinary course of business?
A. **Correct.**
11:39 **MR. RAZAI:** Your Honor, I'd like to move to enter Exhibit SS into evidence.
MR. AGUILA: Objection, Your Honor.
THE COURT: On what grounds?
MR. AGUILA: This is not a business document. This
11:39 is an engineering design, and the proper foundations haven't been laid out by the IT or whoever kept this document saved.
THE COURT: Well, what do you think is lacking?
MR. AGUILA: Well, it says a date there of 2004, created 2004. And, you know, it's -- might be a -- it's
11:40 inaccurate or misleading. It hasn't been authenticated.
THE COURT: Well, it's easier for me just to ask the witnesses than perhaps to go back over the record.
Sir, was this record made at a time or near the time by somebody with knowledge of the information in it.
11:40 A. **Yes.**
THE COURT: Okay. Who would that be? How would that be? Who created this document, or how was it created?
A. **It was created on our CAD system by one of our designers, and it was documented in our system.**
11:40 **THE COURT:** Okay. And tell me, why would -- just

give me a little background to understand why a designer would create this in your CAD system. Just help me understand it.

A. **Okay. Well, the process, really quickly, is you first put together a specification of how you think a device should operate, taking information from engineering and marketing. And then you start creating from that specification. We start making models, and then we start putting together the representation of how we are going to package that model. And that's what this is.**

THE COURT: And so why would this document be necessary to that process? How is that part of that process?

A. **Well, it starts depicting where we're going to put all the components. This is the top level. There are also backup documents behind it. This is a 3D CAD system that we design on.**

THE COURT: Right now, the document has two things. It has what appears to be kind of a screen shot --

A. **Yes.**

THE COURT: -- from a computer.

A. **Yes.**

THE COURT: Next to a rendering or a drawing of the machine.

A. **Yes.**

THE COURT: Are you referring to the rendering or

drawing of the machine right now, or are you talking about the screen shot?

A. **When you say screen shot, are you talking about that (indicating)?**

THE COURT: Is that what this is? Help me --

A. **This is the file -- this is how you locate the file. This is the result of the file (indicating).**

THE COURT: I see.

A. **And this dates the file. All of our files are dated.**

THE COURT: So the file -- what you really are trying to show me is this rendering, this picture of the machine; am I right?

A. **Was created on to that date.**

THE COURT: But in order to pull that off the computer, you have to access what is a page, if that's the right word.

A. **Uh-huh. That comes off of our server.**

MR. RAZAI: Your Honor, that document was produced by Edge system. What I believe that is, is the screen shot on the right is a properties of that drawing. So when that file exists on the computer and -- and this is my best guess because I wasn't involved in the collection of that document. But what I believe that on the right is, is the properties of that file showing when it was last modified.

THE COURT: I see.

MR. RAZAI: So it's just showing -- so the document was created contemporaneously with the design. And that metadata or the property box is showing when the last time somebody made a change to that file.

11:43 **THE COURT:** So why don't lay more of a foundation with your witness to explain this.

MR. RAZAI: Absolutely, Your Honor.

THE COURT: And hold on. Let him do this. You raised an objection and I'm following up on your objection, so let him do it.

11:43 **BY MR. RAZAI:**

Q. Mr. Ignon, is this a CAD drawing that was created at Edge Systems?

A. **It is.**

11:43 Q. And the -- on the right, is that the property box of the file that is depicted in the drawing, the CAD drawing?

A. **Yes.**

Q. And so --

MR. AGUILA: Objection, Your Honor --

11:43 **THE COURT:** Hold on.

MR. AGUILA: -- hearsay.

THE COURT: No, no. Let him -- this is laying a foundation. He should be asking this.

MR. AGUILA: Okay.

11:43 **BY MR. RAZAI:**

Q. And Mr. Ignon, on -- does -- that screen shot, what the properties show that the date that this file was last modified? Just yes or no.

A. **Yes.**

11:44 **MR. RAZAI:** Your Honor, would you like more foundation?

THE COURT: Well, I think so.

A. **I think -- could I interject just for a second?**

THE COURT: It's okay with me.

11:44 A. **You can't change these dates once you put in when it was created. It's like we can't go back and manipulate the date if that's the concern.**

THE COURT: So are you telling me that part of the way your computer systems are maintained, that the data that

11:44 appears on this document, for example, includes the date that it was last modified, which shows a date in 2004, correct? That you are -- you and the people at your company are unable to change that last modification date unless the drawing were to be modified.

11:44 A. **Correct.**

THE COURT: Right? And so is this part of the regular business activity at Edge Systems, to maintain the CAD drawings on a computer system in this way?

A. **Yes.**

11:45 **THE COURT:** With this documentation?

A. **Yes.**

THE COURT: Okay. All right. Was there anything else you wanted to follow up on, sir.

MR. RAZAI: With respect to the document, I'd like to ask questions now if the foundation has been laid?

THE COURT: Right. Okay.

So was there any other objection, Mr. Aguila?

MR. AGUILA: Yes, Your Honor. The evidence is irrelevant unless it can be established that it has not been subject to tampering or alterations. And I'm afraid this year -- we would need to know who created this CAD file. Who was the person who clicked on this document to bring up the properties box. And we would need to do that, is why would you do that?

THE COURT: I think that's proper subject to cross-examination on your part, but I don't think it prevents the admission into evidence of the document. So I'll allow Plaintiff's Exhibit SS to be admitted into evidence, but certainly these are areas you can follow up when you question the witness.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

BY MR. RAZAI:

Q. Mr. Ignon, just to follow up on a couple issues that Mr. Aguila did raise. Was this document created at your

direction?
A. **Yes.**
Q. And do you recall seeing this document back in 2004?
A. **Yes.**
11:46 Q. What's the date of last modification of this document? And you have it in front of you as Exhibit SS.
A. **October 29th, 2004.**
Q. And based on your understanding of your recordkeeping system at Edge Systems, does that mean that this look that
11:46 you see here on the screen was in existence as of October 29th, 2004?
A. **Yes. Actually, prior to that.**
Q. But just talking about this record --
A. **Yeah, that's exactly right.**
11:46 Q. -- that's before us.
A. **Yes.**
Q. So at least as early as October 29th, 2004, Edge had designed a machine that looked like what you see on the screen that in front of you --
A. **Yes.**
Q. -- as Exhibit SS?
A. **Yes.**
Q. Mr. Ignon, so you said you were involved in the design of the look of this product, right?
11:47 A. **Yes.**

Q. Did Edge copy any product made by a company called Diamond Skin when designing the look of this product?
A. **Absolutely not.**
Q. Did Edge copy any other product when designing the look of the design that's depicted in Exhibit SS?
11:47
A. **No.**
Q. Going back to the look of the HydraFacial MD, which is the machine on the right, Mr. Ignon, do you consider the look to be distinctive?
11:47
A. **Yes.**
Q. And what makes it distinctive, Mr. Ignon?
A. **Well, a combination of things. We have a touch screen at the top. We have a blue translucent door that's backlit. We have a vertical configuration with a light gray chassis, and then a base with castors and a dark skirt.**
11:47
Q. So besides Edge Systems and besides the activity of Defendant's that brings us to court today, do you know if anyone else in the United States sells a microdermabrasion machine in the United States that looks like that product?
11:48
A. **No. Other than the defendant.**
Q. Do you know if besides the reason we're in court today, and besides Edge Systems, if anybody in the United States makes a machine that looks even similar to the HydraFacial MD product that's on the far right?
11:48
A. **No.**

Q. Do you know if anyone else at Edge has authorized Mr. Aguila to sell a design that looks like that?
A. **No.**
Q. Do you know if anyone else at Edge has authorized anyone in the country to sell a machine that looks like that?
11:48
A. **No.**
THE COURT: Your questions are, do you know if, and he's answering no.
MR. RAZAI: We'll go back.
11:48
BY MR. RAZAI:
Q. Does anyone in the United States sell a machine that looks like that besides Edge?
A. **No.**
Q. Has Edge authorized anyone in the United States to make a
11:49
machine that looks like that?
A. **No.**
THE COURT: What shall we call this Exhibit SS?
MR. RAZAI: Can we call it Exhibit SS or would you like --
11:49
THE COURT: No, we can. But what would you describe it as?
MR. RAZAI: It's a CAD drawing, Your Honor.
THE COURT: CAD drawing.
BY MR. RAZAI:
11:49
Q. And CAD stands for computer-aided design; is that

correct, Mr. Ignon?
A. **Correct.**
Q. Computer-aided design?
A. **Correct.**
11:49 Q. Mr. Ignon, is the way the machine looks functional?
A. **The machine is functional, but there are certainly many other ways that you can configure it to do similar procedures.**
Q. Is the look of the blue translucent cover functional?
11:49 A. **I'm sorry?**
Q. Is the look of the blue translucent cover functional?
A. **No.**
Q. Can the configuration of the HydraFacial MD be changed without changing the functionality?
11:50 A. **Yes.**
Q. And can you give me some examples of how you can change it?
A. **Well, for instance, the bottles could be mounted on the top or in the back. That's behind the translucent shield there. The touch screen could be mounted on the side. Doesn't necessarily have to have castors. It could be a tabletop model as opposed to a roll-around castor version.**
Q. Does it have to be a tower?
A. **No, it could be tabletop unit.**
11:50 Q. Can you -- can Edge Systems design other machines that

have the same functionality and be as simple to manufacture?
A. **Yes.**
Q. Can Edge Systems design the machine in a different way and maintain the functionality and still have it be as cheap
11:50 to manufacture as the HydraFacial MD?
A. **Yes.**
Q. Mr. Ignon, I'd like to change gears for a little bit. Is the Edge HydraFacial MD product covered by any patents?
A. **Yes.**
11:51 **MR. RAZAI:** And if I can approach, Your Honor, I'd like to hand the witness a copy of the complaint.
THE COURT: Yes.
BY MR. RAZAI:
Q. Mr. Ignon, this is a copy of the complaint in the matter.
11:51 Do you know if the Edge HydraFacial MD is covered by the six patents that are attached as exhibits to the complaint in front of you?
A. **Yes.**
Q. Does Edge own those patents?
11:51 A. **No, we do not.**
Q. And who owns those patents, Mr. Ignon?
A. **We license that from Axia Medical.**
Q. So does Axia Medical own those patents?
A. **Yes.**
11:51 Q. So when you say Edge licenses those, is Edge the

exclusive licensing?

A. **We are the exclusive licensee and pay a royalty.**

Q. Does anybody else have a license to practice the six patents that are attached in the complaint besides Edge Systems?

A. **No, we do not.**

Q. I'd like to turn your attention to the product on the far left, Mr. Ignon. Have you seen this product before?

A. **I have.**

Q. And what is this product?

A. **It's a HydraDerm abrasion machine, I assume.**

Q. Is that a copy of Defendant's product?

A. **It copies many of -- I'm sorry?**

Q. Is that a Defendant's product?

A. **Correct.**

MR. RAZAI: And, Your Honor, I'd like to ask some questions about this with respect to the foundation. This is a machine that was purchased by a declarant, Lealani Irby. In the supplemental declaration, we have all the paperwork that establishes the chain of custody after purchase from the eBay site. And it was shipped to Edge Systems and now it's present here today. Ms. Irby unfortunately is out of the country. She has a declaration that's been submitted, but she's in Panama. But I would like to ask the witness questions about the machine if I may.

THE COURT: Yeah, go right ahead.

MR. AGUILA: Well, objection, Your Honor. The proper chain of custody hasn't been assessed without Ms. Irby.

11:53 **THE COURT**: Well, what you can do, I think you're going to get to later on the question of trying to admit -- where are you going to go from here?

MR. RAZAI: I'd like to ask some questions about the machine. I'm not sure whether we necessarily need to 11:53 admit the actual product into evidence. But his testimony of evaluating and -- of the machine that was sold by Defendants -- by Defendant. And we have in evidence in terms of declarations, which I believe we can rely on at the preliminary injunction stage. We can rely on declarations 11:53 and sworn testimony to establish that this is an Edge machine -- and this is (inaud.) the defendant's machine.

And then the sworn testimony that Mr. Ignon is going to provide is based on his own knowledge and understanding of the product because he's evaluated it.

11:53 **THE COURT**: Are you going to ask him questions based on his inspection of the machine?

MR. RAZAI: I am, Your Honor.

THE COURT: Okay. So Mr. Aguila, are you denying that the machine on the left is a machine that you 11:54 manufactured and sold? Is that in dispute?

MR. AGUILA: This one right here (indicating)?

THE COURT: Uh-huh. (Nodding affirmatively.)

MR. AGUILA: I believe that it has been altered.

THE COURT: Well, have you had a chance to take a look at it and see if it's been altered?

11:54

MR. AGUILA: I can see it right here. Can I show Your Honor real quick? I can just --

THE COURT: All right. All right.

MR. AGUILA: (Complies.) In the back of the machine there is a Jiffy peanut butter plastic --

11:54

THE COURT: Container.

MR. AGUILA: -- container, I guess. Yeah. We don't include Jiffy peanut butter plastic containers.

THE COURT: Okay. That makes sense.

11:54

MR. AGUILA: At a minimum this has been altered.

THE COURT: To include that as a substitute for some other container that you would normally include with the product?

MR. AGUILA: Yes. And I haven't inspected it, but at a minimum, it has been altered from the original.

11:55

THE COURT: I don't think anybody is going to dispute the fact that the Jiffy peanut butter is not part of what the defendant is selling, right?

MR. RAZAI: That's correct. I can explain that, if you'd like, Your Honor. And I can ask the question so we can

11:55

put it into evidence why there's (inaud.) models there.

THE COURT: All right. So here's the thing. I'm thinking Mr. Aguila, perhaps even over the lunch break if you like, inspect the machine more carefully and let us know later on whether this is really -- if you have a dog in that fight, you know, about whether that's your product other than obviously the substitution of the Jiffy container in the back. That makes perfect sense that that's not part of what you're marketing. And then as you say, we can kind of tie this up later on whether we have a fundamental problem with the witness testifying about that machine or not.

MR. AGUILA: Your Honor, Mr. Razai said that there was sworn testimony from Ms. Irby. However, she just has a declaration without any kind of affidavit. So I'm not sure it --

THE COURT: Oh, her declaration isn't sworn?

MR. AGUILA: No.

THE COURT: Her supplement declaration?

MR. RAZAI: I believe it was.

THE COURT: Under the 1746?

MR. AGUILA: There's no notary.

THE COURT: At the end of it there is a statement: I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

And never wanting to rely upon pure memory, I

believe that sounds like what you can do under 17 -- I think it is 46. Unsworn declarations. If executed within the United States. And I notice you did this, too, sir, on something you swore. I declare under penalty of perjury that the foregoing is true and correct.

11:56

So that makes it a sworn declaration. You don't need a notary. It's just the way you had given me something sworn in that way.

MR. AGUILA: Right.

11:57

THE COURT: That's proper.

MR. AGUILA: Okay. Well --

THE COURT: There's nothing wrong with that. So listen, inspect the machine over the lunch break. And you'll have a chance to tell us if there's -- you think it's been altered in some way.

11:57

MR. AGUILA: Well, at least that has been altered.

THE COURT: I understand the Jiffy peanut butter container attached to the back. But otherwise. And meanwhile, we can go ahead and hear the witness' testimony. And you'll have a chance to come back and tell me if there's some reason why this really isn't your product. Okay?

11:57

MR. AGUILA: Yes. Thank you.

MR. RAZAI: Your Honor, if I may, just real quick. With Mr. Ignon, I'm only going to be introducing just the two pieces of evidence that we already have, Exhibit SS as well

11:57

as the machine into evidence. Well, actually, I'm not even going to introduce this. I'm just going to talk about this.

With Mr. Cohen there's a much larger stack of documents that I'd like to go through. And seeing the way things are going now, I think it might take probably four or five days if we're going to go at this pace for foundation and for objections.

THE COURT: Right.

MR. RAZAI: What I suggest is we at least temporarily admit them into a evidence or kind of in a holding patent. If Mr. Aguila has objections to them, we can file a briefing as to the admissibility to those. And we can do a briefing in whatever timeline Your Honor prefers. But just for the sake of the Court's resources and for four or five different flights --

THE COURT: Well -- and you all not having to come back. I'm sure everybody wants to finish this today.

MR. RAZAI: And my wife probably would appreciate that as well.

THE COURT: Well, we all got things to do. It's a busy time of year.

Makes sense, Mr. Aguila? You can note an objection to evidence. State what it is, but then to go into a great -- listen, you may want to respond to an objection by laying a foundation. So --

MR. RAZAI: Yes, Your Honor.

THE COURT: But again?

MR. RAZAI: I'm not going to ignore it.

THE COURT: But as I said, I can consider objections to admissibility later on. There's not a jury involved.

11:58

MR. AGUILA: Your Honor, the only thing I can say on that is that I'm afraid that some witnesses might testify on evidence that later will not be held permissible or, you know, into evidence. So that's the only thing I'm scared of, that evidence or testimony might be given on the basis of inadmissible evidence.

11:59

THE COURT: Well, if that happens to the plaintiff, that will be to your benefit.

MR. AGUILA: Okay. Thank you.

11:59

MR. RAZAI: So that's okay?

THE COURT: All right. Go ahead.

MR. RAZAI: Thank you, Your Honor.

BY MR. RAZAI:

Q. Mr. Ignon.

11:59

MR. RAZAI: If I can approach, Your Honor.

THE COURT: Uh-huh. (Nodding affirmatively.)

MR. RAZAI: And the majority of the testimony on the machine that Mr. Ignon's going to give is going to be on this handle. If you'd like, I can give the handle to

11:59

Mr. Aguila now and he can look at it to see if it's actually his handle or not.

THE COURT: All right. Let's find out if we even have a dispute about that.

11:59 **MR. AGUILA:** We do not sell metal handles. Our handles are plastic.

THE COURT: So you're saying that handle is not something you manufacture?

MR. AGUILA: No. I've seen other machines, other

12:00 microdermabrasion machines from China. They have something similar to that but our machine does not.

THE COURT: So -- and you'll testify to that later.

MR. AGUILA: Yes.

THE COURT: Okay. Go right ahead.

12:00 **MR. RAZAI:** I'd like to hand this to the witness if I may.

THE COURT: Yes, you can.

MR. RAZAI: (Complies.)

BY MR. RAZAI:

12:00 Q. Mr. Ignon, have you had a chance to take a look at this handle before today?

A. **I have.**

Q. And you've examined it, sir?

A. **I have.**

12:00 Q. And is this the handle that came with the Edge machine

that was shipped to Edge Systems from Ms. Irby?
A. **Correct. Yes.**
Q. So looking at the handle, Mr. Ignon, I'd like to kind of go through it with you and compare it to Claim 1 of the 620 patent if I may. Looking at the handle -- and I'll call it a handpiece. Is that the correct terminology, Mr. Ignon?
12:00
A. **It's a handpiece.**
Q. I apologize. So the handpiece that you're holding, again, that's the handpiece that was shipped to you from Ms. Irby?
12:01
A. **Yes.**
Q. So looking at the handpiece, does the handpiece have a working end for engaging a skin surface?
A. **It does.**
Q. And can you show that?
12:01
A. **(Complies.)**
Q. Can you describe it for the Court?
A. **It's a removable because there are different sizes with different diamond grits on them. This is for exfoliating -- the outer surface is for exfoliating the skin, pulling the tissue off. The handpiece itself has two major lumens; one for delivering fluid and the other for evacuating fluid. So an operator puts whatever tip they select. They attach it to this handpiece. When they turn the machine on, fluid -- and it's put in contact with the skin, it occludes this tip so**
12:01

the vacuum starts working and pulls fluid on to the skin. The operator then moves the handpiece over the skin and the exfoliated tissue and used fluid is then evacuated through this tube back to the Jiffy can.

12:02 Q. Mr. Ignon, does the working end of the handle -- of the handpiece have an abrasive fragment composition secured to it?

A. **Yes, around the outer periphery.**

Q. So it does?

12:02 A. **Yes.**

Q. Does the skin interface portion of the handpiece have an inflow aperture?

A. **Yes.**

Q. And is that inflow aperture in communication with a fluid

12:02 reservoir?

A. **Yes.**

Q. And what does that mean?

A. **It means that when you put this up to the edge of the tip up to the skin, it allows the vacuum to pull fluid from those**

12:02 **canisters onto the person's face.**

Q. And how is the fluid pulled from the canister --

A. **Through vacuum pressure.**

Q. And -- but are there structures in the handpiece that you're holding --

12:02 A. **Yes, there's tubing. There's tubing and a lumen at the**

end that allows it to flood the area of the tip of the handpiece.

Q. And the lumen at the end, is that the aperture on the working end for the inflow aperture?

12:03 A. **There are two lumens; one for delivering product -- there can be one or more lumens for delivering product and one or more lumens for taking the product away.**

Q. And does that have a lumen for introducing fluid to the skin?

12:03 A. **Yeah. This is -- I believe it's the white tube that delivers the fluid and the gray tube vacuums away the tissue and the expended fluid.**

Q. Is there an aperture at the skin interface portion that introduces the fluid?

12:03 A. **Yes.**

THE COURT: Right now you're testifying about this -- what's on what we believe -- what you believe to be the defendant's product. But are you telling me the same basic function and structure that you've described is true

12:04 for the handpiece for your product?

A. **Yes. It reads entirely on our patent Claim 1.**

THE COURT: Okay.

BY MR. RAZAI:

Q. Does the skin interface portion also have an outflow

12:04 aperture?

A. **Yes.**
Q. And is the outflow aperture the hole that sucks the fluid back out?
A. **Correct.**
12:04 Q. And is that at the skin interface portion as well?
A. **Yes.**
Q. So it's in the working end?
A. **Yes.**
Q. Okay. Does Edge's HydraFacial MD have the same features
12:04 of the Claim 1 of 620 patent?
A. **Yes.**
Q. And the features that are patented in Claim 1, does that drive sales for the HydraFacial MD product?
A. **Absolutely. That's the core of the whole system.**
12:04 Q. If the defendant is allowed to continue selling the machines that infringe the 620 patent, will that tarnish the market for the HydraFacial MD?
A. **Yes.**
Q. And how will it do that?
12:05 A. **Well, in a number of ways. First of all, it's a direct competition infringement of our patent. The second is that we've seen that the quality of the device or devices is -- seems not up to par and therefore puts a bad reputation on us. We are afraid and have gotten calls -- actually, the**
12:05 **doctor that is going to testify here thought it was our**

machine in his case. It was our machine and he wanted us to repair it for him. So it's -- tarnishes our name as well as directly infringes our patent.

Q. And is it possible that a poor experience with an infringing machine could turn a customer off to hydradermabrasion completely?

A. **Absolutely. Yeah.**

Q. Are there other alternatives to dermabrasion besides hydradermabrasion?

A. **There are.**

Q. So is it possible that a bad experience with a hydradermabrasion machine that's infringing your product could make a customer choose a completely different alternative?

A. **Yes.**

Q. And would that take sales away from your company?

A. **Yes.**

Q. Mr. Ignon, have you seen the product that's in the middle?

A. **Yes.**

Q. And what -- do you know what that product is supposed to be?

A. **Well, we earlier called it a hybrid unit. It's really our unit that has been altered to accept the defendant's fluids. And he has attached his handpieces to this system,**

removed part of our name but left other parts. We can actually see where the logo has been peeled off, the plastic.

MR. RAZAI: And, Your Honor, if I may, I'd like Mr. Ignon to actually examine the machine and point out a few things if I may.

THE COURT: He can step down.

BY MR. RAZAI:

Q. **Mr. Ignon, if you can approach the machine. I'm going to hand you a microphone so you have...**

A. **(Complies.)**

Q. Mr. Ignon, can you point out where the machine has been altered?

A. **I don't know the best way to stand here. Firstly, this door is the same door as our system. If you look very closely here, you can see where this is an applied mark that we put on there.**

THE COURT: The HydraFacial is applied mark on here.

A. **It's peeled off. That's been peeled off. You can still see evidence of it. This is I think a pretty early model. It was probably bought on eBay or something. The other thing is the --**

THE COURT: Pretty early model of your HydraFacial MD machine?

A. **Yes.**

THE COURT: I see.

A. **If you look here, we have a -- an interlock system.**

THE COURT: You'll need to keep that microphone up next to you.

12:08 A. **I'm sorry. We have an interlock system where the bottles have a holder that holds it in place. The products then are inserted in here (indicating), and there's a latch that holds it in place. On this side --**

THE COURT: Now looking at the hybrid machine.

12:08 A. **Yes. On the hybrid machine they use our same manifold. This is a manifold system, but they have altered it so they can put their bottles.**

THE COURT: So the bottles are different and the way the bottles attach to the machine are -- have been --

12:09 A. **Correct. These are screwed in and this has a keyway that locks it in place.**

THE COURT: So the hybrid has a screw-in bottle?

A. **Correct.**

THE COURT: Okay.

12:09 A. **They put an added piece here to provide the screw-in capability. We have this holder to hold our handpiece. They substitute their own handpiece on this and put their own handpieces.**

THE COURT: They've substituted a holder for the handpiece and --

12:09

A. **This is the holder, and it also holds the extra tips. They're different tips, different sizes and different grit sizes. And this handpiece is the same handpiece that's on here.**

12:09 **THE COURT:** The handpiece on the hybrid machine is the same as on the machine you believe the defendant recently sold?

A. **It may be a little bit different, but it's essential the same. It has a screw-off tip on it.**

12:10 **THE COURT:** Okay.

A. **Do we have the other handpiece?**

MR. RAZAI: You have it. I'll get it for you. (Complies.)

A. **These tips are entirely interchangeable. The handpiece**

12:10 **itself is almost identical.**

THE COURT: You're pointing at the handpiece in the hybrid machine and the one that you identify as the defendant's machine.

A. **This machine and this machine. The hybrid and the**

12:11 **Hydradermabrasion MD machine.**

MR. RAZAI: Your Honor, if I can approach and bring the handles to you so you can take a quick look.

THE COURT: Yeah. Uh-huh. (Nodding affirmatively.)

12:11 **MR. RAZAI:** (Complies.)

THE COURT: I could actually take a look at them over the lunch break if you'd like. I'm just thinking of time saving.

MR. RAZAI: You can take a look at it if you want.

12:11 **THE COURT**: Does it matter which way they come back to you? There are different tips on these two, right?

MR. RAZAI: Yes. I'm going to ask some questions of Mr. Ignon in a second.

A. **I think the thing that's important is that these handpieces are remarkably the same. They're interchangeable. In both cases they were received from the defendant.**

12:11 **THE COURT**: Okay. And you couldn't take the tips off of the defendant products you're speaking about now and put them on your product? They would not be interchangeable?

12:12 A. **No. You have to change the whole handpiece assembly. He's taken this connector, which is a commercially available connector and adopted it to go with ours.**

THE COURT: Uh-huh. (Nodding affirmatively.) So that it can plug -- so the handpiece can plug --

A. **You can buy these --**

THE COURT: -- into the machine?

A. **These are medical-grade connectors that can be purchased anywhere.**

THE COURT: Okay.

12:12 A. **So he just --**

THE COURT: Keep your voice up.

A. **-- buys the same connector.**

THE COURT: The same connector as you use on your machine?

12:12 A. **Correct.**

THE COURT: So the point of that being that you can plug the handpiece into the base of the machine.

A. **Correct.**

BY MR. RAZAI:

Q. Mr. Ignon, if I could ask you --

A. **The last thing is the back here. We don't have a Skippy jar. This one actually had the actual -- to the best of my knowledge, this is the actual container. This is a very standard thread. And when we got this machine, we didn't**

12:13 **have anything other than the jar to use.**

THE COURT: You're pointing to the jar in the back, which is where the used serum --

A. **The waste -- this is a waste canister on the back of the machine. And this is a rather standard thread configuration.**

12:13 **THE COURT:** And so because on the machine that you recently purchased or were given, whatever it is, from the woman who got it on eBay, didn't have a waste container in the back, for purposes of just demonstrating the machine, you found the best available container, which was an empty Jiffy

12:13 peanut butter container, and screwed it on the back.

A. **Yeah. Which is a standard thread.**

THE COURT: Got it.

BY MR. RAZAI:

Q. Mr. Ignon, with respect to the canister in the back of Defendant's Hydradermabrasion MD machine on the far left, is that container necessary to create a seal so the vacuum actually operates?

A. **Yes, you have to do that. So for us to test whether this machine was operating similar to ours, we had to put something on the back because it came without it.**

THE COURT: Got it.

BY MR. RAZAI:

Q. Mr. Ignon, if I could ask you to take the handpiece that's in your hand back to the stand, I'd like to ask you some questions about the handpiece in the hybrid machine.

A. **(Complies.)**

Q. Mr. Ignon, the handpiece in your hand, is that slightly different than the handpiece that you were looking at from Defendant's machine?

A. **It's very hard to tell. I don't have a pair of calipers. It's very, very similar. And I think it's maybe a little bit different length.**

Q. And that's the handpiece from the hybrid machine in the center, correct?

A. **I believe so.**

Q. And would the analysis that you gave us with respect to the handpiece for the defendant's machine in light of Claim 1, would the same analysis apply to the handpiece in your hand now?

12:15 A. **Correct.**

MR. RAZAI: I turn the witness over to Mr. Aguila for cross-examination.

THE COURT: All right. Mr. Aguila, go ahead.

MR. AGUILA: Thank you, Your Honor.

12:15

CROSS-EXAMINATION

BY MR. AGUILA:

Q. Hello, Mr. Ignon. Do you remember seeing me in the year 2000 in Los Angeles at a Porsche auto club meeting?

12:15 A. **No, I don't recall that at all.**

Q. Are you a member of a Porsche auto club in Los Angeles?

A. **I am. I am, yeah.**

Q. Can I ask you about Exhibit -- Plaintiff's Exhibit SS again? Do you have a copy of that?

12:16 A. **Yes.**

Q. So it says it was -- in the box, in the -- this box here, has near the bottom dates, three separate dates. You mentioned that you had ordered the creation of this image, correct, in your testimony?

12:16 **MR. RAZAI:** Objection. Mischaracterizes testimony.

A. **Ordered? I don't know what you mean by ordered.**

THE COURT: Excuse me. Hold on one second. What was the objection?

MR. RAZAI: He's mischaracterizing the testimony. He didn't say that -- what he said was inconsistent.

12:16

THE COURT: All right. Well, I'll overrule it. You can ask the question. Go ahead.

BY MR. AGUILA:

Q. Who -- in your testimony, who did you say created this document?

12:16

A. **It was created by one of our designers.**

Q. But not by yourself?

A. **No.**

Q. Would you have given the order to create it?

A. **It came out as a result of our design meetings in the initial specification.**

12:17

Q. That's your testimony?

A. **It is.**

Q. Mr. Ignon, do you know the name of the person who might have created this?

12:17

A. **Two people might have created it, yes.**

Q. Can you tell us their names?

A. **One is Scott Mallet and --**

Q. Can you spell their last, please?

A. **M-A-L-L-E-t.**

12:17

Q. M-A-L?
A. **L-E-T.**
Q. T as in Tom?
A. **Yes.**
12:17 Q. M-A-L-L-E-T?
A. **He was a contract worker working for us.**
Q. And the second gentleman?
A. **I -- actually, I think it was just Scott Mallet.**
Q. Okay. So originally you thought it was two people but
12:17 now you just think it's one?
A. **(Nodding affirmatively.)**
Q. That's your testimony?
A. **Yes.**
Q. Thank you. But on this date -- do you have any
12:18 recollection at all of this date, October 29th, 2004?
A. **Well, I have a recollection that we did a lot of work in 2004. This is the result of many drawings that we made during that time.**
Q. But you don't remember seeing this drawing on that date?
12:18 A. **Yes, I do.**
Q. You remember seeing this drawing on October 29th, Friday, 2004?

Do you remember, was it early in the morning at 8:24 a.m. like it says here? Around that time?
12:18 A. **This was probably created for a design review meeting, so**

I probably didn't see it at the exact time it was created.

Q. But at that day?

A. **Sometime during, closely related to that date, yes.**

Q. Mr. Ignon, would you say that you have a good memory?

12:18 A. **It's failing as I get older, but it's not bad, though.**

Q. Could you describe this Friday, October 29th a little bit more? What events did you do that day other than --

A. **I don't see where that's of any pertinent to what we're trying to establish here.**

12:19 **THE COURT:** Hold on. That's not for you to say, sir. That's for your lawyer to make an objection.

MR. RAZAI: Objection, Your Honor. Relevance.

THE COURT: Well, I -- your response, sir?

MR. AGUILA: Your Honor, if he has very good memory

12:19 better than me, I don't remember what I ate yesterday. If he can remember what he did on October 29th, 2004, I believe that he should be able to remember other things during that day as well. If he can't, that would show that perhaps he did not remember seeing this document either.

12:19 **MR. RAZAI:** Your Honor, if I may.

THE COURT: Hold on just one minute. All right. So your point is that the witness has testified that he recalls seeing this drawing on October 29th of 2004. And now you're trying to impeach him on that memory?

12:20 **MR. AGUILA:** That's correct.

THE COURT: I think you can ask about it.

MR. RAZAI: If I may, Your Honor. Mr. Ignon did correct his testimony and say that he remembers seeing it sometime close to that date afterwards.

12:20 **THE COURT**: I think that's also possible. But meanwhile, you can question him and the witness can, if he wants, clarify his testimony. And you can go ahead. I wouldn't spend too much time on it, but go ahead.

MR. AGUILA: Yes. Thank you, Your Honor.

12:20 **BY MR. AGUILA:**

Q. Please, Mr. Ignon, don't think I'm trying to attack you.

A. **Oh, sure.**

Q. But could you tell us what you did on that day at Edge Systems?

12:20 A. **I couldn't tell you what I did on that day. I do many things. This was related to a design review that happens closely related to that date.**

Q. Okay. Well, it was close to Halloween. Would that help your recollection? October 29th, maybe...

12:21 A. **You know, I don't want to be cute about it.**

Q. Do you have any recollection at all of any event on that day?

A. **Close to that day or on that day we probably had a design review meeting. We wouldn't -- we create these drawings aperiodically during the design process.**

12:21

Q. Design review meeting over what?
A. **The design of this device. We actually -- we design our devices. We don't copy them.**
MR. AGUILA: Motion to strike, Your Honor. That's prejudicial.
THE COURT: Well, it's not responsive.
And what you should do is confine yourself, sir, to answering the questions.
BY MR. AGUILA:
Q. If you don't remember on that day, you mentioned in or about that time you do remember, can you tell us perhaps that week what you might have been doing at Edge Systems? At this time, what was your occupation? Your title?
A. **I was of -- a president of the company at that time, but I -- one of my responsibilities was the design and development of new devices and products.**
Q. Thank you, Mr. Ignon. As president of Edge Systems, Corp at that time, what do you remember doing during this week regarding Edge Systems?
A. **Like you, I can't remember exactly. I would imagine that one of the things I would do is have a design review meeting.**
Q. Yeah. Okay. Do you keep notes from all your design meetings?
A. **I don't keep notes on all of them, no.**
Q. But do you keep e-mails to keep track of what changes are

happening?
A. **I think in this particular case we kept most of -- if we kept notes, we have them in the design history file.**
Q. So you can't remember what you did on this week, but you do remember seeing this document on October 29th, 2004. That's your testimony?
A. **There or abouts.**
Q. No. You said on this date --
A. **No, I told --**
12:23 **THE COURT:** Don't argue with the witness.
MR. AGUILA: Sorry.
THE COURT: You got your answer. I would move on.
BY MR. AGUILA:
Q. Just to reiterate, the designer of this was -- his name is -- what was it again? Ed Mallet?
12:23 A. **Scott Mallet.**
Q. Thank you. Who clicked -- I imagine this CAD file, you would normally just see the image. Who clicked on this properties box to make it visible?
12:23 A. **Oh, to do -- to make this --**
Q. To make this box.
A. **Ed Nickolas.**
Q. Could you spell that name?
A. **N-I-C-K-O-L-A-S.**
12:24 Q. Is he still with Edge Systems?

A. **He is.**
Q. And the other person, he's not with Edge Systems? This Scott?
A. **He was a consultant all along, as I previously said.**
12:24 Q. Thank you. Now, Mr. Ignon, you received this machine from Ms. Irby, the one on the left-hand side that says Hydradermabrasion MD?
A. **Correct.**
Q. What date did you receive it from Ms. Irby?
12:24 A. **I don't have the exact date. It was sometime I think in beginning of December, late November.**
Q. Beginning of December, early -- or early December --
A. **Or late November.**
Q. -- late November. Okay. Who signed -- or was it sent by
12:25 FedEx or UPS? How was it sent?
A. **You know, I don't know. I didn't -- all I know is that it appeared in our engineering department after it was received by a receiving department.**
Q. You have a shipping department that takes -- intakes
12:25 shipments?
A. **Yes.**
Q. Do you know the person who might have received this machine, the name?
A. **I don't offhand.**
12:25 Q. Mr. Ignon, why is there a Jiffy peanut butter

container --

A. **When the -- yes.**

Q. -- on the machine?

A. **When the device came to us, we were trying to establish that it operated in a similar manner to our machine and that it would infringe our patent. And it came without a waste container. So we looked at what the thread was and got the nearest thing that we could to close off the system so it could then operate as if it were an operating system.**

12:26 Q. Are you aware of a machine called the SilkPeel?

A. **Yes.**

Q. What do they do?

A. **They make a hydradermabrasion machine.**

Q. Would you say it's similar to the HydraFacial?

12:26 A. **It has similarities.**

Q. Could you give us an idea zero to ten, something like that? Ten being high, zero being low.

A. **It's similar.**

Q. So very high?

12:26 A. **Not very high. Similar.**

Q. Well, very similar.

A. **No, I used similar. You used very similar.**

Q. Thank you. So they also have liquid that -- well, just like the HydraFacial, right? I mean you have solutions, bottles with solution, they go through a handpiece, it hits

the skin and gets vacuumed back into the machine into the waste receptacle?

MR. RAZAI: Objection lacks foundation.

THE COURT: Okay. So what you want to do is ask the witness if he's familiar with the operations --

MR. AGUILA: The competitors.

THE COURT: You're talking about the SilkPeel machine right now.

MR. AGUILA: Yes.

THE COURT: Manufactured by some third party?

MR. AGUILA: A third party. EMed, yes.

THE COURT: So why don't you first find out if the witness has had a chance to look at it and would know.

BY MR. AGUILA:

Q. Have you ever seen a SilkPeel?

A. **I have from afar, yes.**

Q. When is the first time that you saw a SilkPeel?

A. **You know, I really don't know.**

Q. Would you say it's a long time ago?

A. **A while ago, yeah.**

Q. A while ago. Okay. Not recent?

Are you aware of a company called Derma Genesis from Texas? Derma Genesis?

A. **Yes. Uh-huh. (Nodding affirmatively.)**

Q. Are you aware -- have you ever seen the product called

AccelaFuze, A-C-C-E-L-F-U-Z-E (sic). AccelaFuze. Have you ever seen that product?

A. **Yeah. Just from afar. I've never seen it up close.**

Q. Would you say that it is also a hydradermabrasion machine?

A. **Yeah. I think they deliver it differently, though.**

Q. Are you aware of a company called Altair Instruments?

THE COURT: Can you spell it?

MR. AGUILA: Altair is A-L-T-A-I-R and then Instruments.

A. **I'm aware of them, yes.**

BY MR. AGUILA:

Q. Are you aware of a machine that -- I don't recollect the name. But do they sell a hydradermabrasion machine as well?

A. **A different configuration.**

Q. But it also has solutions, serums, a vacuum source, a handpiece similar to the --

A. **Yeah, but the delivery is different.**

Q. It's different. Okay. Have you filed a lawsuit with any of those companies?

A. **We have not.**

Q. Why?

MR. RAZAI: Objection. Relevance.

THE COURT: What's the relevance?

MR. AGUILA: Well, if there are so many competitors

that sell similar machines, why are they targeting my company? And he was president and still -- well, owner, vice president.

THE COURT: I'll allow the question.

12:29 **BY MR. AGUILA**:

Q. Why are you suing our company?

A. **Because they don't try to bait and switch or make products look identical to ours.**

BY MR. AGUILA:

12:30 Q. Good answer.

So you would say that none of the other competitors have a machine that copy any of your parts, any of your machine's parts or delivery systems?

A. **They don't copy them, no.**

12:30 Q. Mr. Ignon, did you promise to reward Mr. Duboys? The doctor who brought in the middle machine, did you promise to reward him in any way for his testimony?

A. **I did not.**

Q. You did not. Do you know if someone did from your

12:30 company?

A. **I am not sure of that.**

Q. Were you aware that Mr. Duboys would like to purchase 30 hydradermabrasion machines for his various clinics?

A. **That's the first I know about it is today. This --**

12:31 **you're saying that.**

Q. Do you think it would be --
A. **That's good. I'm glad.**
Q. Do you think it would be advantageous for Mr. Duboys to -- by giving testimony, will he a reduced price on his HydraFacials if he decides to buy machines from you in the future, the 30 hydradermabrasion?
A. **If anybody buys 30 machines from us at one time or collectively, we would give them a discount.**
Q. Include Mr. Duboys?
12:31 A. **Sure.**
Q. You had mentioned that the tips are not compatible, is that right, between the accused machines and your HydraFacial MD?
A. **I don't believe. I haven't had the time it take yours and check them against another configuration. But I don't think they work with ours.**
Q. Can we turn on these machines? Do you have --
MR. RAZAI: Objection, Your Honor. I don't understand what the relevance is of the interchangeability of the handpiece of our machine and Defendant's machine.
THE COURT: So there's two questions. Why would you need to turn on the machine?
MR. AGUILA: I would like to show that this machine is actually their machine. I would like to see the touch screen, what happens. There's a touch screen on this --

THE COURT: But you're talking about the hybrid machine right now?

MR. AGUILA: Yes. What's the similarities between them and the original HydraFacial. I'm trying to show that this is their machine that they prepared for this occasion.

THE COURT: You're saying that the defendant created the hybrid machine for the purpose of this lawsuit?

MR. AGUILA: Yeah -- well, I shipped a machine to Mr. Duboys but this is not that machine. And so I'm trying to figure out if this machine is actually a HydraFacial, could I have made this machine.

THE COURT: Would you be better off over the lunch break inspecting it? I'm just thinking -- I'm trying to understand why we need to do this now with the witness.

MR. AGUILA: I would like to show him -- I would like to compare the touch screen on both. One principal part of these machines is they have touch screen capabilities. And I have a touch screen that I know what it looks like. I just want to make sure that this machine, the hybrid, has -- that my screen, that it would say HydraDerm MD and would have my contact information in Miami.

THE COURT: Okay. So why don't you do that over the lunch break. Why don't you plug it in and look at that. And then if you have an issue with it, the question -- this witness is going to stay here.

Mr. Ignon, you're not leaving until we're finished here today.

A. **God willing.**

THE COURT: Right. So because it's going to take a little time. And I am concerned. It's 12:30 and we're still on the first witness.

MR. AGUILA: I'm going to try to rush. It's really just those things --

THE COURT: So then if you need to call the witness on that point after lunch, you could do so.

MR. AGUILA: Yes. How long until the lunch?

THE COURT: Well, when you finish with this witness, I thought we'd take a lunch break.

MR. AGUILA: Okay. I'm going to rush things then and get this going. Can I present the evidence?

THE COURT: Yes, you can hand a copy to --

MR. AGUILA: This is my Exhibit 4. I included this and -- well.

THE COURT: Go ahead and give that to my clerk so she can mark it. You want to mark it as Defendant's Exhibit 4?

MR. AGUILA: Yes. That's in my Defendant's opposition.

THE COURT: Right. You filed that with the Court. And in your filing you called it Exhibit 4, so you'd like to

call it Exhibit 4 here too.

MR. AGUILA: Yeah. Not to confuse things further.

THE COURT: That's fine.

BY MR. AGUILA:

12:35 Q. Mr. Ignon, have you seen that paper before?

A. **I'm trying to read it.**

Q. Okay. Please tell me when you're done.

A. **Okay.**

Q. Do you notice the company? What is that company name?

12:35 Can you see?

A. **Diamond Skin? Is that what you're referring to?**

Q. Yes. That's my company. Do you see the date on the upper left-hand corner of that document? Can you read that date?

12:35 A. **February 2004 through January 4, 2014. I don't know what that means.**

Q. That's fine. Can you read the first couple sentences?

A. **Sure. Welcome to the latest in crystal-free microdermabrasion. Not hydradermabrasion but**

12:36 **microdermabrasion -- with --**

MR. AGUILA: Your Honor, that's unnecessary.

THE COURT: Right. He asked you just to read the first couple sentences.

A. **Welcome to the latest in crystal-free microdermabrasion**

12:36 **with oxygenation. Our Diamond Skin machine uses advanced**

oxygen infusing technology to assist skin cell recuperation at the moment of dermabrasion.

BY MR. AGUILA:

Q. Can you continue a little bit more?

12:36 A. **This new transdermal oxygen delivery system assists skin cell oxygenation, destroys blemish-causing bacteria and detoxifies most skin cell waste.**

Q. That's fine. I think that's --

Would you describe what you just read as something

12:37 similar to what the HydraFacial does?

A. **Not really. This is a dry machine. It has no fluid going through here. You're talking about using oxygen, which is an entirely different mode of operation.**

Q. Have you ever seen --

12:37 A. **If I understand this right.**

Q. Have you ever seen a Diamond Skin in person?

A. **I haven't seen this one, no.**

Q. Have you ever used a Diamond Skin in person?

A. **I have not.**

12:37 Q. So --

A. **I'm just going by your description.**

Q. So, in fact, if I would tell you that it does use liquid, would that surprise you?

A. **I don't know if it would surprise me.**

12:38 **MR. AGUILA:** If I could introduce Defendant's

Exhibit Number 5.

BY MR. AGUILA:

Q. Mr. Ignon, can you -- do you remember seeing that web page before? It's a printout of a web page.

12:38 A. **It looks familiar, yes.**

Q. It is a printout of the Edge Systems website from 2004. Does that refresh your memory?

A. **A bit.**

Q. Do you see the HydraFacial as one of the devices being

12:39 offered by Edge Systems?

A. **No.**

MR. RAZAI: Your Honor, if I may. I think we agree that the HydraFacial wasn't commercially available until 2005. Mr. Aguila's trying to prove that it was 2004. So we

12:39 have -- there's no reason to prove that. We stipulate to that.

THE COURT: All right. Does that make sense, Mr. Aguila?

MR. AGUILA: Yes, but I wanted to provide that into

12:39 evidence. That's, I think, important.

THE COURT: All right.

MR. RAZAI: We do reserve our ability to challenge the authenticity of the document as well as admitting it into evidence. But we do stipulate that in 2004 we were not

12:39 selling a HydraFacial MD machine.

THE COURT: Okay.

BY MR. AGUILA:

Q. Here is Exhibit 8, Defendant's Exhibit 8. Mr. Ignon, you participated in the trademark applications for Edge Systems in your capacity?

12:40

A. **I did.**

MR. RAZAI: Objection, Your Honor. This document is a USPTO application for a HydraFacial MD which I don't believe is at issue in this preliminary injunction (inaud.).

12:40

THE COURT: Well, he hasn't moved any of these into evidence. He's shown them. He's marked them for identification.

MR. RAZAI: I'm objecting to relevance to this line of questioning.

12:40

THE COURT: I see. So any questioning because you're saying this is what? Tell me again.

MR. RAZAI: This is an application -- Mr. Aguila is talking about the marked HydraFacial MD which is not an issue in this preliminary injunction.

12:40

THE COURT: Oh, this is the trademark application for HydraFacial. Right. And the plaintiff is not seeking a preliminary injunction based on any infringement of that trademark. So what would be the relevance of this?

MR. AGUILA: If you give me the next step, this

12:41

will become very clear in one second here.

THE COURT: Just so you understand, Mr. Aguila, you haven't moved any of this into evidence yet.

MR. AGUILA: Okay. Well, can I move -- how?

THE COURT: Well, I mean, if -- do you want to deal with that now? There's different issues for each document.

12:41

MR. AGUILA: Okay.

THE COURT: So I don't know if you're going back to Defendant's Exhibit 4.

MR. AGUILA: No. We're talking about -- this is a different exhibit, but I mean...

12:41

THE COURT: Well, before you're finished with the witness, you may want to move them in on your own testimony, some of them. So it may depend for the document. But I just want you to be clear they're not in evidence yet.

12:41

MR. AGUILA: Oh, thank you. Okay.

BY MR. AGUILA:

Q. Okay. So this is Exhibit -- oh, okay.

THE COURT: Now you're marking for identification which exhibit? Defendant's Exhibit what?

12:42

MR. AGUILA: Exhibit 10.

BY MR. AGUILA:

Q. This is a response from Edge Systems regarding their HydraFacial MD trademark application. And just to show the point. If you can go to page 2 of that document?

12:42

A. **Which document? 10?**

BY MR. AGUILA:

Q. The 10. The response from Edge Systems to the original USPTO.

A. **What page is that on?**

12:42 Q. The second page of Exhibit 10 where there's some arrows. If you look at the second arrow, it will show that Edge Systems is arguing that HydraFacial means a facial for a consolation or something. It's not a descriptive term. And this is where -- this is the whole point of this.

12:43 **MR. AGUILA:** Defendant's Exhibit 11.

THE COURT: Okay.

MR. AGUILA: After this I just have one quick thing about the patents issue and then I'm finished.

THE COURT: But we've got a lot of balls in the air

12:43 right now.

MR. AGUILA: Yes.

BY MR. AGUILA:

Q. So this last one, Exhibit 11, Mr. Ignon, can you describe what you see? Have you seen this before?

12:43 A. **It looks like a website.**

Q. Is it the HydraFacial.com website?

A. **Could be, yes.**

Q. Do you know what your company's website looks like?

A. **Well, it's changing pretty often. So yes and no.**

12:44 Q. Thank you. Can you read the first line of the facts,

frequently asked questions section?

MR. RAZAI: Your Honor, objection; relevance. This is still going to the trademark application. It has nothing to do with the PI issues at stake looking at the first two lines of the --

12:44

THE COURT: Right. Let's go back for a minute. Let's go back. We've got a pile of exhibits here, and you said you want to move them all in. The first, Defendant's Exhibit 4, I gather is, you would say, a shot of a web page of your company back --

12:44

MR. AGUILA: In 2004, yes.

THE COURT: That's Exhibit 4.

MR. AGUILA: Yes.

MR. RAZAI: Your Honor, objection. It's -- he's saying that he owns Diamond Skin. It lacks foundation, but that's what he's alleging.

12:44

THE COURT: Right. He's saying this is Defendant's company. Right. Does the plaintiff object to admitting Defendant's Exhibit 4 into evidence?

MR. RAZAI: We do object. And the reason is this is a printout from a wayback machine. I have no way of verifying that this actually is what the website looked like in 2004.

12:45

MR. AGUILA: Your Honor, I'll do it in my testimony.

12:45

THE COURT: Exactly. That makes sense. So that's not in evidence right now, Defendant's Exhibit 4. Let's just -- and if you want to address that in your testimony, you can try to lay a foundation and get it into evidence.

12:45 Defendant's Exhibit 5, does the plaintiff object to the admission of this document?

MR. RAZAI: On the same basis. A wayback machine which is not any type of a record kept in (inaud.) course of business. It's an internet website where you could go in and

12:45 theoretically it's pulling cashed web sites, so again we --

THE COURT: So you're saying you have an objection to the authentication?

MR. RAZAI: Authenticity, yes.

THE COURT: So you could address that in your

12:45 testimony. All right.

Defendant's Exhibit 8, this is U.S. Patent and Trademark Office. Is it an application?

MR. AGUILA: Yeah. It was originally denied by the USPTO. And then --

12:45 **THE COURT**: And it concerns a mark that is not the subject of the preliminary injunction. So the plaintiff's objection to this is?

MR. RAZAI: Relevance.

THE COURT: Relevance. All right. How about this?

12:46 I will consider your objection later. For purposes of the

hearing, it's in evidence and I'll figure out the relevance later on.

MR. RAZAI: That sounds fine. I was just -- my objection was to the line of questioning again because we're still in the same line of questioning about the marked HydraFacial which has nothing do with --

THE COURT: I know. I know. And I'm not clear on the relevancy yet, but I'm going to give Mr. Aguila a chance to explain that to me.

12:46 Defendant's Exhibit 10. Again, other correspondence from the patent and trademark office. Does the plaintiff has the same --

MR. AGUILA: You mean 9? Exhibit 9?

THE COURT: I'm looking at 10.

12:46 **MR. AGUILA**: 8 and 9 are --

THE COURT: I have 10. I have 8 and 10, what's been marked as 8 and 10.

MR. RAZAI: I have 8 and 11. I don't have 9 or 10. I might have it. I have 10.

12:46 **THE COURT**: Okay. You want to show that to Mr. Aguila just so we're all talking about the same thing.

MR. RAZAI: (Complies.)

THE COURT: That was your Exhibit 10.

Is the plaintiff's objection again relevance?

12:47 **MR. RAZAI**: Yes, Your Honor.

THE COURT: I'll take this subject to the objection. So 8 and 10 are in evidence.

(Thereupon, the aforementioned exhibits were admitted into evidence.)

12:47 **THE COURT**: And now we have Defendant's Exhibit 11, which is, Mr. Aguila, you say is an image of Plaintiff's website.

MR. AGUILA: Yeah. Yes. HydraFacial.com.

THE COURT: Is there an objection?

12:47 **MR. RAZAI**: I haven't had a chance to examine --

MR. AGUILA: It's a live shot.

MR. RAZAI: I haven't had a chance to examine it for authenticity, but I think our objection is just relevance.

12:47 **THE COURT**: Okay. So I'll take it subject to the relevance objection.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

MR. AGUILA: And just this last point --

12:47 **THE COURT**: So now you want to address relevance of this?

MR. AGUILA: Yes.

THE COURT: Okay. You can question the witness.

BY MR. AGUILA:

12:47 Q. Could you read that first sentence of Exhibit 11, the

HydraFacial.com --

A. **11 -- are you talking about Exhibit 11?**

THE COURT: Yeah, I think that you were. The current screen. This current web page.

12:48 **BY MR. AGUILA**:

Q. Yeah. From the website.

A. **Yes. The HydraFacial treatment is a new breakthrough in aesthetic technology. It takes its name from the root word hydrate, to cause to take up moisture. This ability is -- this ability to moisturize the skin separates --**

12:48 **BY MR. AGUILA**:

Q. You can stop there, Mr. Ignon. Can you compare what you saw there on your present website at HydraFacial.com that explanation of the term HydraFacial meaning hydrate, to bring up moisture, and the response from Edge Systems in 2005 -- the response to the original USPTO declined to accept their application where Edge Systems says that it is not descriptive?

MR. RAZAI: Objection, Your Honor. The leeway, I

12:49 understand, if Mr. Aguila can tell us where we're going with that at this point would be -- it's still exactly to the mark, the trademark application into a trademark that is not at issue.

THE COURT: I'll allow you to ask the witness if he

12:49 can reconcile the different explanations about the meaning of

HydraFacial.

So could you -- Mr. Ignon, would you like to -- if you can offer any explanation that reconciles the one statement of what HydraFacial means versus the other.

12:49 **MR. RAZAI**: I'm going to object to that as lacking foundation, Your Honor. I don't think there's anything in the evidence that Mr. Ignon actually had anything to do with the application or with the website's description.

MR. AGUILA: He just said he participated in the 12:49 application for the trademark.

THE COURT: Well, okay. First let's -- I'm just going to ask him directly.

Sir, did you have any involvement in either what's written in Defendant's Exhibit 11 or Defendant's Exhibit 10 12:50 regarding the significance of the term HydraFacial?

A. **First of all, we had a patent and trademark person, Catherine Holland, do the -- you know, the application. And I don't pretend to be an attorney knowing the subtleties of the words that are involved. There is an association of** 12:50 **hydration, but I think that's as far as I would, you know, be able to take it.**

THE COURT: All right. Is there something else you want to ask.

BY MR. AGUILA:

12:50 Q. No. Just to reiterate. You would say HydraFacial, the

term, has something to do with hydrate?
A. **Correct.**
Q. Right. Okay. Lastly --
A. **Our mark is HydraFacial MD. And then subsequently we have reapplied to the trademark office and gotten HydraFacial also trademarked.**
Q. Right. But the USPTO's attorney, they were talking about specifically HydraFacial in your HydraFacial MD application as shown in --
12:51 A. **That was the initial but not the final outcome.**
Q. Right. Okay. Lastly, this is it. The patents.
MR. AGUILA: I would like to present into evidence Exhibit -- Defendant's Exhibit 20, which is...
BY MR. AGUILA:
12:52 Q. Mr. Ignon, have you ever seen this patent before?
A. **A long time ago. A long time ago.**
Q. Can you read the first page, the date when it was submitted -- this patent was submitted to the patent and trademark office?
12:52 A. **I don't see the -- where is it? It was filed November 12th, 1999, or the patent was issued June 5th, 2001.**
Q. No. But the file date where it says November 1999. Can you --
A. **Yes. 12 -- November 12th, 1999.**
12:52 Q. Would you say that that date is before or after your --

the patent that you're submitting?

MR. RAZAI: Objection. Vague.

MR. AGUILA: I'm trying to see which patent was first.

12:53 **THE COURT**: What two patents are you talking about?

MR. AGUILA: Their main patent that they're talking about.

THE COURT: The 620 patent?

MR. AGUILA: The 620 patent. Yes. Sorry.

12:53 **MR. RAZAI**: And Your Honor, I think what Mr. -- if I can help. Mr. Aguila is getting into which patent was filed first.

THE COURT: Right.

MR. RAZAI: So the filing date is what -- he's

12:53 probably asking if it's before the filing date of our patent, not the issue date.

THE COURT: All right. Does the witness have in front of him that information or does e=he --

MR. RAZAI: He has the complaint that I had given

12:53 him as in Exhibit 1 of the complaint. So he has -- he should have our filing date. And he has Exhibit 20, which has the 739 patent's filing date.

THE COURT: Okay. So you want the witness to say which patent was filed first?

12:53 **MR. AGUILA**: Right. If he is aware of which patent

came first.

MR. RAZAI: Again objection. Are you asking which came first or filed first? There is a distinction.

MR. AGUILA: Well, filed with the patent and trademark office.

A. **This is not a wet system. This is a dry system.**

THE COURT: But the question, sir, is whether 739, that patent document that's Defendant's Exhibit 20, can you tell us if that was filed before or after your 620 patent?

A. **I don't have that in front of me.**

THE COURT: I mean it's probably subject to stipulation. There's going to be a record --

MR. RAZAI: We can stipulate.

THE COURT: -- with the patent office.

MR. RAZAI: We can stipulate that the filing date of the 739 patent was one month prior to the filing of the 620 patent.

THE COURT: Okay. All right. It is what it is. We don't have to argue about that.

MR. AGUILA: Perfect.

A. **But --**

BY MR. AGUILA:

Q. Yes, go on.

A. **This is like comparing origins and apples. I can have -- I got tons of patents that have different dates of**

application, but they don't apply to what we're talking about here.

Q. So you're saying that this current patent that I'm showing you, the 6241739 is not comparable to the 620 patent?

12:55 A. **You know, I haven't read it in a long time. But everything that it indicates on this current page, without reading all the claims, it indicates a dry machine, not a wet machine:**

Q. Are you aware that the 739 patent does mention liquids in it?

12:55 A. **I haven't read this in a long time. I'm not prepared to answer you.**

MR. RAZAI: Your Honor, objection. The document speaks for itself. We stipulate to its entrance into evidence.

12:55 **THE COURT:** That's fine. If he says he hasn't read it -- it's a lengthy document. I don't want to take the time now for him to read it.

MR. AGUILA: Your Honor, it's just -- no, I don't want him to read. But it's just strange that a patent that affects his business he has not read in a long time. But okay.

THE COURT: I mean it is what it is.

MR. AGUILA: Yes. Okay. I think I'll rest and we can see the screens afterwards and maybe we might recall

12:55

Mr. Ignon.

THE COURT: Okay. If you turn on the computers during the lunch break and based on the screen, what you see on the screens, there's a question for this witness, you can ask that.

MR. AGUILA: Yes.

THE COURT: Afterwards.

Any redirect, sir?

MR. RAZAI: Can I direct for two minutes before we break for lunch and finish Mr. Ignon?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. RAZAI:

Q. Mr. Ignon, Mr. Aguila was asking you about the Altair product; do you recall that?

A. **Yes.**

Q. Do you know if the Altair patent infringes -- the Altair product infringes any of Edge's licensed patents?

A. **I don't know. You would be better prepared to answer than I.**

Q. Sitting here today, do you think that it infringes the patents? Do you have information to believe that it is an infringing product, the Altair product?

A. **I don't know.**

Q. Do you have reason to believe that the Skin Peel is an infringing product?
A. **It could be. I don't know.**
Q. But you don't know that it infringes?
12:57 A. **No.**
MR. RAZAI: Your Honor, just one piece of evidence. There is a declaration submitted by John Shadick, who is an inventor on the 620 patent who was attesting under oath that the date of invention was prior to the filing date of the 739
12:57 patent. And also submitting evidence again under penalty of perjury establishing that there were prototypes of products that embody the 620 patent available prior to the filing date, which is November of '99, of the 739 patent. Which under 102(e) makes the 739 patent not prior art to the 620
12:57 patent and would not affect the patentability of that patent.
THE COURT: Under 102(e) you say?
MR. RAZAI: 102(e) Your Honor. 35 USC-102(e). And if Your Honor would like additional briefing on the patent validity issue, because that's a much more legal issue than
12:57 it is factual, we'd be happy to provide that upon your request, Your Honor.
THE COURT: Okay.
MR. AGUILA: Your Honor, that's hearsay. The gentleman is not here to be cross-examined.
12:58 **THE COURT:** He's not -- no. He's just saying that

he -- it's a legal issue that you all could brief.

MR. BABCOCK: Your Honor, I plan to address that in the closing. Hopefully we'll have time. But I did want to make that point, which is the basis that this particular reference is being applied is based upon a filing date. It's one month before the filing date of our patent. The statute 35 USC-102(e) says it has to be -- our invention -- it has to be before our invention, not before our filing. And we have evidence to --

12:58 **THE COURT:** You haven't filed a reply memorandum to the defendant's response.

MR. BABCOCK: Which we got on Tuesday.

THE COURT: I understand. But I'm just -- I'm confirming the obvious. You have not filed a reply, which 12:58 that's something you might want to address. So we'll talk about that at the end. What --

MR. BABCOCK: Because we would like to address that.

THE COURT: -- additional briefing. That's fine. 12:58 Remind me to discuss it at the end.

MR. BABCOCK: Yes, Your Honor.

THE COURT: But right now, you've finished with your redirect of Mr. Ignon?

MR. RAZAI: I apologize for not -- I have no 12:58 further questions for Mr. Ignon.

THE COURT: All right. You can step down. Thank you.

We're going to take a lunch break. I am concerned about time. So my clerk can give you -- there's the courthouse across the street on the 7th floor has a quick cafe. You got to cross the street and go through security. And then also my clerk can tell you if you go right down Miami Avenue, there's a salad place about a block. That's probably your closest options. We need to finish this today. I'm sure for your sake as much as for mine. So you tell me. I mean, I would normally give you an hour for lunch. I'm a little concerned about it.

MR. BABCOCK: Let make that shorter, Your Honor. 40 minutes?

MR. RAZAI: I think 30 is probably more in line with what -- come back as soon as possible.

THE COURT: Right.

MR. BABCOCK: Feasible?

THE COURT: I can certainly give you 30 minutes for lunch.

Would you want to do that, Mr. Aguila?

MR. AGUILA: I'm full. I don't need any lunch.

THE COURT: Well, that's a good thing.

A. **I got a Power Bar.**

THE COURT: So we'll be back at 1:30.

In recess.

(Whereupon, at 12:59 p.m., a luncheon recess was taken.)

* * *

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

(1:35 p.m.)

THE COURT: Thank you very much. Stay seated -- you don't have to stay standing. Whatever. It's all good.

01:35 **THE COURT SECURITY OFFICER**: This gentleman is allowed to stay after he testifies, right?

THE COURT: Yes, he is. Unless he was going to be recalled as a witness.

MR. RAZAI: He will not be recalled as a witness.

01:35 **MR. AGUILA**: Well, I wanted to show the monitor.

THE COURT: Do you want to ask him some questions about what's on the monitor? Because you can call him now for that purpose, otherwise we're going to move on from him.

MR. AGUILA: Let's see here. Yeah, the monitors

01:36 aren't very important. So that's fine.

THE COURT: All right, sir. So you're not going to be recalled as a witness. Your testimony is done. You're welcome to sit in the courtroom.

MR. IGNON: Thank you.

01:36 **MR. RAZAI**: Your Honor, one question before we get started. There's about four exhibits that I'm going to enter with the next witness. I only have two copies of each, not three. I can give -- so I won't have a copy for Mr. Aguila. I can take the witness' copy and give it back to him or --

01:36 **THE COURT**: Why don't you show them to him right

now.

MR. RAZAI: That sounds great.

THE COURT: Are these exhibits that you had filed?

MR. RAZAI: We have not. These are new exhibits. I apologize. We had a -- all the exhibits were flying in from California and the plane broke down and they're in Tennessee, so I had to print out these all last night.

THE COURT: Are there other exhibits that you don't have sufficient copies of?

MR. RAZAI: No, just those.

THE COURT: Just these two documents?

MR. RAZAI: It's just these -- it's four documents, Your Honor.

THE COURT: So Nancy, why don't I ask you to make some copies of them.

THE COURT SECURITY OFFICER: Sure.

MR. BABCOCK: That's greatly appreciated, Your Honor. We apologize.

THE COURT: I don't want to send her out of the courtroom when we need her, but we're not going to move exhibits in while she's stepped out.

That's all right. You can come in, sir. If you're the next witness, that's fine.

(Thereupon, there was a brief discussion off the record.)

MR. BABCOCK: Maybe it's best for leaving the witness box for now for other witnesses to refer to. Then when we're all done we'll stack them up and we'll leave them with the reporter.

01:39 **THE COURT:** Sure.

MR. AGUILA: Are you talking about my exhibits?

MR. BABCOCK: Well, the copies we gave to the exhibit -- to the witness, right? So we're going to keep those there with the witness box and then when we're all

01:39 done --

MR. AGUILA: Where are they?

MR. BABCOCK: Roger actually walked out of the box with them.

THE COURT: No big deal. We're just going to run it back up there.

Can one of you deal with that while the other one begins the direct examination?

MR. RAZAI: Of course. We gave all the exhibits to the deputy clerk.

01:40 **THE COURT:** The ones to be copied?

MR. RAZAI: Yes.

THE COURT: Oh, you mean you can't start without them?

MR. RAZAI: Yeah.

THE COURT: Okay. For future reference, it's the

kind of thing you might one to think about in advance --

MR. RAZAI: I'm sorry about that, Your Honor. I just realized it.

THE COURT: -- concerned about time.

01:40 **MR. RAZAI**: We can start. I have slides and then we can -- I can get copies of the documents at the end and have the witness authenticate them when they're back. Is that okay?

THE COURT: All right.

01:40 **MR. RAZAI**: Plaintiffs call Dr. Elliott Duboys to the stand.

Thereupon,

ELLIOTT DUBOYS,

having been duly sworn by the Court, testified as follows:

01:41 **THE WITNESS**: I do.

THE COURT: Okay, sir. You can have a seat. And you'll want to get close to that microphone. And if you would, tell us your name and spell your last name.

THE WITNESS: Certainly. It's Elliot, E-L-L-I-O-T. The last name is D-U-B-O-Y-S.

01:41

THE COURT: All right. Go ahead.

MR. RAZAI: Your Honor, if I can approach just for the time being, if I can give a copy of the slide presentation to Dr. Duboys so he can read it.

THE COURT: Yes.

MR. RAZAI: And then when the documents come back, we'll authenticate them. It's just these documents.

THE COURT: Okay.

A. **Thank you.**

01:41

DIRECT EXAMINATION

BY MR. RAZAI:

Q. Dr. Duboys, what do you do?

A. **I'm a plastic surgeon.**

01:42 Q. And where are you employed?

A. **I'm employed with Associated Plastic Surgeons in New York and Long Island.**

Q. And correct me if I'm wrong, but you also do some neurosurgery?

01:42 A. **I'm not a neurosurgeon. I have -- I'm a craniofacial surgeon, so I work with the Department of Neurosurgery at Stonybrook.**

Q. And what are your duties at Associated Plastic Surgeons and Consultants?

01:42 A. **Basically, it's a private practice. I do cosmetic surgery. I do reconstructive surgery. And I'm also medical director of a chain of medical spas.**

Q. And how many medical spas are you the director of?

A. **We have two freestanding brick and mortar. And there's**

01:42 **probably about ten others that are located in certain salons.**

Q. Can you describe your educational background?
A. **Sure. After college, I went to Fairleigh Dickinson University in New Jersey. I subsequently went and got my MD degree from the University -- the Free University of Brussels. I'm translated from the French. I spent seven years there.**

I subsequently came back, and I did five years of general surgical training, and then subsequently two years of plastic surgical training. And somewheres in between I did a preceptorship in Canniesburn Hospital in Scotland in craniofacial surgery.

Q. And Dr. Duboys, do you hold any medical certifications?
A. **I do.**
Q. And what certifications do you --
A. **I'm board certified by the American Board of Plastic Surgery.**
Q. Dr. Duboys, are you familiar with Edge Systems' HydraFacial machine?
A. **Yes.**
Q. And what familiarity do you have with that?
A. **About six months ago when we were contemplating opening up our brick-and-mortar medical spas, somebody told me about the HydraFacial machine and it would be something that we should consider looking into. A couple of the estheticians had a following with the HydraFacial units in other spas.**

And I did have one of the representatives from Edge Systems come in and, I guess, represent the machine to me. In fact, I did have the HydraFacial myself. I wanted to experience that.

01:44 Q. So you've seen it before?

A. **I have.**

Q. And before October of 2014, you'd seen the -- Edge's HydraFacial MD machine?

A. **Yes.**

01:44 Q. And Dr. Duboys, when you say that a representative from Edge came to visit, do you mean a representative from Plaintiff Edge Systems LLC?

A. **From Plaintiff's Edge Systems.**

Q. And did you recently try to purchase a HydraFacial

01:44 machine on eBay?

A. **I did.**

Q. Can you describe how you tried to do that?

A. **I was doing a search on eBay. I entered HydraFacial, and that's how I found it. And it was being offered for $10,000**

01:44 **or best offer.**

Q. Was there a website associated with the eBay posting?

A. **I believe there was. And it was Edge-Systems.com.**

Q. Did you go on the website?

A. **I did.**

01:44 Q. And did you find a phone number on that website?

A. **I did.**
Q. Did you call the phone number?
A. **At that time, I'm not sure. But I did eventually call that telephone number.**
01:45 Q. The phone number from Edge-Systems.com?
A. **Correct.**
THE COURT: Try to slow down just a bit for our court reporter. She's got a tough job.
MR. RAZAI: I'm sorry.
01:45 **THE COURT:** I know yours is challenging, but try this one.
BY MR. RAZAI:
Q. When you called the phone number, Dr. Duboys, how were you greeted?
01:45 A. **They answered the telephone as Edge Systems.**
Q. Who did you speak -- do you remember speaking to anybody at the number you called at Edge-Systems.com?
A. **The only person I recall by name was a Mr. Wilcox.**
Q. And what did you speak about with Mr. Wilcox when you
01:45 called?
A. **Prior to having purchased something on eBay, I was concerned how I was going to pay for the system. I also wanted to verify the fact that this indeed was a machine that was refurbished by the manufacturer, Edge Systems, the**
01:46 **plaintiff.**

Q. Now, did you eventually end up putting a bid on the posting?
A. **I did.**
Q. And how much was your bid?
01:46 A. **$7,650.**
Q. And I'm giving you some slides as copies of the slides up here on the screen. Is that the posting that you won on eBay?
A. **It appears that way, yes.**
01:46 Q. And who is the seller?
A. **Raguila11.**
Q. So R-A-G-U-I-L-A 11?
A. **Correct.**
Q. Now, looking at the -- going back to this photograph, is
01:46 that the photograph that was posted with the eBay posting?
A. **I believe it was.**
Q. Now, did you notice that on the cover of that machine it says HydraDerm?
A. **I did.**
01:46 Q. Did you ask Mr. Wilcox why it said HydraDerm?
A. **I did.**
Q. And what did Mr. Wilcox say?
A. **Mr. Wilcox said that this was the latest machine that was out there. It was refurbished.**
01:47 **Excuse me. Can I get some water?**

THE COURT: You can. When my clerk comes back she'll be able to help you with that.

MR. RAZAI: May I approach?

THE COURT: Yeah. Uh-huh. (Nodding affirmatively.)

A. **And I was a little bit concerned about the HydraDerm name. In all form it appeared to me that this was the same machine that I had seen in the past. When a representative from the plaintiff came to -- Cactus is the name of the salons that we own, the spas that we own.**

BY MR. RAZAI:

Q. So based on the look of the machine, you thought that it was a HydraFacial machine?

A. **I did.**

Q. And when Mr. Wilcox said that it's the newest machine, did he say it was the newest machine from Edge Systems?

A. **I believe he did.**

Q. Did he say that -- did he say whether it was different than the HydraFacial?

A. **He said it was a machine that was being used in doctors' offices and distributed in Europe.**

Q. But it was Edge Systems' machine, though?

A. **That's correct.**

Q. That's what Mr. Wilcox said?

A. **That's correct. And I also was concerned a little bit**

about the serial number. The serial number was on the listing, and I did contact the Edge-Systems.com website to verify that this indeed was one of their machines. And I was explained by Mr. Wilcox that this was a machine that was given out to an individual to -- it was refurbished by us, given out to an individual to go ahead to post and sell online.

Q. Now going to the next line. Did you receive an e-mail from Mr. Wilcox?

A. **I --**

Q. Did you receive an invoice after you purchased the machine?

A. **I did.**

Q. And is this the invoice that you received? Is that an e-mail for the invoice that you received?

A. **It is.**

Q. And was that logo on the e-mail that you received?

A. **Yes.**

THE COURT: What would be the exhibit number for this? Is this a composite exhibit?

MR. RAZAI: No. This one is going to be Exhibit CCC, Your Honor.

THE COURT: So why don't we be, you know, making our record here what exhibits you're referring to now. You've now shown two slides.

MR. RAZAI: Yes, Your Honor.

THE COURT: Thanks, Nancy.

THE COURT SECURITY OFFICER: Oh, you're welcome.

THE COURT: Do you have some exhibit stickers up there?

01:49

MR. RAZAI: They're already on there.

THE COURT: Okay. And I know that the chair doesn't move, but if you try to get a little closer to the microphone, it's going to make it easier for us all to hear you.

01:50

BY MR. RAZAI:

Q. Dr. Duboys, if I can direct your attention to Exhibit CCC.

A. **(Complies.) Okay.**

Q. Do you recognize that document, sir?

01:52

A. **I do.**

Q. What is that document, sir?

A. **This is an e-mail that I received from customer help at eBay.**

Q. And is this a document that was kept in your records, Dr. Duboys?

01:52

A. **Yes.**

Q. And so it's correspondence between you and eBay, sir?

A. **That's correct.**

Q. Now, going to the sixth page from the back in

01:53

Exhibit CCC.

A. **Okay.**

Q. Is that the same posting you see on the screen, sir?

A. **I don't think so. Is this the one that's marked page 1 of 2? You said the sixth page from the back?**

Q. Yes, sir.

MR. RAZAI: Permission to approach, Your Honor.

THE COURT: (Nodding affirmatively.) Since I don't have the exhibit yet, is that a composite exhibit or have you stapled together a series of exhibits?

Nancy, do you have the admitted -- the --

BY MR. RAZAI:

Q. Dr. Duboys, Exhibit CCC, is that a compilation of different correspondence between you and eBay, sir?

A. **It is.**

Q. And is that from one single string of correspondence, sir?

A. **It's from one thread of correspondence, yes.**

Q. Between you and eBay?

A. **Between me and --**

THE COURT: You want to mark that for identification and give me a copy so I can look at it too?

MR. RAZAI: Yes, Your Honor.

THE COURT: The defendant already has it, right?

MR. RAZAI: No, I think that is the evidence copy,

Your Honor.

THE COURT: Didn't we just make copies of it?

MR. RAZAI: Yes, we made one copy, Your Honor.

THE COURT SECURITY OFFICER: He asked for one copy.

01:54 **THE COURT**: Oh, you only have one copy. So you have one and he has one? I thought the point was to get the defendant a copy too.

MR. RAZAI: The defendant has a copy, Your Honor.

THE COURT: He does?

01:55 **MR. RAZAI**: Yeah.

THE COURT: So I'm the only one left out. All right.

MR. RAZAI: I can give you the copy after Dr. Duboys. I apologize, Your Honor. I sincerely apologize

01:55 for this. It was a huge mixup with the airplane. I tried as hard as I could to fix it. I got the rest of them. It was just these last four I couldn't.

A. **If I may continue answering. There's a compilation of e-mails that are from eBay, from Mr. Aguilar, from multiple**

01:55 **sources here.**

BY MR. RAZAI:

Q. So it's a compilation, then, Dr. Duboys?

A. **It is, yes.**

Q. But it's records that were kept in your files and you

01:55 produce to us; is that correct?

A. **That's correct.**
Q. And is this the exact way that you produced it to us, or has there been any alterations? You can examine the document.
01:55 A. **It appears to be an exact copy.**
Q. And Dr. Duboys, going to that page that I was directing you to, is that the same posting you see now on the screen?
A. **Yes, it is.**
MR. RAZAI: And, Your Honor, if I may, I can give
01:56 you that exhibit so you can see it. I don't have any questions on that further. Would you like see it?
THE COURT: We're talking about Exhibit CC --
MR. RAZAI: CCC. It's it right there, yes.
THE COURT: CCC. And it's that particular image on
01:56 the screen?
MR. RAZAI: Yes, Your Honor.
THE COURT: All right. I'm with you.
BY MR. RAZAI:
Q. So now I'm going to page 6 of Exhibit CCC. Do you see
01:56 that, sir, from the front?
A. **From the front. So you're counting front and back as two pages?**
Q. Yes, sir.
A. **That's where the problem is.**
01:56 **MR. AGUILA:** Your Honor, objection. I don't see

what the controversy is. I agree that I sell HydraDerm machines. I don't understand what the point of this is.

THE COURT: The relevance is?

MR. RAZAI: If Mr. Aguila is willing to stipulate that this machine was sold to Dr. Duboys, then I can -- I don't have much need for Exhibit CCC.

01:57

THE COURT: It's great to cut through things.

MR. AGUILA: I can stipulate that as far as we call, we sold a machine to Dr. Duboys. Whether this machine is that, that is a question.

01:57

THE COURT: Well, and you want to prove that the machine in the courtroom -- is it the hybrid machine that we're talking about now?

MR. RAZAI: Yes, Your Honor.

01:57

THE COURT: Is what Dr. Duboys purchased on eBay at the time that he's just been testifying about?

MR. RAZAI: Yes, Your Honor. I guess one thing we can visit if Mr. Aguila is willing to stipulate, that Raguila11 is Mr. Aguila, and he did, in fact, sell Dr. Duboys a machine on or around that time --

01:57

THE COURT: Then we can move on.

MR. RAZAI: -- we can move on to authenticate --

MR. AGUILA: Yes, I can stipulate that we sold a machine to Dr. Duboys on that time.

MR. RAZAI: And this is his posting? This is your

01:57

posting? Going back to --

MR. AGUILA: What posting?

MR. RAZAI: The eBay posting. This is your posting?

01:58 **MR. AGUILA**: What do you meant? That's an automatic eBay --

MR. RAZAI: Are you Raguila.

MR. AGUILA: I am Raguila11, yes.

MR. BABCOCK: And the machine was sold for 7650 to 01:58 Dr. Duboys?

MR. AGUILA: Yes.

THE COURT: Okay. So to be clear about the stipulation, let me just say it and let's see if we agree. The -- there are three machines in the courtroom. The one in 01:58 the middle has been referred to as the hybrid machine. And so the stipulation, am I right, Mr. Aguila, is that you sold that machine on --

MR. AGUILA: A machine. I don't know if it's that one.

01:58 **THE COURT**: You sold a machine that is like the hybrid machine?

MR. AGUILA: Well, our -- the HydraFacial and the HydraDerm have basically the same trade dress, so they do look the same. Our argument has always been that we were 01:58 first with that trade dress.

THE COURT: Okay. We don't need to go there right now.

MR. AGUILA: But I don't know if this specific machine has been altered or not. In fact --

01:58 **THE COURT**: Well, that's a different question. That's a different question whether it was altered. And this witness can testify whether once he received it he made any changes to it or not. The question is whether the machine in the courtroom is a machine that you sold via eBay to this

01:59 gentleman, Dr. Duboys, on around the date that is shown on the documents which are in Plaintiff's Exhibit CCC.

MR. AGUILA: Well, this --

THE COURT: Would you agree to that?

MR. AGUILA: No, because I don't -- I agree we sold

01:59 a machine and it looks like the HydraFacial. I agree with that. But I don't know if this specific machine is that machine that we sold to him. In fact, if I can just reiterate, when I turned on the machines during lunch, I noticed that the touch screen on the middle machine is not

01:59 our touch screen. It is an older version of the HydraFacial, as far as I can tell. So I don't know what alterations were done. If this is, in fact, maybe the body of our machine, but they have changed either the computer screen or some other parts.

02:00 **THE COURT**: All right. So then I'm going leave

this to Mr. Razai to handle as he wishes.

MR. RAZAI: Thank you, Your Honor.

BY MR. RAZAI:

Q. Dr. Duboys, so after purchasing the machine, were you shipped the machine?

A. **I was.**

Q. And can you point to the machine that you were shipped?

A. **It's the middle machine.**

Q. It's the machine that's in the middle of the three machines that you're --

A. **Correct. That you have been referring to as the hybrid machine.**

Q. And what did you do with that machine?

A. **I cleaned it up.**

Q. Did you turn it on?

A. **Eventually, yes, after I unpacked it.**

Q. Did you have any problems with the machine when you first received it?

A. **Yes, there were several problems that I had.**

Q. What problems did you have?

A. **Well, the computer -- I was very, very taken back by the fact that this did not appear to be a refurbished machine. I've purchased refurbished products in the past and they're usually spit-shined and polished. There are not major chips on the machine. If there was a scratch on the computer**

screen, it would have been repaired. It did not look like it had been refurbished at all. There was -- the cowling that covers the wheels in the back is cracked. And there were a couple of other issues that I had addressed at that particular time.

The instruction manual that I received was page -- included pages -- I believe it was 1 to 9. However, the table of contents went to -- upwards of pages 30 or what have you. And it was a poorly photocopied representation. Usually when you purchase something that's been refurbished, in my experience, it's always been an original copy of the owner's manual and not something that's been xeroxed in that respect. So I thought there were some issues at that particular time.

Q. Did you call to complain?

A. I did.

Q. And who did you speak to?

A. Mr. Wilcox again. He was the name that I had dealt with in the past and I had knowledge of. And there were other issues at the time which I failed to mention. I'm sorry.

That during my communications with the defendant, I had asked if all handpieces were included, and I was told that all handpieces were included. And when I received it, I had two handpieces and I did not have other handpieces. And once again, I brought this to the attention of Mr. Wilcox.

The serums were also to be included as well in the purchase, and there were no serums.

So when I discussed my concerns with Mr. Wilcox, and the fact that this did not appear to be a refurbished machine -- and there was dirt which I purposefully left inside the machine. And the machine is engraved and it says HydraFacial on there as well. Mr. Wilcox explained to me that the serums and the additional handpieces -- he asked me which handpieces, and I said the LED lights, would be coming under separate cover.

Q. And did they come in a separate cover?

A. **About ten days to two weeks later, yes.**

MR. RAZAI: Permission to approach, Your Honor?

THE COURT: Yes. You don't have to ask me.

MR. RAZAI: Thank you, Your Honor.

BY MR. RAZAI:

Q. Dr. Duboys, are these the handpieces that you received under separate cover from John Wilcox?

A. **Yes, they are.**

Q. Did they look like the handpieces you expected to receive?

A. **Not at all.**

Q. Why not?

A. **Well, the handpieces that the HydraFacial had had in the past, in fact, even on this particularly unit, there are**

multiple ports on the -- I guess facing the machine on the right side of the machine where the LED lights plug in to. It's controlled by the computer software. And these were standalone LED units that plug into a base. And these were not the LED handpieces that I had seen.

Q. Now, going back to when you first unpacked the machine, the machine itself without the handpieces, was there any reason for you to believe that it wasn't a HydraFacial?

A. **I was a little bit concerned. When I got the packaging, the machine was wrapped in bubble wrap on five sides of the machine. It was not wrapped on the base. And there must have been -- this is a pure guesstimate -- five, six, seven pounds of Styrofoam peanuts in there. And it took me the better part of two hours to unpack it and clean up the peanuts because I got this box that was four and a half feet tall, packed with peanuts. When I removed the machine, they went obviously all the place. And to me, this was not a professionally packed unit.**

Q. Now, when you received the handpieces, did that concern you about whether the machine was a HydraFacial or not?

A. **Absolutely.**

Q. When did you do then?

A. **I then tried to contact the defendant. I went to their website and I found that their website was down. I did have the telephone number someplace in my records. I tried**

calling that telephone number and I could not get through to that telephone number. Obviously, that put up a couple of red flags for me at that particular time. And then I did a search. And then I found the plaintiff's website and was subsequently put through to Mr. Cohen.

Q. If I can direct your attention to Exhibit triple D.

A. **You're asking a plastic surgeon about Exhibit triple D? Do I have triple D here?**

Q. Do you have triple D there?

A. **I do, yes.**

MR. RAZAI: If I can approach, Your Honor?

THE COURT: Yes.

A. **Is this triple D here?**

MR. AGUILA: Your Honor, the relevancy is lost on me. I don't understand what the purpose of all this is.

MR. RAZAI: I can tell you. The purpose of this is on December 5th, approximately at 10:00 a.m., Eastern time, the Court had a teleconference with Mr. Aguila appearing on the phone call. The TRO was in effect. Mr. Aguila was warned that he had noticed of the TRO and he was expected to abide by it. At December 5th at 6:48 p.m. Eastern time, there's an e-mail to Dr. Duboys from Mr. Aguila's organization again purporting to be Edge Systems LLC, signed Edge Systems LLC. So if I may, I'd like to probe that a little bit.

THE COURT: I understand the relevance. You can inquire about it.

BY MR. RAZAI:

Q. Dr. Duboys, I've handed you what has been marked as triple G. It's the letter that appears on the screen here. Is that accurate?

A. **Yes, it is.**

THE COURT: Is it Exhibit G or D?

MR. RAZAI: This is a different one. It's Exhibit triple G, Your Honor.

THE COURT: Okay. Got it.

MR. RAZAI: And I'll provide the Court with copies. As soon as I can jump out and make some photocopies, I'll bring back copies of triple G. And it's just this one page, Your Honor.

BY MR. RAZAI:

Q. Is this a true and correct copy of an e-mail that you received from Edge Systems mail support -- support at Edge-Systems.com?

A. **Yes.**

Q. And is it accurate that you received this e-mail on Friday, December 5th, 2014?

A. **Yes.**

Q. And is it accurate that you received this e-mail at 6:48 p.m., Eastern Standard Time?

A. **Or sometime thereafter.**
Q. Can you testify based on the address of this e-mail that it was sent at 6:48 p.m., Eastern Standard Time?
A. **It was sent at 6:48 p.m., yes.**
02:08 Q. And in the signature line, do you to see it signed as Ralph Anderson?
A. **Yes.**
Q. As sales manager, correct?
A. **Correct.**
02:09 Q. For what company, sir?
A. **For Edge Systems LLC.**
Q. Now, is this an e-mail that you received from the seller of the machine in the middle?
A. **Yes.**
02:09 Q. If I can direct your attention to Exhibit triple B, do you recognize this document, sir? It's the one you're holding. If you can just take a look at it and tell me what that is.
A. **Do I recognize this document?**
02:09 Q. Yes.
A. **Yes. I'm sorry. I do. This is correspondence that -- after I found out that this was not the plaintiff's device, I can't use a device that I don't really know what the origin is in my medical practice. And it basically stayed in my**
02:10 **waiting area for want of a better place to put this. And I**

did get in touch with American Express as well as eBay to go ahead and try to get my money back for the $7600 that I had paid for the device.

Q. And is this a document that's part of your records, Dr. Duboys?

A. **Yes, it is.**

Q. And is this correspondence between you and the seller through eBay?

A. **That's correct, yes.**

Q. And these are eBay postings, sir?

A. **These are not postings. This is -- they have a dispute resolution center, and this was through their dispute resolution center.**

Q. And this is -- the correspondence that you see on the screen and in your hand, is that correspondence between you and the seller of the machine in the middle, sir?

A. **Yes.**

Q. If I can ask you to go to the posting on December 10th and December 11th message that you had sent and had a response from the seller. Do you see that, sir?

A. **If -- in one moment.**

Q. Okay. Do you see the comment from December 11th where it says the seller has sent a message? It starts with Hello?

A. **Yes.**

Q. Can you read that sentence, please?

A. **Certainly. It says, Hello, we are Edge Systems.**
Q. Thank you. So as of December 11th -- is that December 11th, 2014, sir?
A. **Yes.**
02:11 Q. So as of December 11th, 2014, the party who sold you the machine in the middle was representing itself to be Edge Systems?
A. **That's correct.**
Q. Now, did you ever get your money back?
02:11 A. **No.**
Q. And talking about the machine now. So how did the machine come to be here in the courtroom today? Can you tell us the exact procedure that you followed?
A. **Sure. After I had spoken with Mr. Cohen --**
02:11 Q. If we can go back, I'd like to go all the way back to you unpacking the machine. And I think you said five or six pounds of peanuts.
A. **Right.**
Q. Tell me what happened to the machine until it arrived
02:12 here.
A. **Sure. Well, I unpacked the machine several days after it arrived in my office. Our office is typically closed on Friday and I was out of town. So it was probably about four or five days before I unpacked the machine. I unpacked the**
02:12 **machine with the help of my office staff. Everybody was kind**

of blown away by the way that it was packed -- or improperly packed. To the extent that I don't think it got damaged in the shipping, but there was just tons of peanuts and tons of bubble wrap just thrown in indiscriminately. There were hunks of Styrofoam within the packing itself. It just was not a -- to me a professional way to pack a unit as such.

02:12

So after I unpacked it, after we cleaned up everything, I did plug the unit in. I did let it boot up to see what was on the screen. And then it basically stayed in my waiting area for a number of days until such time -- I did clean up the machine because there was some damages. There were scuff marks on the wheels. I did clean it up. I did not use any abrasives. I did not change any of the outward appearance to it other than remove some of the dust, some of the -- there were tremendous finger marks on the computer screen as well. I did, on the back of the unit, tape the instructions so it wouldn't get lost. And that was really about it.

02:13

02:13

And then it remained in my office probably for a week to ten days, perhaps. And then I got a -- I was in touch with Mr. Cohen from the plaintiff, and they asked me if I would ship the unit down. Shipped the unit. I don't know where -- I don't think any discussion was made as to where at that particular time. And they said they were going to be sending a box up for the unit. And I personally packed the

02:13

02:14

unit, the handpieces myself. Taped everything and sealed the box myself.

Q. Where did you ship the unit to, to what city?

A. **I believe it went to California. FedEx came and picked it up. I don't know really where it went.**

Q. So you don't know where the machine went?

A. **I don't know where the machine went initially at that point.**

MR. RAZAI: We can provide declaration from Mr. Guerra's firm that the machine actually was shipped to Miami, Florida. And it's been sitting in -- at the office of Feldman Gale since Dr. Duboys shipped it. And we'll submit that declaration, Your Honor, after the hearing, probably on Monday.

THE COURT: All right.

MR. RAZAI: I also moved to enter Exhibits triple A, triple B and triple G into evidence. And like I said, I'll provide copies shortly of those three so we can have identified copies.

THE COURT: What about C? You're not moving in C?

MR. RAZAI: I thought we had a stipulation to what the contents of C where, so I don't know whether there's a need to actually get that into evidence.

THE COURT: I wasn't sure that that stipulation fully met -- wasn't clear to me. So it's A, B, and G.

MR. RAZAI: Triple A, triple B, and triple G. And let's go ahead and -- I also move to -- I'd like to get Exhibit triple C into evidence too just in case, as well as Exhibit triple E in that case, just in case the stipulation isn't --

THE COURT: All right. So are there any objections to triple A, B, C, and G?

MR. AGUILA: Well, what -- which one is this one?

MR. RAZAI: I believe that's triple C. That's triple B.

THE COURT: Do you have the exhibits, Nancy?

So I have not B. What about A, C, and G?

MR. RAZAI: So here is triple A, Your Honor.

THE COURT: Okay.

So Mr. Aguila, do you have an objection to any of these?

MR. AGUILA: Well, the eBay one.

THE COURT: Are you talking about triple B?

MR. AGUILA: The triple B. I would -- since this is not his document, this is on an eBay resolution site, I'm not sure this can be admitted or if it's hearsay since it's not his. He doesn't have it. It's on eBay's site.

THE COURT: All right. Well, there's two things: there's authenticating the exhibit and then there's the hearsay question, right? So am I right that the witness

testified that he received this communication?

MR. RAZAI: He was actually part of the communication, Your Honor.

THE COURT: Right. Right. And this is what he -- that he -- so I think he's authenticated the document. Regarding hearsay, are you introducing it for the truth of the matter asserted or for the fact that it was said?

MR. RAZAI: For the fact that it was said.

THE COURT: So you're not seeking -- so that would take it not hearsay.

MR. RAZAI: That's right, Your Honor. We're not seeking that they truly are Edge Systems. We're just introducing for the fact that they said, We are Edge Systems.

THE COURT: Right. Okay. So triple B is admitted.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

THE COURT: Triple A, is there any objection to that? That's from -- Mr. Aguila -- I'm sorry -- I think from your company.

MR. AGUILA: Which one?

THE COURT: Triple A is communications between Edge Systems, your company, and Dr. Duboys.

MR. AGUILA: Well, I have objections in that this e-mail -- I mean I have no way of knowing from our side. I

haven't taken a look at what e-mails we sent.

THE COURT: Well, I mean do you dispute that the e-mail address shown here for Edge Systems, like support at Edge-Systems.com is your company?

02:18 **MR. AGUILA**: That is my company, yes.

THE COURT: Okay. And I'm just checking, but I think then there's -- right. On your end, it's all support at Edge-Systems.com. So you do not dispute that that would be from your company.

02:18 **MR. AGUILA**: We do not dispute that.

THE COURT: So those could be admitted as admissions against interests. They're your -- your communications, so it's not hearsay.

MR. AGUILA: Right.

02:18 **THE COURT**: There's no hearsay issue. And we had testimony by the witness that this was his communications with you. So it's authenticated. Some triple A is in evidence.

(Thereupon, the aforementioned exhibit was admitted

02:18 into evidence.)

THE COURT: Now, what about C and G? I can give you back these two if you'd like to hold on to them for now.

MR. RAZAI: Again, I sincerely apologize.

THE COURT: Let's just work our way through it.

02:19 I'm hearing that the next one they're moving in is C and G.

C was potentially -- almost stipulated to, maybe. I don't know that there's -- I'm not clear whether there is a dispute on that.

THE COURT SECURITY OFFICER: Okay. Thank you.

02:19 **MR. RAZAI**: We were entering this, Your Honor, to show that Dr. Duboys actually did purchase a machine from Raguila11 and Mr. Aguila is Ralph Aguila, or Raguila11 is the defendant.

MR. AGUILA: That's not in dispute. I agree with

02:19 that.

THE COURT: Right. So there's no dispute for Exhibit triple C.

MR. AGUILA: Yes, that he purchased an item.

THE COURT: Well -- but I'm asking you about

02:19 admitting this -- I understand you're not --

MR. AGUILA: Well, this specific machine that's here --

THE COURT: Do you dispute the admission of Plaintiff's Exhibit triple C? I need a straight answer on

02:19 that. I'm not saying you're trying to be evasive, but I need that question to be answered.

MR. AGUILA: No, I agree. I agree to the stipulation.

THE COURT: You agree to it being admitted?

02:20 **MR. AGUILA**: Yes.

THE COURT: So triple C is in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

THE COURT: And then we have triple G.

02:20 **MR. AGUILA**: I don't have triple G.

MR. RAZAI: Let me give you triple E first. It's stipulated that it's a -- the document that had the Chevron logo and correspondence from the defendant.

THE COURT: Okay. So triple E. And does the

02:20 defendant have a copy of that?

MR. AGUILA: I have triple E but not triple G.

THE COURT: So look at E right now. Plaintiff, you're moving in triple E; am I right?

MR. RAZAI: Yes, Your Honor.

02:20 **THE COURT**: Okay. Take a look at that, Mr. Aguila, and tell me if you have any objection to its admission.

MR. AGUILA: Yeah, this can be admitted. Yes.

THE COURT: There's no objection to triple E, so it's in evidence.

02:21 (Thereupon, the aforementioned exhibit was admitted into evidence.)

THE COURT: Last is triple G.

MR. RAZAI: Your Honor, triple G's on the screen. I gave the only copy that I had to Mr. Aguila for now. I'll

02:21 bring it to you once he's done examining it, Your Honor.

THE COURT: Okay.

MR. RAZAI: The next witness will be much smoother. I promise. Here is Exhibit triple G, Your Honor.

THE COURT: All right. So is there any objection from Mr. Aguila?

02:21

MR. AGUILA: No objection, Your Honor.

THE COURT: All right. Then I'm going to give it right back to you if you want to work with it, Mr. Razai.

So triple G is in evidence there being no objection.

02:21

(Thereupon, the aforementioned exhibit was admitted into evidence.)

THE COURT: Okay.

MR. RAZAI: Your Honor, I give the witness to defendant for cross.

02:21

THE COURT: All right. Mr. Aguila, you can go ahead and cross-examine.

MR. AGUILA: Thank you, Your Honor.

02:21

CROSS-EXAMINATION

BY MR. AGUILA:

Q. Hello, Mr. Duboys. So you are a plastic surgeon, correct?

A. **I am.**

02:22

Q. That means that you have an MD and an FACS, or how is --

facial plastic surgeon?
A. **I'm not a facial plastic surgeon. I'm a plastic surgeon.**
Q. Okay. What is your normal medical degree on?
A. **I don't understand the question.**
02:22 Q. So, I mean, any doctor can be a facial surgeon?
A. **No.**
Q. Okay. But basically, your time is very valuable, correct?
A. **It is.**
02:22 Q. Do you -- when did you come to Miami?
A. **I came to Miami yesterday evening. I arrived somewhere as about half 8 at the airport.**
Q. And you're leaving today?
A. **I'm leaving today.**
02:22 Q. So how much time do you think you've invested in coming here?
A. **Well, if I arrived at half past 8 last night and I'm leaving around 8:00 o'clock today, sounds like 24 hours or what have you.**
02:23 Q. And you spent apparently quite a long time communicating with Plaintiffs; is that correct?
A. **I don't understand -- I don't know what you mean by long time.**
Q. How much time have you invested speaking with the
02:23 plaintiffs?

A. **We've had a couple of telephone calls. I've had a couple of telephone calls with your office as well.**
Q. Can you describe the nature of the telephone calls with the plaintiffs?
02:23 A. **Well, when these handpieces were received and I could not get in touch through your website because it was down, or through your telephone number, I then did a search, I think as I previously testified to, that I had to find out what was happening because these handpieces did not appear to be the**
02:23 **same handpieces. And when I couldn't get through to your organization, I then did a search for the HydraFacial. I found the plaintiff's website, and that's how I got through to them.**
Q. And your testimony is that you believed that you were
02:24 purchasing a HydraFacial on eBay; is that right?
A. **Absolutely.**
Q. And the term HydraDerm that was clearly marked on the machine, did you read that on the machine or did you not see that?
02:24 A. **I saw HydraDerm on the machine, correct.**
Q. Yet you still thought you were purchasing a HydraFacial?
A. **Especially after I contacted your office, because I questioned the fact that it had HydraDerm. And I was told by Mr. Wilcox of your office that the HydraDerm was a**
02:24 **medical-grade machine, the newest version that is being sold**

in Europe. You might have used the term abroad rather than Europe.

Q. Mr. Duboys, do you get paid by the hour?

A. **I get paid -- you have to be a little bit more specific.**

02:25 Q. How do you earn your money?

A. **Depends. How --**

Q. It depends. Tell me. How do you make money?

A. **How do I make money? When I'm operating, I bill by the case. When I work in my med spa organization, I get paid by the patient. I don't get paid on an hourly basis.**

Q. And you are president or in some kind of ownership capacity with a group of med spas; is that correct?

A. **I am.**

Q. How many med spas total?

02:25 A. **We have two brick-and-mortar med spas. And I don't know exactly. Anywheres between eight and ten salons that have spas affiliated with them.**

Q. So franchises?

A. **They're not franchises. They're company-owned stores.**

02:25 Q. So you would say you have about 10 to 12 type -- or companies that -- you know, 10 to 12 spas that you have some ownership capacity in?

A. **I have ownership capacity in two. I'm involved with the remainders.**

02:26 Q. What do you mean involved?

A. **I'm the medical director. So in other words, if there are any questions, I don't get paid by them. It's just part of my titular head as being medical director of the Cactus MedSpa organization.**

02:26 Q. Okay. That's good. Mr. Duboys do you remember speaking about wanting to purchase 30 machines thereabout, 30 machines -- 30 HydraDerm abrasion machines?

A. **Not directly. I mentioned that I do have association with 30 hair salons.**

02:26 Q. Okay. And each salon would need a hydradermabrasion machine?

A. **No, not necessarily.**

Q. That's your testimony?

A. **That's my testimony.**

02:26 Q. Do any of these 30 -- first you mentioned 12. What were these 30? They're different?

A. **We have 30 hair salons.**

Q. That are separate from the spas?

A. **Let me try to see if I can simplify things a little bit here. Okay?**

02:27 Q. Please do.

A. **The titular head is called -- of the organization is called Cactus Salons. Now within a number of --**

Q. Can you spell that, please?

02:27 A. **Cactus. C-A-C-T-U-S.**

Q. Go ahead.

A. **The owner of Cactus, a gentleman by the name of Joe Secreti approached me, oh, better part of a year and a half ago to see if I would be interested in investing in the organization and becoming medical director of the brick-and-mortar salons -- brick-and-mortar spas. Here is where it gets a little bit confusing. Within a number of his salons in the back room, he does offer facial services, skin care services, if you may. And that total number is approximately 30 hair salons that he owns. And probably at the present time about 10, somewheres in that area -- I don't know the exact number -- that have actually spas, not med spas but spas associated with the salon. And that's where we're at. So we have 30 hair salons. We have 10 salons that have spas attached to them.**

Q. These are the med spas that you're talking about?

A. **No, just regular spas.**

Q. So 30 salons, ten extra hybrid --

A. **Not extra. Not at all.**

Q. They're part of the 30?

A. **They're part of the 30, yes. Within that ten, correct.**

Q. So basically you have many spas or salons or whatever you want to call them that you're associated with?

A. **That's correct.**

Q. Do you expect to purchase HydraFacials from the

plaintiffs in the future?
A. **Only if I make money with them.**
Q. What does that mean?
A. **Well, if -- I'm not going to invest in something that I don't have a return on my investment on. So if it's something that is working for me and that we're making money from and I can sell the procedure and the procedure seems to be working and it's liked by the community, yes, I might consider purchasing additional units.**
02:29 Q. Did you speak with Edge Systems, the plaintiffs, regarding any compensation?
A. **We have not spoken about any compensation at all.**
Q. Have you spoken about compensation after the hearing?
A. **There have been absolutely no discussions whatsoever about that.**
02:29 Q. Have you spoken about a reduction in price on HydraFacials being sold to your associated companies?
A. **Not at all, no.**
Q. What was that?
02:29 A. **No.**
Q. That's your testimony?
A. **It is.**
Q. Have you sent any e-mails with Plaintiffs? Have you been e-mailing back and forth?
02:30 A. **We've exchanged several e-mails.**

Q. Okay. Using what e-mail address? The one that you were showing there, the plastic surgeons -- is that -- is that e-mail, is that the one you use or a different one?

A. **Well, I use one of three e-mails.**

02:30 Q. What were they?

A. **Medprobe, M-E-D-P-R-O-B-E, at optonline.net. I use EDuboys@associatedplasticsurgeons. Those are my two main e-mails. I do have an Elliott.Duboys@Cactusmedspa.com e-mail as well. These are all my e-mails that I use.**

02:30 Q. Have any of your associates also spoken with Plaintiffs regarding this issue?

A. **Not to my knowledge.**

Q. You're the only person in your association that has dealt with the plaintiffs?

02:30 A. **That's correct. Well, to be truthful to you, prior to --**

Q. Please.

A. **I only know --**

Q. Please be truthful. Thank you.

A. **I only know how to be truthful.**

02:31 Q. Good.

A. **As I had mentioned to you, prior to that, we did have a representative from Edge Systems come in to demonstrate the unit prior to the summer. And at that time I don't know if it was I who made the initial request to have the**

02:31 **representative from -- or the plaintiff's representative come**

in and demonstrate the machine to me or if it was one of my people from the Cactus organization. But there was no -- to the best of my knowledge, nobody --

Q. What does that mean?

02:31 A. **To the best of my knowledge?**

Q. Yes.

A. **I'm under oath. I'm going say with 100 percent certainty unless somebody did something behind my back -- I can't speak to that. That would become hearsay, wouldn't it? And at**

02:32 **that particular point I don't know if anybody has made any inroads outside of my telephone calls to the plaintiff.**

Q. So you're not aware of anybody, any of your organizations, Cactus, the two brick-and-mortar spas, your practice, nobody in any capacity has spoken with the

02:32 plaintiffs that you are aware of?

A. **As I said, to the best of my knowledge. As I'm aware of.**

Q. What does that mean? Yes or no?

A. **As I am aware of.**

MR. BABCOCK: Objection. Badgering.

02:32 **THE COURT:** I -- it's -- his -- sustained. He can answer the question to the best of his knowledge. It's a legitimate way to answer a question.

MR. AGUILA: Okay. Thank you, Your Honor.

A. **To the best of my knowledge, nobody in my organization**

02:32 **has made...**

BY MR. AGUILA:

Q. Have you ever been involved with any lawsuits prior to this one?

A. **I did have a number of years ago one medical malpractice lawsuit.**

Q. Can you describe that for us?

MR. RAZAI: Objection. Relevance, Your Honor.

THE COURT: Yeah, what would be the relevance?

MR. AGUILA: The trustworthiness of the gentleman.

THE COURT: No. Sustained. I don't think that goes to trustworthiness. We're talking about capacity to tell the truth. I don't see a bearing on that.

BY MR. AGUILA:

Q. So you are part of an organization that has 40 to 50 different units, spas, salons, whatever you call them --

MR. RAZAI: Objection. Compound.

MR. AGUILA: I didn't finish.

THE COURT: Well, why don't you restate your question.

BY MR. AGUILA:

Q. So you participate in an organization or various organizations that amounts to 40 to 50 different companies, salons and spas.

Do you think that if the plaintiffs offered you a reduction in price in the future, that you would accept that?

A. **Your question, I believe, is incorrect. I don't know where the 40 or 50 came from. I don't think --**

Q. Well, 30 salons.

A. **Well, the difference between 30 and 40 and 50.**

02:34 Q. Okay. 30. Go ahead. Yes.

A. **So just rephrase the question. Repeat it for me, please.**

THE COURT: So what is your question?

BY MR. AGUILA:

Q. Would these 30 organizations, would they ever agree in the future to purchase HydraFacial machines from the plaintiffs at a reduced price?

A. **If somebody offered me a discount on a toothbrush if I purchased 30 of them --**

Q. Answer the question, please.

02:34 A. **I'm answering it.**

MR. RAZAI: Objection. Argumentative, Your Honor.

THE COURT: Right. Sustained. Let him answer the question. He can answer it as he was beginning to.

A. **If somebody offered me 30 or 40 toothbrushes and would**

02:34 **give me a discount if I purchased 30 or 40, of course, I would take. I don't think anybody in their right mind wouldn't take a discount.**

BY MR. AGUILA:

Q. So you would take a discount from the plaintiffs that you

02:35 flew -- you lost two days, Thursday and Friday, of your

practice to come here, you're willing to do that for free? Yes or no?

A. **I'm not sure I understand the same question.**

Q. You're saying that you came to Miami --

A. **Yes.**

Q. -- for free?

A. **Hoping to get back my $7600 that I paid for the machine. So did I come to Miami for free? The answer is yes. There has been no discussion, as I had previously testified to, of any sort of compensation or reimbursement or favors for my testimony.**

Q. Well, not just previous, but any favors in the future either, right?

A. **There's been no discussions about anything in the future.**

Q. And that's your testimony?

A. **Absolutely.**

Q. Have you had any telephone conversations -- how many telephone conversations have you had with the plaintiffs?

MR. RAZAI: Objection, Your Honor. Just for point of clarification, plaintiffs or attorneys?

THE COURT: All right. Well, his question right now is with the plaintiffs.

So you can ask that question.

A. **Probably perhaps three or four.**

BY MR. AGUILA:

Q. And how many telephone conversations have you had with the attorneys for the plaintiffs?
A. **Three or four, perhaps. I don't remember an exact number.**
02:36 Q. So you're expecting to get back your $7,000 -- or $7600. How much money do you think you've lost by coming to Miami and testifying here in these two days?
A. **More than that.**
Q. More than that?
02:36 A. **Yes.**
Q. So your testimony is that you came here with the goal of getting the $7600 that you paid for the HydraDerm, but you're admitting that you lost more than that amount in coming here?
A. **Yes.**
02:37 Q. Does that make sense to you?
A. **Absolutely.**
Q. How does it make sense?
A. **It's a principle issue. I happen to be an extremely principled individual. And despite the fact that I'm not**
02:37 **being compensated, I feel I'm doing a service both to myself and to future individuals by being here and offering testimony in this matter.**
Q. Have you ever done this before?
A. **On a principle basis?**
02:37 Q. In any base. Have you testified in a courtroom in any

capacity before?

A. **Many times.**

Q. Can you describe those?

A. **If you want to give me a particular instance, I'll be more than happy to.**

Q. Well, in the past two years, how many times have you testified in a courthouse.

MR. RAZAI: Objection. Relevance.

THE COURT: And what is the relevance?

MR. AGUILA: I'm trying to see if he has a business of testifying for various companies. I have no -- this, you know, like --

THE COURT: Well, he may well. But how would that bear on his testimony here today?

MR. AGUILA: I'm trying to see how he benefits other than the principle that he's talking about. If he's so principled, if that's also the reason that he's done all these other --

THE COURT: But whether the gentleman has been compensated for testimony, say, for example, as an expert witness or whether he has not simply because he's been subpoenaed, it doesn't really seem to matter. He's giving you -- he's testified here of the circumstances of his testimony today, and that seems to be what's important. So I think I'm going to sustain that objection.

MR. AGUILA: Okay.

BY MR. AGUILA;

Q. Let's see here. Well, I think it's clear that we did sell you a machine. How long did it take you to file a complaint?

A. **With whom?**

Q. With us.

A. **I notified you folks either the day that I unpacked the machine or the day after I unpacked the machine by telephone.**

Q. That you wanted a return?

A. **No. That the machine was not as -- not as I expected it to be. That the machine was not what I would have considered to be professionally refurbished. That the machine that I received was not the machine that was on the photograph on eBay. Once I had a chance to look at this machine, that the computer monitor was cracked. I believe I had testified to this previously.**

Q. Can you show us?

MR. AGUILA: Can I bring the machine?

BY MR. AGUILA:

Q. Can you show us where it's cracked?

A. **Sure.**

THE COURT: You can, but why would that be important?

MR. AGUILA: Well, I'm trying to see -- well, his

honesty. I didn't see it cracked.

THE COURT: Okay. I'm just concerned about our time. But if you consider it important, you can do that.

A. **May I leave the witness box, Your Honor?**

02:39 **THE COURT**: You can. What you'll need to do is keep your voice up or get that handheld microphone.

THE COURT SECURITY OFFICER: The battery may be dead.

THE COURT: But I'm sure you can project your

02:40 voice. Pretend -- act like a lawyer for a minute, right?

A. **Oh, I can project my voice.**

THE COURT: Horrible thing to say to a doctor. Why don't you turn that around so the others -- so the rest of us can see it the other way because you're going to point out on

02:40 the screen.

A. **I am.**

THE COURT: You're welcome to even put it back where it was if you want.

A. **Tell me where Your Honor can --**

02:40 **THE COURT**: I'm thinking if you're going to point out the screen -- go ahead. Roll it back where it was.

A. **I think I can show where it's cracked in this matter. I think if you look at the cowling down here (indicating), this is cracked. And it's quite obvious that that's cracked. The**

02:40 **wheel was not steady. I think something was done to the**

machine. It was moving. Now, whether or not it's just a function of the castor being placed within its receptacle. And the scratch on the screen -- may I approach, Your Honor, to show you?

02:41 **THE COURT:** Yeah.

A. **It really is a lighting issue. Depends upon how the light hits the screen.**

THE COURT: Right.

A. **But if you look at it -- I don't know if you can see the** 02:41 **scratch that goes from here to here (indicating).**

THE COURT: Yeah, I do. I don't know if Mr. Aguila needs to see that or not.

MR. AGUILA: Well, that's fine. I think I'm ending this line of questioning. I see what he's talking about.

02:41 **THE COURT:** Okay. Well, thank you, sir.

BY MR. AGUILA:

Q. But just to finish up --

THE COURT: Do you need him to be near the machine?

MR. AGUILA: No, no. He can go back to the witness 02:41 stand. Thank you.

THE COURT: Go back over there.

Give him a chance to get seated.

BY MR. AGUILA:

Q. Mr. Duboys, it took you how long to complain to eBay that 02:41 you wanted your money back?

A. **I believe I filed a complaint after I was unable -- I first filed a complaint with American Express.**
Q. Do you have a copy of that complaint?
A. **No. I never received anything from American Express here. I know that's still pending. Which was the credit card that I had paid through PayPal.**
Q. But eBay, how -- did it take you approximately three weeks, would you say?
A. **I think that wouldn't be an unfair statement.**
02:42 Q. So you received a machine that you did not like, and you waited three weeks to file a complaint with eBay?
A. **The answer is yes. And I received a notice --**
Q. Thank you. No, that's fine. You answered the question.
MR. BABCOCK: Objection.
02:42 **THE COURT:** I think he answered the question. You can redirect if you'd like.
MR. AGUILA: Thank you.
THE COURT: Let's try to wrap this up.
MR. AGUILA: Yes.
02:42 **BY MR. AGUILA:**
Q. Why did it take you so long to complain to eBay?
A. **Well, I first complained to American Express.**
Q. To eBay, please. Answer the question.
THE COURT: He's answering the question, I believe.
02:42 So go ahead.

A. **I first complained to American Express, and then I subsequently received a communication from eBay. And I was a little bit confused by the eBay listing, and that's Plaintiff's CCC. And I will read you the listing that I had received from eBay. And this is the first page of Plaintiff's CCC.**

Q. This is not really necessary, I don't think. I mean there's no doubt we sold you a machine.

THE COURT: I think he's explaining why it took him three weeks. Your question is why did it take three weeks for him to --

MR. AGUILA: Yeah. I don't see how --

THE COURT: -- complain to eBay. And so he's describing what he did leading up to, I believe.

Is that right?

A. **I am, Your Honor.**

THE COURT: Do you need him to go through that? I mean we have --

MR. AGUILA: No, I would prefer just to know why it took him so long than the lead up to.

THE COURT: Well, if you want that answer, then he'll give his answer, however long it is.

MR. AGUILA: Okay. Thank you.

A. **So I received a notice which came to my inbox on November 16th, 2014. And it basically says, We're writing to**

let you know that we've removed an item you recently won, a device from Edge Systems compatible with HydraFacial solutions. We wish you all the best on eBay and hope your future experiences are pleasant and successful. If you have questions, please click customer support at the top of most eBay pages. If you have already filed an eBay money-back guarantee for this item, the case has been decided in your favor and payment has been refunded.

So when I received that from eBay, I was a little bit concerned. And I read this. I figured, Well, maybe this is another way for me -- I didn't want to confuse the issue by applying to American Express, PayPal and eBay all at the same time. But when I received this e-mail and then I reviewed this particular e-mail, it said that the case was decided in my favor, that's when I filed a formal complaint with eBay.

BY MR. AGUILA:

Q. And that was three weeks?

A. That was about three weeks. It sounds reasonable. I don't know the exact dates. I can find it out for you if you'd like.

Q. No. It is three weeks.

A. Okay. Well, let me just verify that.

Q. And --

MR. RAZAI: Your Honor, if I can just object to

this line of questioning. I'm not exactly sure why the time it took Dr. Duboys to complain makes any difference.

THE COURT: Well, isn't it in the record too, the date of --

02:45 **MR. RAZAI**: Everything is in the record.

THE COURT: In terms of that timeframe. So I don't think there's really a dispute on that, so I would move on.

MR. AGUILA: And Your Honor, can I ask him about any disciplinary actions he's had as a doctor?

02:45 **MR. RAZAI**: I object to the relevance of that. If it goes to his truthfulness, that's fine. But if it has anything to do with anything besides truthfulness or moral turpitude --

THE COURT: That's just what I was thinking.

02:45 You can ask him if he has ever had any disciplinary action taken against him for his failure to be truthful.

BY MR. AGUILA:

Q. Yes. Have you had ever a disciplinary action against you regarding truthfulness?

02:45 A. **I've never been disciplined by any organization in my over 35 years of medical practice.**

Q. Okay.

MR. AGUILA: I think that's it, then. Thank you.

THE COURT: Any redirect, sir?

02:46 **MR. RAZAI**: No, Your Honor. We're done with

Dr. Duboys. Thank you.

THE COURT: Thank you, Dr. Duboys. You are free to leave.

A. **Thank you.**

02:46 **THE COURT**: All right. Plaintiff's next witness.

MR. RAZAI: Your Honor, we have no further questions for Dr. Duboys. Can he stay in the courtroom?

THE COURT: He certainly can.

MR. RAZAI: Thank you, Your Honor.

02:46 **THE COURT**: This is your last witness, right?

MR. RAZAI: Yes, Your Honor. It's out last witness. And, Your Honor, if there are certain lines of questioning that I'm entering into that you think is redundant or in any way you think is unnecessary to your

02:47 ruling, let me know and I'll move along because I know we are short on time. So I'm willing to skip stuff, go through stuff because Mr. Cohen is testifying to a pretty large amount of subjects since he is the president of the company.

THE COURT: Right. Right.

02:47 Thereupon,

WILLIAM COHEN,

having been duly sworn by the Clerk, testified as follows:

THE WITNESS: I do.

THE COURT SECURITY OFFICER: Please have a seat and

02:47 state your name for the record.

THE WITNESS: William Cohen, C-O-H-E-N, or I go by Bill.

DIRECT EXAMINATION

BY MR. RAZAI:

Q. Good afternoon, Mr. Cohen. Mr. Cohen, are you currently employed at Edge Systems?

A. **Yes.**

Q. And what's your title?

A. **President of the company.**

Q. And what are your duties as president?

A. **I run the company. Everything from just day-to-day operations, sales, marketing, strategic planning of the company, this type of thing, legal, everything.**

Q. When did you start with Edge?

A. **I was cofounder with Roger Ignon in 1997.**

Q. And has Edge Systems used the name Edge Systems since 1997?

A. **Yes.**

Q. Continuously?

A. **Yes.**

Q. Has Edge Systems gone by any other name?

A. **No.**

Q. Has Edge Systems always used a variation of the Chevron-E logo? Strike that.

Since 1999, has Edge Systems used the variation -- some variation of the Chevron-E logo that you see?

A. **Yes, we have. That's when we started.**

Q. Is there any point between 1999 to now that you discontinued the use of the Chevron-E logo?

A. **No.**

Q. How does Edge use its logo?

A. **We put it on everything; our business cards, letterhead, brochures, trade booths, our website, anything that you can think of related to the company and the name of the company.**

Q. Do you put it on products?

A. **And also on all of our products.**

Q. Like T-shirts and mugs?

A. **Yeah. Anything that we give away. T-shirts and mugs. But our products, our box labels, every little consumable all has our name on it. It has to. The FDA requires our name. And we put our logo with our name.**

Q. Is the logo on your building?

A. **Yes, it's on the side of the building.**

Q. Now, does Edge sell a product called the HydraFacial MD?

A. **Yes.**

Q. What were your sales of the HydraFacial MD over the past five years in the United States?

A. **Roughly 64 million.**

Q. And does that include the product and consumables?

A. **Correct.**
Q. Is that a significant portion of Edge's total U.S. sales?
A. **Yes, slightly over 60 percent.**
Q. About 60 percent you said?
02:49 A. **Right.**
Q. Okay. Has the HydraFacial MD garnered any recognition in the industry?
A. **Yeah. I mean most -- everyone that's in our business that's a B-to-B business, they understand the name, they**
02:49 **understand our company. They've seen some of the awards we've won. LNE, we've won best equipment for four years. Day Spa magazine, two years. You know, varies awards like that. Aesthetic Buyers Guide gave us an award as well.**
Q. You said you've won the LNE award?
02:50 A. **That's Le Nouveau magazine. That's like a trade magazine in our industry. We have won other awards as well, those are just the ones I remember.**
THE COURT: Did you say Lane Nuval?
A. **Le like L-E Nouveau. Le Nouveau, I think it's called.**
02:50 Q. LNE magazine, is that a pretty significant publication in your industry?
A. **It is. It's got a good circulation. Lot of people see it. Another one that you would probably know is a New Beauty magazine. We're about to get an award this December for best**
02:50 **in-office procedure. So that's a big coup for us, you know.**

Q. Is the award by Day Spa a pretty big deal as well?
A. **Yeah, the same as LNE.**
Q. And has HydraFacial MD been featured in any popular media outlets?
02:50 A. **We have. We've been on a lot of national television, like The Doctors. We have been seen on different news channels. We have been on the Tampa Bay news. Various news in our area. Actually, I have a list I can give -- if you need me to read it. I knew I'd forget those things.**
02:51 Q. Do you have some notes that can refresh your recollection as to the magazines that you --
A. **I do, yeah.**
THE COURT: And go slowly enough so our court reporter can understand what you're saying, because we're not
02:51 familiar with all these publications.
A. **Okay.**
THE COURT: You might both give her a list afterwards of these names.
A. **I'll give you this card. The Doctors show. People**
02:51 **magazine, you'd know. Allure. The Hollywood Reporter. Tampa Bay Times. New Beauty. Okay magazine. Great Day Houston. Great Day LA. KLBK news. Essence magazine. Harper's Bazaar. There's a ton. Star magazine.**
And then there's a lot of different stars who --
02:51 **I'm a bit old to know who all of them are, but Amy Pohler I**

know. Brittney Snow I know through my daughter. Kate Winslet. Beyonce. They've all mentioned our product. Maria Menounos. You know the gal on E News. So those are some of the stars that are shown on the news that see it.

So you can have that, if --

BY MR. RAZAI:

Q. How does -- what channels does Edge sell through?

A. **Channels meaning our sales representatives?**

Q. Yeah. Do you have a sales force?

02:52 A. **We have about 60 sales representatives in the United States.**

Q. And how many states do they cover?

A. **All 50.**

Q. And do they sell the HydraFacial MD as well as other

02:52 products?

A. **Yes, but that's the lead product.**

Q. So all 60 are involved with sales of the HydraFacial MD?

A. **That's correct.**

Q. Okay. How much does Edge spend on advertising, sales,

02:52 and marketing, let's say for 2014, for instance?

A. **Last year it was about 8 million.**

Q. And how much of that was advertising alone?

A. **About 1.4 million. And that's in trade magazines, not in consumer. Our business trade.**

02:52 Q. Does Edge operate a website?

A. **We do, yes.**
Q. And how long has Edge had a website?
A. **Since 1999. It's been continuing since 1999.**
Q. And has it always gone by the same domain name?
02:53 A. **No. It's started with various names. And it's just changed a little bit, you know, over the time -- over time.**
Q. But has Edge since 1999 always had a website?
A. **Yes. And it's always had Edge in it. And it's currently called EdgeforLife.com.**
02:53 Q. Does the website feature the HydraFacial MD product?
A. **It does. And then there's a consumer side that has HydraFacial.com.**
Q. And what information about the HydraFacial MD is present on Edge's website?
02:53 A. **Everything that a buyer or a consumer would want to know. Everything from how to do the procedures, the protocols, what are the solutions, what's in the solutions, before and after photos. There's a provider site so if a physician or somebody buys the machine, they're listed on the provider side. So if you wanted to get a procedure, you can click your zip code in and find a provider in the area.**
Q. Does Edge currently sell products in Florida?
A. **We do.**
Q. And how long has Edge been selling products in Florida?
02:54 A. **Well, we started in 2000 in Florida. And then we started**

selling HydraFacial in 2005 in Florida.

Q. In Florida?

A. **Uh-huh. (Nodding affirmatively.)**

Q. Okay. What types of customers does Edge sell the HydraFacial MD to?

A. **Either physicians' offices or spas -- resorts and spas. So primarily plastic surgeons and dermatologists, and then also high-end resorts or day spas or med spas.**

Q. And how many locations across the country feature the HydraFacial MD?

A. **It's about 24- to 2500.**

Q. And about how many states?

A. **All 50.**

Q. Are you familiar with a company called Lumenis?

A. **Yes.**

Q. And who is Lumenis?

A. **Lumenis is in our industry. They're I wouldn't say a competitor, although we compete a little bit. They make light-based systems, like lasers, for aesthetic procedures.**

Q. Does Edge have a friendly relationship with Lumenis?

A. **Yeah. I mean I know the people. Yeah.**

Q. I'd like to hand you Exhibit C.

MR. RAZAI: Do you mind if I get different stickers?

THE COURT: Sir, would you tell us how to spell

Lumenis?

A. **L-U-M-E-N-I-S.**

BY MR. RAZAI:

Q. Mr. Cohen, have you seen this document before?

02:56 A. **Yes.**

Q. What is it?

A. **It's the triple W hydradermabrasion.com website with the Lumenis banner on top.**

Q. And is it true that you first saw this in October of

02:56 2014?

A. **Yes.**

Q. And do you see what the website is?

A. **Well, it shows our machinery under the name of hydradermabrasion.**

02:57 Q. Do you know what the domain name of the address is?

A. **Triple W.hydradermabrasion.com.**

Q. Do you know if you asked anyone to contact Lumenis about this issue?

A. **Yes, I did. This was given to me by our sales force, and**

02:57 **then the chain of -- what I did was I knew some the people at Lumenis. I told the salesmen -- he also knew them -- to call them. And then I gave this to our attorney Brent.**

Q. You don't have to tell us about what you told the attorney because that's privilege information.

02:57 A. **Right. And then long story short, we thought Lumenis was**

making our device and violating our patent, which I was very surprised to see. And then they assured us they weren't. And then I was told later on that they -- Lumenis had sent Mr. Aguila a cease and desist letter to tell them to take their name off the banner.

Q. So this screen shot you see, was this from www --

MR. AGUILA: Hearsay, Your Honor, that he said that Lumenis told him. I mean, where is the evidence on this?

THE COURT: Okay. Well, I think what you're making is a hearsay objection.

MR. AGUILA: Yes. Hearsay.

THE COURT: Sir, are you introducing that for the fact that it was said?

MR. RAZAI: Your Honor, I'm introducing that for the fact that Lumenis said that they had nothing to do with it or what --

THE COURT: For the truth of the matter asserted.

MR. RAZAI: -- whether they had something to do with it or not, it doesn't matter. So it's not really truth of the matter assert -- and also, if there is hearsay that will be introduced, I believe it's within the Court's purview to consider hearsay testimony even at the PI hearing. It's just the weight or the credibility given will be up to Your Honor.

THE COURT: You can give me some authority after

today on that, and I'll look at the record. But at any rate, here is an out-of-court statement that is admitted for the truth of the matter asserted as hearsay. If it's admitted for the fact that it was said, that's a distinction. And so
02:59 I certainly will admit that testimony about what Lumenis said or the fact that it was said and overrule your objection on hearsay. Because the plaintiff is not seeking to introduce it as hearsay at this point. I just want to be clear, though.

02:59 Were you informed that this website hydradermabrasion -- were you informed by Lumenis representatives that that was not their website?

A. **Yes. I was told by them that they were not making my machine. That was my first concern. So when I contacted --**
02:59 **I had my rep contact them and then I spoke to Mark -- I can't remember his last name -- but he's a sales manager. And he said, No, we're not selling or making your machine.**

THE COURT: And denied, disavowed having created this website with the Lumenis name?

03:00 A. **Right. And he said as far as he knew, it was not his -- their website and that he would then give it to Lumenis -- they have in-house counsel.**

THE COURT: Okay. I understand.

MR. RAZAI: And, Your Honor, also, there is an
03:00 issue (inaud.) that Lumenis had sent. I had followed up with

Lumenis to get a copy of that. I haven't yet heard back. And once I do, I'll submit that as the declaration as well. It's not relevant to what we're discussing. I just wanted to clarify that.

03:00 **THE COURT**: I'm not sure it's even necessary to your motion.

MR. RAZAI: No. It's just an issue that Mr. Aguila had raised in his opposition. So I just wanted to address it.

03:00 **THE COURT**: Well, okay. I mean submit it if it goes to your -- it's necessary. But if it's not --

MR. RAZAI: Then I won't.

THE COURT: -- then don't.

MR. RAZAI: Absolutely. Thank you, Your Honor.

03:00 **BY MR. RAZAI:**

Q. Mr. Cohen, did you have the website hydradermabrasion.com researched?

A. **I did.**

Q. And who did you find out that it was owned by?

03:00 A. **Mr. Aguila.**

Q. Is Mr. Aguila affiliated with Lumenis, to your knowledge?

A. **No.**

Q. Did Edge send him a cease and desist letter?

A. **We did. Edge then sent him a cease and desist based on**

03:01 **violating our patents.**

Q. So is it true that on October 27th, 2014, you personally sent Mr. Aguila a cease and desist letter?
A. **That's correct.**
Q. And I'd like to hand you what's being marked as Exhibit D.
03:01
Mr. Cohen is this a true and correct copy of the cease and desist letter that you signed on October 27th, 2014?
A. **Yes, it is. And just to clarify. It says second notice. We sent it -- there were two addresses. We couldn't tell which one was which so we sent it to both addresses.**
03:02
Q. And it was addressed to Mr. Ralph Aguila?
A. **Correct.**
Q. Did you receive a response to this letter?
03:02
A. **No.**
Q. Do you know if your attorneys received a response from Mr. Aguila?
A. **I can't remember if it was directly after this one, but I know they responded, yes, to our law firm. And I believe it was right after this letter.**
03:02
Q. Let me hand you Exhibits E and F.
A. **Can I clarify that? He did send one to Ted Papagiannis. He was cc'd here. That's what it was. Is that what you're handing me? Yeah.**
Q. Do you recognize Exhibit E?
03:03

A. **Yes. This is the letter.**
Q. And what is this letter?
A. **This is Mr. Aguila's response to the cease and desist letter, and it's dated November 7th, 2014.**
03:03 Q. And who is it addressed to?
A. **To our attorney, Mr. Papagiannis.**
Q. At which law firm?
A. **Knobbe Martens and Olson.**
Q. Before today, had you seen this letter?
03:03 A. **Yes.**
Q. And in this letter, what does Mr. Aguila respond?
A. **He brings up an issue in 2006 with Marshae -- an employee of ours. And for whatever reason -- I still don't know the reason -- Mr. Aguila bought product from us in 2006. And**
03:04 **this woman that was an employee of ours ended up having credit card fraud, I guess you would call it. She was using other people's credit cards to buy things. We ended up dismissing her. We didn't know about that. We dismissed her for other reasons. She went to work for Long Beach --**
03:04 **University of Long Beach, Cal State Long Beach, the university local to us. And that is where she did it again. And the local police ended up arrested her and ending the situation. So that's when that ended.**
And then also he mentions in here that he believes
03:04 **there were other problems, which I had never heard anything**

after that. And he says it hadn't stopped, which it has. I mean, I don't -- I'd never seen anything given to me or any proof that Marshae or anybody from my company was continuing to use his credit card.

03:05 Q. Did Edge Systems have any involvement in the use of Mr. Aguila's credit card in 2006?

A. **No. That was done by this woman, and it was done at her home. And the local police handled it all with the university.**

03:05 Q. So November 7th, 2014, that seems to be about eleven days after you sent your cease and desist letter, right?

A. **Correct.**

Q. And does Mr. Aguila in any way respond to your allegations in this cease and desist letter, in Exhibit E?

03:05 A. **No. No.**

Q. I'm going to hand you what's been marked as Exhibit F.

Do you recognize Exhibit F?

A. **Yes.**

Q. And what is Exhibit F?

03:05 A. **It's another letter dated November 11th to Mr. Papagiannis, our attorney, mentioning something about a fraudulent click campaign that we were promoting. Which I'm under oath and can tell you that never happened. I can tell you all of us were in shock about that web page and several**

03:06 **of us looked at it. And I can also tell you that 200 clicks**

is not -- is probably due to customers more so than anybody at my company.

Q. So going back to the 200 clicks, can you tell us what the allegation about the 200 clicks is?

03:06 A. **That we fraudulently clicked on his website. And that at $5 a click, which is way more than anybody in the world charges, we would have cost him a thousand dollars. Which isn't true.**

Q. And the letter dated November --

03:06 **MR. AGUILA:** Objection, Your Honor. The witness is posing a fact that he doesn't know. He's talking about something that he doesn't know.

A. **Well, I'm saying --**

THE COURT: Excuse me. Hold on. Hold on. I'll

03:06 overrule that.

BY MR. RAZAI:

Q. Mr. Cohen, in the letter dated November 11th, 2014, again this letter is about two weeks after your cease and desist letter?

03:07 A. **Uh-huh. (Nodding affirmatively.)**

Q. Does Mr. Aguila in any way address the allegations in your October 27th cease and desist letter in this --

A. **No, he doesn't say anything about it.**

MR. RAZAI: Your Honor, I'd like move Exhibits C,

03:07 D, E, and F into evidence.

THE COURT: All right. Are there any objections?

MR. AGUILA: No objections.

THE COURT: All right. Plaintiff's Exhibits C, D, E, and F are in evidence.

03:07 (Thereupon, the aforementioned exhibits were admitted into evidence.)

MR. RAZAI: Thank you, Your Honor.

BY MR. RAZAI:

Q. Do you know if in response to your cease and desist

03:07 letter if Mr. Aguila removed the product that you were complaining about from the website www.hydradermabrasion.com?

A. **No. You have it there.**

Q. Did he remove the hydradermabrasion -- strike that.

Which machine were you complaining of in the cease

03:08 and desist letter from October 27th?

A. **That he was showing our HydraFacial -- our hydradermabrasion machine called HydraFacial.**

Q. So was it the machine that he was advertising as the Hydradermabrasion MD?

03:08 A. **Yes. That's essentially a picture of our machine and he put his name on it.**

Q. Do you know if he removed that product -- did he remove that product from the website?

A. **No.**

03:08 Q. I'm going to hand you what's being marked as Exhibit VV.

V as in Victor.

Do you recognize this document, sir?

A. **Yes.**

Q. And what is it?

03:09 A. **It's copies of photoshops of the web page of triple W hydraderm --**

Q. Do you mean -- so are those screen shots of the website?

A. **Screen shots, yes.**

Q. Of the website, www?

03:09 A. **Correct.**

Q. One second, Mr. Cohen. So are those -- is Exhibit VV screen shots of www.hydradermabrasion.com?

A. **That's correct.**

Q. Is there a date for the screen shots on Exhibit VV?

03:09 A. **November 12th, 2014.**

Q. And on page 1 of Exhibit VV does it read, Welcome to Edge Systems new website?

A. **Correct.**

Q. Is this your website?

03:09 A. **No.**

Q. And by you, I mean is this Edge System LLC's website?

A. **No.**

Q. Did Edge Systems LLC authorize Mr. Aguila to create a website called Edge Systems?

03:10 A. **No.**

Q. Do you know who this website belongs to?
A. **Mr. Aguila.**
Q. Mr. Cohen, did Edge Systems hire a private investigator in this matter?
03:10 A. **Yes.**
Q. I'm going hand you what's being marked as Exhibit T.
Do you recognize Exhibit T?
A. **Yes. This is the report by the Maconachy Group, the PI -- our private detective.**
03:11 Q. Can I ask you to turn to page 26 of Exhibit T?
A. **Yes.**
Q. Do you see the application on page 26?
A. **I do, yes.**
Q. And what is the application for?
03:11 A. **For a fictitious name of Edge Systems.**
Q. And on page 27 is there also a fictitious business name for that?
A. **Yes. Application for registration of fictitious name.**
Q. Are page 26 and 27 accurately represented on the screen?
03:11 A. **Yes.**
Q. Is this a fictitious business name application with the Department -- for the Florida Department of State, Division of Corporations?
A. **That's correct.**
03:11 Q. And who is the name -- who is the owner of the fictitious

name?
A. **Rafael Newton Aguila.**
Q. When was the application filed?
A. **October 29th, 2014.**
03:12 Q. And that's two days after your cease and desist letter?
A. **That's correct.**
Q. Please turn to page 40 of Exhibit T. Do you see page 40?
A. **Yes.**
Q. And what's on page 40?
03:12 A. **It's a trade -- let's see. It's -- I can't read it. It's a trademark application to the United States Patent and Trademark Office.**
Q. Who is the applicant?
A. **Ralph Newton Aguila.**
03:12 Q. And what's the date of filing of this application?
A. **November 1st, 2014.**
Q. And it's got a -- it's a little obscure to see. But on the second line where it says goods and services, at the very end it says use and commerce. Do you see that?
03:12 A. **Yes.**
Q. And what date does it say was the first use in commerce?
A. **1996.**
Q. When was Edge founded?
A. **1997.**
03:13 Q. So the trademark application is alleging use one year

before Edge's founding, correct?
A. **Correct. But filed in November 1st, 2014.**
Q. I'm going to hand you what's been marked as Exhibit UU.
Have you seen this document before?
03:13 A. **Yes.**
Q. Is this -- are these screen shots from the website www.Edge-Systems.com?
A. **That's correct, yes.**
Q. And you've had a chance to review this document, right, sir?
A. **Yes.**
Q. Is it identical to the screen shots from the website www.hydradermabrasion.com?
A. **Yes.**
03:14 Q. And have you had the website www.Edge-Systems.com researched?
A. **Yes.**
Q. Do you know who it's owned by?
A. **Ralph Aguila.**
03:14 Q. Looking at page 1 of VV --
MR. RAZAI: And, Your Honor, since the two -- there's testimony that they're identical, I'm just going to refer to Exhibit VV, which is the hydradermabrasion.com website screen shots.
03:14 **THE COURT:** VV as in?

MR. RAZAI: Victor Victor, Your Honor.

BY MR. RAZAI:

Q. So looking at Exhibit VV, on the top left corner do you see a Chevron logo?

03:14 A. **Yes.**

Q. And is that Chevron logo accurately depicted on the screen?

A. **Yes, on the right.**

Q. And is that similar to Edge's Chevron logo?

03:14 A. **Very similar, yes.**

Q. Looking at page 1 of Exhibit VV, do you recognize the medical-grade HydraDerm that was advertised on that website?

A. **Yes. It's our photo with his name on it. It's our device.**

03:15 Q. And is that photo to similar to Edge's HydraFacial MD machine?

A. **Yes, if not exact, except for the name.**

Q. Looking at the slides, do you recognize the machine on the left?

03:15 A. **Yes, that's our HydraFacial MD system.**

Q. And the machine on the right, is that from Exhibit VV?

A. **Yes, from the website.**

Q. Are those pictures similar?

A. **They're the same. I mean, if you look at -- to me, if**

03:15 **you look at the tubing set and the couplings in the tubing**

set and the exact orientation of the tubing, and then on the right is the LED lights. And it's the exact orientation of the hanging cords that are on our system. The orientation of the machine, the wheels, everything is exactly the same, except for the screen which was, to me, photoshopped, and I think to everybody in the room.

Q. So do you think this -- the picture of the defendant's advertised product on Exhibit VV is just a photoshopped version of the picture from your website?

A. **That's correct.**

Q. And are you referring to the tangling of the tubes as being identical?

A. **Correct.**

Q. And you're referring to the location of the wheels being in the same exact orientation?

A. **That's correct.**

Q. And you're referring to the LED light wires being tangled in the same exact manner?

A. **That's correct.**

Q. And you're referring to the kink in the red light being identical on both machines?

A. **That's correct.**

Q. Have you ever seen the defendant's product advertised anywhere besides the website?

A. **No. And we do over 50 trade shows a year where we can --**

I have people on the magazines. We're in the street with everybody, you know, a lot of customers. We've never seen his presence anywhere except for on his website.

Q. Just changing gears for a second, Mr. Cohen. Are portions of the HydraFacial MD product cleared by the FDA?

A. **Yes. It's a listed device.**

Q. Now, during the application -- during the motion that we filed there was a 510(k) clearance submitted for sterile tubes. Now, that had nothing to do with this machine?

A. **No, that was an error. We submitted the -- we have several 510(k)s and several listed products and we submitted the wrong one. Which I believe we have the correct one.**

MR. RAZAI: Before we get to Exhibit II, Your Honor, I move to enter Exhibits UU, Victor Victor, and T into evidence, please.

THE COURT: Right. Any objection?

MR. AGUILA: No objections.

THE COURT: All right. UU, VV, and T, Plaintiff's exhibits are in evidence.

MR. RAZAI: Thank you, Your Honor.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

BY MR. RAZAI:

Q. If I can direct your attention to Exhibit II, what is Exhibit II, sir?

A. **This is our 510(k) clearance from the FDA on our LED blue light.**

Q. And looking at the machine, if I can -- looking at this machine, is this the blue light (indicating)?

03:18 A. **That's correct.**

Q. And now looking at Defendant's machine, there is a blue light?

A. **That's correct. And one of these would be the same.**

Q. I'm going to hand you Exhibit JJ, sir.

03:18 A. **Just to be clear, that's the only one that I make. I don't make these (indicating).**

Q. Mr. Cohen, do you recognize JJ?

A. **Yes. This is a 510(k) clearance on our red light.**

Q. And again, is this the red light (indicating)?

03:19 A. **That's the one that I manufacture, yes.**

Q. And it's cleared by the FDA?

A. **That's correct. So I don't want to repeat because I know we're running out of time, but for clarification, our device is a Class 1 exempt device, so it needs to be listed with the**

03:19 **FDA. And it can only be made by a registered manufacturer, which is what we are. But the lights need a -- they're a Class 2 device, so you need a 510(k) clearance on just the lights. So that's the difference; one is listed and one is a 510(k).**

03:19 Q. Mr. Cohen, I've handed you what's been marked as

Exhibit LL. Do you recognize this document?
A. **Yes.**
Q. And what is this?
A. **This is the FDA certificate to foreign government for Edge Systems. So it essentially shows which products we make that they have cleared for -- that the FDA is saying is properly registered and properly listed with the FDA and therefore we are allowed to export them out of the country.**
Q. So if you look at the last paragraph on page 1 of Exhibit LL, it starts with the last such inspection. Do you see that sir?
A. **Yes.**
Q. Can you read that sentence for me?
A. **The last such inspection showed that the plant, our manufacturing plant, at that time appeared to be in substantial compliance with current, good manufacturing practice requirements for the product listed above.**

So what they do is we get audited, and we've been audited several times, and then they reference our audits to make sure we're clear as a good manufacturing practice, a manufacturer, and then they issue this certificate. Then we, in turn, use this for clearance in other countries. They require this for clearance.

Q. And looking at the name of the products on the top left, do you see that on page 1? If you look at page 1, sir,

there's two headings; one says Name of Products and one says Name of Manufacturer Distributor Address. Do you see that?
A. **Yes.**
Q. What's the list -- what's the first five listed on Name of Products?
A. **HydraFacial systems.**
Q. Going to page 2 of Exhibit LL.
A. **Yes.**
Q. Do the first five products refer to the HydraFacial MD?
A. **Well, they're all our hydradermabrasion products. And the HydraFacial is the first four, and then the two tabletops are the last two HydraFacial systems.**
Q. So based on this -- based on Exhibit LL, does that mean that the FDA has certified that Edge Systems LLC is in compliance with good manufacturing practice requirements for the HydraFacial MD?
A. **That's correct.**
Q. I'll hand you what's been mark as Exhibit J. Do you recognize Exhibit J?
A. **Yes.**
Q. What is Exhibit J?
A. **It's the FDA's establishment registration and device listing.**
Q. And with the -- in Exhibit J, the first page where it says Exhibit J, page 101, which product signifies that it's

a -- it's the HydraFacial MD?
A. **The tower system. And you would also see that on Exhibit LL. It's also called the HydraFacial, and it has the word tower in it. So at this time when we listed it with the FDA, we didn't -- you don't necessarily list it with your trademark name, so we listed it as our tower system.**
Q. So is the HydraFacial MD then listed with the FDA?
A. **Yes.**
Q. And is Edge Systems LLC registered with the FDA?
03:23 A. **Yes. We have been since 1997.**
MR. RAZAI: Your Honor, I'd like to ask to move Exhibits LL, J into evidence.
THE COURT: LL and J. Is there any objection? Mr. Aguila, any objection --
03:23 **MR. AGUILA:** No, no objection. Sorry.
THE COURT: -- to Plaintiff's Exhibit LL and J?
MR. AGUILA: No.
THE COURT: All right. Those are in evidence.
(Thereupon, the aforementioned exhibits were admitted into evidence.)
THE COURT: Did we already get II and JJ?
MR. RAZAI: I'd also like to move Exhibits II and JJ into evidence, Your Honor.
THE COURT: Is there any objection to that?
03:23 **MR. AGUILA:** No objection.

THE COURT: Those are also in evidence.

(Thereupon, the aforementioned exhibits were admitted into evidence.)

MR. RAZAI: Your Honor, would you like me to go into the irreparable harm portion? I know that you had mentioned something about not really wanting too much evidence on that. I know we're running out of time, so I wanted to ask what you would prefer for me to get into irreparable harm. Because I think that there is a portion of testimony that's very important, which is the issues of latches and an issue of prior use by Mr. Aguila that Mr. Cohen will address, which might take a little bit of time.

THE COURT: Right.

MR. RAZAI: So would you like me to go into the irreparable harm for the trademarks? I know that Mr. Ignon did testify to the irreparable harm for the patent side. The irreparable harm for the trademark side I think is pretty well briefed and I think it's a legal issue more than a factual issue. But I'll ask you whether you would like --

THE COURT: I can't tell you I have a command of the record to tell you whether you should or you shouldn't. I'm going to have to leave that to your judgment.

MR. RAZAI: Okay. I just wanted -- I was asking you a preference. I'll go ahead and ask the questions,

then --

THE COURT: You'll have to do what you think is necessary.

MR. RAZAI: Thank you, Your Honor. I'll take the (inaud.) as one of my colleagues normally refers to it as.

A. **I can be quick --**

THE COURT: Get to the point, but speaking quickly won't actually us there faster.

A. **Okay.**

BY MR. RAZAI:

Q. Do you know how much Defendant charges for the accused product?

A. **Yes. In one case it was $6,000. And I believe that Dr. Duboys, it was $7600.**

Q. Now selling a product for $6,000, does that damage your business?

A. **Yes. Our average sale price is around $24,000.**

Q. If Defendant is allowed to continue selling this product, looking the way that it does, will that harm your reputation?

A. **It will harm our reputation. It will injure our business. And I have 125 people working for me that I won't have in the future.**

Q. And if he's allowed to sell products under the mark Edge Systems, will that harm your business?

A. **Oh, yes. Yeah.**

Q. Do you have control over the quality of Mr. Aguila's goods?

A. **No. It's a few things. Number one, it's the quality of the product. It's also the reputation. The doctors tend to call me after his sales and they ask me if it's my device, which it's not. And they ask me for training and support, which it's not my device.**

In addition, I did speak to the FDA because of that issue when the doctors call me, I'm supposed to report it to the FDA. And I talked to Mr. Frank Lee from our regional office and told him the problem is, is that he's using my name. So if you go on the FDA website, you can't search his manufacturing plant because my company comes up, and there's no other Edge Systems listed with the FDA. So then we looked under all the fictitious that we had and Mr. Lee could not find it. So that was an issue where I don't know how this thing is made and whether it follows the GMPs, but I -- or whether it even has electrical safety.

And so that all puts due harm on me if somebody gets injured, which we -- that's why it's under the auspices of the FDA because it could potentially cause injury. And if that happened, if the proper training is not done and everything else, then it could fall back on me or my company, I should say.

Q. If I can ask you to look at page 3 of Exhibit VV. It's

one of the larger documents.
A. **Yes.**
Q. On the top left, this is again from the website www.hydradermabrasion.com, correct?
03:27 A. **Correct.**
Q. On the top left it has Edge's Chevron logo, correct?
A. **Correct.**
Q. And it has the word Edge, correct?
A. **Correct.**
03:27 Q. If I can direct your attention to the very last section where it says manufacturing?
A. **Correct.**
Q. Can you read that?
A. **I can. On the very top, I just have to say in the first**
03:27 **sentence it says, Edge Systems is the manufacturer of the HydraDerm. That's a big problem. Then on the bottom it says, Manufacturing. The hydradermabrasion is manufactured at our facilities in the USA. Our products conform to all the relevant U.S. and international standards including CE**
03:28 **and CSA.**
THE COURT: Not too fast, sir. Just slow down for the court reporter.
A. **I'm sorry. Ready?**
All hydradermabrasion devices are manufactured in
03:28 **the USA. Edge Systems meets all highest standards for**

quality control including the IO 9001 standard, CE marking and the FDA's current good manufacturing practices, GMP, for both the medical device and our proprietary cosmeceutical products.

03:28 **BY MR. RAZAI:**

Q. Does your company, Edge Systems, manufacture Defendant's Hydradermabrasion MD products?

A. **No.**

Q. Is it possible that if somebody had a negative experience

03:28 with a Hydradermabrasion MD product, they would report you to the FDA?

A. **Yes, very possible.**

Q. Is that problematic for your company?

A. **Very much so.**

03:28 Q. Mr. Cohen, you've had previous interactions with Mr. Aguila before, correct?

A. **Correct.**

Q. If I can hand you Exhibit PP.

A. **Thank you.**

03:29 Q. Do you recognize this document, sir?

A. **Yes.**

Q. And what is it?

A. **This is a letter from Diamond Skin, an e-mail letter to myself.**

03:29 Q. And who is it signed by? Who is it signed?

A. **Ralph Aguila.**
Q. Now, what was the reason for Mr. Aguila sending this letter -- first of all, what's the date on this e-mail?
A. **October 17th, 2006.**
03:29 Q. And what was the reason Mr. Aguila sent you this e-mail on October 17th, 2006?
A. **I had thought that he was violating -- infringing on our patents, our fluid patents, and it's -- sent him a letter mentioning that and this is his response.**
03:30 Q. Now, in 2006 had you asked eBay to take the Diamond Skin system off of eBay?
A. **I did in reference to I thought he was using fluid in his procedure.**
Q. But you did ask eBay to remove a product?
03:30 A. **Correct.**
Q. Was this a letter -- the e-mail you got in response to your asking eBay to remove the product?
A. **That's correct.**
Q. And did you respond to Mr. Aguila? I'm going to hand you XX, first of all. X-ray, X-ray.
03:30 A. **Yes.**
Q. Is Exhibit X-ray, X-ray, reporting to be a screen website shot from www.diamondskin.com?
A. **That's correct.**
03:31 Q. Dated July 28th, 2006?

A. **Correct.**
Q. And is this a document that was kept in your attorney's files in connection with the takedown from eBay?
A. **That's correct.**
03:31 Q. Now, looking at this Exhibit X, can you read the first two sentences for me?
A. **The Diamond Skin crystal-free microdermabrasion system is an FDA-approved system that effectively treats the appearance of fine lines and wrinkles, brown spots, scars, stretch**
03:31 **marks, and acne blemishes.**
Q. And looking at the tiny little picture on the bottom right, is that a copy of the machine that you complained about?
A. **Yes.**
03:31 Q. I'm going hand you Exhibit QQ. Do you recognize Exhibit QQ?
A. **Yes.**
MR. AGUILA: Objection, Your Honor. This is an e-mail from 2006 and they haven't laid the proper foundation
03:32 on how they kept this.
THE COURT: Are you talking about QQ.
MR. AGUILA: QQ, yes.
MR. RAZAI: I'm about to.
THE COURT: Well, he hasn't done it yet.
03:32 **BY MR. RAZAI:**

Q. Do you recognize this document, Mr. Cohen?
A. **Yes.**
Q. It's an e-mail string between you and Mr. Aguila?
A. **Correct.**
03:32 Q. Is this an e-mail that was kept in your system?
A. **It would be in our system, but I've always copied this stuff to our attorney. So I believe it was from them as well.**
Q. Now, do you recall this e-mail string back in 2006?
03:32 A. **I do, yes.**
Q. I'm not asking you whether you remember October 24th, 2006, but you remember this e-mail string itself, though?
A. **I do, yes.**
Q. So looking at the bottom of the e-mail string, is this an
03:32 e-mail from you to Mr. Aguila?
A. **On the bottom is my response, yes.**
Q. And what did you ask Mr. Aguila in your e-mail?
A. **I asked him if he was --**
Q. You can read the e-mail if you'd like. You can read it
03:33 out loud.
A. **Well, before this, I had sent him a letter about fluid in microdermabrasion, not about dry microdermabrasion. He wrote back to me on the top saying, Hello, Bill. That is correct. We apply oxygen air as a separate treatment. Some of our**
03:33 **machines can have oxygen applied at the same time that it is**

being exfoliated. We are pursuing a patent on this kind of application. We have a sprayer and nebulizer which can have a mineral/vitamin solution put inside it and sprayed on the skin, but this has to be done after the microdermabrasion. However, our wands do not have the capability of using liquids such as the SilkPeel the DiamondTome HydraWands or the HydraFacial. Thanks, Ralph Aguila.

And that's dated October 24th, 2006.

Q. So in this e-mail from Mr. Aguila, he says that he has a machine that applies oxygen, correct?

A. **Correct.**

Q. And he says that there's a sprayer nebulizer, but he also says that the machine doesn't have the capability of using liquids, correct?

A. **Correct. He has the ability to spray on fluid, but not --**

MR. AGUILA: Your Honor --

A. **-- microdermabrasion off --**

THE COURT: Let him finish the question.

A. **He has the ability to spray on fluid, but in it he says, But this has to be done after the microdermabrasion treatment.**

THE COURT: All right. What's the objection?

MR. AGUILA: The objection is I don't even know if this -- this (inaud.) e-mail is real. It says, Capability of

using liquids such as the SilkPeel DiamondTome. I think you can refer that it's a different technique of applying the liquid, not that it does not apply liquids at all.

THE COURT: That's something you can argue.

03:34 **MR. AGUILA:** Okay. To the --

THE COURT: But I don't think that goes to admissibility of the exhibit.

MR. AGUILA: Okay.

BY MR. RAZAI:

03:34 Q. Mr. Cohen, if I can direct your attention. It looks to me like the e-mail on the bottom is the e-mail that came from you to Mr. Aguila, and the e-mail on top is a response from Mr. Aguila to you. Is that --

A. **That's correct.**

03:35 Q. Would that change your testimony? Because I think at first you testified that the e-mail on top was from you and then --

A. **No, no. I'm saying prior to this page, I had sent him.**

Q. But if you look on the bottom there's an e-mail --

03:35 A. **Correct. Then he --**

COURT REPORTER: One at a time, please.

A. **Then he responded to me and mentioned the fluid is done after the microdermabrasion treatment. If the fluid is done after the microdermabrasion treatment, it does not infringe on our patent so I'm good. And I wrote back to him.**

Thank you for your e-mail. We understand that the Diamond Skin system is a microdermabrasion system in which fluid was also supplies. Are you telling me that this is not the case? And then subsequent to this -- hopefully you have it -- he wrote back to me and he said, That's correct, it's not --

Q. If I can stop you for one second. I'd like to go through the e-mail with you.

A. **I'm sorry.**

Q. So with respect to the way the e-mails are -- I printed this e-mail out. And the way the e-mails are printed out, usually the older chain -- the older e-mail is on the bottom and the newer one is on top. This is the --

A. **Oh, I see. I see. I'm getting -- I'm confused. I'm sorry.**

Q. Hold on one second.

THE COURT: Stop. Stop. Stop. Sir, we can't talk at the same time. That's a problem. Elsewhere in life it works. Not too well, but it does. But we really can't do it here.

MR. RAZAI: My apologies.

BY MR. RAZAI:

Q. So Mr. Cohen, if you can follow me for a second.

A. **Gotcha.**

Q. Looking at the e-mail on the bottom, that first sentence

says, Thank you for your e-mail. And then it says, We understand that the Diamond Skin system was selling a microdermabrasion in which fluid was also supplied. Are you telling me that is not the case?

03:36 Is that a correct reading of the e-mail?

A. **That's correct. And --**

Q. So going now --

MR. AGUILA: -- conjecture. He does not know my reason.

03:36 **THE COURT:** No, let him -- nope.

MR. RAZAI: I'm just reading the e-mail.

THE COURT: He can ask these questions.

MR. AGUILA: Okay.

BY MR. RAZAI:

03:37 Q. So in response to your question, what is the first sentence in Mr. Aguila's response?

A. **That is correct.**

Q. Period. And then he goes on to describe that the machine that supplies oxygen is not a machine that supplies fluid; is

03:37 that correct?

A. **That's correct.**

Q. After this e-mail, was this matter considered closed?

A. **That's correct, because that application would not infringe on our patent.**

03:37 **MR. RAZAI:** I'd like to move Exhibits PP, XX, QQ

into evidence.

THE COURT: Is there any objection?

MR. AGUILA: I have an objection regarding the foundation of how these e-mails are warehoused.

03:37 **THE COURT**: Okay. So let's take it one at a time. First, I don't know if it matters which one we starts with. Actually, two are e-mails, one is a website, right? So let's take the website first, the XX.

MR. RAZAI: Yes, Your Honor.

03:38 **THE COURT**: Do you have any objection to that, Mr. Aguila? That's apparently from your website at some point, diamondskin.com.

MR. AGUILA: Yes, Your Honor. I do have an objection. I don't recognize this. I'm the designer of my

03:38 websites and I don't remember this from 2006, this writing.

THE COURT: Okay. So you're questioning that your -- questioning the authentication of the document.

MR. AGUILA: That's right.

THE COURT: So Mr. Razai, your comments. Frankly,

03:38 I don't recall what foundation was laid on this.

MR. RAZAI: The question that I had asked Mr. Cohen was that whether this was kept in his attorney's files. If you would like to swear me in as a witness, I can swear and attest to the authenticity of this document and where I got

03:38 it from.

THE COURT: All right. Well, then let's admit this --

MR. RAZAI: It is part of a sworn declaration from me, and it is in evidence on the record. So I have sworn to it.

03:39

THE COURT: Well, let's remember to admit this pending your brief testimony to authenticate it.

MR. RAZAI: Yes, Your Honor.

THE COURT: So this is Exhibit XX, and Plaintiff's counsel will authenticate. So that is on the to-do list. All right. That's XX.

03:39

Now let's take maybe the last one first, QQ. We're most recently talking about that. That's an e-mail apparently from Mr. Cohen to Mr. Aguila and then Mr. Aguila back.

03:39

So the objection to that, Mr. Aguila, is?

MR. AGUILA: Well, QQ -- I'm trying to find it here.

MR. RAZAI: Here you go.

MR. AGUILA: Well, again, the e-mail, the storage. I would like to authenticate this e-mail, the storage methods.

03:39

THE COURT: I know you gave some testimony on it, but perhaps --

MR. RAZAI: Sure, Your Honor. I think Mr. Cohen

03:40

testified that he remembers the document. He remembers sending it. He remembers it being an e-mail string. And he can confirm that --

BY MR. RAZAI:

03:40 Q. Mr. Cohen, can you confirm that the e-mail address on there is your e-mail address?

A. **This is my e-mail. And we keep everything in file in my office. So all the communications regarding our patents, cease and desist, there's one woman that keeps track of all** 03:40 **that, and this came right out of the file.**

THE COURT: So in preparation for the hearing today, did you or someone on your behalf retrieve this document from your computer system?

A. **That's correct. Well, no. From the files, from --**

03:40 **THE COURT:** So you're saying it was printed out.

A. **Printed and stored in the file, yeah.**

THE COURT: So you're saying it was your regular business practice back around October of 2006 to print e-mails of this nature and store them in a hard copy file.

03:40 A. **That's correct.**

THE COURT: And is that, in fact, what was done for this document which is Exhibit QQ?

A. **That's correct.**

THE COURT: And then was it maintained in the

03:41 ordinary course of business at Edge Systems' --

A. **That's correct.**

THE COURT: -- records?

A. **Yes.**

THE COURT: Is there any other question, Mr. Aguila? Any other objection about this?

MR. AGUILA: Just that it lacks adequate foundation, but it's --

THE COURT: Okay. I'm going to overrule that and admit QQ.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

MR. RAZAI: The last one's Exhibit PP, Your Honor.

THE COURT: Right. And now we have Plaintiff's Exhibit PP, which is again an e-mail purporting to be from support at Diamond Skin signed by you, Mr. Aguila, back on October 2006. So are you objecting to this?

MR. AGUILA: I don't object to this one.

THE COURT: Okay. So that's PP is admitted into evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

BY MR. RAZAI:

Q. Mr. Cohen, do you recall having another dispute with Mr. Aguila doing business as Diamond Skin in 2010?

A. **That's correct.**

Q. I'm going to hand you what's been marked as Exhibit U.

MR. RAZAI: And, Your Honor, before we go too far down the road of authenticating this document, this document was also attached to the declaration of Mr. Aguila in one of his files, so I don't think we have an issue with admissibility, so I'd like to move this into evidence.

THE COURT: Is there an objection?

MR. AGUILA: No objection.

THE COURT: So Exhibit U is in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

BY MR. RAZAI:

Q. What is Exhibit U, Mr. Cohen?

A. **It's a letter from our law firm Knobbe Martens Olson & Bear to Mr. Aguila regarding trademark infringement, delusion and unfair competition.**

Q. So is it safe to assume that this is a letter alleging that Diamond Skin Systems was infringing Edge Systems' trademarks, copyrights, unfairly competing with Edge Systems, deluding its trademarks, cybersquatting on its domain name, and infringing its patents?

A. **That's correct.**

Q. Do you know if Mr. Aguila responded to -- actually, who was this letter written by?

A. **It was written by Catherine Holland from your office.**

Q. Do you know if Mr. Aguila responded to this letter?
A. **He did, by e-mail.**
Q. I'm going to hand you Exhibit ZZ. And I normally don't do this, but, Mr. Cohen, I'm going ask you to read the entirety of this e-mail if you could.
03:43
First of all, do you recognize this e-mail?
A. **I do, yes.**
Q. You've seen it before?
A. **Yes.**
03:43 Q. Did Ms. Holland forward this e-mail to you upon receipt?
A. **To both Roger and I, yes.**
Q. Okay. Can you read the e-mail, please?
MR. AGUILA: Objection, Your Honor. This might be prejudicial. First of all, I don't recognize this e-mail,
03:44 and it has something about very anti female commentary at the bottom that I don't think has anything to do with anything.
THE COURT: Well, the question is whether -- it's not in evidence yet. So what would be the objection to it being admitted into evidence?
03:44 **MR. AGUILA:** It would be prejudicial to me in front of a jury.
THE COURT: So you're not -- fortunately, we don't have that problem now.
MR. AGUILA: And I don't -- and I mean I did not
03:44 send this e-mail. So I would -- you know, in this form,

anyway --

THE COURT: Well, prejudice really isn't a basis to keep something out of evidence because presumably each of you are trying to introduce evidence that is prejudicial to the other side, generally speaking. So that's not a problem. The question is authentication.

And so why don't you lay a foundation on that, Mr. Razai. Or perhaps it's already been done and I've overlooked it.

03:44 03:45

MR. RAZAI: I believe I might have. If you want more, Your Honor, I can get more.

THE COURT: Help me out here. It's --I think it's just --

MR. RAZAI: Again, Your Honor, when it comes to the authentication of this document, I'm happy to authenticate this as well. It came from my law firm's files.

03:45

THE COURT: Okay. All right. So I will admit this subject to Plaintiff's counsel being able to authenticate it.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

BY MR. RAZAI:

Q. Mr. Cohen, can you read the e-mail, please?

A. **Hello, Ms. Harris/Holland. Thank you for talking with me today regarding Edge Systems and are HyrdaPeel. I have to congratulation you on your book, Intellectual Property,**

03:45

Patents, Trademarks, Copyrights and Trade Secrets. I read some of it on books.Google.com and found much easier to read than books from Thompson West. I'm not sure how you found time to write it. (Happy face.)

03:45 **The first part of the book was where you described that if a product is important, then one could take the patent infringement case directly to the FTC for faster processing and in order blocking all imports. That part of the book is very well done. I know that this might not**

03:46 **appear professional, and if you don't mind, I --**

Q. Mr. Cohen, I apologize for interrupting. Let's skip that paragraph. It's not relevant. Let's go to the last paragraph.

A. **In any case, and in summary, I hope that Edge Systems**

03:46 **doesn't decide on suing me since I lack almost any resources to defend myself with -- to defend myself with and would not like to be on the receiving of an attack from you and your team there at Knobbe. You can imagine how that would look like. Best regards, Ralph Aguila.**

03:46 Q. So in response to Ms. Holland's cease and desist letter from 2010, did Mr. Aguila ever threaten to sue Edge Systems for common law trademark infringement?

A. **No.**

Q. I'd like to hand you what's been marked as Exhibit RR.

03:47 **MR. RAZAI:** And we actually ran out of stickers so

we only have two on here. If I can be two more? I'll be done with my exhibits, I promise.

MR. AGUILA: Your Honor, it's already 3:45.

MR. RAZAI: This is the last exhibit, Your Honor.

03:47 **THE COURT:** It is what it is. We'll have to deal with it.

A. **You gave me two of them.**

BY MR. RAZAI:

Q. I'll take that one back and give it to you.

03:47 Mr. Cohen, you've been handed what has been marked as Exhibit RR.

A. **Yes.**

Q. Do you recognize this document, sir?

A. **Yes. It's Articles of Dissolution of Diamond Skin**

03:47 **Systems Inc.**

Q. And if you're looking at the bottom on page 2 of 3, do you see the mailing address?

A. **Yes. It's sent to the Amendment Section, Division of Corporations -- and the P.O. Box, and then Tallahassee,**

03:48 **Florida.**

MR. RAZAI: I'd like to move Exhibit RR into testified before I ask any further question. This is just an Article of Dissolution filed with the Secretary of State of Florida.

03:48 **THE COURT:** Is there any objection?

MR. AGUILA: No objection.

THE COURT: So Plaintiff's RR is in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

03:48 **BY MR. RAZAI:**

Q. So looking at the third page, what is the filing date of the Articles of Incorporation?

A. **October 31st, 2006.**

Q. And looking at the stamp date, the file stamp date on

03:48 there, what's the file stamp date?

A. **March 10th. March 10, 2010.**

Q. So about 43 days after Ms. Holland sent a cease and desist letter to Diamond Skin Systems, Diamond Skin Systems was dissolved; is that correct?

03:48 A. **That's correct.**

Q. Now, did you consider the matter closed?

A. **Yes, because the company was dissolved and I thought they were out of business and done selling their product.**

MR. RAZAI: I'm going turn the witness over to

03:48 Mr. Aguila.

THE COURT: Let's take a five-minute break and then we will come back for cross-examination.

MR. RAZAI: Thank you, Your Honor.

(Thereupon, a brief recess was taken from

04:01 3:49 p.m., to 4:01 p.m.)

THE COURT: Okay. So I'm just going to remind Mr. Cohen and Mr. Aguila that you cannot talk at the same time. I'll get a chance to hear from everybody.

MR. AGUILA: Thank you, Your Honor. What time are we expecting to leave or what --

THE COURT: I don't know. Let me say this. Both parties need to have a fair hearing. I'm not going to rush you for your testimony, nor am I going to rush the plaintiff. I'll work somewhat late taking into consideration everybody's ability to do so or I can invite you back on Monday. It's another option. So let's see how it goes.

MR. AGUILA: Okay. Thank you.

CROSS-EXAMINATION

BY MR. AGUILA:

Q. Hello, Mr. Cohen.

A. **Hello.**

Q. So Mr. Cohen, you testified right now that the plaintiffs, yourself and your attorneys had made an error in including Exhibit I with your motion for a preliminary injunction.

A. **Can you remind me which one is I?**

Q. That is the -- Exhibit I -- I don't know if you included it. It's in the motion. It's of the smoke extractor 510(k).

A. **Yes. Okay.**

Q. Do you remember seeing that?
A. **Yes.**
Q. That you made an error. How much preparation time did it take you to prepare this lawsuit?
04:02 A. **Personally? Probably two weeks, a week and a half.**
Q. Okay. And how long did it take Edge Systems -- I mean, you're the president of Edge Systems -- to prepare --
A. **Several people worked on the project.**
Q. And what was the exact mistake? You said there was an
04:03 error. What was that error in --
A. **We submitted the 510(k) on our sterile tubing instead of our information from the FDA on our HydraFacial machine.**
Q. So you have a 510(k) on your HydraFacial machine?
A. **No. Our HydraFacial machine is Class 1 exempt. So that**
04:03 **product, you only need to have it listed with the FDA. And we have a letter to file about our Delphia microdermabrasion machine being listed. And then we have a letter to file noting that this is a version of microdermabrasion and therefore it is listed. And the FDA has seen all of those --**
04:03 **those files.**
Q. Okay. Can I...
MR. RAZAI: Your Honor, if I may. Plaintiffs are willing to stipulate that Exhibit I does not cover the HydraFacial MD machine and it was submitted in error and
04:04 should not have been submitted. If there's other -- if

there's evidence that he'd like to elicit, I'm more than happy. But we're willing to stipulate that it does not apply to that.

THE COURT: Okay . So it's helpful to know that there's no dispute about that.

Does that take care of that issue, sir?

MR. AGUILA: No. Your Honor, I think there was actually bad faith on the part of the plaintiffs in including that exhibit. And so, yeah --

THE COURT: I'll allow you to inquiry to some extent.

MR. AGUILA: Yeah, just a little bit, yes. If I can continue. So I would like to submit Defendant's Exhibit 22, the declaration of William Cohen, which is Plaintiff's Exhibit B in their preliminary motion.

THE COURT: Okay.

MR. RAZAI: Your Honor, again, just to speed things up. I'm willing to stipulate that Mr. Cohen did under oath submit Exhibit I into evidence. He did attest that Exhibit I was a true and correct copy of a February 25th, 1999, FDA -- and it's a typo -- 501 (k) instead of 510(k) notification from Edge.

THE COURT: So you're reading from Mr. Cohen's declaration which Defendant has marked as Exhibit 22.

MR. RAZAI: Absolutely, Your Honor.

THE COURT: And you don't dispute the fact that it says what it says.

MR. RAZAI: Absolutely, Your Honor.

THE COURT: And that was filed.

04:05 **MR. RAZAI**: Exactly.

THE COURT: So you want that in evidence, right, Mr. Aguila?

MR. AGUILA: Yes.

THE COURT: So Defendant's Exhibit 22 is in

04:05 evidence. There's no dispute about the content.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

THE COURT: This is good. It's moving us to the point of where you have an issue.

MR. AGUILA: Yes. Yeah, definitely.

BY MR. AGUILA:

Q. So -- well, could you read paragraph 33 from your declaration?

MR. RAZAI: Again, Your Honor, we stipulated that

04:05 it says what it says.

THE COURT: Well, but he can ask him to read paragraph 33.

MR. AGUILA: It's one sentence long.

A. **A true and correct copy of a February 25th, 1999, FDA**

04:05 **510(k) notification from Edge is attached hereto as**

Exhibit I.

BY MR. AGUILA:

Q. Mr. Cohen, why did you attach a 510(k) to a motion, a 650 page motion?

04:06 **MR. BABCOCK:** Objection, Your Honor. The characterization of the motion as a 650-page motion.

THE COURT: Okay.

MR. AGUILA: It's the truth.

THE COURT: Well, actually, the motion is not. The 04:06 motion is limited probably around 20 pages and their exhibits.

MR. AGUILA: Let me do that again.

BY MR. AGUILA:

Q. Why did you include in a motion and exhibits that 04:06 totalled more than 650 pages long a 510(k) when you know the HydraFacial has no 510(k)?

A. **Well, my initial understanding was we were showing that we've been in business for quite a long time and we have worked with the FDA since 1999, and this is our initial and** 04:06 **our first 510(k). Then later on I was told by the attorneys that they you wanted information --**

MR. RAZAI: Objection, Your Honor.

Please don't divulge attorney/client privileges communications.

04:07 **THE COURT:** Right. That's fair. Okay.

A. **Later we corrected what we needed to give you, which was the Court, was the listing of our hydradermabrasion --**

BY MR. AGUILA:

Q. So Mr. Cohen, you're testifying that your intentions were not bad, that you did not try to mislead the Court in including a 510(k) in a 650-page document -- can I call it a document? -- where only in small parts of it could the Court see that it was not referring to a HydraFacial at all but actually to a smoke extractor.

04:07 **MR. RAZAI:** Objection. Mr. Aguila is testifying at this point.

THE COURT: Right. So rephrase it as a question. What's your question?

BY MR. AGUILA:

04:07 Q. So did you include it in bad faith?

A. **No.**

Q. Did you -- let me see here. Well, that's more of my testimony.

When you wrote in your declaration the Edge machine 04:08 is an FDA-registered medical device, and then you included Exhibit I, do you not think that the Court might assume -- reasonably assume that this 510(k) that you're including as Exhibit I refers to, quote/unquote, the Edge machine?

MR. RAZAI: Objection. Speculation.

04:08 **THE COURT:** No, I'll allow the question.

A. **No. I think we've given the Court and yourself and everybody here a lot of evidence that shows we follow the laws of the FDA. We've been audited several times. Recently --**

04:09 **BY MR. AGUILA:**

Q. That's not the question.

A. **-- and the FDA has cleared us. They've actually asked us to be a site to train their auditors.**

Q. Please, sir, let me ask -- .it's very short in time. So

04:09 you mentioned in your declaration the Edge system is an FDA-registered medical device. I just don't understand why you would include a 510(k) for -- you said that you made a mistake. You included the smoke extractor when you meant to include the LEDs; is that right? Is that your testimony?

04:09 A. **No.**

Q. So you made a -- you're saying that you should not have included any 510(k) in the motion or exhibits?

A. **No, I'm not saying that.**

Q. What are you saying?

04:09 A. **Am I allowed to give an (inaud.)?**

THE COURT: No, he just asked you a question. Sure.

A. **What I'm saying is the -- we gave you the surgical smoke evacuator, which was in error, but it does show that we have**

04:09 **been under the auspices of the FDA since 1999. So it is**

relevant. Then we gave you the listing of the -- of our hydradermabrasion with the FDA. Then we gave you proof of our registration through our certificate of foreign government. And then we also gave you other information with the FDA to show that we comply.

BY MR. AGUILA:

Q. Yes. But that's done already by showing the registration number that you have with the FDA. Why do you have to include a 510(k) for an irrelevant device to show that you have --

MR. RAZAI: Objection, Your Honor. It's getting argumentative. Mr. Cohen testified it was submitted in error. If there is some question about a faith --

THE COURT: Right. At this point I'm going to sustain it. I think we have his explanation.

MR. AGUILA: Okay. Thank you, Your Honor. I'll continue to other points.

THE COURT: So were you moving into evidence Defendant's Exhibit 22?

MR. AGUILA: Yes. Can I move that into evidence?

THE COURT: Now?

MR. AGUILA: Yes.

MR. RAZAI: No objection.

THE COURT: No objection. It's in evidence.

(Thereupon, the aforementioned exhibit was admitted

into evidence.)

MR. AGUILA: This is also Plaintiff's Exhibit B in their motion.

THE COURT: Right. But the exhibits that we're talking about here today are exhibits of this hearing.

MR. AGUILA: Yes. I'd like to submit into evidence Defendant's Exhibit 32.

MR. RAZAI: Objection to moving this into evidence. I have no idea what this document even is, Your Honor.

THE COURT: All right. Let's see. Can you lay a foundation with this witness?

MR. AGUILA: Yes.

BY MR. AGUILA:

Q. Mr. Cohen, have you ever seen any of these two devices?

A. **Yes.**

Q. Can you describe what they are?

A. **These are HydraFacial tabletop systems that we no longer manufacture.**

Q. When did you started manufacturing these two devices?

A. **After we started production of the tower.**

Q. That's not my question. What year, do you know?

A. **I believe the Wave was first and that was around 2005. We can look -- or 2006. We can look in our records. Or maybe 2007. And then Nectar came shortly thereafter.**

MR. AGUILA: Who has the microphone? Can I just

project my voice?

MR. RAZAI: Your Honor, could I give the witness this to refresh his recollection regarding the sales dates of the machines that Mr. Aguila is asking about?

04:12 **MR. AGUILA**: This might be leading the witness, Your Honor.

THE COURT: Well, do you want to look at the document?

MR. RAZAI: I'm just trying to help him out.

04:12 **THE COURT**: I understand. It may not be a problem for Mr. Aguila.

A. **But to answer --**

MR. AGUILA: I would object to this.

THE COURT: So stop. Where are we at? Is there a

04:13 question pending?

MR. AGUILA: Yes. I would just like to --

THE COURT: Speak up real loudly.

BY MR. AGUILA:

Q. Mr. Cohen, this is you -- would you say that this is a

04:13 HydraFacial manufactured by Edge Systems --

A. **Correct.**

Q. -- LLC?

THE COURT: And for the record, you're pointing to the machine in the courtroom that the plaintiffs have

04:13 identified as their own.

MR. AGUILA: Yes.

BY MR. AGUILA:

Q. You're saying that you built this machine before you built the Wave and the Nectre?

04:13 A. **That's correct.**

Q. Now --

THE COURT: You can give that back to Nancy.

BY MR. AGUILA:

Q. Now Mr. Cohen, you're saying that exact device was built

04:14 in 2005; is that right?

MR. RAZAI: Objection. I think he was testifying to the general machine not to that device.

THE COURT: Okay. Sustained. You can rephrase your question.

04:14 **BY MR. AGUILA:**

Q. Previously in your testimony right now, you had said that that device was made before the Nectre and the Wave -- HydraFacial Wave and HydraFacial Nectre; is that correct?

MR. BABCOCK: Your Honor, just for point of

04:14 clarification, I'll object. Are you stating this -- the actual piece of hardware sitting in the courtroom or the HydraFacial -- the product that was sold by Edge?

MR. AGUILA: When I showed this machine to Mr. Cohen, he said that they built this before he built the

04:14 Wave and the Nectre.

MR. BABCOCK: Well, you just need to clarify so you get the right answer here. Are you talking about that piece of hardware or are you talking about the system? Just making it clear.

04:14 **MR. AGUILA:** I clearly showed this machine.

THE COURT: So let's just ask your question clearly. And when you say this machine -- we're making a record here. So make the record. Referring to the machine in the courtroom the plaintiffs have identified as their

04:15 machine, you're referring to that now?

MR. AGUILA: Yes.

THE COURT: And your question about that is?

MR. AGUILA: Is just to confirm the -- Mr. Cohen's testimony.

04:15 **THE COURT:** Ask him.

BY MR. AGUILA:

Q. Mr. Cohen, do you confirm your testimony that you made right now when I referenced the machine that Plaintiff's have designated as their own to be made by Edge Systems before the

04:15 Nectre and the Wave?

A. **No. That specific machine was not made before the Nectre or the Wave. That specific machine was not made prior to these. But that model of machine, that tower system, that model, the look, that trade dress, that actual line of**

04:15 **machinery was produced and was developed and produced prior**

to these systems or these models. But that particular machine was not. On the back of our machinery is a serial number which is date encrypted. If you want, I can look on the date and tell you the date that that particular --

Q. Yes, I imagine this was built recently. This specific --

A. **Correct.**

THE COURT: And just for the record, when you were making the comparison to these, you were referring to what the defendant marked as his Exhibit 32, which is two images of two different tabletop machines?

A. **That's correct.**

THE COURT: Okay.

BY MR. AGUILA:

Q. One last point on this topic. Are you saying, then, that HydraFacial first developed a machine like this one here and then developed machines like you see in Exhibit 32? Is that your testimony?

MR. RAZAI: Objection to HydraFacial developing anything.

BY MR. AGUILA:

Q. Or Edge Systems developing?

A. **If I understand you correctly, your question, we developed the tower-looking device, that whole idea and that larger machine, that's what we developed first. We led with our premium product. Then these tabletops on Exhibit 32, we**

developed after that one.

Q. Would you say those Exhibits 32 look less modern than the tower here that you've designated as your HydraFacial MD?

A. **I like them. No, I wouldn't say that.**

04:17 Q. So they're not less modern?

A. **I don't think so. I mean, it's up to you. It's very subjective. I don't know.**

MR. AGUILA: So I would like to submit Exhibit 32 into evidence.

04:17 **THE COURT:** All right. Is there any objection?

MR. RAZAI: Yes, Your Honor. We object to that document being put into evidence. I have no idea what that document is, who it was created by -- we have no idea what that document is, who it was created by. It's just two

04:18 pictures on a piece of paper. We can stipulate that these look like the Nectre and the Wave. But as far as this document, I have no idea what it is or where it's from. And I --

THE COURT: Well, the witness testified that he

04:18 recognized the two tabletop machines --

MR. RAZAI: Yes, Your Honor.

THE COURT: -- that are in Exhibit 32 as the Nectre -- as images of the Nectre and the Wave product which the plaintiff produced, manufactured beginning sometime after

04:18 it created the HydraFacial.

MR. RAZAI: Your Honor. I'm fine with it. Let's go ahead and introduce it.

THE COURT: Okay. It's in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

MR. AGUILA: I would like to submit Defendant's Exhibit 20.

BY MR. AGUILA:

Q. Mr. Cohen, could you read the date -- first of all, what document are you seeing?

MR. RAZAI: Objection, Your Honor. I object to Exhibit 25. It's a trademark application for Diamond Skin. It has absolutely no bearing in any way on this case, so I object on the basis of relevance to the document and to this entire line of questioning.

MR. AGUILA: Your Honor --

THE COURT: Is this the most recent -- I mean the trademark application that you submitted just filed in the last 30 days or so?

MR. AGUILA: No. This was actually submitted in 2005. But the evidence is that in it I -- in the application, I put that the first time it was used was in January of 1997, the name Diamond Skin, just to show that I have a history and I didn't just start now, basically. So in 2005 I submitted a trademark application, and I put the

original date on this application back nine years ago now, first starting in 1997. So just to show that --

THE COURT: So that's the relevance?

MR. AGUILA: Yes.

04:20 **THE COURT**: -- that you're arguing, is that it is some evidence of your --

MR. AGUILA: Being established.

THE COURT: -- being in this business earlier?

MR. AGUILA: Yes.

04:20 **MR. RAZAI**: Your Honor, we stipulate to Mr. Aguila having an abandoned registration for the mark Diamond Skin with a first -- a reported first use date of January 1st, 1997. So we can enter this into evidence. I don't know what the witness can add to this.

04:20 **THE COURT**: So you're not objecting to this coming into evidence?

MR. RAZAI: He can put it into evidence. If he's doing it so he can say he was in the business, that's fine. But if it has any relevancy on his first use of any of the

04:20 marks that are in question, there's no relevance.

THE COURT: We can talk about that later on.

So Defendant's Exhibit 20 is in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

04:20 A. **Is there a question?**

BY MR. AGUILA:

Q. Do you remember, when is the first time you heard the word Diamond Skin?

MR. RAZAI: Objection, Your Honor. Relevance.

04:20 **THE COURT:** Okay. What is the relevance to this witness hearing the name Diamond Skin?

MR. AGUILA: Well, you're right. I take that back. I'm sorry.

THE COURT: All right.

04:21 **BY MR. AGUILA:**

Q. What was the first time you heard a company -- the name of a company called Edge Systems?

A. **It's our company name. We created it in 1997.**

Q. Is that the first time you've ever heard of the word Edge

04:21 Systems to describe a company?

A. **To my recollection. And then we did a -- and I'm not sure what you call it, but a corporate or a search on the web and there were two others. In the -- one was in the computer business and the other was in like a machining business,**

04:21 **totally separate from us. And it seemed irrelevant. We contacted them and they didn't have any issue with us calling our company -- we're in totally different businesses. And that was it. That's all I've ever heard of.**

Q. So you saw two other companies that were also called Edge

04:21 companies?

A. **In a different industry.**

THE COURT: Can you give us a time frame, sir?

A. **That was 1997.**

BY MR. AGUILA:

04:22 Q. Since your logos are so valuable, the Chevron logos, why did you never apply for a trademark on those logos?

A. **There is one logo that's currently -- somebody owns it that will go -- come up, I think it's September of next year. So we had just waited until then. We never had an issue. Nobody had ever copied our name. Nobody had ever done anything so we didn't have an issue.**

Q. You waited until 1999 until now to apply for your logo?

A. **We have all -- a lot of our other products and everything all trademarked and marked.**

04:22 Q. But not the logo?

A. **No.**

Q. And your reasoning for that is that you were waiting for a different company to do what exactly?

A. **I'm not --**

04:23 Q. You're the president.

A. **You guys would know better than I would. But there's a company that has a logo that's similar. They're in a completely different industry and they're --**

MR. RAZAI: I would like to object to the extent 04:23 that it involves attorney/client communications. If

Mr. Cohen had had communications with your client regarding why you should or should not apply for registration, I'm advising not to divulge that information.

A. **Okay.**

04:23 **MR. AGUILA:** Well, but I mean it's valuable because you're saying that I'm copying your logo.

THE COURT: Well, but the question is, is this witness competent to answer your question? So the witness is being correctly advised that --

04:23 Your attorney is asserting on your behalf the attorney/client privilege. So you can answer the question but not to the extent it would require you to reveal confidential communications with your counsel. Does that make sense?

04:23 A. **Yes.**

THE COURT: So let's see what the question is pending now.

BY MR. AGUILA:

Q. So what was the -- what is the exact reason that you did

04:24 not apply for a logo from 1999 until now?

MR. RAZAI: Same objection.

THE COURT: Okay. But if he can, he can answer the question if he knows outside of his attorney/client communications.

04:24 A. **This goes back pretty far. So I can tell you right off**

in 1999, the company wasn't the size that it is today. We were two guys in a garage, so money was an issue. So paying for logo marks was not high on our list.

BY MR. AGUILA:

04:24 Q. Please get to the point, sir. We've behind time.

THE COURT: Excuse me. No, that -- no, he's answering your question.

MR. AGUILA: I'm sorry.

A. **So then we started into the business. Our name is well**

04:24 **known in the industry. Our logo is well known in the industry. Everybody knows us. They know our HydraFacial. We did look at applying and our attorney recommended to wait --**

MR. RAZAI: Objection.

04:24 **THE COURT:** That's the attorney part.

A. **Oh, sorry.**

MR. RAZAI: You don't have to divulge anything that you discussed with your attorney or your attorney told you. So if you can't answer the question without divulging --

A. **Okay.**

MR. RAZAI: -- attorney/client (inaud.) --

A. **And that's --**

MR. RAZAI: You don't have to answer. You can if you want to. But my advice to you is not to divulge

04:25 attorney/client information.

A. **Okay.**

BY MR. AGUILA:

Q. Mr. Cohen, as your -- in your position as president -- and I guess before you were also cofounder of Edge Systems; is that right?

A. **That's correct.**

Q. In that capacity, why did you not pursue a trademark for the logo?

MR. RAZAI: Same objection. Asked and answered, and same objection. Please do not divulge attorney/client privilege unless you want to.

THE COURT: Have you completed answering the question to the extent you can beyond --

A. **I believe so, yes.**

THE COURT: Okay. You got your answer.

MR. AGUILA: Okay. Thank you.

BY MR. AGUILA:

Q. Why did you not register the trade name Edge Systems until now?

MR. RAZAI: Same objection, Your Honor.

THE COURT: So that means you can answer the question so long as you're not relying upon attorney/client communications.

Your question I find a little confusing, though, because it was registered in 2005, Edge Systems.

MR. AGUILA: Diamond Edge --

THE COURT: You asked why he had not registered Edge Systems until now.

MR. AGUILA: Well, he hasn't. They have not registered.

04:26

MR. RAZAI: As a point of clarification, Your Honor, the Mark V Edge Systems is registered. The Mark X, I think he's referring to it without the word the.

THE COURT: My mistake.

04:26

MR. AGUILA: My mistake. Let me rephrase that.

BY MR. AGUILA:

Q. Why did you wait until -- well, why have you not applied for a trademark for Edge Systems as a company name?

MR. RAZAI: I apologize. For the record, same

04:26

objection. Please do not divulge --

THE COURT: Okay. But I think it's a little confusion because you're objecting and it sounds to Mr. Cohen as if you're saying he can't answer. You're reminding him that he should not be answering any questions by relying upon

04:27

attorney/client communications.

I think the point has been hammered home with you now. Fair to say?

A. **Yeah.**

THE COURT: He's got it. So if I were you, I

04:27

wouldn't say anything more -- any more objection unless you

hear him saying, And then my attorney said.

MR. RAZAI: Can a standing objection to this line of questioning, then, for the record?

THE COURT: Well, to the extent that it --

04:27 **MR. RAZAI**: It might require attorney --

THE COURT: Yes.

MR. RAZAI: -- on why did you or didn't you apply for marks.

THE COURT: Yes. Yes.

04:27 **MR. RAZAI**: Thank you, Your Honor.

A. **So I'd rather not answer.**

THE COURT: Because you're unable to answer it beyond attorney/client communications?

A. **Correct.**

04:27 **THE COURT**: Okay. That would be a way to answer it, then. If he asks you a question and the only way you can answer it is -- the only information I have is from my confidential communications with my lawyer, that would tell us that you have nothing more to say.

04:27 A. **Right.**

BY MR. AGUILA:

Q. Mr. Cohen, do you have any internal Edge System e-mails that deal with this issue of trademark -- the Edge System trademark for the company or for the logo? Any internal

04:28 e-mails?

MR. RAZAI: Can I object to relevance? It seems more like a deposition question than a hearing question --

THE COURT: I'm not sure what the relevance is.

MR. AGUILA: Well, okay. No, that's fine. I think -- well, okay. I'll finish with that. I'd like to submit into evidence Defendant's Exhibit 7.

There you go, sir.

MR. RAZAI: We stipulate to the entry of that exhibit.

04:28 **THE COURT**: All right. So Defendant's Exhibit 7 is in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

BY MR. AGUILA:

04:28 Q. Mr. Cohen, what -- can you describe the document that you're seeing?

A. **No. I've never seen it.**

Q. Well, we'll try to -- can you take a -- I don't know.

A. **It looks like a printout from the U.S. Patent and**

04:29 **Trademark Office for my logo.**

MR. AGUILA: Motion to strike, Your Honor. That was not necessary for him to say, My logo.

A. **For the Edge Systems' logo that we have.**

THE COURT: Yeah. It wouldn't be appropriate to

04:29 strike it. You could follow up and ask him a question about

that.

BY MR. AGUILA:

Q. Now, who is the person who applied for that logo? Does it say?

04:29 A. **Ralph Aguila. On November 1st, 2014.**

MR. AGUILA: I would like to submit that into evidence.

THE COURT: I think it's already in evidence.

MR. AGUILA: Oh, it's already? Okay.

04:29 A. **Just a different form.**

BY MR. AGUILA:

Q. Mr. Cohen, in your Plaintiff's Motion for Preliminary Injunction on page 18 you mentioned that it is necessary to protect consumers from Defendant's potentially harmful

04:30 knockoff products.

Do you have any evidence to say that Defendant's products are potentially harmful?

A. **I mean it's my own vision. I personally looked inside the machine in the white, and there's absolutely no way that**

04:30 **would pass electrical safety and it is fire hazard and could injure somebody. It's hardwired right into a 110 volt from --**

THE COURT: For the record, you're referring to the machine in the courtroom that the defendant has acknowledged

04:31 is his machine.

A. **Correct. Beyond that, the people that have purchased those items, including Dr. Duboys and then the woman in Atlanta, were told -- they told us, my company and myself, that Mr. Aguila's company told them to contact us for training. And we can't train somebody on a device that we don't make and we don't understand it and it's not safe. So there's -- so these people have no training.**

Lastly, the fluids that are in it, I have no idea where they're made or what's in them. So I don't really want to have my company or my name or my patents associated with it because it's dangerous to do so. I also contacted the FDA and spoke to Mr. Lee, as I mentioned earlier. He couldn't find the device, and so it's not registered, nor is any of the company names that you work under. We couldn't find those in the FDA. So all of that together makes it extremely dangerous and extremely harmful to my company.

BY MR. AGUILA:

Q. Mr. Cohen, you realize that Defendant's company is registered with the FDA and his operator number is 10048208.

MR. RAZAI: Objection. Lacks foundation.

THE COURT: Right. So you can ask him a question. That's more of a statement.

MR. AGUILA: Yep. You're right. I'm sorry.

BY MR. AGUILA:

Q. Could you tell us the names of the people who asked you

or told you that we told them to get training with you? Did I get that right?

A. **A woman -- I believe her name is Lonnie. I don't know exactly her name.**

04:32 **Am I allowed to ask you guys?**

MR. RAZAI: (Shaking head in the negative.)

A. **She wrote a declaration to the Court, and she was told by your company to contact us. She went to a trade show. She walked into the trade show. She saw our device in the booth**

04:33 **and that was the first time. She's the owner of the white one, the white unit that you manufactured, and sent it to us because she -- everybody was confused. She walked into our booth and saw our system, which is on the far right there, and saw the difference and frankly started crying. She had**

04:33 **paid you $6,000 and had no idea what to do with your device.**

BY MR. AGUILA:

Q. Were you aware that Ms. Lealani, I think?

A. **Lealani.**

Q. Put a positive notice on her eBay purchase of the

04:33 defendant's product?

A. **No.**

Q. You're not aware of that?

A. **No.**

Q. But you're testifying that she was crying and sad for

04:33 buying Defendant's product?

A. **She was very upset, yes. And to this day is very upset, and that's why she wrote the declaration.**

Q. But you were not aware that she put -- on eBay you can put negative or positive and she put positive?

04:34 **MR. RAZAI:** Objection. Lacks foundation. He said he doesn't know.

THE COURT: You already asked the question, and he said no.

MR. AGUILA: I take that back.

04:34 **BY MR. AGUILA:**

Q. Mr. Cohen, why is there a Jif peanut butter plastic jar on the back of Defendant's purported machine here?

A. **When we received the unit from Ms. Lealani, it didn't have all the componentry. One was the debris canister.**

04:34 **Without the debris canister you can't create vacuum. So we couldn't determine whether or not the system, how it worked and whether or not it violated our patent. So we put that jar on -- that was all we could find that would fit the back -- in order to create vacuum so the machine would work.**

04:34 **Then we tested the handpiece and sure enough found out that it violates -- it infringes on our patent.**

We also looked at the screen, and it's not a touch screen for control. It's just a rotating screen like you would use for your children to show pictures. So it doesn't

04:35 **have any control features like our system does. The controls**

are all analog down in the faceplate there. So in order to get it to operate, we had to put that jar on because it didn't come to her or to us with a debris canister.

Q. Okay. Thank you for that.

04:35 So just to summarize, you altered the machine by adding the Jif peanut butter canister in the back and by changing the monitor?

A. **No, no. The monitor, we just turned on. The jar we -- we didn't really alter it. We just put it on. You can**

04:35 **simply take it off and it will be just how she had it.**

Q. So you're saying that this monitor is not a touch screen monitor; is that right?

A. **No, it's not a touch screen monitor. Not a control monitor. It's just a display monitor. It shows like**

04:35 **pictures of your kids and it rotates through. I don't know what you call that, but it's not a touch screen like in your car or on our system or on your phone where you touch and control things. It just rolls up and shows pictures. You can't turn the machine on or off with the screen. It doesn't**

04:36 **operate the system.**

Q. And would you say that -- have you ever seen a Hydradermabrasion before -- Hydradermabrasion MD?

A. **No. And frankly, if we had, we would have contacted you and told -- like we had in the past. We have no beef with**

04:36 **you selling a dry system, and we've never had a problem with**

you being in business selling a dry system. But when it came to the wet systems, and when you started to produce those, that's when the issue started. And when you started using our marks and putting our name on a fictitious website. That's the only reason.

So we're not here fighting to put people out of business. We're just protecting our property and our patents. And on the dry, there's 20 or 30 companies that sell those devices and all do well -- or oxygen, as you said. You can have at it. It's the wet that's our property, our patents, our trademarks. That's the issue. You got to make sure the Court, I hope, understands that there's differentiation there. And that's -- whenever that comes up, that's when we contact you. But between those times, we don't say a thing.

Q. Mr. Cohen, how long -- for how long have you been aware of Defendant in either the capacity of Diamond Skin or HydraPeel or Hydradermabrasion Systems or any of the other companies that I founded? When was the first time that you heard about Defendant?

MR. RAZAI: Objection. Lacks foundation as to the companies that Mr. Aguila founded.

THE COURT: All right. Why don't you -- do you want him, then, to state the companies he's founded first and then ask him if he's familiar?

MR. RAZAI: Your Honor, I'll withdraw my objection and let Mr. Cohen answer.

A. **You personally, I didn't know anything about you personally until about 2006. I didn't know any of your companies. I didn't have any issues with anything.**

BY MR. AGUILA:

Q. So --

A. **And I really haven't been able to follow all the companies, frankly, and I don't know why they change. But now I kind of do. But I didn't follow it prior.**

Q. So were you aware of an Edge Systems in 1996 that --

A. **When you were 19 years old, I had no idea you had started Edge Systems. At the age 19, that's pretty good. I did not know that.**

Q. So in 2006 is the first time -- that's your testimony? 2006 is the first time you've heard of the name --

A. **Of you personally, Ralph Aguila.**

Q. Yes.

A. **Edge Systems I heard now in 2014. Nobody had ever used my logo or my company name. I wouldn't even imagine somebody trying to steal that. But nobody had ever done that, so I had never ever seen that until 2014. After contacting Lumenis, then that name came down and the Edge name went up. And that's when you started using my company name and logo. That's the first I saw of it, is -- in addition, that's --**

that's the first -- the only place I'd seen it was on that website.

Q. Okay. Mr. Cohen, in your motion on page 2 of the Motion For Preliminary Injunction, you include a side-by-side comparison of Defendant's HydraDerm and your machine that you call here the Edge System -- Edge machine.

In previous testimony, we have heard that there are various -- or variations of the HydraFacial. Why did you include just the one variation of the HydraFacial to compare with Defendant's machine?

A. **Because that's the one you're selling. That's the equivalent of what you're selling.**

Q. But you sell other HydraFacial machines, correct?

MR. RAZAI: Objection, Your Honor. The trade dress of the HydraFacial MD is the only trade dress at issue in this matter, so I don't understand the relevance of this line of questioning.

THE COURT: So you're saying you're only seeking to establish infringement of that trade dress?

MR. RAZAI: Yes, Your Honor.

THE COURT: The trade dress that we see on the machine in the courtroom?

MR. RAZAI: Yes, Your Honor. And if in the future there's other infringement, we can bring that up later. But today the only trade dress infringement issue is we believe

that the Hydradermabrasion MD infringes the trade dress of the HydraFacial MD, and that's why those are the only (inaud.).

THE COURT: Okay. So that's where we need to confine our inquiry.

MR. AGUILA: Okay.

BY MR. AGUILA:

Q. Mr. Cohen, what evidence do you have to support your claim that the defendant copied your trade dress?

A. **Right there, that machine. And then on the website and then the dates that the website was changed, you know, post our letters. It's either copied by the defendant, by yourself, or purchased by somebody from China or something. Looking inside of it, it's hard to know. But it's very easy to know that it does not meet U.S. safety standards. So it's either purchased -- so I don't know who really manufactures it. It's either made --**

Q. That was not the question.

A. **It could be made -- but I do know you sell it. So the problem is that you're selling a device that looks at least confusing enough to my -- to customers that they think it's the same.**

MR. RAZAI: Your Honor, I'm going to object to that line of questioning as argumentative. Mr. Aguila is asking Mr. Cohen to summarize six hours of testimony in one

question.

THE COURT: Right. Right. That's fair enough. So what questions do you have for Mr. Cohen?

BY MR. AGUILA:

04:42 Q. So -- well, your testimony is that Defendant's machine is copying your trademark?

A. **My testimony is the evidence of today proves -- all of the evidence today proves that we created the machinery. We own --**

04:42 **MR. AGUILA**: Objection, Your Honor. That's a legal conclusion.

THE COURT: All right. What is your question?

BY MR. AGUILA:

Q. Well, I just wanted to confirm that you're saying that

04:42 the defendant has copied your machine, the trade dress. I just wanted to have that in testimony.

A. **No. I'm saying that the device you're selling is a mimic of my trade dress, is trying to look much like mine.**

Q. Good. Now --

04:42 A. **And just to further that, the unit in the courtroom is much different than the unit that's shown on the website. That's the issue that the customers have. It's kind of a bait and switch, it's called.**

Q. Referring to Exhibit U, Plaintiff's Exhibit U. This is

04:43 the cease and desist letter from the plaintiffs to the

defendant in January of 2010.

Mr. Cohen, you claim that I stopped selling these supposedly infringing products after this letter shown in Exhibit U, Plaintiff's Exhibit U.

04:43 A. **I got to get -- I don't remember which one it was. What's the date of that one?**

Q. January 26th, 2010.

MR. RAZAI: It's Catherine Holland.

MR. AGUILA: I can give you my copy.

04:43 A. **What I said, and what I stated in claim was that Diamond Skin dissolved itself and therefore I figured the company no longer existed because the Diamond Skin dissolved itself and we -- and you -- we put that into evidence.**

BY MR. AGUILA:

04:44 Q. And in this letter --

A. **Normally when a company is dissolved, they don't sell something.**

Q. Thank you. In the cease and desist letter it mentions the websites hydradermabrasion.com and hydrapeel.com. Did

04:44 you look at those websites after the cease and desist letter?

A. **I don't remember. I don't recall.**

Q. So you can't -- and in this letter it says that we -- or the defendant was selling the supposedly infringing products on these websites, hydradermabrasion.com and hydrapeel.com.

04:44 A. **Is that a question or --**

Q. Yes.
A. **Yes, the letter says that.**
Q. So even though the infringing products -- supposedly infringing products were being sold on these two websites, you never took a look at them again?
A. **I had the Article of Dissolution so I was -- I felt fine. I thought your company was dissolved, dissoluted.**
Q. Do you have any internal e-mails not referring to attorneys that refer to this belief that the infringing products are no longer being sold on either hydradermabrasion.com or hydrapeel.com?
MR. RAZAI: Objection. Relevance to whether --
THE COURT: Yeah, I'm not sure what the relevance is of internal e-mails. You just ask him.
MR. AGUILA: Okay. Yeah, you're right.
BY MR. AGUILA:
Q. So how did you learn that Defendant was supposedly infringing on your products in 2010 or earlier in order to submit this cease and desist letter?
A. **I can't remember exactly. But normally we're told by our local reps or they're -- you know, they're asked by a customer. For example, Dr. Duboys, he asked our rep in New York, Hey, I've seen the device. You know. Different people look. I mean, they click on HydraFacial. And if your website comes up, they suddenly see it and then they -- it**

says the new website and the new and improved, so they call. And if you're telling them it's -- that you're Edge Systems, that's -- and the price is $6,000 they tend to listen. And that's --

04:46 Q. Mr. Cohen, your testimony before was that you print out in hard copy and you submit to -- I guess your attorneys and to your storage, your e-mail storage --

A. **Hard copy file.**

Q. Yeah. -- websites that might be infringing; is that

04:46 correct?

MR. RAZAI: Objection. Mischaracterizes the testimony.

THE COURT: Well, you can answer the question if that was your testimony.

04:47 A. **Anybody that we send out a letter of cease and desist, we keep the information in a file so that we can follow up and complete it. So that's where that came from and where everything else comes from.**

BY MR. AGUILA:

04:47 Q. So Mr. Cohen, as your position as president of Edge Systems LLC, you never took a look at any of these websites since the cease and desist letter?

A. **No, because I had the Article of Dissolution. So the company was dissolved.**

04:47 Q. What does that have to do whether I sell an infringing

product on hydradermabrasion.com?

MR. RAZAI: Objection. Argumentative.

THE COURT: Well, you got your answer. He said no. You know?

04:47 **MR. AGUILA:** Yep. Yep.

BY MR. AGUILA:

Q. One last thing on this topic. In your position as president of Edge Systems, who else other than yourself would have handled an issue revolving around potentially infringing

04:47 products at Edge Systems?

A. **Prior to me being president, Roger was president, so --**

Q. What was your position back then?

A. **What was I? Senior vice president, I guess.**

Q. From what time period?

04:48 A. **Probably from founding until about 2010 or '11, somewhere in there.**

Q. Do you think that you were president or vice president when this cease and desist letter was sent to the defendant in January 2010?

04:48 A. **2010, I believe Roger actually took the lead on that one. I will tell you we're equal partners and we've always shared everything. I mean, we talk about everything. So -- and that one, actually the attorney was taking a lead on sending you the letter. And then you responded to her in 2010.**

Q. Okay.

A. **And then when we got this article, that's when us, the attorneys, we all felt like it was ended.**
Q. And that's what your -- your attorneys thought that as well?
A. **Well, we didn't see a reason to pursue it. And we told our attorneys and they felt that --**
MR. RAZAI: Objection.
A. **Again it's -- yeah, it' client privilege. But yeah, we had a conversation. But the company was dissolved.**
Q. Well -- but, I mean someone told you to not focus on this problem again, right?
MR. RAZAI: Objection. Argumentative. Asked and answered?
THE COURT: Sustained.
MR. AGUILA: Your Honor, this is just for the latches, the four-year statute of limitations. So that's why it's important. But I'm done. I'll continue to another topic now.
THE COURT: Okay.
BY MR. AGUILA:
Q. Mr. Cohen, are you aware of Exhibit -- Plaintiff's Exhibit SS?
A. **Yes. I believe so, yeah.**
Q. I can show it to you.
A. **Yeah. I remember seeing it.**

MR. RAZAI: You should have it over there.
BY MR. AGUILA:
Q. Here.
A. **Thanks.**
Q. No problem.
Do you know who would have been responsible for that CAD picture or that CAD product?
MR. RAZAI: Objection. Relevance.
THE COURT: Plaintiff's Exhibit SS -- oh, I remember what that is.
MR. AGUILA: The drawing, the CAD.
THE COURT: So who is responsible for if, how is that relevant?
MR. AGUILA: They're using that to establish that they developed their trade dress before the HydraDerm in 2004. So I would like to see -- well, I can rephrase the question.
BY MR. AGUILA:
Q. Mr. Cohen, were you responsible for making that drawing?
A. **No.**
Q. Would you claim that that is evidence that it's just on the LLC developed the trade dress in 2004 for your HydraFacial?
A. **It's one of many things, but it does show that we showed the trade dress, that we designed the machine. But it's one**

of many things.

Q. In 2004 in October?

A. **Correct.**

Q. Mr. Cohen, were you aware that one of my companies, Diamond Skin, in early 2004 was already selling a microdermabrasion machine that was offering transdermal infusion at the same time as the point of dermabrasion?

A. **No, I've never seen that.**

Q. Well --

A. **I was always aware that you had a dry microderm crystal system and then a diamond tip system. But they were all dry. And that's why in 2006 I sent you an e-mail and you sent back and confirmed that.**

Q. Mr. Cohen, would you say that you have a good memory?

A. **Not as good as it used to be, but pretty good, yeah.**

Q. Now, did you receive the machine from Ms. Lealani Irby that she shipped from Georgia?

A. **Our company received it, yes.**

Q. Your company. But you did not receive it?

A. **Receive it in? No. My receiving department did.**

Q. Your shipping department or --

A. **Receiving. And then they called me and then we unpacked it and took a look at it.**

Q. Mr. Cohen, did you promise to reward Mr. Duboys in any way for his testimony today?

A. **No.**
Q. Are you aware of anybody in your company as in your capacity as president who may have made an offer to Mr. Duboys for his testimony?
04:53 A. **Not for his testimony. But I believe we made an offer for -- that he wanted to buy a real HydraFacial machine. He's looked at our machine. I don't know if an offer's been written to him or not.**
Q. So you've made him on offer to sell him a HydraFacial
04:53 from your company?
A. **No. He realized what he has is not correct. He called and our rep went out to show him -- or it was a contact with him. And I don't know if it's been shown to him or not yet. I have no idea.**
04:54 Q. Will you be willing to offer a discount on any HydraFacial machines that Mr. Duboys or his companies would purchase in the future?
A. **Well, most of our machines we list at a higher price, around 29,000, and most of them are discount, yes. So --**
04:54 Q. So yes, you will offer him a discount?
A. **Yeah, but not for any of his -- we've never given anybody a machine for any testimony or anything. We stay out of that. So we would not pay him for his testimony. We've not induced him to come here and say that that's something that**
04:54 **other than what it is.**

Q. Now, in your Motion for Preliminary Injunction you had mentioned that your company has made $95 million over five years; is that correct?

A. **Correct.**

04:55 Q. In your testimony, however, you had mentioned now that it's around 60 million?

A. **Well, we sell all the products. The other products -- and the 64 million, what we were speaking about, because this pertains to the United States. So that's HydraFacial, our HydraFacial tower system, 64 million. But other products add into it.**

Q. Are you aware in your capacity as president of Edge Systems of any click fraud against the defendant's company?

A. **No.**

04:55 Q. Now, Mr. Cohen, is Edge Systems LLC an independent company?

A. **You got to define independent. What does that mean?**

Q. Well --

A. **We're privately owned.**

04:56 Q. Does anybody own you? Does another company own you?

MR. RAZAI: Objection. Relevance.

MR. AGUILA: They had mentioned that they have owned Edge Systems, and I'm trying to -- I believe I can get them on bad faith on this.

04:56 **THE COURT:** What would be the relevance?

MR. AGUILA: Well, just to show that -- dishonesty. I believe I have evidence to show that they were actually owned by another company.

THE COURT: And the dishonesty is -- I'm sorry. What -- you're impeaching him for saying something earlier?

MR. AGUILA: Yes.

THE COURT: What -- what's the earlier testimony?

MR. AGUILA: He said earlier, I believe, that Edge Systems is an independent company from the beginning, owned by him and Mr. Ignon.

MR. RAZAI: I think he's confused on the word independent.

THE COURT: Yeah, I'm not sure. I don't remember hearing independent. But I have heard that this witness and Mr. Ignon created the company together as joint partners, and I think -- was it '97? So the exact testimony --

MR. AGUILA: I think they said '97, right.

THE COURT: Okay. So you're trying to impeach that statement, that they founded the company in '97?

MR. AGUILA: Yes.

THE COURT: And that they own it?

MR. AGUILA: Yes.

MR. RAZAI: There was never any testimony that they currently own it. It was just testimony that they founded the company in 1997.

THE COURT: All right. Why does it matter if they personally currently have ownership of the company or not.

MR. AGUILA: Because until now in all their motions and complaints they've said that they own the company, and -- can I just ask one question and maybe they can --

THE COURT: Right. Right.

MR. AGUILA: Could I do that?

THE COURT: Yeah. Go ahead.

BY MR. AGUILA:

Q. Mr. Cohen, have you ever heard of a company called Western Presidio 5 LP?

MR. RAZAI: Objection. Relevance.

THE COURT: So what is the relevance?

MR. AGUILA: Well, to see whether he'll say yes or -- okay. Let me rephrase that.

BY MR. AGUILA:

Q. Does Western Presidio 5 LP own Edge Systems LLC?

MR. RAZAI: Objection. Relevance.

THE COURT: Okay. And how is it relevant whether Edge is owned by another company?

MR. AGUILA: Well, firstly, it impeaches their honesty by saying that they own Edge Systems. And also we would like to know who is actually suing us -- or suing me.

THE COURT: Well, it's clear who's suing you. Edge Systems LLC and Axia MedSciences LLC. I mean, there's no

ambiguity about who the plaintiff is.

MR. AGUILA: Well, but if another -- if Edge Systems is actually a subsidiary of another company --

THE COURT: They could still have the capacity to sue. So I mean the identify of the plaintiff is not ambiguous here. I just think this seems like a tangent that doesn't seem --

MR. AGUILA: Okay. When we're -- deposition or something like that. Okay. All right. I'll leave that.

04:58 **THE COURT**: And can I just inquire. It's a public courtroom and we're happy to have people, but we did have a rule invoked about witnesses.

The two gentleman that have come in, are you witnesses involved in the lawsuit at all?

04:59 **MR. RAZAI**: No, Your Honor. They're affiliated with the law firm, and they're part of packing stuff.

THE COURT: Okay. Great. Happy to have you. I just wanted to check.

A. **They're here to clear your courtroom.**

04:59 **MR. AGUILA**: Okay. Just to continue so we finish this. I would like to enter into -- this exhibit, Defendant's Exhibit 21 into evidence.

BY MR. AGUILA:

Q. Mr. Cohen, can you describe the document in front of you, Exhibit 21?

04:59

THE COURT: That's what you said.

A. **Just give me a minute. I've never seen it. (Reading.) This is -- it's from the Department of Health and Human Resources, and it's a letter from Alonzo Cruse regarding our EIR, which is an establishment inspection report.**

BY MR. AGUILA:

Q. It's a letter from an FDA inspector?

A. **Correct.**

Q. Can you turn to page 4 of that paper?

A. **(Complies.) Yes.**

Q. Page 4, as it says in the bottom. So 4 of 7. Where it says 4 of 7 in the bottom.

A. **Yes.**

Q. Okay. Do you see where it says, Complaints, near the bottom?

A. **Yes.**

Q. Can you read that section?

A. **During the inspection I reviewed the firm's complaint and MDR reporting doc number -- it's a quasi 14.028, revision B, as well as the complaint logs for the years 2011, 2012, and 2013. Keep going?**

Q. Yes.

A. **The firm received five complaints for 2011, 22 complaints for 2012, and 45 complaints for 2013. Many of the firm's complaints were for the Class 1 devices. Many of the 2012**

complaints were for irritation, allergic reaction, burning sensation, breakouts and skin infections regarding the firm's Class 1 devices. When asked about the increase in complaints, Ms. Chang, that's our FDA supervisor at that 05:02 **time, justified the spike in complaints by stating that sales went up drastically and also Edge Systems being calling customers to getting feedback, and they were really forthcoming with information.**

Q. Thank you. Why do you think your company has 45 05:02 complaints in 2013?

A. **We sell a lot of machinery and do a lot of procedures. And most people know different skin types take different types of reagents. People -- a lot of women will try different things. They will get maybe some irritation and** 05:02 **they will move on to a different product. And that's somewhat what happens with our device. The basic procedure, we have very little issue with. It's the post procedure when the estheticians or the doctors put on a different cream or something that's kind of unique to their thought pattern and** 05:02 **may not be ours. It may be somebody's. And there's always interplay in issues with different chemicals and the amount of chemicals that may be put on.**

Q. So would you say that your HydraFacial device is safer than Defendant's HydraDerm MD?

A. **Yes, in regards to the way it's manufactured and the way** 05:03

it's used in an office. I've never really used it in an office. I've never seen it used, so I wouldn't know.

Q. And you're not aware of how many complaints the Hydradermabrasion or the HydraDerm MD had received?

05:03 A. No. Like I said, we couldn't find it on the FDA listing.

MR. AGUILA: I'd like to -- can I submit that into evidence?

THE COURT: Is there any objection to Defendant's Exhibit 21?

05:03 MR. RAZAI: No, Your Honor.

THE COURT: All right. It's in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

MR. AGUILA: I would like to submit Defendant's

05:03 Exhibit 34 into evidence.

BY MR. AGUILA:

Q. Mr. Cohen, have you ever seen that document before?

A. No.

Q. Have you ever heard of MAUDE, an FDA database called

05:04 MAUDE, M-A-U-D-E?

A. Yes.

Q. Are you aware of that specific complaint to the FDA?

A. Yes. Yeah, we reported it to the FDA.

Q. You reported it?

05:04 A. Yeah, that's our responsibility. If there's any chance

of physical harm to a person, then it's our responsibility to report it to the FDA.

Q. Could you just read that first paragraph?

A. **Patient received a facial acid peel cosmetic treatment performed by the health professional during the above dates. The suspect products used were cosmetic products containing glycolic acid and salicylic acid. The products were used in conjunction with the HydraFacial Wave device. The operator failed to follow the instructions for use and precaution to properly cover and protect the patient's eyes during the patient treatment causing the acidic fluids to get into the patient's eyes and surrounding areas resulting in reported patient injuries.**

These reports include excessive tearing in both eyes, itchiness, swelling and burning sensation of eyes, surrounding areas, rash, and irritated skin. Mild contact dermatitis. Should I keep going here? Lacrimal tear ducts --

Q. I think you can stop.

A. **So what this is is one incident, or even in this case, the 45 incidents, out of slightly over a million procedures. So it's -- as far as the FDA's concerned, they closed the incident report.**

Q. Mr. Cohen, would you say that your testimony was shaped in some way? Did you prepare for your testimony?

MR. RAZAI: Objection. Relevance, Your Honor.

MR. AGUILA: Okay. I take it back.

BY MR. AGUILA:

Q. Now, questioning Exhibit QQ, Plaintiff's Exhibit QQ, the e-mail that I purportedly sent you in 2006.

A. **Right.**

MR. AGUILA: Your Honor, I would like to submit 21.

THE COURT: 34, you mean?

MR. AGUILA: 34. Sorry. The MAUDE.

THE COURT: Any objection?

MR. RAZAI: No objection.

THE COURT: All right. It's in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

BY MR. AGUILA:

Q. Mr. Cohen, have you seen Exhibit QQ?

A. **Yes, I remember it.**

Q. Can you have it in front of you?

A. **I don't see it. Go ahead, though, keep asking.**

Q. All right. Now, you're saying here that I e-mailed to you with the term, However, our wands do not have the capability of using liquids such as the SilkPeel, DiamondTome, HydroWand or the HydraFacial; is that right?

A. **Those were your words, yes.**

Q. And you're saying that none of Defendant's machines

infringed on any of your products before now?
A. **No. What I'm saying is we are only in contact with the defendant or yourself whenever we feel that you're infringing on our products. And at this time I felt that you were infringing on our product, that's why I contacted you. And then you wrote back and you said you're not using fluid through your handpiece so you're not -- so I confirmed that, clarified it. And which you agreed. And then I felt the incident was closed.**

05:07 05:08 05:08 05:08

If there's any issue, I was just thinking, with the validity of this, there's a woman named Carol Ferrin who we can have --
Q. Could you spell that, please.
A. **F-E-R-R-I-N. And she stores all these things. And I can have her write a declaration and swear that she pulled this out of the file and this is what --**
THE COURT: I don't think it's asking about that right now. So I'd just try to answer the question.
A. **I'm just --**
BY MR. AGUILA:
Q. Mr. Cohen, who in Lumenis did you speak with?
A. **Like I said before, I can't remember the person's exact name. I can find it. It was one of the sales managers, who in turn said he would contact the in-house counsel. And then I gave it to my attorney and then my attorney handled it from**

there.
Q. Did you speak with anyone at Lumenis in Israel, their headquarters?
A. **Not recently.**
05:09 Q. Well, regarding this matter specifically?
A. **No.**
Q. Are you aware of anyone at your company who has spoken with Lumenis regarding this matter?
A. **Lumenis USA, yes.**
05:09 Q. Who other than yourself?
A. **Dean Langdon.**
Q. Spell that, please.
A. **Dean Langdon, L-A-N-G-D-O-N.**
Q. And that's it?
05:09 A. **As far as speaking to Lumenis, yeah, I believe so.**
Q. And you're aware that Lumenis is an Israeli company, not a U.S. company?
MR. RAZAI: Objection. Relevance.
THE COURT: Sustained.
05:09 **BY MR. AGUILA:**
Q. Did you know who Marshae Colbert was?
MR. RAZAI: Objection. Relevance.
MR. AGUILA: This is the lady who they testified stole my credit card information in 2006 as an employee of
05:10 Edge Systems.

THE COURT: I can't understand the possible relevance of that.

MR. AGUILA: Well, I believe that they had designed to do that on purpose. And I'm just trying to see if I could build a foundation on that, that they had ordered her to steal my credit card information as an employee of Edge Systems.

MR. RAZAI: That's a little farfetched, Your Honor, for relevance.

THE COURT: It really is.

MR. AGUILA: But they testified --

THE COURT: Yeah. I saw your letter of response.

MR. AGUILA: Right.

THE COURT: This is in response to a 2006 cease and desist letter, correct? You responded to that letter by accusing --

MR. AGUILA: I sent a police report from that and -- okay. That's fine.

THE COURT: The issue here is whether you're infringing their product today.

MR. AGUILA: Yes.

BY MR. AGUILA:

Q. One thing. In 2006, do you know what Edge Systems -- what type of conversations you had at Edge Systems regarding the defendant?

MR. RAZAI: Objection. Vague. Relevance.

THE COURT: I'm sorry. The question is -- let me look at it. Sustained.

MR. AGUILA: Almost finished. Just a little bit more. Where is that CAD exhibit?

THE COURT: SS? Exhibit SS? Would you like to borrow my copy?

MR. AGUILA: No, no. That's fine. Just one question on that.

BY MR. AGUILA:

Q. Mr. Cohen, are you aware that Mr. Ignon ordered the creation of this document?

MR. RAZAI: Objection. Relevance.

THE COURT: Right. What is the relevance whether he's aware of Mr. Ignon ordering it?

MR. AGUILA: You're right. I take that back.

THE COURT: All right.

BY MR. AGUILA:

Q. Now, really we're at the end here.

Mr. Cohen, you claimed that HydraFacial is An iconic brand. Would you classify it that way?

MR. RAZAI: Objection. Relevance.

THE COURT: Right. What is the relevance?

MR. AGUILA: Well, we're trying to say that their product is actually generic, their trademark is generic in

nature.

MR. RAZAI: My relevance objection is whether it's icon has no bearing on any of the claims that are --

MR. AGUILA: Okay. I take that back. Fine.

BY MR. AGUILA:

Q. Would you say that the -- your machine -- what is the name of your machine?

MR. RAZAI: Objection. Vague. Which machine are you referring to?

05:13 **MR. AGUILA**: Your machine. The plaintiff's machine that you've designated. What is the name that you call it?

MR. RAZAI: Observation. Vague.

THE COURT: The machine that is -- that they are claiming you have violated the patent, infringed the patent on?

05:13 **MR. AGUILA**: The machine that they manufacture.

THE COURT: That is the subject of this lawsuit?

MR. AGUILA: Yes.

BY MR. AGUILA:

05:13 Q. What is the name of it?

A. **HydraFacial MD or we also call it the tower for short.**

Q. Have you ever called it the word the Edge System?

A. **We've called some of the solutions inside of the machine the Edge System.**

05:13 Q. But not the machine itself?

A. **We have in the past. You know, just more as a slang talk, yeah. Because it has Edge Systems on the front panel.**
Q. Do you have documentation at Edge Systems?
A. **No.**
05:14 Q. So you don't have documents saying that you've called this the Edge System?
A. **No.**
MR. RAZAI: Objection. Relevance.
A. **I can look for it, but I don't --**
05:14 **MR. AGUILA:** Well, the trademark is the Edge System, that's what they're suing me for.
THE COURT: Right. That's the trademark, but they're not claiming that that's the name of the machine.
A. **That's the name of our company.**
05:14 **MR. AGUILA:** Well --
MR. RAZAI: Mr. Cohen also testified that there are solutions that have been marketed the Edge System.
MR. AGUILA: Well -- but the trademark is from 2000, and it says for a microdermabrasion machine
05:14 specifically, not for a company. Their trademark, the Edge System, is referring to a microdermabrasion machine.
MR. RAZAI: Your Honor, there's -- it's for a class of goods and it's been used in connection with solutions, as Mr. Cohen has testified. So for the relevance, I don't --
05:14 **THE COURT:** Right, right. I think this is kind of

aside from the point.
BY MR. AGUILA:
Q. Would you say that the word hydrafacial is generic?
MR. RAZAI: Objection. The word hydrafacial is not at issue in this case.
MR. AGUILA: But the name of their machine is called HydraFacial MD.
THE COURT: But they're not claiming --
MR. RAZAI: The word hydrafacial is not --
THE COURT: But they're not claiming you've infringed that trademark. This is not part of their preliminary injunction claim.
MR. AGUILA: I see. I gotcha.
THE COURT: And that's all we're concerned with here today.
BY MR. AGUILA:
Q. Would you say that the term vortex fusion, one of your trademark names, is descriptive of a vortex fusion?
MR. RAZAI: Objection, Your Honor. The mark vortex fusion is incontestable based on descriptiveness (inaud.) --
THE COURT: Right. And -- and I don't know this -- whether this witness' opinion about that is really relevant.
MR. AGUILA: Okay.
BY MR. AGUILA:
Q. Mr. Cohen, have you abandoned the term the Edge System?

MR. RAZAI: Objection to the extent that it asks for a legal conclusion. Mr. Cohen is not an attorney.

MR. AGUILA: Well, abandoned the use.

THE COURT: Well, you can answer that as you understand the term abandon, sir.

A. **No. It's my company's name.**

BY MR. AGUILA:

Q. No, no. But I mean have you abandoned the use of calling any microdermabrasion machines of yours the Edge System?

MR. RAZAI: Objection. Relevance. Asked and answered. We've already talked about the Edge System.

THE COURT: Right. Let him answer that question.

A. **I would have to refer to my attorney and go through it all, so I don't know the answer.**

THE COURT: You mean in terms of a legal concept of abandonment?

A. **Yeah. Whether I -- yeah, I can't tell you whether we have or haven't. But our company is still called it --**

MR. AGUILA: Your Honor, I can just -- let me rephrase it.

BY MR. AGUILA:

Q. Do you sell currently any microdermabrasion machines that are called the Edge System?

MR. RAZAI: Objection. Relevance.

THE COURT: You can answer the question.

BY MR. AGUILA:

Q. Yes or no?

A. **We sell some of the fluids that go into the machine under the Edge Systems.**

05:17 **THE COURT:** That's your answer.

BY MR. AGUILA:

Q. Well, which fluids?

A. **I believe it's our -- I believe it's the Activ-4.**

BY MR. AGUILA:

05:17 Q. So the Activ-4 is called the Edge System?

A. **It has it on the bottle.**

Q. But it's called the Edge System?

A. **Uh-huh. (Nodding affirmatively.) It has both.**

Q. Activ-4?

05:17 A. **(Nodding affirmatively).**

Q. Okay. Thank you. That's exactly what I wanted to hear.

Okay. Mr. Cohen, were you aware that the defendant was using the terms Activ-4, Antiox-plus, Antiox-6, Beta-HD, DermaBuilder and GlySal before your company?

05:17 A. **No.**

Q. Now, just -- this is the end. The patents. Well, do you have any knowledge regarding patents --

A. **Some.**

Q. -- in general?

05:18 A. **A little bit, yeah.**

Q. Are you aware of the patent 6241739 that was submitted into evidence?
A. **I need to have it in front of me. I don't know.**
Q. It is Exhibit -- Defendant's Exhibit 19.
05:18 **MR. RAZAI:** It's 20.
MR. AGUILA: 20? Okay. Sorry. Can I show it to him to refresh his memory?
MR. RAZAI: (Complies.)
Your Honor, just to speed things up. Again, we --
05:18 we'll stipulate that the filing date of that patent is what the filing date says. If Mr. Aguila is trying prove validity, we're happy to brief that issue. But I don't think there's any factual testimony that Mr. Cohen can provide. (Inaud.) --
05:19 **THE COURT:** I think that's right. Mr. Cohen doesn't have personal knowledge about the 739 patent. It's a patent from some other wholly independent company. And the filing date on your document for that patent is what it is, right?
05:19 **MR. AGUILA:** Okay. That's earlier. Okay. All right.
BY MR. AGUILA:
Q. So were you involved in any patent -- any of the Edge Systems' patents?
05:19 A. **Yes.**

Q. Are you included as one of the co-inventors in any of the patents?

MR. RAZAI: Objection, Your Honor. The 620 patent does not list Mr. Cohen as an inventor. It's the only patent that's at issue in this preliminary injunction.

05:19

THE COURT: Sustained.

MR. AGUILA: I think that that's all. I have no more questions.

THE COURT: Any redirect?

05:20

MR. RAZAI: Two very quick redirect questions.

REDIRECT EXAMINATION

BY MR. RAZAI:

Q. Mr. Cohen, earlier you said that you've used the word the Edge System in connection with Activ-4; is that correct?

05:20

A. **I believe so.**

Q. Now, you're not necessarily testifying that every single Activ-4 bottle is marked with the Edge System, are you?

A. **No.**

Q. And then the HydraFacial MD machine, does it say Edge Systems on the bottom?

05:20

A. **It says Edge Systems, correct.**

Q. And in your opinion, how similar is that to the word the Edge Systems?

A. **Very similar.**

05:20

Q. How important is the mark Edge Systems to your company?
A. **It's very important. It's the name of our company and it's known in our industry.**

MR. RAZAI: I have no further questions, Your Honor.

THE COURT: All right. You can step down, sir.

So does the plaintiff have any other evidence?

MR. RAZAI: I need to authenticate those two documents. It might take all of three seconds.

05:20 **THE COURT SECURITY OFFICER**: I have a question about Defendant's 4. We were going to go back to that.

THE COURT: Defendent's Exhibit 4, because that's not in evidence, Nancy?

THE COURT SECURITY OFFICER: No.

05:21 **THE COURT**: Let's see what that is. Oh, I think you were going to try to admit that in your case.

MR. RAZAI: Yes.

THE COURT: Thank you, Nancy, but that's not in yet.

05:21 **THE COURT SECURITY OFFICER**: And Number 11?

THE COURT: Defendant's Exhibit 11?

THE COURT SECURITY OFFICER: And then XX for the plaintiff.

THE COURT: Defendant's Exhibit 11. Was that --

05:21 what is that, Nancy?

MR. AGUILA: A copy of the HydraFacial.com website, Defendant's 11.

THE COURT: Let me just see. Our notes are showing I admitted it subject to the plaintiff's relevancy objection. Okay? So that's in. And I can consider relevance when I review all this.

05:21

THE COURT SECURITY OFFICER: Thank you. Defendant's 4 and Plaintiff's XX.

THE COURT: Did that. So --

05:22

MR. RAZAI: That's what I'm doing right now.

THE COURT: Okay. All right. Will you swear Mr. Razai.

MR. BABCOCK: And, Your Honor, just a procedural issue. My clients have an 8:00 o'clock flight. They're off the stand now. They would certainly love to participate further by listening, but they would like to be excused and head to the airport.

05:22

THE COURT: I have no problem with that because you don't plan on calling them in rebuttal.

MR. BABCOCK: We do not. Their testimony is concluded, and they wanted to make sure that they had the Court's understanding that they need to get back to California tonight.

05:22

THE COURT: Right. I see no problem with that. And let me just double-check. Mr. Aguila, you've questioned

them. You're not calling them again as a witness. It wouldn't make any sense. So we're going to allow them to leave.

MR. AGUILA: Okay.

05:22 **MR. BABCOCK:** And that goes for Dr. Duboys as well. He has an 8:00 o'clock flight.

THE COURT: Of course. Of course.

MR. RAZAI: And I do as well, so after this I might -- and I do as well. Can I be excused?

05:22 **MR. BABCOCK:** No, I can't excuse Mr. Razai.

THE COURT: All right. So why don't you swear Mr. Razai.

Thereupon,

ALI RAZAI,

05:23 having been duly sworn by the Clerk, testified as follows:

THE WITNESS: I do.

THE COURT SECURITY OFFICER: Have a seat. State you name for the record and spell your last name.

THE WITNESS: Ali S. Razai, R-A-Z-A-I.

DIRECT EXAMINATION

BY MR. BABCOCK:

Q. Mr. Razai, would you please look at Exhibit double X?

A. **Yes.**

05:23 Q. Do you recognize Exhibit double X?

A. **I do.**
Q. Are you familiar with what Exhibit double X is?
A. **Yes, I am.**
Q. What is it?
05:23 A. **It's a website screen shot from www.diamondskin.com/diamondskin_system.htm dated July 28th, 2006, 3:41 p.m.**
Q. Do you know where this exhibit was obtained?
A. **Yes. It was part of the file for a matter with Diamond** 05:23 **Skin, between our client, Edge Systems, and Diamond Skin from 2006. It was in that file, the physical file.**
Q. Are you familiar with the practice of the firm's collection of the files?
A. **I am.**
05:24 Q. And is it the firm's practice to store these documents in the files?
A. **Yes.**
Q. Was this document obtained from those files?
A. **It was.**
05:24 Q. Is it a true and correct copy of the document in those files?
A. **It is.**
Q. Was it stored in the firm's ordinary course of business?
A. **It was.**
05:24 **MR. BABCOCK:** Your Honor, I move to introduce

double X into the record.

THE COURT: Is there any objection?

MR. AGUILA: Can I cross-examine?

THE COURT: You could inquire about the authentication. It's just limited to that. Go ahead. You can do it right from where you are.

MR. RAZAI: Can we finish the other exhibit first, Your Honor, so we can just do it in one shot?

THE COURT: Well, let him ask you about this one.

MR. AGUILA: It's for ZZ or XX?

THE COURT: XX.

VOIR DIRE EXAMINATION

BY MR. AGUILA:

Q. Mr. Razai, you were saying that this is located in your law firm's servers?

A. **No. It's a physical file.**

Q. This is a physical file located in your law firm?

A. **In our file room. I had my assistant pull the file from the file room.**

Q. Was your assistant involved in printing this out in 2006?

A. **No.**

Q. Who was the person who printed this out in 2006?

A. **I don't know.**

Q. Who is the person who was in charge of maintaining it

from 2006 until now?

A. **I don't understand the question.**

Q. Who was the custodian of this document from 2006 until now?

05:25 A. **Knobbe Martens. The law firm of Knobbe Martens was the custodian.**

Q. No, but the actual person?

A. **There's not -- the law firm of Knobbe Martens was the custodian of this document since 2006.**

05:25 **MR. AGUILA:** Well, you know, I would maintain my objection that he does not have enough proof to authenticate since he doesn't know who printed it out.

THE COURT: You're talking about the authentication, not about the business records exception to

05:26 the hearsay rule.

MR. AGUILA: Right.

THE COURT: It's not a hearsay objection, it's an authentication.

MR. AGUILA: Well, it is hearsay in that the person

05:26 who printed it out is not here and he doesn't know who it is, who printed this out.

THE COURT: Right. Okay. So that's really -- does your objection then fall on the absence of knowledge about the individual who printed this from the computer?

05:26 **MR. AGUILA:** That's correct, yes.

THE COURT: I understand your objection.

MR. BABCOCK: But it's a business record, Your Honor.

THE COURT: I understand. But the business record is one thing. The authentication is something else. But I don't think you're challenging -- I'm trying to understand your objection. You're saying the absence of knowing the human being who printed this out undermines authentication or the business record exception? Which one is it?

05:26 **MR. AGUILA**: I would say both, but probably the business -- well...

MR. BABCOCK: It has every objective indicia of being authentic on its face. It's been maintained in the ordinary course of business at the firm. It was found by Mr. Razai in the files of the law firm. There's no evidence of any tampering. I think it's sufficient indicia for it to be deemed authentic.

THE COURT: Well -- okay. And I think everything you just said goes more to the business record exception than it does authentication. Authentication is, is what we see in this document what was on the computer on July 28th of 2006, right? That's what authentication is about.

MR. BABCOCK: Sure. Yes, Your Honor.

THE COURT: So would you like to lay anymore foundation on that? I understand it's been kept in your

records continuously since that date, but is it what it purports to be, a picture of what was on that computer website on that date?

DIRECT EXAMINATION (cont.)

BY MR. BABCOCK:

Q. Is it the firm's practice to print out the pages from the website that are at issue in the case?

A. **One of our practices when we send out cease and desist letters is document the -- is to document the reason we're sending a cease and desist letter. And one of the practice is to take screen shots. And when we had physical files, was to actually take printouts and put them into the physical file. In 2006 when this document was created, the firm maintained physical files. The document was contemporaneously printed, put in the files at the time of the screen shot. Put into the physical file in which it remained until I took a photocopy and put it into evidence here in this case.**

Q. Is there any practice of changing or in any way altering the documents?

A. **As an officer of the Court, it would be a huge violation of our ethical obligations to the Court as well as to our clients and to the general public if we to in any way mess with documents or --**

Q. So your testimony is that this is a true and accurate screen shot from that time?

A. **I can swear under oath that to my knowledge this is a true and correct copy of this document, and to my firm's policy to maintain true and correct copies of document in its files without doctoring.**

05:28

THE COURT: The question is a different one, I believe. And that is that the document was printed from the internet on July 28th, 2006 at the time stated from the website that's stated there. I won't say it again. And the reason you know that is because your firm was preparing to bring to issue a cease and desist letter to the defendant for his use -- in connection with his use of the diamondskin.com website; am I right?

05:29

A. **Or a product printed thereon, Your Honor.**

THE COURT: A product offered on that website.

A. **Yes.**

THE COURT: And that's why it caused you to go to the website and to document what was on it on that date because this was a predicate to you issuing a cease and desist letter; am I right?

05:29

A. **Yes, Your Honor.**

THE COURT: I understand that. You've authenticated the document. I will overrule the objection. So the Exhibit ZZ -- XX -- excuse me. This is an e-mail.

05:29

MR. BABCOCK: ZZ was the website. I'm sorry. XX is the website, ZZ was the e-mail.

THE COURT: Yes. Okay. So now go ahead and authenticate.

05:30 A. **Can I see a copy of it? I don't have a copy here.**

BY MR. BABCOCK:

Q. Mr. Razai, I'm going to show you what's been marked as Exhibit ZZ. Do you recognize Exhibit ZZ?

A. **I do.**

05:30 Q. And what is Exhibit ZZ?

A. **Exhibit ZZ is an e-mail from Ralph -- from an e-mail address at support at hydradermabrasion.com to Catherine Holland dated January 12th, 2010, signed by Ralph Aguila.**

Q. And have you seen that e-mail before?

05:30 A. **I have.**

Q. Where did you first see it?

A. **This e-mail was forwarded to me by one of my colleagues at the firm who had searched the physical -- the electronic file for this 2010 incident between our client, Edge Systems,** 05:30 **and Diamond Skin Systems over trademark violations as well as copyright and patent violations which resulted in a cease and desist letter.**

Q. So was that document stored in the electronic file?

A. **It was stored in the electronic file.**

05:31 Q. And is it a true and correct copy of the document that

was stored in the electronic file?
A. **It is a true and correct copy.**
Q. And is that file kept in the ordinary course of the law firm's business?
05:31 A. **It is kept in the ordinary course of the law firm's business.**
Q. What is the law firm's practice regarding storing files and maintaining them in their original form?
A. **We have a policy to store files and maintain them in the**
05:31 **original form.**
Q. Is there any possibility that that exhibit was in any way altered or changed?
A. **Absolutely not.**
Q. Why is that?
05:31 A. **Because this document was forwarded to the file upon receipt where it stayed until it was forwarded to me for printing. And we can't go in and change e-mails like that. It's just not possible.**
Q. Is that correspondence basically a correspondence folder?
05:31 A. **It's a correspondence folder. That's correct.**
MR. BABCOCK: So, Your Honor, I move to introduce ZZ into evidence.
THE COURT: Is there any objection?
MR. AGUILA: Your Honor, I don't have an objection
05:31 for this. But going back to the XX real quick.

THE COURT: Okay. Then if you don't have an objection to this, Exhibit ZZ is in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

05:32 **THE COURT**: And what did you want to say, sir?

MR. AGUILA: Real quick. Mr. Razai in his first testimony he had said that the XX document was retrieved by his secretary and then later on he had claimed that he was the one who retrieved it. So maybe I misheard.

05:32 **THE COURT**: I don't think that really undermines the authentication of the document. So they're both in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

05:32 **MR. BABCOCK**: I have no further questions for Mr. Razai.

THE COURT: Okay. No. Thank you, sir.

MR. RAZAI: Thank you.

THE COURT: So now the plaintiff rests, correct?

05:32 **MR. BABCOCK**: Yes, Your Honor.

THE COURT: So now we have -- let me ask you, Mr. Aguila, have you introduced all the exhibits -- actually, I think you still have one or two. But have you basically gotten your exhibits into evidence through the plaintiff's

05:32 witnesses?

MR. AGUILA: Yes. Except those two.

THE COURT: Okay. Those are your testimony. How long do you expect your direct testimony to last?

MR. AGUILA: Well, I would say ten minutes should be enough. It's fairly quick. Well, no -- yeah. 20 minutes. I'll try to summarize it.

THE COURT: And then there has to be cross-examination.

MR. BABCOCK: Well. If it's only 20 minutes of direct, I can't imagine the cross would be more than a few minutes.

THE COURT: I can. You have a complete failure of imagination. I would like for you to be right. I gather you would like to try to complete this tonight?

MR. BABCOCK: Well, it is 5:30, Your Honor. I must confess I've been in Japan all week so I loathe resuming on Monday.

THE COURT: Yeah, I understand.

MR. BABCOCK: But --

THE COURT: I understand. And if you think -- I mean we can take Mr. Aguila's direct. See if it's really 20 minutes. And we can see where we're at at that point.

MR. RAZAI: At 6:00 o'clock we'll see if we're finished. Maybe we'll be done. In the hopes of being done at 6:00, that would be nice.

THE COURT: Well, I mean that would be the end of the direct. You need to cross-examination.

MR. BABCOCK: No. He said 20 minutes and I'm saying maybe 10 minutes on --

05:34 **THE COURT**: Yeah. And my biggest concern is for Gigi and Nancy. Should we keep going for a little bit and see where we're at?

Okay. I need just a two-minute restroom break, and then we'll take Mr. Aguila's direct testimony.

(Thereupon, a brief recess was taken from 5:34 p.m. to 5:39 p.m.)

THE COURT: So Mr. Aguila, why don't you come and sit in the witness stand.

Thereupon,

RALPH AGUILA,

having been duly sworn by the Clerk, testified as follows:

THE WITNESS: Yes, I do.

THE COURT SECURITY OFFICER: Thank you. Have a seat and state your name for the record and spell your last name.

THE WITNESS: My name is Rafael Newton Aguila. Last name is spelled A-G-U-I-L-A.

THE COURT SECURITY OFFICER: Thank you.

THE COURT: All right. So you can go ahead, sir,

05:40 in a narrative fashion and testify. If there is an

objection, stop so we can hear the objection.

MR. AGUILA: Well, thank you to the Court for giving me this opportunity to finally present my case in court.

05:40 **THE COURT:** Of course. That's the way it works. Everybody gets to give their version of events.

DIRECT EXAMINATION

A. **Where to start? So let's just start chronologically. I** 05:40 **guess that's the best part. Real quick.**

My family had been involved with the beauty care and salon industry since I was very young, and that's how I got to know about concepts like microdermabrasion or those type of machines. My parents would distribute them when I 05:41 **was younger. In about --**

THE COURT: They distributed microdermabrasion machines?

A. **Yes, and other machines, other beauty salon machines.**

In 1996 I decided that the profit margins were so 05:41 **high for microdermabrasion machines which consists of basically a vacuum pump connected with some tubing. So very simple machine, but extremely high profit margin. So I decided to start distributing some machines at that point in 1996 under the name -- the actual name of the machine was** 05:41 **Dermis Peel (ph.). Dermis Peel. And at that time, I decided**

to -- I needed a company name to start selling these, and one of the company names was Edge Systems.

The reason to -- for this name was the fact that I had read some article about Yahoo or the web searches. At that time it was still very young and people, I figured, would search for the leading edge machines. So that's how I came up with the term Edge Systems to describe my company since it would be a leading edge.

THE COURT: So how old were you in 1996?

A. **19.**

THE COURT: And when you say your company, did you formally create a company?

A. **No. At that point I did not formally do any paperwork until, I would say, 2002 or '3. So I was going to college at that time at University of Florida, and this was basically a side business for me. In 2002, 2003, I became much -- well, anyway. Before that.**

In 1997 I decided to open up a company called Diamond Skin to sell a different product category of microdermabrasion machines. So machines that did not use aluminum oxide, which at that time was what microdermabrasion machines used before that. And I decided to start using -- so like a diamond-type tip to exfoliate the skin. That's sort of the concept behind Diamond Skin in 1997.

THE COURT: And you say you opened the company

Diamond Skin in 1997?

A. **Well, again, I mean opened it -- I started selling under that moniker, but --**

THE COURT: You didn't formally create a company?

05:44 A. **No. My first formal DBA or doing business as would be I think in 2003 or thereabouts. Until then -- I mean that's what my parents -- I mean you would just sell salon equipment sort of, yeah, without an official corporation or anything like that. It was a very small industry at that time.**

05:44 **Well, just to go quickly. By 2003, we had started developing a liquid-based system that we would call hydra and -- for liquid. And then we decided to use the moniker derm for dermatology. So HydraDerm. And also other names, like HydraPeel we would call some of our machines and**

05:45 **hydradermabrasion. And this would be in 2003.**

And then in 2004 is where you would see my website that I had designed for Diamond Skin. I had included some of these machines where they mention in the website Diamond Skin in 2004 a transdermal infusion. And I forget -- but another

05:45 **infusion at the same time of -- as your dermabrading the skin. Which is, in fact, what HydraFacial -- what Plaintiff's machine does now.**

THE COURT: So you're saying in 2003 or 2004 you started using a liquid-based system that is essentially the

05:45 same system that the plaintiff uses now?

A. **Essentially, yes. And several other machines also like SilkPeel, things like that. But the plaintiff's machine is a serum-based microdermabrasion or wet microdermabrasion. And, in essence, that's what the 2004 machine was. And this way back -- unfortunately, the wayback machine, this archive.org -- and I can authenticate that document. They have a process of authenticating websites from before. So maybe in the future I can --**

THE COURT: Well, I mean you have I think an exhibit -- you'll have to remind me which one it is -- that you wanted to try to get into evidence on your testimony.

A. **4. Exhibit 4. Thank you. So many exhibits.**

And at that time -- so we had machines called the HydraPeel, which the plaintiff's make reference to in their cease and desist letter from 2010. And the Hydradermabrasion, which is still being used. And in 2004, we decided to make the HydraDerm our top brand or top-level device. And we decided to instead of making a tabletop unit, which is what most microdermabrasion machines are, you put it on a table and that's it -- to put it on a -- wheels, basically, so it's mobile.

THE COURT: This is in 2004?

A. **2004. And we made it a touch screen and all that. This is -- and we called it the HydraDerm. Not the HydraDerm MD. That would come later. But HydraDerm. And in -- well, I**

guess just to skip over a little bit.

In 2010, we received a cease and desist letter from the plaintiffs through their attorneys at law at Knobbe. In the cease and desist letter they want us to stop all supposedly infringing products. They mentioned that we were violating their trademarks, cybersquatting, patent infringement, et cetera. And we decided to -- well, I decided not to do anything, that these were empty threats. And if they would attack us for infringement, we would be able to defend ourselves in 2010.

05:47 05:48

The Court should note that in Plaintiff's Motion for Preliminary Injunction, they mention the cease and desist letter. But instead of claiming that -- they claim that we stopped all sales after their cease and desist letter. But instead of claiming, as Mr. Cohen claimed during his testimony, that they based this reasoning in accordance to Diamond Skin Corporation being dissolved around that time, they didn't mention that in their motion. They mentioned that they just saw the website and they stopped selling.

05:48 05:49

So in any case, I would argue with that, at that time or until now, this was my only income source, selling microdermabrasion machines. And so to stop sales of their supposedly infringing products would stop all my income. So I would not voluntarily do that, but put up a fight and not just give up. So I believe since that cease and desist

05:49

letter --

THE COURT: The 2010 letter?

A. **The 2010 letter cease and desist letter. That the statute of limitations in Florida, four years, comes into being for trademark infringement, for their other claims regarding deceptive practices and unfair --**

MR. BABCOCK: Your Honor, this is a legal argument. I'm not sure if that's appropriate for his testimony. If you want to indulge, that's fine.

05:50 **THE COURT**: Right, right.

MR. AGUILA: Okay. Well -- okay. So sorry. Just to keep forward.

A. **My company as either Diamond Skin or Hydradermabrasion Systems has been FDA registered. We did not register**

05:50 **under -- our company with the FDA as Edge Systems because Edge Systems had purchased all websites associated with Edge Systems. And other companies that are also called Edge Systems in computing and hardware and furniture, they bought every website that has anything to do with the term Edge**

05:50 **Systems. So we were not able to sell under Edge Systems until recently, until the website Edge-Systems.com became available.**

Once that became available, we decided to purchase it and start selling under the Edge System name on the

05:51 **website as Edge Systems.**

THE COURT: When did that start?

MR. AGUILA: This was -- the Edge Systems dash.com was maybe three months ago, two or three months ago that it became available.

05:51 **THE COURT:** And you said your companies. Today, what are your companies?

MR. AGUILA: It is just Edge Systems and Hydradermabrasion Systems. And I have just two websites that are active. Edge-Systems.com and hydradermabrasion.com.

05:51 **THE COURT:** Okay. So those are your two companies. Are they incorporated anywhere or formally created?

A. **They are DBAs. So doing business as in Florida. And the Hydradermabrasion System, especially was for a long time. I decided to do a DBA with Edge Systems when I noticed that the**

05:52 **plaintiffs were pretty much ready to file a lawsuit against me for my HydraDerm. And so I wanted to protect my intellectual property as much as possible in the time that I had before a lawsuit commenced. So that's why there was a flurry of activity in around late October or November where I**

05:52 **purchased a DBA of Edge Systems. Where I -- and I got the EdgeSystems.com domain name. And I filed a trademark for Edge Systems and the -- and our logo.**

THE COURT: You have an application pending to trademark --

05:53 A. **Application pending.**

THE COURT: At Edge Systems.

A. **And the logo. As a company, not as a machine.**

So just to continue. Oh, the trade dress. I believe that I was able to show that the trade dress of the plaintiffs regarding their HydraFacial MD, some weaknesses in their case. So they're claiming that they designed their machine before my HydraDerm MD. And my HydraDerm MD was already in 2004 being sold through Diamondskin.com. I could not -- at that time also all websites associated with hydra were taken. So, for example, hydradermabrasion.com I only purchased in 2009. All these terms are very quickly purchased by companies, hydra or dermabrasion or anything like that.

So I believe I was able to show that -- you know, that our machine was before theirs and they had copied ours. And that notwithstanding Mr. Cohen's testimony about the HydraFacial Nectre and the Wave, that they actually were designed before the tower. And the tower was an evolution of those black boxes, the HydraFacial Wave.

THE COURT: I don't know that you're really qualified to testify to that. We've got to hear your testimony right now.

MR. AGUILA: Sorry. Sorry.

A. **Well, okay. So my testimony is that the HydraDerm MD trade dress existed before the current HydraFacial MD trade**

dress, and they had copied our machine since then, since 2004, 2005.

THE COURT: And your proof of that is?

A. **Proof of that is that my -- through the Diamond Skin website, which is at that time what I would sell my machines through since, like I said, I could not find a domain name under hydraderm or hydradermabrasion. In that Diamond Skin website in 2004 in that Exhibit 4, I'm able to show that the machine that I was selling at that point did transdermally infuse and did -- meaning it would infuse through the skin, just like the HydraFacial claims, liquid and not just air as they claim. So --**

THE COURT: Are you relying on Defendant's Exhibit 4 to show the trade dress that you had preexisted the plaintiff's trade dress?

MR. AGUILA: I don't have a picture of our trade dress.

THE COURT: Right. Right. I'm wondering where your evidence is that you -- your trade dress, it preexisted the plaintiff's.

MR. AGUILA: That's difficult to prove, Your Honor, to be honest, especially when something happened ten years ago.

THE COURT: I'm just trying to be clear that I'm not missing anything.

MR. AGUILA: Right. No, no. Yeah.

THE COURT: So all I have is your testimony, to be clear. You don't offer any photographs from that time or any nature, anything like that.

05:56 **MR. AGUILA:** Well, but -- yeah. But I mean, my understanding was photographs might be under hearsay -- that was my understanding -- if I would just provide a photograph of my trade dress from that time. So I wasn't sure the legal standard of that.

05:56 **THE COURT:** Well, I mean you've certainly moved in quite a bit of evidence today and haven't been shy about trying to get evidence in. And very appropriately, today's the day, you know, to present evidence. So I'm just being clear because your Defendant's Exhibit 4 does not have a

05:57 photo and -- okay. I just need to understand that. Okay. Go ahead.

MR. AGUILA: All right.

A. **Regarding their logo and copying their logo and their name. Edge System never registered their logo with the**

05:57 **trademark office. I guess during deposition we can investigate the reasons. But that's a fact. Edge Systems from -- the plaintiffs have never registered their logo with the trademark office.**

THE COURT: Right.

05:57 A. **And neither the company name of Edge Systems, the company**

name.

THE COURT: Right. They call a common law trademark, not a registration.

A. **For Edge Systems, the company name, I know they're claiming the trade, the Edge System -- yeah. Here common law. Okay. Thank you. And their trademark of the Edge Systems. And I believe that they had tried to confuse the Court purposely by calling --**

MR. RAZAI: Objection, Your Honor. He's characterizing our testimony and not providing evidence.

THE COURT: Yeah.

A. **Reading their complaint and Plaintiff's Motion for Preliminary Injunction, I noticed that they had labeled their machine -- Plaintiff's machine, the Edge machine.**

MR. RAZAI: Again relevance, Your Honor. We've already discussed this issue.

THE COURT: Right. And --

MR. AGUILA: Okay. Well --

THE COURT: Yeah. And really, you need to stick to what you have some personal knowledge about.

MR. AGUILA: Okay.

A. **Well, let me claim this. The -- my potential harm from the preliminary injunction would be devastating, would be -- would mean a bankruptcy, would mean that I would definitively not be able to find any counsel in the future, or I'm also**

planning an ex parte reexamination of the patents that the plaintiffs have submitted in their claims. Each ex parte reexamination with the USPTO costs $6,000. So this would be quite an amount.

06:00 **And I also would like to file an appeal with the trademark office on their trademarks that they have. So -- and basically, I would be left without any funds. So compared to them, who according to Mr. Cohen, make almost a hundred million dollars in five years, the balance of harm is in no way comparable.**

THE COURT: Do you have employees, sir?

A. **I have -- I don't have employees for my company. I pay freelancers or -- like to pick up the phones, things like that. So I don't have any employees myself.**

06:00 **THE COURT:** So are there people working for you?

A. **No, not directly. Just a freelancer.**

THE COURT: Even in the last few months, say, before -- say as of the time that you received this cease and desist letter. Was it October, I think?

06:01 **MR. AGUILA:** Yeah. When did you send -- I don't know. Yeah. Probably.

THE COURT: Yeah, I think it was October. So at that time, before the -- say immediately before the cease and desist letter, did you have any people working for you or is this a sole --

06:01

A. **Yeah. The way I designed my company is I organize the manufacturing of it. And I can do that, but all of our HydraDerms that we've produced were actually produced several years ago when I did have employees working for me. In 1997, 1998, during the recession, basically our sales plummeted and all the HydraDerms that we had from that time have been in storage. And we have only been able to sell, I would say, maybe 30 machines in all this period.**

THE COURT: From?

A. **From 2008, we have only sold about 30 or 40 machines.**

THE COURT: So in that time frame, then, since you've picked that, say, from the time of the recession, since then until now, have you had anyone working for your company?

A. **No. Sole proprietor, so.**

THE COURT: So you have handled all the sales and marketing and communications?

A. **No. I -- well, for telephone calls, I hire a freelance, but they don't work for me. They're a company that just handles calls, for example. I don't know if I would call that my employee. But I pay like, you know, freelancers to --**

THE COURT: What? To simply take a phone message or to answer questions about your product?

A. **Both.**

THE COURT: So how are they informed to know about the product?

A. **Well, I just tell them. It's a simple product. I mean it's not, you know, an X-ray or something. So it's -- it doesn't take too long to explain the pricing and the competitive points.**

THE COURT: So that Mr. Wilcox we have heard about --

A. **Right.**

THE COURT: Who is that?

A. **That would be one of the freelancers that I have.**

THE COURT: Okay. And have you communicated on behalf of the company under names other than your given name, Ralph or Rafael Aguila?

A. **No.**

THE COURT: So Ralph Anderson?

A. **That's another. It's Ralph but not Aguila.**

THE COURT: So who is Ralph Anderson?

A. **Another freelancer that would help me out whenever I needed to -- you know.**

THE COURT: Okay. I was just curious about that. So go on. You were --

A. **Well --**

THE COURT: You were talking about irreparable injury and how it would be devastating to your company. It

would, you know, put you out of business. And that's what led me to ask you if there were people working with you at the company. So that's where you were. I didn't want to throw your train of thought off.

06:04 A. **Yeah. Well, I mean it would put me out of business, basically, since I -- this is the only thing I know. I've been dealing with microdermabrasion machines since 1997. That's all -- this is the industry that I know. If I can't sell microdermabrasion machines, you know, I'm -- don't have** 06:04 **any income, basically.**

THE COURT: Well, I think what the plaintiff is asking is the Court enjoin you from selling a machine that meets the definition of the 620 patent and using the names that the plaintiff uses.

06:04 A. **Right.**

THE COURT: It would not -- as I understand it, there are a variety of treatment systems that exist and any number of endless number of names, right? So how would you be irreparably harmed if you were restricted in the way that 06:05 the plaintiff asks?

A. **Because, Your Honor, I don't believe that's an honest claim from the plaintiff. And my evidence is the cease and desist letter from 2010 and before then in 2006 when they had tried to prevent my sales through eBay. I sell through eBay.**

06:05 **MR. RAZAI**: If I might, Your Honor. That's

non-responsive. You're asking about harm. I think he's going --

THE COURT: That's all right. That's all right. Go ahead.

06:05 A. **So because they sent me all these letters before, before I had the name of the -- or the website EdgeSystems.com, which I imagine is what motivated them to finally --**

THE COURT: Well, you've only recent acquired that website in the last couple months.

06:05 A. **That's right.**

THE COURT: So if you had to sell -- if you were limited to selling microdermabrasion or skin rejuvenation machines that did not -- did not operate in the way that is patented under the 620 patent, and did not use the names that

06:06 the plaintiff has trademarks on, how would you be irreparably harmed?

A. **Well, the term hydradermabrasion specifically. My website hydradermabrasion.com, I would have to stop using the HydraDerm, Hydradermabrasion --**

06:06 **THE COURT:** I don't think so. Let's clear that up.

MR. BABCOCK: We haven't asserted the hydradermabrasion in this case. It's not even a complaint. (Inaud.)

THE COURT: Right. So you would be not be

06:06 precluded -- I just want to check in. You would not be

precluded from using the hydradermabrasion website.

MR. BABCOCK: That's correct, Your Honor.

THE COURT: Just checking with the plaintiffs and what they're asking. So you could use that website. What you could not do is call yourself -- if they got what they wanted -- and I haven't decided that yet -- you could not call yourself Edge Systems or the Edge Systems. You could not use the Chevron-E logo. You could not use the other trademark names, assuming the Court found that they established the trademark theory. Endless number of names. I mean imagination is the only limitation.

A. **I've come up with many names.**

THE COURT: All right. So how would you be irreparably harmed if you could not use the names the Court found are trademarked -- and let's assume for the purpose of my question that I agreed that all their names, they have a protectable trademark. Just assume for the purpose of my question -- and you could not use a machine that is covered by the 620 patent, how would be irreparably harmed?

A. **Because, Your Honor, I no longer manufacture any of those machines that are not a liquid based on wet microdermabrasion. So to -- I would have to -- it's a different industry.**

THE COURT: So you're saying right now you're just selling off your stock of machines that were manufactured a

number of years ago?

A. **We manufactured in 2005 and 2006 several -- well, like 200 machines, I would say. And -- expecting for the economy to keep going. Around 2007, our sales started plummeting. And in 2008, they completely collapsed. So we have been selling our machines from this stock. I could make a new machines or hire people to help me, but this would be very difficult at this point, especially since I have no funds to really start that manufacturing operation again.**

06:08 **THE COURT:** All right. All right. So what else did you want to say on that irreparable injury?

A. **Well, that's about it for that. I mean I can't really say anything else. As Your Honor can see, I have come here without an attorney representing me. So even though I've** 06:09 **tried to find one. It's -- they're for patent and trademark laws, it's quite difficult.**

Well, regarding the patent issue, I just did want to say something. In 2004 -- from 2004 until 2006 as Diamond Skin will -- and New Cell Technologies -- a different 06:10 **technology of mine.**

THE COURT: New Cell Technologies?

A. **New Cell Technologies. We were involved in a patent litigation lawsuit from a company called Altair Instruments and --**

06:10 **MR. RAZAI:** Objection. Relevance, Your Honor.

THE COURT: How is that relevant?

A. **That patent that they sued us over is the patent that I'm claiming was before theirs. So I'm just saying that -- well, I don't know what I'm saying, actually.**

06:10 **THE COURT:** So the 739 patent.

A. **739 patent is the one we sued for. And we were able to get an ex parte reexamination on that patent and the company withdrew their lawsuit --**

MR. RAZAI: Objection. Relevance, Your Honor.

06:10 **THE COURT:** Right. So -- that's what I'm wondering. How is this relevant to the patent infringement claim that we're hearing today?

MR. AGUILA: Thank you, Your Honor.

A. **I believe if I can file my ex parte reexamination with**

06:10 **the -- on the patent trademark office on their 620 patent that they're including in their motion, I believe I can get that to be reexamined and --**

MR. RAZAI: Objection, Your Honor. It's a legal conclusion. He's not an attorney.

06:11 **THE COURT:** All right. I'm going to overrule that. All right. I understand what you're saying.

A. **Like it happened before, basically.**

THE COURT: I understand.

A. **Unfortunately, I mean in this business, patents and**

06:11 **lawsuits, it's how it is.**

THE COURT: Okay.

A. **Many patent lawsuits. Even though -- I mean all these microdermabrasion machines have been around, the idea, for many decades, so -- I think I don't really have anything else to say to that.**

06:11

THE COURT: Did you want to authenticate this Defendant's Exhibit 4? That's not in evidence yet.

MR. AGUILA: That is the HydraFacial.com, slash --

THE COURT: The diamondskin.com.

06:11

MR. AGUILA: From 2000?

THE COURT: From the wayback machine.

MR. AGUILA: Yes. I would like authenticate that. I did that website --

THE COURT: What do you mean? You created this website?

06:12

MR. AGUILA: I created the website, yes.

THE COURT: You're saying this is what? This is --

MR. AGUILA: A website of diamondskin.com.

THE COURT: On what date? I can't tell. I found the date very confusing.

06:12

MR. AGUILA: On the top to the left.

THE COURT: Do you not have a document in front of you?

MR. RAZAI: I believe it's September 24th, 2004. The date of the document.

06:12

THE COURT: But let's get the document. Do you have yours handy you could just put right in front of Mr. Aguila.

MR. AGUILA: Could you show it to me?

06:12 **MR. RAZAI**: I just remember the date.

THE COURT: Yeah. I thought that's how you read it, but it's not self-evident to me. I have it. I want the witness to have it.

MR. RAZAI: (Complies.)

06:13 **THE COURT**: All right. You wanted to authenticate Defendant's Exhibit 4.

A. **Right. This was September 24th is this date.**

THE COURT: The date that what we see on this document appeared on the website?

06:13 **MR. AGUILA**: Right. A cache version that's captured by archive.org or the wayback machine.

THE COURT: So how do we know that what we see in Defendant's Exhibit 4 is what was on the New Cell Technologies website on September 24th, 2004? How do we know

06:13 that?

MR. AGUILA: Well, actually, it should say diamondskin.com. This is a separate --

THE COURT: Oh, yeah.

MR. AGUILA: But I can authenticate it with this

06:14 company. They do authenticate there --

THE COURT: But now is your chance to do it. So tell me, how do I know it is what it claims to be?

MR. AGUILA: Well, I created this website. I remember writing the terms transdermal delivery. I remember dealing with oxygen infusion technology. I remember this writing from that time. I kept this writing until 2009 or so. So this writing didn't change very often.

THE COURT: So this is -- was your website, diamondskin.com and this is the language you offered?

MR. AGUILA: Right.

THE COURT: And you remember it from 2004?

MR. AGUILA: Well, yes. I mean, we used it for several years.

THE COURT: Okay. All right. And so -- but you didn't have it with you at the time of the lawsuit. You had to go retrieve it. So how did you get it?

MR. AGUILA: I went on a website called waybackmachine.com or -- well, just wayback machine. Also just internet -- no. Archive.org is the website. Archive.org. And then you punch in your website that you want to look up. And it -- if it retrieved, if it cached previous years of that website, it will show you. Not all websites have that.

THE COURT: So when did you retrieve this?

MR. AGUILA: This must have been during the

lawsuit, sometime in December.

THE COURT: So in the past month?

MR. AGUILA: Right.

THE COURT: And you went on to the internet and you put in your own website for September 24th, 2004?

06:15

MR. AGUILA: It doesn't tell you what date it will give you. It just gives you a date that it cached. It doesn't cache every day. It doesn't record every website every day. But it will tell you the earliest date that it did.

06:15

THE COURT: All right. And when you did that, you came up with this and you recognize it as your own website from that time?

MR. AGUILA: Yes.

06:16

THE COURT: Okay. All right. Are there any objections to this being admitted into evidence?

MR. BABCOCK: Your Honor, this may be a little unique. I think there's a few documents that we had some issues with regards to getting them into evidence after the hearing.

06:16

THE COURT: But I wonder if that really matters now.

MR. BABCOCK: First of all, I don't know if this matters so much. I guess Mr. Aguila is right, that archive.org will provide a declaration with regards to a

06:16

particular page from their system. Our concern is that it's not clear from that document if this is the right page that was done on that day. So I guess what I'm saying is if he would endeavor post hearing to obtain that declaration from archive.org and submit it to the Court authenticating that, then we withdraw our objection.

06:16

THE COURT: Does it even really matter, though, given the content? That's what I'm wondering.

MR. BABCOCK: I think on the merits it doesn't, Your Honor.

06:16

THE COURT: That's my sense.

MR. BABCOCK: So if you want me to -- for the sake of expediting things, we can withdraw our objection and you can admit it and we'll live with that.

06:17

THE COURT: Sure. Defendant's 4 is in evidence.

(Thereupon, the aforementioned exhibit was admitted into evidence.)

THE COURT SECURITY OFFICER: There are two Defendant's 20s. The first one is his patent US 6241739 and the second 20 was the Diamond Skin trademark electronic search systems, which we could just put as 20-A.

06:17

THE COURT: They were admitted, Nancy?

THE COURT SECURITY OFFICER: Yes.

THE COURT: So what are we going to call 20-A?

06:17

THE COURT SECURITY OFFICER: It's the Diamond Skin

trademark electronic search system.

THE COURT: Thank you both for catching that.

Is there any more direct testimony, Mr. Aguila?

MR. AGUILA: I can't think of anything other than legal conclusions --

THE COURT: No. That's argument.

All right. So cross-examination.

MR. BABCOCK: Yeah, Your Honor. I think this will be rather quick.

CROSS-EXAMINATION

BY MR. BABCOCK:

Q. Mr. Aguila, good afternoon.

A. **Good afternoon.**

Q. I think most of your testimony was clear, but I did have some questions about the first part of your testimony where you talked about your use of Edge Systems in, you said, 1996?

A. **Yes.**

Q. Do you have any documents that show that?

A. **I do have some documents, but they're -- I mean not -- I don't know how to prove them. It would be like photos or things like that.**

Q. Okay. And you've submitted nothing in this case to the Court that would authenticate that testimony, that you were using Edge Systems in 2006?

A. **Yes. Well, I did. In the Edge Systems trademark application, I wrote there that it was 1996.**
Q. But that's -- you wrote that in saying that's your testimony. But I'm looking for corroborating evidence, say, a contemporaneous printout of a receipt or a billing label or a website or a letter to a customer that had that word on it. Anything like that with a date. Magazine article, newspaper or press release. Any type of file with the Florida Secretary of State. Something with a date and it says Aguila and it says Edge Systems. Anything?
A. **Well, like I said, I did not incorporate or anything like that. So I mean other than pictures that I can give you of mine, but --**
Q. Undated?
A. **Right.**
Q. And then you said in 1997, you started up something called Diamond Skin?
A. **Diamond Skin Systems, I think.**
Q. Diamond Skin --
A. **Or maybe just Diamond Skin.**
Q. At that point in time did you discontinue the use of Edge System?
A. **No. I tried to have different segments. So Edge System, Diamond Skin would basically attack two different groups. The idea was Diamond Skin would be for the diamond peeling**

and the Edge System would be for aluminum oxide.

Q. So did you at some point discontinue using Edge System?

A. **Well, I stopped -- I stopped the sale of the Edge Systems as a company when the Edge Systems from California basically took over and became the Edge System. So I could not really make any sales as Edge System.**

Q. Okay. And that was about when?

A. **2000 is when we --**

Q. About 2000?

A. **Yeah.**

Q. Okay. And so then you didn't resume using the name Edge System until about 2014, October, after the cease and desist?

A. **No. I mean we continued to have Edge Systems as one of our companies. Like I said, Diamond Skin, New Cell Technologies, and Edge System as well. But our sales, you know, were very small for the Edge System.**

Q. Well, from 2000 until 2014, what were your sales of Edge System?

A. **Maybe a total of -- I'm thinking 14 years. I would say 50,000 maybe. We would sell the machine. Each machine would be $4,000 per machine.**

Q. So now let's start from 1996, your testimony, until current until -- well, until pre Edge-Systems. So you said for 2000 until 2014 you sold maybe $50,000 worth of equipment?

A. **With the Edge Systems trade name. (Inaud.)**
Q. Okay. So do you have a single piece of documentation that shows your use of the word the Edge System or anything like that from 2000 until 2014?
06:22 A. **Yes. I have receipts from that time.**
Q. And invoiced, a receipt that has the name the Edge System on it?
A. **That was selling an Edge System machine.**
Q. That's not my question. I want the use of the words the
06:22 Edge System on a document that's dated from 2000 until 2014.
A. **I've never called my machines or my company the Edge System. I would just call it the Edge or an Edge System but not the.**
Q. Okay. So I'm looking -- my question is anything with
06:22 Edge System or Edge Systems or anything like that on a document that's dated from 2000 to 2014. An invoice, a receipt, a company logo, a company name. Anything that -- have you submitted anything to the Court?
A. **I have not submitted any documents for receipts. I**
06:23 **didn't think that you could submit that into evidence under the hearsay rules.**
Q. Company records. Do you have any -- you have not submitted any company records showing the use of Edge Systems; is that correct?
06:23 A. **Yeah, that's correct.**

Q. And that's for a period of 14 years?
A. **Well, from 1996.**
Q. From 1996 until 2014?
A. **18 years.**
06:23 Q. 18 years.
The logo that you recently applied for, did you use that logo in 1996?
A. **I've always used that logo.**
Q. The exact same logo that you applied for now?
06:23 A. **Yes.**
Q. Same question. Do you have a single document of any type that shows that logo on it from 1996 until 2014?
A. **Yes.**
Q. And have you submitted those to the Court?
06:24 A. **Well, again, I mean these would be invoices. So I have no way of proving them in court.**
Q. Well, you have an invoice. It has a date, correct?
A. **Right.**
Q. And it has -- purportedly it has the logo on it?
06:24 A. **Yeah.**
Q. And you've not submitted any of those to the Court?
A. **Well, again, my understanding on the evidence rules, I could not submit just an invoice. That's why I focus on the wayback machine because that's an independent way of showing something other than just, you know, showing an invoice.**
06:24

Q. Again. But you have not shown the Court any use of that logo for 18 years. The wayback machine doesn't show the logo, does it?

A. **Well, it's a cache. I mean, I --**

06:24 Q. It's a cache.

A. **Well, the French. But yeah. Right.**

Q. So any documents or any corroborating evidence from 1996 to 2014 showing your use of that logo that you have submitted to the Court.

06:25 A. **I have not submitted any business documents.**

Q. Or any other kinds of documents?

A. **Right.**

Q. And just on the numbers of units, you manufactured 200 of these units that we see here in the courtroom that are --

06:25 we've called the defendant's hydradermabrasion machine?

A. **So the one on the left, the white one, that's called the Hydradermabrasion MD, and that's one of our machines. We sell a machine that's -- well, looks similar to the HydraFacial that we call a HydraDerm. And we have about a**

06:26 **hundred of those.**

Q. Oh, so it's none of these three. It's yet another machine?

A. **Well, the HydraDerm, I thought would be the middle one. But it's not. Apparently it is just a -- your plaintiff's**

06:26 **machine adapted. But it's not a HydraDerm. When you turn on**

the touch screen, it doesn't say HydraDerm. Like when you turn -- I think the other machine, the Hydradermabrasion -- well, you wouldn't see HydraDerm. But when you turn on the touch screen, you should see HydraDerm and you don't with the middle one.

Q. Okay. So is the HydraDerm MD, is that a reworked HydraFacial with a touch screen or is it a machine that's completely manufactured by you?

A. **It's a completely -- yeah, it was manufactured by us. Right.**

Q. Okay. But it looks -- it looks more like a HydraFacial than the Hydradermabrasion MD?

A. **Well, the trade dress I would say is almost identical.**

Q. Okay. And then with regards to the trade dress, I think the Court asked some questions in that regard. There was nothing on the website, even the wayback machine, that showed the trade dress of your earlier devices, correct?

A. **Well, I mean the cache, as you can see, it's very limited to what it shows, so.**

Q. So I'm going to ask the same question I asked before with regards to trade dress now. From 1996 to 2014, have you submitted any documents to the Court that would corroborate the trade dress -- the purported trade dress of the machines you were selling?

A. **I have pictures but I have not submitted any.**

Q. And so you've sold 30 machines in about six years. 30 of these accused machines in about six yeas. Is that your testimony?

A. **Since 2008, yeah. Right.**

06:28 Q. Around 4,000, $5,000 a machine?

A. **Thereabouts. It depends, right.**

Q. So that's about five machines a year?

A. **Right.**

Q. So that's $20,000?

06:28 A. **Yeah. I'm here without a lawyer, so I'm not doing too well economically.**

Q. And that's your entire source of income, is $20,000 a year? That's how you survive? You have no other source of income from any other sources?

06:28 A. **Well, I design websites, but that doesn't bring any money.**

Q. But this isn't your sole source of income. You don't live on $20,000 a year?

A. **Well, yeah. Basically yes. Yeah. That's -- I do.**

06:28 Q. So your income is $20,000 a year for the last six years under oath?

A. **Well, I mean it varied. It wasn't every year $20,000. But yeah, I would say that.**

Q. Do you get support from anybody else?

06:29 A. **No. And that's another reason I moved to Germany, so I**

can be -- my -- try to get better job opportunities. And my wife supports me, so.

Q. Oh, your wife supports you?

A. **Well, we're taking care of small kid, so.**

06:29 Q. But does she -- she's employed?

A. **No. But in Germany you get money for being a mother. And it's a different system. Welfare.**

Q. Besides designing websites, do you have any other occupations?

06:29 A. **No. That's it. Like I said, I've been selling microderms for -- you know, that's all I know.**

MR. BABCOCK: Your Honor, those are all the questions I have.

THE COURT: Okay. I did have a few questions. Did you want to follow up on anything, though, sir?

06:30 **MR. AGUILA:** No.

THE COURT: In the nature of redirect?

MR. AGUILA: No, that's it.

EXAMINATION

BY THE COURT:

Q. So to be clear, the -- we've had three machines in the courtroom all day. The one on the right is indisputably Plaintiff's machine?

06:30 A. **Right.**

Q. The one on the left is indisputably your machine, right?
A. **Well, the --**
Q. With -- except for the Jiffy jar that they put on just because the debris jar wasn't there.
06:30 A. **And the wands. We don't use metal wands. So I'm not sure if the woman who received it, if she might have changed it. But we don't use --**
Q. Other than the wands, it's your machine.
A. **Right. The machine, yes, for the HydraDerm.**
06:30 Q. The one in the middle, I'm still not clear. Is that a machine that you sold?
A. **We sold a machine to Mr. Duboys. However, it's a HydraDerm. And it should say HydraDerm when you turn on the monitor. With this machine in the middle, when I turned it**
06:31 **on, it says Edge Systems HydraFacial. And, you know, we don't sell the HydraFacial, we sell the HydraDerm. So that touch screen, we're not aware of. But -- and --**
Q. But you don't dispute that the body of the machine itself --
A. **The body is -- yeah.**
Q. -- is representative of machines that you have sold.
A. **Yes, the HydraDerm machine specifically.**
Q. Something we've called the hybrid machine here today, but the one in the middle.
06:31 A. **Yeah, that's the -- would be the form of the HydraDerm.**

Q. And that's a machine that you have sold?
A. **Yes.**
Q. Okay. I needed to be clear about that.
A. **Right.**
06:31 Q. All right. So, sir, introduced into evidence is Plaintiff's Exhibit GGG is an e-mail that I think you acknowledged you sent or you had sent.
A. **Which one?**
Q. Can you put GGG in front of the witness? Unless you have it, sir.

It's the e-mail sent the day of the status conference that I had, when I had you on the phone.

A. **Oh, to the Duboys?**
Q. Yes.
06:32 A. **So that's -- okay. Our eBay name is Edge System. So when he filed a complaint on eBay, we had to respond. But we did not respond as Edge System. That's an automatic thing that, you know, you become Edge System. So I did not write that, that we are Edge Systems and the rest of it. It's the**
06:32 **name -- the eBay name is Edge System.**
Q. But Ralph Anderson, sales manager, is the fellow who wrote this, right?
A. **Right. So --**
Q. And he wrote it on behalf of your company, Edge Systems; is that right?

A. **Yes. That's -- that is probably what happened. Yeah, it looks like what happened.**

Q. And then introduced as Exhibit BBB is a series of I guess e-mail communications from eBay dated -- on page 4, 10 -- December 10th and 11th. So that was at -- the temporary restraining order was issued on December 2nd. The status conference we had was on December 5th. At that time I cautioned you about the effect of the significance of the temporary restraining order and the obligation to follow it. And then there are a series of comments. Do you have that exhibit in front of you?

A. **I have BBB, triple B.**

Q. So on page 4.

A. **4 of 6?**

Q. Page 4 of 6, yeah. So, for example, on the December 11th one at the top, comments: Hello, we are Edge Systems and we did refurbish this previously used item. And it goes on. This is a response to Dr. Duboys' complaint. Can you tell me about who sent that communication on behalf of Edge Systems?

A. **That would have had to be either the Ralph Anderson or John Wilcox. I certainly would not have written we are Edge Systems. At that time I voluntarily took out our website on both Hydradermabrasion and Edge Systems. And our telephone conversations, the telephone receptionist, I had instructed to remove We are Edge Systems to just say Welcome, how may we**

help you.

Q. So did you give a copy of the temporary restraining order to Ralph Anderson or Mr. Wilcox?

A. **I did not. I just told them to stop using Edge Systems. They could see my website was gone. So I --**

Q. Were they not informed that that temporary restraining order had been entered?

A. **Well, I informed them to stop all sales. I don't think they would have known what a temporary restraining order is.**

Q. So they were not informed about the lawsuit, then?

A. **I mean, they know that we're being sued, yes. But the technicalities of a technical TRO versus -- well, yeah. I mean, I've --**

Q. Do you have any people acting on behalf of your company at this point? Well, anyone?

A. **No.**

Q. Just Ralph Anderson and Mr. Wilcox?

A. **No. I'm the only person now because of the no sales.**

Q. So if there were a complaint or a communication that came in to your -- to the phone number that you had used or to your e-mail address, would either of these individuals take it upon themselves to respond?

A. **No, they -- well, for e-mails I'm not sure if the Edge Systems works anymore because they did file with GoDaddy is the web hosting, also e-mail hose.**

Q. So that website is down?
A. **That website is down. And I think the e-mail, as far as I can tell, is down. I'm not sure what their rules are, but they completely froze my website. And -- yeah. And that hasn't stopped since the TRO started on the 2nd. The EdgeSystems.com has not been available since then.**
MR. BABCOCK: Just for your clarification, Your Honor. We did as soon as we got the TRO submit it to GoDaddy for the -- both the websites, and they took it down.
06:36 **THE COURT:** Okay.
A. **The hydradermabrasion.com and EdgeSystems.com.**
THE COURT: Okay. Those are my questions about that.
All right. So I think you've completed your
06:37 testimony, is that right, Mr. --
MR. AGUILA: I'm done.
THE COURT: Okay. So you can go back to counsel's table. Thank you. And do you rest then? You've presented all your evidence, Mr. Aguila?
06:37 **MR. AGUILA:** I rest. Yes, Your Honor.
THE COURT: Very good.
And I take it there's no rebuttal evidence from the plaintiff because you have no witness left.
MR. BABCOCK: That's correct, Your Honor. They've
06:37 all gone home.

THE COURT: Well, hallelujah. Let's talk about some practicalities and then let's all go home. The -- I'm going to need a transcript, and I'm going to need it on an expedited basis. The plaintiff is responsible for getting that and getting it filed. So you want to talk to the court reporter about that.

06:37

Mr. Aguila, I remember you were saying that you were eager to get this resolved as quickly as possible because you're out of business at the moment. And I know the plaintiffs are eager to get it resolved as quickly as possible.

06:38

Doing it as quickly as possible would require you both to consent to me to be the presiding judicial officer over this. You don't have to. And if you don't, there'll be no punishment. I mean no recriminations on my end. But as a practical matter, we're upon the Christmas and the New Year holidays. I will not -- I have plans to be away part of the time. And if I am to write up an order, if you were to both consent to me -- and it would require all parties doing so -- you'd have to file a Notice of Consent with the Court. I would be able to get to the point a lot more quickly in an order, write it much more quickly than a report and recommendation because the report and recommendation I always am considering -- there are a number of arguments raised here.

06:38

06:38

Typically, often courts resolve issues on some but not all of the arguments. But if there is a report and recommendation, I don't know, I can't read Judge Moore's mind, and I'm going to err on the side of writing about more
06:39 issues even if I think in the end they're not dispositive. So I'm trying to explain to you why I can write an order more quickly than I can write a report and recommendation.

If I write a report and recommendation, however much more time that takes me, then there's a 14-day period to
06:39 object. Then Judge Moore has to get the transcript of this hearing, read it, read the objections, read the report and recommendation, read all the case law that I cite, and make a de novo, that is, from the beginning review. That's taking you well into the new year.

06:39 **MR. BABCOCK:** Into January.

THE COURT: So I just want you to understand how it works. You don't have to decide today whether you're going consent to me. But if you -- I'd ask you both to speak about it and decide if you're in agreement on that. If you're not,
06:40 you don't file anything and I don't know anybody's opinion. One might say great, the another might say no, one might say, oh, I think she's fabulous, the other might say, oh, I think she stinks. I mean anything is possible, and I wouldn't know that. And it wouldn't matter.

06:40 Lawyers understand this better, but since you're

new to the process. If you both do agree, you would file a Notice of Consent. Plaintiff's lawyers could pull it up easily from a website and get it. And I'd ask you to do that sooner than later. You do not need to respond to me on that, but I wanted to make clear that it affects timing. Right now your TRO is extended by agreement to the 30th. Under either scenario, I don't think I can get this written up, either an order or a report and recommendation by the 30th.

06:40

MR. BABCOCK: Well, it's not fair to the Court to -- we wouldn't require that either.

06:41

THE COURT: Right. So then it's something for you to consider, either agreeing to a further extension or if can't agree, applying for it. At the moment, if you don't consent to me, that goes to Judge Moore. And, you know, that's up to him.

06:41

MR. BABCOCK: Okay.

THE COURT: So if you consent to me on the pending motion for preliminary injunction and the TRO, then I could address that, just to be clear about how it would work. And this is clearly on my radar. And I can't speak for him at the moment what's on his radar and what his holiday schedule is, so --

06:41

MR. AGUILA: Well, I mean from our side, I have no problem with having you preside over our case. I mean, I don't know if we can make that decision now or --

06:42

THE COURT: No, because what you would want to do is file it. And I don't want to put anybody on the spot. So I appreciate you saying that. But go home. You could file -- if you decide if you want to do it, you could file it on Monday. I'll see it. I'm going to be watching the docket. Trust me.

So -- but you need to address this issue of extending the TRO. And I'm not going to ask you at the moment to, unless you have an agreement on it to extend it for some other period of time. But short of your having a ready agreement on that right now, you can talk to each other and then address it however you want to address it.

MR. BABCOCK: Understood. It's obviously issues for my client who has now left. But we'll discuss these probably before they land.

THE COURT: Right. Okay. All right.

MR. BABCOCK: A reply brief, Your Honor?

THE COURT: Well, right.

MR. BABCOCK: At least on -- I think some of the issues that Mr. Aguila raised may not necessarily deserve a reply or may not warrant a reply. I don't want to be condescending.

THE COURT: Right.

MR. BABCOCK: But I do think on the patent issue -- which is important. I know we spent a lot of time today

focusing on the trademark. And to be certain, while the patent issue was a serious issue for my client, the trademark took the issue over the top. When the trademark issue became front and center, that really became a critical issue. But the patent issue has always been core. And you heard Mr. Cohen talk the patent issue, and Mr. Ignon about the dry and the wet. We haven't had a chance to at least elaborate on this alleged priority. It's not prior art to our patent. It would be based on the wording -- the statute is very -- as a patent lawyer, we look at a 102(e) reference. That's one month earlier and we say no problem because you can swear behind. You can show inventorship before the date of the filing of that patent. It's no longer prior art to you.

So under U.S. law it's first to invent, not first to file. So by being able to show that we invented before the filing date, then it's not prior art to us. So while it was filed earlier -- and they may be relevant on the merits as far as what it teaches, it isn't prior art to us, so it doesn't render an invalidated reference.

THE COURT: So what you're saying is that the defendant in his response, which -- hold on one second. Let me just put my hands on it.

MR. AGUILA: It's the 739 patent.

THE COURT: No, no, no. I know. It was file -- well, it's dated December 15th. I don't remember if it was

filed December 15th.

MR. BABCOCK: It was filed in November.

THE COURT: No, no, no. The response to your Motion For Preliminary Injunction.

06:44 **MR. BABCOCK:** Right. So their argument is with regards to our patent --

MR. AGUILA: It was filed on Monday.

THE COURT: The date you were able to over-the-counter file your response?

06:44 **MR. AGUILA:** Yeah, I turned it into the clerk's office.

MR. BABCOCK: Well, we got it on Tuesday.

THE COURT: Okay. So the point here is that the defendant in his response to your Motion For Preliminary

06:45 Injunction, which was filed on -- what you got on Tuesday, today being Friday, that's where the defendant raised this notion of anticipation, is what I think he called it. The 739 patent, which he says invalidates your patent.

MR. BABCOCK: That's correct.

06:45 **THE COURT:** And you haven't had a chance to address that. So you're asking to have a limited reply to address that challenge to the patent?

MR. BABCOCK: Well, I guess my first request, Your Honor, would be a reply to his opposition. Limited -- I

06:45 don't know what the local rules are. Maybe ten pages? Ten

pages. We would focus on that issue. To be honest, we might -- if the Court gives us her permission, we might address a couple other issues that we think might deserve attention as well.

06:45 So unless the Court says, No, I don't want to hear about the patent, then we can do that. But we'd like to at least maybe early next week -- I think, you know, even though Christmas is coming up. Maybe before Christmas. We could by Tuesday. That would give us a week from when we got it. File a ten-page reply to address particularly the patent issue. I think that's the one that stuck out at me. And I said, Well, this is a confusing issue because this is the first time this has come up.

I'm not sure how much familiarity the Court has with 102(e). It's kind of a nuanced reference that even some patent lawyers don't really know a lot about. And it's a really simple issue to explain. And that's why we filed those two declarations from the inventor.

THE COURT: I don't have a problem with that. My question I have in my mind is whether I allow a whole new round of briefing by everybody. That I'm somewhat reluctant.

MR. BABCOCK: Okay.

THE COURT: Something very focused. An issue you keep raising is you think that you can rely upon declarations at a preliminary injunction hearing. I'm not familiar with

that authority. So I invite you by Tuesday to file a brief. You know, it would be a page or two with just a citation, very to the point about how the Court can rely upon declarations. And the defendant could certainly respond. It's a very focused narrow point.

What I don't want is for you to file a memorandum that starts from A and go to Z and repeat the whole thing again and I have 20 pages of it, because it will just slow me down and bog me down and not help me. That's what I'm concerned about.

MR. BABCOCK: But is this memorandum that you're proposing just focused on the general use of declarations --

THE COURT: That's something that I know you need to address. But that's a page or two. That's just about declarations.

MR. BABCOCK: Can we also address the patent issue in that --

THE COURT: I think you should. Then the question is -- I think I'd like to leave it there. If I allow you to give me -- what I want to think about is whether I want post trial briefings from both of you. And frankly, I'd rather issue an order on Monday telling you whether I'd like you to go beyond. I think you get to reply to the patent issue because it was newly raised in response. And my thought is on Monday I could tell you if I find it helpful for you all

to submit any other post hearing memorandum. How does that sound?

MR. BABCOCK: That sounds really good. And Your Honor -- and I hate to impose more work on the Court. I know how busy you are. But if there is something else in the opposition that struck you as confusing or, oh, this is something that we should really hear what the other side is, then we're happy to address that as well.

THE COURT: Right. Right.

MR. BABCOCK: There were a lot of issues that we thought, gee, this is kind of are coming out of left field.

THE COURT: I think the record has developed this better, though.

MR. BABCOCK: Yeah. But if you skim through it and you say, Oh, here's an issue. We didn't really hit on it during the hearing, let me get a couple pages from Plaintiff's on that issue as a rebuttal or a plot. And we'll hit that as well. If you say, No, everything else made sense, everything else I understood, give me something on the patent issue and --

THE COURT: So here is where we're going to leave it for now. The plaintiff can file sometime next week. I'll leave it up to you. Because honestly, if I can get through the -- much of the trademark issues before I go on vacation next week, that would be pretty amazing. I won't get to the

patent issue, get it written up. So you can file next week a reply memorandum that is no more than ten pages that addresses the patent issue, and you can address -- just put in there your claim about being able to rely on affidavits.

06:49 **MR. BABCOCK:** Understood.

THE COURT: I will be obviously digging into this starting Monday. And I will be thinking about whether I want more briefing. And if I allow it for one, I'm going to allow it for the other. Otherwise, we're going to leave the record

06:49 where it is. How's that sound?

MR. BABCOCK: That sounds fine, Your Honor.

THE COURT: Nancy, about getting exhibits filed. How is the best way to handle it from your perspective?

THE COURT SECURITY OFFICER: Well, those are the

06:49 exhibits --

THE COURT: I know those are the exhibits. And I have my original. But who is going to file them?

THE COURT SECURITY OFFICER: No. When you're done with them, I'll file them.

THE COURT: You'll file them?

THE COURT SECURITY OFFICER: Yeah. But they're not going to be scanned. They're going to be having a sheet that says you have to go to records. That can't be scanned. It's impossible. But --

06:50 **THE COURT:** You're just going to have an exhibit

list that you were going to file.

THE COURT SECURITY OFFICER: Oh, yeah. I'm going to do that Monday.

THE COURT: But the actual exhibits, I think for this record to be complete?

MR. BABCOCK: What we can do is after Nancy files the list -- and you'll have -- I assume in the courthouse you'll have the documents there that you take from the Court.

THE COURT: For now I'm going to have the originals --

THE COURT SECURITY OFFICER: -- I didn't get a set. And then those are for the court reporter.

MR. BABCOCK: Well, what we can do is we can scan the exhibits that we have and file them so that they're -- is that what you're looking for, Your Honor? To have them available --

THE COURT: I think it's always good to have a record. Although these -- most of the exhibits are found somewhere in this record. It's too hard. I think I'm going to ask the plaintiff once the exhibit list is filed, for you to file as a document all exhibits, Plaintiff and Defendant's.

MR. BABCOCK: Understood.

THE COURT: The defendant will see it. Check in with them. Double check you haven't missed anything with

Mr. Aguila. But I'm sure you haven't because the exhibit list will be clear.

MR. BABCOCK: Now, given that there's a little bit of chaos, I know your set is complete. We don't want to touch that one, though. You have your set here.

THE COURT SECURITY OFFICER: That's for the court reporter. That's as complete as I could figure it out.

MR. BABCOCK: But if we give that to her, then --

THE COURT: You could get it back.

MR. BABCOCK: Could we get it back? That works.

THE COURT REPORTER: (Nodding affirmatively.)

MR. BABCOCK: If we're missing something from our collection, then we'll talk with you and get a copy of it.

THE COURT SECURITY OFFICER: And then there was a rogue page on the floor. I gave it to Mr. Richard there. I don't know where that -- what that goes to. I have no idea.

MR. BABCOCK: I think it was a collection that Mr. Razai was separating. And so this one didn't end up in one of the exhibits.

THE COURT SECURITY OFFICER: That's it. It should have, shouldn't it?

MR. BABCOCK: Well, no. I think he had a series of documents that he broke up into separate exhibits. And this one didn't end up as one of those collections. It was a little chaotic. We apologize.

THE COURT: Okay. Well, you could certainly get back from the court reporter that set of exhibits. And I'm going to have in chambers the set that I have, the original.

All right. That was all my housekeeping issues.

06:52 Anything further from the plaintiff?

MR. BABCOCK: No, Your Honor. Particularly for the Court and the staff, we're very grateful for the effort.

THE COURT: Nicole, Nancy, and Gigi are my heros.

MR. BABCOCK: Happy holidays and thank you for your

06:52 time today.

MR. AGUILA: Thank you very much.

THE COURT: And Mr. Aguila, anything further from you, sir?

MR. AGUILA: No. Thank you, Your Honor, for your

06:52 time.

THE COURT: So I know you need some time to pack all this up and get it out of here. You will be able to exit the building on the first floor. Getting back in is a challenge.

06:52 **MR. BABCOCK**: We do have gentlemen coming to help pack these out to take them out.

THE COURT: You want to do that tonight? The other thing we could do is we could lock the courtroom and you could come on Monday.

06:52 **MR. GUERRA**: Well, if that's easier, we could

coordinate with the marshals' office because we're going to need to use the loading docks to take these devices out.

THE COURT SECURITY OFFICER: They're going to have to do it Monday, then.

06:53 **MR. GUERRA**: So if the Court prefers, we can do it Monday morning.

THE COURT: We'll lock up the courtroom and you are -- there's two medical appointments I know of out of the three of us. One might get in a little bit later than 9:00, so don't show up right at 9:00. That's all I'm saying.

06:53 **MR. GUERRA**: Okay. We'll call beforehand.

THE COURT: That's a great idea.

THE COURT SECURITY OFFICER: Or they can call me. I'll come up and unlock it.

06:53 **MR. GUERRA**: And then we can just leave everything as is.

THE COURT: Yes.

MR. GUERRA: Okay. Thank you. We appreciate it.

(Thereupon, the above hearing was concluded.)

* * *

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

12/29/2014



DATE FILED

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