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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

INTUITIVE SURGICAL, INC., et al.,	)
Plaintiffs,	)
	) C.A. No. 18-1359-MN
v.	)
AURIS HEALTH, INC.,	)
Defendant.	)

Monday, April 6, 2020
12:00 p.m.
Teleconference

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

SHAW KELLER LLP
BY: KAREN KELLER, ESQ.
BY: DAVID M. FRY, ESQ.

-and-

DURIE TANGRI
BY: DARALYN J. DURIE, ESQ.
BY: LAURA E. MILLER, ESQ.

-and-

FINNEGAN HENDERSON FARABOW GARRETT & DUNNER, LLP
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Counsel for the Plaintiffs

APPEARANCES CONTINUED:

RICHARDS LAYTON & FINGER
BY: KELLY FARNAN, ESQ.

-and-

DESMARAIS LLP
BY: JOHN M. DESMARAIS, ESQ.
BY: PAUL A. BONDOR, ESQ.
BY: TAMIR PACKIN, ESQ.
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BY: JOZE WELSH, ESQ.

Counsel for the Defendant

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held remotely, beginning at 10:00 a.m.)

11:50:35 THE COURT: Good afternoon, everyone. This is Maryellen Noreika. Who is there, please?

11:58:35 MR. FRY: Good afternoon, Your Honor. This is David Fry from Shaw Keller on behalf of Intuitive. And with me today is Karen Keller from my office, and also on the line is Daralyn Durie and Laura Miller from Durie Tangri, Frank DeCosta and Jacob Schroeder from Finnegan, and we also

12:00:53
12:00:59
12:01:01
12:01:04
12:01:07
12:01:11

12:01:16 1 have Scott Mosko from Intuitive.

12:01:19 2 THE COURT: Welcome.

12:01:20 3 MS. FARNAN: Good afternoon, Your Honor. This

12:01:22 4 is Kelly Farnan from Richards, Layton & Finger on behalf of

12:01:26 5 Auris. I'm joined by my co-counsel from Desmarais LLP, John

12:01:31 6 Desmarais, Paul Bonder, Tamir Packin, Cosmin Maier, Jamie

12:01:37 7 Kringstein and Joze Welsh. And from the client we have Mike

12:01:41 8 Timmons, Jeffie Kopczynski and Luke Kuipers.

12:01:45 9 THE COURT: Welcome to all of you as well.

12:01:50 10 So we have two things. We have the motion to

12:01:54 11 stay and we have the discovery issues. And we have reviewed

12:02:01 12 the papers on those. I guess we should deal with the motion

12:02:08 13 to stay -- hello. Folks still there?

12:02:15 14 MS. FARNAN: Yes, Your Honor.

12:02:17 15 MR. FRY: Yes, Your Honor.

12:02:18 16 THE COURT: We should address the motion to stay

12:02:22 17 first. I have read all of the papers on that. And I'll

12:02:26 18 have some thoughts, but I will hear from the parties first.

12:02:31 19 I guess defendants first since it's your motion.

12:02:35 20 MR. DESMARAIS: Thank you, Your Honor. This is

12:02:37 21 John Desmarais. Good afternoon.

12:02:40 22 THE COURT: Good afternoon.

12:02:40 23 MR. DESMARAIS: May it please the Court, let me

12:02:43 24 start with a brief description of where we are. I think

12:02:46 25 fact discovery is almost complete. We have a few more

12:02:50 1 things to do, but we plan to finish fact discovery by
12:02:54 2 April 24th. The parties have been largely working well
12:02:57 3 together. We have a few outstanding issues from the letter
12:03:00 4 briefs that we'll resolve today, but other than those we
12:03:04 5 should wrap up fact discovery shortly. Our renewed motion
12:03:08 6 to stay is not seeking to interrupt fact discovery at all.
12:03:12 7 We think we should finish that. Nor are we seeking to
12:03:15 8 interrupt the Court's last remaining claim construction
12:03:18 9 issue.
12:03:19 10 As Your Honor knows, you set an indefiniteness
12:03:22 11 hearing on one of the patents that is not in an IPR and we
12:03:26 12 see no reason to take that off the calendar. That's
12:03:29 13 currently scheduled for June 19th. The Coronavirus outbreak
12:03:34 14 may require that to be rescheduled, but we don't need to
12:03:38 15 deal with that today. Maybe that date will hold. It's the
12:03:42 16 balance of the schedule that our renewed motion to stay is
12:03:45 17 focused on. We are about to start expert discovery on six
12:03:48 18 patents. Each patent is complicated. They're robotic
12:03:53 19 surgery patents. Each side has three different technical
12:03:58 20 experts, not to mention damages experts, so we're talking
12:03:59 21 about eight expert reports under construction and we're on a
12:04:05 22 pretty aggressive schedule. Those reports are due in May
12:04:09 23 and June and then eight experts will be deposed in July.
12:04:13 24 Following that we'll have summary judgment and Daubert on
12:04:17 25 six patents and eight expert reports, then pretrial and the

12:04:20 1 trial in January.

12:04:21 2 In light of the state of the world right now,

12:04:24 3 I'm not sure that those eight experts are going to be

12:04:27 4 deposed in July. We haven't even reached the peak outbreak

12:04:31 5 yet of the Coronavirus, and if those experts don't get

12:04:35 6 deposed in July, the whole schedule starts to slip, which is

12:04:39 7 interesting because it gives us a practical reality of where

12:04:42 8 we are and whether the January trial date will even hold.

12:04:45 9 With that backdrop, the motion to stay makes a

12:04:48 10 lot of sense. For three of the six patents-in-suit, the

12:04:52 11 Patent Office has instituted IPR's. Once instituted there

12:04:57 12 is an 80 percent chance of success in the IPR's based on the

12:05:02 13 current statistics.

12:05:04 14 THE COURT: You said three of the six patents,

12:05:06 15 but that is seven of the twenty claims that are at issue,

12:05:11 16 right, that are being asserted?

12:05:14 17 MR. DESMARAIS: That's correct, Your Honor. In

12:05:16 18 the IPR is one patent has five claims and the other two

12:05:20 19 patents each have one asserted claim. So there are seven

12:05:25 20 claims in IPR.

12:05:27 21 THE COURT: Okay.

12:05:28 22 MR. DESMARAIS: And so two of the patents have

12:05:31 23 only one claim, two of the patents in the IPR, so with an

12:05:35 24 80 percent chance of success, we're looking at a very high

12:05:38 25 likelihood that at least two of the three patents get killed

12:05:42 1 in the Patent Office. We'll have the final written
12:05:46 2 decisions on March 4th which is right around the time of our
12:05:49 3 trial. Our trial is in January.
12:05:51 4 So the way we look at this it would be a
12:05:53 5 colossal waste of time for us to start reports on six
12:05:57 6 patents with eight experts when we know that three of them
12:06:00 7 have a high likelihood of not making it, getting invalidated
12:06:05 8 right after the trial. And the resource crunch won't be
12:06:08 9 just on the parties. Your Honor is going to be presented on
12:06:12 10 Daubert motions on eight experts on six patents, all the
12:06:16 11 time knowing that three of them are likely to be invalidated
12:06:20 12 just moments after the trial.
12:06:21 13 We can avoid that whole waste of time with a
12:06:24 14 short stay. If we stay the case right after fact discovery
12:06:28 15 closes on April 24th, we only need to hold the stay until
12:06:33 16 March 4th. If by some miracle at that point three of the
12:06:37 17 seven patents come out of the Patent Office intact, we can
12:06:40 18 serve expert reports thirty days later and still have the
12:06:43 19 trial back on schedule for sometime December 2021, assuming
12:06:48 20 Your Honor's calendar has time. So slippage there of less
12:06:54 21 than a year especially when you consider it's unlikely the
12:06:57 22 January trial will stick if the experts can't --
12:07:01 23 THE COURT: Aren't you going to be asking me --
12:07:03 24 let's assume that one or more of the patents, the claims of
12:07:06 25 those patents go down in the IPR trial, you're going to be

12:07:13 1 asking me to continue the stay pending appeal probably;
12:07:16 2 right?
12:07:18 3 MR. DESMARAIS: If the patents get invalidated
12:07:20 4 in the IPR, I think one of two things can happen. Intuitive
12:07:25 5 would conclude that the likely chance of flipping it is
12:07:28 6 small and maybe they would drop it from the case. They have
12:07:32 7 already dropped two from this case that were IPR'd. If they
12:07:37 8 don't drop it, yes, then for things that were invalidated we
12:07:41 9 would ask the stay to continue, that's true, but at that
12:07:44 10 point you could bifurcate and take them out of the case. We
12:07:48 11 don't need to stay the whole case at that point. But yes,
12:07:51 12 if they do get invalidated we would expect not to have to
12:07:56 13 prepare expert reports and try them. That's right. But if
12:07:59 14 they're not invalidated like Intuitive is arguing, perhaps
12:08:03 15 they come out against all odds, we could put the case right
12:08:07 16 back on schedule, serve expert reports thirty days later and
12:08:10 17 still get everything else done for a trial in December.
12:08:13 18 So if you consider that in light of the fact
12:08:15 19 that we may not be able to do eight expert depositions this
12:08:20 20 July and the January date might slip anyway, we're really
12:08:24 21 not talking about a large long-time stay here. And the
12:08:27 22 judicial economies for that short stay clearly outweigh
12:08:32 23 rushing to trial when we're going to have to deal Daubert
12:08:35 24 motions and summary judgment motions on eight experts and
12:08:39 25 six patents and there is very little likelihood that all of

12:08:42 1 those patents are going to make it to this trial. Even if
12:08:45 2 they do emerge from the Patent Office unscathed, which would
12:08:49 3 be remarkable, the trial issues will still be narrowed
12:08:53 4 because all of the validity estoppels will kick in. We'll
12:08:57 5 have a much different, more focused trial even if they do
12:09:01 6 come out of the Patent Office.
12:09:02 7 There is no doubt this approach will simplify
12:09:06 8 issues for the Court and the jury if we just wait and go to
12:09:10 9 trial on the patents that are going to survive. And it
12:09:14 10 comes at a sensible time in the case schedule where the
12:09:16 11 parties should be taking a breather at the end of fact
12:09:19 12 discovery especially in the light of the fact that the
12:09:23 13 Coronavirus is making us take a breather. The prejudice to
12:09:27 14 the short stay is very little, if any. Three of the six
12:09:30 15 patents have already expired or will within weeks of the
12:09:34 16 trial that we're going to have, and remaining three that
12:09:37 17 will still be alive after the January trial are not really
12:09:41 18 injunction patents anyway. They're on small features of
12:09:44 19 complicated systems. Intuitive didn't seek a preliminary
12:09:49 20 injunction, and as we can see from the deposition quotes,
12:09:52 21 excerpts we put on attached to our letters, Intuitive
12:09:57 22 doesn't even have evidence of lost sales of any real
12:10:00 23 magnitude from our competition. So any delay can be
12:10:03 24 entirely compensated with monetary damages should Auris lose
12:10:08 25 the trial. When you balance the short delay against the

12:10:11 1 judicial economies by what we would achieve by the short
12:10:16 2 stay, the stay motion makes tremendous sense, Your Honor.
12:10:19 3 And we respectfully request that you grant it.
12:10:23 4 THE COURT: Okay. Let me hear from the
12:10:27 5 plaintiff.
12:10:31 6 MS. DURIE: Thank you, Your Honor. This is
12:10:32 7 Daralyn Durie from Intuitive. As the Court noted, only
12:10:37 8 seven of the asserted twenty claims are subject to IPR. And
12:10:41 9 importantly with respect to five of those claims, we expect
12:10:44 10 to receive a final written decision before trial based on
12:10:48 11 the date when the IPR proceedings for the '601 Patent were
12:10:53 12 filed. So as of the existing trial date, the vast majority
12:10:58 13 of the patents at issue, and in the event that Auris is
12:11:03 14 successful on two IPR's with respect to that patent, we will
12:11:07 15 know that and we won't face the estoppel issues that counsel
12:11:12 16 was referring to.
12:11:13 17 In terms of the ability to proceed with expert
12:11:16 18 depositions, the parties have already agreed that the
12:11:19 19 remaining fact depositions can be taken by video. And I
12:11:23 20 think in the current environment it makes sense for the
12:11:26 21 expert depositions to be taken by video as well and for the
12:11:30 22 case to continue to move.
12:11:31 23 One of the concerns with putting a stay in place
12:11:34 24 and making the trial date in the current environment is that
12:11:40 25 we know that in many other cases with trial dates set

12:11:44 1 earlier that would be happening now are being vacated in
12:11:49 2 view of the pandemic and will have to be rescheduled. We
12:11:53 3 are particularly concerned here that even though counsel
12:11:56 4 characterized this as a brief stay, that very well may not
12:11:59 5 be realistic and this could turn into a stay of substantial
12:12:04 6 magnitude.
12:12:04 7 We think it makes sense to do the work that we
12:12:07 8 can do because we know that there would be a trial here on
12:12:10 9 the vast majority of claims that are at issue one way or the
12:12:14 10 other. And I would say the prejudice here to Intuitive is
12:12:18 11 substantial. This is in essence a two-player market. These
12:12:23 12 are the only two companies with robotic bronchoscopy
12:12:32 13 surgical devices. It's also very narrow market. So while
12:12:32 14 counsel referred to the relatively small number of sales
12:12:35 15 that take place, that's right. That's because it's a long
12:12:39 16 cycle for something that is a new product, hospitals are
12:12:41 17 buying this new line of robotic equipment. And as the Court
12:12:46 18 can well imagine, competition in the early days of
12:12:49 19 establishing the market is particularly fierce and
12:12:53 20 particularly important. So while counsel characterizes
12:12:56 21 these as small features, it's true that they are features
12:12:59 22 with respect to the system, we think that they are important
12:13:02 23 features to the market. We do think that they are features
12:13:05 24 to which we would be entitled to an injunction under Ebay.
12:13:11 25 It's true, we did want an injunction. We didn't want to

12:13:13 1 distract efforts to have this case move forward as
12:13:15 2 efficiently and quickly as possible towards the penultimate
12:13:20 3 trial date.
12:13:20 4 But at the end of the day, we face very
12:13:27 5 competitive loss of market share and competitive pressure
12:13:29 6 with long-term effects because getting a foothold in at a
12:13:32 7 particular hospital can obviously have long-term effects in
12:13:36 8 terms of the purchase of subsequent devices and really
12:13:39 9 framing the market, so the competitive consequences here are
12:13:43 10 real.
12:13:43 11 In view of the fact that Auris waited until
12:13:48 12 almost the one-year deadline to file the various IPR's and
12:13:53 13 Initiative and where we are in the case, we think it makes
12:13:55 14 sense to move forward. Expert reports are due in basically
12:13:58 15 a month. The preparation of those expert reports is
12:14:02 16 obviously already well underway. There is no prejudice to
12:14:05 17 Auris for moving forward. It would simply be a matter at
12:14:09 18 the end of the day, if anything, of eliminating certain
12:14:13 19 arguments from the expert reports and again with a very
12:14:16 20 small portion of the claims.
12:14:19 21 THE COURT: Okay. Look, I'm going to deny the
12:14:28 22 motion. In addressing a motion to stay I have broad
12:14:33 23 discretion and I have reached this decision by reviewing the
12:14:37 24 factors that I typically would need to look at in these
12:14:41 25 circumstances. And here primarily I'm not convinced that

12:14:44 1 the stay will simplify the issues sufficiently.
12:14:50 2 Trial has been instituted on only seven of the
12:14:53 3 twenty claims at issue, three of the six patents, and as we
12:14:56 4 just heard that we'll have some, at least preliminary,
12:15:01 5 answers on five of those claims before the current trial is
12:15:06 6 set.
12:15:06 7 And as for the other factors, I think that those
12:15:09 8 are largely neutral or leaning slightly toward going forward
12:15:14 9 in the case, so I'm going to deny the motion to stay. So
12:15:20 10 that means that we now need to address the fact discovery
12:15:25 11 issues. I guess we would have needed to address those
12:15:28 12 anyway. But let's address the current discovery issue. And
12:15:35 13 on this one, everybody has issues, so let's hear from
12:15:40 14 plaintiffs first.
12:15:42 15 MS. DURIE: Thank you, Your Honor.
12:15:47 16 THE COURT: Could you make sure when you start
12:15:49 17 talking you say who it is because my court reporter is
12:15:52 18 remote, and if you just start talking it's going to make for
12:15:56 19 a messy transcript.
12:15:58 20 MS. DURIE: Completely understood, Your Honor.
12:16:00 21 Daralyn Durie for Intuitive. And I apologize.
12:16:03 22 I know Intuitive's motion is generally addressed
12:16:08 23 to a category of documents pertaining to Johnson & Johnson's
12:16:14 24 acquisition of Auris, and then we have an additional issue
12:16:18 25 with respect to the deposition of Auris' claim construction

12:16:22 1 expert. But I want to start with the transactional
12:16:24 2 documents. These documents are critically important to this
12:16:28 3 case and in particular to damages. Because at the point in
12:16:35 4 time where at the hypothetical negotiation, the date of the
12:16:39 5 hypothetical negotiation would be the date which Monarch
12:16:43 6 launched, which was in March of 2018.
12:16:46 7 Roughly a year later, Johnson & Johnson acquired
12:16:50 8 Auris, a transaction obviously that had been under
12:16:53 9 negotiation for an extended period of time. At that point
12:16:56 10 the Monarch was Auris' only approved product. And obviously
12:17:01 11 for that reason, the competitive prospects of the device,
12:17:07 12 the market in which it was situated, and what it was about
12:17:11 13 that device that would lead to its market acceptance were
12:17:14 14 all obviously going to be critical factors in that
12:17:20 15 transaction.
12:17:22 16 Auris has produced to us only a handful of
12:17:25 17 documents, but has refused to produce the transactional
12:17:29 18 documents themselves. Those transactional documents are
12:17:33 19 critical precisely for us to be able to ascertain the nexus
12:17:38 20 between the consideration --
12:17:40 21 THE COURT: When you're asking for the
12:17:41 22 transactional documents themselves, tell me specifically
12:17:45 23 what you want and why you think those would be relevant.
12:17:50 24 MS. DURIE: So we want the actual purchase
12:17:54 25 agreements, and we want the negotiation, the red line

12:17:58 1 documents pertaining to the negotiation of that.
12:18:02 2 THE COURT: Because you think that's going to
12:18:04 3 tell you what features of the Monarch were relevant to the
12:18:10 4 purchase or the price that was paid?
12:18:13 5 MS. DURIE: That's right, Your Honor. In
12:18:15 6 negotiating the price, we know that the parties were looking
12:18:19 7 at anticipated sales of the Monarch, for example, and what
12:18:24 8 the likely market was in order to determine what the value
12:18:31 9 of the company was given this was at the time its one and
12:18:34 10 only product. And in analyzing that, we would expect that J
12:18:40 11 & J would have been looking at the Monarch, at the Monarch
12:18:43 12 only competition which is to say the, I don't know, the
12:18:46 13 Intuitive device, and assessing the competitive position of
12:18:50 14 the parties, and the value that they expected from being
12:18:55 15 able to acquire the Monarch. And in assessing in a
12:18:59 16 hypothetical negotiation what Auris would have been willing
12:19:04 17 to pay Intuitive for a license so that it could have an
12:19:08 18 approved product with those features we think understanding
12:19:12 19 the dynamics in the J & J negotiations is critical to that.
12:19:18 20 And the case that Auris is relying on actually sort of
12:19:21 21 illustrates this point perfectly because there at an
12:19:24 22 ultimate motion in limine stage, the court said that no
12:19:27 23 nexus had been shown between the acquisition price of the
12:19:32 24 company and the relevant features that were at issue in the
12:19:35 25 litigation so the acquisition price wasn't relevant to the

12:19:39 1 damages analysis. But here precisely that we want discovery
12:19:43 2 in order to be able to determine from J & J's perspective
12:19:49 3 sort of what was important in the price, in the
12:19:51 4 multi-billion dollar price that they were willing to pay to
12:19:56 5 Auris in order to get rights to the Monarch, what was
12:19:59 6 important about the Monarch in making that decision and how
12:20:02 7 they saw the likely market for it in the future. Because in
12:20:06 8 our view, the features, the patented features were critical
12:20:10 9 to Monarch's ability to compete successfully with the
12:20:14 10 Intuitive product. And it is our expectation that the
12:20:18 11 transactional documents are going to confirm that.
12:20:21 12 So specifically, Your Honor, in regards to your
12:20:24 13 question, and this is something that it should be very
12:20:27 14 simple for the parties to provide, we want a copy of the
12:20:31 15 sales agreement. We want a copy of the red lines that went
12:20:35 16 back and forth and the negotiations that went back and
12:20:37 17 forth.
12:20:38 18 THE COURT: And what's your response, what's
12:20:39 19 your response to defendant's assertion that you didn't ask
12:20:46 20 for some of the documents that you're currently asking me
12:20:49 21 for?
12:20:50 22 MS. DURIE: We did, Your Honor. And I want to
12:20:52 23 be clear. The defendants are not making that assertion I
12:20:55 24 don't think as to J & J. And we are making that request of
12:20:59 25 J & J as well. These documents should be readily obtainable

12:21:03 1 from either side of the transaction. But we did ask and
12:21:06 2 I'll run through quickly, document request number 3 to Auris
12:21:11 3 was all documents about the subject matter of the lawsuit.
12:21:14 4 Number 46, all contracts relating to sales of the Monarch.
12:21:17 5 Number 40, the agreements relating to the Monarch. Number
12:21:21 6 34, documents relating to the market for the Monarch.
12:21:24 7 Number 28, any contracts and agreements that were relating
12:21:28 8 to the Monarch.
12:21:29 9 So we think there is a number of different
12:21:31 10 document requests in which these documents would fall. And
12:21:36 11 again, there is no substantial question of burden here.
12:21:40 12 This is a set of documents that it should be very easy for
12:21:43 13 Auris to put its hands on or for J & J to put its hands on
12:21:48 14 and turn over. Again, at the discovery stage we think we
12:21:52 15 should be able to take discovery into this precisely in
12:21:55 16 order to lay the factual predicate for the ultimate
12:21:59 17 determination.
12:22:02 18 THE COURT: All right. Let me hear from Auris.
12:22:07 19 MR. PACKIN: Yes, Your Honor. This is Tamir
12:22:13 20 Packin from Desmarais LLP on behalf of Auris as well as on
12:22:16 21 behalf of J & J. Let me start with the Auris' side and I
12:22:23 22 think Your Honor identified the issue very well which is
12:22:26 23 that Intuitive never served requests for production seeking
12:22:30 24 those topics. Counsel just read a number of requests, but
12:22:34 25 those requests do not mirror the agreement that they're

12:22:37 1 seeking. They knew about this acquisition. They never
12:22:40 2 sought documents about the acquisition. Those requests are
12:22:43 3 about the accused product, and Auris produced tons and tons
12:22:47 4 of documents about the accused product. There was an ESI
12:22:52 5 procedure about how to produce communications, and now what
12:22:56 6 they're doing is they're trying to end run around the ESI
12:23:00 7 procedure by trying to get e-mails from J & J if I heard
12:23:04 8 correctly about the red line --
12:23:06 9 THE COURT: That's it. Let me just understand,
12:23:11 10 is there a separate like subpoena out there for J & J? When
12:23:15 11 you say the documents have been requested of Auris and J & J
12:23:20 12 and you're here representing them both, is there a separate
12:23:26 13 request to J & J or is it based on the relationship with
12:23:31 14 Auris that they're requested?
12:23:35 15 MR. PACKIN: That's a great question. Again,
12:23:38 16 this is Tamir Packin. There is a separate request is the
12:23:42 17 short answer. Essentially there are requests for production
12:23:45 18 from Auris. They never sought these products, these
12:23:48 19 documents throughout the course of discovery. And they
12:23:52 20 never tried to add J & J to the case. There was the
12:23:56 21 acquisition. Then after the acquisition, they issued a
12:24:00 22 separate subpoena to J & J, a third party, and they're
12:24:05 23 treating J & J as a third party through a third-party
12:24:09 24 subpoena and have these broad requests including effectively
12:24:13 25 all documents relating to the Monarch, so basically anything

12:24:16 1 relating to the accused product, they're seeking that from
12:24:20 2 the parent company rather than going to Auris which they did
12:24:23 3 go to Auris and Auris also produced tons and tons of
12:24:27 4 documents on the various particular issues. And what
12:24:30 5 happened --
12:24:31 6 THE COURT: But for the J & J request, is there
12:24:35 7 anything specific about the reason for the acquisition and
12:24:41 8 how Monarch figured into the acquisition price or is it just
12:24:46 9 documents relating to Monarch?
12:24:49 10 MR. PACKIN: Your Honor, the way that they
12:24:51 11 requested it was documents relating to Monarch. When we
12:24:54 12 objected to that timely back in September and said this is
12:24:58 13 way too broad, that's not proper, and during the meet and
12:25:02 14 confer process, which was protracted, and in January they
12:25:06 15 said what we're really looking for is to know how much the
12:25:10 16 Monarch was valued in terms of the overall acquisition
12:25:15 17 prices. And we said you know what, we don't think that's
12:25:19 18 relevant. We don't think there is a nexus, not relevant to
12:25:24 19 the hypothetical negotiation, but given that narrow focused
12:25:29 20 request, we'll get them for you.
12:25:31 21 We presented the slides that were presented to
12:25:33 22 the board of directors at J & J that broke out at the bar
12:25:38 23 graph here is how much the Monarch went in to the overall
12:25:41 24 acquisition price. We did that. Then they came back and
12:25:44 25 said, oh, you know what, our request was broader.

12:25:47 1 Everything related to the Monarch. And again, I said to
12:25:50 2 them, well, that's not going to cut it. If you tell me what
12:25:53 3 you're looking for, maybe we can get to an agreement I
12:25:57 4 originally thought we had when we produced the first slide
12:26:02 5 deck. They said well, we want the underlying due diligence
12:26:06 6 that related to the Monarch as I think counsel suggested on
12:26:10 7 the phone now.
12:26:11 8 What we did was we went and we got them both
12:26:14 9 from an initial investment and the final acquisition, there
12:26:17 10 are slide decks that are dozens of pages long specifically
12:26:21 11 on the Monarch, the Monarch diligence slide deck. Now they
12:26:26 12 say no, that's not enough, we want everything related to
12:26:29 13 Monarch. There has been this back and forth, none of it is
12:26:33 14 relevant. They haven't met their burden which in this case
12:26:36 15 a third party is higher than it would be for a party and you
12:26:39 16 can't just say it's relevant to damages, therefore it's
12:26:42 17 relevant, and so --
12:26:44 18 THE COURT: Let me ask you this. If they say
12:26:50 19 this entire sales price, or purchase price is relevant and
12:26:57 20 you're going to come back and say no, it's not relevant, and
12:27:02 21 because only some small portion of that related to the
12:27:07 22 Monarch, you're not going to rely on any testimony or
12:27:11 23 documents that you have not already produced. Is that
12:27:15 24 correct?
12:27:16 25 MR. PACKIN: It's correct. We don't -- let me

12:27:19 1 just answer with one nuance. We are not going to rely on
12:27:22 2 any documents that we haven't already produced. They have
12:27:25 3 not yet deposed our witness, so obviously our witness has
12:27:29 4 not testified at all. When the witness testifies, we may
12:27:33 5 rely on what the witness says. But the documents are the
12:27:36 6 scope of the universe and we expect that the questioning
12:27:38 7 will be limited to those documents and that's what the
12:27:41 8 witness will testify to. So the answer is yes, Your Honor.
12:27:46 9 THE COURT: Okay. Let me hear back from
12:27:49 10 Intuitive, why isn't that sufficient to deal with our
12:27:54 11 concerns rather than say everything related to Monarch,
12:27:57 12 which I have to tell you seems awfully broad?
12:28:00 13 MS. DURIE: And Your Honor, I understand
12:28:02 14 everything related to Monarch, although during the meet and
12:28:05 15 confer we were clear that from -- in terms of getting
12:28:09 16 documents from J & J, it is documents pertaining to the due
12:28:12 17 diligence and the transaction and that should be a narrow
12:28:17 18 discrete set of documents.
12:28:18 19 In terms of why this isn't good enough, the
12:28:21 20 problem precisely is that Auris has cherry picked a couple
12:28:25 21 of documents and produced -- sort of produced them in
12:28:31 22 partially redacted form without giving us any way to test
12:28:34 23 whether that was, in fact, the premise of the transaction.
12:28:37 24 So the concern that I have is I'm going to go
12:28:39 25 take this deposition, the witness is going to say something

12:28:42 1 that may be relatively self serving in terms of asserting
12:28:46 2 that only some small portion of the transactional value
12:28:50 3 pertained to the only product that Auris had at the time,
12:28:53 4 and without access to the documents, I'm not going to have a
12:28:57 5 way to test the underlying bona fide of that testimony which
12:29:01 6 is then what J & J and Auris are going to come in and
12:29:05 7 testify at trial. If Auris and J & J will agree that the
12:29:09 8 entire transactional price was attributable to the Monarch
12:29:12 9 --
12:29:12 10 THE COURT: But they're not going to agree to
12:29:15 11 that because they said they already have given you documents
12:29:18 12 that show only some portion of it is. So that -- I mean,
12:29:23 13 what I'm not understanding is why you need the deal
12:29:28 14 documents for the entirety of the deal. It just doesn't
12:29:33 15 seem to me that they're going to break out for you what
12:29:37 16 portion of that was Monarch. It sounds more like the things
12:29:42 17 that they've already given you do that. And your problem is
12:29:46 18 that they don't give a high enough number is what it sounds
12:29:50 19 like.
12:29:51 20 MS. DURIE: Well, no, Your Honor, the problem is
12:29:53 21 they have identified a couple of documents that they have
12:29:57 22 given us, one of which was sort of after the fact. But we
12:30:02 23 don't have any way to test whether that is, in fact, the
12:30:07 24 premise of the deal. And our concern is allowing Auris to
12:30:13 25 pick out a couple of documents that are presumably the ones

12:30:16 1 that it likes and say here, one of which is sort of an
12:30:20 2 after-the-fact reconstruction. Understanding that the
12:30:23 3 parties were in litigation and this was likely to be an
12:30:25 4 issue, we should be able to test the bona fides of what is
12:30:31 5 reflected in those documents to see whether it accords with
12:30:36 6 the actual negotiation of the deal, and the importance in
12:30:40 7 the context of those negotiations that the parties put on
12:30:44 8 the fact that Auris had an approved product. And that's
12:30:47 9 really I think the critical thing here is if Auris had not
12:30:51 10 had an approved product in the form of the Monarch, and it
12:30:56 11 hadn't had this ability to compete with Intuitive's product
12:31:00 12 that we think it had because of the patented features, what
12:31:03 13 would the deal price had looked like at that point? How
12:31:07 14 much of that value was attributable to sort of this
12:31:10 15 technology and its importance in the competitive landscape?
12:31:13 16 And again, the burden --
12:31:15 17 THE COURT: All right. I think I have heard
12:31:17 18 enough because we have already been going for half an hour
12:31:21 19 and we're through one of a billion discovery requests. I'm
12:31:25 20 going to deny this request. If you take the deposition and
12:31:29 21 it turns out that there are some other documents that the
12:31:31 22 witness identifies that are relevant to this or that suggest
12:31:36 23 that the number that was presented to the board is not
12:31:39 24 correct, and that's not really what they were looking at,
12:31:44 25 then you guys can work it out and get additional documents.

12:31:48 But for now, based on both the requests that were made and
12:31:53 the arguments that I have heard here, I'm going to deny the
12:31:56 request.
12:31:57 Let's go to the claim construction expert
12:31:59 deposition.
12:32:02 MS. DURIE: So here the issue, Your Honor, is
12:32:07 during the claim discovery process, we made the judgment
12:32:10 that it was not necessary for us to depose Auris' claim
12:32:14 construction expert at that time in view of the way the
12:32:17 arguments had set up on as a predicate to the claim
12:32:22 construction hearings that we had. The Court ordered as the
12:32:26 Court is aware an evidentiary hearing. And we indicated
12:32:30 that in view of that evidentiary hearing, we wanted to take
12:32:33 the deposition. Auris' position was we had forfeited our
12:32:37 right to take the deposition of the claim construction
12:32:40 expert making the judgment that we didn't need to do so
12:32:43 initially.
12:32:43 When we met and conferred about this, I said to
12:32:46 Auris if there is something you need to do or have if it
12:32:52 prejudices you of taking this deposition at this juncture, I
12:32:56 said we're very open to any suggests Auris has as to how to
12:33:01 mitigate that prejudice, we didn't say anything that would
12:33:04 alleviate their concern. We think it would be prejudicial
12:33:08 to us to go forward with a live evidentiary hearing where we
12:33:14 didn't have an opportunity to take Auris' expert's

12:33:17 1 deposition and --

12:33:18 2 THE COURT: Let me hear from Auris on this one,

12:33:20 3 because I have to tell you it seems like it would only be

12:33:23 4 helpful to me to have folks cross-examine the witnesses and

12:33:28 5 make the presentation at the second hearing where I will

12:33:34 6 hear from these witnesses more streamlined and more focused

12:33:38 7 rather than have people flailing around at a time when I

12:33:43 8 actually want to have people more prepared. So what's

12:33:47 9 really the problem here?

12:33:51 10 MR. MAIER: Good afternoon shall, Your Honor.

12:33:52 11 This is Cosmin Maier from Desmarais on behalf of Auris.

12:33:56 12 Counsel for Intuitive told you that they decided to forgo

12:34:01 13 the deposition of our claim construction expert. And doing

12:34:05 14 so now, allowing them to do the deposition now during expert

12:34:10 15 report drafting, that would really put us in a bad position

12:34:14 16 that we would not have --

12:34:16 17 THE COURT: Right. But I'm asking you -- I get

12:34:18 18 it, I get it, you don't want to do it, but you guys -- I'm

12:34:25 19 saying it's putting me in a difficult position if I want to

12:34:30 20 adequately address the arguments that are in front of me,

12:34:33 21 and I want them to be the best presentation that it can be.

12:34:37 22 And you're talking about you, I want you to focus on me.

12:34:43 23 Why is it not helpful to me to have that?

12:34:46 24 MR. MAIER: Well, Your Honor, I think you have

12:34:48 25 to look at it in the whole picture. What is going to happen

12:34:51 1 is we're going to need to prepare our expert for his claim
12:34:55 2 construction deposition five months after he opined on these
12:34:59 3 issues. So it's going to hurt his ability to prepare his
12:35:03 4 invalidity reports.
12:35:05 5 THE COURT: All right. What, that's it? I get
12:35:07 6 it. I get it. But you proposed -- they want four hours,
12:35:12 7 you suggested two, they're going to get two hours because I
12:35:16 8 want things to be better presented to me rather than less
12:35:19 9 well presented to me. And your expert is going to have to
12:35:23 10 prepare for the hearing anyway. So that one I'm going to
12:35:26 11 give them two hours.
12:35:27 12 What's next?
12:35:28 13 MR. MAIER: Your Honor, if I could ask one
12:35:30 14 question. Would we also be able to redepose their claim
12:35:35 15 construction expert now in light of the fact that we can
12:35:38 16 focus it on the questions that you had at the first hearing.
12:35:42 17 THE COURT: Sure.
12:35:43 18 MR. MAIER: Okay. Thank you, Your Honor.
12:35:46 19 THE COURT: Okay. What's next?
12:35:53 20 MR. BONDOR: Your Honor, it's Paul Bondor for
12:35:55 21 Auris. I think the only thing remaining on the agenda are
12:35:58 22 the discovery disputes that Auris raised in its letter to
12:36:01 23 Your Honor. If it's appropriate, may it please the Court, I
12:36:05 24 can kick off with that.
12:36:06 25 THE COURT: That would be great. Thank you.

12:36:08 1 MR. BONDOR: Okay. So starting I'm just going
12:36:11 2 to go in the order that they were addressed in the letter
12:36:13 3 for convenience. The first issue was Intuitive's
12:36:18 4 manufacturing capabilities and capacity. The bottom line
12:36:20 5 here is that Intuitive's broad responses, their discovery
12:36:25 6 responses have identified that they're planning to, or at
12:36:28 7 least keeping alive the option for a lost profits claim and
12:36:31 8 as part of that as Panduit factor three we need to assess
12:36:37 9 their manufacturing capabilities and capacity, and we need
10 information about the current Ion manufacturing
12:36:42 11 arrangements, capabilities and capacity such as how many
12:36:43 12 lines are there? Where are they? How many units can they
12:36:46 13 produce? What schedule are they?
12:36:48 14 There haven't been any documents produced that
12:36:51 15 provide that information. There haven't been any listing or
12:36:55 16 identification of contractor parts or what their capacity
12:37:00 17 is. In terms of whether or not the documentation exist,
12:37:03 18 Mr. Rosa of Intuitive confirmed that rigorous records are
12:37:09 19 kept relating to manufacturing and supplying mixed with the
12:37:13 20 Ion and it gave some examples. But none of the people that
12:37:17 21 Intuitive has put up as a damages related witness has been
12:37:22 22 able to speak to any of that. I asked Jones about it, I
12:37:26 23 asked Patton about it, I asked Carlson about it, they didn't
12:37:31 24 designate anybody with any knowledge about manufacturing.
12:37:34 25 That's all with respect to the Ion.

12:37:35 1 With respect to Da Vinci -- let me back up for a
12:37:39 2 second. Intuitive has two product lines. One of them is
12:37:44 3 the Da Vinci product line, that's the large multi-arm
12:37:47 4 robotic surgery machines. And the second product line is
12:37:50 5 Ion, which is robotic bronchoscopy. That's the device they
12:37:56 6 launched a year-and-a-half after we launched ours.
12:37:59 7 THE COURT: Hold on. Hold on. Sorry. One of
12:38:02 8 the problems with doing this by phone is that the phone
12:38:05 9 doesn't click over necessarily, so sometimes I have to cut
12:38:09 10 in.
12:38:10 11 But in the responsive letter I think they said
12:38:22 12 Da Vinci doesn't compete with the Monarch product. And
12:38:27 13 maybe this is a question I should be asking plaintiff, but
12:38:32 14 are they asserting lost profits vis-a-vis the Da Vinci?
12:38:39 15 MS. DURIE: This is Daralyn.
12:38:42 16 MR. BONDOR: Good ahead, Daralyn.
12:38:45 17 MS. DURIE: We are not asserting lost profits
12:38:48 18 for Da Vinci, only Ion.
12:38:50 19 THE COURT: If that is the case, then why do you
12:38:53 20 need the manufacturing information for the Da Vinci?
12:39:01 21 MR. BONDOR: Thank you, Your Honor. Paul Bondor
12:39:03 22 again. It certainly is very helpful to hear for the first
12:39:07 23 time that they are not seeking it with respect to Da Vinci.
12:39:10 24 At this time the manufacturing capacity of Da Vinci is only
12:39:14 25 relevant if anybody is going to assert in an expert report

12:39:18 1 that they could switch over the Da Vinci manufacturing line
12:39:22 2 to the Ion. And we would have absolutely no way to test
12:39:25 3 that assertion because they haven't produced anything
12:39:29 4 associated with the Da Vinci product line. None of that, of
12:39:31 5 course, addresses the fact that they haven't giving us
12:39:35 6 anything that is current with respect to the Ion
12:39:38 7 manufacturing capacity, product lines, what they can do, how
12:39:42 8 many shifts they're running, all that sort of stuff.
12:39:45 9 THE COURT: Okay. Let me hear from Intuitive.
12:39:48 10 MS. DURIE: Thank you, Your Honor. It's simply
12:39:51 11 not correct that we haven't produced any documents.
12:39:53 12 THE COURT: Is this Ms. Durie again?
12:39:56 13 MS. DURIE: I apologize, Your Honor. Yes, it
12:39:58 14 is. Dara Durie for Intuitive.
12:40:00 15 It simply is not correct that we haven't
12:40:03 16 produced any documents pertaining to the manufacturing
12:40:06 17 capacity for Ion. We have. We had a search protocol for
12:40:09 18 searching for documents. We searched electronic files for
12:40:14 19 our chief business officer and our CEO. We produced
12:40:18 20 documents that included internal reports from the product
12:40:20 21 manufacturing and operations scheme. There isn't a set of
12:40:24 22 centralized documents that list information in the form in
12:40:26 23 which Auris wants it listed. Essentially they're asking us
12:40:29 24 to create documents that don't exist, but we produced the
12:40:33 25 documents that we identified from the set of custodial

12:40:37 1 searches and we produced witnesses who were questioned about
12:40:39 2 manufacturing capacity. And Auris chose the witnesses that
12:40:44 3 it wanted to depose given the subject matter that they knew
12:40:48 4 about, it made a selection, it deposed those witnesses.
12:40:51 5 They were asked about manufacturing capacity and they
12:40:54 6 answered those questions to the best of their knowledge.
12:40:56 7 THE COURT: What about the testimony that at
12:40:58 8 least has been referenced in their letter from one of the
12:41:04 9 Intuitive's witnesses who said that things like supply
12:41:10 10 capacity exist to plan for the growth of the company. Where
12:41:14 11 are those documents?
12:41:17 12 MS. DURIE: So their supply capacity exist.
12:41:23 13 Certainly it is true that the company in general is planning
12:41:27 14 for supply at a high level. That doesn't mean that there
12:41:32 15 are sort of the particular centralized documents that Auris
12:41:37 16 is referring to about plant investment. I'm not aware of
12:41:41 17 the existence of such documents. And again, that was
12:41:44 18 testimony from Dave Rosa whose files, in fact, were searched
12:41:49 19 and responsive documents were produced as a consequence of
12:41:53 20 that.
12:41:57 21 THE COURT: All right. For this one, if
12:42:04 22 Intuitive is going to be seeking lost profits, then it needs
12:42:10 23 to produce documents that indicate its manufacturing
12:42:18 24 capability. And I don't think it's sufficient to say we
12:42:21 25 looked through custodial sources when there may be

12:42:25 1 noncustodial sources. So I think you have to go back to
12:42:29 2 your clients and say look, if this is what we need to figure
12:42:32 3 out, what would we do, what documents would we look at and
12:42:36 4 see what documents exist and produce them.
12:42:39 5 I'm not going to order you to do that for the Da
12:42:43 6 Vinci product unless you plan to make the argument that was
12:42:51 7 suggested which is that you say well, we would just convert
12:42:55 8 over the Da Vinci line so that we would have the capacity to
12:42:59 9 make these, then I think it is fair game to say you have to
12:43:06 10 produce the backup for saying that there was enough capacity
12:43:11 11 on the Da Vinci line. But for now, if you're not making
12:43:15 12 that argument, then producing information that shows the
12:43:20 13 manufacturing capacity for the Ion product should be
12:43:25 14 produced.
12:43:30 15 Okay. Sales, revenues, costs, profitability.
12:43:36 16 Where are we on that?
12:43:37 17 MR. BONDOR: Thank you, Your Honor. Paul Bondor
12:43:39 18 for Auris. There are two prongs to our request here. One
12:43:44 19 is basic financial information about both of the two product
12:43:47 20 lines, Da Vinci and Ion. The second one is projected sales
12:43:50 21 and demand for both product lines. Basically this is a case
12:43:55 22 where or at least in almost all patent infringement cases
12:43:59 23 the parties produce revenue sales cost on a granular level
12:44:02 24 from the accounting system used by the company. They're
12:44:04 25 generally produced at the product or product line level.

12:44:07 1 Sometimes it's SKUs, sometimes it's families of SKUs.
12:44:11 2 Bottom line starting with Da Vinci they have produced
12:44:14 3 absolutely nothing --
12:44:14 4 THE COURT: Why do you need that given that they
12:44:20 5 -- they're just damages positions that they said that they
12:44:26 6 are making?
12:44:26 7 MR. BONDOR: I think, Your Honor, the short
12:44:29 8 version is that as you heard in the motion to stay and from
12:44:32 9 your work on the case, you know that these are robotic
12:44:35 10 surgery patents that they are asserting. Part of the issues
12:44:38 11 that are relevant to the damages is ascertaining of what
12:44:41 12 with the value of the supposed advancements that are
12:44:47 13 claimed. They have robotic surgery products. Da Vinci
14 products are unquestionably robotic surgery products. In
12:44:55 15 fact, some of the patents grew out of Da Vinci work. So
12:44:55 16 understanding what the profitability of those systems is and
12:44:58 17 what the pricing of the systems is is a relevant issue that
12:45:03 18 the damages experts ought to be able to consider, so --
12:45:08 19 THE COURT: Are they asserting that Da Vinci is
12:45:11 20 covered by those patents?
12:45:14 21 MR. BONDOR: At least some of them, yes.
12:45:17 22 THE COURT: Okay.
12:45:20 23 MR. BONDOR: I'm sorry, I could be more blunt,
12:45:24 24 but there is a discrepancy between what the witnesses have
12:45:27 25 said and what the interrogatory responses have said, but

12:45:29 1 their interrogatory responses do identify Da Vinci systems
12:45:32 2 that are allegedly covered by certain of the
12:45:35 3 patents-in-suit.
12:45:36 4 With respect to the Ion product line, they have
12:45:38 5 -- they have given us only a summary spreadsheet of the Ion
12:45:44 6 products for which they have made actual sales as distinct
12:45:54 7 from clinical systems. But basically they haven't given us
12:45:59 8 product level data or sort of instrument accessory level
12:46:05 9 data on the Ion either. In point of fact, what they did
12:46:08 10 produce for Ion is much better than what they produced for
12:46:13 11 Da Vinci. So in fairness, we could get by on the stuff that
12:46:20 12 they gave us on Ion, but it's not the standard production.
12:46:25 13 Then I just really wanted to go to the projected
12:46:28 14 sales of Da Vinci very, very briefly. Two of their
12:46:32 15 witnesses, Patton and Rosa, confirmed that they do product
12:46:37 16 demand sales forecasting and they do it on a regular basis.
12:46:41 17 The single agreement between Intuitive Surgical, Inc. and
12:46:45 18 Intuitive Surgical Ops require that the demand forecast to
12:46:49 19 be provided to Intuitive Surgical Ops. That hasn't been
12:46:52 20 provided, so we're looking for projected sales or demand.
12:46:57 21 And I'm not talking about stuff that's two years old, I'm
12:47:01 22 talking about stuff that's related to their launch and the
12:47:03 23 projected sales alleged. Again, this ties into lost profits
12:47:07 24 and alleged value of the invention.
12:47:12 25 THE COURT: Okay. Ms. Durie.

12:47:15 1 MS. DURIE: Thank you, Your Honor. Daralyn
12:47:17 2 Durie.
12:47:18 3 First with respect to Ion, we have produced the
12:47:21 4 most granular sales revenue cost information that exist. We
12:47:26 5 produced it essentially at an invoice by invoice level. So
12:47:30 6 Auris has never identified any financial information about
12:47:34 7 the Ion that is not --
12:47:36 8 THE COURT: But are you saying that Da Vinci is
12:47:39 9 covered? Is that going to be an issue such that the
12:47:44 10 commercial success of Da Vinci is relevant, something along
12:47:50 11 those lines?
12:47:50 12 MS. DURIE: So it is true that Da Vinci does, in
12:47:56 13 fact, embody some of these claims. We have produced
12:48:01 14 financial information pertaining to Da Vinci. We have not
12:48:06 15 produced it at the sort of granular invoice level because
12:48:12 16 there has been many, many, many sales of Da Vinci over time,
12:48:16 17 unlike the situation with the products that are fully at
12:48:20 18 issue in the lawsuit where there is a smaller number of
12:48:22 19 sales and, therefore, we can produce that much more granular
12:48:27 20 information. We have produced high level information about
12:48:30 21 Da Vinci including sales revenue --
12:48:32 22 THE COURT: When you say high level, what is
12:48:35 23 that information?
12:48:36 24 MS. DURIE: So we have produced information at a
12:48:39 25 quarter-by-quarter basis of sales, revenues, costs, pricing

12:48:46 1 so that certainly to the extent that the question is can
12:48:49 2 they ascertain for commercial success purposes whether the
12:48:53 3 Da Vinci has been commercially successful, I would say the
12:48:57 4 financial information that we have produced is more than
12:49:00 5 sufficient to do that. If you are trying to construct sort
12:49:03 6 of a lost profits model, I understand that you might want
12:49:07 7 more detailed information that we produced for Ion, but
12:49:11 8 we're not seeking lost profit for Da Vinci.
12:49:14 9 MR. BONDOR: Your Honor, Paul Bondor --
12:49:16 10 MS. DURIE: So the information that we have
12:49:20 11 provided is more than sufficient to make a determination
12:49:22 12 about whether Da Vinci is commercially successful. That's
12:49:25 13 not even a contested fact.
12:49:27 14 MR. BONDOR: Your Honor, it's Paul Bondor. I'm
12:49:30 15 sorry, I wanted to be clear for the Court. What Ms. Durie
12:49:34 16 is referring to is they produced their publicly filed SEC
12:49:38 17 filings. All that does is break things out at a very, very
12:49:42 18 high level and, in fact, it does not break it out product by
12:49:45 19 product. We're sitting here right now not knowing what the
12:49:48 20 price of a Da Vinci system is. They have list prices for
12:49:52 21 catalogs and whatnot, but they do not break out costs on a
12:49:56 22 product-by-product basis or even a product line by product
12:49:59 23 line basis. The SEC stuff just isn't granular enough. And
12:50:03 24 their 30(b)(6) witness, Mr. Jones, said yeah, we didn't
12:50:07 25 produce anything. We think the SEC is enough and you can go

12:50:10 1 to the SEC website and get it. Later they did produce the
12:50:14 2 SEC filings, but they're just SEC filings. So they can
12:50:19 3 point to big numbers and say there, that is commercially
12:50:22 4 success, but it's really difficult to dig down into the
12:50:25 5 weeds and figure out what's really supposedly successful and
12:50:26 6 where are they making the money, is it on some big system or
12:50:30 7 some tiny piece.
12:50:31 8 THE COURT: Ms. Durie, is that the sales revenue
12:50:35 9 and cost information that you were referring to with Da
12:50:39 10 Vinci is just the public SEC filing?
12:50:43 11 MS. DURIE: It says our public SEC filings
12:50:46 12 contain information about revenues, costs, et cetera
12:50:50 13 pertaining to Da Vinci.
12:50:51 14 THE COURT: But is that -- when you say Da
12:50:54 15 Vinci, I don't know how this works. Are there different
12:50:58 16 models, different lines? Does it break it down in any way
12:51:03 17 like that or just say for anything that is in the Da Vinci
12:51:06 18 family, here is the number?
12:51:10 19 MS. DURIE: I'm actually -- I apologize, Your
12:51:12 20 Honor. I'm going to ask someone else who is on the call to
12:51:16 21 answer that more specific question with respect to Da Vinci
12:51:19 22 on our side. Frank, if you're on.
12:51:30 23 MS. MILLER: Your Honor, this is Laura Miller of
12:51:33 24 Durie Tangri. There are multiple series of the Da Vinci
12:51:38 25 system over the past twenty years. The SEC filings do not

12:51:45 1 break down on a product-by-product basis what the
12:51:49 2 profitability of those systems are. However, the only
12:51:52 3 systems that Intuitive was selling over the last
12:51:58 4 twenty years were the Da Vinci systems that do embody some
12:52:01 5 of the claims. Breaking out that financial information on a
12:52:05 6 product-by-product basis is actually an incredibly
12:52:09 7 time-consuming process and project. It's not something that
12:52:12 8 Intuitive maintains in the ordinary course of business. And
12:52:17 9 given the fact that we are just talking about commercial
12:52:22 10 success, that information is not actually going to help with
12:52:26 11 that inquiry, and would also be incredibly burdensome for
12:52:32 12 Intuitive to do.
12:52:33 13 THE COURT: Mr. Bonder, are you looking for --
12:52:37 14 what's the time period that you're looking for the
12:52:40 15 information for?
12:52:42 16 MR. BONDOR: I mean, I think that we could be
12:52:44 17 reasonable, Your Honor, with respect to the time period. I
12:52:48 18 think for the current calendar year and maybe the previous
12:52:53 19 three years, what does their product line look like. I
12:52:56 20 mean, in terms of realized profits on a product-by-product
12:53:03 21 basis that is stuff that is in every company's accounting
12:53:06 22 system. All they have to do is pull and run a report the
12:53:09 23 same way that they would in any patent case, so I'm not
12:53:13 24 buying -- I'm sorry, I recognize it's not my place, but I
12:53:17 25 think that the burden argument is a hollow one. I think

12:53:20 1 what you're hearing is they want to look at just big numbers
12:53:23 2 in their SEC filings because that helps them in their
12:53:28 3 commercial success arguments, but it does not help any of
12:53:30 4 the damages experts dig into the weeds and figure out where
12:53:33 5 it is that they're supposedly making their money and does it
12:53:36 6 have any relation at all to any of the claim features that
12:53:39 7 is supposedly at the root of these patents. That's exactly
12:53:42 8 the undertaking that the Federal Circuit says that we have
12:53:45 9 to do. We have to get in there and apportion out the value
12:53:48 10 associated with the improvement. And if I'm at a point
12:53:51 11 where I don't even know whether all of the Da Vinci systems
12:53:54 12 that show up in the SEC things are things that even
12:53:58 13 Intuitive claims are covered by the patent, how is it that
12:54:01 14 me or my damages expert is supposed to figure out what those
12:54:06 15 right numbers are?
12:54:07 16 THE COURT: Well, that's a good question. Are
12:54:11 17 all of the Da Vinci -- is it sort of a blanket assertion
12:54:15 18 that every single Da Vinci product falls within the scope of
12:54:22 19 certain claims?
12:54:29 20 MS. MILLER: This is covered in our
12:54:31 21 interrogatory responses and is unrelated to the financial
12:54:34 22 information. The financial information is not going to
12:54:37 23 indicate which Da Vinci system practiced the patents and the
12:54:44 24 financial information doesn't bear on that, either.
12:54:48 25 THE COURT: I'm sorry. I didn't understand what

12:54:50 1 that meant. Are you asserting that every -- are you
12:54:58 2 asserting that every sale, every bit of revenue in that
12:55:04 3 number that you gave in the SEC filing is a product that is
12:55:10 4 covered by claims of the patent?
12:55:14 5 MS. MILLER: All of the sales in the Da Vinci
12:55:16 6 systems that are in the SEC filing, yes, are covered by some
12:55:21 7 of the claims in the patent. And that's spelled out in our
12:55:25 8 interrogatory responses.
12:55:35 9 MR. BONDOR: Your Honor, Paul Bondor again.
12:55:38 10 But that simple assertion does not help us
12:55:40 11 because if we look to the table that they have and they say
12:55:43 12 that X patent supposedly covers some or all of the Da Vinci
12:55:48 13 systems, the 10-K's and 10-Q's that they're pointing to
12:55:54 14 don't break them out by various different systems. The only
12:55:57 15 thing that you have is all products and services, that's one
12:56:00 16 breakdown. And then you have a breakdown between systems
12:56:03 17 and instruments and accessories.
12:56:06 18 Again, they want us to go through those mental
12:56:09 19 gymnastics and assumptions to dive down into their own
12:56:13 20 10-Q's and 10-K's to try to figure out what number to apply
12:56:18 21 to the supposed revenues associated in any respects to the
12:56:22 22 alleged inventions when they're sitting on the actual
12:56:25 23 information and they brought the lawsuit. I understand that
12:56:30 24 it takes some accounting person a while to run the query and
12:56:35 25 pull the query, but candidly that's something they should

12:56:38 1 have done months ago. And we were surprised when their
12:56:43 2 30(b)(6) witness said oh, no, you can just go to the SEC
12:56:48 3 about that.
12:56:49 4 MS. DURIE: Your Honor, this is Daralyn Durie.
12:56:52 5 What we're hearing when we're hearing all this stuff about
12:56:55 6 apportionment, the detailed analysis that Mr. Bondor is
12:56:58 7 saying the damages expert is supposed to do is what is
12:57:02 8 required for a damages analysis. If we were seeking lost
12:57:05 9 profits with respect to sales of Da Vinci, I can understand
12:57:08 10 why the argument for why more detailed financial information
12:57:12 11 would be required, but --
12:57:14 12 THE COURT: I guess the question is are you
12:57:15 13 planning to do anything with that number in the SEC
12:57:19 14 statement at trial, like say, look how great Da Vinci is and
12:57:25 15 use that big number for anything? Because if you are, then
12:57:30 16 it seems to me that it's fair game to give them some ability
12:57:34 17 to understand what goes into that number and to test your
12:57:39 18 assertion that every product in that number is covered by a
12:57:42 19 claim.
12:57:43 20 MS. DURIE: But I think those are two different
12:57:46 21 questions, Your Honor. The answer to your first question is
12:57:49 22 yes, the level of commercial success, we plan to say that Da
12:57:54 23 Vinci has been commercially successful. Like I said, that
12:57:56 24 should not even be a controverted question in the case.
12:58:00 25 There are witnesses that have said that it has been

12:58:03 1 enormously successful, from the former CEO of Auris, now a J
12:58:13 2 & J employee. But the question of whether some products at
12:58:16 3 issue are present in some iteration of the Da Vinci and
12:58:19 4 others, no such assertion has been made. We have explained
12:58:22 5 in our interrogatory response that that has not sort of
12:58:26 6 changed over time with respect to various iterations of the
12:58:30 7 product that have come out, but in any event, as Ms. Miller
12:58:33 8 was saying, our financial information is not the thing that
12:58:37 9 would answer that question.
12:58:38 10 If Auris had tried to take discovery into
12:58:41 11 earlier versions of the Da Vinci to try to show that they
12:58:44 12 didn't include the claimed features, that sort of is what I
12:58:48 13 am hearing now, but given that we explained that the
12:58:51 14 features are consistent across the various iterations of Da
12:58:55 15 Vinci, we have provided financial information that shows the
12:58:58 16 sales number attributable to the sales of devices themselves
12:59:02 17 that embody the claim. That is the information that is
12:59:06 18 relevant to show commercial success which again is a pretty
12:59:10 19 low bar.
12:59:11 20 MR. BONDOR: Your Honor, if I could be heard.
12:59:13 21 I'm Paul Bondor.
12:59:14 22 The issue isn't whether the Da Vinci is
12:59:16 23 commercially successful or not. The issue is whether any of
12:59:19 24 the inventions or alleged inventions are commercially
12:59:22 25 successful.

12:59:23 1 While we have been discussing in Exhibit 1 of
12:59:27 2 our letter, I believe that you can see on page 38, it's an
12:59:37 3 excerpt, but I think we're in luck, we have it, on 38 of
12:59:41 4 Exhibit 1 to our letter, the response that Auris gave
12:59:45 5 actually identifies specific models of the Da Vinci, not all
12:59:49 6 Da Vinci, for instance the '906 is said to relate to the Da
12:59:54 7 Vinci SI and XI models, IS 33000 and IS 4000. The '701 is
01:00:01 8 supposedly related to the Da Vinci, the Da Vinci S, Da Vinci
01:00:04 9 SI, the Da Vinci XI, and some EndoWrist instruments. But
01:00:08 10 again, they're pointing to those things and then they want
01:00:13 11 to look at the entire supposed profitability or revenues
01:00:17 12 associated with the Da Vinci system without providing what
01:00:21 13 costs should be backed out associated with that, or how the
01:00:24 14 EndoWrist profitability related to anything. They can't
01:00:29 15 have it both ways. They can't say it's a low bar, we need
01:00:32 16 to show commercial success of Da Vinci, and then deprive us
01:00:36 17 of the actual information when their response particularly
01:00:40 18 sets out particular models of the Da Vinci and even
01:00:43 19 particular items or instruments associated with the Da
01:00:50 20 Vinci.
01:00:50 21 THE COURT: Okay. I think I heard enough for
01:00:55 22 this one, or at least for the financial aspect. I still
01:00:59 23 want to hear on the demand, but with respect to the
01:01:09 24 financial documents -- I'm sorry, I lost my place in this
01:01:15 25 letter -- I am going to order that Intuitive produce for the

01:01:24 1 last three years information on the sales, revenues, costs,
01:01:30 2 that it has on an either product-by-product or product line
01:01:37 3 by product line, I can't tell what those things are that are
01:01:41 4 in the list of products, if those are lines or products, but
01:01:50 5 it does appear that different things are broken out by
01:01:53 6 patent there, and so it seems like they should be able to
01:01:56 7 get some financial information with respect to those, but
01:01:59 8 not going back twenty years. I would say go back three
01:02:02 9 years which is what was suggested.
01:02:06 10 Okay. So what's the next issue?
01:02:10 11 MR. BONDOR: Thank you, Your Honor.
01:02:12 12 THE COURT: Wait, we did have -- I wanted to
01:02:16 13 hear from Ms. Durie on the demand projections. Have demand
01:02:26 14 projections for the Ion been produced?
01:02:34 15 MS. DURIE: Yes, Your Honor, we have. We
01:02:36 16 understand and appreciate that sales and demand projections
01:02:41 17 for the Ion are relevant responses and we have produced what
01:02:44 18 we have been able to identify. And I would say if we
01:02:47 19 identify additional documents -- we are not contesting the
01:02:51 20 relevance of that information, we are saying that we have
01:02:54 21 produced what we have been able to find.
01:02:56 22 THE COURT: Okay. And with Mr. Bondor, what do
01:03:02 23 I do with that when they say they have produced what they
01:03:05 24 were able to find?
01:03:06 25 MR. BONDOR: That's a good question, but I think

01:03:08 we could benefit from a direction from Your Honor to say go
01:03:13 back and speak with Mr. Patton and Mr. Rosa. In their
01:03:17 depositions they identified quarterly or semiannually demand
01:03:22 of product forecasts, demand forecasts that were made, and
01:03:26 also the IS Ops/ISI demand forecasts mandated by the
01:03:33 agreement and at least gather those subsets so we understand
01:03:36 what it is that the witnesses are talking about because
01:03:38 those documents have not been produced.
01:03:42 MS. DURIE: And, Your Honor, we have no
01:03:43 objection. We have already spoken with Mr. Patton and
01:03:47 Mr. Rosa, but we have no objection to speaking with them
01:03:49 again and ensuring that we have produced the sales and
01:03:53 demand projections that exist.
01:03:55 THE COURT: Okay. So I will ask you to do that,
01:04:00 talk with Mr. Patton and Mr. Rosa, and figure out if there
01:04:07 are additional documents relating to that issue.
01:04:10 Okay. Sales agreements. And here --
01:04:18 MR. BONDOR: Thank you, Your Honor.
01:04:20 THE COURT: Here it seems like -- I have to get
01:04:22 off the phone. I have another call at 1:30, so we need to
01:04:26 see if we can move this along.
01:04:28 Sales agreements. Seems like Monarch, Auris has
01:04:32 produced its agreements with Monarch. Intuitive hasn't
01:04:36 produced the same information. Why should it?
01:04:39 MR. BONDOR: The short version is because we

01:04:41 1 don't know the general terms that govern things, that the
01:04:45 2 real sticking point here, again, for Da Vinci, sales
01:04:48 3 agreements they haven't produced any at all. We would
01:04:51 4 welcome sales of a representative sample at the very least
01:04:54 5 so that we understand what the terms are.
01:04:57 6 With respect to the Ion, the bigger issue here
01:05:00 7 are there are sales contracts that go along with the
01:05:03 8 machines when they are shipped to hospitals. They gave us
01:05:06 9 the invoices and so the invoices just list the service
01:05:13 10 package and the revenue number, that's what they have given
01:05:16 11 us. However, there are at least six, maybe more, but at
01:05:20 12 least six machines that essentially Intuitive gave away for
01:05:25 13 free to hospitals who were affiliated or associated with
01:05:28 14 their clinical trial efforts. With respect to those, those
01:05:34 15 loaner machines or free machines, the machines themselves
01:05:38 16 were free. The instruments and accessories to be used with
01:05:41 17 them were free. We're trying to get a handle on exactly
01:05:46 18 what sort of arrangement that really was and at the moment
01:05:49 19 we have only witness testimony on that point, but of course
01:05:52 20 the witnesses didn't have all of that detail back and forth.
01:05:56 21 Specifically, for example, at the end of the
01:05:59 22 clinical trial arrangement, the hospitals are able to
01:06:02 23 purchase on some depreciated costs, at some discounted price
01:06:07 24 the machine that they have been using for the clinical
01:06:09 25 trials, but we don't even know what that depreciated price

01:06:13 1 is. Apparently it exist. The witnesses told me that the
01:06:18 2 lease people put that together, but we have no idea what
01:06:21 3 that is. And it's not a big request to ask. And it's
01:06:23 4 pivotal again to understanding what their realized average
01:06:28 5 selling price really is and whether the hospitals are even
01:06:31 6 taking them or not. So we want -- that's the import behind
01:06:35 7 this group of documents.
01:06:37 8 MS. DURIE: Your Honor, Daralyn Durie.
01:06:39 9 With respect to clinical trials, the use of our
01:06:43 10 devices during clinical trials is not relevant to any
01:06:47 11 damages analysis. Obviously we're not seeking lost profits
01:06:52 12 for that work that was done in connection with the clinical
01:06:57 13 trials. We are seeking lost profits with respect to lost
01:07:00 14 sales. We have produced all of these invoices that pertain
01:07:03 15 to any such sales.
01:07:05 16 And to the extent that a hospital that was
01:07:07 17 previously the site for a clinical trial was purchasing the
01:07:11 18 Ion, we would produce the invoice that was associated with
01:07:14 19 that purchase which would include all of the information
01:07:16 20 that Auris is seeking. In terms of what hospitals were able
01:07:25 21 to use devices with respect to clinical trials is just not
01:07:28 22 relevant to anything.
01:07:30 23 MR. BONDOR: Your Honor, I can address why that
01:07:32 24 is so. Paul Bondor for Auris. I mean, we don't know how
01:07:38 25 much extraneous nonclinical trial work was done at these

01:07:42 1 hospitals. We don't know how much the hospitals would have
01:07:45 2 to pay if any was done. On all of the instrument
01:07:48 3 accessories that Intuitive are giving those hospitals for
01:07:52 4 free, those are volumes that among other things are
01:07:56 5 manufacturing capacity, it's all off the books. We have no
01:07:59 6 insight into how much that is. But primarily they should
01:08:03 7 absolutely be able to tell us what the purchase terms are at
01:08:06 8 the end of those clinical trial arrangements, because that's
9 sitting on some document somewhere in an Intuitive file in
10 the clinical trial.
01:08:17 11 Their witness said you can go on
01:08:18 12 clinicaltrials.gov and look at that and I did it last night
13 and all you see is the location of the clinical trial. It
01:08:23 14 doesn't tell you anything about the equipment or anything.
01:08:27 15 THE COURT: All right. I'm going to deny this
01:08:29 16 request. The relevance is tangental at best. And with
01:08:35 17 respect to the issue of taking up manufacturing capability,
01:08:38 18 I have already ordered them to produce documents about their
01:08:41 19 manufacturing and I think that that would be -- you would be
01:08:47 20 able to find that information in those.
01:08:50 21 Next we get to license agreements.
01:08:53 22 MS. DURIE: Your Honor, this is Daralyn Durie.
01:08:55 23 MR. BONDOR: That's been resolved.
01:08:57 24 MS. DURIE: It has been resolved.
01:08:58 25 THE COURT: Okay. Corporate relationship and

01:09:03 1 organizational chart. Really?

01:09:07 2 MR. BONDOR: Your Honor, that's fair. I think

01:09:09 3 that org chart should be easy and noncontroversial. The

01:09:14 4 witnesses testified they have them. Intuitive's response

01:09:17 5 seems to be well, they're two years old. We would welcome

01:09:21 6 them for an understanding of the relationship between ISI

01:09:24 7 and IS Ops, particularly in the context of a lost profits

01:09:28 8 argument. I think that really the corporate relationship

01:09:31 9 issues comes down to that demand forecast that was mandated

01:09:37 10 by the ISI/IS Opts agreement and that falls into the

01:09:42 11 category, too, and then there is another big issue which is

01:09:46 12 the tracking of payments between ISI and IS Ops that are

01:09:50 13 also part of the 30(b)(6) dispute and I can kind of jump to

01:09:55 14 that if you would like if it would be helpful.

01:09:58 15 THE COURT: Sure. Go ahead.

01:09:59 16 MR. BONDOR: Okay. So the day before Mr. Patton

01:10:05 17 was deposed, that evening Intuitive produced a 4,000-page

01:10:11 18 spreadsheet that Mr. Patton asserted at his deposition

01:10:15 19 related to payments going back and forth between Intuitive

01:10:20 20 Surgical, Inc. and Intuitive Surgical Ops. He was able to

01:10:23 21 say on Intuitive's behalf that he understood that the

01:10:26 22 spreadsheet reflected those payments, orders made from ISI

01:10:32 23 to IS Ops and then payments going both directions on the

01:10:36 24 basis of the distribution agreement.

01:10:38 25 He also pulled out of a couple of scribbled

01:10:42 1 lines of code that he said related to the Ion. But he was
01:10:46 2 utterly unable to tell us anything else about the
01:10:49 3 spreadsheet. He couldn't identify any of the headers nor
01:10:53 4 could he explain how to use his codes so that we could
01:10:56 5 design what the Ion relevant payments really were.
01:10:59 6 I actually invited counsel afterwards and during
01:11:02 7 the dep to shed whatever light they had on the circumstance,
01:11:06 8 but basically this was dumped on our lap the night before
01:11:08 9 the dep. The witness could say nothing other than what he
01:11:14 10 had notes to say on. Obviously their damages expert is
01:11:17 11 going to be able to work with them to understand what it
01:11:20 12 really represents, but we're entirely in the dark and so
01:11:22 13 that kind of comes down to the 30(b)(6) question. We would
01:11:28 14 like just the follow-up opportunity with the 30(b)(6)
01:11:32 15 witness on the stuff that you ordered to be produced so far
01:11:35 16 today, and then to shed light on this history with respect
01:11:39 17 to ISI and IS Ops' spreadsheet because the witness couldn't
01:11:44 18 say anything about it at all.
01:11:48 19 MS. DURIE: Your Honor, with respect --
01:11:50 20 THE COURT: Go ahead.
01:11:52 21 MS. DURIE: Thank you, Your Honor. It's Daralyn
01:11:54 22 Durie for Intuitive.
01:11:56 23 I will invite Ms. Miller to comment because she
01:12:00 24 was present at Mr. Patton's deposition and I was not. But
01:12:03 25 it was my understanding that Mr. Patton was shown a sort of

01:12:07 1 printout of the Excel file that was produced obviously to
01:12:10 2 Auris in the beta form. He was basically shown a printout.
01:12:15 3 He was able to identify and explain the code. He's there as
01:12:19 4 a 30(b)(6) witness, so yes, he had notes that he was
01:12:23 5 referring to to be able to provide that testimony, but we
01:12:26 6 think he was able adequately to explain what the codes were
01:12:29 7 in order to determine the various payments related to Ion.
01:12:33 8 MS. MILLER: Your Honor, this is Laura Miller.
01:12:36 9 I agree with everything that Ms. Durie just said. He was
01:12:40 10 prepared to testify regarding the Excel spreadsheet and did
01:12:44 11 so. The sort of level of granularity and analysis counsel
01:12:48 12 for Auris seems to be asking for is just inappropriate for a
01:12:52 13 fact witness at a deposition. Especially given the fact
01:12:55 14 that Auris --
01:12:56 15 THE COURT: Are you able to provide -- are you
01:12:59 16 able to provide them -- you say it's inappropriate for a
01:13:03 17 fact deposition, but are you able to give them that
01:13:06 18 information if they ask you for it and they say okay, you
01:13:10 19 tell me, then, if a fact witness can't have all this
01:13:16 20 information, here are the questions we want, will you give
01:13:19 21 them the information?
01:13:19 22 MS. MILLER: We would be happy to provide that
01:13:22 23 information, Your Honor, to the extent we can.
01:13:24 24 THE COURT: Mr. Bondor, will that address the
01:13:26 25 issue?

01:13:27 1 MR. BONDOR: Yes, Your Honor, that will address
01:13:29 2 the issue. That's fine for that spreadsheet.
01:13:32 3 So then I think that it just collapses to -- I
01:13:37 4 understand that it is an obscure request or a seemingly
01:13:42 5 strange one for the org charts, but we don't have an
01:13:47 6 overarching view for who works for ISI, who works for IS
01:13:52 7 Ops, the witnesses couldn't tell who works for who, so just
01:13:56 8 to understand the distribution relationship as relates to
01:14:00 9 the one contract that governs that relationship, we think it
01:14:03 10 would be helpful because again, Intuitive witnesses said
01:14:06 11 that these things are available to every Intuitive employee
01:14:09 12 and they could go on and look it up. And counsel has told
01:14:13 13 us, oh, well, we haven't made those for two years. Fine.
01:14:16 14 Give us the last one that's available and we'll go with it.
01:14:20 15 With respect to the ISA, IS Ops' agreement, give us those
01:14:25 16 demand forecasts that ISI is obliged to give IS Ops no fewer
01:14:31 17 than once a year, I believe.
01:14:31 18 MS. DURIE: Your Honor, this is Daralyn Durie.
01:14:34 19 I believe we have already addressed the demand forecast
01:14:36 20 issue. We are happy to go back and see what we can find out
01:14:39 21 about that.
01:14:40 22 With respect to the org charts, we haven't
01:14:42 23 maintained org charts for over two years. The concern that
01:14:46 24 what we have is going to be substantially updated, I don't
01:14:50 25 have a problem going back and identifying an org chart and

01:14:53 1 we can produce it, but I want everybody to understand we
01:14:56 2 don't have anything that is current. It's going to be
01:14:59 3 something that is substantially out of date. I think there
01:15:02 4 is one that we can identify and if so, we're happy to
01:15:06 5 produce them.
01:15:06 6 THE COURT: That would be helpful if you would
01:15:09 7 do that.
01:15:11 8 Okay. Anything else we need to address?
01:15:14 9 MR. BONDOR: Your Honor, the only other thing
01:15:16 10 is -- this is Paul Bondor again for Auris. Just a
01:15:21 11 placeholder for I guess one additional deposition on the
01:15:28 12 docs and additional information that we're going to get by
01:15:32 13 virtue of your rulings today.
01:15:34 14 THE COURT: Why don't you look at the documents
01:15:36 15 and see if you need a deposition on those, and if so, try
01:15:42 16 and work it out.
01:15:44 17 MR. BONDOR: Okay, Your Honor. We'll do that.
01:15:46 18 Thank you.
01:15:48 19 THE COURT: Okay. Anything else?
01:15:51 20 Ms. Durie?
01:15:52 21 MS. DURIE: This is Daralyn Durie for Intuitive.
01:15:55 22 Not on our behalf.
01:15:57 23 THE COURT: What about for Auris, anything?
01:16:01 24 MR. BONDOR: No, Your Honor.
01:16:02 25 THE COURT: All right. Thank you very much.

01:16:06 Thank you everyone for getting on the call. And thank you
01:16:11 for trying to go forward and keep this case moving despite
01:16:15 some extraordinary circumstances. I'll just end with
01:16:19 everyone, I hope you stay healthy and I'll talk to you soon.
01:16:22 MS. DURIE: Thank you, Your Honor.
01:16:24 MR. BONDOR: Thank you, Your Honor.
(Teleconference concluded at 1:16 p.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Dale C. Hawkins
Official Court Reporter
U.S. District Court