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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3 MAGNOLIA MEDICAL)
4 TECHNOLOGIES, INC.,)
5 Plaintiff,)
6 v.)
7 KURIN, INC.,)
8 Defendant.)
9
10
11 Friday, December 12, 2025
12 8:18 a.m.
13 Jury Trial

14 844 King Street
15 Wilmington, Delaware

16 BEFORE: THE HONORABLE COLM F. CONNOLLY
17 United States District Court Judge

18
19 APPEARANCES:

20 MORRIS NICHOLS ARSHT & TUNNELL
21 BY: RODGER D. SMITH, II, ESQ.
22 BY: ANTHONY D. RAUCCI, ESQ.

23 -and-

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1 APPEARANCES CONTINUED:

2
3 DAVIS POLK & WARDWELL LLP
4 BY: ASHOK RAMANI, ESQ.
5 BY: MICAH G. BLOCK, ESQ.
6 BY: SERGE A. VORONOV, ESQ.
7 BY: KEON ZEMOUDEH, ESQ.
8 BY: NATALIE STOECKLEIN, ESQ.
9 BY: DAVID JIANG, ESQ.

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12 Defendant Magnolia Medical
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17 BY: KELLY FARNAN, ESQ.
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21 KIRKLAND & ELLIS
22 BY: GREGG F. LOCASCIO, ESQ.
23 BY: SEAN M. MCELLOWNEY, ESQ.
24 BY: KELLY TRIPATHI, ESQ.
25 BY: MATTHEW J. MCINTEE, ESQ.
 BY: M. HOUSTON BROWN, ESQ.

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P R O C E E D I N G S

 (Proceedings commenced in the courtroom beginning at
8:18 a.m.)

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1 **THE COURT:** Good morning. Please be seated.
2 We have some objections, I guess?

3 **MR. McELLOWNEY:** There's some objections to
4 Dr. Meinhart's slides, Your Honor.

5 So the first is there's a series of slides --
6 can I have the ELMO -- where Dr. Meinhart is talking about
7 this movable plug issue, and the title of the slide is:
8 "Dr. Antonsson's non-infringement opinions contrary to
9 physics." The concern with that, Your Honor, they are
10 arguing that it's impossible.

11 At the pretrial conference, Your Honor said,
12 "So he," talking about Dr. Meinhart, "can't get up there
13 and say, 'Well, it's not really between the plug and the
14 outlet. Doesn't have to be because, otherwise, it would
15 be impossible. No, he stuck with it's the difference
16 between the pressure at the movable plug, pressure at the
17 outlet. He can't say anything different.'"

18 **THE COURT:** I'd have to see the transcript.

19 **MR. RAMANI:** Can I make a suggestion, Your
20 Honor? I'm not sure if, timing wise, we're going to get
21 to Professor Meinhart before the first morning break.
22 Happy to address this now if Your Honor would like.

23 **THE COURT:** What I would say is we've got ten
24 minutes. If you've got something, we should do it in
25 order of when it comes up. So if there are other

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1 disputes, then yes, let's put this one on the back. But
2 we have ten minutes. Let's take advantage of it.

3 **MR. LoCASCIO:** I don't know if there's anything
4 else before that.

5 (Speaking simultaneously.)

6 **MR. RAMANI:** Yeah, I don't think we have
7 anything else before that.

8 **THE COURT:** Well, then, let's go ahead.

9 **MR. McELLOWNEY:** I'm going in order of the
10 slides, so I think this is the order they are going to
11 come up.

12 **THE COURT:** That's great, and then somebody
13 hand me the transcript.

14 Is this the pretrial transcript?

15 **MR. McELLOWNEY:** It's the pretrial conference
16 transcript, Your Honor.

17 **MR. RAMANI:** I have got a copy of it.

18 **MR. LoCASCIO:** We have one here.

19 **THE COURT:** All right. What page?

20 **MR. McELLOWNEY:** This is Page 55, bottom of the
21 page.

22 **THE COURT:** Okay.

23 **MR. McELLOWNEY:** So this is the slide that
24 we're objecting to. It's on a few slides, the title.
25 **THE COURT:** Well, before I get to that, let me

1339 1 ask you things that I had been thinking about a lot last 2 night. 3 I had thought Dr. Antonsson would come in here 4 and I thought he was going to testify, knowing what my 5 written ruling was, not just my oral ruling, my written 6 ruling, which had to do with at the plug. 7 Do you recall that I asked you yesterday 8 whether there were the words "at the plug" in the claim 9 language? Do you remember that? 10 MR. McELDOWNEY: Yes, Your Honor. 11 THE COURT: It was because I forgot. You know, 12 I get hit with so many issues in the rush of a trial -- 13 think about how many things you all raised yesterday -- 14 that I kind of forgot this, and I went back and refreshed 15 my recollection by reading the pretrial transcript last 16 night, by reading the order I issued clarifying what I had 17 said about plain and ordinary meaning with regard to 18 pressure differential. 19 And as I thought about that, with a glass of 20 wine, I thought, Why did Dr. Antonsson testify the way he 21 did? Why didn't Dr. Antonsson just testify that at the 22 side of the plug in the sample channel, that's where you 23 do the measurement? 24 But he didn't. What he kept on saying was, "I 25 read the claim." I mentioned this last night. "I read	1340 1 the claim." Essentially, he was engaging in claim 2 construction testimony. And that wasn't objected to. And 3 he tried to bring in what I'll call spatial-only claim 4 construction that you all, being Kurin, have pursued. 5 So why didn't you? Why didn't you have him 6 testify that knowing what the plain and ordinary meaning 7 was, as I understood it, why didn't you have him testify 8 that way? 9 MR. McELDOWNEY: So that was the intent, Your 10 Honor. So he did use the word "read" the claim, but when 11 he did that -- 12 THE COURT: No, no. What he kept on doing was 13 "somewhere," "somewhere in the sampling channel." We'll 14 have to go back and look at the transcript, but as I 15 recall it, it was, "somewhere in the sampling channel, you 16 take those two measurements." 17 He didn't say, "at the plug side." He didn't 18 say, "at the side of the plug that touches," or, "that 19 begins," if you will, "that sampling channel." 20 Why didn't he do that? 21 MR. McELDOWNEY: So I think that was the 22 intent. He was pointing to 7 versus 9 in his testimony. 23 So I'm not sure he did use the word "at," Your Honor. 24 THE COURT: I'm pretty confident he did. But I 25 will give you that, and thank you for reminding me. He
1341 1 definitely did say you do the measurement... Well, we'll 2 see. I'm going to guess he was all over the map, 3 actually. 4 But I do believe, at least, as you say it, 5 probably at some point during his testimony he said, 6 "yeah." You pointed him to 7. 7 MR. McELDOWNEY: And then this spatial concept, 8 Your Honor. On cross-examination, he was crossed on the 9 spatial concept. So that came up on cross. That was not 10 in his direct testimony. So that was -- to the extent 11 that that was claim construction, that was elicited by 12 cross questions that specifically asked about the spatial. 13 THE COURT: When did you do the A, B, C 14 demonstration? Was that direct or redirect? 15 MR. McELDOWNEY: A, B, C? 16 THE COURT: You put the thing on the ELMO with 17 the A, B, C. 18 MR. McELDOWNEY: It was on direct, Your Honor. 19 THE COURT: Yeah. Well, that's what I'm 20 talking about spatially. If you have a line between the 21 three dots, that's spatial, the way I think of it. In 22 fact, it's two-dimensional spatial. 23 I'm going to let the slide in. Sorry, yeah, 24 I'm going to let the slide in. The reason why is I still 25 am inclined to say you both kind of are playing this game	1342 1 of asking me at different times for constructions. I 2 mean, yesterday, Mr. Block says I need now to construe 3 this term, Kurin says I don't. When you went into claim 4 construction, Kurin said I needed to construe the term, 5 Magnolia said I don't. 6 See, I still think the answer is I don't need 7 to construe it. Now, if I get a jury question along the 8 lines of what I read to you yesterday from the prior 9 trial, maybe then we could explore it. But I still think 10 the best way to do this is to say, it's plain and ordinary 11 meaning, and the experts get up there and say at the plug 12 means, from Magnolia's perspective, position 5 in the 13 diagram, and from Kurin's perspective, position 7 in the 14 diagram. 15 I will say, and it seems like all this happens 16 all the time, nothing is easy because Dr. Antonsson didn't 17 testify in that way, at least very clearly. 18 But I still think that's the best way to do 19 this right now. Of course, <i>O2 Micro</i>, I can change my mind 20 later on. But I am going to let the slide in. 21 MR. McELDOWNEY: Thank you, Your Honor. 22 MR. BLOCK: Just quickly on that, Your Honor, I 23 know we have limited time. 24 I think that Dr. Antonsson's testimony -- so 25 the law is, I believe, in sum and substance, if it's plain

1343 1 and ordinary meaning, then the jury can apply any 2 reasonable plain and ordinary meaning. I think your claim 3 construction order, your order regarding whether or not to 4 construe that term, stands, at a minimum, for the 5 proposition that that spatial concept is outside the 6 bounds of what is a reasonable meaning. 7 So if there is a factual dispute left for the 8 jury to consider, that can't be within it, and I think a 9 curative instruction would be appropriate if you are not 10 going to construe the term. 11 THE COURT: I don't agree with that because I 12 think at the end of the day, as we instruct the jury, they 13 can also bring their common sense to bear. 14 Actually, I want to note this for the record. 15 I am not sure really where it gets us, but, you know, when 16 the Federal Circuit has many months to consider what I had 17 minutes to consider, I hope they consider this: Neither 18 side ever offered expert testimony to say, in the realm of 19 either fluid dynamics, in the realm of medical devices, 20 that when you construe this word, this is how it's 21 understood. Nobody ever did that, as far as I recall. 22 And instead, what you really are relying on is 23 common sense, which, you know, I have some. Or at least I 24 bring to the table human common sense or everyday common 25 sense. And really, I think that's what you both are	1344 1 doing, too. You're both bringing kind of commonsensical 2 understanding to this. 3 I've never heard anybody say, "By the way, 4 there's these dictionaries out there, there's these 5 conferences where these experts get together and we 6 discuss pressure differential, and this is how we 7 interpret it." 8 Can you point to anything? 9 MR. BLOCK: Anything in the... 10 THE COURT: In the record, in the entire case, 11 where somebody said, "That's how we interpret pressure 12 differential"? 13 MR. BLOCK: I don't think we did extrinsic 14 evidence as to -- pressure differential is not a term we 15 sought. In fact, I think the parties have agreed that a 16 pressure differential is a difference in pressure between 17 locations. 18 So the actual issue is, I would respectfully 19 submit, Your Honor, slightly different to the way it was 20 put up. It think just as to pressure differential, there 21 was no extrinsic evidence. And then we're talking about 22 between the plug and the outlet, which is different 23 language. And as to that phrase, that is specific to 24 these claims, and I don't -- well, I will just say I don't 25 believe either side tried to find a technical definition
1345 1 in the field for "between the movable plug and the 2 outlet." 3 THE COURT: But this is the key, it's pressure 4 differential between. So I hear you. It's not pressure 5 differential that you guys stipulated to. It's pressure 6 differential between. That's what we never heard expert 7 testimony on, none. 8 To put it in layman's terms, it's kind of like 9 the way I think about it, I remember this analogy, which 10 is if you had a geographer come in and we said, "What's 11 the distance between," or, "What's the pressure 12 differential between Wilmington," or not a geography, a 13 weather expert. "What's the pressure differential," or, 14 you know, "temperature differential between Wilmington and 15 Philadelphia," and we went through that about how they 16 would do it, where they would measure it, and that kind of 17 thing. 18 MR. BLOCK: Let me amend my answer as I 19 searched my recollection live in just one respect. 20 There wasn't a new declaration in that claim 21 construction proceeding, but we did, to exactly this 22 slide, submit to you extrinsic evidence expert analyses, 23 and one important part of that was pointing to 24 Dr. Antonsson's report, where he said a plug cannot move 25 as a matter of physics based on a differential between the	1346 1 plug and the outlet, and so that is an impossible -- that 2 would make the claims impossible. 3 THE COURT: It would make how many claims 4 impossible? 5 MR. BLOCK: Every single claim, according to 6 his analysis, Your Honor. 7 THE COURT: All right. Okay. 8 Anyway, I'm letting the slide in. 9 MR. McELDOWNNEY: Next slide, Your Honor. This 10 is also one of Dr. Meinhart's slides. This is part of the 11 jury instruction, not expert testimony. 12 THE COURT: Well, I'm definitely not letting 13 that in. That is not coming in. 14 Just for the record, this is a balancing of 15 scales, and above the heading "clear and convincing." If 16 you want to do scales, I don't mind, for preponderance of 17 the evidence. I am going to do it to the jury. 18 But clear and convincing is not to be 19 physically or pictorially depicted, so it's not coming in. 20 MR. VORONOV: Thank you, Your Honor. 21 Just to clarify, if we remove the scales from 22 this slide and just have Kurin's burden to prove 23 invalidity by clear and convincing evidence? 24 THE COURT: Sure. I know there were no 25 objections to Mr. Block asking the expert that yesterday.

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1 I don't really even understand why it was allowed.

2 You know, this is a legal question, and it's

3 what the jury's burden is.

4 And, anyway, you can do it.

5 **MR. VORONOV:** Thank you, Your Honor. We'll

6 make that change.

7 **THE COURT:** Look, if they object, I mean, just

8 because I said you can play it, like I just mentioned, I

9 don't know why you're asking an expert this, period. But

10 you did ask and they didn't object, so...

11 **MR. McELDOWNNEY:** You mean in Dr. Antonsson's

12 testimony?

13 **THE COURT:** I mean in anybody's.

14 **MR. McELDOWNNEY:** It did come up and I opted not

15 to object.

16 But with Dr. Meinhart, if he's on the stand, he

17 should not, in our view, be talking about the clear and

18 convincing burden.

19 **THE COURT:** I don't think he should either.

20 **MR. McELDOWNNEY:** And if he does, I think it --

21 I mean, we've heard a lot about clear and convincing

22 evidence.

23 **THE COURT:** So stand up and object, and I will

24 rule on it then. I am not precluding the slide.

25 **MR. VORONOV:** I'm just trying to understand the

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1 in a medical negligence trial and you have an expert on

2 the stand, okay, you don't ask the medical expert, "So do

3 you believe by a preponderance of the evidence that the

4 doctor was negligent?" What you ask the expert is,

5 "What's your opinion and do you hold that opinion to a

6 reasonable degree of certainty within the field?"

7 Essentially words like that, right?

8 **MR. VORONOV:** Got it.

9 **THE COURT:** I have actually never had people

10 tell you what you are supposed to do in a patent case with

11 experts. It's really never come up. And I don't know the

12 answer to that. And it sounds like... I don't know, if

13 you can all agree on the standard that the expert is

14 supposed to have or apply in coming up with his or her

15 opinions.

16 You are standing up, do you know?

17 **MR. LoCASCIO:** I believe I do. I don't have a

18 case to show you.

19 The experts should have a belief in their

20 opinion. They should stand behind their opinion, I would

21 say, wholeheartedly. That's why they are here. They are

22 under oath to tell the truth. If they don't know -- it

23 could be 51, 49 -- I don't think that's the test.

24 **THE COURT:** Well, I don't either but, you know,

25 you didn't object to when they asked.

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1 scope of Your Honor's ruling because I understood Your

2 Honor to not find the slide objectionable without the

3 scales.

4 **THE COURT:** Right, because they didn't object

5 to when Mr. Block asked about the legal questions that the

6 jury will have to grapple with. They didn't object.

7 **MR. VORONOV:** Right.

8 **THE COURT:** So if they object, I am going to

9 sustain it.

10 Why are we doing legal issues in front of the

11 jury through a witness? Can you tell me why that's

12 admissible?

13 **MR. VORONOV:** Well, it's simply trying to frame

14 the issue for the jury. I don't think that anyone

15 disputes that there's a clear and convincing burden of

16 proof in connection with invalidity, and that's the same

17 burden that the expert applies. We're happy to withdraw

18 this slide, Your Honor.

19 **THE COURT:** I mean, in a way I get why you get

20 one question to it. Although, it's a weird thing, right?

21 Is the expert supposed to apply herself the

22 clear and convincing standard, right?

23 **MR. VORONOV:** Well, I mean, that is -- they

24 have an understanding of the law that --

25 **THE COURT:** Let me ask it this way: If you are

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1 **MR. LoCASCIO:** I agree, and I thought Mr. Block

2 did a fine job. I think he sort of built a building on

3 that. Could we have objected? Sure. But we are not

4 going to now sit through their own expert -- at least it

5 was cross. Their own expert, to sit here and tell them

6 what the standard for anticipation and obviousness and

7 clear and convincing are. We will object, but they have

8 slides on all that, Your Honor.

9 **MR. McELDOWNNEY:** There's other legal slides

10 also, Your Honor. This is Meinhart slide --

11 **THE COURT:** Well, hold on. Before we leave

12 that, they're standing up.

13 Did you want to say anything?

14 **MR. RAMANI:** Yes. To the extent that it's

15 pertinent, Your Honor, I have done exactly what

16 Mr. Voronov is proposing to do at least in a half dozen

17 trials, in patent cases. It's been permitted. Not in

18 this jurisdiction. That's not to say --

19 **THE COURT:** But was it objected to?

20 **MR. RAMANI:** I was just going to say it wasn't

21 objected to. Both side did it. So it's not to say it's

22 right, but it certainly has been the practice.

23 **THE COURT:** What cracks me up more than

24 anything is in this case, you are both suing each other,

25 you are both doing validity. Kind of, also, why are we

1351 1 arguing about this because it's going to apply both ways. 2 I mean, what struck me listening to it 3 yesterday was, would the jury infer that Magnolia is more 4 concerned about this because they are asking burden 5 questions that the other side didn't and, of course, who 6 knows what jury's do. But I thought it was funny that one 7 side asked, and I think it's funny you are fighting about 8 it because this all applies both ways. 9 MR. RAMANI: Thank you, Your Honor. 10 THE COURT: So the bottom line is I don't know 11 the answer, and I think if you asked... We'll play it by 12 ear. 13 MR. LoCASCIO: These are closing slides, Your 14 Honor. It is a preview to closing slides, and it 15 shouldn't be done with experts. 16 MR. McELDOWNEY: This is definition of written 17 description, which I am sure we will talk about at the 18 charge conference to a great extent, and it shouldn't be 19 on an expert slide now. Same for anticipation and 20 obviousness. 21 THE COURT: Well, no, because the experts, if 22 they have to have an opinion, they have to know what the 23 invalidity theory is, right? 24 MR. McELDOWNEY: Can I cross him on the law, 25 then?	1352 1 THE COURT: Well, I guess. 2 MR. McELDOWNEY: I don't think -- 3 THE COURT: When you say can you cross him on 4 the law, I mean, I would have to think of an example, but 5 it's got to be adequacy of the written description. I 6 mean, I am a little afraid the jury doesn't really know 7 what they are supposed to decide. I don't think there is 8 harm to them knowing it upfront. 9 Now, what standard they are supposed to apply 10 in further elucidation of legal principles, I don't think, 11 but, no, this would explain to them what a written 12 description is. I am not sure they know right now, and I 13 think that should be pretty helpful. 14 MR. McELDOWNEY: Fair enough. Do we have time 15 for a few more objections? 16 THE COURT: Yeah. Keep going. Oh, no, no. 17 They are here. Let's go. 18 MR. McELDOWNEY: Thank you, Your Honor. 19 MS. FARNAN: Your Honor, may Ms. Distler take 20 the stand? 21 THE COURT: Yes, please. 22 I will remind you, you are under oath. 23 THE WITNESS: Yes, sir. Yes, Your Honor. 24 (The jury enters the courtroom at 8:39 a.m.) 25 THE COURT: Please be seated. Good morning.
1353 1 Hope you had a good rest. Can you just confirm by nodding 2 your head that no one has spoken to you about the case and 3 you have not heard anything about the case. 4 Great. All right. And you have not researched 5 the case? All right. 6 Ms. Farnan. 7 MS. FARNAN: Thank you, Your Honor. 8 Before we proceed with Ms. Distler's testimony, 9 I wanted to move in some exhibits that I neglected to do 10 when we started yesterday. 11 So, at this time Kurin moves to admit DTX- -- 12 THE COURT: Hold up one second. Wait for the 13 case manager. Okay. He's ready. Go ahead. 14 MS. FARNAN: Okay. DTX-81, DTX-124, DTX-182, 15 DTX-258, DTX-639, DTX-671, DTX-673, DTX-765, DTX-767, 16 DTX-769, DTX-844, DTX-845, DTX-846, DTX-847, DTX-895, 17 DTX-896, DTX-972, DTX-1075, DTX-1076, DTX-1077, DTX-1080, 18 and PTX-299. 19 THE COURT: Any objection? 20 MR. RAMANI: No objection, Your Honor. 21 THE COURT: They are admitted. All right. 22 (Exhibits DTX-81, DTX-124, DTX-182, DTX-258, DTX-639, 23 DTX-671, DTX-673, DTX-765, DTX-767, DTX-769, DTX-844, 24 DTX-845, DTX-846, DTX-847, DTX-895, DTX-896, DTX-972, 25 DTX-1075, DTX-1076, DTX-1077, DTX-1080, and PTX-299	1354 1 admitted into evidence.) 2 MS. FARNAN: Thank you, Your Honor. 3 CARRIE DISTLER, having been called as a witness, 4 being previously duly sworn under oath, testified further 5 as follows: 6 DIRECT EXAMINATION (resumed) 7 BY MS. FARNAN: 8 Q. Good morning, Ms. Distler. When we left off 9 yesterday, I think you were about to talk about your lost 10 profits opinion. 11 Do you remember that? 12 A. I do. 13 Q. Okay. And can you just tell the jury what patent 14 that you're talking about in the context of this lost 15 profits opinion? 16 A. Sure. So to level set from yesterday, we're talking 17 about Kurin's '052 patent. It issued on November 12, 18 2024. The Magnolia Steripath Micro is accused of 19 infringing the '052 patent and the Kurin Jet is covered by 20 the '052 patent. 21 Q. Could you just, I guess at a high-level, step back 22 and remind the jury what lost profits is? 23 A. Lost profits here would be the profit that Kurin 24 would have received if the Magnolia Micro had not been 25 sold and a Kurin product had been sold instead.

1355 1 Q. Did you review the '052 patent in connection with 2 giving your opinion? 3 A. I did. 4 Q. And in general terms, based on your understanding 5 from the other witnesses, can you tell us what the '052 6 patent is and the benefits of it? 7 A. From a nontechnical perspective, it's my 8 understanding from Dr. Antonsson and from Mr. Rogers that 9 the '052 patent relates to an initial specimen diversion 10 device, an ISDD, that has improvements over existing 11 technologies. Those benefits include it's small, its ease 12 of use, so it can seamlessly integrate into a nurse's 13 workflow. It also is an ISDD that requires only a small 14 initial amount of blood draw for diversion. And then, 15 lastly, I would say a single assembly that uses negative 16 pressure. 17 Q. I think you may have said this before, but just so 18 we're clear, which products do you understand practice the 19 '052 patent? 20 A. So the Magnolia Micro is accused of practicing the 21 '052 and Kurin's Jet practices the '052. 22 MR. RAMANI: Your Honor, I'm going to object to 23 the last point. Move to strike. 24 I can explain. 25 THE COURT: This is the non-infringing	1356 1 alternative issue? 2 MR. RAMANI: No. 3 THE COURT: Okay. Well, we will go to sidebar, 4 then. Sorry. 5 (Whereupon, the following occurred at sidebar:) 6 MR. RAMANI: So the objection is that there 7 hasn't been any evidence that the Kurin Jet practices the 8 '052 patent. 9 THE COURT: Right. 10 MR. RAMANI: So they can't backdoor that from 11 the damages expert. 12 THE COURT: Well, she can rely on the expert 13 opinion of the technical expert who presumably told her it 14 does, right? 15 MR. RAMANI: I don't believe there's a 16 disclosure in her report to that effect. 17 THE COURT: It's not in her report? I thought 18 it is in the report. 19 MS. FARNAN: Right. And she did rely on 20 discussions with Dr. Antonsson. I thought that Mr. Rogers 21 may have said it. I'd have to go back. 22 MR. RAMANI: I don't think he did. 23 MR. LoCASCIO: He didn't do a claim analysis. 24 Mr. Rogers talked about the features of the Jet and the 25 features of his patent, and they align.
1357 1 THE COURT: Okay. I mean, isn't it in his 2 report that he was told the Kurin Jet relies? Otherwise, 3 how could she say it's a non-infringing alternative? 4 MS. FARNAN: It is. 5 THE COURT: Do you challenge that? 6 MR. RAMANI: That she's been informed? 7 THE COURT: Yeah. That she had been informed 8 by a technical expert and it's in her report. 9 MR. RAMANI: Oh, I don't challenge that. 10 THE COURT: Okay. I'm going to allow it. I'm 11 going to allow it. 12 (Whereupon, the discussion at sidebar concludes.) 13 - - - 14 THE COURT: All right. The objection is 15 overruled. 16 MR. RAMANI: Thank you, Your Honor. 17 BY MS. FARNAN: 18 Q. Okay. Ms. Distler, can you generally explain to the 19 jury how you determined that lost profits was an 20 appropriate remedy here? 21 A. I used the <i>Panduit</i> test. 22 Q. And can you generally explain the four factors that 23 you'll go through on the <i>Panduit</i> test? 24 A. Yes. It's my understanding that to be entitled to 25 lost profits, you have to satisfy what are often called	1358 1 the <i>Panduit</i> Factors, these four factors here on the slide. 2 Q. Let's look at Factor 1. How did you evaluate the 3 first <i>Panduit</i> factor, demand for the patented product? 4 A. To satisfy demand for the patented product, one often 5 looks to the sales that are generated by products that 6 practice or alleged to practice the patent, the '052. 7 So here, I looked at both the Micro and the Jet. 8 Q. Okay. We'll start off with the Jet. Can you explain 9 to the jury how you evaluated the demand for the Jet? 10 A. Sure. So this slide summarizes the sales of Kurin's 11 Jet. The data starts here in early 2023, so the initial 12 commercial launch of the Jet, and it's through September 13 30, 2025, where the data that I had ends. 14 As you can see, over this period, Kurin sold 15 1,170,750 units of the Jet for revenue of approximately 16 \$20,950,702. And I would point out that if you look at 17 the 2024 units, for that year Kurin sold a total of almost 18 480,000 units. And you can see for the first three 19 quarters of 2025, they've already sold almost 665,000 20 units, so exceeding the prior years. 21 Q. You mentioned your chart there starts at 2023. Were 22 there some sales of the Kurin Jet prior to 2023? 23 A. Yes, there were. 24 Q. Do you know approximately how many? 25 A. Yes. Approximately 9,500 were sold prior to early

1 2023. 1359 2 Q. And just from the bottom corner of the slide, can you 3 just tell us which exhibits you relied on for this? 4 A. Yes. DTX-765, DTX-639, and DTX-1080. 5 Q. Okay. Now, the Magnolia Micro, how did you evaluate 6 the demand for that? 7 A. Here, I summarized Magnolia's sales of the Micro from 8 the period since the '052 patent issued in November 2024 9 through September 2025. Here you'll see the monthly units 10 sold amounted to 1,334,100. And this was approximately 11 \$23 million in revenue over this period. 12 Q. So what conclusion did you reach about what drove 13 demand for the Jet and the Micro? 14 A. Based on my review and analysis of information, 15 documents, and testimony, it's my conclusion that these 16 sales of both the Micro and the Jet were the result of the 17 benefits of the '052 patent. 18 Q. So based on your analysis, what's your conclusion 19 with respect to Factor 1? 20 A. For Factor 1, it has been satisfied for determining 21 if lost profits would be appropriate. 22 Q. Okay. So let's move on to Factor 2. Can you explain 23 what the absence of acceptable non-infringing alternatives 24 is? 25 A. Sure. So in thinking about lost profits, you have to	1 reconstruct the market, we call it. You have to go back 1360 2 in time and imagine that the product that's accused of 3 infringing is no longer there, and then what would the 4 market look like, what would happen to those sales of that 5 product. 6 Q. Okay. Which products were available in the market at 7 the time of your analysis? 8 A. So starting at November 2024, when the '052 patent 9 issued, it would be the two Kurin products, the Jet and 10 the Lock. And then on the Magnolia side, they were 11 selling the Micro, the accused product, and Gen2. 12 Q. So can you just explain what you considered 13 specifically about the market for these products? 14 A. Sure. So I thought it would be helpful to take a 15 look at the state of the market for ISDDs starting at 16 November 2024. 17 So what I plotted here are going to be the unit sales 18 of the Micro in green, the Jet in blue, the Lock in red, 19 and the Gen2 in yellow. So a couple of takeaways from 20 this chart. 21 As you can see, the Micro, Jet, and Lock are 22 outselling the Gen2 pretty significantly. And you see 23 that the Gen2 sales down in September 2025 are almost zero 24 at that point. 25 The second thing I would take away is that -- so
1 we're reconstructing the market, so you're taking out the 1361 2 Micro, so that green line disappears. So if the Micro 3 wasn't there, what products would be available for buyers 4 to choose from. This chart makes it clear that it would 5 be the Jet and the Lock. Those are the two products that 6 are generating significant levels of commercial sales in 7 that period. 8 Q. Okay. So I think you said these are the products you 9 think the customers would choose. Why is that your 10 opinion? 11 A. So if you think about the benefits that have been 12 described with the Micro: it's easy use, it has a small 13 initial blood draw, those would be characteristics and 14 features that are also provided by both the Lock and the 15 Jet. 16 So if you were a buyer of the Micro and you are 17 looking for an alternative ISDD out there that would 18 provide similar, if not the same, benefits to you, these 19 would be the two products, in my opinion, that you would 20 look at to purchase instead of the Micro. 21 Q. Just for the market slide that you talked about, 22 DTX-5.12, could you tell us which documents you relied on 23 for that? 24 A. Yes. Sorry. DTX-767, DTX-1076, and PTX-298. 25 Q. I think you said that the Gen2 would not be an	1 acceptable and available non-infringing alternative; is 1362 2 that right? 3 A. Yes, that's my opinion. 4 Q. And why is that? 5 A. Well, for example, we've heard some -- some things 6 about Magnolia documents themselves, right, that talk 7 about the weakness of the Gen2 compared to other products 8 in the space. 9 So we heard Mr. Bullington acknowledge that there 10 were some, you know, customer feedback around the 11 bulkiness or that it's too heavy. And then I've already 12 taken a couple of snips here from documents from 2019 and 13 2021 that discussed the Gen2, again around issues with 14 ease of use and price on the left, and then also that it 15 was bulky and difficult to use. These are from DTX-972 16 and DTX-182. 17 Q. So what conclusion did you reach about whether the 18 Gen2 would be an acceptable non-infringing alternative? 19 A. Well, from my review as I looked at the information 20 about the Gen2 as compared to the Micro, it's not as easy 21 to use as the Micro and there's a greater amount of blood 22 required than the Micro. It's more expensive than the 23 Micro because it's more difficult to manufacture. And 24 then, lastly, we heard that it's no longer being 25 manufactured and Magnolia has moved on from the Gen2 at

1 this point. 1363 2 Q. And is the fact that it's no longer being 3 manufactured, how does that factor into your opinion? 4 A. Well, that would mean it wouldn't be available if 5 Magnolia has chosen not to make it anymore. 6 Q. Based on your review of the market and the product 7 you talked about, what's your opinion as to <i>Panduit</i> Factor 8 2? 9 A. For <i>Panduit</i> Factor 2, the available non-infringing 10 alternatives that would be acceptable to buyers of the 11 Micro would be the Jet and the Lock. 12 Q. Move on to Factor 3? 13 What is Factor 3? 14 A. So Factor 3 requires us to figure out whether or not 15 Kurin could have made those sales of the Micro. Did they 16 have the manufacturing capacity, and did they have the 17 marketing capacity to have made those sales. 18 Q. So what was your first step in evaluating the 19 manufacturing and sales capacity? 20 A. Well, the first step was to figure out how many of 21 those Micro units that Kurin would have sold in 22 replacement of the Jet and the Lock. So I looked at the 23 historical sales trends for new customers of Kurin, and 24 based on that information, I determined that, of the 25 1.3 million Micro units, 1,174,916 would have been Jets,	1 1364 2 and 159,184 would have been Locks. Information I used for 3 that were the -- was PTX-298, PTX-297, DTX-895, DTX-765, 4 and DTX-1080. 5 Q. Did you form an opinion as to whether Kurin had the 6 manufacturing and marketing capacity to make these 7 additional sales? 8 A. I did. 9 Q. What is your opinion on that? 10 A. So with respect to marketing, I reviewed the 11 deposition of a Ms. Norfleet, who testified a couple of 12 days ago, and in her transcript, she discusses Kurin's 13 approach to sales, marketing, and its clinical outcome 14 team. 15 Based on the number of units that Kurin would have 16 had to have sold, it's my opinion that Kurin would have 17 had to have spent more money on sales personnel and also 18 clinical outcome personnel to have made those sales, so I 19 factored that into my analysis. 20 With respect to manufacturing capacity, I 21 investigated how the Jet and Lock are manufactured with 22 Kurin personnel, and understood the capacity to do that 23 and if they could have made those sales, and based on that 24 information, I determined that, yes, Kurin could have made 25 those sales of the Jet and the Lock. Q. What's your understanding as to whether Kurin has
1 1365 2 reached, for example, full automation in its 3 manufacturing? 4 A. It has with the Jet. And that goes a long way into 5 making sure that they had the capacity to have actually 6 made these additional units. 7 Q. And to the extent that Kurin needed to expand its 8 manufacturing in any way, did you have an opinion on 9 whether on or not that would be possible? 10 A. They would not need to expand their manufacturing. 11 To the extent that any adjustments would need to be made 12 to make these additional units, it would be to add a 13 second shift or something along those lines, but no new 14 equipment purchases or things like that. 15 Q. What's your opinion as to whether <i>Panduit</i> Factor 3 is 16 satisfied? 17 A. <i>Panduit</i> Factor 3 is satisfied with respect to the 18 marketing needs. As I mentioned, I would need to factor 19 in additional costs for sales personnel and clinical 20 outcome personnel to make the sales. 21 Q. Let's move to the fourth factor. 22 What is the fourth factor and how did you identify 23 it? 24 A. In the fourth factor, here is where you calculate the 25 amount of profits that the patent holder, here Kurin, would have earned if it would have made those sales of the	1 1366 2 accused product, here the Micro units. 3 Q. Okay. So where do you start with that analysis? 4 A. So first, we had to identify the number of units, 5 which we just talked about, and I separated them based on 6 Jet units and Lock units that would have been sold. 7 Q. Okay. What's your next step? 8 A. Then I had to analyze the product financial 9 information that Kurin produced so that I could understand 10 the average sales price of the two products, the cost to 11 make the products, so that I could arrive at the gross 12 profit per unit. 13 So for the Jet, the average variable gross profit per 14 unit is \$15.12, and for the Lock, it's \$13.85 over this 15 period. 16 Q. What's your next step in Factor 4? 17 A. You would then need to multiply the number of units 18 times that of variable gross profit per unit. 19 So for the Jet, that would amount to lost variable 20 gross profits of \$17,767,070. And then for the Lock 21 units, you would multiply those by the \$13.85 average 22 variable gross profit per unit, and that would result in 23 Lock lost variable gross profits of \$2,205,205. And then 24 adding those two together, it takes you to lost variable 25 gross profits of \$19,972,275. Q. I think you mentioned you'd have to deduct some

1 incremental costs; is that right? 2 A. That's correct. 3 So I also analyzed not just product-specific cost 4 information, but more company-specific product information 5 for Kurin. And I determined that there would be 6 additional costs that I talked, for example, sales 7 personnel, clinical outcome costs, and some others. 8 And so I also make that adjustment here, if you go to 9 the next slide, and I determined additional incremental 10 costs that would be necessary to make those sales would be 11 \$10,014,041. Subtracting those from the line above, you 12 end up with Kurin's lost profits, which in my opinion 13 would be \$9,958,234. 14 Q. What record evidence or what exhibits did you 15 consider in the lost profit Factor 4 analysis? 16 A. DTX-1080, DTX-639, DTX-765, PTX-298, PTX-297, 17 DTX-895, and DTX-1076. 18 Q. Now, for this analysis, you assumed that all of the 19 Micro sales that are no longer happening in this but-for 20 world would be Jet or Lock sales; is that right? 21 A. I did. 22 Q. Why is that? 23 A. For a few reasons, as I was reconstructing the 24 market. 25 First, it is clear it's a two-player market. If	1367 1 someone is wanting to buy an ISDD, they are either buying 2 it from Magnolia or they are buying it from Kurin. 3 Secondly, we've heard this Me Too, that both Magnolia 4 and Kurin are selling to the same set of customers, 5 hospitals, right? So they are trying to reach those same 6 customers. 7 I would say third, the Micro units that were sold, as 8 we've heard this week, are used for sick patients, very 9 sick patients at some points. So those units, those 10 ISDDs, are being used to help patients, and the hospitals 11 and the healthcare providers have determined that using an 12 ISDD was the appropriate way to conduct blood cultures. 13 So if the Micro isn't there and those healthcare 14 providers and those hospitals still think that it's 15 appropriate to use an ISDD for those patients, they are 16 going to look to the Jet and they are going to look to the 17 Lock as that option in the marketplace that would still be 18 available. 19 Q. Does that conclude your lost profits opinion? 20 A. Yes, it does. 21 Q. I think you mentioned yesterday you also have a 22 reasonable royalty opinion; is that right? 23 A. I do. 24 Q. And what is your opinion as to the alternative 25 reasonable royalty that should be awarded to Kurin?
1369 1 A. If Magnolia and Kurin were sitting across the table 2 from one another and had to negotiate a royalty, they 3 would have agreed to a royalty on the Micro units of at 4 least a dollar per unit. 5 Q. How do you calculate a reasonable royalty? 6 A. As we've heard about earlier this week, there's 7 something called a hypothetical negotiation, which it is 8 hypothetical. You go back in time, and you imagine that 9 the two parties have to sit at a table across from one 10 another. And they are doing it willingly. It's a willing 11 licensee and a willing licensor as part of that 12 assumption, and they have to reach an agreement. 13 So in this case, they would have sat down at 14 November 12, 2024. It would have been Magnolia and Kurin, 15 and they would be negotiating a nonexclusive license for 16 Magnolia to have rights to use the '052 patent. 17 There's one other important assumption about a 18 hypothetical negotiation. It's that every one has full 19 information. So imagine you're playing cards and you have 20 to play the entire game with your cards face up so the 21 other side has all the same information that you do as you 22 are trying to play. So you have to keep that in mind, 23 right? It's a full sharing of information. 24 Also, there's something called the Book of Wisdom, 25 which allows you to look forward in time to consider facts	1370 1 that may be informative to determining what the value of 2 the patent might be as you are sitting there at that 3 table. Again, it is a hypothetical negotiation, so you 4 can make those kinds of assumptions here. 5 Q. Okay. What are the factors you consider in your 6 hypothetical negotiation analysis? 7 A. We've also talked about these this week. So here 8 I've just grouped 14 of the 15 factors into licensing, 9 economic, and benefits of the technology categories. And 10 then, based on the information that you may gather as part 11 of your analysis in Factor 15, you actually simulate that 12 the two parties are sitting down across from each other 13 and doing that negotiation based on that information. 14 Q. Now, have you already given testimony that's relevant 15 to a number of these factors? 16 A. I have. 17 Q. So let's just try to summarize some of these, and 18 let's start with Factors 9 and 10. 19 What have you talked about that's relevant to those 20 factors? 21 A. We talked about the '052 patent and the benefits of 22 the '052 patent. 23 Q. Did you also, in Factor 14, rely on experts in this 24 case? 25 A. I did. I relied on Dr. Antonsson.

1371 1 Q. What about -- let's talk about Factor 5. 2 What have you already talked about that's relevant to 3 Factor 5? 4 A. So this is about the commercial relationship between 5 the two parties. Obviously, they are competitors in the 6 ISDD market. 7 Q. And then, have we already talked about information 8 that's relevant to Factors 8 and 11? 9 A. We did. We reviewed the sales history of both the 10 Jet and the Micro during that period, and we also talked 11 about how Magnolia had moved forward, such that the 12 commercial product that it's offering for sale right now 13 is primarily focused on the Micro. 14 Q. Okay. I want to focus on Factor 13, but before we 15 move to that, have you considered all these factors in the 16 analysis that you are giving today? 17 A. Yes, I did, but for brevity, I am only going to focus 18 on a few of them today. 19 Q. Let's focus on Factor 13. Can you tell us about 20 Factor 13 and how you performed that analysis? 21 A. Yes, so Factor 13 requires us to apportion. So what 22 does apportionment mean? So with respect to patent 23 damages, it's my understanding that you have to look at 24 the product, identify what the contribution is of the 25 patented invention, and remove all those other things that	1372 1 are not related to the patent to figure out what the 2 appropriate royalty would be. So remove things like the 3 sales and marketing, remove other types of technologies 4 besides the patent that might be important to making that 5 sale. So really isolate in on that inventive aspect. 6 Q. How did you do that in this case, to isolate -- or 7 apportion under Factor 13? 8 A. Sure. So Kurin sells the Jet product that's covered 9 by the '052 patent, and it also sells the Lock product, 10 which is not covered by the '052 patent. So if you look 11 at the difference in the profitability of those two 12 products, it's a way to isolate the contribution of the 13 '052 patent. 14 As we've heard this week, the Lock, it -- the initial 15 blood draw is not -- does not use negative pressure and it 16 requires the user to wait a bit, maybe up to three seconds 17 before you would actually connect to do the actual sample. 18 So those are a couple of differences that I understand 19 from Dr. Antonsson would not be related to the '052 20 patent, so we are focusing in on those. 21 I found that from 2023 to -- through the third 22 quarter of 2025, when those two products are being sold in 23 the marketplace at the same time, that the difference in 24 the incremental profit was \$1.32. So the Jet sales were 25 \$1.32 and we can attribute that to the '052 patent.
1373 1 Q. What evidence did you consider to make that 2 determination? 3 A. I looked at DTX-639, DTX-765, DTX-769, DTX-0895, 4 DTX-1075, DTX-1076, DTX-1080, PTX-297, and PTX-298. 5 Q. Okay. So you have the \$1.32. Then can you explain 6 what your opinion is as to the reasonable royalty and how 7 you got there. 8 A. Sure. So after weighing all the factors that I 9 considered as part of my <i>Georgia Pacific</i> analysis, their 10 competitors, it's a growing market, a growing industry. 11 They both are selling commercially successful products in 12 the marketplace. As they negotiated back and forth at 13 that table, I determined that they would agree to a 14 royalty of at least \$1 per Micro unit. 15 Q. And how many Micro units would that apply to? 16 A. Over the period from November 12, 2024, to 17 September 30, 2025, would be 1,334,100 units. 18 Q. So then, can you just summarize what your opinion is 19 as to the lost profits or reasonable royalty that Kurin 20 should be awarded in this case? 21 A. Yes. It's my opinion that Kurin is entitled to lost 22 profits on those Micro units, and that amount would be 23 \$9,958,234. To the extent that the jury thinks that a 24 reasonable royalty is more appropriate, that rate should 25 be at least \$1 for the '052 patent applied to the number	1374 1 of Micro units. 2 Q. Okay. Does that conclude your opinions on Kurin's 3 '052 patent? 4 A. Yes, it does. 5 Q. And I think you -- when we started off, you said you 6 also have opinions about the damages that Magnolia has put 7 forward; is that right? 8 A. I do. 9 Q. And were you here for Mr. Napper's testimony 10 regarding the damages that Magnolia is seeking? 11 A. I was. 12 Q. And can you just remind the jury what -- generally 13 what opinions he gave and how you're going to analyze 14 them. 15 A. Mr. Napper provided a damage opinion for the Magnolia 16 asserted patents of lost profits of approximately 17 \$5 million and a reasonable royalty of \$3.05 per Jet unit. 18 Q. Do you agree with Mr. Napper's conclusions? 19 A. I do not. 20 Q. Now, before we get into analyzing those, do you have 21 to make the same assumption on the Magnolia side as you 22 made on the Kurin side when you're evaluating damage? 23 A. I do. You have to assume that the patents are valid 24 and infringed. 25 Q. And if the patents are not infringed or invalid, what

1375 1 does that mean for your analysis? 2 A. There would be no damages, just like in the Kurin 3 case that I was talking about. 4 Q. Okay. And so can you, just before we get into it, 5 summarize your opinions with respect to the damages that 6 Magnolia is seeking? 7 A. Sure. First, it's my opinion that there should not 8 be lost profits for the Magnolia asserted patents. But if 9 the jury disagrees, I think that amount should be no more 10 than \$1,419,963. 11 For those Jet units that would not be subject to lost 12 profits, those units would be 866,183, and to those you 13 would apply a royalty that you thought would be 14 appropriate. 15 I also reviewed Mr. Napper's royalty rate and I made 16 a few corrections and adjustments to it, which resulted in 17 66 cents to \$1.05 per unit instead of the \$3.05 that 18 Mr. Napper opined. And then also the Jet units that have 19 been sold since the first Magnolia asserted patent issued 20 in December 20, 2022, through the third quarter of 2025 21 are 1,238,225 units. 22 Q. Okay. And what are your criticisms of Mr. Napper's 23 lost profits analysis? 24 A. I'm going to focus first on Factor Number 2, the 25 absence of acceptable non-infringing alternatives.	1376 1 Q. And what is your disagreement with Mr. Napper on the 2 non-infringing alternatives? 3 A. So to be awarded lost profits, it's my understanding 4 that you have to properly reconstruct the market that 5 would have existed if the accused product were not on the 6 market. So you have to look at the facts and 7 circumstances that are actually in place in the 8 marketplace and determine what would have happened. 9 Mr. Napper did not consider the Lock to be an 10 acceptable non-infringing alternative in his analysis, and 11 that's contrary to the Magnolia documents that I reviewed. 12 For example, this is a presentation prepared by Magnolia 13 in 2023 where Magnolia is identifying the primary device 14 competitors in this table. So the first one, it's called 15 the Kurin Flash here but it's the Kurin Lock. And then 16 the second one is the Kurin Jet. And if you look at the 17 bottom here, it says: "Of the currently available device 18 options, only the Kurin products have achieved material 19 market share and penetration." 20 As we talked about earlier, the Kurin Jet did not 21 start its initial commercial launch until 2023, so the 22 product that has to be gaining material market share and 23 penetration at this point would be the Lock. So that 24 means that Magnolia in 2023 views the Lock as a competing 25 product to its offerings.
1377 1 Q. Then just to take a step back so we can level set, in 2 this lost profits analysis, is it fair to say you're 3 looking at a world where the Jet is no longer on the 4 market and what other alternatives are there? 5 A. That's exactly right. So in this case, you're going 6 to pull the Jet off the market, look at what's available, 7 and figure out what would have happened to those sales. 8 Q. Okay. And in connection with evaluating Mr. Napper's 9 Factor 2, did you look at the ISDD market? 10 A. I did. So here, I again plotted the four ISDDs, and 11 I started at the fourth quarter of 2022, which is the date 12 that the first Magnolia asserted patent issued, and I take 13 it through September of 2025. 14 So there are a few takeaways from this chart that I'd 15 like to make. So, first, at Q4 2022, the first Magnolia 16 asserted patent, the ISDD with the highest volume of units 17 that's being sold is the Lock. And that continues until 18 the third Magnolia asserted patent issues, which would 19 have happened in the first quarter of 2024. So through 20 all that period, the Lock is the highest selling ISDD. 21 That means that it is commercially acceptable and it is 22 available and it's being purchased. That makes it a 23 non-infringing alternative. Mr. Napper did not consider 24 that. 25 Q. And what documents --	1378 1 A. Oh, this -- 2 Q. Oh, sorry. 3 A. The second takeaway that I would make from looking at 4 this chart is that the Micro at this point -- well, the 5 Micro came out in 2020. Okay? But you look at fourth 6 quarter of 2022, there still aren't a lot of Micro sales. 7 And if you move forward into the second quarter of 2023, 8 you see that there are more sales of the Micro that start. 9 Well, what happened then? In April 2023, Magnolia 10 announced that they were going to be rolling out more 11 configurations of the Micro to the market. So what I do 12 mean there? 13 Up until that point in time, Magnolia had only sold 14 the Micro as a syringe, but we've seen that hospitals may 15 want bottles, different types of vacu-containers, they may 16 want longer tubing, they may want different types of 17 needles. 18 So both Magnolia and Kurin sell their product in what 19 I'll call, like, a bundle but with different 20 configurations based on the needs. 21 At that point in time, Micro starts adding those 22 configurations. And you can see that its sales start to 23 increase. So those other configurations I would say 24 contribute to sales. We're going to come back and talk 25 about that in a little but when we talk about the BD sets.

1379 1 Q. Okay. And what documents did you rely on for this 2 analysis? 3 A. DTX-81, DTX-765, DTX-767, DTX-769, DTX-1076, 4 DTX-1080, and PTX-298. 5 Q. Did you also look more specifically at the Lock units 6 sold over this time period? 7 A. Yes. So this is just a summary, again, of the Lock 8 units that have been sold since it came out in 2017 9 through the third quarter of 2025. And over this period, 10 Kurin sold over 8 million Lock units, again demonstrating 11 that it is acceptable -- it's an acceptable non-infringing 12 alternative to the Jet. 13 Q. What exhibits did you rely on for that? 14 A. DTX-767, DTX-765, and DTX-1080. 15 Q. So what's your conclusion with respect to 16 Mr. Napper's non-infringing alternative opinion? 17 A. It's my understanding that it is the patent holder's 18 burden to establish that they would have made those sales. 19 And to do that, you have to properly reconstruct the 20 market and what it would have looked like. It's my 21 opinion that Mr. Napper not considering the Lock as a 22 non-infringing acceptable alternative renders his analysis 23 of lost profits fundamentally flawed. 24 Q. And does that mean that, in your opinion, Magnolia 25 would not be entitled to lost profits?	1380 1 A. That's correct. 2 Q. And if they are, have you also evaluated Mr. Napper's 3 calculation of lost profits? 4 A. If the jury finds that lost profits would be 5 appropriate, I did also look at Mr. Napper's calculations 6 of lost profits, and I have some criticisms there as well. 7 Q. Okay. You recall Mr. Napper had two scenarios for 8 lost profits? 9 A. Yes, he did. 10 Q. Okay. Let's start with Scenario 1. What are your 11 criticisms of Mr. Napper's analysis under his Scenario 1? 12 A. Mr. Napper's claimed lost profits in Scenario 1 were 13 approximately 1.4 million. I have three criticisms and I 14 would say in two different buckets. 15 The first bucket relates to costs that Mr. Napper did 16 not consider when he arrived at his profit number. So the 17 first one is rebates. We have heard some about rebates 18 this week. So both Kurin and Magnolia, they negotiate 19 with hospitals or purchasing organizations, they enter 20 into contracts. And as part of those contracts, depending 21 on volume or sales levels, you will have to pay a rebate 22 to that hospital, that organization, right? They buy so 23 much of your product. 24 Mr. Napper did not deduct any rebates when he was 25 doing lost profits analysis and, in my opinion, he should
1381 1 have. 2 Secondly, Mr. Napper did deduct some incremental 3 costs but, in my opinion, he should have deducted more 4 incremental costs for Magnolia to have made those Kurin 5 Jet sales. So my analysis is more -- my analysis of the 6 Magnolia lost profits are consistent with the cost 7 categories that I looked at in my Kurin lost profits 8 analysis. 9 Q. Okay. Then you have a little more detail on your 10 third criticism about the customers? 11 A. I do. So in Scenario 1, Mr. Napper takes the 12 position of starting looking at the Magnolia sales, 13 Magnolia customers. And a couple of days later, he called 14 them the Magnolia lost customers. So then, he looks at 15 the buyers of Magnolia products and then he says if they 16 bought a Jet, those Jet units would be lost Magnolia 17 customer sales. 18 So I took a look at customers that were in his 19 analysis. One of them is still a Magnolia customer. It 20 bought products from Magnolia in September 2025, just a 21 few months ago, so it's not really a lost customer in my 22 mind. 23 In the second category, I looked to see when was the 24 last time those customers purchased a product from 25 Magnolia and was it a long time ago. So I looked to see	1382 1 what customers in his analysis had not purchased a 2 Magnolia product in at least six months. 3 So I give an example here, Deaconess Henderson. They 4 bought the Gen2 from Magnolia, and then five quarters 5 later, so over a year later, they bought Jet units. 6 Well, Magnolia had already lost that customer five 7 quarters ago. It wasn't because of the Jet coming out 8 that that customer was not buying from Magnolia. So 9 that's not a lost customer tied to the Jet sale and those 10 units should be subject to a reasonable royalty, not lost 11 profits. 12 Q. What's the total number of lost units that you 13 thought Mr. Napper improperly included? 14 A. 81,600, or approximately 60 percent of those units. 15 Q. And then what are the documents you relied on for 16 that? 17 A. DTX-1080, DTX-639, and DTX-765. 18 Q. So when you make all of those adjustments, what is 19 your opinion as to what Mr. Napper's Scenario 1 lost 20 profits should have been? 21 A. They would reduce to \$199,894. 22 Q. Let's move on to his Scenario 2. Do you have some 23 criticisms with respect to Mr. Napper's Scenario 2? 24 A. Yes. Again, I have the same criticisms related to 25 the costs that he did not deduct, and then I also looked

1383 1 at the customers that were included in Mr. Napper's 2 Scenario 2. 3 Q. And Scenario 2, again, if you could just remind the 4 jury, is that where Mr. Napper said if somebody went from 5 Lock to Jet, they would not go back to Lock? Is that his 6 analysis? 7 A. Yes, effectively. 8 Q. How many customers did you find that Mr. Napper 9 improperly included based on his definition? 10 A. Well, I found 55 out of 116 customers in his analysis 11 should not have been included. The first set are Jet 12 units that were free samples or scrapped units. So 40 of 13 those customers are -- 40 or so of those customers are 14 actually sales reps of Kurin, who would be -- the customer 15 would be Abby Norfleet, for example, where she would take 16 those and show those as part of samples. Those units 17 should be part of a reasonable royalty, not part of a lost 18 profit analysis. 19 I also looked to see are there situations we see in 20 the data where Kurin customers chose to buy a Lock and a 21 Jet and go back to a Lock, like -- or did they buy the Jet 22 and the Lock at the same time, right? So it wasn't the 23 case that a customer would move from the Lock to the Jet 24 and never go back to the Lock again. 25 Q. So do you have examples of that?	1384 1 A. I do. So, for example, in the top part of the slide, 2 this is Lake Charles, I looked at the various products 3 that Lake Charles had bought. So they started buying a 4 Gen2, then they went to a Lock, then they went to a Jet, 5 then they went back to a Lock. 6 Also, I looked Southern Modesto, Marietta Memorial, 7 and Hutchison Regional. They bought a Lock, they bought a 8 Jet, and then they bought a Lock. 9 Now, keep this in mind: Mr. Napper did not consider 10 the Lock to be an acceptable non-infringing alternative, 11 right? So here it's showing us that Kurin customers are 12 buying both. 13 Q. Do you want to just briefly tell us about these 14 additional examples? 15 A. And in these examples, these customers bought the 16 Lock and the Jet on the same day. So, again, they're 17 buying both products. 18 Q. And what are the documents you relied on to find 19 these examples? 20 A. DTX-1080, DTX-639, and DTX-765. 21 Q. So just to conclude, is it accurate that these 22 172,345 customers are customers that don't meet 23 Mr. Napper's own definition but that he included anyway? 24 A. Yeah. And those are units, yes. 25 Q. I'm sorry. Those are --
1385 1 A. Those are units, 172,345 units. 2 Q. Sorry. 3 A. Yes. 4 Q. So when you make these adjustments, what is your 5 conclusion as to what Mr. Napper's lost profits should 6 have been? 7 A. It would be no more than 1,419,963. 8 Q. Were you here also when I asked Mr. Napper about 9 Bethesda North? 10 A. Yes, I was. 11 Q. And is that a customer -- have you excluded Bethesda 12 North from your analysis? 13 A. I excluded some of the Bethesda North units -- or 14 some of the Bethesda units but not all of them. 15 Q. And were you trying to be conservative in that way? 16 A. Yes, I was. 17 Q. So if you could just summarize your criticism of 18 Mr. Napper's lost profits opinion. 19 A. If the jury finds that lost profits for Magnolia's 20 asserted patents is the right remedy, the lost profits 21 would be no more than \$1,419,963. And for the Jet units 22 that are not subject to lost profits, the royalty would be 23 applied to those, and those units amount to 866,183. 24 Q. Do you also have criticisms of Mr. Napper's 25 reasonable royalty analysis?	1386 1 A. Yes, I have some corrections or adjustments to Mr. 2 Napper's reasonable royalty opinion. 3 Q. And do you remember Mr. Napper put up a 223 and 224 4 number in connection with his reasonable royalty analysis? 5 A. Yes, he did. 6 Q. Okay. How do you disagree with that analysis? 7 A. So, in my mind, Mr. Napper is comparing apples to 8 oranges when he goes to his 223, 224. 9 So in my analysis, resulting in a \$1.32, I am looking 10 at the time period that the Jet and the Lock were sold at 11 the same time. Mr. Napper looks at the Lock and goes all 12 the way back to 2017. There have been a lot of changes in 13 the ISDD market from 2017 to 2023. You have -- the Lock 14 came out, you have Gen2 coming out, you have the Micro 15 coming out, and just the market's growing in general. 16 So if you want to do apples-to-apples approach, you 17 look when, again, both products are on the market together 18 and they're competing against one another to figure out 19 what's that incremental profit on the product that's 20 accused of infringing the Magnolia asserted patents. 21 Q. Then Mr. Napper also had an opinion about a \$3.05 22 royalty rate. Do you remember that? 23 A. Yes. He called it his cost of components approach. 24 Q. Is this the slide that Mr. Napper used to show his 25 analysis?

1387 1 A. Yes, it is. 2 Q. And we talked a little bit -- you might remember I 3 talked to Mr. Napper about adjustments that could be made 4 to the numerator and the denominator that would adjust the 5 royalty rate. Do you remember that? 6 A. Yes. 7 Q. Okay. Have you done some more specific adjustments 8 to Mr. Napper's math here? 9 A. I did. 10 Q. Okay. What is your -- what is wrong with what 11 Mr. Napper did in his component cost analysis? 12 A. Going back to the idea of what happens at a 13 hypothetical negotiation, how you can use that Book of 14 Wisdom to help inform you about information that would let 15 you better value the patent at the hypothetical 16 negotiation date, I think that Mr. Napper didn't consider 17 some of that. 18 Q. Why are you showing the cards upside here? How is 19 that relevant to your criticism of Mr. Napper? 20 A. Again, it's the whole idea of playing a card game 21 against someone else that sees all of your cards. You 22 can't really hide anything. Everyone has full 23 information. 24 Q. Can you just explain here what you -- the things that 25 you think Mr. Napper didn't consider, but that he should	1388 1 have? 2 A. Yes. So these are -- it's the same data that 3 Mr. Napper presented a couple of days ago. So if you 4 recall, the Kurin Jet chamber was about 31 cents. But if 5 you look at it under full automation, in the same 6 document, right, in September 2023, that's the date of 7 this, the cost of that Kurin Jet chamber is 15 cents once 8 they get to full automation. And that happened in 2023. 9 So, in my mind, the 15 cents would be the appropriate 10 amount to use for the Jet chamber. 11 Q. In this document, DTX-673, what's on the screen, is 12 that a document that Kurin uses in the ordinary course of 13 business? 14 A. Yes, it is. It's how they determine their costs for 15 products. 16 Q. So is it your opinion that Mr. Napper should have 17 used the full automation cost? 18 A. Yes, it is. 19 Q. Do you have other issues with how Mr. Napper 20 performed his royalty calculation? 21 A. I do. So, specifically the BD set and the overhead. 22 So we spoke a little bit earlier today about the BD 23 set. So Mr. Napper excludes the BD set, but about 24 60 percent of the units of the Jet that are sold include 25 the BD set. So it's a driver, I think, of sales. It
1389 1 makes a difference in your sales. So he should have 2 included that in his denominator when looking at total 3 costs, right, as you're performing that ratio. 4 Also, too, for overhead, I think it also should have 5 been included. It includes things like adhesive, 6 solvents, lubricants, gloves, indirect labor, all these 7 other things that make sure that the Jet is ready to sell 8 and ship out the door. 9 So my opinion, he should have included both of those 10 costs also in his analysis. 11 Q. And, again, this DTX-673, is it your opinion that 12 this would have been available to the parties at the time 13 of the hypothetical negotiation? 14 A. Well, definitely. It's a September 2023 document, 15 and the third Magnolia asserted patent issues in February 16 of 2024. So it's right within the wheelhouse of the 17 period to consider. 18 Q. So when you make those adjustments to the costs and 19 to adjusting for full automation, how does that change 20 Mr. Napper's calculation? 21 A. Sure. So the 21.07 percent that he relied on, it 22 would range from 4.46 percent, if you look at both the 23 overhead and the BD sets, but if you thought you shouldn't 24 include overhead and only include the BD sets, that 25 percentage would change to 7.05 percent. So the 305 would	1390 1 change 66 cents to a range of \$1.05. 2 Q. Between the 66 cents and \$1.05, if you're moving 3 along that range, what is the factor that's changing 4 there? 5 A. It's whether or not you would include the overhead. 6 I would also add that Mr. Napper discussed that the 7 denominator should be adjusted for that full automation 8 15 percent -- or 15 cent decrease. I factored that in 9 here as well, so it captures both sides of it. 10 Q. So does that conclude your criticisms of Mr. Napper's 11 opinions with respect to Magnolia's damages? 12 A. It does. 13 Q. And what are your -- just summarize your conclusions 14 as to how, if he had done his analysis properly, what 15 would the damages have been? 16 A. If lost profits are appropriate, they would be no 17 more than \$1,419,963. 18 If Mr. Napper's royalty rate of \$3.05, if corrected 19 would be more in the range of 66 cents to \$1.05 per unit, 20 and the total number of Jet units sold from December 20, 21 2022, through the third quarter of 2025 would be 22 1,238,225. 23 Q. Okay. I just want to come back to where we started 24 to remind the jury, too, you did have opinions about 25 Kurin's damages, right? And those haven't changed.

1391

1 Are these your final opinions as to Kurin's damages?

2 **A.** That's correct.

3 **MS. FARNAN:** No further questions.

4 **THE COURT:** All right. Cross-examination.

5 **MR. RAMANI:** Thank you, Your Honor.

6 May my colleague approach, Your Honor?

7 **THE COURT:** Sure.

8 **MR. RAMANI:** Thank you very much.

9 **THE COURT:** All right. Go ahead, Counsel.

10 **MR. RAMANI:** Thank you, Your Honor.

11

CROSS EXAMINATION

12

13 **BY MR. RAMANI:**

14 **Q.** Ms. Distler, good morning.

15 **A.** Good morning.

16 **Q.** Now, you testified yesterday -- but before we get to

17 the substance of your opinions, I'd like to speak just a

18 little bit about your background.

19 I believe, if I heard correctly, you testified that

20 you've actually testified in eight other patent trials; is

21 that right?

22 **A.** I have.

23 **Q.** And in two of those occasions, the court excluded

24 your opinion in part, true?

25 **A.** I believe that's correct.

1392

1 **Q.** And this is the third time that you're working with

2 the law firm that's representing Kurin in this case,

3 Kirkland & Ellis, right?

4 **A.** It is.

5 **Q.** Now, before this case, you had never done any expert

6 work related to blood cultures, true?

7 **A.** Specific to blood cultures, no.

8 **Q.** And, also, before serving as an expert in this case,

9 you hadn't previously served as an expert in any case

10 related to fluid dynamics in medical devices, true?

11 **A.** In medical dynamics -- or medical devices, that's

12 correct.

13 **Q.** Why don't we turn to your responses to Mr. Napper's

14 opinions, if we could.

15 **MR. RAMANI:** Your Honor, may I approach the

16 flip chart?

17 **THE COURT:** Sure.

18 **MR. RAMANI:** Thank you.

19 **THE COURT:** Move it up, too, if you don't mind.

20 **MR. RAMANI:** Thank you, Your Honor. Appreciate

21 it.

22 Your Honor, may I ask questions from here?

23 **THE COURT:** Sure.

24 **MS. FARNAN:** Your Honor, may I move over here

25 so I can see?

1393

1 **THE COURT:** Sure.

2 **MR. RAMANI:** Let me know when you are there,

3 Ms. Farnan.

4 Can you see?

5 **MS. FARNAN:** Yes.

6 **THE WITNESS:** I actually can't see it.

7 **BY MR. RAMANI:**

8 **Q.** Oh, you cannot? Well, we don't want that.

9 How's this? Can you see this?

10 **A.** That's better.

11 **Q.** This is better?

12 **MR. RAMANI:** Is it okay here, Your Honor?

13 **THE COURT:** Sure.

14 **MR. RAMANI:** Thank you.

15 **THE COURT:** Are you good, Ms. Farnan? Can you

16 see?

17 Well, you do have to let Ms. Farnan see.

18 **THE WITNESS:** Turn it a little more, yeah.

19 **THE COURT:** That's great. Thank you.

20 **BY MR. RAMANI:**

21 **Q.** Okay. Now, Ms. Distler, you have been here in court

22 for the entire trial, true?

23 **A.** I have been.

24 **Q.** So you saw, when I was speaking with Mr. Rogers, that

25 he identified these three differences between the Kurin

1394

1 Jet and the Kurin Lock, true?

2 **A.** That's my recollection.

3 **Q.** Right. And part of your criticism of Mr. Napper's

4 lost profits opinion is that he is incorrect in saying

5 that the Kurin Lock is a suitable non-infringing

6 alternative to the Kurin Jet, correct?

7 **A.** And the Micro, correct.

8 **Q.** Okay. Now, you understand that the question of

9 whether a product is a suitable non-infringing

10 alternative, that's a fact question for the jury to

11 decide, right?

12 **A.** For sure.

13 **Q.** And I think you testified in your criticism of

14 Mr. Napper that the reason that you believe Magnolia

15 should receive no lost profits is because of this, is

16 because you've concluded that the Kurin Lock is, in fact,

17 a suitable non-infringing alternative, right?

18 **A.** Yes, based on the market data that we were reviewing

19 and the other -- other points we discussed today.

20 **Q.** Right, but it's ultimately in the jury's hands.

21 If the jury disagrees with you, then they can award

22 lost profits, right?

23 **A.** Yes, and I provided alternative calculations of that,

24 too.

25 **Q.** Great. So let's focus on this first point, no

1395 1 drawing force at the outlet. 2 Now, overall in this case, there's been discussion of 3 four different products. 4 We've got the Lock and the Jet on the Kurin side, 5 right? 6 A. Yes. 7 Q. And then we have the Gen2 and the Micro on the 8 Magnolia side, right? 9 A. Yes. 10 Q. Now, since you've been here and you've heard the 11 testimony, you've heard that the Lock is the only product 12 that does not use some kind of pressure to draw the dirty 13 blood into the device, right? 14 A. That's generally my understanding from a nontechnical 15 perspective. 16 Q. Right, just as a damages expert who's trying to 17 understand the technology in the case. 18 The other three products, that would be Magnolia's 19 Gen2, Magnolia's Steripath Micro, as well at Kurin's Jet, 20 they all use active pressure to bring the dirty blood into 21 the device, right? 22 A. That's my understanding. 23 Q. So the Lock stands alone in not doing that, right? 24 A. Yes. 25 Q. And you, of course, also agree with Mr. Rogers that	1396 1 the Lock does not have a movable plug or a vent, two other 2 technical features that distinguish it from the Jet, 3 right? 4 A. I don't think that's accurate. 5 Q. Well, you saw Mr. Rogers said the Lock lacks a 6 movable plug, right? 7 A. I agree with that. 8 Q. And you saw Mr. Rogers said that the Lock lacks a 9 vent, right? 10 A. As I sit here, I'm not sure that it lacks a vent. 11 Q. Okay. That's okay. We can stay focusing on this 12 one. 13 Again, the Lock is the only one of the four products 14 that doesn't use active pressure to draw in the dirty 15 blood. 16 We agree on that? 17 A. Yes. 18 Q. Great. 19 MR. RAMANI: Your Honor, may I? 20 THE COURT: Yeah, sure. 21 MR. RAMANI: Thank you. 22 BY MR. RAMANI: 23 Q. So as the jury makes this consideration in deciding 24 whether to award Magnolia lost profits and they consider 25 these technical differences we've discussed, they should
1397 1 also consider Kurin's statements distinguishing the Lock 2 and the Jet to determine whether the Lock is a suitable 3 non-infringing alternative. 4 You would agree with that, right? 5 A. Yes, you would want to consider the differences. 6 Q. Okay. Well, why don't we look at some of those. 7 MR. RAMANI: Mr. Smith, could we please pull up 8 PTX-134, which is already in evidence. 9 BY MR. RAMANI: 10 Q. It's in your binder, Ms. Distler, but you will have 11 seen it many times and it will be on the screen. It is 12 the press release that Kurin issued when the Jet launched 13 in February 2023. 14 A. It's in my -- the cross binder? 15 Q. If it's not, it's up on the screen. 16 A. Okay. 17 MR. RAMANI: Mr. Smith, would you blow up the 18 headline in the first two paragraphs, please. 19 BY MR. RAMANI: 20 Q. And so it's appropriate for the jury, in assessing 21 whether or not the Lock is a suitable non-infringing 22 alternative to the Jet, to consider these statements by 23 Kurin that they made to the world, that the Jet is a 24 quantum leap forward, and it offers a significant 25 technological advance over Kurin's own market-leading	1398 1 Lock. 2 See that? The jury should consider that, right? 3 A. Yes. 4 Q. You also think the jury should consider what Kurin's 5 CEO said when announcing the Jet. As he put it, "a 6 fundamentally different product that provides a new level 7 of performance in addressing the blood culture 8 contamination market." 9 You see that? 10 A. I do. 11 Q. They should consider that, right? 12 A. The jury should consider the evidence it thinks is 13 appropriate, absolutely. 14 Q. And then they should also consider where Mr. Rogers 15 says, in this press release, "We have leapfrogged that 16 technology," "leapfrogged that technology and created a 17 much faster device with a greater level of control for 18 clinicians." 19 All of that, again, in the jury's hands to determine 20 whether they disagree with you in whether the Lock is a 21 suitable non-infringing alternative to the Jet, right? 22 A. It is, yes. 23 MR. RAMANI: We can take that down, Mr. Smith. 24 Thank you. 25

1399

1 **BY MR. RAMANI:**

2 **Q.** Now, in your presentation --

3 **MR. RAMANI:** May I have the document camera,

4 please. Thank you.

5 **BY MR. RAMANI:**

6 **Q.** You put up this slide.

7 Do you remember that?

8 **A.** I did.

9 **Q.** Okay. This shows -- the idea of this slide is that

10 there were four customers. You were criticizing

11 Mr. Napper's opinion that there are 118 -- actually, at

12 least 118 Kurin Lock customers who then moved to the Jet.

13 And your point was that, "Well, not so fast, four of

14 those customers actually returned to buy the Lock," right?

15 **A.** I would characterize it a little differently.

16 **Q.** You would, okay.

17 Well, when I took your deposition, you identified 2

18 out of 118 customers who had switched from the Lock to the

19 Jet, who then switched back to the Lock, true?

20 **A.** That could be true that we discussed.

21 **Q.** Yeah, that's what we discussed, right?

22 So at that time there were 2, but today in court,

23 you've identified 4.

24 But, again, even saying that there were 4, there were

25 at least 118 total who switched from the Lock to the Jet,

1401

1 question, if you would.

2 Can we do that?

3 **A.** I'll do my best.

4 **Q.** Thank you. I appreciate that.

5 Your lawyer can ask you questions if you believe

6 there's -- she believes there's more context for you to

7 provide, okay?

8 **A.** Sure.

9 **Q.** Great. Let me just get back to part of -- I think

10 what was buried in that answer that you just gave.

11 At your deposition, when I took it this past

12 summer --

13 **MR. RAMANI:** I am at Page 81.

14 **BY MR. RAMANI:**

15 **Q.** I asked you the question, "Sitting here today, can

16 you identify any other of the 118 customers who Mr. Napper

17 identified as having moved from the Lock to the Jet as

18 having gone back to the Lock other than the two you cite

19 in Paragraph 87?"

20 And you answered, "As I sit here, I see situations

21 where they have been purchased at the same time, but

22 outside of these two examples, as I sit here, those would

23 be two that would fall into my criticisms of his scenario

24 two analysis."

25 That's what I asked you and that's how you answered,

1400

1 and out of that you've only identified 4 who went back,

2 true?

3 **A.** I would disagree with that.

4 **Q.** Well, let's address that.

5 You also have another slide that says there were

6 customers who purchased, on the same day, the Jet and the

7 Lock, right?

8 **A.** Yes, examples.

9 **Q.** Okay. So adding up what you've shown to the jury,

10 that's 9 total customers out of at least 118. It may be

11 even more now for all we know because you didn't say.

12 A maximum of 9 that you've identified here today?

13 **A.** Well --

14 **Q.** That in some way switched back, right?

15 **A.** Well, I would disagree. In that total number of 116

16 or 118 customers, you also have 40, approximately 40 sales

17 reps of Kurin, that are -- it's free goods or samples --

18 that are also in part of that number.

19 I would say, too, my other disagreement with that is

20 that there is a lack of consideration overall of the

21 acceptability of the Lock as a non-infringing alternative

22 in a world where the Jet did not exist. So I relaxed that

23 assumption in correcting Mr. Napper's analysis.

24 **Q.** Ms. Distler, you are opinion expert. I'd ask that

25 you kindly listen to my question. Please answer that

1402

1 right?

2 **A.** Yes.

3 **Q.** Now, Ms. Distler, one more point on your criticisms

4 of Mr. Napper.

5 You didn't mention at all in your testimony any

6 relevance whatsoever in whether or not the jury should

7 award Magnolia lost profits, whether Magnolia itself, as a

8 business, is profitable or not.

9 You just didn't offer that opinion, right?

10 **A.** I did not discuss the profitability of Magnolia or

11 Kurin today with the jury.

12 **Q.** Right. It's not pertinent to any of your opinions

13 that you offered, whether either company is profitable or

14 not, at least as you've offered it today to the jury,

15 right?

16 **A.** I would say I didn't discuss that information with

17 the jury today, but I considered it in part of my *Georgia*

18 *Pacific* analysis overall.

19 **Q.** Suffice to say, you discussed a number of

20 *Georgia-Pacific* factors. You didn't discuss profitability

21 of the business enterprises, true?

22 **A.** I looked at various costs, as I discussed, for each

23 of the companies and presented those as part of my

24 incremental costs today.

25 **Q.** Right. But just to make sure we're on the same page,

1403 1 when you criticized Mr. Napper's lost profits analysis, 2 you did not, as part of the opinion that you've offered to 3 this jury, say, "You know what, Magnolia, they've spent 4 \$100 million, you should take that into account in 5 deciding whether or not to award lost profits"? 6 That's not part of your opinion, right, as you've 7 offered it today? 8 A. Well, it's my understanding in patent damages that 9 you should be focusing on the inventive aspect. 10 Q. Ms. Distler, I'm sorry. I asked you a yes-or-no 11 question. We're on a clock. I'm just asking you to 12 please listen carefully to my question and try to answer 13 it, if you could. So can I just restate the question for 14 you? 15 A. Sure. 16 Q. So the question was: In the testimony -- I'm asking 17 you about the testimony you gave today, and I guess 18 yesterday afternoon, in response to questions from your 19 lawyer, you didn't say "The jury should consider whether 20 or not Magnolia Medical is profitable in making their 21 judgment on lost profits." Yes or no? 22 A. I did not present information on Magnolia's 23 profitability today. 24 Q. Thank you. 25 Let's turn, Ms. Distler, to your opinions on Kurin	1404 1 where you believe that Kurin should receive damages for 2 infringement of its patent. 3 Now, I notice throughout your testimony, but 4 especially in the Kurin section, you used this term "ISDD" 5 when you were describing the market. 6 Do you remember that? 7 A. Yes. 8 Q. So ISDD stands for Initial Specimen Diversion Device, 9 true? 10 A. That's my understanding. 11 Q. And you've been here in trial, so you understand 12 that's actually a trademarked word that Magnolia holds the 13 trademark to, right, Magnolia Medical? 14 A. That may be the case. 15 Q. So you heard Mr. Bullington's testimony that Magnolia 16 Medical created this entire new device category, and 17 that's why the U.S. Patent and Trademark Office gave it 18 protection for this market, ISDD, right? 19 A. I would disagree with that. I don't believe they 20 were given protection from the market. 21 Q. Protection for this term that describes the market. 22 Would you agree with that? 23 A. They were given -- 24 MS. FARNAN: Objection, Your Honor. Relevance. 25 Trademark is not a patent.
1405 1 THE COURT: I'll let it go just a little bit, 2 but like a question or two, and if you want to renew the 3 objection. 4 I'm not seeing the connection yet, but if you 5 want to quickly make it. 6 MR. RAMANI: Your Honor, to save time, I'm 7 happy just to move on. I can withdraw my question. 8 BY MR. RAMANI: 9 Q. Now, Ms. Distler, you also assessed suitable 10 non-infringing alternatives as part of your opinion that 11 the jury should award Kurin lost profits, correct? 12 A. I did. 13 Q. And so in assessing suitable non-infringing 14 alternatives, you assessed the alternatives, you compared 15 them to the Micro, right? 16 A. Well, yes. You're looking at the product that's 17 being removed from the market and what would be the 18 available options. 19 Q. Right. So I just want to make sure that we're on the 20 same page, and I think we are. 21 But in assessing acceptable and available 22 non-infringing alternatives to the Micro, it's your 23 opinion that consideration should be made to whether any 24 non-infringing alternatives would provide the same or 25 nearly the same benefits such that buyers would consider	1406 1 the alternatives as reasonable substitutes, true? 2 A. I would say, generally, one would consider that. 3 Q. Now, in your lost profits analysis, on the Kurin side 4 of the case again, for the suitable non-infringing 5 alternatives, it's your view that of the four products 6 we've talked about, the Magnolia Gen2 would not be a 7 suitable non-infringing alternative, true? 8 A. Could you read that back? It was long. 9 Q. Sure. I'm happy to. 10 So of the four products we've talked about in the 11 case, for your opinion as to Kurin's lost profits, that 12 opinion relies on the fact that you believe the Magnolia 13 Gen2 is not a suitable non-infringing alternative to the 14 Micro, true? 15 A. Yes. At November 2024, that's correct. 16 Q. Now, I want to make sure that we all understand and 17 get oriented here to this information. 18 Now, in this opinion that you offered for the 19 non-suitability of the Gen2, as a non-infringing 20 alternative to the Micro, you put up this graph, right? 21 And you were saying it shows the Gen2 sales are declining 22 and Micro is going up and Jet is starting to take off. 23 Do you see that? 24 A. So now we've switched to the Magnolia asserted 25 patents?

1407 1 Q. Oh, you know what? I'm sorry. I put the wrong one 2 up there. Thank you. Thank you for pointing that out to 3 me. 4 I think this is the one I meant to show you, which is 5 that the Gen2 was at a relatively low sales volume as of 6 November 2024, right? It's at the bottom of the slide. 7 A. Yes. 8 Q. Okay. Now -- now we should look at the other slide. 9 When you were discussing your criticism of 10 Mr. Napper, you showed this slide. And this actually 11 shows a broader context, that the Gen2 started declining 12 when the Micro started increasing in 2023, right? 13 A. Yes. When the Micro added additional configurations, 14 you see that the sales of the Micro start increasing and 15 the Gen2 starts decreasing. 16 Q. Right. And you put up a slide, too, in your 17 presentation from Mr. Bullington, and it had some 18 deposition testimony and some document pulls. 19 I noticed you didn't include his trial testimony. So 20 why don't we take a look at that so that we can get the 21 full picture here. 22 A. I thought I did include his trial testimony on the 23 slide. 24 Q. Well, here's what he said about the decision to 25 sunset. "Why did Magnolia Medical decide to sunset its	1408 1 Gen2?" 2 And he talks about how the Micro platform has been 3 quite significant and just from a business complexity 4 standpoint, we've consolidated to one manufacturer. We 5 fully automated and so on. 6 Do you see that, that one question and answer? It 7 goes over to the next page over here. 8 Ms. Distler, are you with me? 9 A. Yes. 10 Q. Okay. Let's keep going. He then went on to say -- 11 this certainly wasn't in your presentation. 12 "If Magnolia Medical never introduced Micro, what 13 product would you have sold? 14 "ANSWER: Well, Gen2 really demonstrated exceptional 15 clinical efficacy and very strong user adoption and use. 16 As I mentioned previously, across hundreds of hospitals, 17 millions of patients. So we would have just continued to 18 sell the Gen2 product, had we not introduced Micro." 19 And then he goes on to talk about how they would have 20 been able to manufacture it. And then, finally, the 21 question is: 22 "As far as you understand it, how did Magnolia 23 Medical's customers, overall, find Gen2's ease of use? 24 "ANSWER: Overall, the feedback has been quite 25 positive, and the clinical results speak for themselves,
1409 1 as does the commercial success of the product." 2 Do you recall you were here in court when 3 Mr. Bullington gave that testimony about Gen2 and Micro, 4 correct? 5 A. Yes. 6 Q. Now, let's talk a little bit about other aspects of 7 your Kurin lost profits opinion. 8 It's your opinion that Kurin would receive all Micro 9 sales because, again, Gen2 is not a suitable 10 non-infringing alternative. And those sales would be 11 split between the Lock and the Jet, true? 12 A. Yes. 13 Q. Now, the Lock does not use the '052 patent. You know 14 that, right? 15 A. That's my understanding. 16 Q. The Gen2 does not use the '052 patent. You know 17 that, right? 18 A. That's my understanding. 19 Q. In 2018 and 2019, the Gen2 and Lock were the only two 20 products Magnolia Medical and Kurin were selling, right? 21 A. I believe so. I don't think that Magnolia was 22 selling the Gen1 anymore. 23 Q. So for those two years, 2018 and 2019, the Gen2 and 24 Lock were head-to-head competitors, true? 25 A. Yes.	1410 1 Q. Okay. Now, let's move to whether the Gen2 competes 2 with the Jet. You said that as part of your opinions you 3 spoke with Dr. Antonsson. You said you spoke with 4 Mr. Rogers. Earlier today you said that, right? 5 A. I spoke with Dr. Antonsson and I heard Mr. Rogers' 6 testimony this week. 7 Q. Oh, so you heard his testimony; you didn't have a 8 conversation with Mr. Rogers? 9 A. I did not have a conversation with Mr. Rogers from my 10 report. I reviewed his deposition, but I did not speak 11 with him, correct. 12 Q. That was kind of my point. I mean, in preparing your 13 report, you didn't recall asking anybody at Kurin whether 14 Gen2 competes with Jet, true? 15 A. I don't recall if I specifically asked that question, 16 as I looked at the data and documents that had been 17 produced in the case and deposition testimony. 18 Q. Right. You didn't ask that question. But you did 19 actually include in your report -- you didn't present it 20 to the jury today -- a Kurin document that shows one 21 hospital's experience using the Steripath Gen2 and the 22 Steripath -- excuse me -- and the Kurin Jet, right? 23 Remember that, Valleywise? 24 A. Valleywise? I did not talk about Valleywise today, 25 correct.

1411

1 Q. You did not, but you considered it in your report,
2 right, as part of the analysis you did?
3 A. Yes.
4 Q. Okay. And you relied on it, right?
5 A. Yes.
6 Q. Okay. Well, why don't we take a look at this case
7 study. It's DTX-1084. It's already in evidence. You
8 have a copy, I believe, in your binder, Ms. Distler, but
9 it should be on the screen momentarily. Feel free to look
10 at it wherever you prefer.
11 MR. RAMANI: And, Mr. Smith, can we please blow
12 up the middle where there's that graph being shown?
13 THE WITNESS: I don't think I got it.
14 BY MR. RAMANI:
15 Q. Do you have it, Ms. Distler?
16 A. Is it just the -- okay. Got it, yep.
17 Q. Yeah. It's just a one-page Kurin document.
18 A. Yeah.
19 Q. You got it?
20 (Speaking simultaneously.)
21 A. It's the first one, though? It says 1 so I was just
22 making sure I have the right document. Okay.
23 Q. Yeah, no, that's right. That's right. It's the one
24 that says 1.
25 Valleywise, to your knowledge, they did this trial.

1413

1 similar, right?
2 A. Putting aside the lack of ease of use concerns by the
3 users, yes.
4 Q. Now, for whatever reason, this hospital, to your
5 knowledge, didn't try Steripath Micro as part of this
6 trial, right?
7 A. They did not.
8 Q. And to your knowledge, for whatever reason, this
9 hospital didn't try Kurin Lock as part of this trial,
10 right?
11 A. It does not appear that they did.
12 Q. So when you opine to this jury that the Gen2 is not a
13 suitable non-infringing alternative to the Kurin Jet, in
14 this experience, at least, you see one hospital trying
15 them both in succession, right?
16 A. And that the hospital was not pleased with the Gen2.
17 Q. Let's talk about that.
18 MR. RAMANI: Would you please remove the graph,
19 Mr. Smith. Thank you. Would you please blow up the
20 "Baseline and Interventions" section of this document.
21 BY MR. RAMANI:
22 Q. Now, let's talk about what you just said, that the
23 hospital was not pleased. And Ms. Distler, it's very
24 small in your paper so we've got it big on your monitor
25 too if you prefer.

1412

1 So here we see in this graph on the left, this hospital
2 was suffering from pretty significant false positive rates
3 from July 22 until about April 23.
4 Do you see that?
5 A. Yes.
6 Q. And then they did a Steripath trial and that's with
7 the Gen2, right?
8 A. Yes.
9 Q. And boom, when they did the Steripath trial, the
10 Gen2, the false positive rates dropped to 1.6 percent.
11 Do you see that?
12 A. Yes.
13 Q. But according to this Kurin document, the nurses
14 weren't big fans of the Gen2 and so they stopped using it,
15 and we can see that the false positive rates started going
16 way up, right?
17 A. Yes.
18 Q. And then they started using a trial with the Kurin
19 Jet and the false positive rates came down anywhere from
20 1.4 to 1 percent.
21 Do you see that?
22 A. Yes.
23 Q. Now, you would agree that the actual false positive
24 results that this Valleywise hospital saw with the
25 Steripath device and the Kurin Jet, they were pretty

1414

1 So here it says that there were high rates and
2 then Valleywise -- four sentences down: "Valleywise
3 originally brought in Steripath Gen2," and it says, "and
4 although they achieved results in one month..."
5 So achieved results, that presumably means
6 there was a drop in false positives that we saw, right?
7 A. Yeah. You see it in the chart.
8 Q. Yep.
9 "The nurses did not like the product and looked for
10 an easier-to-use solution."
11 And then: "With the introduction of Kurin Jet, rates
12 dropped to about 1.5 percent and stayed there. Nurses
13 were pleased with how easy Jet is to use and how it
14 works."
15 Do you see that?
16 A. Yes.
17 Q. And that's part of what you relied on in forming your
18 opinions, right, that Gen2 is not a suitable
19 non-infringing alternative?
20 A. To the Jet or the Micro, based on areas like ease of
21 use, and I also added in the amount of initial blood draw
22 for the diversion sample is much higher, yes. And it's
23 also more costly for Magnolia to manufacture because it is
24 hand assembled as opposed to a full automation scenario
25 like they can do with the Micro.

1415 1 Q. Okay. Ms. Distler, I'd ask you to kindly just listen 2 to the question I'm asking you. You'll have the chance to 3 say what you want to the jury as your lawyer decides is 4 appropriate. 5 So again, what's highlighted here on the screen in 6 this exhibit, you relied on that in forming your opinion 7 that the Gen2 is not a suitable non-infringing alternative 8 to the Jet, right? 9 A. Absolutely, because the nurses did not like the 10 product and they looked for -- 11 THE COURT: All right. So now I'm going to 12 interrupt. 13 THE WITNESS: Yes, sir. 14 THE COURT: You are a paid expert. I did it to 15 their side. You know, it's time. I time the trial. Your 16 time is on that time. Wait until your lawyer asks you the 17 questions. 18 THE WITNESS: Yes, Your Honor. 19 THE COURT: All right. 20 BY MR. RAMANI: 21 Q. Why don't I repeat the question, Ms. Distler, so you 22 have it in mind. 23 So this language that's highlighted here, this is 24 part of what you relied in forming your opinions that the 25 Gen2 is not a suitable non-infringing alternative to the	1416 1 Jet, true? 2 A. Yes, I did. 3 Q. Okay. And, again, this was a document created by 4 Kurin, right? 5 A. I think Kurin working with Valleywise is my 6 understanding, yes. 7 Q. Okay. And, again, you didn't speak with anybody 8 about Kurin before forming your opinions. You just looked 9 at the documents and did your analysis and came up with 10 what you did, right? 11 A. I don't think that's what I said. 12 Q. Okay. Well, did you ask Kurin whether what's said 13 here in this document and that you relied on is actually 14 accurate? 15 A. I don't recall asking Kurin if the one page here was 16 accurate. 17 Q. Okay. 18 MR. RAMANI: Your Honor, I have marked as next 19 in order PTX-310. We will add it to our exhibit list 20 later. May I approach the witness? 21 THE COURT: Yes. Have you shown it to counsel? 22 MR. RAMANI: Do you have a copy? 23 May I approach, Your Honor? 24 THE COURT: Yes. 25 MR. RAMANI: May I also hand a copy up to Your
1417 1 Honor? 2 THE COURT: Yes, please. 3 MR. RAMANI: Thank you. 4 May I have the document camera, please. 5 BY MR. RAMANI: 6 Q. Now, Ms. Distler, you can see that this is a Kurin 7 document, right? 8 Ms. Distler, do you see that? It's an e-mail with 9 some attachments? 10 A. Yes. 11 Q. Okay. 12 MR. RAMANI: Your Honor, Magnolia moves the 13 admission of PTX-310. 14 THE WITNESS: I'm not sure what the last few 15 pages are. 16 MR. RAMANI: Oh, we'll get there. 17 THE COURT: Any objection? 18 MS. FARNAN: Objection, Your Honor. 19 Foundation. 20 It's not clear she ever considered this in her 21 opinion and -- or has seen it before. 22 THE COURT: Yeah. 23 MR. RAMANI: She hasn't seen it before, Your 24 Honor. That's kind of the point. 25 THE COURT: Right.	1418 1 MR. RAMANI: And it goes entirely to -- 2 THE COURT: Hold up, hold up. 3 MS. FARNAN: I also think -- 4 THE REPORTER: Could you speak up, please. 5 MS. FARNAN: I said, I also think for this 6 point, it's going beyond the scope of the direct. 7 MR. RAMANI: I'm happy to respond to both 8 points if Your Honor likes. 9 THE COURT: Hold on. 10 All right. So the objections are two. One is 11 lack of foundation, one is... Actually, let's do a quick 12 sidebar. Let's do it fast, please. 13 (Whereupon, the following occurred at sidebar: 14 THE COURT: Okay. There's two objections. I 15 understand one is scope, beyond the scope, and then one is 16 foundation. 17 MS. FARNAN: Right. So -- 18 THE COURT: All right. Hold on. Let's do the 19 foundation. I mean, it's a Kurin document. It was 20 produced in discovery, according to the Bates stamp, 21 correct? 22 MS. FARNAN: That's correct. 23 THE COURT: All right. So -- 24 MS. FARNAN: I don't think -- she's not the 25 appropriate witness to talk about it or --

1419

1 **THE COURT:** No, but it's an admission by a
2 party opponent. I mean, the authenticity of the document
3 is not in dispute, is it?
4 **MR. LoCASCIO:** The attachment doesn't have the
5 Bates -- there's pages -- Bates numbers on the first two.
6 There's no Bates numbers on this. I'm not sure...
7 **THE COURT:** I agree with that, and that's why I
8 called a sidebar, because there's only a Bates stamp on
9 the first document. What I call the first two documents.
10 Actually, let's be really precise here. So I
11 have in front of me, I don't know how many pages. I guess
12 it's a seven-page double-sided document. On the cover is
13 an e-mail, which that would be self-authenticating. Well,
14 when I say "self-authenticating," I don't think there's an
15 authentication issue.
16 But it's true, all the stuff that's attached to
17 it seems to be...
18 What is it?
19 **MR. RAMANI:** I can tell you. So this case
20 study, that's Page 2 of --
21 **THE COURT:** Yeah.
22 **MR. RAMANI:** -- the exhibit, Your Honor, has a
23 number of annotations.
24 **THE COURT:** Yep.
25 **MR. RAMANI:** What follows are the annotations

1421

1 "good."
2 **MR. RAMANI:** They did.
3 **THE COURT:** Yeah.
4 **MR. RAMANI:** Yeah.
5 **THE COURT:** Okay.
6 **MR. RAMANI:** That's the point.
7 **THE COURT:** All right.
8 **MR. LoCASCIO:** If may, Your Honor. I'm sorry,
9 just giving -- it's not actually for this witness. This
10 is -- they just added this to the exhibit list.
11 **THE COURT:** Yeah.
12 **MR. LoCASCIO:** We just saw it now. Mr. Heindel
13 was a witness to the case --
14 **THE COURT:** Yeah.
15 **MR. LoCASCIO:** -- by video. Mr. Rogers was a
16 witness in the case. If they planned to use this or ask
17 questions about this document, well, they had a person
18 they could have done that with and, instead, they now want
19 to introduce into evidence this -- the comments in a draft
20 that the witness wasn't involved in and didn't know about
21 as if then they want to suggest there was some, you
22 know --
23 **THE COURT:** Well, here's what I'm going to do,
24 I think. Mr. Heindel --
25 **MS. FARNAN:** Your Honor, she didn't rely on it

1420

1 as pulled from the document as produced. And so there's
2 not a Bates stamp because the annotations are electronic
3 information on the document, so they are not produced with
4 separate Bates pages. So that's why it's in this form.
5 And I can tell Your Honor, the whole point of this
6 examination is to show her bias and to show her failure to
7 consider the information.
8 She just admitted she considered language that
9 I highlighted in forming her opinions, and the language in
10 the version of this document that she considered says
11 that -- in the fourth sentence: "Valleywise originally
12 brought in Steripath Gen2 and although they achieved
13 results," and here it says "although they achieved good
14 results."
15 **THE COURT:** Right.
16 **MR. RAMANI:** And if you turn two pages to
17 PTX-310005, you see Matt Heindel, VP of business
18 development, he wants --
19 (Speaking simultaneously.)
20 **THE COURT:** -- wants to strike the word, right.
21 But my question then is, is what's attached here a draft
22 or does this differ from what's already been introduced
23 into evidence?
24 **MR. RAMANI:** It does. It does.
25 **THE COURT:** Okay. They deleted the word

1422

1 in her direct, right? So he brought it up on cross to
2 cross the point that Gen2 is a suitable non-infringing
3 alternative, and now he's going down a rabbit hole to take
4 the document he introduced for that purpose, to now
5 introduce it for another purpose.
6 **THE COURT:** Right.
7 **MS. FARNAN:** That's not within the scope of the
8 a direct.
9 **THE COURT:** That I agree with. And that's what
10 I need to hear. Because what you're telling me now is,
11 and I didn't appreciate it the beginning. When I looked
12 at the document, I thought it was the same document
13 because I'm not, of course, paying attention to all this
14 small text. But it turns out it's not the document she
15 relied on, correct?
16 **MR. RAMANI:** It's not.
17 **THE COURT:** Then it's beyond the scope. I
18 mean, if she had relied on this document, you could
19 establish that, but it's a different document. In fact,
20 that's your whole point, it's a different document. She
21 relied on the document that Mr. Cellini and Mr. Heindel
22 struck the word "good" from.
23 **MR. RAMANI:** She did, but let me just see if I
24 can persuade Your Honor otherwise. This is basics of
25 cross-examination.

1423

1 **THE COURT:** Time out. Then just ask her, "Did
2 you rely on this e-mail chain? Did you rely on that?"
3 You know, I think she's going to say no because she's
4 never seen it before, and then we're done. So, you know.
5 **MR. RAMANI:** You're asking me to do that, and
6 then we'll call somebody from Kurin on the rebuttal to put
7 it in.
8 **THE COURT:** I mean, sure. That's a different
9 story. We don't have to deal with this issue. I don't
10 know if Heindel or Cellini is getting on the stand. I
11 don't know.
12 **MR. RAMANI:** I heard from Mr. LoCascio that I
13 had called -- we could call Mr. Rogers, we could have
14 called Mr. Rogers about this document. I am happy to call
15 Mr. Rogers on rebuttal case and put him on --
16 **THE COURT:** I will leave that to you. I'm not
17 trying the case. But it's beyond the scope of this
18 witness. This witness did not rely on this document. I
19 didn't appreciate it until we came to sidebar. I mean, I
20 think it's kind of definitive proof that she didn't rely
21 on it. You can ask her the question, but my guess is she
22 is going to say no because this document differs from the
23 documents she had relied on.
24 **MR. RAMANI:** Okay. We can do that and argue
25 it.

1425

1 **A.** Yes.
2 **Q.** And he suggested those were -- that was the only data
3 that you had shown the jury?
4 **A.** Yes.
5 **Q.** Is -- I'm up here on Slide 39.
6 Is this the information in full that you actually
7 showed the jury?
8 **A.** Yes, and there's schedules in my report that have
9 that information detailed.
10 **Q.** What percentage is it of Mr. Napper's lost units that
11 you think is incorrect?
12 **A.** Just for scenario two, about a third.
13 **Q.** And then I think Mr. Ramani suggested that you
14 actually didn't show the jury Mr. Bullington's trial
15 testimony.
16 Showing your Slide 13.
17 Did you show the jury Mr. Bullington's trial
18 testimony?
19 **A.** Yes, I did.
20 **MS. FARNAN:** No further questions.
21 **THE COURT:** All right.
22 Thank you. You may step down.
23 Next witness.
24 **MR. LoCASCIO:** Housekeeping issue on a couple
25 of exhibits that we mentioned the other day to put on the

1424

1 **THE COURT:** Exactly. All right.
2 (Whereupon, the discussion at sidebar concludes.)
3 - - -
4 **THE COURT:** You may ask the question consistent
5 with what we discussed at sidebar.
6 **MR. RAMANI:** I am happy to, Your Honor.
7 **BY MR. RAMANI:**
8 **Q.** Ms. Distler, PTX-310, the document that I just
9 handed you, an e-mail attachment and some other
10 information, that is not a document that you have seen
11 before I handed it to you here in court today, true?
12 **A.** Not that I recall as I sit here.
13 **Q.** So that's not a document that you relied on in
14 forming your opinions, true?
15 **A.** As I sit here, I don't know if it appears on
16 appendix B of my reports.
17 **MR. RAMANI:** Thank you.
18 I have no further questions, Your Honor.
19 **THE COURT:** Thank you.
20 Any redirect?
21 REDIRECT EXAMINATION
22 **BY MS. FARNAN:**
23 **Q.** Ms. Distler, you remember Mr. Ramani asking you about
24 some examples of hospitals that you had put forward in
25 your direct?

1426

1 record.
2 **THE COURT:** Please, would you do that.
3 **MR. LoCASCIO:** Of course.
4 The three exhibits used that we've determined
5 were not moved into evidence or admitted, PTX-27, DTX-156
6 from Mr. Rogers, and DTX-48 from Mr. Bullington.
7 **THE COURT:** Just hold one second.
8 Was the first one PTX or DTX?
9 **MR. LoCASCIO:** PTX-27.
10 **THE COURT:** The first one is P and the others
11 are D.
12 Any objection?
13 **MR. RAMANI:** No objection, Your Honor.
14 **THE COURT:** They're admitted.
15 (Exhibits PTX-27, DTX-156, and DTX-48 admitted into
16 evidence.)
17 **MR. LoCASCIO:** At this point, Your Honor, Kurin
18 has a couple uncontested facts and responses to requests
19 for admission to read into evidence.
20 **THE COURT:** All right.
21 **MR. LoCASCIO:** The '052 patent is entitled --
22 **MR. RAMANI:** Excuse me, counsel, do you have a
23 copy?
24 **MR. LoCASCIO:** Undisputed facts three and five.
25 **MR. RAMANI:** Sorry, I thought you were

1 reading -- 1427 2 (Counsel confer.) 3 MR. LoCASCIO: The '052 patent is entitled, 4 "Blood sample optimization device," and was issued by the 5 U.S. PTO on November 12, 2024, from U.S. patent 6 application Number 18/783088, filed July 24, 2024. 7 The '052 patent claims priority to United 8 States patent application 62/318194, and has a priority 9 date of April 4, 2016. 10 Magnolia learned on the '052 patent at least as 11 early as November 12, 2024. 12 Request for admission: Admit that Magnolia 13 does not contend that the '081 was conceived and reduced 14 to practice earlier than September 12, 2018. Magnolia 15 answered: Admitted. 16 Request: Admit that Magnolia does not contend 17 that the '863 patent was conceived and reduced to practice 18 earlier than September 12, 2018. Answer: Admitted. 19 Request: Admit that Magnolia does not contend 20 the '709 patent was conceived and reduced to practice 21 earlier than September 12, 2018. Answer: Admitted. 22 Thank you, Your Honor. 23 At this point, Kurin rests its case. 24 THE COURT: All right. Thank you very much. 25 I think this is a good time for a break. I	1 have to deal with some other issues as well. So if you 1428 2 don't mind, we will take our break right now. Thank you. 3 (The jury exits the courtroom at 10:16 a.m.) 4 THE COURT: Please be seated. 5 Mr. Ramani. 6 MR. RAMANI: Thank you, Your Honor. 7 Your Honor, we also have some exhibit cleanup 8 that -- would you like us to do that when the jury 9 returns? 10 THE COURT: I don't know why, that might be 11 just a criminal thing, but I always think you have to do 12 it in front of the jury. 13 Does anybody disagree? 14 MR. RAMANI: I've seen judges do it both ways. 15 THE COURT: Which probably means you don't have 16 to do it in front of the jury. 17 That's going to be in rebuttal anyway, right, 18 what you want to introduce? 19 MR. RAMANI: The parties have agreed on it. 20 It's just a -- we put some exhibits before, I think it 21 might have been Mr. Rogers, and we didn't move them. So 22 it was during Kurin's case, I believe. 23 THE COURT: Right. The only reason I'm asking 24 is because is there any chance that, in response to what I 25 expect to be a motion from you, they are going to rely on
1 anything in those exhibits? 1429 2 MR. RAMANI: I wouldn't expect so. 3 THE COURT: We'll see. Let's just go. 4 MR. RAMANI: Okay. And Magnolia does have a 5 JMOL motion it would like to make. Now, none of these 6 issues are issues that Magnolia is requesting a ruling on 7 at this moment. So with that context -- 8 THE COURT: So you are basically just making 9 sure you satisfy Rule 50(a)? 10 MR. RAMANI: Making sure we satisfy Rule 50(a). 11 That's right. 12 May I proceed? 13 THE COURT: Please. 14 MR. RAMANI: Thank you. 15 Magnolia rules -- excuse me -- moves for JMOL 16 that -- on the Kurin prior art, that the Rogers '445 17 reference, as a matter of law, fails to show anticipation 18 because it has no movable plug. Kurin cites Figure 23, 19 for the '081 and '863 patents on the anticipation, but 20 Kurin admits that Figure 23B does not show a movable plug. 21 For example, trial transcript, day three, at 899, 13 to 22 14, Mr. Nason testified that Figure 23B does not show a 23 movable plug. 24 Kurin also cites Figure 24 for all patents, but 25 there is more than sufficient testimony to demonstrate	1 that that is not so. Mr. Rogers' direct testimony 1430 2 regarding Figure 24 at the trial transcript day 2, 792, 3 10, to 793, 23, for example. Mr. Rogers' further 4 testimony on cross-examination as to Figure 24, trial 5 transcript day 2 at 841, 19, to 843, 12. Dr. Antonsson's 6 direct testimony on point at 11, 12, and 11, 19 on day 7 three trial testimony. 8 That wraps up Magnolia's JMOL as to Rogers '445 9 anticipation. 10 And the same arguments as to Figures 23 and 24 11 apply to all three of the Magnolia patents, so the '081, 12 '863, and '709. 13 As to Kurin's '052 patent, Magnolia seeks JMOL 14 on two grounds for failure to demonstrate infringement as 15 a matter of law. 16 The first is the failure to demonstrate the 17 required drawing force at the outlet. For example, 18 DTX-0054.0018 demonstrates -- cited by both parties' 19 experts, demonstrates that the user pulls on a syringe or 20 attaches a transfer adapter pulling down the bladder, and 21 it is the bladder that flips, creating negative pressure 22 that draws diverted blood into its chamber. 23 Mr. Antonsson's testimony at 1349 as well supports this. 24 Magnolia also seeks JMOL on the housing that 25 defines limitation of the '052 patent. It is undisputed

1431

1 that the sampling channel that must be defined by the

2 housing is not created until a button is pushed. That

3 button is not part of the housing. Both parties agree.

4 And so there exists no sampling channel defined by the

5 housing in the accused Magnolia Medical device.

6 In addition, that button has a hole that blood

7 flows through, so the button partially defines the

8 sampling channel in that it fixes or marks the limits of

9 the sampling channel, and the housing is not the only

10 thing that defines the sampling channel.

11 As to '052 patent damages, Magnolia moves on

12 *Panduit* ground 2, failure to compare to the right product.

13 As Ms. Distler just acknowledged on cross-examination, in

14 assessing suitable non-infringing alternatives for the

15 '052 patent, the point of comparison was the Steripath

16 Micro, which is incorrect as a matter of law. She should

17 have analyzed non-infringing alternatives as compared to

18 the Kurin Jet.

19 And finally, Your Honor, back to '445 Rogers.

20 As to the '709 patent, that part of the motion addresses

21 the valve and transition limitations.

22 That concludes Magnolia Medical's JMOL.

23 **THE COURT:** What are the grounds, the

24 infringement, what did you just say?

25 **MR. RAMANI:** Two different grounds, Your Honor.

1433

1 have testimony --

2 **THE COURT:** So you want to show that Kurin's

3 device was used by somebody other than Kurin?

4 **MR. RAMANI:** Correct.

5 **THE COURT:** All right. Who were those people

6 and what was the testimony?

7 **MR. RAMANI:** So the testimony is that -- I

8 believe from Mr. Rogers, and perhaps others, that the

9 device is intended to be used by hospital professionals,

10 by phlebotomists, to draw blood. We also have --

11 **THE COURT:** I got that. But that's not the

12 question.

13 **MR. RAMANI:** Yeah.

14 **THE COURT:** Let's just assume for argument's

15 sake, and it's funny, because I think you want to call it

16 active inducement of infringement. Right? That's what

17 you want in the jury instruction title? Right?

18 **MR. RAMANI:** Right.

19 **THE COURT:** Okay. So let's just assume for

20 argument's sake you've got active encouragement. What's

21 the proof that it was induced, that somebody was induced

22 to infringe?

23 **MR. RAMANI:** What you have to show is that some

24 third party committed direct infringement.

25 **THE COURT:** Right. So who is the third party

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1 One is that there's no drawing force at the outlet, and

2 the second is that there's no housing that defines.

3 **THE COURT:** Okay. So those are the two?

4 **MR. RAMANI:** That's right. It's not the

5 entirety of the no housing that defines -- housing that

6 defines limitation. We don't contest that the housing

7 defines the inlet and outlet. It's the sampling channel.

8 **THE COURT:** Okay. Thank you.

9 **MR. RAMANI:** Thank you, Your Honor.

10 **THE COURT:** Now I'm going to reserve judgment

11 on it as well. All right.

12 Now that both JMOLs are in, though, I do want

13 to ask you all something, and it comes up because of your

14 fight over the title of the jury instruction for

15 inducement.

16 So what evidence is there that a third party

17 actually administered this device? I have a question for

18 both of you on this because you don't stipulate to it in

19 the two stipulated facts.

20 So what's the evidence that somebody actually

21 was induced to infringe, and who was it?

22 **MR. RAMANI:** Why don't I go first, Your Honor?

23 **THE COURT:** Sure.

24 **MR. RAMANI:** So we have testimony from

25 Mr. Bullington -- as to the Magnolia side of things, we

1434

1 that committed the direct infringement on your inducement

2 case?

3 **MR. RAMANI:** All of the hospitals and others

4 who have used the Kurin Jet.

5 **THE COURT:** What evidence is there of any

6 hospital using the Kurin Jet? That's what I'm asking.

7 **MR. RAMANI:** Well, we just had evidence of

8 Valleywise Hospital, for example, in this one clinical

9 study that we saw.

10 **THE COURT:** Yep.

11 **MR. RAMANI:** But there's also broader evidence

12 from our damages expert, from both damages experts, that

13 all parties' products were used by a considerable number

14 of customers. And so the use --

15 **THE COURT:** So I agree there's some hearsay,

16 although it's hearsay, and we'd have to go back and look

17 at the transcript. I mean, for instance, there was

18 complaints, right? You introduced, ironically, the one

19 exhibit, and there were only one that went in, when the

20 nurse person, the vice president from Florida testified,

21 there's a document in there that you could at least

22 probably argue that some third party used it because they

23 complained about it. And is that a Jet or is it a Lock?

24 **MR. RAMANI:** That was a Lock, Your Honor.

25 **THE COURT:** That was a Lock. So that's the

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1 evidence. I have the same question for the other side.
 2 Can you name me any party that there was evidence, and who
 3 it was, that used it? You've got this study now, I'll
 4 have to look at that.
 5 **MR. RAMANI:** We have the study. We also
 6 have -- I can pull specific testimony, Your Honor, at the
 7 break, if that would be helpful, but --
 8 **THE COURT:** It doesn't seem like it's a
 9 contested point.
 10 **MR. RAMANI:** If I can say, there's also --
 11 you're right, there is some hearsay. There was no hearsay
 12 objection made. So all of that evidence is in already,
 13 and it's present for the jury to consider.
 14 But more fundamentally, the inducement question
 15 is not a question of whether or not there are any
 16 customers who used the devices as intended. There's ample
 17 testimony from both sides that we issue instructions and
 18 our customers use these devices --
 19 **THE COURT:** Different question. Different
 20 question. I'll give you that for right now. I'm asking
 21 for: Where is the evidence that a third party actually
 22 used the device? And I come in, last night I was thinking
 23 about, well, you've got the complaint. I don't remember
 24 anybody else that I could name who used the device.
 25 **MR. RAMANI:** Let me -- let my team --

1437

1 documents they have records of field uses and tests and
 2 the context that comes in through, I think there's an
 3 exception in the list that that falls in. I've got to
 4 think about it.
 5 **THE COURT:** Well, it's a business records
 6 exception, you'd probably say.
 7 **MR. LoCASCIO:** Well, for sure. But I was
 8 thinking you were thinking it was two levels of hearsay.
 9 I was thinking second.
 10 But, at base, the fact that some of these
 11 claims require additional elements, and the customers are
 12 induced because they're told "use it with this element."
 13 There's instruction manuals, et cetera.
 14 **THE COURT:** You are doing the same thing he
 15 did. I'm with you. I've got all that.
 16 **MR. RAMANI:** Your Honor, I think the two of us
 17 are probably willing to stipulate to this point.
 18 **THE COURT:** You pretty much have. I actually
 19 was asking. The reason why I was asking, I'm curious, but
 20 you've got the fight over the title, which I think is so
 21 funny. I've never seen that before, ever. Did you work
 22 that out overnight?
 23 **MR. LoCASCIO:** So on that issue, I now
 24 understand why -- I know I had complained that it took,
 25 you know, a couple of days to get it back. We thought we

1436

1 **THE COURT:** Let me ask them. So who do you
 2 have? Now, incidentally, I think you both used it. You
 3 know, Magnolia tested and used their device. They used
 4 your device. So that is arguably it. It might be that
 5 the evidence is of anybody who used the devices, that you
 6 each used each other's device while you were each
 7 following the other innovator. Somewhat ironic.
 8 Who do you say has used Magnolia's device?
 9 **MR. LoCASCIO:** It's the same folks that my
 10 colleague just referred to. It's the folks in the
 11 hospitals, and the nurses who use these products.
 12 **THE COURT:** So that generic testimony that
 13 comes in through each of your CEOs that people are out
 14 there using it?
 15 **MR. LoCASCIO:** We put on evidence, and there
 16 are documents. We can get the exhibits for you, Your
 17 Honor. There was also -- we've identified, and there are
 18 documents that were moved in that identify complaints or
 19 uses of their device, of the Micro.
 20 **THE COURT:** And you think that that's not
 21 hearsay?
 22 **MR. LoCASCIO:** If it's in there -- I want to
 23 think about that one. I think it's in. Let's start with
 24 that, to the point.
 25 But the question of if in their own business

1438

1 were getting closer. We got back, it had changed. And so
 2 my folks stayed up all night, so we were getting it back
 3 to them I think at four or something with ours.
 4 So what you had, Your Honor, where we only had
 5 some of these titles and other things, has maybe evolved a
 6 little bit. I know you're going to get something today.
 7 **THE COURT:** Okay.
 8 **MR. RAMANI:** Can I also just say, Your Honor,
 9 on that front, I think the parties are not that far apart.
 10 The number of disputed instructions are not so
 11 significant.
 12 **THE COURT:** Okay.
 13 **MR. RAMANI:** So I think it's not -- the charge
 14 conference is not a Battle Royale.
 15 **THE COURT:** All right. Well, here is what I am
 16 going to do, though. We will break for ten minutes. Will
 17 that be enough time for everybody? Right?
 18 **MR. RAMANI:** Yeah.
 19 **THE COURT:** Okay. And then I want whoever is
 20 doing closing arguments, I'm going to suspect it's you
 21 two, but maybe not, you have to be present during the jury
 22 instruction conference.
 23 **MR. LoCASCIO:** Fine with me.
 24 **MR. RAMANI:** We also have some thoughts on
 25 closings, Your Honor, that we may want to raise. Would

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1 that be the right time to raise it?

2 **THE COURT:** Yes. Give you a break so the jury

3 doesn't wait too long. We will be back at 20 of.

4 **MR. RAMANI:** Thanks, Your Honor.

5 (Recess in proceedings.)

6 **THE COURT:** Please be seated. Bring the jury

7 in.

8 So it's rebuttal now, right?

9 **MR. RAMANI:** It is, Your Honor.

10 **THE COURT:** It's actually not rebuttal, it's

11 response.

12 **MR. LoCASCIO:** It's both. It's rebuttal --

13 **THE COURT:** That's true. Rebuttal on

14 infringement.

15 **MR. LoCASCIO:** Response on ours.

16 **THE COURT:** And then you get rebuttal on their

17 invalidity. All right.

18 You know you are each down to somewhere in the

19 four hours each left, right?

20 **MR. LoCASCIO:** Let's hope we don't need that,

21 Your Honor.

22 **THE COURT:** My point is, I will tell them

23 Tuesday, I think. Really, that's it.

24 **MR. RAMANI:** Well, actually, Your Honor, if I

25 may remind you, when Your Honor gave us the 17-hour clock,

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1 **THE COURT:** Sure.

2 **MR. RAMANI:** Your Honor, may I approach?

3 **THE COURT:** Yes.

4 **MR. RAMANI:** Thank you.

5 **THE CLERK:** Please stand up. Please remain

6 standing and raise your hand.

7 Please state and spell your name for the

8 record.

9 **THE WITNESS:** Shan Gaw, first name S-H-A-N.

10 Last name G-A-W.

11 SHAN GAW, having been called as a witness, being

12 first duly sworn under oath or affirmed, testified as

13 follows:

14 **THE CLERK:** Thank you. You may be seated.

15 DIRECT EXAMINATION.

16 **BY MR. RAMANI:**

17 **Q.** Mr. Gaw, good morning.

18 **A.** Good morning.

19 **Q.** Would you please introduce yourself to the jury?

20 **A.** Yeah, my name is Shan Gaw.

21 **Q.** Mr. Gaw, tell us a little bit about your education

22 and professional background, please.

23 **A.** Yeah. I pursued my undergraduate studies at Stanford

24 University, where I graduated with a BS in engineering.

25 Then I spent the early part of my career working for a

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1 it excluded willfulness and closings.

2 **THE COURT:** I knew it did closings. Okay. I

3 won't mention it. We'll bring them in.

4 **MR. VORONOV:** Your Honor, there are a few

5 remaining disputes as to Professor Meinhart's

6 demonstratives. He's going to be our witness after

7 Mr. Gaw, who is coming up.

8 **THE COURT:** Okay. Thanks.

9 (The jury enters the courtroom at 10:44 a.m.)

10 **THE COURT:** Please be seated. Now, we are in a

11 new part of the presentation of the evidence. All right.

12 So we've heard the opening case from Magnolia, its

13 infringement case. Then we proceeded to Kurin defending

14 against infringement and raising issues of validity with

15 respect to Magnolia patents and bringing their

16 counterclaim infringement case.

17 So now we have Magnolia's turn, who gets to

18 respond to Kurin's infringement case. Right? Kurin's

19 asserted patent. And it gets to do what we call

20 "rebuttal," which is a very limited presentation

21 responding to arguments made by Kurin in defense.

22 All right. Mr. Ramani.

23 **MR. RAMANI:** Your Honor, thank you.

24 Magnolia Medical calls Shan Gaw.

25 May my colleague approach, Your Honor?

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1 design firm providing engineering and design services to

2 clients like Starbucks, Microsoft, Hewlett Packard, Nike,

3 among others.

4 Then I spent the next ten years working on

5 neuro-implantables. At the first company, we were

6 providing stimulation of the cortex of the brain to help

7 with stroke recovery. And then the other company was

8 recording small millivolt signals on the brain, looking at

9 trying to predict seizures for patients with epilepsy.

10 Then I spent the next ten years working on portable

11 mechanical ventilators which help patients breathe on

12 their own who can't otherwise breathe on their own.

13 **Q.** Mr. Gaw, have you ever testified in court before

14 today?

15 **A.** I have not.

16 **Q.** Now, tell us about your current occupation, please.

17 **A.** Yeah, I have a design consulting business where I'm

18 an independent contractor providing engineering services

19 under the name Gaw's Design. And I also cofounded a

20 company called Dental Products Lab, where we focus on

21 products for the dental market.

22 **Q.** Mr. Gaw, as part of your design consulting business,

23 did a time come when you began working with Magnolia

24 Medical?

25 **A.** I was first introduced to Magnolia Medical in late

1 2011 and have continued to work with Magnolia Medical in 2 an independent consulting capacity since 2011 on and off 3 through the years and still work with them today. 4 Q. What products have you worked on with Magnolia 5 Medical since you began this relationship in 2011? 6 A. I helped develop the Steripath Gen1 device, the 7 follow-on, the Steripath Gen2 product, as well as the 8 Steripath Micro device. 9 Q. Mr. Gaw, would you please turn to the tab in your 10 binder marked PTX-15. 11 MR. RAMANI: It's already in evidence, Your 12 Honor. 13 BY MR. RAMANI: 14 Q. You mentioned that you began working with Magnolia 15 Medical in 2011. What is this document? 16 A. This is a series of slides that represent the down 17 selection of some concept work for what eventually became 18 the first, or the Steripath Gen1 product. 19 Q. Mr. Gaw, would you turn to Slide 4, please. What is 20 that? 21 A. This is the title slide for, it's called Concept 22 Number 2 with my name. 23 Q. Could you turn to Slide 5 of PTX-15, please. 24 And, briefly, can you just explain what's shown here 25 and the connection to Steripath Micro. Excuse me, the	1443 1 Steripath -- the original Steripath. 2 A. Yeah, there's a -- an image up there with kind of the 3 line art or illustration on the right-hand side. The 4 proprietary device, the device that we're looking at for 5 Magnolia Medical is in the center, and just above it 6 there's a connection that says "Patient" there. That's an 7 inlet accessory. And then on the outlet side, which is at 8 the bottom of that illustration, is what we call a 9 transfer adapter. 10 Q. And did this concept squeeze that you created evolve 11 into Magnolia Medical's first commercial product? 12 A. Yes, this is really the foundation. This same basic 13 architecture was then refined over the years and 14 eventually became the Steripath Gen1 device. And that 15 same architecture was then also leveraged or used in the 16 Steripath Gen2 product. 17 Q. Thank you, Mr. Gaw. You can set that document aside. 18 I'd like for us to focus on Steripath Micro, if we 19 could, please. 20 Did you play any role in developing Steripath Micro? 21 A. It's a similar role in, you know, providing technical 22 oversight, participated in brainstorming sessions and sort 23 of conceptualizing Steripath Micro, effectively helping, 24 you know, help solve tough technical challenges. 25 Q. When did you begin working on Steripath Micro,
1445 1 Mr. Gaw? 2 A. In earnest we really started working on Steripath 3 Micro in 2017, with a lot of the foundational work being 4 done really since 2011, leading up to that time as well. 5 MR. RAMANI: Your Honor, we have a PTX-272. 6 It's not objected to. 7 THE COURT: Okay. 8 MR. RAMANI: I'd like to move it and then, with 9 Your Honor's permission, approach Mr. Gaw to hand it to 10 him. 11 THE COURT: Sure. 12 MR. RAMANI: Thank you. So I am formally 13 moving it into evidence, Your Honor. 14 THE COURT: All right. Any objection? 15 MR. LoCASCIO: None, Your Honor. 16 THE COURT: All right. It's admitted. 17 (Exhibit PTX-272 admitted into evidence.) 18 MR. RAMANI: Thank you, Your Honor. 19 BY MR. RAMANI: 20 Q. Mr. Gaw, would you please tell the jury what PTX-272 21 is. 22 A. Yeah, this is the Steripath Micro device. 23 Q. Would you take it out of its packaging, please. 24 MR. RAMANI: Your Honor, permission to ask 25 Mr. Gaw to step down in front of the jury box to	1446 1 illustrate how the device works? 2 THE COURT: Sure. 3 MR. RAMANI: Thank you. 4 BY MR. RAMANI: 5 Q. Mr. Gaw, why don't you step down and kindly stand 6 near where the court reporter is. 7 Let me ask you a quick question, Mr. Gaw. 8 Can you illustrate how the Steripath Micro works? 9 A. Yes. So this, you know, kind of cylindrical object, 10 this is actually the Steripath Micro device, and then what 11 you see on the inlet, much like the concept that was 12 reviewed earlier, this is an inlet accessory. This 13 particular configuration happens to be connected to a 14 needle, and there are a couple configurations. This is a 15 certain gauge needle. We have also accessory -- inlet 16 accessories that are Luer connections. 17 And then this is the outlet side of the Steripath 18 Micro. This is a configuration with a syringe. There are 19 also configurations that have what's called a transfer 20 adapter that connects directly to a culture bottle. 21 So how it works is once the user, a phlebotomist or a 22 nurse, gains venous access, so basically gets access to 23 the vein, you can then apply a pressure using a syringe. 24 You can pull back on the syringe or connect it to a 25 culture bottle that has a pre-charged vacuum in it. And

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1 then what happens is -- you can see here, this kind of a
 2 shape of a C, there's a -- that window there, behind there
 3 is a bladder, an internal elastomeric bladder made of
 4 silicone rubber. And that bladder then flips, and when
 5 that flips, it creates a small pocket of air on the other
 6 side. It's that pocket of air and the displacement of
 7 that volume of air that then starts to draw blood into the
 8 product. And when that C channel starts to fill, it will
 9 fill. And once it terminates, the user then presses the
 10 button, and this button slides over. And once that button
 11 slides over, it now provides a sample path or a sample
 12 channel from the patient to the outlet.
 13 **Q.** Thank you, Mr. Gaw.
 14 **MR. RAMANI:** Your Honor, permission for Mr. Gaw
 15 to hand PTX-272 to the jury?
 16 **THE COURT:** Same thing. There's no needle
 17 sticking out, right.
 18 **MR. RAMANI:** We removed it, Your Honor.
 19 **THE WITNESS:** No needles.
 20 **BY MR. RAMANI:**
 21 **Q.** Mr. Gaw, please resume the witness stand, if you
 22 would.
 23 Mr. Gaw, why did Magnolia Medical name this Steripath
 24 product Micro?
 25 **A.** Yeah. We named it Micro for two reasons. One is a

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1 entered the vein and you apply a relatively high vacuum or
 2 a negative pressure to it, it can truly just collapse, and
 3 then that effectively diminishes any kind of flow. In
 4 some cases it will completely stop flowing of blood.
 5 **Q.** How did you and the Magnolia Medical team engineer
 6 the Steripath Micro to minimize vein collapse, if you did?
 7 **A.** Yeah. The advantage of introducing the internal
 8 bladder inside Steripath Micro is when you apply a vacuum,
 9 whether it's a syringe, as I showed in that product, or a
 10 culture bottle that has a pre-charged vacuum in it, when
 11 the bladder flips inside Micro, it flips, and there's only
 12 so far it can move. It's bound between some rigid plastic
 13 pieces. So it can only expand so much. It's that
 14 expansion that then limits, it attenuates the vacuum or
 15 minimizes it, and then it limits it. There's only so much
 16 vacuum that can be applied to the vein.
 17 **Q.** Mr. Gaw, I'm going to ask you to turn in your binder
 18 to PTX-61, please.
 19 **MR. RAMANI:** Your Honor, may I collect the
 20 Steripath Micro --
 21 **THE COURT:** Yep.
 22 **MR. RAMANI:** -- from the jury?
 23 Thank you.
 24 **BY MR. RAMANI:**
 25 **Q.** Mr. Gaw, what is PTX-61?

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1 reduced size, just the physical size of the product, but
 2 also the -- we reduced the diversion volume to nominally
 3 about .5 mLs to 1.0 mLs or milliliters, whereas our Gen1
 4 and Gen2 products are about 2 to 3 milliliters.
 5 **Q.** Why is it that Magnolia reduced the diversion volume
 6 to a nominal amount of .5 milliliters with the Steripath
 7 Micro?
 8 **A.** Yeah. Since the introduction of our Steripath Gen1
 9 and Gen2 products, we had received some feedback from the
 10 field about the possibility of reducing the volume, both
 11 the device size as well as the diversion volume.
 12 And then we had some, you know, foundational work
 13 from Dr. Patton, one of the founders of the company. And
 14 that work really demonstrated over the years -- early in
 15 the company's formation, we had done on the order of tens
 16 of thousands of blood draws using a manual process, and so
 17 we had a fair bit of data that demonstrated that we had
 18 good clinical efficacy between .5 milliliters and
 19 3 milliliters of diversion volume.
 20 **Q.** Mr. Gaw, are you familiar with vein collapse?
 21 **A.** Yes. Vein collapse isn't uncommon. It's really due
 22 to physiology or anatomy of a patient. Some cases it may
 23 be from older age, other cases it may be due to other
 24 comorbidities, but it really is what the word is, vein
 25 collapse. It's when you apply -- you know, once you've

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1 **A.** This is a series of slides for what's called an
 2 architecture design or view for -- our internal name was
 3 Project Argyle. This was our internal name for the
 4 development of the Steripath Micro device.
 5 **MR. RAMANI:** Your Honor, Magnolia moves PTX-61
 6 in. I don't believe it's objected to.
 7 **MR. LoCASCIO:** It's not objected to.
 8 **THE COURT:** It's admitted.
 9 (Exhibit PTX-61 admitted into evidence.)
 10 **BY MR. RAMANI:**
 11 **Q.** Mr. Gaw, what is the date on this architecture design
 12 review presentation?
 13 **A.** November 30, 2018.
 14 **Q.** Let's go ahead and turn to Slide 6.
 15 Would you please explain what's shown here on Slide 6
 16 of PTX-61, Mr. Gaw?
 17 **A.** On the left-hand side, those four illustrations or
 18 images, those are just four orthographic views of the
 19 Steripath Micro device. Then on the right-hand side is
 20 what we call an exploded view, and that's --
 21 **Q.** Mr. Gaw, can I pause you for one second? Would it be
 22 helpful for you to have a pointer?
 23 **A.** That would be great. Please.
 24 **MR. RAMANI:** Your Honor, may I approach
 25 Mr. Gaw?

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1 **THE COURT:** Yes.

2 **MR. RAMANI:** Thank you.

3 **BY MR. RAMANI:**

4 **Q.** Here you go sir.

5 **A.** Thank you.

6 **Q.** I didn't mean to interrupt your response, but I

7 thought a pointer might help.

8 So let me just ask, can you please explain what's

9 shown here on Slide 6 of PTX-61?

10 **A.** Yeah, it's these images on the left-hand side. Those

11 are the orthographic views, so those just show a couple of

12 different views of the product itself.

13 And then on the right-hand side you can see here,

14 this is what we call an exploded view, just showing all

15 the internal components and how it's constructed and what

16 the materials are.

17 **Q.** We're going to want to talk a little bit more about

18 the bladder and the button that are both shown there on

19 the right, Mr. Gaw.

20 So starting with the bladder, would you please turn

21 forward to Slide 9.

22 Please explain what's shown here.

23 **A.** In the top here, this is an isometric view, and then

24 there's a cross-section, and both of these are related to

25 the initial state, is what we call it. So that's the

1453

1 second, but do you know why there's an emoji next to it?

2 **A.** I don't. I don't recall.

3 **Q.** Okay. Can you please explain what D is pointing to

4 in the button of the Steripath Micro, please?

5 **A.** Yeah. The area between these two seals where it's

6 been highlighted here as D, there is a cutout in the

7 button, and that's really designed to help with flow. So

8 when the -- from inlet to outlet, when the button gets

9 pressed, this is the area here, this area here is what

10 then is connected to an inlet on this side and an outlet

11 on this side.

12 So having this cutout of the material removed

13 increases the flow area. So the flow actually goes into

14 the button, into that area or cutout, and then back out

15 the outlet.

16 **Q.** You can set that document aside, Mr. Gaw. Thank you.

17 I'd like to turn your attention to PTX-1 in your

18 binder.

19 **MR. RAMANI:** And we can show it on the screen,

20 Mr. Smith. It's in evidence.

21 **BY MR. RAMANI:**

22 **Q.** What is this?

23 **A.** This is the '081 patent.

24 **Q.** Are you an inventor on this patent, Mr. Gaw?

25 **A.** Yes, I am.

1452

1 condition or how the bladder is formed to begin with.

2 That's in the product.

3 And you can see some of these, you know, what we call

4 convolutes or ridges that are in the bladder. In the

5 bottom view here, you can see that's that same isometric

6 view and then also the same cross-sectional view there.

7 This is the bladder where those ridges or convolutes have

8 been flipped in the opposite position.

9 **Q.** Focusing on the initial position above, Mr. Gaw, is

10 there anything filling the convolutes, what looks like

11 spirals, in the initial position?

12 **A.** Yeah. There isn't actually anything on this

13 backside, and this top surface is actually in intimate

14 contact with some of the plastics. So it's just air

15 that's behind there.

16 **Q.** Mr. Gaw, why don't we turn to Slide 13, please.

17 This says "architecture button." Would you please

18 explain what's shown on this slide.

19 **A.** The bottom image here on the left, that's just a

20 cross-section view of how the button interfaces with the

21 body or the main housing. And then this top view is one

22 view of the button itself, and then this is just -- it

23 rotated in another orientation.

24 **Q.** Mr. Gaw, on the top image, there's a D that's

25 pointing to something. I want to ask you about that in a

1454

1 **Q.** And then maybe to save time --

2 **MR. RAMANI:** We can keep that up there,

3 Mr. Smith.

4 **BY MR. RAMANI:**

5 **Q.** Would you please turn in your binder to PTX-3 and

6 PTX-5 and confirm what those are and whether or not you

7 are an inventor on those patents.

8 **A.** Yeah. Those are the '863 and '709 patents and, yes,

9 I am an inventor, named inventor on both of those patents

10 as well.

11 **Q.** Did you participate in -- or let me rephrase that.

12 Can you describe the inventive work that you did in

13 coming up with the inventions of these three patents?

14 **A.** There was a whole body of work that led up to these.

15 And, again, starting with the early concept work in 2011

16 all the way up to the introduction of our latest product.

17 This was a multiple series of brainstorm. These were

18 design reviews, you know. There were -- we were solving

19 technical challenges and characterizing performance, and a

20 number of elements, as well as in the kind of broader

21 concept, product concept.

22 **Q.** Mr. Gaw, would you please turn to DTX-89, which is in

23 your binder.

24 **MR. RAMANI:** It it's in evidence, Mr. Smith, so

25 you can display it.

1455 1 Mr. Smith, do you have a color version of this 2 by any chance? 3 BY MR. RAMANI: 4 Q. We can get started, in the meantime, Mr. Gaw, while 5 he's looking for that. 6 What is this document, DTX-89? 7 A. This is a series of slides that represent kind of an 8 update on the latest sort of design concepts or 9 architecture, things that -- we were providing an update 10 to the team, as well as to our IP team. 11 MR. RAMANI: Thank you, Mr. Smith. 12 BY MR. RAMANI: 13 Q. So did you participate in this particular meeting, 14 this IP update in December 2017, Mr. Gaw? 15 A. I don't recall if I was actually at this meeting. 16 Certainly helped create the contents. I'm very familiar 17 with the actual slides and content of those slides. 18 Q. Let's turn to the last slide, Mr. Gaw. 19 This says "Trap Door 1." Did you play any role in 20 coming up with this invention in DTX-89? 21 A. This is a concept that came out of a whole body of 22 work, you know, I think originally conceptualized in 23 multiple brainstorming activities. So I helped with, you 24 know, the general architecture, the kinds of fit and 25 finish of a few of the pieces and some of the elements,	1456 1 helping to direct, you know, technical resources to look 2 for opportunities to improve things, refine things. That 3 was my primary role. 4 MR. RAMANI: Mr. Smith, can we please blow up 5 the main figure, as well as the steps. 6 BY MR. RAMANI: 7 Q. Mr. Gaw, while Mr. Smith is doing that, I'm going to 8 ask you, can you please describe how this Trap Door 1 9 concept that you helped create operates? 10 A. So, again, this is a cross-section of that device, 11 and on the left-hand side is an inlet, and then on the 12 right-hand side is the outlet. 13 So, functionally, once the venous access is achieved 14 and there's a vacuum source applied to the outlet, blood 15 actually flows in here and you can see that little red 16 line there. It flows underneath what -- you know, that 17 green piece there is called the plug. The blood flows 18 underneath, and then it's a little hard to see, but those 19 little rectangles or squares, those are actually just a 20 spiral flow pattern. Those are channels that then start 21 to fill with blood. 22 Once that blood gets then in contact with what's 23 shown here as a hydrophobic membrane -- so this 24 hydrophobic membrane, once that gets wetted, it then 25 starts to build pressure on this side of the plug. And in
1457 1 that pressure, it exerts a force on the plug, and then the 2 plug pops out and then flow starts to go into this 3 sampling channel directly from the inlet to the outlet. 4 Q. In this concept that you helped create, Mr. Gaw, on 5 what side of the plug does the force build that causes the 6 plug to pop? 7 A. The force builds -- pressure builds on this side, 8 which then exerts a force on the plug. 9 Q. Mr. Gaw -- 10 MR. RAMANI: Let's keep this up here, 11 Mr. Smith. 12 BY MR. RAMANI: 13 Q. -- would you please turn to PTX-001, your '081 14 patent. 15 As an inventor of the '081 patent, where, if at all 16 in the patent, do you see this trap door invention you 17 just described? 18 A. I don't believe there are illustrations for this 19 specific embodiment, but they're in the detailed 20 description on -- in Column 66 is where it's described. 21 MR. RAMANI: Now, Mr. Smith, would it be 22 possible to keep what you have on the screen on one side 23 of the screen and then pull up Column 66 of the '081 24 patent on the other side of the screen? 25 Great.	1458 1 BY MR. RAMANI: 2 Q. Where in Column 66, Mr. Gaw, do you see this 3 Trap Door 1 invention described? 4 A. It's a little hard to see there, but on -- about 5 halfway down, Line 39, there's a sentence starting with 6 "After transferring the initial volume of bodily fluid..." 7 Q. Can you pause for a second, Mr. Gaw. 8 MR. RAMANI: Can you blow the column up 9 greater, Mr. Smith? 10 Great. 11 BY MR. RAMANI: 12 Q. Go ahead, Mr. Gaw. 13 A. "After transferring the initial volume of bodily 14 fluid and after the flow controller is transitioned to its 15 second state, an amount of negative pressure exerted on 16 the surface of the movable member or the like may build 17 until the magnitude of the negative pressure is sufficient 18 to pull or move the movable member out of the opening." 19 It's really the first piece that describes the trap 20 door concept. And then at the end, you can see there's 21 a -- at the end of that same paragraph -- 22 Q. Thank you. 23 A. -- starting with "In such embodiments, the movable 24 member can be, for example, an elastomeric plug, cork, 25 plunger and/or and any other suitable member that can be

1459 1 moved or popped out of such an opening or portion of a 2 flow path." 3 Q. Anything else in Column 66, Mr. Gaw? 4 A. I believe that covers that. 5 Q. Great. 6 MR. RAMANI: Now, we can take down the 7 Trap Door 1 portion of the -- on the screen, Mr. Smith. 8 BY MR. RAMANI: 9 Q. Mr. Gaw, could you please turn to Claim 11 of your 10 '081 patent. 11 Why don't we wait until Mr. Smith is able to blow 12 Claim 11 up on the screen. 13 MR. RAMANI: In fact, Mr. Smith, can you please 14 blow up Claim 11 and 12? 15 BY MR. RAMANI: 16 Q. So, Mr. Gaw, just to get oriented here, what's your 17 understanding of the relationship between Claim 12 and 18 Claim 11 in your '081 patent? 19 A. Claim 12 is just a subset of 11, describing a syringe 20 that's connected to apply the negative pressure. 21 Q. Do you understand that in order to satisfy Claim 12, 22 Claim 11 has to first be satisfied? 23 A. Yes. 24 Q. So directing your attention to the third element of 25 Claim 11, and particularly the language starting at	1460 1 Line 56 -- excuse me, 54, "A movable plug configured to 2 move from the first position to the second position in 3 response to an increase in pressure differential between 4 the movable plug and the outlet," and it goes on from 5 there. 6 How does that language relate to the Trap Door 1 7 concept you just walked us through? 8 A. Yeah. So Trap Door 1, if you recall, when the blood 9 initially flows into that first state and it fills those 10 spiral channels that were shown in kind of the bottom of 11 that product, and that membrane gets wetted, so what 12 happens is that then stops the airflow, and so pressure 13 remains relatively static. But meanwhile, you have on the 14 outlet the negative pressure that's still being applied. 15 Well, that negative pressure starts to build in that 16 sample channel on the surface of the plug, and it's this 17 pressure differential between the -- on the surface of the 18 plug to the outlet that then forces the plug to pop out of 19 place. 20 Q. Let me ask to you focus on the claim language here. 21 Do you understand this claim language to be in line 22 with what you just described? 23 MR. LoCASCIO: Objection, leading, Your Honor. 24 MR. RAMANI: I'm happy to rephrase, if you 25 like, Your Honor.
1461 1 BY MR. RAMANI: 2 Q. What you just described about Trap Door 1, Mr. Gaw, 3 can you identify any portion of the highlighted section in 4 Claim 11 that operates the same way? 5 A. I think the entirety of the highlighted section 6 captures the functionality of trap door. 7 Q. And as an inventor on this patent, when you see the 8 movable plug configured to move from a first position to a 9 second position in response to an increase in a pressure 10 differential between the movable plug and the outlet, how 11 do you understand that language? 12 A. We use a pressure differential and we measure -- 13 MR. LoCASCIO: Objection, Your Honor. 14 THE COURT: Stop for a second. 15 MR. LoCASCIO: Sounds like claim construction. 16 MR. RAMANI: It's in response to written 17 description. 18 THE COURT: Oh sorry, but I'm going to do a 19 sidebar quickly. 20 (Whereupon, the following occurred at sidebar:) 21 THE COURT: Objection is? 22 MR. LoCASCIO: Objection is the witness is 23 offering how he understands the claim language. 24 THE COURT: Right. 25 MR. LoCASCIO: And particularly, if they wanted	1462 1 to do that -- 2 THE COURT: Okay. That's the objection. 3 Now, correct me if I am wrong, did you not put 4 into evidence a video of another inventor on this patent 5 asking him the exact same type of questions about what he 6 understood? 7 MR. LoCASCIO: I asked if he understood the 8 claims of his own patent, Your Honor. They are now 9 offering affirmative testimony from an inventor on what he 10 thinks the claim should be. 11 THE COURT: Then why was it relevant what 12 Mr. Bullington thinks, his understanding? 13 MR. LoCASCIO: Because he had none, and we have 14 a written description and argument that they don't 15 understand it, they didn't invent it because they couldn't 16 make it work, Your Honor. 17 And their absence of any understanding of how 18 their own patent works is absolutely relevant to validity. 19 This is now infringement expert testimony essentially, 20 through Mr. Gaw. 21 THE COURT: Hold on. Well, I don't know if its 22 infringement. It might be. I mean, it might not be. 23 What is it for? 24 MR. RAMANI: It's for written description 25 response. What Mr. LoCascio --

1463 1 THE COURT: The objection is overruled. 2 Let's go. 3 MR. RAMANI: Thank you, Your Honor. 4 THE COURT: It's overruled because I think it's 5 relevant for the same reasons I allowed the Bullington 6 testimony in, just for the record. Thank you. 7 (Whereupon, the discussion at sidebar concludes.) 8 - - - 9 THE COURT: The objection is overruled. 10 MR. RAMANI: Your Honor, thank you very much. 11 BY MR. RAMANI: 12 Q. Mr. Gaw, shall I re-ask the question so you have it 13 in mind? 14 A. Please. 15 Q. Okay. As an inventor on this '081 patent, when you 16 see the language that's in red there, the movable plug 17 configured to move from the first position to a second 18 position in response to an increase in the pressure 19 differential between the movable plug and the outlet, how 20 do you understand that language? 21 A. Yeah. In characterizing the product performance, we 22 do a lot of tests and measurement and prototyping to 23 really understand how the product works and how it 24 functions, and so we do rely on a pressure differential in 25 order to make it behave a certain way. So for this	1464 1 particular claim language, we really are measuring the 2 pressure on the bottom surface of the plug to the outlet 3 in order to create that force to make the plug pop out of 4 the opening. 5 MR. RAMANI: Your Honor, I have no further 6 questions. 7 THE COURT: All right. 8 Any cross? 9 MR. LoCASCIO: Yes, Your Honor. 10 CROSS EXAMINATION 11 MR. LoCASCIO: One second, Your Honor. 12 THE COURT: Sure. 13 MR. LoCASCIO: We have cross binders. 14 May I approach? 15 THE COURT: Sure. 16 MR. RAMANI: Thank you, Counsel. 17 BY MR. LoCASCIO: 18 Q. How are you, sir? 19 A. Fine, thank you. 20 Q. We've never met before. My name is Gregg LoCascio. 21 It's nice to meet you, Mr. Gaw. 22 Let me ask you a couple of questions about where you 23 just left off. You were talking about the three patents 24 that Magnolia is asserting in this case, PTX-1, 3, and 5, 25 and those were in your binder.
1465 1 Do you recall that? 2 A. Yes, I do. 3 Q. Okay. You were just looking at some claim language. 4 If we could -- one second. Actually, let's do this. 5 MR. LoCASCIO: Mr. Urban, could you pull up for 6 me PTX-3. 7 BY MR. LoCASCIO: 8 Q. I want to direct your attention to Claim 27. It's 9 Column 75. 10 MR. LoCASCIO: Blow that up. 11 BY MR. LoCASCIO: 12 Q. This is one of the claims that's being asserted in 13 this case. 14 And you'll see here the claim language says, "The 15 pressure differential in at least a portion of the 16 sampling channel between the movable plug and the outlet 17 that exerts a force on the surface of the movable plug to 18 move the plug to the second position." 19 Are you familiar with that? 20 A. Loosely, yes. 21 Q. When you say "loosely," let me ask you a couple other 22 questions. 23 These patents were filed sir, in 2020. This one in 24 2022. You are listed as an inventor. 25 Before they -- the lawyers for Magnolia chose to file	1466 1 this patent claim, did they consult with you or let you 2 know that they were doing so? 3 A. Yes. We were aware that they would be filing a 4 patent based on some of the information that we provided 5 to them. 6 Q. Hang on a second, sir. 7 The original disclosure in this application was filed 8 in 2018, correct? 9 A. I don't know the exact date, no. 10 Q. You don't know when your patents were filed? 11 A. I don't know the exact date, no. 12 Q. You have in your binder that counsel for Magnolia 13 gave you, the other binder, PTX-3. 14 Right on the front, it has filing date for this 15 patent application of August 2022, but the original 16 application is filed September 12, 2018. 17 Do you see that on the second page, sir? 18 A. I do. 19 Q. Okay. So when you just said you had discussions 20 about when the patents would be filed, you meant before 21 the first application was filed, right? 22 A. That's correct. 23 Q. Okay. So before the claims in the patents in this 24 case were filed, the one we just looked at, for instance, 25 Claim 27, before those claims were put in in the 2022

1467 1 application, counsel didn't come back to you say, "Hey, we 2 are going to draft claims that say this specific 3 language," did they? 4 MR. RAMANI: Your Honor, objection, seeks 5 privileged information. 6 MR. LoCASCIO: The substance of it might be but 7 I'll ask it a different -- let me rephrase it, Your Honor. 8 THE COURT: Okay. Yeah, rephrase the question. 9 BY MR. LoCASCIO: 10 Q. Before these patents -- these claims were filed, did 11 you have any communications with counsel about these 12 patents? These applications? This one, the 2022 one, 13 sir? 14 A. I don't recall. 15 Q. Okay. And in fact, sir, you gave depositions -- you 16 gave a deposition in this case, correct? You were asked a 17 lot of questions about the patent applications, correct? 18 A. That's correct. 19 Q. Okay. As of the time of your deposition in this 20 case, before you started to prepare for that or be 21 involved in that, you hadn't even ever read the claims of 22 the patents that are asserted in this case, had you? 23 A. For these specific claims, I don't recall reading 24 them, no. 25 Q. And so with respect to this, you just testified on	1468 1 direct examination that -- I think you said the trap door 2 design sort of was the genesis of this movable plug in 3 response to a pressure differential. 4 Recall that? 5 A. Maybe not in those exact words but, yes, the general 6 sentiment, yes. 7 Q. Okay. Sir, the -- according to the claim on the 8 screen, Claim 27, the movable plug has to move where -- as 9 a result of a pressure differential in at least a portion 10 of the sampling channel between the plug and the outlet, 11 correct, sir? 12 A. That's what it states there. 13 Q. Okay. And the claims require a pressure differential 14 is built between the movable plug and the outlet in the 15 channel, correct? 16 A. That's what the claims state, yes. 17 Q. Meaning somewhere in that sampling channel between 18 the plug and the outlet, there has to be a pressure 19 gradient in the channel, true? 20 A. A pressure gradient? 21 There would exist one, yes. 22 Q. In the channel? 23 A. Throughout the entire device. 24 Q. Okay. But somewhere in the sampling channel, there 25 has to be a pressure gradient between the movable plug and
1469 1 the outlet, true? 2 A. There is a pressure gradient that exists there, yes. 3 Q. That's what the claims require in your view? 4 Pressure gradient in the sampling channel between the plug 5 and the outlet, right? 6 A. This specific language is really about a pressure 7 differential. 8 Q. You had used gradient in your deposition so I used 9 gradient, but we will stick with differential. 10 You understand those are the same thing, fair? 11 A. They are related. 12 Q. They are related. Okay. Let's go to differential. 13 Sir, you'd agree that the claims of your patents need 14 to have, as written, a pressure differential in the 15 sampling channel between the location of the plug and the 16 location of the outlet, true? 17 A. The language that's shown here in the claims state 18 that the pressure differential in at least the portion of 19 the sampling channel between the movable plug and the 20 outlet. 21 Q. And that's how you understood it, correct? 22 A. Yes. 23 Q. Okay. You were talking about the disclosure of this 24 patent in connection with some earlier work that was 25 called the trap door.	1470 1 Do you recall that? 2 A. The whole series of different concepts, yes. 3 Q. So let's look at a couple of those. 4 MR. LoCASCIO: Can we pull up Column 66 of 5 the -- let's use the '081. It's PTX-1. It's the one I 6 have the mark-up from the conversation. 7 Okay. If we can, can we start, Mr. Urban, by 8 blowing up right where you were, Line 11 to Line 54. 9 BY MR. LoCASCIO: 10 Q. This is the portion of the disclosures in the 11 Magnolia patents that -- jurors heard about this, but you 12 were also just referred to, to indicate this is the 13 support for the idea of a movable plug that moves in 14 response to a pressure differential. 15 Do you recall that? 16 A. I do. 17 Q. And a second ago we were talking about the claims. 18 And the claims require, as they're written in these later 19 patents, to say that the pressure differential has to move 20 that plug to either block or open up access to the 21 sampling channel, right? 22 A. Pressure differential is relied on to move the plug, 23 correct. 24 Q. To either block or open up the sampling channel, not 25 just move it somewhere, right? It's supposed to move it

1471 1 to either open up access to the sampling channel or block 2 the sampling channel, correct? 3 A. The pressure differential doesn't actually block it. 4 Q. It's blocked until the pressure differential moves it 5 is what you are saying? 6 A. That's correct. 7 Q. But the gist is, the movable plug in the claims as 8 they were written has to be dislodged from blocking the 9 sampling channel to opening access to the sampling 10 channel, fair? 11 A. That's a fair statement. 12 Q. Okay. So this whole column talks about three 13 diagrams. Top, see Diagrams 576, 676, and 776? Do you 14 see that? 15 A. Yes, I do. 16 Q. And at the bottom, it says "e.g.," may be Line 48, 17 again, those same three diagrams. 18 Do you see that? 19 A. I do. 20 Q. And if we wanted to see what these -- well, let me 21 back up a step for the jury and you and everybody's 22 benefit. 23 These diagrams are described in here as sort of a 24 movable -- it's the flow controller, essentially, right? 25 They're flow controllers or, basically, valves?	1472 1 A. There are -- could be a number of different things so 2 I don't know how to respond. 3 Q. Okay. Let -- let me ask you this. There's some 4 conversation, and you gave some in here about a plug. And 5 it talks about sort of blocking off the fluid flow. Let's 6 just, like, take this really high level to everyday stuff. 7 You have a sink in your home and it has two valves on 8 it, correct? 9 A. In most cases, yes. 10 Q. There's a valve for the cold and a valve for the hot, 11 right? 12 A. That's correct. 13 Q. And that means there is a pipe there and there's cold 14 water that's running through the one on the right and hot 15 on the left and it -- when you turn it to the -- the 16 valve, the valve keeps it closed normally and when you 17 want the water to come out, you turn the knob and it opens 18 the valve, fair? 19 A. I would agree. 20 Q. That's how a valve works. 21 But a valve can take a lot of different forms. It 22 might close that pipe from the outside, it might plug it, 23 correct? 24 A. There are a lot of different permutations of a valve, 25 yes.
1473 1 Q. And a valve is one way to block flow and a plug is 2 another way to block flow, right? 3 A. There are a number of ways you can block flow. 4 Q. And in this section, there's discussion of the 5 movable member. And what you identified is, well, that's 6 saying that movable member moves in response to a pressure 7 differential, and you pointed to the language -- 8 MR. LoCASCIO: You don't need to highlight for 9 a second, Mr. Urban. 10 BY MR. LoCASCIO: 11 Q. You pointed to -- around Lines 41, you said: "An 12 amount of negative pressure exerted on a surface" -- 13 MR. LoCASCIO: Highlight. Thank you. 14 BY MR. LoCASCIO: 15 Q. -- "of the movable member or the like may build until 16 a magnitude of the negative pressure sufficient to pull or 17 move the movable member out of the opening, thereby 18 allowing the flow of bodily fluid through the opening that 19 was previously occluded." 20 Do you recall that? 21 A. I do recall reading that, yes. 22 Q. Okay. And let's look at the disclosure you made of 23 these diagrams or figures. 24 MR. LoCASCIO: Mr. Urban, can we go to, first 25 it's Page 15. Or it's Page 15 of the patent, so PTX-1,	1474 1 15. And you can take the text you have off. 2 Actually, that's probably a good idea. I like 3 that, Mr. Urban. Can you keep that there? 4 BY MR. LoCASCIO: 5 Q. Okay. So -- 6 MR. LoCASCIO: Mr. Ramani has the brightest 7 laser pointer. 8 MR. RAMANI: I think he's got it. 9 MR. LoCASCIO: Oh. 10 MR. RAMANI: You are welcome to it. 11 MR. LoCASCIO: No, you keep yours. 12 BY MR. LoCASCIO: 13 Q. Okay. So your -- the patents say there's three 14 diagrams and they have numbers, and those numbers refer to 15 numbers on the figures, correct, sir? 16 A. That's correct. 17 Q. 576 is this guy right here. 576. That diaphragm 18 does not move inside the channel, does it, sir? 19 A. I don't know what's being described here as the 20 channel specifically. 21 Q. So you're not sure? 22 A. I'm not sure. 23 Q. Okay. How about 676? 24 MR. LoCASCIO: Let's go to that, Mr. Urban. 25 You're going to have to go to Slide -- Page 17. It's

1475

1 Figure 15B.

2 **BY MR. LoCASCIO:**

3 **Q.** You see 676 right there. This is Figure 676. That's

4 not a movable plug, is it, sir? Certainly not described

5 that way in the patent?

6 **A.** I think that just as we talked about earlier, there

7 are a lot of different things that could constitute a plug

8 or a valve. There's a portion of this that actually is

9 plugging an area. I would call that a plug as well, in a

10 slightly different form maybe.

11 **Q.** Okay. It's not the form you showed as your trap door

12 form?

13 **A.** This is a slightly different embodiment of that.

14 **Q.** Okay. Let's -- there are a bunch of figures in this

15 patent, right? I think there are 52 or so figures in the

16 '001 patent. Do you have your copy? Can you check me on

17 that.

18 Do I have the number right?

19 **A.** I see the last figure being Figure 52.

20 **Q.** Okay. And we looked already. The filing date of

21 that application with all those figures is 2018, right?

22 **A.** That's correct.

23 **MR. LoCASCIO:** Can we pull up DTX-89?

24 **BY MR. LoCASCIO:**

25 **Q.** You walked through this with Magnolia's counsel and

1477

1 **Q.** Well, hey, let's talk about this for a second --

2 pardon me, sir -- this case.

3 You know there's a Kurin Lock and a Kurin Jet out

4 there in the world, right?

5 **A.** Yes, I do.

6 **Q.** Okay. Compared to those products, this has got a lot

7 of parts.

8 Can we agree with that?

9 **A.** I think this is substantially equivalent to the

10 Steripath Micro in terms of the number of components.

11 **Q.** We'll get to that in a second.

12 Can you answer my question? Do you need it read

13 back?

14 **A.** Sure.

15 **Q.** Compared to the Kurin Lock and the Kurin Jet, what

16 we're looking at here in DTX-89, valve 5 has a lot more

17 parts, right?

18 **A.** I believe there are more parts in this concept than

19 there are in the Kurin Lock or Jet products.

20 **Q.** You equated this figure we're looking at, DTX-89, to

21 the Micro because you know the Micro has a lot more parts

22 than the Kurin Lock, and Jet also, correct?

23 **A.** I believe they do have more components, yes.

24 **Q.** Okay. So if we go to the last page, the page were

25 you asked about, Trap Door 1, Page 7, you already

1476

1 you described it as some ideas and brainstorming and other

2 things of that sort. Do you recall that?

3 **A.** Yes.

4 **Q.** And there are --

5 **MR. LoCASCIO:** Can you go to the next page?

6 **BY MR. LoCASCIO:**

7 **Q.** -- various sketches and drawings and things from this

8 document DTX-89. And this one, I mean, looks a little bit

9 like one of the figures we saw a minute ago with that kind

10 of umbrella diaphragm, right?

11 **A.** Yes, that's correct.

12 **Q.** So it seems like at least this guy -- I don't know,

13 we can have an interesting debate over whether you thought

14 this was something you should put in your patent.

15 **MR. LoCASCIO:** Let's go to the next one.

16 Figure 5.

17 **BY MR. LoCASCIO:**

18 **Q.** This guy, this looks pretty complicated. Can we

19 agree with that to start with?

20 **A.** Perhaps just looking at it without knowing how it

21 works, I can see how it might be complicated.

22 **Q.** Okay. Well, it's got a lot of parts. Can we agree

23 with that?

24 **A.** Compared to -- compared to a cell phone, it's a lot

25 fewer parts.

1478

1 admitted, during questions from Mr. Ramani, that this

2 design, this figure that we're looking at and you went

3 through with your counsel, DTX-89, is not in any of the

4 three Magnolia patents.

5 It's not in PTX-1, it's not in PTX-3, and it's not in

6 PTX-5, correct, sir?

7 **A.** What I stated is that there wasn't an illustration of

8 it in any of those patents.

9 **Q.** The 52 figures in the patent filed in 2018, all sorts

10 of ideas that Magnolia thought, "That's a good one, that's

11 a great one, I invented this, I am going to put it in my

12 patent," this figure, the figure your counsel chose to

13 show you, DTX-89, Trap Door 1, is not one of the

14 embodiments or figures included in any of the three

15 Magnolia patents, true?

16 **A.** It is clearly described in the description.

17 **Q.** That's not my question, sir.

18 The figure you'd used to show how Trap Door 1 works

19 and the ideas people allegedly had in 2017, that figure,

20 that embodiment, is not shown in any of the three Magnolia

21 patents, true?

22 **A.** There isn't an illustration of this specific design

23 concept, that's correct.

24 **Q.** And you see how this -- you remember the membranes we

25 looked at were kind of like umbrellas? They were like

1479 1 Y-shaped in the actual patents? Do you remember that? 2 A. Yeah. There were many different illustrations, yes. 3 Q. There were three membranes, remember, 576, 676, 776? 4 A. Correct. 5 Q. This guy has this flat thing called a plug that looks 6 like a disc. 7 Do you see that? 8 A. I do. 9 Q. That's not shown, whether in this figure or any other 10 figure in any of the Magnolia patents, is it? Shown, sir? 11 A. I don't believe an illustration was included in 12 those. 13 Q. And if -- well, it certainly wouldn't have been hard 14 when you had 52 figures and you filed these patents to 15 say, "Well, heck, that last guy, Trap Door 1, that's a gem 16 of an idea. We should put that one in the patent." 17 You certainly could have done that and nobody did, 18 right? 19 A. It doesn't appear that way, yes. 20 Q. Even though the meeting -- IP update was literally a 21 meeting with the patent lawyers, right? 22 A. I believe so. 23 Q. So you showed them and you talked to them -- and I 24 don't want you to tell me what you said, but you talked to 25 them and showed them ideas and things, and then they went	1480 1 off to draft a patent application, correct? 2 A. Generally speaking, yes. 3 Q. And you all looked at it before it got filed in 2018, 4 right? 5 A. Yes. 6 Q. And nobody -- nobody thought, "We should make sure we 7 put the figure for Trap Door 1 in," because it's not 8 there, correct? 9 A. It's not -- the illustration is not present. 10 Q. And the flat disc plug, not there either, right? 11 A. I don't believe so, but I don't recall all 52 12 figures. 13 Q. The reason you all -- this was something that came 14 out of Project Suntory, right? 15 A. This specific concept that we are talking about? 16 Q. This series of work in 2017 came out of something 17 called Project Suntory, right? 18 A. I don't know that it came out. I think Suntory was a 19 separate project that -- a lot of the concepts that we've 20 leveraged over the years have been things that we have 21 been working on since 2011, so what order, I don't recall. 22 Q. Okay. Can I ask you a question? 23 MR. LoCASCIO: We can take that down. Thanks. 24 BY MR. LoCASCIO: 25 Q. You didn't say -- you talked about your background
1481 1 and you said you worked on, as a designer, on a lot of 2 different things, neural implants, ventilators, now you 3 have a dental business, fair? 4 You nodded. Unfortunately for the court reporter, 5 you need to answer orally. 6 A. Yes. 7 Q. Thank you. 8 You're a designer, a design consultant, fair? 9 A. I provide, yeah, engineering services on a contract 10 basis. 11 Q. Were you ever an employee of Magnolia? 12 A. I have never been a direct employee, a W-2 employee. 13 Q. You're sort of a freelance designer, fair? 14 A. Yes, that's correct. 15 Q. I take it they pay you hourly for your services and 16 your design work, and you send them bills from -- is it 17 Gaw's Design? 18 A. That's correct. I just bill time and materials. 19 Q. For your involvement in this case, are you billing 20 Magnolia for your time? 21 A. Yeah. I bill my standard hourly rate as if I were 22 doing engineering work for them. 23 Q. How much is that, sir? 24 A. My hourly rate? 25 Q. Yes, please.	1482 1 A. It's \$150 an hour. 2 Q. So where do you live? 3 A. I live in Seattle. 4 Q. And how long have you been here in Wilmington? 5 A. I arrived last Wednesday evening. 6 Q. Do I understand that you've been here nonstop from 7 Wednesday of last week to -- today is Friday -- so about a 8 week and a half? 9 A. Yes, that's correct. 10 Q. And have you -- anytime you've -- let me ask 11 separately. 12 Do you just bill by the day, or do you bill basically 13 for every hour you are dealing with the lawyers or other 14 folks from Magnolia? 15 A. Yeah. I bill specific to a project or client, and so 16 the time that I've been here, the time that I've prepped 17 with the attorneys, I've billed accordingly as a separate 18 line item on an invoice versus the billable time as if I'm 19 responding to e-mails or someone has a design question, 20 I've had multiple meetings. Those are billed separately. 21 In some cases, I'm billing to Magnolia when I'm working on 22 Magnolia. The rest of the time that I have been here, I 23 have been doing other client work. I do have existing 24 clients, and so I have been working on those projects as 25 well.

1483

1 Q. On the Magnolia part, it sounds like you -- you've
 2 met with them, you spent time preparing with the lawyers
 3 for what you would say, all those things.
 4 Just ballpark for me, how many hours have you spent,
 5 before you got here to court, preparing to do that and
 6 working on this engagement, if you will, for your hours?
 7 A. Prior to arriving here in Delaware, minimal time. I
 8 would say on the order of, I don't know, 2 to 4 hours,
 9 maybe 6 hours at the most. And then since I've been
 10 here -- I could certainly go back and look at times that
 11 I've put, but I would have to say 10 to 12 hours kind of
 12 reading and preparing.
 13 Q. And so you were paid \$150 an hour for that work.
 14 And are you being paid for your time even here in the
 15 courtroom?
 16 A. That's correct.
 17 Q. Okay. So you mentioned you went to Stanford. That's
 18 a beautiful place. I've only visited.
 19 How -- what was your actual degree? I'm a mechanical
 20 engineer.
 21 What type of engineer are you?
 22 A. I have a BS in engineering in product design.
 23 Q. Okay. At Stanford, there is a mechanical engineering
 24 degree you can achieve, correct?
 25 A. That's correct.

1485

1 since you got to Wilmington?
 2 A. Yeah. Conversations, nothing to do with this trial.
 3 Q. Nothing to do with anything to do with your patents?
 4 A. We've not discussed the patents, no.
 5 Q. So you've had no -- have you had any conversations
 6 with anybody about the substance or subject matter of
 7 what's gone on in this case before you got here today?
 8 A. Apart from the attorneys, no.
 9 Q. So you were talking about Suntory a second ago and --
 10 MR. LoCASCIO: Can we go to DTX-88.
 11 BY MR. LoCASCIO:
 12 Q. So in those designs you had in that meeting with the
 13 lawyers in December, in the months that led up to fall of
 14 2017, you were meeting with Mr. Bullington and Mr. Ramsey
 15 and Mr. Miazga to look at products called passive
 16 products.
 17 Remember that?
 18 MR. RAMANI: Your Honor, objection, beyond the
 19 scope.
 20 THE COURT: Overruled.
 21 MR. RAMANI: Thank you.
 22 BY MR. LoCASCIO:
 23 Q. And if we look, sir, at this slide -- let's just make
 24 sure you connect up to it.
 25 MR. LoCASCIO: Go to the next page, please.

1484

1 Q. And just like there is a chemical engineering degree
 2 and others.
 3 Yours was in the design side, not a traditional
 4 mechanical engineering degree, fair?
 5 A. It's within the engineering department.
 6 Q. But you don't have a mechanical engineering degree,
 7 do you?
 8 A. I do not have a BS in mechanical engineering.
 9 Q. And in the mechanical engineering curriculum,
 10 there's -- at least when I was there -- two semesters, but
 11 at least a course on fluids, right? It's a whole course
 12 just on fluids. You know that's a thing, right?
 13 A. That's correct. There is coursework there in
 14 undergraduate, graduate, different levels, yes.
 15 Q. You were asked during your deposition if you had some
 16 experience in taking coursework in fluids, and I think you
 17 said it was part of your physics class; is that correct?
 18 A. That's correct. I didn't take specific coursework or
 19 a class. It was part of a physics curriculum.
 20 Q. Okay. So -- actually, one other question, just a
 21 threshold one.
 22 You have not been here in the courtroom during anyone
 23 else's testimony, agreed?
 24 A. That's correct. I have not been here.
 25 Q. Have you had any conversations with Mr. Bullington

1486

1 BY MR. LoCASCIO:
 2 Q. You went to a meeting in July with Mr. Bullington and
 3 Mr. Miazga, Mr. Schoen, Mr. Ramsey, and Mr. Hulteng.
 4 Do you see that?
 5 A. Yes.
 6 Q. If we go to the outline, the next page, the outline
 7 of this meeting was testing summary, passive flow problem,
 8 and leading concepts.
 9 I want to take those -- let's go to -- in the
 10 interest of time, we'll go to passive flow.
 11 So you understood, as of July 2017, that Kurin had
 12 launched the Lock, and you all called it a passive product
 13 internally, right?
 14 A. I believe that's how we characterized its
 15 functionality.
 16 Q. You all were trying to work on a smaller blood
 17 level -- let me back up. Let's set the stage.
 18 At the time this is going on, this is summer of 2017,
 19 Magnolia has the Gen2 product.
 20 That's its product, correct? In terms of
 21 commercialized products?
 22 A. Commercial products, that's correct.
 23 Q. And Kurin has launched, beginning of 2017, its Kurin
 24 Lock, fair?
 25 A. I don't know the exact time when it was launched.

1487 1 Q. But you were at -- pretty involved in the -- I don't 2 know, for lack of a better word, I'll call it hubbub going 3 on at Magnolia when Kurin's Lock launched, right? 4 A. Yes. I don't recall the exact date. 5 Q. Okay. And right after that, you and Mr. Bullington 6 and others tried to work on a product with lower blood 7 diversion because the Magnolia Gen2 used 1 1/2 to 8 2 milliliters of blood in the waste area, correct? 9 A. The Gen2 product had a diversion volume that's 10 nominally 1 1/2 to 2 milliliters. We had been working on 11 some different diversion volumes much earlier than this. 12 In fact, starting as early as 2011. 13 Q. Okay. We'll get to that. But as of 2017, you were 14 trying to get from 1 1/2 to 2 milliliters down to 15 .5 milliliters, correct? 16 A. The goal was to achieve a lower diversion volume. 17 Q. And the problem with that much blood is a passive -- 18 you couldn't develop a passive system that used that much 19 blood because the results showed that with a 23-gauge 20 needle in healthy suspects, it took 16 to 27 seconds to 21 drain that kind of volume of blood in a passive system, 22 correct? 23 A. I recall those test results, yes. 24 Q. Okay. Sir, you know the volume of blood in a needle, 25 23-gauge needle? Do you know what that is?	1488 1 A. Small. I don't know the exact volume, no. 2 Q. Okay. Can you tell me how small? 3 A. On average, I'm assuming microliters maybe. 4 Q. A microliter being a -- a milliliter is a thousandth 5 of a liter. A microliter is a 10,000th of a liter or 6 smaller than that? 7 A. It's smaller than that. 8 Q. And so 1 1/2 to 2 milliliters of blood is like 9 flushing, what, thousands of needles worth of blood out, 10 correct? 11 A. Yeah, if you do the math. Again, I would have to 12 know the exact volume but I get your point. 13 Q. And so even at a half a milliliter, that's still a 14 lot of needles worth of blood that's coming out, correct? 15 A. Yeah. That's -- the equivalent, just to give you an 16 example, the equivalent is -- in that tubing set that I 17 showed and the needle, that's about just under a half a 18 milliliter, so that gives you a sense for how long that 19 tube is, and then plus the needle. That total volume is 20 about -- it's actually a little under a half mL. 21 Q. So let me actually -- when you were saying the 22 point -- the thing you showed, was that this? 23 A. Yeah, sorry. 24 Q. Okay. 25 A. The Steripath Micro device.
1489 1 Q. That's okay. Okay. 2 MR. LoCASCIO: Go to the ELMO for me, 3 Mr. Urban. 4 BY MR. LoCASCIO: 5 Q. So this is PTX-272. 6 And so, am I right that, for the jury's benefit, what 7 you're referring to is there's a volume of blood in the 8 lead-in, call it hose or line, is that a fair word? 9 A. Yeah, the volume of empty space in the lumen of that 10 tube that goes from Micro to the needle. 11 Q. The lumen is the -- is a sort of science word for the 12 inside of a hose? The open space in the middle of a tube 13 or hose, that's the lumen? 14 A. Yeah, the inside diameter. 15 Q. And so what you are saying is the -- I won't draw on 16 it, sir. Mr. Ramani probably doesn't want me to draw on 17 an exhibit. 18 This -- the diversion chamber in here is a half -- .5 19 to 1 milliliters as it's described, correct? 20 A. The device is capable of diverting a nominal volume 21 of a half milliliter of blood. 22 Q. Okay. And why does it say .5 milliliter to 23 1 milliliter in all the Micro press materials and 24 brochures, et cetera? 25 A. The way the product works with an internal bladder is	1490 1 once that bladder flips to the other side, that 2 displacement of air is the thing -- that's the maximum or 3 the limit of the amount of both air and blood that you can 4 fill. 5 So depending on physiologic conditions, access to the 6 vein, you can get a varying amount of actual diversion 7 volume so the ratio of blood to air may be slightly 8 different depending on the patient, depending on the 9 needle size, depending on access, those kinds of things. 10 Q. So while you said .5, depending on the experience or 11 the person using it or the patient, it might pull more 12 than .5 up to 1, agreed? 13 A. Yes. That is approximately the upper end. 14 Q. Okay. And what you were saying, though, is that's 15 all in here before you get to the sample, but this line 16 here, is that the additional .5 milliliters you were 17 talking about? 18 A. I think what I explained earlier is to give you a 19 relative reference for volume of air or blood, that inside 20 diameter of that tubing length accounts for approximately, 21 I think it's on the order of .3 or .4 milliliter. So 22 under a half milliliter. 23 Q. Okay. So if we go to Page 11 of -- we were back in 24 DTX-88. By the summertime, when efforts were going 25 underway at Magnolia to come up with a response to the

1491 1 Lock, the conclusion was made that at least at the volumes 2 you all were working, there was no apparent sufficiently 3 fast passive flow solution for .5-milliliter 4 sequestration, correct? 5 A. Yeah, that's what it states here. That's how I 6 recall. 7 Q. And then, if we go to the next slide. So the 8 decision was made to abandon that and instead use a vacuum 9 source, culture bottle, a vacutainer, syringe, or user 10 force like Steripath. 11 And the user force that Steripath meant was you sort 12 of -- you squeeze something to create a vacuum to pull the 13 blood out. Agreed? 14 A. That's how -- prior to Steripath Micro, that's how 15 the Steripath Gen1 and Gen2 products operate. 16 Q. It says you can alternatively use a vacuum source: 17 Culture bottle, vacutainer, or syringe. 18 Can we agree, sir, that using a vacuum source to draw 19 blood like a culture bottle, a vacutainer, or syringe was 20 certainly not some new idea, right? That's how blood was 21 being drawn for decades, agreed? 22 A. That's how it is drawn currently today. 23 Q. Sir, I know you weren't here for this, but we're on a 24 time clock. My question was about decades, and you said 25 today. So if you could do me a favor and just listen to	1492 1 my question and answer that. 2 Sir, the idea of using a vacuum source, a culture 3 bottle vacutainer or syringe, when you were having these 4 discussions in 2017, certainly wasn't some new idea. 5 That's how blood has been drawn for decades, agreed? 6 Is that true, sir, or not? 7 A. I don't know how long they have been used to do blood 8 draws. In this specific example, this was an approach to 9 perform the diversion and then perform the switching of 10 diversion to sample. 11 Q. Mr. Gaw, as of 2017, are you able or not able to tell 12 this jury -- this is a yes-or-no question -- whether 13 culture bottles vacutainers, or syringes have been used 14 for years before you had that meeting? 15 A. They've been used for years. I don't know if it's 16 been decades or longer. 17 Q. You're not sure if syringes were around in 2007? 18 This is 2017, so a decade earlier, 2007. Is it seriously, 19 sir, your testimony under oath that you don't know if 20 syringes were used to draw blood before 2007? 21 A. Sorry. Just to clarify, it could have been much 22 longer than decades ago. That's all I was trying to say. 23 I don't know when they started. 24 Q. Okay. Hang on. So when I said "decades" and you 25 said "I don't know if it's decades," your explanation for
1493 1 that is it could have been centuries? 2 A. I would imagine a syringe has been around longer than 3 that. More than a century, I don't know. 4 Q. So when I said "decades," you didn't agree with me. 5 Can you -- so if we -- Suntory is in 2017, in June. 6 Leading up to that, you -- and let me ask another 7 question, which is that the Micro, you pointed to the 2017 8 IP meeting document on direct. The Micro was called 9 Project Argyle, right? 10 A. The internal project name was Argyle. 11 Q. Okay. 12 And Argyle is in 2018, true? 13 A. Yeah, the substantial portion of the work was 14 conducted in 2018. 15 Q. Turn to DTX-113. 16 You were shown this document during your direct 17 examination, and I want to ask you some questions about 18 this. This is the design review for what ultimately 19 becomes the Micro, agreed? 20 A. That's correct. 21 Q. Can we go to Slide -- let's go to 13, first, 113.13. 22 Do you remember being shown this? This is the button 23 of the Micro. 24 A. Yes, I do. 25 Q. You were directing the jury's attention to this	1494 1 little slot here, D. See that? 2 A. Yes. 3 Q. There's -- your counsel said, what's with the -- I 4 don't know, I call him the "meh" emoji. I don't know 5 which one that is, just the flatliner. 6 You were asked about that and you said you didn't 7 know. 8 MR. LoCASCIO: Can we go back to -- actually, 9 leave that one, leave that up, and can you go to 113.3, 10 Mr. Urban. And pull up the agenda for that. There you 11 go. Okay. I don't think you need to blow it up, but if 12 you can blow up the box on the right side. 13 BY MR. LoCASCIO: 14 Q. Okay. So the doc has a legend that tells us what 15 "meh" emoji means. That means it's an open issue that 16 will not be addressed. 17 MR. LoCASCIO: So of the -- you can take the 18 pin down for a minute, Mr. Urban, the drawing of the 19 button. That's great. 20 BY MR. LoCASCIO: 21 Q. So back here on the legend page, it said "Identify 22 problems or limitations with the architecture." 23 And then it has the code. Star is resolved, blank is 24 just open but we're going to fix that or deal with that. 25 Then you've got the "meh," open issues. We will not

1495

1 address.

2 Do you see that?

3 A. Yes, I do.

4 **MR. LoCASCIO:** So if we can go back now to

5 113.13. Put the other part away. Mr. Urban, we don't

6 need that part. Perfect. Exactly right. Okay. Leave

7 this up for a second.

8 **BY MR. LoCASCIO:**

9 Q. You testified -- Mr. Ramani was asking you about how

10 this button works. I wrote this one down. You said it

11 was a cutout in the button. And then to increase the

12 flow, you said it goes into the button, but then you

13 changed it. You corrected yourself. You said "into the

14 area." Do you recall that?

15 A. I don't recall those exact words, but yes.

16 Q. You seem like a pretty cautious, careful guy with

17 your words. People said that to you before?

18 A. Not that I recall.

19 Q. Okay.

20 There's not a hole that goes through that button, is

21 there?

22 A. There is not a hole into the button, correct.

23 Q. And so if somebody else, before you got here or any

24 point, said "the flow of the sampling channel goes through

25 a hole in the button," that would not be true, would it?

1497

1 Q. So once you take off the -- call this the syringe?

2 A. Yes, that's a syringe.

3 Q. What do you call this part?

4 A. That would be the Luer extension of that

5 configuration.

6 Q. Okay. So at this point, with those removed from a

7 Micro, there's this barrel kind of that screws on that

8 connection, right?

9 A. That's a Luer collar, yes.

10 Q. And then there's a button, and then this is a

11 housing, correct, sir?

12 A. There's a button. The dark blue area is the button,

13 and then the multiple housings or plastic parts.

14 Q. Okay. We will get to that in a split second but I

15 want to get that button out.

16 **MR. LoCASCIO:** Do you have a paper clip?

17 **BY MR. LoCASCIO:**

18 Q. Do you ever, like, get the sim card out of your

19 phone, you need, like, to poke a little thing? It's kind

20 of like that.

21 You know there's a little detacher tab you can pop

22 and this will come out, right?

23 A. I am well aware.

24 Q. Take the button to its open position. And then if we

25 push down on this detent, we can take out the button.

1496

1 A. Correct. There's no hole in that area of the button.

2 Q. Okay. There's a sort of slot right there, and that's

3 what D is, correct?

4 A. Yeah. The cutout is through the elastomeric

5 over-mold.

6 Q. You got right to my next question. Let's see if

7 everybody else can get to where we are, which is the

8 button has a plastic part that's the pin, but then an

9 elastomer or plastic coating on the end of it, doesn't it?

10 A. It's not really a coating, but, yeah, it's an

11 over-mold.

12 Q. Like a sleeve?

13 A. It's an over-mold, which just means that it's molded

14 together. So they take the pin part of the substrate, put

15 it into another tool, and then inside that tool they

16 inject some elastomeric material around the button.

17 Q. You showed the jury the outside. You didn't show

18 them the inside of the button.

19 This is Steripath Micro, correct? You agree?

20 A. That's correct.

21 Q. Okay. So you can take the connector off, take the

22 syringe off. Now, what I've got there --

23 Can we switch to it? Thanks.

24 -- is the body or the housing of the Micro, agreed?

25 A. That's correct.

1498

1 Now the button has been removed from the housing.

2 You see that?

3 A. Yes.

4 Q. This is an actual Micro. This is the accused

5 product, correct?

6 A. That is an actual product, the Steripath Micro.

7 Q. Now, if we zoom in on the button.

8 So -- oh, sorry, I shouldn't have moved it. That

9 didn't make it any better for sure.

10 Okay. Do you see there's a slot in the white

11 elastomer part, right?

12 A. Are you describing the channel there?

13 Q. I am. So the button itself, if we look at it on

14 end -- the focus is going to really be a bear on this

15 one -- is solid, correct, sir?

16 I can bring it up if it's easier, or if you just know

17 that that center of the button, the pin, if you will, has

18 no hole through it. It is solid, correct?

19 A. The substrate has no hole.

20 Q. Substrate being the blue stuff?

21 A. That's correct.

22 Q. And so when -- if we do it like this, the top is the

23 inlet, correct, sir?

24 A. That's correct.

25 Q. The top part of the housing we're looking at here on

1499 1 this picture is the inlet, the bottom is the outlet, 2 correct, sir? 3 A. Yes, that's correct. 4 Q. And then, when the sampling channel is opened, blood 5 flows from the top down, it rides around the outside of 6 the button in that slot where the elastomer has been 7 removed, and then that routes it over there, you see, to 8 the outlet, correct? 9 A. The bulk of the material or blood flow goes into that 10 area that's been cut away in the elastomeric overmold. 11 There is, obviously, some material or blood that flows 12 around it as well on both sides in kind of an annular 13 opening. 14 Q. So the blood is flowing around the button, either 15 around the elastomer or inside that channel that you've 16 cut in the elastomer to form the sampling channel, 17 correct, sir? 18 A. That's correct. In between those two seals. 19 Q. And all of that is happening inside the housing, 20 correct, sir? 21 A. The button is housed inside of that back plastic 22 part. 23 Q. But... 24 So we just looked at the physical version of the 25 product. And then below that, you see I have a photograph	1500 1 or a printout of that, correct? 2 A. That's correct. 3 Q. And am I right that this is the inlet up top? That's 4 what you testified to earlier? 5 A. Yes, that's an inlet that you were pointing to. 6 Q. On this side we can see the outlet on the bottom of 7 this demonstrative, correct, sir? 8 A. That's correct, what you just pointed to. 9 Q. And inside the definition of this housing we're 10 looking at, there's a sampling channel, correct? And the 11 sampling channel, once the collection -- once the diverted 12 blood had been removed, runs from the inlet, through here, 13 diagonally in that slot we just looked at, and out the 14 outlet, correct? 15 A. That plastic component that you were just talking 16 about has an inlet and an outlet, and then it also has a 17 large bore that's open to ambient. 18 Q. Sir, that large bore, you're talking about that hole 19 there right? 20 A. Yes, that's correct. 21 Q. And that hole is closed on this end, right, and it 22 entirely surrounds everywhere that the blood flows through 23 the sampling channel, doesn't it? 24 A. The only way for that to happen is with the presence 25 of the button.
1501 1 Q. But, sir, you agree that the sampling channel, if we 2 drew it on this, starts here at the inlet, runs here, goes 3 this way, down right, and then out the outlet. 4 Can we agree on that? That's the route of the 5 sampling channel? 6 A. When you discussed it, you had a button in the same 7 image. 8 Q. Can you answer my question? This is the route of the 9 sampling channel, sir? Is the route of the sampling 10 channel from here at the inlet, down here to the center, 11 diagonally to the right, and out the outlet. 12 Is that the sampling channel? 13 A. When we discussed it last, you had an image of the 14 button in there as well. The button is required to form 15 the sampling channel. 16 Q. Sir, the sampling channel is surrounded by this white 17 back housing at all times, correct, sir? 18 It's surrounded by the housing at all times, correct, 19 sir? 20 A. This -- it plays a role in this -- yes. 21 Q. And the outer limits of where that sampling channel 22 is are all, in this picture we're looking at, inside of 23 the housing, correct? 24 A. Only with the presence of a button. 25 Q. Now, if you delivered the device in a way it's not	1502 1 intended to be used, then the sampling channel wouldn't be 2 entirely within the housing. That's your testimony, if 3 you left the button out? 4 A. The button is required to make up the sampling 5 channel. 6 Q. And the housing, sir, defines the inlet port and the 7 outlet port and marks the limits of the outer boundaries 8 of the sampling channel, true? 9 A. I think putting a clarifier it's the outer 10 boundaries, it's fair. 11 Q. If I wanted to know where is the sampling channel in 12 its broadest, biggest day, when it runs through the 13 Steripath Micro, it is always inside the housing, agreed? 14 A. Agreed. 15 Q. If I wanted to draw the sampling channel on here, I 16 would put an arrow from the top inlet diagonal to the 17 bottom right and out the outlet, correct, sir? 18 A. With the presence of a button, that would be true. 19 Q. As it's sold, that's where the sampling channel is; 20 as it's used, that's where the sampling channel is, 21 correct? 22 A. Yes, when the button is depressed. 23 Q. Have I depicted the path accurately, sir? 24 A. Yeah, close enough. 25 MR. LoCASCIO: I will make this DDX-6.

1503

1 **BY MR. LoCASCIO:**

2 **Q.** We talked a lot about one other term I probably

3 should have put on here.

4 The white part of the back and the front, we agree

5 that's a housing, correct, sir?

6 **A.** I think that's fair to constitute them as housings or

7 components.

8 **Q.** So I want to go back to DTX-113. Can you go to Page

9 16.

10 **THE COURT:** You all doing all right? In terms

11 of lunch, I don't know how much longer you have.

12 Do we need to think about that?

13 **MR. LoCASCIO:** If I finish this document in

14 another minute or two, then we'll take the lunch break,

15 that would be great.

16 **THE COURT:** Will that work? All right.

17 **MR. LoCASCIO:** Appreciate that.

18 **BY MR. LoCASCIO:**

19 **Q.** Okay. So this is the design review for the Argyle,

20 the Micro, and you talked about this bladder. And the

21 bladder flip kind of got a "meh" under it, too, then

22 something got fixed. An open problem that was not going

23 to be resolved and a problem that was fixed, correct?

24 **A.** Just looking at it, there was one aspect that was,

25 yeah, we did not address, and one aspect of the bladder

1505

1 you have? Okay. We will try to do that. Thank you very

2 much.

3 (The jury exits the courtroom at 12:22 p.m.)

4 **THE COURT:** Please be seated.

5 Mr. Gaw, you are on cross-examination, so it's

6 important that you do not speak at all about the case with

7 the lawyers. Have lunch, you can talk about the sandwich

8 or whatever, but nothing about the case. All right?

9 **THE WITNESS:** Understood. Thank you.

10 **THE COURT:** Thank you very much. You may be

11 excused. Any issues we need to address before we leave?

12 **MR. RAMANI:** Nothing on our side, Your Honor.

13 **THE COURT:** No. Oh, wait. There are slides, I

14 thought. Go ahead.

15 **MR. LoCASCIO:** You don't have to sit up there,

16 Mr. Gaw. You probably shouldn't stay in the room even.

17 **MR. RAMANI:** Your Honor, Mr. Gaw should leave

18 the courtroom before we discuss anything.

19 **THE COURT:** Was he involved in these slides?

20 He is welcome to leave. The rest of the

21 lawyers who want to eat lunch, just whoever needs to argue

22 the slides should stay.

23 **MR. McELDOWNEY:** I think just one slide in

24 dispute -- or one issue affects a couple slides.

25 So Dr. Meinhart apparently intends to talk

1504

1 that looks like we did address.

2 **Q.** And the aspect that you didn't address, the "meh"

3 emoji, was the idea that because of the way this was

4 designed with the bladder, if somebody got this before

5 they did a venipuncture, if they opened and closed the

6 syringe with the button in the open position, they would

7 be basically popping this bladder in and out, fair?

8 **A.** It would cycle, yes.

9 **Q.** And the concern was that that might be a problem

10 because it might at some point fail, just because it's an

11 elastomer, right?

12 **A.** I think what's mentioned there is about the

13 repeatability, how reliable it is going back and forth.

14 **Q.** When you demoed it -- save that for after the break.

15 I promised just the doc, so I'll stick to just the doc.

16 Just to close out the document on 113.23, it wasn't

17 my word or your word that this thing has a housing, right,

18 because even in your own internal document, top bullet,

19 you all referred to the casing that sort of surrounds the

20 sampling channel as a housing, correct, sir?

21 **A.** Yeah, we define them as housing or components.

22 **Q.** Okay.

23 **MR. LoCASCIO:** This is a fine time, Your Honor.

24 **THE COURT:** Okay. We will take a break. You

25 want to do the same thing, try half an hour? Is that what

1506

1 about the '052 file history, and this is one of his

2 slides. The issue here is 402, 403. You will recall that

3 Dr. Meinhart's opinions on anticipation were excluded.

4 **THE COURT:** Okay.

5 **MR. McELDOWNEY:** He is not going to be offering

6 an anticipation opinion.

7 **THE COURT:** All right.

8 **MR. McELDOWNEY:** As to the prosecution history,

9 he offers no opinion. It is in his report, but all he

10 does is states the facts of the prosecution, right, and

11 this will be very confusing to the jury. Anticipation is

12 at issue against Magnolia's patents. It's not at issue

13 against the '052 patent.

14 **THE COURT:** Sorry. Hold on. What did you just

15 say?

16 **MR. McELDOWNEY:** Sure. So anticipation is at

17 issue against Magnolia's patents. Dr. Antonsson says

18 their patent's invalid because of anticipation. There is

19 no invalidity on anticipation or obviousness against the

20 '052 patent.

21 **THE COURT:** Right.

22 **MR. McELDOWNEY:** And so this will confuse the

23 jury because this is about anticipation of the '052

24 patent. It was rejected as anticipated during

25 prosecution. Obviously that rejection was overcome.

1507

1 **THE COURT:** Okay.

2 **MR. McELDOWNNEY:** This will confuse the jury.

3 **THE COURT:** All right. Mr. Voronov, are you

4 going to argue this?

5 **MR. VORONOV:** Yes, Your Honor.

6 **THE COURT:** All right. Why is it relevant?

7 **MR. VORONOV:** So this is relevant to two

8 issues, Your Honor.

9 The prosecution history of the '052 patent

10 shows that initially the '052 patent was filed without the

11 final limitation, the housing that defines limitation that

12 has been the subject of much testimony and will be the

13 subject of a non-infringement argument by Magnolia.

14 This is relevant because there's also a written

15 description argument that Magnolia has that is based on

16 the housing that defines limitation not being disclosed

17 within the '052 patent.

18 **THE COURT:** I'm sorry. I'm totally lost. So

19 written description adequacy, we're only looking at what

20 is in the published written description and what are in

21 the claims.

22 Why is it relevant, what occurred during the

23 prosecution history?

24 **MR. VORONOV:** Because the fact that this was

25 added during prosecution --

1509

1 **THE COURT:** So, again, so Napper is your

2 damages person, and Napper is going to say the key, the

3 inventive aspect of the '052 patent is the housing.

4 Is that what you are saying?

5 **MR. VORONOV:** That's right.

6 **THE COURT:** Okay.

7 **MR. VORONOV:** And --

8 **THE COURT:** And why do you need to bring in

9 that the patent was rejected or, if you want to say, why

10 do you have to bring in that the housing limitation was

11 added at a later date? Why is that necessary to establish

12 that Napper... Who is the other dude's name?

13 **MR. VORONOV:** Professor Meinhart?

14 **THE COURT:** That Meinhart said to Napper, "Hey,

15 the inventive aspect of this claim is the housing"?

16 **MR. VORONOV:** Well, it goes to support the

17 explanation for why the inventive aspect of the claim is

18 the housing. That is this history. And if I could

19 show -- we've been looking at one slide, but it's actually

20 a series of, I believe, four slides.

21 **THE COURT:** Can I just hold you, though?

22 **MR. VORONOV:** Of course.

23 **THE COURT:** What do you all say is the

24 inventive aspect?

25 **MR. McELDOWNNEY:** I mean, it's the combination

1508

1 **THE COURT:** The fact that what was added, the

2 claim?

3 **MR. VORONOV:** The housing that defines

4 limitation.

5 **THE COURT:** So the fact that a limitation to a

6 claim was added during the history, okay.

7 **MR. VORONOV:** Is --

8 **THE COURT:** Is relevant to the adequacy?

9 **MR. VORONOV:** Is relevant to the fact that

10 there may have -- may be a question as to the adequacy of

11 the written description.

12 **THE COURT:** All right. That's your best

13 argument?

14 **MR. VORONOV:** No.

15 **THE COURT:** Because I am rejecting that

16 argument. That doesn't make sense to me at all.

17 **MR. VORONOV:** Understood, Your Honor.

18 The second argument is that this is Mr. Napper,

19 who will be testifying after Professor Meinhart, relies on

20 Professor Meinhart's opinion as to the inventive feature

21 of the '052 patent. And in his report, he explains that,

22 "I had a discussion with Mr. Napper about the prosecution

23 history," and that is a key component of the damages

24 opinion that Mr. Napper intends to provide to the Court

25 because --

1510

1 of the whole claim. So it's using -- the vacuum inlet is

2 a part of it, included in all the housing is part of it.

3 And so the inlet by itself, obviously, not inventive, but

4 when you combine those chamber limitation, sampling,

5 channel limitation, and the housing, that's the inventive

6 aspect.

7 **THE COURT:** When it comes up in damages, so

8 then Napper gets up and he says... It's a "he," right?

9 **MR. McELDOWNNEY:** Mr. Napper is a he.

10 **THE COURT:** Says, "Hey, inventive aspect of

11 this is limited to the housing," and then, what, he does

12 an apportionment or something based on that? Is that what

13 happens?

14 **MS. FARNAN:** That's correct, Your Honor.

15 **THE COURT:** And then is Distler going to be,

16 does she get to respond? I don't even know.

17 **MS. FARNAN:** She will have the opportunity if

18 we decide to.

19 **THE COURT:** Yeah, she gets to rebut.

20 And she says... What does she say in response

21 to the housing?

22 **MS. FARNAN:** She says there's going to be

23 issues with these calculations if it's the housing, but

24 also that that's too narrow.

25 **THE COURT:** Right, because she uses the whole

1511

1 thing.

2 But you don't dispute that he says it's the

3 housing?

4 **MS. FARNAN:** That's what Napper says?

5 **THE COURT:** Yeah.

6 **MS. FARNAN:** Correct.

7 **THE COURT:** Okay. Go ahead, Mr. Voronov.

8 Sorry.

9 **MR. VORONOV:** So I was going to provide the

10 additional context that Professor Meinhart would be

11 testifying about.

12 After the initial claims were rejected, there's

13 a slide that Kurin did not file a response disputing

14 that -- the originally filed claims. This is not yet in

15 evidence, but we intend to read the request for admission

16 into evidence so it will be by the time Professor Meinhart

17 testifies.

18 And here they admitted that they did not

19 specifically file a response disputing that originally

20 filed Claim 1, as well as other claims were anticipated by

21 patent -- the application that we just saw.

22 **THE COURT:** Wait, wait. We are bringing up

23 anticipation? You are not bringing an anticipation

24 defense.

25 **MR. VORONOV:** We are not. This is simply --

1513

1 So you've got two theories of admissibility for

2 these three slides, as I understand it. One is it backs

3 up the reasonableness of the reliance by Napper on your

4 technical expert that the housing is the inventive

5 element, right?

6 **MR. VORONOV:** That's correct.

7 **THE COURT:** All right. And then, two?

8 Anything else left, because I'm not letting...

9 Anything else? Maybe it's only one.

10 **MR. VORONOV:** Our final response, Your Honor,

11 is that Kurin's counsel is very capable of minimizing any

12 potential confusion by the jury. This can -- and they

13 haven't demonstrated that the probative value is

14 substantially outweighed by that --

15 **THE COURT:** Okay. Thank you. All right.

16 Now, on the damages issue, so we just had all

17 this discussion. How are we waging this battle when we

18 get to the damages about what's the inventive aspect? Do

19 you know what I mean?

20 **MR. McELDOWNEY:** Yeah. I'm going to let

21 Ms. Farnan address that.

22 **MS. FARNAN:** I didn't hear a part of your

23 question.

24 **THE COURT:** I'm just trying to figure out how

25 we wage this battle about what's inventive for

1512

1 **THE COURT:** Why are you putting this in front

2 of the jury?

3 **MR. VORONOV:** Well, the only reason is that

4 Kurin did not specifically file a response disputing the

5 point that we just showed on the slide previously. That's

6 September --

7 **THE COURT:** That's 403. That's out. You can't

8 bring in anticipation. You chose not to bring an

9 anticipation defense. You are not putting it in front of

10 jury. So that's out. That slide is out under 403. It's

11 minimally probative. I mean, really minimally. I don't

12 even get it. It's barely probative.

13 But it's clearly unduly prejudicial, unfairly

14 prejudicial, and it will absolutely confuse the jury

15 because you did not bring an anticipation defense. It's

16 out under 403. That prejudice substantially outweighs any

17 probative value.

18 Next.

19 **MR. VORONOV:** The next slide is Kurin amends

20 the claims to add the housing. And the final slide in

21 this section is the patent examiner allows the patent

22 because the prior art does not teach, disclose, and/or

23 fairly suggest a housing that defines the inlet port, the

24 sampling channel, and the outlet port.

25 **THE COURT:** Okay. All right.

1514

1 apportionment. I struck your expert because I didn't

2 think it was sufficient, right, evidence of her reliance

3 or it justified her reliance on apportionment. Hold on a

4 second.

5 Okay. Anyway, but I allowed it in for the

6 Kurin patent because I thought there was sufficient

7 evidence for her to rely because I think she relied on

8 some conversation with the expert or something.

9 **MS. FARNAN:** The expert reports at the time.

10 **THE COURT:** All right.

11 Okay.

12 **MS. FARNAN:** With Mr. Napper, though, I am not,

13 on cross, going to challenge -- he has the housing.

14 There's some issues within how he -- how he calculates the

15 number from the housing. But it's not as if I'm going to

16 be asking him about the prosecution history or any of

17 that. So I'm not really sure why all this is necessary,

18 given all the issues my colleagues have identified with

19 respect to the 403 aspect of it.

20 **THE COURT:** Okay. So where I am on this, I'm

21 not letting it in. You can't bring in any of this

22 discussion about the rejection. I think it just

23 introduces too many things that are confusing, unfairly

24 prejudicial, and would create the need for a mini trial.

25 If you want to have the technical experts duke

1515

1 it out on the merits of what's truly inventive, they can
 2 do that, but they cannot allude to the prosecution history
 3 to justify their opinions. All right? That's my ruling.
 4 **MR. RAMANI:** Can I ask for a point of
 5 clarification, Your Honor?
 6 **THE COURT:** Yes.
 7 **MR. RAMANI:** Just to confirm, you're not
 8 precluding Mr. Napper from saying he had conversations
 9 with Professor Meinhart and it was explained to him that
 10 the housing was the inventive aspect?
 11 **THE COURT:** That's okay. I don't think they
 12 even object to that. Right? That's fine. He can do
 13 that. But he can't get into...
 14 I mean, you need Meinhart to come up if you're
 15 going to debate the merits of that.
 16 **MR. RAMANI:** No, no. Mr. Napper will not be
 17 debating the merits of the --
 18 **MR. LoCASCIO:** Judge, in the line of people
 19 seeking points of clarification, I'm next.
 20 **THE COURT:** Shows you how unclear I am on my
 21 rulings.
 22 **MR. LoCASCIO:** No. It is clear. We just need
 23 to know what -- you know, in our own head, we see the
 24 ghosts of what's going on the other side.
 25 What you may have noticed in all of those

1517

1 **MR. LoCASCIO:** I think -- where I think the
 2 line should be drawn is they do not have a prior art 102,
 3 103 defense.
 4 **THE COURT:** Yeah.
 5 **MR. LoCASCIO:** So referring to a piece of prior
 6 art that is not the basis for invalidity to suggest in
 7 some way that the claim is narrower or should have only
 8 granted or snuck out of the Patent Office, they can't
 9 argue in front of the jury that there's the reference that
 10 they want to say gets you 80 percent of the way there.
 11 This is essentially an obviousness argument they're
 12 making.
 13 **THE COURT:** Okay. But this would only be
 14 relevant to damages.
 15 **MR. LoCASCIO:** At most, that's all they put
 16 forward because it is a relevant --
 17 **THE COURT:** It is not relevant to a written
 18 description. It has no relevance whatsoever.
 19 The problem you get in is, you know, you've got
 20 to do apportionment. And I don't think you believe, as a
 21 matter of law, that you're limited to the claim in its
 22 entirety, that you can't vote for some particular parts of
 23 the claim in terms of assessing apportionment, do you?
 24 **MR. LoCASCIO:** I do not.
 25 **THE COURT:** Okay.

1516

1 slides was specific reference to the Patton patent.
 2 **THE COURT:** I'm not surprised.
 3 **MR. LoCASCIO:** After the story we heard and
 4 Richie -- so I just want the point of clarification to be
 5 that, okay, they can't use that. They can point to a
 6 rejection in the prosecution history. Your Honor just
 7 laid out that we won't hear about the rejection over
 8 Patton. But when they then talk about, okay, we think
 9 this -- we think the '052 patent is really narrow, they
 10 can't, without referring to the prosecution history, refer
 11 to the Patton patent and what it disclosed in any sense
 12 because that would be a backdoor prior art argument.
 13 We just want to make sure that we're not going
 14 to still see what we saw in those slides in the live
 15 testimony, Your Honor, references to Patton and the prior
 16 patent that is not in this case and are not the invention
 17 in this case, Your Honor.
 18 **THE COURT:** Well, see, but you both often refer
 19 to things that were in the prior art that you're saying,
 20 you know, makes little things not inventive, including
 21 stuff, right, that hasn't been specifically identified in
 22 your obviousness defense, for instance.
 23 Like, I mean, you just brought up, we've had
 24 syringes for decades, right? I mean, so where are we
 25 drawing this line?

1518

1 **MR. LoCASCIO:** And my point is, that's fine and
 2 Mr. Napper can talk about that. And if he wants to rely
 3 on Dr. Meinhart to say, yes --
 4 **THE COURT:** Actually, I got it. Hold on. I
 5 figured out how to do this. And I am not going to hear
 6 any more arguments. We don't have time, right? Again,
 7 Federal Circuit, please be mindful, you know, we've got
 8 half an hour, we've all got to get lunch, and this is what
 9 I have to decide in seconds or minutes.
 10 Okay. So if you want to deal with
 11 apportionment, let's... I actually have a question. What
 12 does Magnolia intend to assert about Patton, if anything,
 13 with respect to apportionment?
 14 **MR. BLOCK:** In the damages presentation, Your
 15 Honor, I don't expect the word "Patton" to arise.
 16 **THE COURT:** All right. Then who is putting on
 17 Meinhart?
 18 **MR. VORONOV:** That's me, Your Honor.
 19 **THE COURT:** Do you intend to adduce from
 20 Meinhart what he thinks is the inventive aspect of the
 21 asserted claims of the '052 patent?
 22 **MR. VORONOV:** I had intended to do that, Your
 23 Honor.
 24 **THE COURT:** All right. Other than just... and
 25 you were going to rely exclusively on the prosecution

1519

1 history for him to establish that; is that right?

2 **MR. VORONOV:** That's correct, Your Honor.

3 **THE COURT:** All right. I have to say, you

4 know, it's been seven years doing these things, never had

5 to address this issue. Does anybody have any case law?

6 **MR. VORONOV:** Perhaps we can look during the

7 lunch break.

8 **THE COURT:** Look during the lunch break.

9 All right. We'll come back in 20 minutes. Oh,

10 wait. Mr. Mc- --

11 **MR. McELDOWNNEY:** No, just one very quick thing.

12 Dr. Meinhart does not have an opinion on the inventive

13 aspect of the '052.

14 **THE COURT:** Oh, well, that's huge. Is that

15 true?

16 **MR. VORONOV:** No. In the Napper report --

17 **THE COURT:** No, no, no, no, not in the Napper

18 report.

19 Does Meinhart have any discussion of it in his

20 report?

21 **MR. VORONOV:** So Meinhart discusses the

22 prosecution history.

23 **THE COURT:** I didn't ask that. Just a very

24 precise question.

25 Does he have an opinion about what is the

1521

1 the specification to be considered in any Section 112

2 analysis."

3 **THE COURT:** Hold on.

4 Original filed claims.

5 **MR. VORONOV:** Originally filed claims.

6 **THE COURT:** But this wasn't an originally filed

7 claim.

8 **MR. VORONOV:** This was the originally filed

9 claim of the '052 patent application before they amended

10 the claim.

11 **THE COURT:** You're trying to bring the

12 rejection.

13 **MR. VORONOV:** I beg your pardon?

14 **THE COURT:** I thought you were trying to bring

15 in the rejection.

16 **MR. VORONOV:** The critical point is that those

17 four claim elements did not include that fifth claim

18 element that added the housing that defines limitation.

19 **THE COURT:** Isn't the case you're talking about

20 talking about originally filed claims that didn't end up

21 in the patent?

22 **MR. VORONOV:** Well --

23 **THE COURT:** Do me a favor, yes or no?

24 I'm going to guess it's a yes, so why don't you

25 quickly look.

1520

1 inventive aspect of the '052 patent in his report?

2 **MR. VORONOV:** Your Honor, given that we're

3 looking up the cite, I'd ask for a minute to check the

4 report.

5 **THE COURT:** Okay. That would be a threshold

6 issue. If he doesn't, then he cannot opine. I thought

7 maybe he did. And then you are limited to, you are both

8 limited to, then, the discussion of inventiveness in your

9 financial or your damages expert's report. And I'm sure

10 that will be interesting, but not probably incredibly

11 illuminative cross-examination on that. Thank you.

12 (Whereupon, a recess is taken.)

13 **THE COURT:** Please be seated. Wrap up that

14 issue we were talking about real quick.

15 **MR. VORONOV:** So yes, Your Honor.

16 We found two cases that we wanted to bring to

17 Your Honor's attention. This is in connection with the

18 written description requirement that Your Honor held the

19 prosecution history was not relevant to.

20 It is Magnolia's position that the originally

21 filed claims are relevant to the written description

22 analysis. This is from *Allergan vs MSN Laboratories*

23 *Private Limited*, cite 111 F.4th 1358, 2024. This is a

24 case from the Federal Circuit where there's the statement,

25 "Originally filed claims have long been held to be part of

1522

1 Using Mr. Ramani and Mr. LoCascio's technique,

2 can you just give me yes or no.

3 **MR. VORONOV:** So based on my view, Your Honor,

4 this was -- I do believe that they were considered. I

5 haven't read -- had time to read the entire --

6 **THE COURT:** I think you should get the answer

7 to that question because I'm pretty sure that's what it

8 means. We don't have that situation here.

9 **MR. VORONOV:** So what is the distinction that

10 Your Honor is drawing, just so I understand?

11 **THE COURT:** So I'm going to guess you are going

12 to find cases that say, for instance, that the claims

13 themselves can be used in terms of assessing adequacy of

14 the written description. And I'm going to guess, I wasn't

15 familiar with the document, I never read that case, never

16 heard of it, that it probably is looking at originally

17 filed claims to assess whether there was a disclosure that

18 was adequate with the application.

19 **MR. VORONOV:** And -- well, what we're trying to

20 point out is the difference in the claim, the fact that

21 the housing that defines limitation was added and is

22 different from the originally filed claims. That's

23 relevant to the jury's analysis.

24 **THE COURT:** No, no. Yeah, you have to show

25 that the patent that's issued, that its written

1523

1 description is inadequate. That's what you have to show.
2 So the housing limitation is in the patent
3 today.
4 **MR. VORONOV:** It is.
5 **THE COURT:** So the fact that it wasn't in, why
6 is that relevant? It didn't come in until midstream. Why
7 is that relevant?
8 **MR. VORONOV:** We're trying to show the delta
9 between what was originally filed and what was ultimately
10 granted.
11 **THE COURT:** You know what, actually, we can't
12 spend any more time on it. On the adequacy of the written
13 description, you have not established it at all, and
14 that's not good enough.
15 Really, I thought the only issue left was on
16 whether Meinhart could testify with respect to the
17 damages, and the issue is where is it in his report.
18 That's what I thought we were going to address when we
19 came out here.
20 Did you find it in his report?
21 **MR. VORONOV:** So, Your Honor, when we looked,
22 we didn't find that issue and so we're willing to abandon
23 it.
24 I have one other case cite for Your Honor.
25 **THE COURT:** Okay, but I'm not going to hear it

1525

1 document to move into evidence, which is a Magnolia
2 drawing called "Button in Gate Steripath Micro."
3 I take it in your work you have seen production
4 drawings before for parts?
5 **A.** Yes.
6 **MR. LoCASCIO:** We offer PTX-178, Your Honor.
7 **THE COURT:** Any objection?
8 **MR. RAMANI:** No objection, Your Honor.
9 **THE COURT:** It's admitted.
10 (Exhibit PTX-178 admitted into evidence.)
11 **BY MR. LoCASCIO:**
12 **Q.** Okay. I want to -- just a couple more questions
13 about the Micro. Okay. So we can level set where we are.
14 And so the version of the Micro -- this was the one
15 from Mr. Ramani. I took it out of this envelope, like you
16 did. I've just got some questions because I have some
17 notes from when you gave the -- call it a demo, when you
18 explained it to the jury.
19 And as the Micro is sold, it has both a syringe
20 sometimes on the end, correct?
21 **A.** That's correct.
22 **Q.** Or it has something -- did I hear you call it a
23 transfer cap; is that right?
24 **A.** We call them transfer adapters.
25 **Q.** Thank you. Transfer adapter.

1524

1 now because you didn't know the answer to that question.
2 **MR. VORONOV:** Understood, Your Honor.
3 **THE COURT:** I mean, we just have to move on.
4 I'm sorry.
5 Are you ready to bring the jury in?
6 **THE COURT:** By the way, does Kurin agree about
7 my guess as to what that case said?
8 **MR. LoCASCIO:** When you were saying it, that
9 was my assumption. We didn't get a copy. I don't know
10 the case, but that was my assumption. I don't know if he
11 had the same.
12 **MR. McELDOWNEY:** Yes.
13 (Jury enters the courtroom at 1:09 p.m.)
14 **THE COURT:** Is the witness on the stand?
15 **MR. RAMANI:** He was. Can I go get him?
16 **THE COURT:** Oh, yeah. Please. Go ahead.
17 (The jury enters the courtroom at 1:10 p.m.)
18 **THE COURT:** Lunch was good, I hope. I know we
19 ordered it particularly for you all. Appreciate it.
20 Please have a seat.
21 Mr. LoCascio.
22 **MR. LoCASCIO:** Thank you.
23 **BY MR. LoCASCIO:**
24 **Q.** Mr. Gaw, right before the break we spent some time
25 talking about the button. I just want to show you a

1526

1 And those are blood sample collection devices, right?
2 That's what those things are?
3 **A.** Yes.
4 **Q.** And the other end has a patient needle typically, as
5 sold by Magnolia, correct?
6 **A.** There's a variety of inlet accessories.
7 **Q.** But one of them includes a patient needle, fair?
8 **A.** One of the configurations is a needle, yes.
9 **Q.** And as you walked through it, you said, my notes say,
10 you apply a pressure to the syringe and you kind of -- you
11 didn't pull this one down, but you sort of gestured that
12 you pull down on the syringe; is that correct?
13 **A.** I don't know my exact words but, yes, you pull back
14 the plunger on the syringe.
15 **Q.** Just so we understand how this device works, the user
16 applies some force to this syringe, they pull back the
17 plunger, correct?
18 **A.** That's correct.
19 **Q.** And then that movement of the plunger back, because
20 it's a plunger, creates a vacuum on the other side of the
21 plunger, correct?
22 **A.** Yeah. The upstream side, correct.
23 **Q.** And then that vacuum force is applied from the outlet
24 port of the Micro, correct? That's where the outlet --
25 the vacuum force is applied at the outlet, correct?

1527

1 A. Yes, that's correct.

2 Q. And so this vacuum force -- are you familiar with the

3 term "drawing force"?

4 A. Yes, loosely.

5 Q. Is it roughly the same thing? Is another way of

6 saying vacuum force or drawing force, something pulling

7 something out?

8 A. A vacuum could be, by itself. That has nothing to do

9 with drawing anything. But I understand the question.

10 Q. Okay. So I said vacuum force or drawing force, you

11 wouldn't -- you would understand those could mean the same

12 thing in a product like this?

13 A. In this context, yes.

14 Q. Okay. And so the user applies some kind of drawing

15 force from the outlet port of the Micro, correct, sir?

16 A. That's correct.

17 Q. And then that drawing force applied from the outlet

18 ultimately results in the -- while the button is in its

19 initial state, out, results in the bladder being flipped

20 and then the first portion of blood filling the Micro

21 containment channel, fair?

22 A. Yes, that's correct.

23 Q. So the blood gets into the collection channel when

24 the button is out because the user applies a drawing force

25 from the syringe or from the outlet port, agreed?

1529

1 sort of the concepts that became the Micro or the patented

2 concepts.

3 Do you recall that?

4 A. I do.

5 Q. Okay. I just want to look at a couple of things.

6 The jury has seen a lot. I'm not going to go over

7 them all with you. I just want to show you a couple of

8 documents from that time frame.

9 MR. LoCASCIO: Can you pull up DTX-102, which

10 is in evidence.

11 BY MR. LoCASCIO:

12 Q. So before we blow it up, can you see on the screen,

13 sir, it's an e-mail exchange. It involves three people:

14 Shan Gaw, Jay Miazga, and Greg Bullington, and its subject

15 line is "Passive."

16 Do you see that?

17 A. Yes, I do.

18 Q. And this is from January of 2017. And you know, sir,

19 that at that time, you and Mr. Miazga and Mr. Bullington

20 were all talking about the new release of the Kurin Lock,

21 correct?

22 A. I'm just reading the rest of that e-mail. I don't

23 know what the subject was.

24 Q. Okay. Let me show you, sir. I don't know if this is

25 one that you looked at or not when you were spending some

1528

1 A. The only way for the blood to get in is if that

2 bladder flips.

3 Q. But the bladder flips because you pull the syringe

4 and apply the drawing force from the outlet, agreed?

5 A. In a perfect scenario, yes.

6 Q. As the product is intended to work, the user applies

7 a drawing force from the outlet and the causal effect of

8 that is blood flows into the containment channel and into

9 that bladder, agreed?

10 A. Yes. The bladder flips and then blood comes in.

11 Q. And if we look here -- I'm going to pull the

12 plunger -- you see there -- sort of visually, can you see

13 a change inside the -- inside the containment channel

14 every time I pull it and push it in?

15 Do you see that?

16 A. Yes, I do.

17 Q. Is that the bladder flipping back and forth?

18 A. Yes, it is.

19 Q. And that bladder flipped because I applied a drawing

20 force from the outlet port, correct?

21 A. Yes, that's correct.

22 Q. Okay. You talked about the developmental process on

23 direct examination with respect to the body of work. You

24 said you did this body of work in 2011 and then you kind

25 of continued that work and that led, in your testimony, to

1530

1 time with the lawyers this week but let's go to the bottom

2 one in the chain.

3 Actually, if you have it on the screen, it's more

4 efficient that way.

5 MR. LoCASCIO: Mr. Urban, can you go to the

6 last e-mail from Mr. Gaw. And take the bottom of the --

7 yeah, perfect. The bottom of that, the page before and

8 the top of that page. Okay.

9 BY MR. LoCASCIO:

10 Q. Okay. So on Jan. 19, 2017, you sent an e-mail titled

11 "Passive" to Mr. Miazga copying Mr. Bullington. "Do you

12 have sometime tomorrow to chat on the phone about

13 prototyping the passive device? Been thinking about a few

14 variables we'll want to play with to better characterize

15 the functionality performance of this concept. Thank

16 you."

17 You sent this e-mail on Jan. 19, 2017, to

18 Mr. Bullington and Mr. Miazga, correct, sir?

19 MR. RAMANI: Your Honor, objection. Beyond the

20 scope.

21 THE COURT: Overruled.

22 MR. RAMANI: Thank you.

23 BY MR. LoCASCIO:

24 Q. Can you answer my question?

25 A. Can you repeat the question?

1531

1 **Q.** Of course I can, sir.

2 On Jan. 19, 2017, you sent this e-mail that we're

3 looking at, DTX-102, to Mr. Miazga and Mr. Bullington,

4 true?

5 **A.** That's what it looks like, yes.

6 **Q.** And you called the message, the subject of the

7 message was "Passive," and you refer to in the body of the

8 e-mail, "prototype passive device," and -- and you wanted

9 to prototype it to "better characterize the functionality

10 and performance of this concept."

11 That concept was the Kurin Lock, agreed?

12 **A.** The concept was to simulate as best we could some of

13 the geometry of the Kurin Lock.

14 **Q.** You wanted to prototype the Kurin Lock, correct, sir?

15 **A.** We were looking to develop a proxy for the Kurin

16 Lock, correct.

17 **Q.** Because, at this point, you all -- the product

18 Magnolia had was the Gen2 product, correct, sir?

19 **A.** Yes, that was the only commercial product at the

20 time.

21 **Q.** And you didn't have an understanding of how or the

22 designs for anything like a Kurin Lock at the time, did

23 you?

24 **A.** We didn't have a commercial device, correct.

25 **Q.** You didn't even have designs for such a passive

1533

1 **BY MR. LoCASCIO:**

2 **Q.** And he included a photo -- or a drawing -- pardon me.

3 Withdrawn.

4 His e-mail included a rendering of the prototype of

5 the Kurin Lock you all were making at Magnolia, correct?

6 **A.** For this particular effort, yes, we were trying to

7 characterize the performance of that product.

8 **Q.** And let's look at Mr. Bullington's response. It's

9 the e-mail with the redaction in it.

10 **MR. LoCASCIO:** Blow that up. This page is

11 fine. I want to see the first paragraph first. Thank

12 you.

13 **BY MR. LoCASCIO:**

14 **Q.** Mr. Bullington sends a response, still same day.

15 It's like within an hour of Mr. Miazga's e-mail. "This

16 looks great and I really appreciate the sense of urgency."

17 He sent you that e-mail, right? You knew this was an

18 urgent issue in his mind?

19 **A.** Based on the e-mail, that's what I recall.

20 **Q.** And then it says -- Mr. Bullington is saying he,

21 "spent an inordinate amount of time thinking about how

22 this could/should impact our go-forward product

23 development and commercial strategy."

24 Do you see that?

25 **A.** I do.

1532

1 system at all, did you?

2 **A.** We had not explored a passive system in great detail.

3 It was discovered and first talked about in 2011 with some

4 of the early concept work.

5 **Q.** Okay. You think this was stuff you knew and had

6 kicked around back in 2011, that's your testimony?

7 **A.** For a passive diversion device, yes, we had concepts

8 that included a vent to ambient.

9 **Q.** Okay. So let's look at the next e-mail in response

10 to that from Mr. Miazga to you.

11 So that -- your e-mail was at 2:30. Within an hour

12 and a half, Mr. Miazga sends you an e-mail back. And it

13 says: "Two SLAs of the device. Based on what I could

14 guess of the geometry from pictures and the video. Will

15 ship overnight tomorrow."

16 What's an SLA, sir?

17 **A.** That's an acronym for stereolithography. It's a

18 rapid prototyping. Kind of think of 3D printing.

19 **Q.** So in 2017, you rapidly made a prototype of a Kurin

20 Lock, correct, sir?

21 **A.** This was a proxy that, as best we could, get closer

22 to the geometry, as Jay explained.

23 **MR. LoCASCIO:** Can you show me the rest of his

24 e-mail, Mr. Urban?

25

1534

1 **Q.** Now, at this point the product development strategy

2 at Magnolia was always more diverted blood was better to

3 reduce contamination, right?

4 **A.** I don't know that I would characterize it that way.

5 **Q.** Are you familiar, sir, with the study article that

6 Dr. Patton did which had a volume of blood of 1 1/2 to

7 2 milliliters? We referenced it on direct. Are you

8 familiar with that study?

9 **A.** I don't know the exact study. What I referred to was

10 a body of data that -- a histogram of different diversion

11 volumes. That's what I was referring to.

12 **Q.** Between 1 1/2 and 2 milliliters, correct?

13 **A.** The data that I was referring to showed --

14 demonstrated clinical efficacy between a half milliliter

15 and 3 milliliters.

16 **Q.** Well, up to three.

17 Is that a yes?

18 **A.** That's correct.

19 **Q.** Do you know that at the time, the thinking from

20 Dr. Patton and Mr. Bullington was even more than 2 would

21 be even better to reduce contamination, meaning

22 2 milliliters?

23 **A.** I don't know that we had a direct conversation about

24 that specifically, but I know in the data that I was just

25 referring to, we had more draws, more data in that range.

1535

1 So it's just like a bell-shaped curve. We had more data
2 in that range, and so we chose to pursue that specific
3 diversion volume first to prove out clinical efficacy.
4 **Q.** And you, being Magnolia -- withdrawn, since you are
5 not a Magnolia employee.
6 Magnolia launched a product with 1 1/2 to
7 2 milliliters of blood, and now .5, which is the Micro, to
8 1.
9 As far as you know, there have been no commercialized
10 Magnolia products that use less than .5 milliliters of
11 blood, fair?
12 **A.** That is a true statement.
13 **Q.** Let's look at your next e-mail, because you respond
14 to Mr. Bullington.
15 And you were saying to Mr. Bullington, "Excellent
16 idea to consider passive solutions and concepts to move
17 diversion closer to the needle, if not in the needle
18 itself."
19 Your next sentence is the one I really want to ask
20 you about. It say, "This definitely should be
21 incorporated into planning ideas, specifically to capture
22 IP."
23 Did I read that correctly?
24 **A.** That's what it says here.
25 **Q.** When you look at -- "capture IP" meant try to get

1537

1 **A.** I agree.
2 **Q.** Okay. And you say we should, "Let's get some
3 patents." But then you say, "Before spending time and
4 resources on a concerted effort to actually develop
5 concepts around this idea, we need to better understand a
6 few things."
7 That's what you wrote, correct?
8 **A.** That's correct.
9 **Q.** And the first section of this was characterizing the
10 existing passive device to understand it. That's the
11 Kurin device that you had just prototyped, correct?
12 **A.** That is the prototype that has similar geometry.
13 **Q.** To the Kurin device?
14 **A.** To the Kurin device.
15 **Q.** And by characterizing the existing device, you were
16 trying to figure out if and how it works, first point,
17 fair?
18 **A.** That's what it says.
19 **Q.** Second point, what variables affect the performance
20 of the device, correct?
21 **A.** That's correct.
22 **Q.** And before you had even understood if or how it
23 worked, what variables affect performance, you were
24 already thinking we should start growing, file some
25 applications to grab some patents, weren't you?

1536

1 some patents, agreed?
2 **A.** I think that's one element, yes, is to secure
3 patents.
4 **Q.** So as of January 22 -- you say this is the next day?
5 Actually, the 19th was a Thursday. This is the 22nd.
6 This is Sunday. You send a message back and say, "Okay.
7 We should incorporate the Kurin Lock ideas into our
8 planning activities. Specifically to capture or get some
9 patents."
10 That's what you said within three days of this e-mail
11 exchange about the Lock, right?
12 **A.** This doesn't include anything about Kurin's products.
13 This is talking about different passive solutions.
14 **Q.** Let's look at -- before you could even -- can we
15 agree, high level, you should have ideas of your own
16 before you try to get IP or patents on those ideas? Can
17 we agree on that principle?
18 **A.** I would agree with it.
19 **Q.** And if it's somebody else's idea or product, you
20 don't think that's something you should claim you
21 invented, agreed?
22 **A.** Passive solutions we had explored in 2011.
23 **Q.** If you could answer my question, sir.
24 Do you agree with this concept: You shouldn't take
25 credit for other people's work?

1538

1 **A.** This is in the broader context of just passive
2 solutions, not this device specifically.
3 **Q.** Can we agree sir, that the e-mail chain starts
4 because the Kurin Lock is launched, you prototyped their
5 devices. Mr. Bullington thinks it's urgent, and then you
6 say, hey let's go get some IP.
7 Do I have the chronology, right?
8 **A.** The chronology matches, yes.
9 **Q.** Okay.
10 Let me show you one or two more in this timeline.
11 Can you go to DTX-243, please. Hang on.
12 Do you have DTX-243 in your binder, sir? It's the
13 cross binder. I think you have two binders, but if it has
14 a 243 tab, you're in the right binder.
15 **A.** I have that here.
16 **Q.** Okay.
17 This is an e-mail from you to Mr. Miazga, correct?
18 **A.** Yes.
19 **MR. LoCASCIO:** We offer DTX-243, Your Honor.
20 **MR. RAMANI:** Objection, Your Honor, it's 402,
21 403 at this point. Really beyond the scope.
22 **THE COURT:** The scope was pretty broad, you
23 know.
24 I'm going to let this in.
25 **MR. RAMANI:** Thank you, Your Honor.

1539

1 **THE COURT:** It's admitted.

2 (Exhibit DTX-243 admitted into evidence.)

3 **BY MR. LoCASCIO:**

4 **Q.** So remember the timeline we were on a bit ago, 19th,

5 January 19 e-mail chain started. It's called "Passive."

6 On the Sunday you sent the e-mail about getting some

7 IP, that's the 22nd. This e-mail is later in time, now a

8 couple days later. Can we start with the original e-mail,

9 which is to Mr. Gaw from Mr. Miazga. Right there.

10 So on Friday of that week, Mr. Miazga sends you an

11 e-mail. Sounds like he's saying "I don't have time to

12 talk right now about the passive prototype."

13 But then on the right side of the second sentence, he

14 says, "Putting a BD needle on the input does not come

15 anywhere close to mimicking the Kurin device."

16 So now a week out, you're working on the prototype to

17 try to mimic the Kurin device with Mr. Miazga, agreed?

18 **A.** That's correct.

19 **Q.** And if we can scroll down one more paragraph below.

20 Here you go.

21 I'm trying -- Mr. Miazga here, "I'm trying to think

22 through the experimentation before I just start trying

23 shit."

24 He wanted to think about what tests you guys should

25 run and what you were trying to figure out before he did

1541

1 looking at another device, there are some advantages of

2 doing things that they're not doing. There are lots of

3 different reasons, not necessarily to patent this specific

4 work.

5 **Q.** So hang on a second. Are you saying that you think

6 there's a lot of reasons you might want to look at your

7 competitors' products when you're drafting your patent

8 applications? Is that what you said?

9 **A.** I think across the board, it's generally common

10 practice to look at competitors' products in any field,

11 any industry.

12 **Q.** Are you aware, sir, that during the time where your

13 patents in this case were being prosecuted, folks at

14 Magnolia were taking CT scans of the Kurin Jet?

15 You know that?

16 **A.** I'm not aware of the CT scans, no.

17 **Q.** You know they were looking at the Jet when these

18 patents were being filed at Magnolia, though?

19 **A.** I don't know the timeline of that.

20 **Q.** Okay. Last document I want to ask you about, sir,

21 was -- we sort of went in reverse chron order.

22 You started with, I think you called it a couple of

23 times, your kind of body of work at Magnolia starting in

24 2011.

25 Remember that?

1540

1 it on the chance that it only might work once, right, like

2 it might be a once-and-done-test?

3 **A.** That's how I interpret that, yes.

4 **Q.** Because you were trying to mimic the Kurin device and

5 there was some question, okay, unlike your products, it

6 had a seal or a plug, and there was some concern that if

7 you filled it with fluid, it might not react the same way

8 the second time, fair?

9 **A.** I don't recall exactly, but, yes, that's how I

10 interpret the e-mail.

11 **Q.** Then if you look at your e-mail at the top.

12 You told him, "Spot on. This first prototype might

13 only work once as intended. And then whatever residual

14 fluid would change the dynamics."

15 Because in January of 2017, you and Mr. Miazga, and

16 in correspondence with Mr. Bullington, were all working to

17 try to figure out how the Kurin device worked and how you

18 could respond to it competitively, agreed?

19 **A.** We were working on characterizing its performance.

20 **Q.** And during this timeframe where you still -- you

21 haven't even run the tests yet to figure out how it works.

22 This is a week after, just shy of a week after you had

23 already said, "Hey, maybe we should go file some patents,"

24 right?

25 **A.** The approach on intellectual property, just by

1542

1 **A.** That's correct.

2 **Q.** And you showed a document that is PTX-15.

3 **MR. LoCASCIO:** Pull that up, Mr. Urban.

4 **BY MR. LoCASCIO:**

5 **Q.** And PTX-15 has the sort of final concepts or choices

6 to pick which design the company wanted to go with based

7 on its original ideas way back in 2011, correct?

8 **A.** That's correct.

9 **Q.** So if we could, could you go to the next slide. We

10 will flip through this for a second. We won't do all of

11 them.

12 Concept one, Mr. Miazga. So before we flip it, do

13 you -- we talked about the number of parts in these

14 products. You have a design engineering degree.

15 Do you agree with me the design of the Lock and the

16 Jet is a simpler design than the design of at least the

17 Gen2 product from Magnolia? Can we agree on that?

18 **A.** They have fewer parts. I would agree with that.

19 **Q.** And one of the things folks with a degree like yours

20 do -- there's a lot of them at places like Apple -- to

21 make things sort of seem, they would say, elegant looking,

22 right? Like an elegant design versus just a functional

23 design.

24 You are familiar with that concept?

25 **A.** Yeah. Broad terms, sure.

1543 1 Q. You agree with me that the Kurin Lock and the Kurin 2 Jet designs compared to the Gen2 and even the Micro, would 3 you agree as a design engineer those are more elegant 4 designs? 5 A. I don't know that I would characterize it that way. 6 Q. Okay. Do you think that the Magnolia Gen2 and the -- 7 let's start with that -- is a more elegant design than the 8 Kurin Jet or Lock? 9 A. I don't know that I thought of that opinion either 10 way, comparing the two products. 11 Q. You have been designing products for 20 years, and 12 you can't answer the question? 13 A. I think there's some subjectivity there, for sure. 14 Q. Let's take your subjective opinion. 15 Which one is the more elegant design? 16 A. I think from a usability perspective, the Gen2 17 product is more elegant. 18 Q. You think the squeeze one is more elegant? 19 A. That's correct. 20 Q. Okay. Well, let's look at some of the other ideas. 21 Let's go to the next page, Mr. Miazga. 22 So this is the first design in the list, and do you 23 know who Rube Goldberg is? 24 A. I do. 25 Q. It means a really complicated thing that could be	1544 1 done a lot simpler, fair? 2 A. I think that's what it's turned into, yes. 3 Q. You see this guy at the top, it has two -- actually, 4 kind of a third plunger in it, and then what I would 5 describe as a cam in yellow that's going to rotate based 6 on the pressing of the brown lever. 7 You see that? 8 A. Yes. 9 Q. And you agree this is a complicated design idea, 10 right? 11 A. I don't know that I would characterize it as 12 complicated. 13 Q. It does say, though, right under there, in cons, 14 "high part count." 15 You see that? 16 A. I do. 17 Q. It's using a lot of parts to try to accomplish 18 something, blood diversion, correct? 19 A. This particular concept, just as drawn up, has a high 20 part count, I think is what the statement is. 21 Q. Let's go to concept two, the one you talked about. 22 It's yours. Let's look at that one. 23 Can we agree that your designer approach is more 24 elegant? This is quite a nice slide you put together to 25 show your feature.
1545 1 You created this at your business, Gaw's Design, 2 right? 3 A. I did create this, yes. 4 Q. This is the concept squeeze. I think you said 5 this -- in words or in substance, correct me if I'm wrong, 6 this sort of became the Gen2, this idea right here; is 7 that fair? 8 A. The general architecture, I think, is what I said. 9 Q. Well, let's look at how you designed this. 10 So it's got some pluses and some minuses. The plus 11 says one hand operation, low part count, and some others. 12 Agreed? 13 A. I see that, yes. 14 Q. The one under it, the minus, says not fully 15 integrated because the Gen2 -- well, withdrawn -- because 16 the concept squeeze was not fully integrated as a device, 17 right? It was not all-in-one housing or anything like 18 that, correct? 19 A. That's what that's intended, yes. 20 Q. It says negative patent opportunities. 21 So at the time when you created this slide, you at 22 least thought this concept squeeze idea, you might not be 23 able to get a lot of patents on that, correct? 24 A. I think as an engineer it is pretty common for us to 25 not necessarily think the things that we are discovering	1546 1 and inventing are novel, so this is, I think, a common 2 statement that I think would show up for a lot of 3 engineers. 4 Q. So in your dealings, you, on one side, as you just 5 said, maybe a little more humble about what's patentable 6 and what's not. 7 Now, when you were dealing with Mr. Bullington -- 8 now, is it fair to say that Mr. Bullington has been 9 historically much more bullish about, "Hey, let's file 10 more patent applications on these, we think we can get 11 even more patents on these," fair? 12 A. I think there is a difference between the two of us, 13 for sure, with respect to IP. 14 Q. Meaning, your view is we should file less IP or 15 certain things aren't patentable, his view being we should 16 file more patents and more things are patentable? Do I 17 understand that distinction you just identified? 18 A. It's probably a fair characterization that there is a 19 difference between the two. 20 Q. So if we look at your concept squeeze -- 21 MR. LoCASCIO: Can we turn to the next slide. 22 BY MR. LoCASCIO: 23 Q. I don't know that you showed this one. 24 Your idea from 2011, it looks a lot nicer than the 25 first version. But can we agree it's also got a not small

1547 1 number of parts in here? 2 A. I count six parts. 3 Q. And two of them are neodymium -- 4 Did I get that word right? 5 A. That's correct. 6 Q. Neodymium magnets. One is neo- -- no, they're both 7 magnets. Two neodymium-plated magnets. That was in your 8 idea that you told the jury about, right? That was the 9 genesis according, apparently, to the Gen2? 10 A. A lot of the architecture, yes, was leveraged in 11 order to create Gen2 and Gen1 products. 12 Q. Can we agree that your concept squeeze with the 13 neodymium magnets, to use those to help with the blood 14 draw, that's not in any Magnolia product, right? 15 A. Correct. There are no magnets in any of the devices. 16 Q. Now, all these designs, and there are others in the 17 dep- -- 18 MR. LoCASCIO: Let's go actually one more slide 19 forward, slide -- Page 7. 20 BY MR. LoCASCIO: 21 Q. All of these were using large volumes of blood, 22 right? Yours was 1 1/2 to 3 milliliters for the initial 23 diversion or waste blood, correct? 24 A. Yes. It was conceptualized. I think I accounted for 25 in the design to accommodate kind of that range.	1548 1 Q. So there are others. They are all -- we can debate 2 the degrees of Rube Goldbergness of them, but let me just 3 turn you to the last one, which is Concept 9, if you go to 4 Slide 41. 5 You have not been here, but there has been a lot of 6 discussions about ideas from a Dr. Patton. You referenced 7 him during your direct examination. 8 In this 2011 concept selection, everybody's idea is 9 put them on the table, let's see what people came up with. 10 Let's look at what Dr. Patton's concept was. 11 Dr. Patton's concept, as disclosed in the Magnolia 12 work from 2011, had three steps. Step 1, this is 13 basically a transfer housing with a needle that you put a 14 vacutainer in, correct? 15 A. That's correct. 16 Q. Step 1, product sterile with BD needle of appropriate 17 size attached. 1. Okay. 18 2, twist, push, and fill, meaning insert a 19 2.5-milliliter vacutainer that's sterile onto the needle. 20 That's Step 2, correct? 21 A. That's correct. 22 Q. And it would fill up with blood, because it would be 23 2.5 milliliters, agreed? 24 A. That's correct. 25 Q. And then take it off, throw it out, and you twist and
1549 1 remove diversion tube, device ready for culture bottles. 2 Step 3, correct? 3 A. That's what it says, yes. 4 Q. And so this Step -- three-step concept at Magnolia in 5 2011 that was in the discussion, Richard Patton's 6 December 7, 2011, contribution was use waste vials or 7 waste tubes to divert the first portion of blood, agreed? 8 A. That's what the concept is as shown here. 9 Q. And it was described as very low cost, about 25 cents 10 or less; low tech, he gives it two explanation points; 11 proven practical application, and you could control the 12 pressure because this would be a passive device, right, 13 sir? 14 A. Just to clarify, we've talked about passive in terms 15 on what allows the blood to flow, so I don't want -- I get 16 confused -- 17 Q. Okay. Appreciate that. Let me ask it more simply. 18 You talked earlier about with a vacutainer, that's 19 going to put pressure -- creates negative pressure and so 20 you might want to, call it govern or mitigate that, and 21 that's one of the things you talked about in connection 22 with your bladder, right? 23 A. That's correct. 24 Q. Okay. 25 A. It's pressure modulation.	1550 1 Q. In 2011, Dr. Patton's Point 3 was you could control 2 the pressure by crimping the line, sort of like if I -- 3 you know, you're washing the car and you don't have -- I 4 never have the sprayer part, I just have the hose, and you 5 can sort of crimp when you -- you don't want the water to 6 spray where you just seal it off. Like you could 7 basically plug it by bending it, correct? 8 A. Understood. 9 Q. And then at the end, if you want to control the flow, 10 you sort of put your thumb on the end to spray the water 11 far enough to the car, right? You could control the 12 pressure by crimping it and that's sort of something 13 people have been doing for a long, long, long time, right? 14 A. That's what he's put down here, yeah. 15 Q. Okay. And so as of the 2011 brainstorming session, 16 Dr. Patton's idea was we should use waste tubes, correct? 17 A. I believe this is one of his ideas, yes. 18 Q. Okay. And in this slide deck we have, it's the only 19 one attributed to him, correct? 20 A. As part of the final concept selection, yes. 21 Q. Okay. So of the ones that made it to the end, this 22 was his. What we see in example Concept 9 in PTX-15, this 23 was Dr. Patton's submission or contribution to the design 24 process, agreed? That made it that far? 25 A. Of the concept that he worked on directly, yes.

1551

1 Q. Okay.

2 MR. LoCASCIO: No further questions, Your

3 Honor.

4 THE COURT: All right. Redirect.

5 MR. RAMANI: Yes, Your Honor. Just letting my

6 colleague clean up a little bit.

7 THE COURT: Sure.

8 REDIRECT EXAMINATION

9 BY MR. RAMANI:

10 Q. Mr. Gaw, good afternoon.

11 A. Good afternoon.

12 Q. Why don't we begin right where Kurin's lawyer left

13 off.

14 MR. RAMANI: Let's go to PTX-15, Mr. Smith.

15 BY MR. RAMANI:

16 Q. And it's in your binder as well, Mr. Gaw, if you

17 would like to look at it there.

18 You were asked some questions about this final

19 concept selection prototype document. Do you remember?

20 A. I do.

21 Q. You mentioned during, I think, a few of your answers

22 that Magnolia Medical and you had been working on passive

23 solutions since 2011.

24 Can you identify any passive solutions in PTX-15?

25 And when you come to one, please just let us know the PTX

1553

1 basically allows blood to flow through from the inlet up

2 here through that outlet, bypassing all of the stuff that

3 was previously collected.

4 I think Slide 14 may also show that.

5 Q. What's shown here on Slide 14, Mr. Gaw, related to

6 the vented diverter concept in PTX-15?

7 A. This is a cross-section of what I was just describing

8 previously. So this is -- this vent allows air to escape,

9 it prevents blood from escaping. But then it just says,

10 "Once reservoir is full, that back pressure prevents

11 further blood flow."

12 The umbrella valve itself is showing up here. Again,

13 this is what happens when that blood volume starts to fill

14 up, that volume fills up and then basically closes that

15 valve. That vent allows -- you can see here, that vent

16 allows culture bottles here. Once it gets connected, it

17 just goes through this. So here's the initial specimen

18 over here, and over here in that cross-section then,

19 here's that sampling channel.

20 Q. Thank you, Mr. Gaw. You can set that document aside.

21 MR. RAMANI: Mr. Smith, can we please pull up

22 DTX-102 and Page 2 specifically. Would you blow up the

23 e-mail from Mr. Gaw near the top of the page, please.

24 BY MR. RAMANI:

25 Q. So, Mr. Gaw, you were asked some questions about this

1552

1 page number and we can put it on the screen.

2 A. The start of that concept is on Page 10.

3 Q. Is it up here, "concept vented diverter"?

4 A. That's correct. And it ends on 16.

5 Q. Would you please describe this concept?

6 A. It might be easier on another --

7 Q. Do you want to direct us which slide to go to

8 Mr. Gaw?

9 A. Yeah, if you don't mind. On 11. We can start on 11.

10 The way this works, and again, this is an exploded view

11 and so --

12 Q. Would you like a pointer, Mr. Gaw? You have it up

13 there still?

14 A. I have it here, yeah.

15 So this is an exploded view. But really how it works

16 is blood enters this collection volume, and what's shown

17 here is the lower housing. And it happens because there's

18 a hydrophobic air vent is what is shown here. So, again,

19 this allows air to escape. So you need to exchange -- if

20 you're going to bring something in, the fluid or blood in

21 this case, you have to evacuate that area. And so that's

22 the purpose of this.

23 And then as this starts to fill down below, it then

24 pushes up against an umbrella valve that you see there.

25 And then that kind of like closes off this area and then

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1 January 2017 e-mail that you sent. Specifically, the

2 second sentence. "This definitely should be incorporated

3 into planning activities, specifically to capture IP."

4 And in connection with this, you said that you and

5 your colleagues were looking to develop a proxy for the

6 Kurin Lock.

7 Can you explain what you meant?

8 A. Yeah, we were trying to mimic some of that geometry

9 and then better understand how the device performs. So we

10 were doing several different sort of performance benchmark

11 tests.

12 Q. Now, you were asked a lot of questions about passive

13 devices and passive projects and the like.

14 Does the Argyle project that led to the Steripath

15 Micro, does that have anything to do with passive device

16 development?

17 A. None of our products include a passive solution.

18 MR. RAMANI: You can take that down, Mr. Smith.

19 BY MR. RAMANI:

20 Q. Now, you were asked a question, "More diverted blood

21 is better," and you said, "I wouldn't quite put it that

22 way."

23 Please explain. Why not?

24 A. I think I had mentioned early on, Dr. Patton built a

25 whole body of work really based on science that helped us

1555 1 establish the foundation, what this concept should be or 2 what the technology really is, and it is about diverting 3 the initial specimen. 4 In the work that he did -- I think I had mentioned 5 kind of a histogram. So basically, if you imagine just 6 kind of a bell-shaped curve, those are a lot of data 7 points, and so then we would have some information on how 8 many draws did we do that included 1 milliliter or 9 2 milliliters or half a milliliter up to 3 milliliters. 10 And I think we took the position that we -- the work 11 that he did demonstrated clinical efficacy in a manual or 12 very manual process and, again, this was on tens of 13 thousands of draws on people. And so we relied on kind 14 of, well, where do we have the most data, and that was 15 really the driver to begin with. 16 So we chose to stay in an area that we thought if we 17 go and productize this technology into a thing that people 18 can interact with, I think the reasonable approach, the 19 position that we took, and I contributed to it as well, 20 which is let's go in an area or zone that we have got a 21 lot of data on that says yes, this shows that we can 22 reduce contaminants in blood cultures. And so that's why 23 we chose that volume. 24 Q. Mr. Gaw, would you please turn to PTX-61. It will be 25 shown on the screen.	1556 1 I had asked you some questions about this Argyle 2 document, and Kurin's lawyer asked you some questions 3 about it. 4 Let's turn to Page 16, please. 5 Do you remember you were asked some questions about 6 the bullet that says "bladder" and the emoji face -- maybe 7 it is a meh face, I'm not sure -- next to it? Do you see 8 that? 9 A. Yes, I do. 10 Q. Let's go to the next slide that you weren't shown. 11 Would you please describe what's shown on this slide? 12 A. Yeah. I think that was -- we had demonstrated that 13 if you pull back on the syringe -- in this early concept 14 that's shown here, if you pull back the syringe and that 15 bladder deflects or flips to the other state -- and this 16 is what it says here, is that when you push back, it 17 doesn't return to that initial starting position. 18 Q. We saw Kurin's counsel demonstrating here with the 19 syringe and the Steripath Micro several times, pulling the 20 syringe, pushing it back maybe three, four times. 21 Is this a problem that was remedied? 22 A. Yes, we were able to solve the problem. 23 Q. Relatedly, you were asked some questions about how 24 pulling on the syringe causes the bladder to flip, and 25 then that causes the dirtier blood to enter the device.
1557 1 If you pull on the syringe and the bladder doesn't 2 flip, what happens? 3 A. Nothing would enter the device. And the same holds 4 true if you pull the syringe back really, really far, you 5 actually -- it won't keep doing -- it won't keep creating 6 the vacuum. As soon as that bladder flips, that volume of 7 air that we had talked about -- the syringe, when it pulls 8 back that same volume of air to match it, it stops. There 9 is no more vacuum that's being pulled. So you can keep 10 pulling on the syringe and nothing else will happen. The 11 same way that if you connect another vacuum source, it's 12 also limited by that bladder. 13 Q. Mr. Gaw, why don't we flip up in the same document, 14 PTX-61, to Slide 13. 15 You were asked some questions -- I asked you some 16 questions and Kurin's counsel asked you some questions 17 about this button. 18 When you were asked these questions, you testified, 19 "The button is required to form the sampling channel." 20 What did you mean by that? 21 A. I think -- I was asked to describe, you know, the 22 sampling channel, and I think the illustration that was 23 presented with the pen line drawing only is possible with 24 the presence of a button. So what we had discussed -- 25 Q. Maybe I can show that demonstrative to you.	1558 1 MR. RAMANI: Can I get the document camera, 2 please. Thank you. 3 BY MR. RAMANI: 4 Q. So, Mr. Gaw, you were shown this demonstrative, and 5 you said during questioning the button is required to form 6 the sampling channel. 7 What did you mean? 8 A. This line drawing that's just, again, pointed here, 9 annotated as sampling channel, the only way for that to 10 hold true is with this button in place and in this 11 position. Without it, that is not -- this is not true. 12 Q. You said "in this position." 13 What did you mean by that? 14 A. I think I described, when I was in front of you guys 15 with the product, it starts with the button that's out. 16 We call it the button, but the dark blue piece. And in 17 that position, there's a flow path that fills or helps 18 fill up using that bladder when the bladder flips. But 19 then once that's complete, I think I had mentioned to you, 20 you push the button that's the C, it gets filled up with 21 the blood, you push the button. It's only until you push 22 the button that the sampling channel opens up. Prior to 23 that, there is no sampling channel. So the button needs 24 to be in the second state, which is what's shown up here. 25 MR. RAMANI: Mr. Smith, can we pull up Column

1559 1 66 of the '081 patent, PTX-1, please. Would you blow up 2 from roughly Line 10 down through Line 60. Thank you. 3 BY MR. RAMANI: 4 Q. So Mr. Gaw, you were asked some questions about the 5 language -- 6 MR. RAMANI: You know, Mr. Smith, why don't you 7 blow up 10 through 34. 8 BY MR. RAMANI: 9 Q. So you were asked questions about this language while 10 the diagrams are described. You see that? And you 11 pointed to some figures. 12 Do you remember that? 13 A. I do. 14 Q. Would you read the rest of the sentence that you 15 weren't pointed to, starting at Line 16, please? 16 A. "In other embodiments, a fluid control device can 17 include any suitable actuator or the like configured to 18 transition, move, flip, and/or otherwise reconfigure in 19 response to being exposed to a desired and/or 20 predetermined amount of negative pressure." 21 Q. How, if at all, does that language relate to the trap 22 door invention of yours and Magnolia Medical's? 23 A. That precisely describes how that works. 24 Q. Thank you, sir. 25 MR. RAMANI: Your Honor, I have no further	1560 1 questions. 2 THE COURT: All right. You may step down. 3 Thank you. 4 Next witness. 5 While they are getting ready, let me just 6 explain to you how I do this. We time our trials. And so 7 remember I said yesterday, I thought we would be finished 8 maybe early? I'm not sure we're going to have that, but 9 the saving grace is that the time that's used today, you 10 know, they don't get to use next week. And I actually 11 think we have been moving fast, that we are going to be 12 earlier next week than originally I had explained to you 13 when we first came here on Monday. 14 The other thing is, the sidebars count as the 15 time, so all those sidebars count against, you know, both 16 sides. My staff, we divide up the time pretty evenly. 17 You want to take a break for water? 18 Next witness, please. 19 MR. VORONOV: Thank you, Your Honor. 20 Just brief housekeeping matter. Magnolia moves 21 to admit PTX-179, PTX-230, PTX-304, and DTX-0054B. 22 THE COURT: Any objection? 23 MR. McELDOWNNEY: No objection, Your Honor. 24 THE COURT: They're admitted. 25 (Exhibits PTX-179, PTX-230, PTX-304, and DTX-0054B)
1561 1 admitted into evidence.) 2 MR. VORONOV: Your Honor, Magnolia calls 3 Professor Carl Meinhart. 4 THE COURT: This is recall him, really, right? 5 MR. VORONOV: Yes, Your Honor. 6 THE COURT: Just want to make sure it's the 7 same one. 8 MR. VORONOV: Yes, Your Honor. 9 THE COURT: Identical twin or anything like 10 that. 11 All right. I'll remind you that you are under 12 oath, sir, all right? 13 THE WITNESS: Yes. 14 MR. VORONOV: Your Honor, if my colleague may 15 approach with the binders. 16 THE COURT: Please. 17 CARL MEINHART, having been called as a witness, 18 being previously duly sworn under oath, testified further 19 as follows: 20 DIRECT EXAMINATION 21 BY MR. VORONOV: 22 Q. Good afternoon, Professor Meinhart. 23 A. Good afternoon. 24 Q. Do you have slides to present today? 25 A. I do.	1562 1 MR. VORONOV: Mr. Smith, if you would please 2 pull those up. 3 BY MR. VORONOV: 4 Q. At a high level, what are the issues that you're 5 going to address today? 6 A. I'd like to have an opportunity to respond to 7 Dr. Antonsson's opinions about the infringement and 8 invalidity of Magnolia's patents, as well as provide my 9 own opinions about Kurin's patents. 10 Q. You were here for Dr. Antonsson's testimony? 11 A. I was. 12 Q. And did you agree with Dr. Antonsson's opinions as to 13 Kurin's non-infringement of Magnolia Medical's patents? 14 A. I do not. 15 Q. So let's address that. 16 To start off with, why are you showing this testimony 17 on Slide 4? 18 A. This is testimony I showed previously. This is from 19 Mr. Rogers. And he was asked about does the Jet -- about 20 how the Jet infringes the '081 patent or if it suggests to 21 him that it does. And his answer was: 22 "The third element is a movable plug disposed in the 23 housing? 24 "Yes. That suggests the Jet." 25 And what I was struck by is Dr. Antonsson did not

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1 refute that.

2 **MR. VORONOV:** So before I move on to the next

3 slide, Your Honor, I understand that there may be an

4 objection to an exhibit.

5 If I may have a brief sidebar.

6 **THE COURT:** Okay. Thank you. Remember, it

7 counts against them. I'm teasing. It's both sides. All

8 right? They are doing their job.

9 (Whereupon, the following occurred at sidebar:)

10 **MR. VORONOV:** So this concerns

11 Exhibit DTX-1091.

12 **THE COURT:** Okay.

13 **MR. VORONOV:** The three dots on the page. We

14 want to use this exhibit with Professor Meinhart as

15 rebuttal testimony.

16 **THE COURT:** Okay. Objection?

17 **MR. McELDOWNEY:** It's not in his expert report.

18 Also, it wasn't disclosed last night. More importantly,

19 it's not in his expert report, so I never had a chance to

20 depose him about it.

21 **THE COURT:** But was it in your expert report?

22 **MR. McELDOWNEY:** No.

23 **THE COURT:** Didn't you have your expert talk

24 about it?

25 **MR. McELDOWNEY:** I used this as an exhibit I

1565

1 highlighted here: "A pressure differential between a

2 movable plug and the outlet."

3 So the way I read that is it should be between the

4 bottom of the movable plug and the outlet. And then that

5 pressure differential encompasses the pressure

6 differential across the plug, which is what -- so this

7 combination is what actually moves the plug.

8 Dr. Antonsson opines that it should be the difference

9 between the top of the movable plug and the outlet. And I

10 think everyone agrees that there is no pressure

11 differential between the top of the movable plug and the

12 outlet that's capable of moving the plug. So I was struck

13 by that.

14 And so my reading, I think, is the correct one, that

15 it's the difference between the pressure at the bottom of

16 the movable plug and the outlet that moves it up, and

17 that's only way the physics works.

18 **Q.** And I was just showing your -- where you measured the

19 pressure.

20 But moving on to Slide Number 7, can you describe how

21 you -- how those pressure measurements, whether they were

22 consistent with Professor Antonsson's testimony -- excuse

23 me, Dr. Antonsson's testimony.

24 **A.** Yeah, I was surprised. Dr. Antonsson didn't present

25 any pressure data at all.

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1 created last Friday when I deposed Greg Bullington.

2 **THE COURT:** And they want to use -- oh, the

3 exhibit from the deposition itself, and he doesn't have an

4 opinion.

5 Yeah. You can't do that. You can have another

6 witness talk about it; i.e., Mr. Bullington probably, but

7 not this witness.

8 **MR. VORONOV:** Understood, Your Honor. Thank

9 you.

10 (Whereupon, the discussion at sidebar concludes.)

11 - - -

12 **BY MR. VORONOV:**

13 **Q.** Professor Meinhart, you've shown this slide before.

14 Why are you showing this slide again here?

15 **A.** In my opinion, Dr. Antonsson's non-infringement

16 opinion is contrary to the basic physics at hand.

17 **Q.** And why is that?

18 **A.** Well, what I'm showing here is a schematic of the

19 experimental apparatus that we talked about before. And

20 based upon all the testimony I've heard, Mr. Nason,

21 Dr. Antonsson, myself, we all agree that the movable plug

22 moves because there's a high pressure at 5 and a lower

23 pressure at 7, and that difference in pressure causes it

24 to move.

25 And so if you read the claim language that's

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1 And so -- so when you look at this graph, which we

2 all saw before, right?

3 So it's time on this access pressure here in PSI.

4 When the containment channel is filled and the plug or

5 valve is in its first position, there is no flow. So we

6 all agree that the pressure in this region is pretty much

7 uniform and the pressure up here is uniform. And so the

8 measurements at the transducer are actually the

9 measurements between the pressure at the bottom of the

10 movable plug and pressure at the outlet.

11 So -- so if you read the language that's highlighted

12 in this requirement, the movable plug configured to move

13 from a first position to a second position in response to

14 an increase in a pressure differential between the movable

15 plug and the outlet as a result of the volume of blood in

16 the containment channel.

17 So that's what we're seeing. So if you click to the

18 next slide, the pressure we measure, that difference

19 rises, it hits that threshold pressure and it moves to the

20 second position.

21 **Q.** What happens next?

22 **A.** And then what happens next is the last part of that

23 requirement: "Such that a subsequent volume of blood is

24 drawn from the inlet, through the sampling channel, to the

25 outlet."

1567 1 And we see exactly that happening. The subsequent 2 volume of blood is being drawn through the inlet, and from 3 the inlet, through the sampling channel and to the outlet. 4 Q. Let's continue to validity. What are your opinions 5 on the validity of Magnolia Medical's patents? 6 A. My opinion is that Magnolia Medical's patents are 7 valid. 8 Q. What are you showing on this next slide? 9 A. So here I'm showing the prior art and other 10 considerations for evaluating the validity of Magnolia 11 Medical's patents. 12 Q. So let's jump in. So first what are the materials 13 that you considered in performing your prior art analysis? 14 A. So the material that I considered for the prior art, 15 which are the references that come before the priority 16 date, is Rogers '445, the Kurin Lock device that was on 17 the market, Rogers '682, and Villa-Real. 18 Q. And what else did you consider as part of your 19 analysis? 20 A. The other part that I considered was witness 21 testimony from both Magnolia and Kurin, as well as Kurin's 22 expert reports, and also the patents in question -- 23 Magnolia Medical's patents and their corresponding file 24 histories. 25 Q. So which prior art should we address first?	1568 1 A. Let's address Rogers '445. 2 Q. So what prior art theory are you addressing in 3 connection with the Rogers '445 reference? 4 A. Sure. There's something called anticipation. And 5 anticipation of a patent happens if there's a single 6 reference, a single prior art reference that discloses all 7 the requirements of a claim. 8 Q. And what reference are you showing here on Slide 14? 9 A. This is the Rogers '445 reference. 10 Q. And what part, you know, of Rogers '445 are you 11 focused on here? 12 A. I'm going to be focused on Figure 24A through D, 13 which is what Dr. Antonsson focused on. And these are a 14 couple of figures that you may recall. 15 Q. So what are you showing on Slide 15? 16 A. So I wanted to look at what specific requirements in 17 Magnolia patents' claims that were not met in Rogers '445. 18 Q. So let's start with the first requirement, pressure 19 differential between the movable plug and the outlet. 20 What are you showing on Slide 17? 21 A. Yeah, so when you focus on the pressure differential 22 between the movable plug/valve and the outlet, the 23 independent claims of these three patents contain that 24 language, either "movable plug" or "valve." 25 Q. And what evidence are you analyzing on Slide 18?
1569 1 A. What I want to look at specifically is the Figures 24 2 out of Rogers '445, and the written text that goes along 3 with those figures to explain them. 4 Q. Why did you focus on this written text on Slide 18? 5 A. So if we read the text, "As the initial aliquot of 6 blood flows into the sequestration chamber, it displaces 7 air therein, and eventually the blood contacts the blood 8 barrier 2420 forcing the inner chamber housing to the 9 second position." 10 So what it's explaining is that blood is flowing in, 11 it hits this blood barrier, and then goes into the second 12 position. But it doesn't say how; it doesn't say if it's 13 a pressure differential or there's some other force. It 14 just says that it goes into a second position. 15 Q. And how does this evidence inform your analysis of 16 whether this requirement is met? 17 A. So based upon this analysis, this pressure 18 differential between movable plug and outlet is not met. 19 Q. What is causing that part in the middle to be forced 20 over into the second position? 21 A. Well, the text isn't clear, but what I would say is 22 what happens, the flow comes in and it stops because of 23 the barrier. So I think it's the force between the 24 barrier and the outlet that causes this to move, not a 25 force between the movable plug or valve and the outlet.	1570 1 Q. What are you showing on Slide 19? 2 A. This is testimony from Mr. Nason. And Mr. Nason was 3 asked about how Figure 24B functions, and what he said 4 was, "I can't tell exactly how" that's -- "how it's 5 working." So, to me, that identifies that he didn't know 6 at that time how it worked. 7 Q. Let's continue to Slide 20. 8 What are you showing on this slide? 9 A. So this is Figure 24D that we've just seen, but it's 10 been annotated. I believe this is from Dr. Antonsson's 11 annotations at 24D. And then what I want to do is 12 highlight the key language. And it's color coded to 13 compare. 14 So it says, "Blood sequestration chamber 2418," 15 and -- "is filled," right? So we see it being filled. 16 "Providing force to overcome the locking mechanism to 17 enable movement of the inner chamber housing 2419 to the 18 second position." 19 So what this text is saying is providing a force to 20 overcome the locking mechanism, so it moves to the second 21 position. 22 Q. What is providing that force? 23 A. My analysis is that there's a pressure differential 24 between the -- between the barrier, this blood barrier, 25 and the outlet that forces it in that direction. Because

1571 1 force is -- pressure can only create a force that's normal 2 to a surface. Not tangential, just normal. 3 So pressure, as Dr. Antonsson pointed out, can push 4 up, and it can push down here because it's normal to this 5 member and this member. But the blood barrier, the 6 pressure exerts a normal force, and that's the only 7 horizontal force that can be exerted. 8 So it has -- based on physics, it has to be a 9 pressure differential between the plug -- or the -- sorry, 10 correct me -- between the barrier and the outlet. That's 11 the only pressure differential that can move this object. 12 Q. Based on your analysis, what was your conclusion as 13 to whether or not Rogers '445 discloses the pressure 14 differential between the movable plug/valve and the 15 outlet? 16 A. Based upon my analysis, Rogers '445 does not disclose 17 the pressure differential between the movable plug/valve 18 and the outlet. 19 Q. What did you look at next, Professor? 20 A. The next thing I wanted to look at is the movable 21 plug. 22 Q. What are you showing on Slide 13 -- excuse me -- 23? 23 A. This is the language in the claims that describe a 24 movable plug disposed within the housing. 25 Q. And what are you analyzing on Slide 24?	1572 1 A. When Dr. Antonsson was talking about Rogers '445, I 2 don't think Rogers '445 discloses -- it does not disclose 3 a movable plug. Dr. Antonsson was calling this a movable 4 plug, and the movable plug would move from a first 5 position to a second position. 6 Q. And why do you disagree that the blue -- what's 7 highlighted in blue and labeled as inner chamber housing 8 2419 is not a movable plug? 9 A. Yeah, it just can't be. Dr. Antonsson, in his own 10 words, said that when it's in the first position, this 11 body is covering the slots, keeping blood from flowing out 12 radially, right? So out this way and out this way. 13 Now, a plug doesn't cover something. A plug plugs a 14 hole. A plug inserts into something. A good analogy 15 is -- in daily life is -- I think this analogy was used 16 before, that you could put ear plugs in your ears, right, 17 plug your ears. They go inside. But if you're covering 18 your ears with earmuffs, they're just covered, right? So 19 earmuffs are not ear plugs; ear plugs are not earmuffs. 20 They are fundamentally different. So this is 21 fundamentally not a plug. 22 Q. What are you showing on Slide 25? 23 A. In Rogers '445, they disclose this member 2419, and 24 it's described as inner chamber housing, 2419. That is 25 movable from a first position. So you can see inner
1573 1 chamber housing goes from first position to second 2 position. Rogers '445 does not call it a plug. 3 Q. And based on that, what was your conclusion as to 4 whether Rogers '445 discloses the movable plug 5 requirement? 6 A. Based upon all of this analysis, it's my opinion 7 Rogers '445 does not disclose the movable plug -- movable 8 plug requirement. 9 Q. What claim requirement did you look at next? 10 A. The next requirement is the elastomeric material 11 requirement. 12 Q. What are you showing on Slide 28? 13 A. These are dependent claims that we talked about 14 previously in the Magnolia Medical patents that describe 15 "A movable plug is formed of an elastomeric material." 16 Q. Why are you showing this testimony on Slide 29? 17 A. Yeah, so Dr. Antonsson was asked: Does '445 Rogers, 18 they did not include an elastomeric plug or valve, 19 correct? 20 And the answer was: Not explicitly, no. 21 Q. Let's take a look at the evidence. What are you 22 showing on Slide 30? 23 A. Mr. Antonsson on redirect highlighted some language 24 in the '445 application -- or Rogers '445. And what he 25 highlighted was a sequestration chamber 55 can be formed,	1574 1 contained, or housed in a chamber housing 50 and can be 2 made of plastic, rubber, steel, aluminum, or other 3 suitable materials. So it calls out plastic and rubber. 4 Q. What does this have to do with Figure 24? 5 A. Well, what's interesting is rubber is, indeed, an 6 elastomeric material, very stretchy, but it has nothing to 7 do with Figure 24C. Or Figure 24 in general. 8 Q. What was this referring to? 9 A. This particular text was actually referring to 10 Figure 1, which is a different embodiment of the 11 Rogers '445. 12 Q. How can you tell? 13 A. Well, it calls out sequestration chamber 55 and 14 housing -- or chamber housing 50, and those are in this 15 figure. 55 and 50 are in this figure, not in this figure. 16 Q. What are you showing on this next slide, Slide 31? 17 A. So because '445 Rogers does not disclose a plug 18 formed of an elastomeric material, Dr. Antonsson referred 19 to another prior art, Villa-Real. 20 Q. And what is Villa-Real? 21 A. Villa-Real is a patent that was published in 1974, 22 decades earlier than this, and they described a problem 23 that they are trying to solve as highlighted in yellow: 24 "Aimed to reduce mechanical hemolysis of the red blood 25 cells and other cellular disintegration."

1575 1 Q. What is that problem? 2 A. Well, essentially, if you pull the blood out too 3 quickly, you could damage the cells, rupture the cells. 4 That's what we mean by lysis is the rupturing of the cell. 5 And so the purpose of the device is to reduce mechanical 6 damage, to slow the -- regulate the flow, to slow it down. 7 Q. What are you showing on Slide 32? 8 A. So here, what I'm comparing is Rogers '445 and 9 Villa-Real and they cannot be combined successfully. And 10 the reason they can't be combined successfully -- you can 11 combine two references if they are very similar, they're 12 trying to achieve some similar problem, that there's a 13 reasonable expectation of success, things like that, you 14 can combine references together. 15 When you look at Rogers '445, it's a sequestration 16 chamber to -- and sequester. So it's designed to 17 sequester blood, as we've been talking about. 18 Villa-Real is a continuous flow -- it does sample 19 blood, but it's a continuous flowing device. There's no 20 intention to sequester blood whatsoever. It's merely to 21 regulate the flow of blood so it doesn't damage the cells. 22 Q. And Professor Meinhart, on the left-hand side, I see 23 that you're showing Figure 23A. How, if at all, would 24 your analysis of Rogers '445 change if -- in connection 25 with Figure 24?	1576 1 A. It wouldn't change at all because Figure 24 is also 2 trying to achieve the same purpose of sequestration, so 3 it's the same analysis. 4 Q. And could these two references, Rogers '445 and 5 Villa-Real, would you expect that to be a successful 6 combination? 7 A. I would not. 8 Q. Why not? 9 A. There's a lot of differences here. If you look at 10 '445 Rogers, it has a valve. If you recognize this, it's 11 like a click valve, right? It's an external thing that 12 you can clamp down. It clamps the tubing. 13 Villa-Real is much different. Villa-Real has these 14 elastomer members that function like a valve that opens. 15 So when there's a pressure, it opens. So once you apply a 16 vacutainer to Villa-Real, it immediately causes flow and 17 this valve cannot close. It just regulates the flow 18 through. 19 So the other thing is that this valve is initially 20 closed when a vacutainer is applied. So if you tried to 21 take this valve and put it inside here and you apply the 22 vacutainer, it would just flow. It wouldn't seal. 23 Q. And if I could just return to the previous slide 24 where there's -- or previous two slides where there's an 25 image of Figure 24.
1577 1 How, if at all, would that impact your analysis of 2 whether you could combine Figure 24 and Villa-Real? 3 A. When you're looking at this figure in Villa-Real, I 4 have no idea how to combine it. I don't know how I could 5 take the valve of Villa-Real and put it in Figure 24. 6 Q. So if we continue on to Slide 33, what was your 7 conclusion as to whether Rogers '445, alone or with 8 Villa-Real, discloses the elastomeric material 9 requirement? 10 A. Based upon my analysis, '445 Rogers, by itself or in 11 combination with Villa-Real, does not disclose a movable 12 plug formed of an elastomeric material. 13 Q. What issue did you look at next, Professor? 14 A. The next issue I looked at is a combination of the 15 Kurin Lock, which is a commercial product, and Rogers '682 16 reference. 17 Q. And before I move on to your analysis of the Kurin 18 Lock and Rogers '682, what did you conclude from your 19 analysis of the Rogers '445 reference that Dr. Antonsson 20 presented to the Court yesterday? 21 A. In my opinion, Rogers '445 does not anticipate 22 Magnolia Medical's patents. 23 Q. So if we continued to Slide 35, what is the analysis 24 to determine whether a claim is obvious? 25 A. So obviousness is when you can -- among other things,	1578 1 when you combine multiple references to see if someone who 2 is of ordinary skill, it would have been obvious to 3 combine these two things together to create the invention. 4 So that's the test. 5 And there's a number of ways that test is done. The 6 first thing is to consider the scope and content of the 7 prior art. And then you have to consider reasons to 8 combine or modify the prior art. And, in addition, you 9 have to avoid hindsight. You can't take whatever is 10 already invented and try to reverse engineer it and 11 backtrack it. You have to approach it from someone at the 12 time of the invention without seeing the invention. 13 Q. So why you are you showing Dr. Antonsson's testimony 14 here? 15 A. Dr. Antonsson relies on a combination of the Kurin 16 Lock in combination with Rogers '682. 17 Q. So focusing on that combination, let's start with 18 Kurin Lock. 19 What are you showing on this slide? 20 A. This is an image of the Kurin Lock. It is a passive 21 device, so blood flows in initially based on venous 22 pressure of the patient that pushes it into the 23 contamination channel, and then also creates a small 24 region here. 25 Q. And let's turn to Rogers '682.

1579 1 What are you showing on Slide 38? 2 A. So Rogers '682 has Figure 23A, and it's a blood 3 sample optimization system, and this is an active device, 4 so in order to collect the initial sample of blood, the 5 initial volume, it has to be connected to a vacuum source 6 to draw the blood in to go to the hydrophobic plug. 7 Q. What are you showing on Slide 39? 8 A. This is a timeline of the relevant dates of these 9 prior art references. What it shows is Villa-Real was 10 filed in 1973, and then Rogers '682 was filed April 2016. 11 The Kurin Lock went on the market in February 2017, and 12 then the priority date of Magnolia Medical's patents are 13 September 2018. 14 Q. So with that timing in mind, what's your opinion as 15 to whether a person of ordinary skill would combine the 16 Kurin Lock with Rogers '682? 17 A. Yeah. It's my opinion that a person of ordinary 18 skill would not combine the Kurin Lock with Rogers '682 19 for a number of reasons. One reason is that the Lock is a 20 passive device for the initial volume. Rogers '682 is an 21 active device. So they fundamentally work differently, so 22 that would be very difficult to combine. 23 The other thing is that this is already a commercial 24 product, and to try to combine it somehow with Rogers 25 '682, it would add cost, complexity, it's not necessary,	1580 1 and it's not desirable or feasible, not clear that it 2 work. And in addition, Kurin could have combined those 3 themselves, if it was obvious, and they didn't. 4 Q. So let's turn to the claim language. 5 What should we start with first? 6 A. So, again, let's look at relevant requirements of the 7 claims. Let's look at movable plug/valve disposed in the 8 housing. 9 Q. What are you showing on Slide 44? 10 A. These are the relevant claim language from the 11 Magnolia Medical patents, which highlight movable plug 12 disposed in the housing or valve disposed at least 13 partially in the housing. 14 Q. What's your opinion as to whether the Kurin Lock 15 discloses the movable plug/valve disposed in the housing? 16 A. So if you look at the Kurin Lock image, there's no 17 indication of a movable plug. There's no indication of a 18 movable valve. So it's my opinion that the Kurin Lock 19 does not disclose a movable plug/valve disposed in the 20 housing. 21 Q. Just for clarity, I think you referred to a movable 22 valve. 23 Is there any indication of a valve in the Kurin Lock? 24 A. No. 25 Q. What about Rogers '682, what are you showing on
1581 1 Slide 46? 2 A. So this is the relevant figure out of Rogers '682 3 that Dr. Antonsson cites to, and this is the textual 4 description of that. And what it says, it is a valve, 5 right? This clip here, it's a clip valve. And what it 6 says is, "Valve 2308 can be a clip or other enclosing 7 device to pinch, shunt, bend, or otherwise close off the 8 sampling channel." So it's clearly talking about a valve. 9 Q. And is this part of Rogers '682, 2310 that's 10 highlighted in blue, what's your opinion as to whether 11 it's disposed in the housing, Professor? 12 A. Yeah. So it's not disposed in the housing. I don't 13 see any housing here at all. There is no housing. It's 14 not disposed in the housing. It's not a movable plug, and 15 it's not a movable valve either. The valve is fixed in 16 position. 17 Q. And how does the text from the written description 18 inform whether that highlighted segment in blue, 2310, is 19 disposed in the housing? 20 A. Well, it reads, "clip or other enclosing device." So 21 it's describing some sort of a device that's enclosing 22 something else. So it can't be in the housing. It has to 23 enclose something else. 24 Q. What are you showing on Slide 47? 25 A. Well, Mr. Nason was asked, "Does this figure show a	1582 1 movable plug?" And under testimony, his response was, "It 2 does not." 3 Q. What was your conclusion as to whether Kurin Lock and 4 Rogers '682 disclosed the movable plug/valve disposed in 5 the housing requirement? 6 A. Based upon my analysis, Rogers '682 does not disclose 7 the movable plug/valve disposed in the housing 8 requirement. 9 Q. What did you look at next? 10 A. The next thing that I looked at is the pressure 11 differential between the movable plug/valve and the 12 outlet. 13 Q. What are you showing on Slide 49? 14 A. This is the relevant claim language from Magnolia 15 Medical's patents. 16 Q. So turning to the evidence, what is your opinion as 17 to whether the Kurin Lock discloses this claim 18 requirement? 19 A. As we discussed, the Kurin Lock does not contain 20 movable plug or a valve, therefore, it cannot satisfy the 21 requirement of a pressure differential between the movable 22 plug/valve and the outlet. So it does not meet this 23 requirement. 24 Q. What about on Slide 51 in the context of Rogers '682? 25 A. Rogers '682 also does not disclose a pressure

1583 1 differential between the movable plug/valve and the 2 outlet. It is discloses a valve, but not a plug, and 3 neither the plug that's not there or the valve is movable. 4 So if it doesn't contain a movable plug or a movable 5 valve, then the requirement of a pressure differential 6 between that element that doesn't exist and the outlet 7 cannot not be met. 8 Q. Based on this excerpt from Rogers '682, what's your 9 understanding as to whether one of ordinary skill in the 10 art would understand if the valve would be released by a 11 pressure differential? 12 A. Yes. So I highlighted the corresponding text that's 13 describing this figure. And it says -- it's describing 14 the valve. Says, "which is initially closed off by valve 15 2308. And then upon release of valve 2308." 16 So it's describing some external person where the 17 valve is initially closed, and then they move it, 18 manipulate it so the valve opens. So the valve is being 19 manipulated by a person or something external, not by a 20 pressure differential. So this requirement cannot be met 21 by this figure and text. 22 Q. So turning to Slide 52, what's your conclusion as to 23 whether the Kurin Lock and Rogers '682 discloses the 24 pressure differential between the movable plug/valve and 25 the outlet?	1584 1 A. It's my opinion that the combination of the Kurin 2 Lock and Rogers '682 does not disclose pressure 3 differential between the movable plug/valve and the 4 outlet. 5 Q. And before I move on to the next claim language, I 6 just want to go back to what we were discussing earlier, 7 the movable plug/valve disclosed in the housing. 8 For the clarity of the record, what's your opinion as 9 to whether the Kurin Lock and Rogers '682 disclose the 10 movable plug/valve disposed in the housing? 11 A. Based upon my analysis, the Kurin Lock and Rogers 12 '682 does not disclose the movable plug/valve disclosed in 13 the housing requirement. 14 Q. So let's continue forward. We already discussed the 15 pressure differential between the movable plug/valve and 16 the outlet requirement. What did you look at next? 17 A. The next thing I looked as was the elastomeric 18 material requirement. 19 Q. What are you showing on Slide 54? 20 A. This is the relevant claim language of the dependent 21 claims, which describe a movable plug is formed of an 22 elastomeric material. 23 Q. And what are you analyzing on Slide 55? 24 A. This, again, is an image of the Kurin Lock. And when 25 you look at it, there is no elastomeric material. There's
1585 1 no plug or valve. So that can't be formed out of an 2 elastomeric material if it doesn't exist. 3 Q. What about with Rogers '682, what are you showing on 4 Slide 56? 5 A. This is Figure 23B out of Rogers '682, and it does 6 disclose the valve, the clip valve, but it's not a movable 7 valve, and it's certainly not a plug. And -- but it also 8 would not function very well if it was built out of an 9 elastomeric material. 10 Q. Why is that? 11 A. Yes, because it's a clip. And so clips need to have 12 flexible parts, but also rigid parts for them to function 13 correctly. Right? When it's clipped in, it needs to be 14 somewhat rigid. If it was elastomeric material or rubbery 15 material, it would not work very well. 16 Q. And what's your opinion as to whether this would be 17 effective to make that valve out of an elastomeric 18 material? 19 A. I've seen a lot of clip valves over the many years 20 that I've been doing fluid mechanics. I've never seen one 21 made out of an elastomeric material and it would not be 22 effective, in my opinion. 23 Q. What are you showing on Slide 57? 24 A. What I'm showing here is that a person of ordinary 25 skill in the art would not combine the Kurin Lock and	1586 1 Rogers '682 with Villa-Real. 2 Q. So -- and why would someone combine those references, 3 Professor? 4 A. Well, first of all, they're not in the same field. 5 They're not trying to solve the same problem. The Lock 6 and Rogers '682 are trying to solve the blood sequestering 7 problem, right, for blood contamination. 8 Villa-Real, as we saw, is trying to solve the problem 9 of cellular damage due to mechanical forces as blood is 10 being drawn. 11 So they are in the blood area, but they're not -- 12 they're not trying to solve the same problem with blood 13 draw. They are different fundamental problems. 14 In addition to that, there's no shared inventors. 15 Villa-Real was filed in the early '70s, you know, decades 16 ago. And so it's not the same inventors that would be on 17 the Rogers '682 or the developers of the Kurin Lock. 18 And, finally, because they're so different, there's 19 no reasonable expectation of success, that combining these 20 two things would yield something functional. 21 Q. And what is the technical nature of that difference 22 between them, Professor? 23 A. Can you rephrase the question, please? 24 Q. Of course. 25 You mentioned that they're so different, so you

1 wouldn't have a reasonable expectation of success. What 2 did you mean by when you said "they're so different"? 3 A. Yeah. They're so different in their function. 4 They're so different -- it's not clear how you would put 5 the valve inside the Kurin Lock. 6 It's not clear how the Villa-Real valve could 7 actually seal when you apply a vacuum source to it. 8 That's required by Rogers '682, Figure 23, I believe. So 9 they're just fundamentally incompatible from a fluid 10 mechanics point of view, as well as an engineering point 11 of view. 12 Q. When does the Villa-Real valve open after attaching 13 the vacuum source? 14 A. The Villa-Real valve opens immediately. So when you 15 apply a vacuum source to the Villa-Real valve, flow starts 16 immediately. It cannot seal -- seal against a vacuum, and 17 that's completely contrary to Rogers '682, which requires 18 a vacuum source to be connected in order to get the 19 initial flow of blood. So they just would not work 20 together. 21 Q. And I think you mentioned that it's contrary to 22 Rogers '682. What about with the Kurin Lock? 23 A. Yeah. The Kurin Lock we already talked about is a 24 passive device. It's not connected to a vacutainer or a 25 vacuum source at all for the first initial volume.	1587 1 Q. And would you be able to combine, then, the Kurin 2 Lock with the Villa-Real? 3 A. No, they're fundamentally different. 4 Q. So what was your conclusion as to whether the Kurin 5 Lock, Rogers '682, and the -- what was your conclusion as 6 to Kurin Lock and Rogers '682 and whether they satisfied 7 the elastomeric material requirement? 8 A. So if you look at Rogers '682, you look at the Kurin 9 Lock, Villa-Real, combine them all together, none of them 10 have a movable plug formed of an elastomeric material, and 11 none of them have a valve formed of an elastomeric 12 material. 13 Q. And just so the record is clear, if you just combine 14 the Kurin Lock and Rogers '682, what's your opinion as to 15 whether they would disclose an elastomeric material? 16 A. Yeah. The combination of the Kurin Lock and the 17 Rogers '682 do not, in combination, disclose an 18 elastomeric material. 19 Q. What was the next topic that you wanted to address? 20 A. Yeah, the next topic was written description. 21 Q. And what did Dr. Antonsson opine as to written 22 description? 23 A. It was Dr. Antonsson's opinion that the Magnolia 24 Medical patents lacked written description of the claimed 25 inventions. 1588
1589 1 Q. So as background, what is the written description 2 requirement? 3 A. Sure. The patent has two parts, right? It has a 4 written description and claims that define the scope of 5 the invention. The written description explains how to 6 make and use the invention. And so the requirement is 7 that a person of ordinary skill in the art reading the 8 original patent application at the time that it was filed 9 would have recognized that the patent application 10 described the invention as claimed. So it has to have 11 enough description to describe the invention as it is 12 claimed. 13 Q. Do you agree with Dr. Antonsson's opinion? 14 A. Not at all. 15 Q. So let's turn to the evidence of that. What are you 16 showing on Slide 61? 17 A. So Slide 61, to the left are the face of Magnolia's 18 three patents. And from that, the written description, 19 I've highlighted some key sentences that do provide 20 written description for the claimed invention. 21 Q. And what did you focus on from the written 22 description of the Magnolia Medical patents? 23 A. So if we look at the highlighted regions, "a fluid 24 control device can include any suitable actuator or the 25 like configured to transition, move, flip, or otherwise	1590 1 reconfigure in response to being exposed to a desired 2 and/or predetermined amount of negative pressure." 3 So it's talking about pressure differentials, right, 4 and moving it. 5 Then the next part reads: "Actuator including and/or 6 arranged as a movable member, plug." 7 Q. And how does that relate to the movable plug 8 requirement, Professor? 9 A. Sure. This language is clearly describing a fluid 10 control device and with an actuator. And this actuator is 11 designed to move in response to a predetermined amount of 12 negative pressure. 13 In addition, the actuator can be arranged as a 14 movable member or as a plug. So the plug is clearly 15 disclosed as an actuator. So in the written description, 16 when it talks about actuator, it's also talking about a 17 plug. 18 Q. What evidence are you looking at on Slide 62, 19 Professor? 20 A. This is the same part of the written description and 21 I wanted to highlight some more text. So: "An amount of 22 negative pressure exerted on a surface of the movable 23 member or the like may build until a magnitude of the 24 negative pressure is sufficient to pull or move the 25 movable member out of the opening, thereby allowing a flow

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1 of bodily fluid through the opening that was otherwise
2 occluded by the movable member."
3 So it's clearly talking about a movable member. It's
4 talking about it moving in response to a pressure
5 differential that's exerting on a surface.
6 If you go on, the bottom part says: "The movable
7 member can be, for example, an elastomeric plug, a cork, a
8 plunger, and/or any other suitable member that can be
9 moved or popped out of such an opening or portion of a
10 flow path."
11 So this language sounds very similar, you know, to
12 what's described in the claimed invention, right? So this
13 language, an elastomeric plug, it's moving due to a
14 pressure differential, it can pop. To me, there's -- this
15 is an adequately described written description here.
16 **Q.** So were you here at the time that Mr. Gaw was
17 testifying about the -- these disclosures in the Magnolia
18 Medical patents, Professor?
19 **A.** I was here for part of Mr. Gaw's testimony, and I
20 believe I was here for the time that he testified about
21 the written disclosures.
22 **Q.** And in your opinion, are those consistent with
23 Dr. Antonsson's opinion as to the written description
24 requirement of whether a movable plug is adequately
25 described?

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1 Steripath Micro and whether it actually infringes Kurin's
2 patent.
3 **MR. LoCASCIO:** Before we go on to a whole new
4 topic, Your Honor, is this a good time for the
5 mid-afternoon break?
6 **THE COURT:** Yes, it is. Okay.
7 Yes, we'll take a break.
8 (The jury exits the courtroom at 2:58 p.m.)
9 **THE COURT:** Step down. Have a seat.
10 You may step down.
11 Are we going to finish today, after you made me
12 tell the jury we were going to finish early this
13 afternoon?
14 **MR. RAMANI:** I'd say 50/50, Your Honor.
15 **THE COURT:** You've got to hustle to finish. I
16 mean, I think the defense is past 15 hours, and I am not
17 going to extend the case. If you're trying willfulness,
18 you're stuck with what you've got. You know, I don't know
19 how we're here. You'd better hustle.
20 All right. Ten minutes.
21 (Whereupon, a recess was taken.)
22 **THE COURT:** Please be seated. I guess I am
23 really mad at myself. It did not include willfulness,
24 inequitable, but, boy, am I going to cut it back. I don't
25 know how we miscalculate 24 hours before that we are going

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1 **A.** So my analysis is completely contrary to
2 Dr. Antonsson and consistent with Dr. -- or Mr. Gaw that
3 the elastomeric plug, all this -- the written description
4 is adequately described of a movable plug.
5 **Q.** What did you analyze next?
6 **A.** So the next thing I analyzed was what's called
7 secondary considerations.
8 **Q.** And what are secondary considerations relevant to?
9 **A.** Secondary considerations are relevant to
10 non-obviousness.
11 **Q.** And what, if any, evidence did you see of secondary
12 considerations here, Professor?
13 **A.** Sure. I looked at objective indicia of
14 non-obviousness. In particular, I looked at commercial
15 success. So if a claimed invention is commercially
16 successful, that's an indication that it wasn't obvious.
17 **Q.** What evidence are you analyzing on Slide 65?
18 **A.** This is Mr. Rogers' testimony about the market size
19 of the Kurin Jet. And he was asked 18 to 20 percent of
20 the diversion device market, and Mr. Rogers opined
21 correct. So it's clear that the Kurin Jet has -- is
22 commercially successful and has a significant fraction of
23 the market.
24 **Q.** So what did you turn to next?
25 **A.** Okay. So the next thing that I looked at was the

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1 to finish early after you are talking... I just don't get
2 it.
3 **MR. LoCASCIO:** My expectation, and we will see
4 how crosses go, is that we might not call any additional
5 witnesses, Your Honor. So it may just be this witness and
6 Mr. Napper.
7 **MR. RAMANI:** If that's the case, Your Honor,
8 then we could finish today.
9 **THE COURT:** We have a juror who has to leave at
10 5:00 and we are done at 5:00 no matter what.
11 **MR. RAMANI:** We have been cutting slides during
12 the break. We are trying to move it along.
13 **THE COURT:** As you can tell, the thing that
14 gets me agitated is the jury's time. Nobody protects the
15 jury.
16 **MR. RAMANI:** Your Honor, jury instructions, I
17 believe, are being filed.
18 **THE COURT:** Yeah, and we'll deal with that. I
19 can stay late. I get paid. Not like you guys do. I am
20 waiting for the witness to respond to the questioning,
21 ones that say, "How much do you get paid," and "A lot less
22 than you do," to the questioner.
23 **MR. VORONOV:** Professor Meinhart, do you want
24 to return to the stand?
25 (The jury enters the courtroom at 3:14 p.m.)

1595 1 THE COURT: All right. Please be seated. I 2 know we are cutting at 5:00. I know we have appointments. 3 Let's see. Hold on. 4 I also need to talk about the weather, before I 5 forget. First of all, we can put you up on Sunday night. 6 I know we have a couple of people that are really 7 traveling. 8 Again, I am so grateful you are doing the civic 9 duty. I am going to be mindful of the weather. I've 10 heard the latest is that maybe it's tomorrow night that 11 it's going to start, and then maybe it's all done by 12 Sunday, but we will keep you posted. We have all your 13 phone numbers. Right? We will reach out to you as soon 14 as we have any news like that. All right? Same thing, if 15 you can call us. But the plan will be to go forward and 16 just try to get through this. All right? Thank you very 17 much. We will, like I said, I'll end. 18 As you probably have heard, and every time you 19 talk to a lawyer, you need to double the time they tell 20 you they need. 21 Go ahead. 22 BY MR. VORONOV: 23 Q. Professor, let's turn to your analysis of Kurin's 24 patent. 25 What did you address first?	1596 1 A. So I addressed the Steripath Micro does not infringe 2 Kurin's patent. 3 Q. So here we have got Claim 1. 4 Why did you focus in on these two limitations on 5 Slide 68? 6 A. Yes. For Claim 1 of the '052 patent, these were the 7 key requirements that, according to my analysis, are not 8 met by the Steripath Micro. 9 Q. So let's start with the first. 10 Why is -- in your opinion, why does the Steripath 11 Micro not practice this claim limitation? 12 A. Yes. So if you read this claim limitation or 13 requirement, "A chamber connected to the inlet port and 14 configured to collect a first portion of the blood sample 15 when under a drawing force applied from the outlet port 16 from a blood sample collection device." So in my 17 analysis, I don't believe that the -- that the Kurin -- 18 or, sorry -- I don't believe that the Steripath Micro 19 meets this requirement. 20 Q. So let's look at the evidence. 21 What are you showing on Slide 70? 22 A. So this is a picture of the Steripath Micro. 23 Q. What have you annotated here? 24 A. So what we're looking at is the inlet port, the 25 chamber, and the outlet port. So the fluid comes in and
1597 1 then out. 2 Q. So let's focus in. 3 What evidence are you looking at on Slide 71? 4 A. So this is one of Magnolia Medical's engineering 5 drawings which depict the function of the Steripath Micro. 6 Q. And for the record, what exhibit number is that, 7 Professor? 8 A. Exhibit DTX-0054. 9 Q. And what is your analysis of this evidence in 10 connection with this claim requirement? 11 A. Yes. So let's zoom in to the highlighted region, 12 "blood sample when under a drawing force applied from the 13 outlet port." 14 Q. And what constitutes the drawing force with the 15 Steripath Micro? 16 A. Yes. So the Steripath Micro, when it's connected to 17 a vacuum source -- if you could click that animation, it 18 will be more clear. 19 But the vacuum from the outlet port deflects this 20 bladder or flips this bladder in red that you can see it 21 deflecting, right? So the vacuum flips the bladder, and 22 it's the bladder that creates the drawing force that pulls 23 in the blood sample. 24 Q. What are you looking at on Slide 72? 25 A. On Slide 72 is Mr. Bullington's testimony where he	1598 1 talks about the importance of the bladder. And so the 2 bladder regulates the pressure. So you could apply a 3 large pressure or a less pressure, but the bladder 4 regulates the pressure that actually is applied to the 5 blood sample. And so it's really -- according to 6 Mr. Bullington, it's really important to create a gentle 7 negative pressure so it's -- carefully draws the blood in. 8 Q. What is the benefit of having a gentle negative 9 pressure? 10 A. A lot of these patients are very, very sick and so 11 they have veins that can easily collapse. So by having a 12 gentle pressure, you can draw the blood in without 13 collapsing the veins or hurting the patient, so it's quite 14 important. 15 Q. What are you showing on Slide 73? 16 A. Well, I wanted to do my own experiment to understand 17 how the bladder works and how the bladder provides the 18 drawing force in the Steripath Micro. So this is a 19 top-level image of an experiment that I directed where we 20 see the syringe here that's going to manually apply a 21 vacuum. We have two valves and we created these valves to 22 slow the process down so it's easier to understand, 23 because it happens quite quickly, so we wanted to look at 24 it step by step. 25 So what we're going to do is we're going to pull a

1599 1 vacuum that is applied to the bladder. We're going to 2 isolate this valve, shut it off, remove the syringe, and 3 then we'll see when that syringe is applying the vacuum, 4 the bladder deflects and then we'll open this valve and 5 you'll see it's the deflection of the bladder, the bladder 6 being flipped, that actually draws in the blood sample. 7 Q. So let's take a look. 8 (Video plays.) 9 A. So the vacuum is being manually applied and the 10 bladder is flipping. And then he's going to shut the 11 valve to isolate the syringe and then remove the syringe. 12 So the bladder is in a flipped state when it's 13 removed. All right. So we're just stepping it one by 14 one. Now blood is allowed, or fluid -- mimicking fluid in 15 this case -- is allowed to enter and it's the bladder that 16 draws the mimicking fluid into this C channel. 17 Q. Professor, based on this evidence, what's your 18 opinion as to whether the Steripath Micro practices this 19 claim requirement of 1C of the '052 patent? 20 A. Yeah, based upon my analysis, the Steripath Micro 21 does not practice requirement 1C of Claim 1 of the '052 22 patent. 23 Q. Which requirement did you look at next? 24 A. The next requirement is what I call a housing that 25 defines requirement.	1600 1 Q. And what is your opinion as to the housing that 2 defines requirement, Professor? 3 A. The '05- -- so Magnolia's Steripath Micro does not 4 meet the housing that defines requirement. 5 Q. So let's take a look at that. First, what definition 6 did you apply when you were considering the meaning of 7 this requirement? 8 A. We've agreed upon a definition. The term "a housing 9 that defines," and our agreed definition is "a casing that 10 fixes or marks the limits of." 11 Q. And what evidence are you looking at on Slide 77? 12 A. So these are still images of the Steripath Micro 13 during its operation. So the one on the left shows that 14 the button has not been depressed, and so there is no flow 15 connection between the two. And -- and then when it is 16 pressed, this button slides over internally, so it changes 17 the configuration inside. 18 And then, finally, when it's completely depressed, it 19 creates a pathway. Now there is a pathway that blood can 20 flow from the inlet to the outlet to be collected. And 21 this pathway is only created once the button is pressed 22 because it's a combination of the housing and button that 23 form the sampling channel. 24 Q. And what does that mean as to whether the housing 25 defines the sampling channel?
1601 1 A. Well, this requirement is not met by the Steripath 2 Micro because the housing, by itself, does not define the 3 sampling channel. It's -- it requires the button in 4 combination with the housing, and the button in a 5 particular configuration, to form the sampling channel. 6 So the Steripath Micro does not meet this requirement. 7 Q. Let's turn to the next slide. What are you showing 8 on Slide 78? 9 A. This is the Steripath Micro. 10 Q. And what do these annotations on the slide mean, 11 Professor? 12 A. So this is an engineering drawing from Magnolia 13 Medical. It is an exploded view, so you can see how it 14 comes apart. And so we have a housing down here, and a 15 housing up here, so one, two, and they are sandwiched 16 together, and then there's the button. And the button is 17 definitely not part of the housing. So the button is not 18 part of the housing, but the button is required to form 19 the sampling channel. 20 Q. For the record, what exhibit number is this, 21 Professor? 22 A. Exhibit PTX-179. 23 Q. What evidence did you look at next on Slide 79? 24 A. This is a figure out of Magnolia Medical's document 25 which shows another view of the components. This is the	1602 1 inner body component, and this is the button. And what's 2 interesting is if you look at the details here, the button 3 is called blood path indirect and skin contact. So they 4 are talking about the blood path that's in the button. 5 Q. And for the record, what is the exhibit number on 6 Slide 79, Professor? 7 A. The exhibit is DTX-0054. 8 Q. What was your conclusion as to whether the Steripath 9 Micro practices Claim 1(e) of the '052 patent? 10 A. Yeah. It's my opinion, based upon all the evidence, 11 that the Steripath Micro does not meet the requirement of 12 1(e), the housing that defines the requirement. 13 Q. What was your conclusion as to Claim 1? 14 A. Since at least these two requirements are not met, 15 Claim -- requirement 1C and 1(e), it is my opinion that 16 the Steripath Micro does not infringe Claim 1 of the '052 17 patent. 18 Q. And what does that mean for Claims 10 and 12, 19 Professor? 20 A. The other two claims, both Claims 10 and 12, are 21 dependent claims. They depend upon Claim 1. So since 22 Claim 1 is not infringed, that also means that Claim 10 23 and Claim 12 are not infringed. 24 Q. So what did you conclude based on your analysis of 25 the Steripath Micro in connection with Kurin '052 patent?

1603 1 A. Yes. It is my opinion that the Steripath Micro does 2 not infringe Kurin's '052 patent. 3 Q. What did you look at next? 4 A. The next thing I looked at is the Steripath Gen2 is a 5 non-infringing alternative. 6 Q. Let's look at the evidence. 7 What are you showing on Slide 85? 8 A. So what I'm showing on Slide 85 is a still image of 9 the Steripath Micro. Actually it might be a -- 10 Q. I think that we can actually cause this to play. 11 So should we watch the video? 12 A. Sure. 13 So it shows the blood sample, initially being pulled 14 into the Steripath -- to the Steripath Gen2, but it's 15 being actuated by a person. So it's the squeezing force 16 that the person is applying to it that's drawing the blood 17 in. So when you read this claim limitation, "A chamber 18 connected with an inlet port and configured to collect the 19 first portion of the", and this is important part, "blood 20 sample when under drawing force applied from the vacuum," 21 so it's -- 22 Q. I'm sorry you mentioned a drawing force applied from 23 where, Professor? 24 A. A drawing force applied from -- thank you. A drawing 25 force applied from the outlet port.	1604 1 And so because the Gen2 has a person that 2 mechanically actuates it, the drawing force is generated 3 by the person actuating it, not by the outlet port, not 4 from the outlet port. 5 Q. And would the Steripath Gen2 have been an acceptable 6 alternative, Professor? 7 A. Yes, because it's non-infringing, and it also is 8 acceptable. 9 And here I'm citing a study done at Stanford Health 10 Care where it documents the reduction in contamination 11 from 1.5 percent to 0 percent. So as a scientist, I 12 really like independent third-party analysis. So this 13 study by Stanford shows that it performs quite well, very 14 well. And so since it's non-infringing and it performs 15 well, it is acceptable, an acceptable non-infringing 16 alternative. 17 Q. And for the record, what was the exhibit number that 18 you relied on on this slide, Professor? 19 A. Exhibit PTX-289. 20 Q. So let's turn to the last topic. 21 What are you going to discuss next? 22 A. Kurin's patent is invalid. 23 Q. So let's get into your analysis. You already 24 discussed the written description requirement when you 25 were testifying earlier.
1605 1 So what is your opinion as to Claim 1 of the '052 2 patent in connection with written description, Professor? 3 A. Yes. It is my opinion that Claim 1 of the '052 4 patent lacks written description specifically on 5 requirement 1(e), which is a housing that defines the 6 inlet port, the sampling channel, and the outlet port. So 7 I referred to that as a housing that defines requirement. 8 Q. So we already discussed the definition of housing 9 that defines. If we could move on to the evidence on 10 Slide 96. 11 What are you looking at here? 12 A. So this is one of the figures of the '052 patent. 13 And what I'm looking -- and this is DTX-1. And if we read 14 the requirement language, it's a housing that defines. 15 And then what's critical here is an inlet port, the 16 sampling channel, and the outlet port. So the housing has 17 to define all three of those in one embodiment. And when 18 I look at this embodiment, it does define a sampling 19 channel in purple here, so -- and it's also in the text, a 20 sampling channel, 1506. So that's covered. But what 21 isn't covered is a housing that defines the inlet port and 22 the outlet port in combination. 23 Q. What evidence are you looking at on Slide 97? 24 A. So I was looking for other embodiments in the '052 25 that would meet all those requirements, a housing that	1606 1 defines an inlet, outlet, and sampling channel. I 2 couldn't find any. And then I looked at Mr. Rogers' 3 testimony, and he was asked about Figure 23 of this 4 patent. And the question was, "That's the only embodiment 5 that discussed use of a drawing force at the outlet in the 6 '052 patent, right?" And his response was, "I think 7 that's true." 8 So if the embodiment also has to have all the other 9 requirements of the claim, including a drawing force, I 10 couldn't find it, and Mr. Rogers said that it was just 11 Figure 23. 12 Q. And we've looked at Figure 23 a lot today. 13 Does Figure 23, in your view, provide a written 14 description for a housing that defines? 15 A. It's the only figure that has a drawing force and 16 there is no housing. So if there's no housing, there's no 17 housing that defines. 18 Q. And what are you looking at on Slide 98? 19 A. So this is, again, Figure 15, which depicts a 20 housing, and the housing is called out by 1501. You can 21 see it in green here. And then we have an inlet port, 22 1502, and an outlet port, 1504. And I colored them 23 separately because the housing is clearly called out here 24 in green, that this is not identified as a housing, this 25 is not identified as part of a housing. In fact, they are

1607

1 identified separately in the written description.

2 So if you read along with me, from the inlet port,

3 1502, and the top side of the housing, 1501. So they're

4 separately calling those out. And nowhere in the '052

5 patent does it say the inlet port and outlet port are

6 defined by the housing when there is a sampling channel.

7 **Q.** And how does the '052 patent refer to the entirety of

8 this device based on this written description right below?

9 **A.** So Mr. Rogers pointed out that Figure 23 is the only

10 figure that uses a drawing force. And I noticed on here

11 that this cannot use a drawing force because there's a

12 vent. So if you were to apply a vacuum at the output to

13 create a drawing force, the vent here would just suck air

14 in from the outside and you couldn't apply a drawing force

15 to pull fluid in through the inlet. So clearly, this

16 Figure 15 could not be the embodiment of a claimed

17 invention.

18 **Q.** And what does the disclosure below refer to this

19 entire Figure 15C as under Number 1500?

20 **A.** Yes. So the written description shows that. So the

21 blood sequestration device, 1500, that includes the vent,

22 1510. So the vent would prevent it from having a drawing

23 force from the outlet.

24 **Q.** Got it.

25 Professor, based on your analysis, what did you

1609

1 **CROSS EXAMINATION.**

2 **BY MR. McELDOWNEY:**

3 **Q.** Good afternoon, Dr. Meinhart.

4 **A.** Good afternoon.

5 **Q.** Can't get very far without my glasses.

6 So Dr. Antonsson testified that in his opinion,

7 Magnolia's '081, '863, and '709 patents are anticipated --

8 or some of the claims are anticipated by Mr. Rogers' and

9 Kurin's '445 patent application.

10 You understand that?

11 **A.** Yes.

12 **Q.** He also testified that the inventions that are

13 claimed in those Magnolia patents would have been obvious

14 compared to Kurin's Lock product combined with some other

15 prior art.

16 You understand that?

17 **A.** Yes.

18 **Q.** And you know that to be patentable, an invention has

19 to be new, novel, and non-obvious compared to the prior

20 art?

21 **A.** Yes.

22 **Q.** You did not testify at this trial that the claims of

23 the '052 patent are anticipated by the prior art, did you?

24 **A.** I did not.

25 **Q.** You did not testify at this trial that the '052

1608

1 conclude about Claim 1 and whether there's sufficient

2 written description in the '052 patent?

3 **A.** Yeah. In my opinion, there's a lack of written

4 description for Claim 1 in the '052 patent, specifically

5 requirement 1E, a housing that defines, the inlet port,

6 the sampling channel, and the outlet port. So if this is

7 not described or disclosed in the application or in the

8 specification, a written description, then there's no

9 support for this requirement, and so that's invalid. So

10 Claim 1 is invalid, and so is Claim 10 because Claim 10

11 depends on Claim 1, and Claim 12 is invalid because it

12 also depends on Claim 1.

13 **Q.** And how, if at all, is your conclusion consistent

14 with the testimony of Mr. Rogers that you just showed us?

15 **A.** Well, it's consistent with Mr. Rogers' testimony in

16 that the only embodiment or figure that Mr. Rogers points

17 out that has a drawing force is Figure 23. And that --

18 and then the housing defines requirement is not present in

19 23, and it's not present anywhere. So none -- there's no

20 embodiments that I can find in the '052 patent that meets

21 the claimed invention.

22 **MR. VORONOV:** Thank you, Professor Meinhart.

23 Pass the witness, Your Honor.

24 **THE COURT:** Cross-examination.

25 **MR. McELDOWNEY:** Yes, Your Honor.

1610

1 patent claims are obvious compared to the prior art, did

2 you?

3 **A.** I did not.

4 **Q.** So let's turn to the '052 patent.

5 From your presentation, I gather there's two points

6 that you make as to non-infringement for the '052 patent;

7 is that right?

8 **A.** Yes.

9 **Q.** First one is about the bladder that's inside the

10 device; is that right?

11 **A.** Yes.

12 **Q.** And essentially, your opinion is that it is the

13 bladder that's supplying the vacuum force, not the

14 syringe.

15 Do I understand that correctly?

16 **A.** Yes.

17 **Q.** Okay. And the low pressure from a -- well, let me

18 start over.

19 Vacuum is essentially just a very low pressure; is

20 that right?

21 **A.** A vacuum is a pressure less than atmospheric

22 pressure.

23 **Q.** And to understand how the bladder works in the Micro

24 product, you talked to Greg Bullington at Magnolia; is

25 that right?

1611

1 A. Yes.

2 Q. And he's the only person you talked to at Magnolia

3 when you formed your opinions in this case, true?

4 A. Yes.

5 Q. Not Mr. Gaw; not Mr. Miazga, who we saw by

6 deposition; not Mr. Ramsey, who we saw by deposition,

7 true?

8 A. Yes.

9 Q. You didn't even ask to talk to them, fair?

10 A. Fair.

11 Q. And as for Mr. Bullington, he told you that, in his

12 view, the bladder is important inside the Micro device.

13 Is that what he told you?

14 A. Yes.

15 Q. Were you here for the video testimony of

16 Mr. Bullington where he explained that he does not know

17 the scientific definition of pressure?

18 A. Yes.

19 Q. That's the person you relied on at Magnolia when you

20 wanted to find out how the bladder worked, though, isn't

21 it?

22 A. Yes.

23 Q. Okay.

24 **MR. McELDOWNEY:** Can we pull up -- let's see --

25 Dr. Meinhart's Slide 73, Josh.

1613

1 experiment is a valve, right?

2 A. Yes.

3 Q. This blue thing to the right of the Micro in the

4 experiment is a valve also?

5 A. Yes.

6 Q. When a nurse actually uses the Micro device, those

7 two valves wouldn't be there, would they?

8 A. Correct.

9 Q. And in the experiment, if Mr. Reid hadn't first

10 pulled the syringe, then the bladder never would have

11 pulled the blood in, true?

12 A. True.

13 Q. Okay.

14 **MR. McELDOWNEY:** Mr. Urban, can we switch and

15 can we pull up the PTX-124. It's a video. Don't start it

16 just yet.

17 And I guess before we get to the video -- leave

18 it up still.

19 **BY MR. McELDOWNEY:**

20 Q. If a Magnolia engineer had testified under oath about

21 how the Micro works, would you take their word for it?

22 A. I would have to see the video under oath.

23 Q. So you are not sure?

24 A. It depends.

25 Q. What does it depend on?

1612

1 **BY MR. McELDOWNEY:**

2 Q. So this is an experiment that you talked about in

3 your direct examination, right?

4 A. Yes.

5 Q. And when you first introduced it, you said, "my

6 experiment," and then you corrected it a couple answers

7 later to say experiment that you directed.

8 You didn't do the experiment yourself, did you?

9 A. To be clear, I directed the experiment, but I didn't

10 do this experiment myself.

11 Q. You weren't personally there when this particular

12 experiment was run, were you?

13 A. That is correct.

14 Q. It was run by Mr. TJ Reid, who we heard about last

15 time you testified; is that right?

16 A. That's correct.

17 Q. And I want to make sure we understand how this

18 experiment Mr. Reid ran works, so -- well, let me start

19 with: There's a white thing to the left of the Micro

20 device and a blue thing to the right of it.

21 Do you see those?

22 A. Yes.

23 Q. Let me just, so everybody is on the same page, that's

24 a white -- start over.

25 This white thing to the left of the Micro in the

1614

1 A. How qualified they are.

2 Q. Okay. Do you think Mr. Gaw is a qualified engineer?

3 A. Yeah.

4 Q. Okay. On the screen now is PTX-124.

5 Would you take Magnolia's word for it on how the

6 product works in their marketing materials?

7 A. Well, it depends.

8 Q. What does that one depend on?

9 A. I would have to read it to understand it before I

10 could take their word on it.

11 Q. Okay.

12 **MR. McELDOWNEY:** Mr. Urban, can we play this

13 video of the Steripath Micro, starting at timestamp 34,

14 and then stop at 48.

15 **BY MR. McELDOWNEY:**

16 Q. I'd like you to watch and listen, Dr. Meinhart.

17 (Video played.)

18 "Steripath Micro addresses contamination right at the

19 source. As the user pulls back on the syringe, negative

20 pressure actively diverts the initial specimen into a

21 chamber, preventing them from entering the culture

22 bottle."

23 **BY MR. McELDOWNEY:**

24 Q. Sir, Magnolia's marketing video says that as the user

25 pulls back on the syringe of the Micro, negative pressure

1615

1 actively diverts the initial specimen into the chamber.

2 Did you hear that?

3 A. Yes.

4 Q. Do you agree or disagree with that characterization?

5 A. I think it's a marketing video. It's not a technical

6 description.

7 Q. Let's keep watching the rest -- or another clip of

8 the video. I'd like you to listen, sir, and I have some

9 questions about it.

10 MR. McELDOWNNEY: Mr. Urban, can we play until

11 timestamp 56.

12 (Video played.)

13 "Pressing the button sequesters potential

14 contaminants and automatically opens an independent

15 sterile pathway for specimen collection."

16 BY MR. McELDOWNNEY:

17 Q. In the video, it says that when you push the button,

18 there is an independent sterile pathway for specimen

19 collection.

20 Do you agree with that characterization or you

21 disagree with it?

22 A. I agree with it.

23 Q. Okay.

24 MR. McELDOWNNEY: You can take that down,

25 Mr. Urban.

1617

1 interrupt. Can I get a copy of the exhibits?

2 MR. McELDOWNNEY: Apologies.

3 THE COURT: It is already in evidence, right?

4 MR. McELDOWNNEY: I actually don't think this

5 one is, Your Honor.

6 THE COURT: Okay.

7 MR. McELDOWNNEY: Kurin does, at this time,

8 offer PTX-76 in evidence.

9 THE COURT: Any objection.

10 MR. VORONOV: No objection.

11 THE COURT: It's admitted.

12 (Exhibit PTX-76 admitted into evidence.)

13 THE COURT: Now, you can put it up.

14 MR. McELDOWNNEY: Yes.

15 BY MR. McELDOWNNEY:

16 Q. All right. At the top, it says, "Steripath Micro,

17 Argyle functional and performance verification report."

18 Do you see that?

19 A. Yes.

20 Q. Argyle was the sort of code name at Magnolia for the

21 project where the engineers were developing the Micro,

22 right?

23 A. I'll take your word for that.

24 Q. You don't know that?

25 A. It looks like it is here, but...

1616

1 BY MR. McELDOWNNEY:

2 Q. Did you review any engineering documents about how

3 the Micro works?

4 A. Yes.

5 Q. And do you think that you would take Magnolia's word

6 for it, their engineers' word for it, in the engineering

7 documents that describe, from Magnolia's own perspective,

8 how the Micro works?

9 A. Again, it depends.

10 Q. Okay.

11 MR. McELDOWNNEY: Mr. Urban, can we pull up

12 PTX-1 -- I'm sorry, PTX-76.

13 And turn to the third page, Mr. Urban.

14 BY MR. McELDOWNNEY:

15 Q. So top of the page here, in the left, it says,

16 "Magnolia Medical technology."

17 Do you see that?

18 A. Yes.

19 Q. And then on the right, it says, "Steripath Micro,"

20 quote, "Argyle functional and performance verification

21 report."

22 Do you see that?

23 A. Yes.

24 Q. And --

25 MR. VORONOV: Excuse me, Your Honor. Sorry to

1618

1 Q. Well, do you know that that's the name of the project

2 that the engineers used at Magnolia when they were

3 developing the Micro? Did you know that before you saw

4 this document, or you didn't know that?

5 A. I didn't recall it at this time.

6 Q. Okay. And this is a document that is verifying the

7 functional and performance characteristics for the

8 Steripath Micro, correct?

9 A. Yes.

10 Q. And if you turn to Page 32, at the top, it says,

11 "functional and performance requirements data sheet."

12 Do you see that?

13 A. Yes.

14 Q. Okay. And so this is the performance requirements

15 for the Micro that they were developing.

16 Is that what you'd understand this to be?

17 A. Yes.

18 Q. Okay.

19 MR. McELDOWNNEY: Let's zoom in sort of two

20 bullets underneath that, Mr. Urban. Let's blow up the

21 functional performance -- yes, exactly. Thank you.

22 BY MR. McELDOWNNEY:

23 Q. Sir, do you see that the second performance

24 requirement for the Micro device when the engineers tested

25 at Magnolia is that applying vacuum to the device in

1619

1 diversion mode fills the diversion chamber? Do you see
2 that?
3 **A.** Yes.
4 **Q.** Do you agree with that one or you disagree with that
5 one?
6 **A.** I see it, yes.
7 **Q.** Do you agree with that one or do you disagree with
8 it?
9 Is that how the Micro works, sir?
10 **A.** Yes.
11 **Q.** Let's turn to some Magnolia patent issues. Let's
12 start with --
13 **MR. McELDOWNEY:** Mr. Urban, can you pull up --
14 I think I have the slide numbers right -- Slide 4 from
15 Dr. Meinhart's presentation.
16 There we go.
17 **BY MR. McELDOWNEY:**
18 **Q.** So this is some testimony from Mr. Rogers that you
19 talked about, and you seemed to suggest that this
20 supported or maybe even confirmed your infringement
21 analysis.
22 Is that what you were suggesting to the jury?
23 **A.** Well, when it talks about -- he's asking about the
24 movable plug element. And so, yeah, what I was talking
25 about here is Mr. Rogers' testimony is the third element,

1621

1 disagree. I think it's trying to patent something that
2 already existed"?
3 **A.** Yes.
4 **Q.** And you know that what he was talking about was his
5 own Rogers '445 application, right? Do you know that?
6 **A.** Not for a fact, but I'll accept it, yeah.
7 **Q.** Okay.
8 Now, you also showed some deposition testimony from
9 Kevin Nason. Do you remember that?
10 **A.** Yes.
11 **Q.** I'm sorry. I said deposition testimony, but that's
12 stuck in my brain. It was testimony from a deposition
13 that was played live here at trial, right?
14 **A.** Yes.
15 **MR. McELDOWNEY:** Mr. Urban, could you pull up
16 Slide 19 from Dr. Meinhart's...
17 **BY MR. McELDOWNEY:**
18 **Q.** And so the testimony that you showed from Mr. Nason's
19 video testimony was he says, "I can't tell exactly how
20 that's -- how it's working."
21 You seem to point to this to say that since Mr. Nason
22 couldn't understand what was going on in Figure 24, that
23 there must not be sufficient written description.
24 Was that the gist?
25 **A.** Yes.

1620

1 "Is a movable plug disposed in a housing," and, yes, that
2 suggests the Jet. So --
3 **Q.** The movable plug is just one piece of the claims that
4 are asserted in this case, right?
5 **A.** Yes.
6 **Q.** The movable plug has to do something very specific in
7 these claims, true?
8 **A.** Yes.
9 **Q.** Okay. In the question that Mr. Rogers was asked that
10 you showed to the jury, the rest of that stuff that the
11 movable plug has to do wasn't part of a question, was it?
12 **A.** That is correct.
13 **Q.** Okay. Mr. Rogers was not saying that the movable
14 plug does what the claims say. That's not what he was
15 testifying to here. Do you understand that?
16 **A.** That is correct.
17 **Q.** And, in fact, when -- you were here in court when
18 Mr. Rogers' deposition played, I assume?
19 **A.** Yes.
20 **Q.** And you remember that right after this question
21 Mr. Rogers was asked: "Is it your understanding that the
22 '081 covers the Jet?"
23 Do you remember that?
24 **A.** Yes.
25 **Q.** You remember his testimony in response was: "I

1622

1 **Q.** Do you know if Mr. Nason was given an opportunity to
2 read the Rogers '445 when he was at his deposition?
3 **A.** I don't know.
4 **Q.** Okay.
5 And you relied on Mr. Nason's deposition testimony
6 when you reached your opinions in the case, didn't you?
7 **A.** Yes.
8 **Q.** Did you review just this part of the transcript or
9 did you review the whole transcript?
10 **A.** I don't recall.
11 **Q.** Okay.
12 **MR. McELDOWNEY:** May I approach, Your Honor?
13 **THE COURT:** Yes.
14 **BY MR. McELDOWNEY:**
15 **Q.** So, sir, there should be, in that binder, Mr. Nason's
16 deposition. You should find it about halfway --
17 **MR. VORONOV:** Counsel, if I could get a copy of
18 the binders.
19 **MR. McELDOWNEY:** Sorry.
20 Apologies.
21 **THE COURT:** Here, just give him ours and we
22 will keep moving.
23 **MR. McELDOWNEY:** Sorry about that, Your Honor.
24 **THE COURT:** That's all right.
25 **MR. McELDOWNEY:** I'm anxious to keep going.

1623

1 Take care of the binders.

2 **BY MR. McELDOWNNEY:**

3 **Q.** Okay. Did you find Mr. Nason's deposition in your

4 binder there?

5 **A.** Can you give me the record number?

6 **Q.** First I need you to find the deposition. It's tabbed

7 and it has, it says "Kevin Nason Deposition" on it. Let

8 me know when you find it.

9 **A.** Okay. I'm here.

10 **Q.** Okay. And so the citation that you've got here is

11 from Page 21 to 22 of Mr. Nason's transcript, right? Up

12 on the slide.

13 **A.** Yes.

14 **Q.** That's what you talked about to the jury, right?

15 **A.** Yes.

16 **Q.** Okay. Take a look at Page 24 in Mr. Nason's

17 deposition.

18 **A.** I'm there.

19 **Q.** Okay. Line 3.

20 **MR. VORONOV:** Objection, Your Honor. He's

21 simply reading deposition testimony.

22 **THE COURT:** I don't know if he's going to. He

23 said "take a look at it." I haven't heard a question yet.

24 **MR. VORONOV:** He just said "Line 3."

25 **THE COURT:** He said take a look at it, Line 3.

1625

1 You know that Dr. Antonsson's opinion is that the

2 correct way to measure the pressure differential in the

3 context of the asserted claims and the way that they're

4 written is to measure 7 versus 9 or some points in that

5 channel between those. You understand that?

6 **A.** Yes.

7 **Q.** If the jury reads the claim that way, if the jury

8 understands that's what the claim requires, then there's

9 no infringement. Do you agree? The Jet can't infringe?

10 **A.** Yes, but that would be nonsensical.

11 **Q.** Okay.

12 Nonsensical. You submitted an expert report where

13 you measured the -- or talked about the pressure

14 differential somewhere in that space between 7 and 9,

15 didn't you, sir?

16 **A.** Yes.

17 **Q.** Dr. Antonsson also opined that in his view, his

18 reading of the written description, the Magnolia asserted

19 patents, the '081, '863, '709, does not sufficiently

20 disclose -- or does not disclose at all a movable plug

21 that moves in response to a pressure differential between

22 the plug and the outlet.

23 You know that's Dr. -- one of Dr. Antonsson's

24 opinions, right?

25 **A.** Yes.

1624

1 I'm waiting. I haven't had a yet.

2 **MR. VORONOV:** Okay.

3 **THE COURT:** But you can get ready. You can

4 keep standing if you want.

5 **MR. McELDOWNNEY:** I'm going to do my best not to

6 ask an objectionable question, Your Honor.

7 **BY MR. McELDOWNNEY:**

8 **Q.** Sir, read to yourself Lines 3 through 10.

9 **A.** Got it.

10 **Q.** Sir, does this -- you can pick it up, put it away.

11 You can close it now and set it aside, sir.

12 Does this refresh your recollection that Mr. Nason

13 testified about the inner housing from Figure 24 moving in

14 response to a pressure differential?

15 **A.** Yes.

16 **Q.** Okay.

17 Now --

18 **MR. McELDOWNNEY:** Can I have the ELMO,

19 Mr. Urban?

20 **BY MR. McELDOWNNEY:**

21 **Q.** There's been a lot of talk about this figure. This

22 is a figure from one of your expert reports, correct?

23 **A.** Yes.

24 **Q.** You know that Dr. Antonsson's opinion is that the way

25 that -- or strike that.

1626

1 **Q.** And if he's right, then the patent claims are

2 invalid, right?

3 **A.** Yes.

4 **Q.** And you know that we talked earlier about new,

5 non-ob- -- boy, that one trips me up every time -- new,

6 novel, and non-obviousness is a requirement for being able

7 to get a patent, right?

8 **A.** Yes.

9 **Q.** Okay. And you also -- well, or do you also know that

10 each and every limitation in a patent claim has to be

11 described in sufficient detail in the written description

12 to show that the investors actually possessed, actually

13 had the claimed invention? Do you know that?

14 **A.** Yes.

15 **Q.** And the point of that requirement is that you

16 shouldn't be able to get a patent on something you didn't

17 actually invent yourself, fair?

18 **A.** One of the reasons, yes.

19 **Q.** Shouldn't be able to take credit for something you

20 didn't invent, fair?

21 **A.** Yes.

22 **Q.** One of your slides, you had the sort of -- I won't

23 call it a definition, but a description of anticipation

24 law, and that's one of the issues that you addressed with

25 respect to Magnolia's patents that Dr. Antonsson says are

1627

1 anticipated, fair?

2 A. Yes.

3 Q. You know that when you're looking at anticipation --

4 well, let me ask it more specifically.

5 As we had agreed earlier, Dr. Antonsson opines that

6 some of the Magnolia claims are anticipated, right?

7 A. Yes.

8 Q. And, in particular, contends that all of the features

9 of the claimed device in Magnolia's patents appeared in

10 Rogers '445 application before Magnolia's invention.

11 That's what Dr. Antonsson opined on, correct?

12 A. Yes.

13 Q. You know that -- well, let me ask this differently.

14 In order for a reference to anticipate, in your view,

15 does the reference need to disclose each and every claim

16 element expressly?

17 A. No.

18 Q. Doesn't have to use -- the Rogers reference wouldn't

19 have to use the exact same words that are in the Magnolia

20 claims in order to anticipate, fair?

21 A. Fair.

22 Q. Okay. And you know that for obviousness, which

23 Dr. Antonsson also opined on, with respect to the Magnolia

24 patents, you don't even have to find all the elements in

25 the same piece of prior art for obviousness. You

1629

1 Q. And when you formed your opinions in this case, you

2 didn't have a physical sample of the Kurin Lock, did you?

3 A. That's correct.

4 MR. McELDOWNEY: Mr. Urban, can I get '682

5 patent.

6 Can we go to Figure 23.

7 BY MR. McELDOWNEY:

8 Q. The obviousness opinion from Dr. Antonsson is that it

9 would be obvious to modify the Lock based on the teachings

10 of the Figure 23 from the '682.

11 You understand that?

12 A. Yes.

13 Q. And you say this feature that's labeled in Figure 23

14 as a valve, that's not, in your view, a plug; is that

15 right?

16 A. Correct.

17 Q. And that thing that's labeled a valve is a -- I would

18 call it a pinch clamp. Is that -- maybe that's not

19 technical term.

20 A. Or a clip valve.

21 Q. Okay. The idea, though -- and this is a Micro. My

22 question is not about the Micro.

23 This is one of those clip valves; is that right? Can

24 you see that far?

25 A. I can't.

1628

1 understand that?

2 A. Yes.

3 Q. Another one of your opinions I gathered from your

4 testimony today is that you don't think it would be

5 obvious to use elastomeric material for a plug.

6 Did I understand that correctly?

7 A. My testimony was the combination of Villa-Real, '682,

8 and the Kurin Lock, that combination does not disclose an

9 elastomeric plug.

10 Q. Okay. So, in your view, the Lock does not have an

11 elastomeric plug?

12 A. Correct.

13 Q. Do you know that it has an elastomeric valve?

14 Do you know that, sir?

15 A. I believe it does.

16 Q. Not sure, though?

17 A. I don't know what the material is, but I know there's

18 a membrane that's punctured.

19 Q. Well, and when you -- so in the trial here with a few

20 witnesses and couple of times with the jury, we've had the

21 physical devices and actually passed them around, right?

22 A. Yes.

23 Q. And it's helpful to see what's going on in three

24 dimensions with the actual device. Do you agree?

25 A. Yes.

1630

1 MR. McELDOWNEY: May I approach briefly, Your

2 Honor?

3 THE COURT: Yeah, sure.

4 BY MR. McELDOWNEY:

5 Q. Is that an example of a clip valve?

6 A. Yes.

7 Q. Okay. And the way this clip valve works, to close

8 it, you pinch it with your fingers, right?

9 A. Yes.

10 Q. Okay. If I asked you to plug your nose, how would

11 you do that? Can you show us?

12 THE COURT: Oh, please. That could really be

13 unseemly.

14 THE WITNESS: Do I have to, Your Honor?

15 THE COURT: Well, I think you got the gist of

16 what he's looking for. Why don't you respond to that.

17 THE WITNESS: Like that.

18 BY MR. McELDOWNEY:

19 Q. I may have misspoke.

20 Would you call this plugging your nose, you take your

21 two fingers and do this if you smell something bad?

22 A. I would hold my nose. I call that holding your nose.

23 Q. So, this, you wouldn't call plugging your nose?

24 A. No.

25 Q. Okay.

1 MR. McELDOWNEY: Mr. Urban, can we get -- 1631 2 I do have it. Do you have Magnolia's opening 3 slides, Mr. Urban? Pull up Slide 21 from that opening. 4 Okay. 5 BY MR. McELDOWNEY: 6 Q. You were here for openings, sir? 7 A. Yes. 8 Q. Okay. And this was -- Slide 21 was the timeline that 9 Magnolia talked about. Do you remember that? 10 A. Yes. 11 Q. And the first item 2008 says "Magnolia founded by 12 Dr. Patton." 13 Do you see that? 14 A. Yes. 15 Q. And you know, sir, that for the '081, '863, and '709 16 patents that are asserted in this case, Dr. Patton is not 17 named as an inventor on those patents, is he? 18 A. That is correct. 19 Q. Okay. 20 The next two events on the timeline are the Steripath 21 and the Steripath Gen2; is that right? 22 A. Yes. 23 Q. You don't contend, do you, that either of those 24 devices practices, uses Magnolia's '081, '863, or '709 25 patents, do you?	1 A. That is correct. 1632 2 Q. Okay. And with respect to the features of those 3 products, both of them used more than 1 1/2 milliliters of 4 blood. Do you know that? 5 A. Something like that, yes. 6 Q. Something in the range of 2 or higher, right? 7 A. 1.5 to, yeah, or higher, yeah, in that range. 8 Q. And neither of them used vacuum from a collection 9 bottle or a syringe to draw blood into the device, did 10 they? 11 A. For the initial volume, that's correct. Manual 12 manipulation. 13 Q. That's useful clarification. Neither of those 14 products, the Steripath or the Steripath Gen2, used the 15 vacuum from a syringe or a vacutainer to pull in the 16 initial volume of blood into the sequestration or 17 containment channel, true? 18 A. Correct. 19 Q. Now, the date of the inventions for the three 20 Magnolia patents that are at issue in this case, the '081, 21 '863, '709, September 2018, right? 22 A. Yes. 23 Q. Now, there's some -- at least on this slide, there's 24 some important dates in this case that are not in this 25 slide. Do you agree?
1 A. It depends. 1633 2 Q. Well, let's walk through a few. The '052 patent 3 claims priority back to 2016 or '17 right? 4 A. Yes. 5 Q. '682 patent is asserted prior art against Magnolia 6 patents. It's a priority date of before 2018 also, right? 7 A. Yes. 8 Q. 445 -- 9 MR. VORONOV: Objection, Your Honor. This is 10 beyond the scope. Cumulative. 11 THE COURT: Do you have something specific in 12 mind you think it responds to in the direct? 13 MR. McELDOWNEY: It's just laying out the... 14 THE COURT: I know it is, but you can also do 15 that in closing. 16 MR. McELDOWNEY: It's maybe two more questions, 17 Your Honor. 18 THE COURT: You get one more. 19 MR. VORONOV: Thank you, Your Honor. 20 BY MR. McELDOWNEY: 21 Q. Comparing the Kurin prior art in this case and the 22 Magnolia '081, '863, and '709 patents, and Magnolia's 23 Micro product that's accused of infringement in this case, 24 Kurin and Bob Rogers came first in that timeline with 25 respect to those events I just mentioned.	1 Do you agree? 1634 2 A. For filing the patents, yes. The original 3 applications. 4 MR. McELDOWNEY: No further questions, Your 5 Honor. 6 THE COURT: Thank you. 7 Any redirect? 8 MR. VORONOV: Yes, Your Honor. 9 REDIRECT EXAMINATION 10 BY MR. VORONOV: 11 Q. Just a few questions. 12 Professor Meinhart, you were asked about Mr. Nason's 13 testimony. 14 MR. VORONOV: Mr. Smith, if you would please 15 pull up PDX- 06018. 16 BY MR. VORONOV: 17 Q. Professor Meinhart, how, if at all, is Mr. Nason's 18 testimony about the existence of a pressure differential 19 in Figure 24 consistent with your opinion of the pressure 20 differential in Figure 24? 21 A. Sure. Mr. Nason, in his deposition, he talked about 22 how when the blood contacts this barrier, that it creates 23 a force that causes this member to move into a second 24 position. And so that's also my read on it. That's how I 25 understand it to work, is the pressure here -- but it's --

1635 1 so the pressure at the membrane causes it to move. So 2 it's a pressure differential between the membrane and the 3 outlet that causes it to move, not a pressure differential 4 between the plug and the outlet, and not a pressure 5 differential between the valve and the outlet. 6 MR. VORONOV: Mr. Smith, if you would pull up 7 PDX-5. Sorry, the Slide 5. Thank you. 8 BY MR. VORONOV: 9 Q. You were asked some questions about the pressure 10 differential between 7 and 9 in the opinions that you had 11 there, Professor Meinhart? 12 A. Yes. 13 Q. Would you remind the jury whose interpretation of the 14 pressure differential were you applying in connection with 15 those opinions? 16 A. I was applying my interpretation of the pressure 17 differential between a movable plug and the outlet to mean 18 a difference between the pressure at the bottom of the 19 movable plug and the outlet. So it's the pressure 20 differential between 5 and 9. And from a physics point of 21 view, it's the only reading that makes sense. The other 22 reading doesn't make physical sense. 23 Q. And whose interpretation is it about the pressure 24 differential between 7 and 9, Professor? 25 A. That's Mr. Antonsson's interpretation.	1636 1 Q. Do you agree with that interpretation? 2 A. Absolutely not. 3 Q. Now, you were also asked about a document. 4 MR. VORONOV: If I could get the ELMO. 5 BY MR. VORONOV: 6 Q. You recall that you were asked about this document, 7 Professor Meinhart? 8 A. I do. 9 Q. And what happens in the Micro when a vacuum is 10 applied? 11 A. Yes. When you apply a vacuum from the outlet, what 12 it does is it deflects the bladder. It flips the bladder, 13 and it is the bladder that pulls in the blood. 14 Q. How, if at all, is this document consistent with your 15 non-infringement opinions? 16 A. Well, the document was saying applying the vacuum to 17 the device in the diversion mode fills the diversion 18 chamber. So it is completely consistent. You are 19 applying a vacuum, it's flipping the bladder, and then 20 that's filling the diversion chamber. So this sentence is 21 completely consistent. They just didn't insert that 22 language into this document because it's an internal 23 document and brevity matters. 24 Q. Thank you. 25 You were also asked some questions about your
1637 1 conversations with Mr. Bullington. 2 Did you hear Mr. Gaw's testimony about the bladder 3 today? 4 A. Yes. 5 Q. How, if at all, was Mr. Gaw's testimony consistent 6 with your non-infringement opinions? 7 A. Yeah. It was completely consistent. Mr. Gaw also 8 testified that the vacuum causes the bladder to flip, and 9 the bladder is what pulls in or draws in the blood. 10 Q. And what about with respect to your opinion, 11 non-infringement opinion, with respect to the housing that 12 defines a sampling channel, Professor Meinhart? 13 A. It's the same. It's quite clear. The sampling 14 channel is only formed when the button is inserted. If 15 there's no button, there's no sampling channel. 16 THE COURT: Hold up. 17 There is an objection? 18 MR. McELDOWNEY: This is beyond the scope of 19 cross, Your Honor. 20 THE COURT: It is, actually, yeah. This is 21 beyond the scope of cross. There was no testimony about 22 the button on cross, I don't believe. 23 MR. VORONOV: Well, Your Honor, there was 24 questions about conversations that he had with 25 Mr. Bullington.	1638 1 THE COURT: Okay. This is beyond, so move on. 2 MR. VORONOV: Understood, Your Honor. 3 BY MR. VORONOV: 4 Q. Professor, based on the questions that you were asked 5 by opposing counsel during your cross-examination, have 6 your opinions in this case changed? 7 A. Not at all. 8 MR. VORONOV: No further questions. 9 THE COURT: All right. You may step down. 10 Next witness. 11 MR. BLOCK: Magnolia recalls Mr. Napper to the 12 stand, Your Honor. 13 THE COURT: All right. 14 While they are doing that, so I'm stopping it 15 midstream at 4:57 so you all can catch your trains. It 16 could be a 30-seconds good-bye, and I will explain. 17 So remember, you can't talk about the case or 18 look at anything or read anything over the weekend. We 19 will be in touch with you weather wise. I am going to 20 stay here as late as we have to stay here with these guys 21 tonight so that we have jury instructions and everything 22 ready to go Monday. If we don't finish the evidence 23 today, we will go right into closings and the evidence. I 24 will just tell you that. Thank you. 25 MR. BLOCK: May my colleague approach, Your

1639

1 Honor?

2 While he does that, Magnolia moves into

3 evidence PTX-75, PTX-208, PTX-292, DTX-0769.

4 **THE COURT:** Any objection?

5 **MS. FARNAN:** No objection.

6 **THE COURT:** They are admitted.

7 (Exhibits PTX-75, PTX-208, PTX-292, and DTX-0769

8 admitted into evidence.)

9 BRIAN NAPPER, having been called as a witness, being

10 previously duly sworn under oath, testified as follows:

11 DIRECT EXAMINATION

12 **BY MR. BLOCK:**

13 **Q.** Mr. Napper, I know you still are receiving the

14 binders. Mindful of the clock, I am going to skip the

15 introductions.

16 I want to start with Ms. Distler's criticisms of your

17 opinions.

18 Were you here in court when she testified?

19 **A.** Yes.

20 **Q.** Do you recall seeing this slide?

21 **A.** I did.

22 **Q.** Would you care to comment on Ms. Distler's criticisms

23 of your opinions?

24 **A.** Yes. So I understand Ms. Distler had three different

25 observations as to my calculation of Magnolia Medical's

1641

1 were taken, I didn't feel it was necessary to deduct those

2 additional marketing costs because those customers were

3 already knowledgeable.

4 And thirdly, she removed a number of customers.

5 Because remember my analysis was customer based, that

6 these customers were in play, if you will, because they

7 were educated by the Kurin Jet and the Magnolia Micro?

8 And she made a number of removal of those sales, those

9 lost sales that I believe are appropriate, for a number of

10 different reasons. I reviewed those reasons and they

11 didn't really, to me, indicate that they should be

12 removed.

13 For example, I think a couple of examples, they were

14 a former Magnolia customer. Well, if they're a former

15 Magnolia customer that switched over, then they are

16 already knowledgeable so they would just come back to

17 Magnolia. I think that was just one of the customers.

18 But there were a number, then, that I looked at those in

19 detail. With all due respect to Ms. Distler, I don't

20 believe those are appropriate deductions based upon my

21 extensive work on the lost profits claim.

22 **Q.** Mr. Napper, Ms. Distler also addressed your cost

23 analysis for the Kurin Jet. Would you like to address

24 those criticisms?

25 **A.** Yes. If I would, please. Sure.

1640

1 lost profits, assuming infringement, and that I did not

2 deduct rebates is one of them.

3 Real quick, what I understood is that Magnolia

4 Medical, during the time it was competing with Kurin head

5 to head, they felt necessary to reduce or provide rebates

6 to their customers. In other words, they were lowering

7 their prices, for all intents and purposes.

8 So in a but-for world where Kurin's Jet product is

9 not being sold, Magnolia Medical would not have had to

10 make those rebates back to customers. So that's why I did

11 not conclude it in in a original lost profits, because

12 that's not the but-for world with Kurin not competing.

13 The second one is she indicated I did not deduct, I

14 think, additional incremental costs to basically reach the

15 customers that Kurin sold to. But if you recall, my

16 analysis is very much based on known customers who

17 purchased products. Either they purchased the Kurin Jet

18 and so they were knowledgeable, if you will, or they

19 purchased -- or customers went from -- hospitals went from

20 buying the Kurin Jet back -- and switched from Magnolia.

21 So Magnolia had already incurred those costs, essentially.

22 I have some deduction for marketing and commissions

23 and those kinds of things, but what I didn't feel

24 necessary is, since Magnolia Medical had expended those in

25 the real world to educate those customers and then they

1642

1 **Q.** I don't have a slide for it.

2 **A.** Okay. The cost analysis in terms of the incremental

3 costs?

4 **Q.** No, the component costs.

5 **A.** The components cost. Thank you. I just want to make

6 sure we are on the same page.

7 So, yes, Ms. Distler had an issue with respect to my,

8 if you'll recall, my cost approach. Essentially, because

9 I take the cost, the component cost of the product, and

10 that's the numerator over the denominator of the entire

11 cost of the product. And she made some adjustments to

12 that cost analysis that I don't think had a basis.

13 **Q.** Did you want to address the BD set?

14 **A.** Yes. So thanks for the reminder, Mr. Block.

15 The BD set was a -- offered by Micro -- on the Micro

16 to customers. So what that is -- and, in fact, I've

17 worked against Becton Dickinson -- it's a set of needles

18 that, as a convenience to the customer, Magnolia Medical

19 would send -- would sell them a BD set as a convenience.

20 Some customers liked that and some customers didn't,

21 so I did not include that in my denominator because that's

22 not really part of the inventive aspect or the core

23 product. It's a convenience. It's like you can buy the

24 needles from us or you can essentially buy them

25 yourselves.

1643 1 And I think about more than, I think, four of the 11 2 customers on volume basis bought their own needle sets, 3 and seven bought from BD. So I didn't think that was 4 appropriate to include that in the denominator. 5 Q. Okay. And then she had a criticism about overhead 6 costs from the nonautomated manufacturing? 7 A. Yes. The other was, I believe what Ms. Distler did 8 is included overhead costs in that denominator. And I 9 didn't think that was appropriate either because overhead 10 costs are essentially not part of the component cost, 11 because that's what we're trying to do, is what part of 12 the component is related to the patented functionality 13 over the cost of doing the whole product. 14 Overhead costs -- you may know this, but overhead 15 costs are just general costs that are allocated to various 16 products. So they are, like, you know -- I don't want to 17 pick on the accounting people at the company. Their 18 salary might be allocated to the various products. And 19 that's an overhead cost. That's not directly associated 20 with the product, so I didn't think it was appropriate to 21 include that. 22 Q. Okay. This is one of your slides where you gave your 23 conclusion regarding the appropriate reasonable royalty 24 that would emerge from the hypothetical negotiation. 25 Having heard Ms. Distler's testimony, do you find any	1644 1 reason to change your conclusion regarding a 2 \$3.05-per-unit reasonable royalty? 3 A. No. I've heard her explanation of her opinion, and I 4 think one of the key takeaways here is with my cost 5 approach at \$3.05 per unit, I find that the reasonableness 6 test that I performed, which is the difference between the 7 Kurin Jet and the Kurin Lock, the Jet has the increased 8 functionality related to the patents, the Kurin Lock does 9 not. That equates to \$2.23 or \$2.24, pretty close, 10 increased price and increased margin. 11 Now, where we do differ, Ms. Distler actually focused 12 on just the infringing period in doing this comparison of 13 the margin for the Kurin Jet and the Kurin Lock. I don't 14 believe that's appropriate because there's a whole period 15 of time prior, back to 2018 I want to say, that where this 16 differential was actually higher, then it became lower. 17 Why did it become lower? Because Magnolia Medical entered 18 the marketplace. And so that has an impact in lowering 19 the differential. 20 So I think you take a longer span period for 21 determining what that differential would be, and it's an 22 important cross-check to the \$3.05 royalty I came up with. 23 Q. And, finally, Mr. Napper, this is the summary slide 24 you previously presented. 25 Having heard Ms. Distler's testimony, do you find any
1645 1 reason to change your opinions about the damages owed to 2 Magnolia Medical? 3 A. The short answer is no. I believe I've done a very 4 data-specific analysis of looking at customers. Customers 5 who, essentially, Kurin sold the Jet to and then two 6 tranches, one they sold them to Micro customers or they 7 were sold to customers who upgraded from the Lock to the 8 Jet. A customer who upgrades to the most significantly 9 advanced product doesn't really go back to the prior 10 product. 11 So those are the only two tranches I believe are 12 appropriate under Magnolia's lost profits and nothing that 13 Ms. Distler provided made me change my opinion on that 14 very fact-based analysis. 15 Q. Okay. Let us turn to your opinions regarding the 16 Kurin patent in this case. 17 MR. BLOCK: Your Honor, may we publish 18 Mr. Napper's slides for the jury, PDX-7? 19 Can we have those up, please? 20 Perfect. 21 Let me skip ahead a little bit. See if we can 22 start here. 23 BY MR. BLOCK: 24 Q. Mr. Napper, how did you approach your analysis for 25 Kurin's patent?	1646 1 A. Same approach, which is looking at the total amount 2 of Micro sales, how many units were sold, and whether 3 Kurin would be entitled to damages. They are entitled to 4 damages on each one of those sales, it's just what for, 5 either lost profits or reasonable royalty. 6 Q. Did you make assumptions about infringement and 7 validity on the Kurin side the way you did on the Magnolia 8 side? 9 A. Correct. I assumed the Kurin patent is both valid 10 and infringed. 11 Q. And if it is not both valid and infringed, what is 12 the measure of damages? 13 A. This makes my analysis irrelevant, zero. 14 Q. Okay. We have spoken about the <i>Panduit</i> factors. Let 15 me start quickly with Number 1. Any dispute to address on 16 this issue? 17 A. No, there is demand for the products. 18 Q. Okay. 19 Let's talk about Number 2, the absence of acceptable 20 non-infringing alternatives. How does this factor apply 21 here? 22 A. So this factor I looked at, again, in the Kurin case, 23 of their patent, and looked for non-infringing 24 alternatives. 25 Little different than when I looked at it from the

1647 1 Micro side because, ultimately, you see testimony, and I 2 reviewed information that would suggest that Magnolia 3 Medical's Gen2 product, which is not accused of infringing 4 the Kurin '052 patent, would be in the marketplace, and 5 would be acceptable if Magnolia Medical were not allowed 6 to sell the Micro product. 7 Q. Did you compare the Gen2 to the Jet? 8 A. I did. 9 Q. What did you conclude? 10 A. When I compared these two, they do have -- they both 11 look at and provide active negative pressure. The Kurin 12 Lock, I understand, does not provide active negative 13 pressure. So that's similar between the Gen2 and the Jet. 14 And that Gen2 does compete for those particular customers. 15 Q. In the but-for world if the Jet is infringing, would 16 the Steripath Gen2 have been available and acceptable to 17 Jet buyers? 18 A. It would. 19 Q. And has the Steripath Gen2 actually been available 20 during the damages period? 21 A. Yes. It has been completely sold. You may recall 22 some downturn in the volume of Gen2 by Magnolia Medical. 23 I think Ms. Distler had a chart on that. And there's a 24 reason for that significant decline in the level of sales 25 of Gen2.	1648 1 Q. And do you have an understanding of whether the 2 Steripath Gen2 is accused of infringement? 3 A. It is not. 4 Q. Okay. Did you consider how Ms. Distler analyzed -- 5 excuse me -- <i>Panduit</i> Factor 2? 6 A. Yes, I reviewed her report as to her framework for 7 things to consider in the world of infringement, assuming 8 infringement and validity, and I think she has three 9 different kind of points to make as to things to look at 10 as to whether lost profits would be available. 11 Q. What is her first? 12 A. The first one was do the -- does the Gen2, in this 13 case, testing it for whether it's acceptable in the 14 marketplace to customers; does the -- we call it NIA in 15 our world -- non-infringing alternative provide a low 16 percentage contamination rate at or near 1 percent, as 17 claimed by the Micro, which is, in this world, out of the 18 marketplace. 19 Q. For the record, are these Ms. Distler's criteria for 20 what buyers of the Micro would look for in alternatives? 21 A. Correct, as a non-infringing alternative. Yes. 22 Q. I think you addressed Number 1. 23 What's the second thing a Micro buyer would look for? 24 A. The second thing that Ms. Distler comments upon is 25 they may not match Micro's ease of use features of the
1649 1 '052 patent, but still offer functionality that helps the 2 device easily integrate into clinicians' use of those 3 products. 4 Q. I think I asked you a question earlier and I 5 misspoke. I asked in but-for world if the Jet is 6 infringing. I meant to ask this: In the but-for world, 7 if the Micro is infringing, would the Steripath Gen2 have 8 been available to those buyers? 9 A. That's how I interpreted your question, and yes, it 10 would be. 11 Q. Thank you. 12 That was criteria on 2. 13 What is the third? 14 A. The third of a non-infringing available product, if 15 the Micro is not available to be sold, would be does the 16 product divert the least amount of blood possible while 17 still being clinically effective? 18 Q. Did you consider Ms. Distler's criteria in relation 19 to Gen2? 20 A. I did. 21 Q. And what are you showing on this slide? 22 A. So for the ability of the non-infringing alternative, 23 in this case the Gen2 of -- the Steripath Gen2, would it 24 provide a low percentage contamination rate at or near 25 1 percent, and I -- you see here on the left side, this is	1650 1 a study at Stanford Health Care, and it shows that the 2 Steripath, which is, in this case -- I think this study 3 was done in 2020 -- was related to the Gen2 and shows a 4 significant reduction in the blood culture contamination 5 results. So that's clearly rising to the level of the 6 Micro. 7 Q. Just briefly, did you look at any additional studies? 8 A. I did. Inova Health System also did a study. It 9 shows a .8 percent baseline level with an 82 percent 10 reduction in blood contamination rates. 11 Q. Okay. Ms. Distler's second criterion was about ease 12 of use. 13 Did you consider that? 14 A. I did. 15 Q. How does the Gen2 fare? 16 A. The Gen2 fares very well in the documents I reviewed. 17 This is just one example of many I looked at that looks to 18 assess the level of use or compliance, which is, 19 essentially, did the assistants, the nurses, if you will, 20 use the product and did they comply with the product. And 21 so clearly, the results for the Gen2 show an 88-percent 22 user compliance. And so that's significant. 23 Q. Was that from the Stanford study you just looked at? 24 A. I believe so, yes. 25 Q. How about compliance in the Inova study as another

1651 1 example? 2 A. Correct, the same Inova from the previous study. 3 80 percent compliance in that case. 4 Q. Third factor or criterion for Ms. Distler, divert the 5 least amount of blood possible while still being 6 clinically effective. 7 How did the Gen2 fare here? 8 A. The Gen2 fares very well in respect to diverting the 9 least amount of blood while still being an effective 10 product on the marketplace. And remember, the Gen2 was in 11 the marketplace for many years and was quite successful. 12 Q. Does it have to be the exact same least amount or 13 something different under Ms. Distler's criteria? 14 A. Not the same least amount, but something that would 15 be acceptable to hospitals. 16 Q. Okay. Did you consider evidence in relation to 17 analyzing the Gen2 on this factor? 18 A. Right. I was here in the courtroom as well when 19 Mr. Bullington provided testimony on this aspect as well, 20 that if the Gen2 -- the Gen2 demonstrated exceptional 21 clinical efficacy and very strong user adoption. And 22 around -- across hundreds of hospitals. And that's 23 consistent with the amount of volume of product sales that 24 Magnolia Medical made of the Gen2 prior to introducing the 25 Micro.	1652 1 Q. Okay. Did you reach conclusion about whether this 2 second factor -- whether Kurin has satisfied the second 3 factor? 4 A. Yes. My opinion, Kurin has not satisfied the second 5 factor. The Gen2 product is an acceptable non-infringing 6 alternative in the but-for world. 7 Q. What's the consequence of that conclusion? 8 A. This would make lost profits not an acceptable 9 approach to quantifying and putting a number on damages. 10 Q. Did you go ahead and consider the other factors 11 anyway? 12 A. I did. 13 Q. Okay. So Factor 3, is there any dispute on that? 14 A. No. That would be no. 15 Q. And then Factor 4. 16 Would you explain your analysis of the fair 17 determination factor to the jury? 18 A. Well, something of interest, and I mentioned it just 19 briefly a while ago, is that both these companies have to 20 educate 6,000 hospitals as to a new way to do blood 21 culture draws. 22 And so, ultimately, I looked at the sales of, in this 23 case, the accused Micro product, and it was sold to 153 24 customers. Essentially, there was only five customers 25 that switched from -- and those Micro customer sales only
1653 1 included five customers that switched from Kurin to Micro. 2 So it's -- there were some customers that switched from 3 Kurin to Micro. 4 Micro in this world is an infringing product, so in 5 my mind, those five customers, because they previously 6 bought from Kurin, would go back to Kurin. And I've 7 accounted for that. 8 Q. Okay. And what is shown on Slide 23? 9 A. That represents 1 percent of the accused total Micro 10 sales, 10,400 units to those five customers that would 11 revert back to Kurin. And so I've calculated lost profits 12 should the Court decide that Kurin is entitled to lost 13 profits, even though that's not my opinion because it 14 hasn't been satisfied. 15 Q. Okay. And would you take the jury through the math 16 quickly? 17 A. Sure. I'm sure they would be happy to talk about 18 math on a Friday afternoon. 10,400 units times the Jet 19 average gross profit of \$14.76. So that's the Jet. Jet 20 loss gross profit of 152,504. Commissions on those, 21 because there's no more incremental costs because the 22 hospital already knows about Kurin. And so lost profits 23 would be \$140,377. 24 Q. Thank you, Mr. Napper. 25 Now, I think the jury has heard about the reasonable	1654 1 royalty analysis generally and about the framework of the 2 hypothetical negotiation. 3 Any dispute on the date of the hypothetical 4 negotiation here? 5 A. No. Ms. Distler and I agree, it's November 12, 2024. 6 Q. Okay. Did you consider all of the <i>Georgia-Pacific</i> 7 factors in your analysis for the Kurin patent? 8 A. I did. I spent pages of my report discussing every 9 single one of them. 10 Q. And there are specific ones you'd like to highlight 11 now? 12 A. Yes. I focused, again, on the portion -- GP13, a 13 portion of the realizable profit attributable to invention 14 versus the other contributions to profit. And then 9 and 15 10 are looking at what does the patent bring, advantages, 16 over the older way of doing things. So I've considered 17 both of those. 18 Q. Okay. Let's start with that 9 and 10 analysis. What 19 are you showing here? 20 A. Here I worked with Professor Meinhart to try to 21 identify within the patent, the '052 patent, where does 22 the patented functionality reside in the Jet product? And 23 so that's what I looked at here. And so -- I'm sorry, in 24 the Micro product but that's accused. 25 So he indicated to me that the real essence of where

1655 1 the patented functionality is of Kurin's patent, of the 2 '052 patent, in the Micro product, it's in what he called 3 the inner body. And so that instructed me to go, then, 4 again, using the cost approach, to try to identify the 5 contribution of the inner body. 6 So here is a calculation I did when I did it for 7 Micro, now it's for Kurin's patents, the inner body cost 8 is the numerator versus all the component product costs as 9 the denominator. And what that resulted in is, depending 10 on the product, over about 12 products, a range of about 2 11 to 3 percent. And that's an indication of the portion of 12 the product that relates to the patented functionality. 13 So then, the next step is I take that 2 to 3 14 percent -- as I mentioned, it varies by model -- I 15 multiply by the \$12.43 margin of the Micro over the time 16 period, and that results in a 29-cents-per-unit rate. So 17 this is very similar to the analysis I did for the Micro 18 case, but just so happens that that particular component 19 was \$3. This one happens to be 29 cents. 20 Q. This is the gross margin of which product? 21 A. It's the gross margin of the Micro product. 22 Q. And did you reach a conclusion regarding the 23 reasonable royalty? 24 A. I did. So based upon that, with some upward and 25 downward influences, it's my opinion that 29 cents per	1656 1 unit would be an appropriate royalty that Magnolia Medical 2 would have to pay to Kurin for use of the '052 patent. 3 Q. Thank you, Mr. Napper. 4 Finally, let me start with the pie charts on the 5 left. What are you showing there? 6 A. I'm trying to show that the top pie, that's all of 7 the accused products, so 1.344 million, I believe, 8 something along those lines. And then the bottom pie 9 chart is sliced to 1 percent of the accused Micro sales 10 that went to former Kurin customers. 11 Q. So if the jury agrees with you that the Gen2 was an 12 available acceptable alternative, what's the resulting 13 number? 14 A. That would be a reasonable royalty approach because 15 there is an acceptable non-infringing alternative in the 16 Gen2, so it would be zero lost profits. A reasonable 17 royalty rate of 29 cents per unit applied to the accused 18 units would be 389,213. So the total damages under that 19 scenario \$389,213. 20 MR. BLOCK: Thank you, Mr. Napper. 21 Pass the witness, Your Honor. 22 THE COURT: All right. Cross. 23 MS. FARNAN: Nice to see you again, Mr. Napper. 24 I am going to try to get through quickly. 25 If I can have the document camera.
1657 1 CROSS EXAMINATION 2 BY MS. FARNAN: 3 Q. So I wanted to start with your lost profits. This is 4 your slide here where you showed five customers would 5 switch from the Micro to Kurin, right? 6 And so you have 148 customers that aren't accounted 7 for, right? 8 A. That's correct. 9 Q. And those 148 customers are using a diversion device, 10 right? 11 A. They are using an ISDD. 12 Q. And so under your analysis, those customers would 13 stop using diversion devices because they would not, then, 14 buy one from Kurin, right? 15 A. No, that's not right. 16 Q. Where have you accounted for those 148 customers? 17 A. Those other customers would purchase the Gen2, the 18 non-infringing alternative, if they had any. 19 Q. Okay. Well, and if the jury doesn't agree with you 20 that the Gen2 is a non-infringing alternative, then they 21 can award lost profits to Kurin, right? 22 A. The jury can do whatever the jury would like to do. 23 Q. I want to talk about your reasonable royalty 24 analysis. I think this is the slide that you put up, 25 right?	1658 1 A. Yes. 2 Q. And the cost that you included -- let me just show -- 3 this is your chart for the -- and you have the inner body 4 cost in the numerator, right? 5 A. Yes. 6 Q. I think we had a similar chart like this the other 7 day, but this time you don't have the numbers in it, 8 right? 9 A. I did not put the numbers in this one, yes. 10 Q. Okay. So we can't follow your math as well here, 11 right? 12 A. Right. 13 Q. But let's look at -- so the inner body cost, that's 14 this pink part down here? 15 A. Correct. That's my understanding from Professor 16 Meinhart. 17 Q. Okay. But so you didn't -- there's a cover here, 18 right, that I just circled? 19 A. I did not because, again, Professor Meinhart told me 20 that wasn't part of the invention. 21 Q. But there is a cost associated with that cover, 22 right? 23 A. There's a cost associated with that. That would be 24 in the denominator but not in the numerator because it's 25 not linked to the invention.

1659 1 Q. Right. And so you haven't accounted for the cost of 2 anything other than this pink portion in your analysis, 3 right? 4 A. But again, I am trying to look at the footprint of 5 the -- 6 Q. That's a -- we have to go very -- it's a yes-or-no 7 question. 8 You haven't accounted for anything other than this 9 pink portion on PDX-7.31 in your analysis? 10 A. I know we are going fast but I have accounted for it. 11 But if your question is -- 12 Q. I will rephrase it. We are really limited on time. 13 Here in the inner body cost, the only thing that you 14 included is the pink portion that's shown on PDX-7.31; 15 isn't that right? 16 A. That is correct. 17 Q. Now, we have, obviously, cross patents here and so 18 you've done an analysis both on the Magnolia patents and 19 the Kurin patents, right? 20 A. The Kurin patent, yes. 21 Q. Patent, correct. 22 And on both sides you've made a reasonable royalty 23 analysis, right? 24 A. Correct. 25 Q. And for the Magnolia patent, that hypothetical	1660 1 negotiation -- the patents, that hypothetical negotiation 2 happens in 2022, right? 3 A. Correct. 4 Q. And for the Kurin patent, that hypothetical 5 negotiation happens in 2024, right? 6 A. Yes. 7 Q. Okay. So in your hypothetical world, do I have it 8 right that in 2022, you think Kurin would agree to pay 9 Magnolia \$3.05 a unit, and two years later would accept 10 from Magnolia 30 cents a unit? That's what happens in 11 your hypothetical world, right? 12 A. That's the result of my extensive analysis of the -- 13 which patents provide most advantages. 14 Q. So it is a yes-or-no question. 15 In your hypothetical world, in 2022 Kurin is going to 16 agree to pay Magnolia \$3.05 a unit, and two years later, 17 in 2024 they are going to agree to accept 30 cents per 18 unit from Magnolia, right? 19 A. Technically, it's 29 cent a unit. Sorry to correct 20 you, Ms. Farnan. 21 Q. Okay. 22 A. And to your point, based upon my analysis -- 23 Q. The answer is yes, right? 24 A. The answer is yes. 25 MS. FARNAN: No further questions.
1661 1 THE COURT: Thank you. 2 Any redirect? 3 MR. BLOCK: Just one, Your Honor. 4 REDIRECT EXAMINATION 5 BY MR. BLOCK: 6 Q. These two different hypothetical negotiations that 7 Ms. Farnan was just asking you about, are those 8 negotiators considering the same patents with the same 9 scope of invention at those two negotiations or is the 10 invention at issue different? 11 A. My understanding, based upon my work with Professor 12 Meinhart, is that the inventions are different and that 13 should be considered in whatever royalty rate and/or 14 damages are appropriate. 15 Q. Whose inventions were considered at the hypothetical 16 negotiation that resulted in the \$3.05 royalty rate? 17 A. Those would be the Magnolia Medical patents. 18 Q. And who's in the other negotiation? 19 A. That would be the Kurin '052 patent. 20 MR. BLOCK: No more questions, Your Honor. 21 THE COURT: All right. Thank you. You may 22 step down. 23 THE WITNESS: Thank you. 24 THE COURT: Any other witnesses? 25 MR. RAMANI: No other witnesses, Your Honor.	1662 1 We have a brief exhibit read in, if we may. 2 THE COURT: All right. Go ahead. 3 MR. RAMANI: The parties agree that DTX-28 may 4 come in. And we would just like to note for the record 5 that PDX-4 was the Jet device used during Professor 6 Meinhart's direct testimony. 7 THE COURT: Yeah. 8 MR. RAMANI: And PDX-5 was his test setup 9 used -- 10 THE COURT: When you say you want to note, are 11 they admitted into evidence? 12 MR. RAMANI: No. 13 THE COURT: Oh, I see. 14 MR. RAMANI: They're not admitted. We're just 15 noting that they're PDXs just for the record. 16 THE COURT: I see. Okay. You are moving the 17 admission of the first one, right? 18 MR. RAMANI: Yes, Your Honor. 19 THE COURT: What is it again? 20 MR. RAMANI: PTX-28. 21 THE COURT: Is that objected to? 22 MR. LoCASCIO: PTX-28 is not. 23 THE COURT: Okay. PTX-28 is admitted, then. 24 Thank you. 25 (Exhibit PTX-28 is admitted into evidence.)

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1 **MR. RAMANI:** Thank you, Your Honor. We do have
2 a dispute over two other exhibits, but I think that can,
3 with Your Honor's permission, be taken up outside the
4 jury's presence.
5 **THE COURT:** That's fine.
6 **MR. RAMANI:** With that, Magnolia rests.
7 **THE COURT:** All right. Thank you.
8 Do you want to put on any rebuttal evidence?
9 You won't have much. We'll have to do the rest on Monday,
10 if you do.
11 **MR. LoCASCIO:** I have good news on that, Your
12 Honor.
13 **THE COURT:** Okay.
14 **MR. LoCASCIO:** After the crosses of
15 Dr. Meinhart and Mr. Napper, Kurin has no need for any
16 additional witnesses.
17 **THE COURT:** All right. So that closes the
18 cases of both parties; is that right?
19 **MR. LoCASCIO:** It does, Your Honor.
20 **MR. RAMANI:** Technically, Your Honor we would
21 have -- we don't have any witnesses. I don't want to
22 alarm you. We would have rebuttal on the invalidity of
23 the Kurin patent.
24 **THE COURT:** So wait. Wait.
25 **MR. RAMANI:** We need to make a motion, that's

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1 **THE COURT:** Five minutes. Let's deal with
2 whatever we can for five minutes.
3 **MR. RAMANI:** We have two issues, Your Honor.
4 One is we have a JMOL motion we'd like to make on the
5 invalidity of Kurin's '052 patent.
6 Then we also have this exhibit dispute that
7 we'd like to take up as well. So, whichever Your Honor
8 prefers. The JMOL will be fast.
9 **THE COURT:** Just hold up.
10 Yeah, you're saying that you win JMOL as matter
11 of law is what you're saying.
12 **MR. RAMANI:** That's what I am saying.
13 **THE COURT:** Hold on a second. It's been a long
14 day or week. So there's a counter. So Kurin put in its
15 infringement case and you did move for JMOL on that.
16 **MR. RAMANI:** Correct.
17 **THE COURT:** And then, you made your case for
18 invalidity of patents. Okay. Are you going to move for
19 JMOL?
20 **MR. LoCASCIO:** We are.
21 **THE COURT:** So you have a competing JMOL. You
22 want a directed verdict, essentially.
23 **MR. LoCASCIO:** We do, on ours.
24 **THE COURT:** Yeah, I think of it differently,
25 though. I don't know why. I just use that language, the

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1 all, before the case closes.
2 **THE COURT:** I'll tell you what, we're not going
3 to close anything.
4 All right. So you're done for the week. All
5 right? I just looked up the weather. It really looks
6 like its Sunday. So, you know, it could be a mess Sunday
7 morning, but then probably end. So I think we're going to
8 be on. And then what the plan would be is there might be
9 some, I imagine, if any, a very small presentation of
10 evidence, then we'll do closing arguments, then we will do
11 jury instructions. Then, you're the boss. All right? So
12 you will control time.
13 Did you order lunch already? Yeah. So that's
14 taken care of. That should be ready. Okay. So don't
15 talk about the case. And I hope you enjoy the weekend.
16 Thank you very much.
17 (The jury exits the courtroom at 4:53 p.m.)
18 **THE COURT:** All right. What we're going to do
19 is, we're going to go for five or so minutes so that the
20 jury can leave and you all don't have to mix with them in
21 the hallway. Then we have to give the court reporter a
22 break. You all should break, plan on five minutes, which
23 is as much as she needs, and then we'll start. Okay.
24 Does that work?
25 **MR. RAMANI:** That sounds fine.

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1 old-fashioned. Okay. So go ahead, make your JMOL.
2 **MR. RAMANI:** Thank you, Your Honor.
3 So Magnolia Medical moves for judgment as a
4 matter of law on the '052 patent brought by Kurin because
5 the '052 patent lacks adequate written description. We
6 are citing, for example, the *Flash Control v. Intel Corp.*
7 case from the Federal Circuit in 2021, which provides that
8 "While the written description requirement does not
9 require that the specification recite the claimed
10 invention any particular way, pointed to a, quote,
11 'amalgam of disclosures,' end quote, from which an artisan
12 could have created the claimed invention does not satisfy
13 this requirement."
14 Going further, "A patent owner cannot show
15 written description support by picking and choosing claim
16 elements from different embodiments that are never linked
17 together in the specification. Instead, the elements of a
18 claim must be treated as a, quote, 'integrated whole
19 rather than as a collection of independent limitations,'
20 end quote the specification must provide more than, quote
21 'disparate disclosures that an artisan might have been
22 able to combine in order to make the claimed invention,'
23 end quote. Enough must be included in the specification
24 to convince a person of skill in the art that the inventor
25 possessed the invention."

1667 1 Combining the testimony of Kurin's lead 2 inventor, Bob Rogers, and Professor Meinhart, we believe 3 that Magnolia should receive judgment as a matter of law 4 and there is no contrary expert testimony from Kurin. 5 THE COURT: Okay. Thank you. 6 MR. RAMANI: Thank you. 7 THE COURT: You want to respond to that and 8 then do yours, right? 9 MR. LoCASCIO: I will respond to that, that 10 there is contrary evidence. Dr. Antonsson spoke to the 11 same issues, Your Honor. So on this issue, there's two 12 experts speaking to the same issue. We actually think 13 there's -- no reasonable jury could find against Kurin on 14 its claim, so I will take that motion first for me. 15 THE COURT: Sure. 16 MR. LoCASCIO: Which is that we will file a 17 motion -- we are moving on all issues. We will file a 18 written motion. But at base, Your Honor, Magnolia 19 directed -- Mr. Gaw directly -- admitted direct 20 infringement of all three claims asserted in this case by 21 Kurin. They had two arguments on the other side, 22 Magnolia, that their expert -- would have been 23 contrivances -- says, okay, I don't think that's a housing 24 and I don't think that's -- I think the bladder is what's 25 causing the vacuum.	1668 1 Mr. Gaw specifically said the opposite of both. 2 And under the Court's claim construction on housing, which 3 I specifically asked him about, and I used that language, 4 and with respect to the even more indisputable of the two, 5 that the vacuum is actually what causes it, which is what 6 their own videos and their own documents all say. So on 7 that score, we think -- 8 THE COURT: By the way, the video that was 9 played in the cross of -- 10 MR. LoCASCIO: Meinhart? 11 THE COURT: Yeah, Meinhart the second time. I 12 was thinking, not the first. But just recently, the 13 Steripath. 14 That's in evidence? 15 MR. LoCASCIO: It is in evidence. 16 THE COURT: Yeah, okay. I was trying to 17 remember. It wasn't objected to anyway, but I just wanted 18 -- 19 MR. LoCASCIO: We will confirm, but it is. 20 So in addition, we move for judgment as a 21 matter of law on induced infringement claims, both -- 22 because the only induced infringement claim we've asserted 23 relates to the addition of the needle and the bottle 24 housing in Claim 10 -- pardon me, claim -- yeah, Claim 10. 25 Magnolia induces it because they -- Mr. Gaw also said they
1669 1 intend for people to apply it that way and intend for 2 people to use it, and they knew about the patent, which is 3 in evidence. The claims are valid. 4 Kurin is entitled to damages. I can walk 5 through the lost profits, et cetera, but the only argument 6 we heard from Mr. Napper, particularly, is -- I don't 7 think it's got enough credibility that a reasonable jury 8 could ever find with Magnolia on the idea that -- we'll 9 just take most recent example -- 153 new customers come 10 out, and 5 of them came from Kurin, and he says, okay, you 11 can maybe get lost profits on those, but all the others 12 are just off the table as a matter of course, and, 13 presumably, they're going to back to this Gen2 product 14 from eight years ago. That's not something a reasonable 15 jury could ever find on. So on non-infringing 16 alternatives, I think his testimony is flawed. Reasonable 17 royalty rate as well. 18 But then the flip side would be on Magnolia's 19 case, we will renew our motion. We raised it before. I 20 am not going to reargue those. We will file on that, but 21 just to sort of box check on this, no reasonable jury 22 could find Kurin infringes the asserted patents because of 23 the pressure differential and the temporary lock 24 limitation. No reasonable jury can find induced 25 infringement. No reasonable jury could find the asserted	1670 1 claims are invalid -- or pardon me -- that the asserted 2 claims are valid because of obviousness and written 3 description. 4 And actually I thought for a minute, while my 5 colleague was arguing written description argument, that 6 he was arguing my case for me because of the nuance of 7 this case, as we both have written description arguments 8 on both sides. 9 But his depiction of the law would undermine 10 their own arguments. The only argument they put forth on 11 written description fails under the law he cited, and 12 Magnolia is not entitled to lost profits, nor reasonable 13 royalty damages. 14 THE COURT: All right. 15 MR. RAMANI: Your Honor, I'm happy not to 16 respond to the JMOL -- 17 THE COURT: Let me ask you all this: Does it 18 make a difference as a practical matter whether I deny 19 with permission to renew or whether I just reserve 20 judgment? 21 MR. RAMANI: I don't think so. I was 22 anticipating Your Honor would just reserve. 23 MR. LoCASCIO: That's what I was anticipating. 24 THE COURT: And that's what I'm going to do. 25 I just wanted to know, does it make a

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1 difference?

2 **MR. LoCASCIO:** And perhaps in an off the record

3 conversation, we could sort of noodle this around.

4 **THE COURT:** We will do that one. Great.

5 **MR. RAMANI:** Can I make just one clarification?

6 **THE COURT:** So I'm reserving judgment on all

7 the motions.

8 As far as I'm concerned, you know... Actually,

9 I could hear from you both.

10 Do you want to just agree that you both

11 satisfied Rule 50(a), or do you want to just leave it and

12 I will say I reserve motions?

13 **MR. RAMANI:** Better to leave it.

14 **MR. LoCASCIO:** Better to leave it, and

15 actually, I'm not sure that the parties can, would be --

16 **THE COURT:** Actually you are right --

17 **MR. RAMANI:** I agree.

18 **THE COURT:** -- because the rule is a must. You

19 are right.

20 **MR. RAMANI:** Can I just make one point? I know

21 we are just about at five minutes. Just one point of

22 clarification. I think Mr. LoCascio might have misspoken.

23 There was no testimony from Dr. Antonsson on written

24 description as the '052 patent because he never testified

25 on point. The only expert testimony as to written

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1 be done.

2 **MR. RAMANI:** I agree. It's entirely dependent

3 on the complexity of the technology, Your Honor.

4 **THE COURT:** All right. Thank you.

5 All right. Then we'll take a break. Get ready

6 to go in five minutes. All right. Let's give the court

7 reporter a break. All right. Take a break. Anything off

8 the record you want to talk about now?

9 (A discussion was held off the record.)

10 **THE COURT:** Let's get started.

11 I want to go off the record just before we

12 start.

13 (A discussion was held off the record.)

14 **THE COURT:** Okay.

15 **MR. LoCASCIO:** So behind the scenes during the

16 last couple of witnesses, Mr. Ramani and I were sort of

17 doing some housekeeping on exhibits. He gave me a list of

18 what he thought. We sort of hashed those out and they got

19 moved in. There was one, I think, that remains. 4A? 4B?

20 **MR. RAMANI:** Yes. It's one --

21 **MR. LoCASCIO:** Okay.

22 **MR. RAMANI:** -- but it's really two parts.

23 **MR. LoCASCIO:** So the only exhibit that remains

24 is the file history, DTX-4. Full file history. No

25 witness testified about it, walked the jury through it or

1672

1 description, the '052 patent, was from Professor Meinhart.

2 **THE COURT:** I wanted to ask about that,

3 actually.

4 **MR. LoCASCIO:** We can look for page and line.

5 He talked about the background of the patent and the

6 disclosure. I don't know that he -- he didn't do a -- to

7 the extent I am suggesting it -- I suggested it, I

8 appreciate the correction.

9 He didn't say, "Okay, let's put up Meinhart's

10 and let's respond to it that way." But we think there's

11 sufficient evidence in the record on written description

12 from his testimony, generally.

13 **THE COURT:** Do you need expert testimony to

14 refute that?

15 **MR. LoCASCIO:** You don't. The patent stands on

16 its own. It is in evidence. We heard from the inventor,

17 so I don't think you need to.

18 **THE COURT:** But you do for infringement?

19 **MR. LoCASCIO:** I'll take your word for it.

20 **THE COURT:** No, it was meant as a question.

21 **MR. LoCASCIO:** I actually think -- because I

22 think that there can be cases. I think in most cases that

23 would a hundred percent be the correct and you would be at

24 grave risk if you didn't, but I actually think there can

25 be cases where, through fact witnesses, et cetera, it can

1674

1 showed the jury anything about it.

2 On cross of Mr. Rogers --

3 **THE COURT:** And by the way, for which patent

4 are we talking about?

5 **MR. LoCASCIO:** Oh, apologies. So the '052

6 patent, for our patent.

7 **THE COURT:** Okay.

8 **MR. LoCASCIO:** During the Rogers examination,

9 Mr. Ramani showed some pages that they, I gather, labeled

10 4A and 4B to be some sort of screened subset, like the

11 file of it. And the portion that they wished to -- that

12 they used with him, we objected and we had some sidebar,

13 sort of moved on at some point.

14 The portion that is, I think, 4A that they

15 would like to move into evidence as a stand-alone slice of

16 the file history is the same portion that we talked about

17 earlier today with respect to Dr. Meinhart. So what the

18 request is from Magnolia's side is to -- and to be fair,

19 when it was used -- well, to be clear. It's not even

20 being fair, it's clear. It's with Mr. Rogers, there was

21 no attempt to move it in.

22 **THE COURT:** Right.

23 **MR. LoCASCIO:** So it is not in evidence. No

24 piece of the file history is in evidence because Exhibit 4

25 was not moved in.

1675

1 **THE COURT:** Right.

2 **MR. LoCASCIO:** And now, having not offered it

3 through a witness who could really speak to it, they want

4 to sort of put in the parts they like, presumably to point

5 to this on closing or have the jury see the very same

6 thing that Your Honor said with respect to the expert that

7 they could not do.

8 **THE COURT:** Okay. Let me hear from them.

9 But it was Rogers discussed it?

10 **MR. LoCASCIO:** Rogers. They showed Mr. Rogers

11 essentially this slide -- and not this slide, per se, but

12 this page -- either this one or the notice of allowance, I

13 think, was the other one -- to say, "Hey, your patent is

14 essentially -- the Patton Patent was everything else and

15 you added housing." And those were questions to

16 Mr. Rogers, and to which he --

17 **THE COURT:** And they can put up his testimony

18 in closing, right?

19 **MR. LoCASCIO:** They can put up his testimony.

20 **THE COURT:** You're not objecting to that?

21 Okay. All right.

22 All right. Go ahead, Mr. Ramani.

23 **MR. RAMANI:** Your Honor, it's a little bit

24 broader than that. It's not quite the skinny file that

25 my colleague seemed to be suggesting.

1677

1 decision, I can represent, because I know Your Honor would

2 shut us down in the middle of closing, that we're not

3 going to say that the Patton Patent invalidates

4 Rogers '445. We are not going to say anything like that.

5 **THE COURT:** Yeah. But I think the safer way,

6 I'm not going to let it in. I mean, you are going to have

7 his transcript.

8 **MR. RAMANI:** Indeed.

9 **THE COURT:** Yeah. So I think the right thing

10 to do at this stage is... And, frankly, I really don't

11 think I would have let it in. I really don't. Because I

12 think it just opens a massive can of worms. Yeah, I mean,

13 as I sit here today, the only reason why I even hesitate

14 to say I absolutely wouldn't have let it in is because,

15 you know, I haven't read the transcript, and I don't

16 remember verbatim the questioning. But I can tell you, I

17 just can't imagine I would have let it in and I don't

18 think I'm going to let it in at this point. Actually, I

19 am not going to let it in. I just think it's a 403 issue

20 and it just opens up a can of worms that could lead to a

21 lot of confusion, so that would outweigh the probative

22 value. And you have the transcript. And that's the main

23 thing is you've got the transcript.

24 **MR. RAMANI:** We do have the transcript. We can

25 argue it from the transcript.

1676

1 **THE COURT:** All right.

2 **MR. RAMANI:** What we had identified, rather

3 than putting in the 1,400-page file history --

4 **THE COURT:** Yeah.

5 **MR. RAMANI:** -- we identified the individual

6 submissions. So one of the submissions was the original

7 claim set, and we did only show the original Claim 1, and

8 we compared it to Claim 1 as issued before the jury. And

9 then we also showed the initial office action, so the

10 examiner's statement rejecting that initial Claim 1 and --

11 **THE COURT:** So you actually showed that to

12 Rogers.

13 **MR. RAMANI:** We did.

14 **THE COURT:** Okay. Yeah.

15 **MR. RAMANI:** We showed the cover page of it.

16 We showed the examiner, had him check who the examiner

17 was, checked it's been rejected. And then we went forward

18 to the page that was shown that says "Patent" and it was

19 simply an oversight on my part for not moving it in. Your

20 Honor had overruled the objection to this testimony, and

21 so that's why the testimony went forward. I think it

22 would be incomplete to have conducted all of that and not

23 have the evidence before the jury.

24 **THE COURT:** Yeah.

25 **MR. RAMANI:** And if it helps in Your Honor's

1678

1 **THE COURT:** Right.

2 **MR. RAMANI:** Thank you, Your Honor.

3 **THE COURT:** All right. Thank you.

4 All right. So jury instructions. Okay. Do

5 you want to walk it? This is D.I. 409, I believe.

6 **MR. RAMANI:** Yeah, we are happy to do that,

7 Your Honor. My colleague Keon Zemoudeh is going to take

8 the lead for the Magnolia Medical side.

9 **THE COURT:** All right. Mr. Zemoudeh, good

10 afternoon. Good evening.

11 **MR. ZEMOUEH:** Good evening, Your Honor.

12 **THE COURT:** All right. Is anybody going home

13 for the weekend besides Mr. Smith and Ms. Farnan?

14 **MR. ZEMOUEH:** I don't think we are.

15 **THE COURT:** No, see, Ms. Farnan is not. She is

16 going to be working, Mr. Smith. You're going home. I

17 know. I know.

18 **MR. RAMANI:** Your Honor, we all consider on

19 this side our home the Staybridge Suites about four blocks

20 away. So, yes, we will be going home tonight and be there

21 all weekend.

22 **THE COURT:** All right. What's the first...

23 okay, so we're at burden of proof is the first issue,

24 right?

25 **MR. ZEMOUEH:** Yeah. We concluded the --

1679

1 **THE COURT:** I'm not going with the
2 presumption --
3 **MR. ZEMOUDEH:** Yeah.
4 **THE COURT:** -- so that's out. I do and I
5 don't.
6 **MR. ZEMOUDEH:** Yeah. Just for preservation
7 purposes.
8 **THE COURT:** Where does it end? It starts on
9 Page 8. Where does it end?
10 **MR. ZEMOUDEH:** The presumption? It ends on
11 Page 9.
12 **THE COURT:** I'm just, like, where does the
13 bracket end, in other words, that we're crossing out?
14 **MR. SMITH:** Right in front on the footnote,
15 Your Honor.
16 **THE COURT:** Oh, I see. All right.
17 **MR. ZEMOUDEH:** The next issue, I believe, is on
18 Page 18.
19 **THE COURT:** Can I just say, look, they will get
20 the written instructions. I think usually I would cut
21 down on some of this in front of them.
22 So here's what I'm going to do. I think
23 certainly this side has been with me when I do this, is
24 I'll do it. I'll read my instructions. I will probably
25 cut some stuff, probably reword some stuff, then I'll ask

1680

1 you if you have any objections. At that point you've got
2 to follow along, if you think I need to correct something
3 orally. Because, remember, they are getting the written
4 instructions. I will tell them that they need to pay
5 attention to them. Okay? So, because, for instance, I
6 know you've...
7 Well, that's the way it is.
8 **MR. SMITH:** Your practice is to docket what
9 they are handed?
10 **THE COURT:** Yes, and they get it. And the
11 reason why I do it is because, you know, it's usually when
12 I'm reading them, though, I find the typos and I find the
13 stuff. I think to myself, why are we doing this? I could
14 do this a lot quicker, and I think in a more helpful way
15 to the jury, and that's when I kind of go off. All right?
16 **MR. BLOCK:** So just in case it's helpful, Your
17 Honor, and I haven't discussed this with the other side,
18 but let me offer a proposal for consideration. This
19 instruction for issues presented, as I explained in the
20 beginning, Magnolia Medical contends, et cetera, then it
21 has a paragraph --
22 **THE COURT:** Wait. Where are issues presented?
23 I was on burden of proof still.
24 **MR. BLOCK:** Did I jump ahead?
25 **MR. SMITH:** Judge didn't get there yet.

1681

1 **MR. BLOCK:** Sorry.
2 **THE COURT:** I was just giving an overview. So
3 what I mean is, therefore, if you think, oh, my gosh,
4 something was wrong, get ready. When I finish, I'm going
5 to say: Any matters I need to attend to? Then we'll go
6 to sidebar and quickly attend to it. All right?
7 So now you want to do disputed issues
8 presented. All right. Go ahead.
9 **MR. ZEMOUDEH:** Yeah. So that's on Page 18, I
10 believe, is the first --
11 **THE COURT:** Now, is the bracketed language
12 disputed? Something like somebody wants to put disputed?
13 **MR. ZEMOUDEH:** They are competing proposals,
14 yes.
15 **MR. SMITH:** I think they're disputed just
16 indicates within the body of it there are disputes.
17 That's all.
18 **THE COURT:** Oh, okay. So, in other words, this
19 is not a dispute whether I use the word "disputed."
20 **MR. SMITH:** There's embedded disputes. Flag
21 that for you.
22 **THE COURT:** Does that mean Number 2 on Page 16,
23 you both agree it will be called "issues presented"?
24 **MR. ZEMOUDEH:** Yes.
25 **THE COURT:** All right. So the first issue then

1682

1 we get to is on Page 18?
2 **MR. LoCASCIO:** Can we -- before Page 18, we
3 just crossed the table here. I think we both realized
4 that the model numbers, all that stuff in there -- you see
5 that?
6 **THE COURT:** Yes.
7 **MR. LoCASCIO:** When Mr. Ramani and I said we
8 were going to do stipulated facts, then Your Honor said
9 we'd put them in the charge, and we said, yes, I think I
10 interpreted it as the first paragraph -- there's two
11 sentences. There's a sentence that says -- essentially,
12 they're all the same. Then there's a whole list of
13 numbers.
14 Both of those for each side's parties went into
15 the charge. I would be fine with just the first sentence
16 that says they're all the same, in parts of, one -- you
17 don't have to read all of that -- but, two, it's kind of
18 needless, from my perspective.
19 **MR. RAMANI:** I agree, Your Honor.
20 **THE COURT:** The truth is, I guess, was this
21 discussed in the undisputed facts or something? There's
22 just no evidence that's been, other than possibly that.
23 It's not been read or presented to the jury.
24 **MR. LoCASCIO:** Correct. It was -- by
25 agreement, we acknowledged and stipulated facts. The

1683

1 first of those two sentences for each would --

2 **THE COURT:** Wait. Wait. The first of those

3 two sentences?

4 **MR. LoCASCIO:** So it's really the first two

5 that each side -- I don't know if it's three sentences.

6 The first two, I think, should stay, and third with the

7 model numbers I think is unnecessary.

8 **MR. BLOCK:** Your Honor, may I approach?

9 **THE COURT:** Yes, thank you.

10 **MR. BLOCK:** Just in case it's helpful to see it

11 on a piece of paper.

12 **THE COURT:** Here's what I don't understand.

13 Why are we doing this? Why is it we are asking the jury:

14 Does the Steripath Micro infringe? I mean, where was the

15 breakout? And the same thing when it comes to: Does the

16 Kurin Jet. That's the way it was presented to the jury.

17 Why are we now bringing in models when everybody agrees it

18 doesn't make a difference? I guess it's because of

19 damages.

20 **MR. LoCASCIO:** I think it's possibly damages,

21 but also for some of the claims. The claims require,

22 one's like a vacutainer or syringe and they've seen

23 versions, I think of at least maybe the Micro, where one

24 time it has a syringe attached, one time it doesn't. And

25 I think just that sentence that says they all are the same

1685

1 **MR. SMITH:** I'm trying to confer with my

2 co-counsel. I believe there's a stipulation on the record

3 in this case docketed as to the parties' agreement on

4 this. And Mr. LoCascio, I think, was going to read it to

5 the jury. We said, no, no, we don't have to do that.

6 There's a more efficient way to do it.

7 So I think maybe to cut through it, the parties

8 have agreed by stipulation this information. How that

9 gets presented to the jury and whether it gets presented

10 to the jury is the only question.

11 **THE COURT:** Why does it have to be presented to

12 them?

13 **MR. RAMANI:** From my perspective, it does not.

14 I believe it's Docket 134 is the parties' stipulation. I

15 think that's fine.

16 **THE COURT:** If I'm a juror, when I go back to

17 the jury room, I'm expecting, as a juror, that all I'm

18 doing is I'm looking at the Steripath Micro, the Gen2, the

19 Kurin Lock, the Kurin Jet, and I have never, ever, I don't

20 have it in my brain that there are subsets of these

21 products. And I would find it incredibly confusing,

22 especially when you're telling me there is a difference

23 between the models.

24 **MR. LoCASCIO:** My only reservation about

25 Mr. Ramani's proposal, but I think we can clearly come up

1684

1 and they all come with this stuff.

2 Sort of just -- do I think anybody is going to

3 care or appreciate it back in the jury room? Probably

4 not.

5 But from a standpoint of what's actually been

6 found to infringe in the case or what's in the case, I

7 think in both directions there's probably some value in at

8 least having that statement clear. Could the parties have

9 just stipulated to it and it doesn't go to the jury?

10 Probably, yes.

11 **MR. RAMANI:** I'm happy to renew that as an

12 option, Your Honor, just to take it out entirely, if the

13 parties do stipulate to it.

14 **THE COURT:** Here's what I think. I read you

15 that note from the last jury. I could see them getting

16 back there and, actually, I know for a fact, right, that

17 we've had juries do this, where they go in and they start

18 doing the individual product numbers. I think you are

19 both perhaps begging or, you know, asking for a real

20 problem.

21 **MR. LoCASCIO:** I think we agree we don't want

22 the numbers.

23 **THE COURT:** You are still saying the models

24 differ. Aren't you asking them now to, like, you've

25 raised an issue for them.

1686

1 with a sentence between us all pretty quickly to solve for

2 it, is at least -- I don't know if it was Mr. Bullington

3 or somebody else talked about sort of the product has

4 undergone some changes and -- the Micro itself, the Micro

5 comes out, like the bladder does some weird stuff. Let's

6 tweak the bladder or --

7 **THE COURT:** I also recall a sentence where

8 there was...

9 Actually, what I recall is the way it looks, it

10 had something to do with the outside.

11 **MR. LoCASCIO:** And that the button was, like,

12 sticking in. So they have just documents in evidence

13 where I think put a detent on it so it didn't sort of stay

14 in that position.

15 At the end of the day, none of that matters.

16 Neither side thinks any of that matters to the issues in

17 the case. So if a juror thinks, well, there were more

18 than one version. Say somebody's notes say that a

19 sentence essentially says -- I'm not saying this is what

20 it should say. The gist of it is there are -- for the

21 purposes of your verdict, for the purposes of

22 infringement, the parties agree that there are no

23 differences between the model -- whether you use models

24 and inject that or not, for the Micro you received and

25 heard evidence about is indicative of all the Micros, and

1687

1 same for all the Jets.

2 **THE COURT:** So you are going to have to work

3 over the weekend to figure that out.

4 **MR. LoCASCIO:** I expect we will do that.

5 **THE COURT:** I just think you are both begging

6 for problems.

7 **MR. LoCASCIO:** We will strip this out and just

8 have a sentence to that effect.

9 **THE COURT:** Okay. Then what remains to be done

10 and submit, you will have to submit it on Sunday. I hate

11 to do that, but we don't have a choice, is that you've got

12 to rewrite paragraph...

13 Wait a second.

14 Is this yours? Where did I get it?

15 **MR. BLOCK:** I handed it up to identify the

16 sentence. We agreed to go away.

17 **THE COURT:** All right. So then looking at

18 D.I. 409, the parties shall meet and confer and simplify

19 the paragraph, the second full paragraph on Page 16 and

20 the corresponding paragraph on Page 17.

21 All right? Both paragraphs begin with "For

22 purposes of."

23 All right. The next dispute is on Page 18.

24 **MR. ZEMOUDEH:** Yes.

25 **THE COURT:** All right. Now, this is an example

1689

1 **THE COURT:** Middle paragraph, "For the

2 purposes." Go ahead, tell me what it is.

3 **MR. LoCASCIO:** "For the purposes of assessing

4 infringement, invalidity, and damages in this action, all

5 Kurin Jet products," strike through the rest, "are

6 identical."

7 **THE COURT:** Okay.

8 **MR. LoCASCIO:** And then on the flip side.

9 **THE COURT:** Now, incidentally, that's an

10 example where I think I could probably just riff in front

11 of them. When I get to that sentence, I'll explain. I

12 said, "Look, there's actually a lot of different products

13 over the years, they've had different numbers, but for

14 purposes of this trial, both parties have treated it as

15 representative." Okay?

16 **MR. LoCASCIO:** That's fine. And everything

17 else gets struck out in that paragraph.

18 **THE COURT:** All right. And I'll do that. You

19 do the same sentence for Page 17. And then if there's an

20 objection to a riff on my part, you just bring it up and

21 we'll fix it.

22 **MR. LoCASCIO:** Okay. For the record, you want

23 me to read that sentence, Your Honor?

24 **THE COURT:** No, I think I'm good.

25 **MR. LoCASCIO:** Okay.

1688

1 of, I don't think the word "indirectly infringed" has been

2 put in front of the jury. So if the jury hears, for the

3 first time I tell them, well, if they indirectly infringe,

4 they're going to say, "What are you talking about?" So

5 we've got to figure out a way.

6 **MR. LoCASCIO:** We just negotiated a new

7 sentence. May I read it into the record?

8 **THE COURT:** Yes. Okay.

9 **MR. LoCASCIO:** Following -- Your Honor could

10 decide where it should sit, but there are two sentences.

11 One is --

12 **THE COURT:** Wait. I'm sorry.

13 **MR. LoCASCIO:** On the issue we just said we're

14 going to do Sunday, we just solved it.

15 **THE COURT:** Okay. On the issue of Page 16 and

16 17?

17 **MR. LoCASCIO:** Yes.

18 **THE COURT:** I'm on to the next issue. Okay.

19 So we're backing up. Fine.

20 **MR. LoCASCIO:** I'm sorry. I just thought since

21 we had rolled closer and solved it before we left, I

22 thought the Court would appreciate that.

23 **THE COURT:** Let's do it. I would. I would.

24 So you want to give me language for Page 16?

25 **MR. LoCASCIO:** Yes.

1690

1 **MR. RAMANI:** Thank you, Your Honor.

2 **THE COURT:** All right. So now we're on

3 Page 18.

4 And this is a thing about indirectly. Like

5 they've not heard the word "indirectly." It will confuse

6 them. They've not heard "inducement." They've not heard

7 "contributory," I don't believe.

8 Are you still bringing a contributory claim?

9 **MR. LoCASCIO:** We are.

10 **THE COURT:** Why? I never understood this. I

11 don't know why people do it.

12 **MR. LoCASCIO:** I think this one, at least one

13 of the claims requires components that are not sold

14 product. And it has a substantial non-infringing use.

15 It's contributory.

16 **THE COURT:** Wow. Okay. It's your guys' case.

17 I'm a juror, I'm thinking the fact that you've never

18 mentioned anything until now could make me think there's

19 something wrong with it.

20 **MR. ZEMOUDEH:** So I think the only --

21 **THE COURT:** Well, I think they're conferring

22 because let's just see. I mean...

23 **MR. LoCASCIO:** Sorry, Your Honor. Yeah, we'll

24 just go with just inducement.

25 **THE COURT:** Okay. I think it's much smarter.

1691

1 All right. Now, so Kurin is not going to
2 pursue the contributory infringement. That makes a lot of
3 sense.
4 Now, here's what I think it would be the better
5 way to produce this to the jury would be you have a list
6 of the claims. Let's start with Magnolia. So, for
7 instance, if I were going to kind of stick with your form,
8 I would say the sentence should read: "Whether Magnolia
9 Medical has proven by a preponderance of the evidence that
10 Kurin has directly or by inducement infringed."
11 But I don't even like that, and here's why.
12 Because I think what we really need to tell the jury is,
13 is it an inducement claim or is it a direct infringement
14 claim.
15 And so the way I would suggest is, you know,
16 the first issue would be, with respect to Magnolia let's
17 start with: "Has Magnolia proven beyond a preponderance
18 of the evidence that Kurin has infringed the following
19 claims?" And then you would list all the direct
20 infringement claims.
21 And then you would say: "Next issue: Has
22 Magnolia proven by a preponderance of the evidence that
23 Kurin has induced the infringement of the following
24 claims?" And you do that. And then we would do the same.
25 Does that make sense?

1693

1 **THE COURT:** Yeah. So what do you want to do
2 about them?
3 **MR. RAMANI:** Why don't you let us reassess that
4 over the weekend.
5 **THE COURT:** Yeah.
6 **MR. RAMANI:** And we can -- when we submit,
7 we'll submit what we would like to do.
8 **THE COURT:** Okay. My suggestion would be you
9 do direct because it's easier to prove and you haven't
10 identified a third party. And, frankly, it has occurred
11 to me that we could get a question one day, you know, who
12 was the other person they induced? You know, who was it?
13 All right. But anyway, so that takes care of
14 that.
15 Next, the roles of the claims, you're good with
16 all that. Independent, dependent, you're good with all
17 that.
18 **MR. LoCASCIO:** Hang on a second, Your Honor.
19 **THE COURT:** Yeah, sure.
20 **MR. LoCASCIO:** If you -- so the proposal we had
21 in -- the proposals you just addressed in Page 18 --
22 **THE COURT:** Oh, we didn't do validity. Yep.
23 **MR. LoCASCIO:** 2.1, no, I think when you get to
24 Kurin's patent, then we had proposed the language the same
25 to match for ours. So it says: "Magnolia Medical

1692

1 **MR. ZEMOUDEH:** That makes sense. And that's
2 actually -- well, the fact that you've separated direct
3 and induced infringement, that's part of our proposal if
4 you go to the next page. And I think we would be fine
5 with listing the claims.
6 **THE COURT:** And then we would do the same
7 thing. What does Kurin think of that? What's wrong with
8 that?
9 **MR. LoCASCIO:** There's nothing wrong with it,
10 Your Honor.
11 **THE COURT:** Okay. Well, all right, so you're
12 good with it?
13 **MR. LoCASCIO:** We're good with it.
14 **THE COURT:** Okay. So that one will have to be
15 redone. I mean, I assume there's no claim where you're
16 really alleging both direct and induced infringement even
17 if you could, right? I mean, there's no benefit to doing
18 that. Because none of you are going to say to the jury:
19 "By the way, the third-party infringer is so and so." You
20 are not even identifying them. You've kind of agreed by
21 practice or whatever to do that.
22 All right. So let's do it that way.
23 **MR. RAMANI:** Your Honor, we do have two claims
24 that we have alleged direct infringement and inducement
25 for.

1694

1 directly or indirectly." That would have to match,
2 correct?
3 **MS. FARNAN:** Correct.
4 **MR. LoCASCIO:** So if you look at Paragraph --
5 Kurin patent Paragraph 1 on Page 19.
6 **THE COURT:** Yes.
7 **MR. LoCASCIO:** The language that sits there now
8 is -- tracks the language that we had proposed in
9 Magnolia 1, which the Court just said you were going to
10 split those up into the --
11 **THE COURT:** And I'm sorry. I meant to say do
12 the same thing for Kurin.
13 **MR. LoCASCIO:** I just wanted to make sure
14 because I don't -- if you said that, I apologize, I didn't
15 hear it.
16 **THE COURT:** No, I probably didn't say it and
17 I'm sorry. So you do it, though.
18 (Speaking simultaneously.)
19 **THE COURT:** So it will say "Kurin Asserted
20 Patent blank," right? And then Issue 1 will be whether
21 Kurin... how many claims do you have? Three?
22 **MR. LoCASCIO:** Three.
23 **THE COURT:** Yeah. So are they all --
24 **MR. LoCASCIO:** All the '052 patent?
25 **THE COURT:** No, no. But are they direct or

1 induced? How does it work? 1695 2 MR. LoCASCIO: They are all both, I believe. 3 MS. CADE: It's two direct and one indirect. 4 THE COURT: So then you'll just say: Have they 5 proved the... you'll say direct infringement of the two 6 and then induced infringement of the one, right? All 7 right. 8 Now, then, we didn't discuss invalidity, 9 though. And then I think the last question would be for 10 all the claims, you know, because you're asserting all the 11 claims are invalid, so it's going to be like Question 1 12 would be the claims, let's say, for the Magnolia, right: 13 Is it proven by a preponderance of the evidence that 14 direct infringement of blank, the claims. 15 2: Is it proved by a preponderance of the 16 evidence that Kurin induced the infringement of blank, 17 whatever other claims there are. 18 And then 3 would be: Has Kurin proven by clear 19 and convincing evidence the invalidity of, and then the 20 following claims. 21 And you probably have to say "any of," right, 22 so that it was clear. It is not an all or nothing 23 proposition. We'll address that later. 24 All right. And then we'll mirror that with 25 Kurin. Okay. Any questions about that? No?	1 MR. LoCASCIO: The only question would be on 1696 2 the -- whether invalidity needs to be broken out by, call 3 it, theory, given that, or if it's all one. 4 THE COURT: Well, this is kind of a general 5 thing at this beginning anyway, right? 6 MR. LoCASCIO: This is just for this 7 instruction, Your Honor. 8 THE COURT: Correct. And, I mean, in fact 9 that's why you guys were wanting to do as a general matter 10 the indirect/direct, and I'm thinking they don't know what 11 indirect is. They've never heard it. 12 MR. LoCASCIO: This section we will be pushing 13 to streamline. 14 THE COURT: Yep. Okay. Perfect. 15 All right. Then we go to role of the claims, 16 that's good. Independent/dependent, that's good. 17 Construction. 18 Okay. Now, hold on. 19 So I am a little worried. I'm more worried 20 than I was yesterday about this. So I do believe, what 21 it's worth, that the plain and ordinary meaning applies. 22 And I do believe the plain and ordinary meaning for the 23 asserted claims of Magnolia's patent were all addressed in 24 my written order where I said that -- what I thought the 25 plain and ordinary meaning was. So if that meaning is
1 going to be challenged in any way, I think I have to tell 1697 2 the jury. That's how they read it. So it kind of is what 3 are Kurin's plans in the closing argument. 4 MR. LoCASCIO: All right. I believe under your 5 order, as we believe we did in trial, measuring that 6 from -- I think, if I remember the figure right -- seven 7 is on the top side of the -- 8 THE COURT: Yep. 9 MR. LoCASCIO: Well, measuring from 7 to 9 is 10 available under that plain and ordinary meaning. 11 THE COURT: I believe it is. I think it can be 12 an application of it. But then I think, though, I am a 13 little worried because today I heard the words 14 "interpretation" being used by experts. So I think the 15 safest course, then, is for us to add an instruction that 16 says plain and ordinary meaning means whatever. 17 Because I am afraid, that's why I asked what 18 you're going to argue. And what you told me was you think 19 that what I believe the plain and ordinary meaning is they 20 can find no infringement under your theory if they measure 21 at 7. 22 MR. LoCASCIO: Except, Your Honor, what I will 23 say is I don't believe that at this point now instructing 24 them -- we are not asking the Court to do it, and I think 25 given where we sit today --	1 THE COURT: Well, they are asking. 1698 2 MR. LoCASCIO: I understand that, Your Honor. 3 But I think while -- I am not saying you can't, right? 4 You could if neither side was asking you to do it. And 5 you could if one side is, but often both sides do and 6 that's what you are asking throughout this case. And 7 we're not. And we just tried a case for a week, okay, 8 based on the fact that construction wasn't going to be 9 read -- I understand you're -- I'm not saying that -- you 10 said it could happen at any time. 11 THE COURT: I did. 12 MR. LoCASCIO: I know you did, Your Honor. 13 THE COURT: I did. 14 MR. LoCASCIO: I'm not saying you didn't, okay? 15 But on this issue, the other side's reading of your 16 construction and emphasis on how to apply it is it's 17 impossible and it can't be in the sampling channel and 18 that that means it's got to be across and anybody who says 19 otherwise is nuts. 20 And right now it's the application of the plain 21 and ordinary meaning, per Your Honor's order, by those of 22 skill in the art when they look at that. And both sides' 23 experts, when they originally looked at it, read the claim 24 and said it's 7 to 9. They did and we did. 25 And on this issue, the reason this has kind of

1700 1 been where we are, because let's not forget, the original 2 contentions, the original disclosures all said let's 3 measure in the sampling channel from 7 to 9. And so we 4 have -- there's a lot of water under the bridge on this in 5 all directions, but from our perspective, while do I 6 believe that under the Court's claim construction of plain 7 and ordinary meaning, we've tried that case without a 8 specific definition provided by the Court for what that is 9 based on just the plain and ordinary meaning of the claim 10 language, that if Your Honor provides the language that 11 you had in the "i.e." now to the jury when they didn't 12 have it before in their binder, we think -- do I think 13 there's -- I think it's prejudicial to us. There's a 14 chance to harm our case, and where we sit today, we're not 15 asking you to do it and we don't think it's appropriate to 16 do it. 17 I am not saying, Your Honor, that you cannot do 18 it. But -- 19 THE COURT: Well, of course you are not 20 because, I mean, you know, I'm the Court. But what you 21 are intimating is that it's unfair because of the way you 22 tried your case, and I object to that, even though, I 23 guess, I'm not in a position as a judge to object. But 24 I'm not persuaded by that is what I would say. 25 I think you were definitely forewarned, and even	1700 1 during the trial I said, and it depends on how you try the 2 case. And that's why I said earlier this morning or 3 yesterday, I was a little surprised at the way Antonsson 4 framed his testimony. 5 So we can do this: We can leave it and let's 6 see how the closing goes. But I want to be clear, I put 7 in writing... First of all, I stated when I orally ruled 8 on the disputed term what I thought the plain and ordinary 9 meaning was and it was the meaning that Magnolia gave. 10 And then I clarified in writing what I thought the plain 11 and ordinary meaning was. And I thought it still best, 12 but this was not presented to me, what the jury would be 13 told until the dispute on the morning of trial or, you 14 know, when you proposed the jury instructions with the 15 three alternatives. 16 You look perplexed. There were blue sheets in 17 the notebook. 18 MR. SMITH: Juror notebook. 19 THE COURT: In the juror notebook. Sorry, 20 that's what it was. Thank you, Mr. Smith, for the 21 clarification. 22 So I had to address it the morning of trial, 23 you know, as I said, in my dear opinion, you know, one of 24 the more hectic days a judge ever has to deal with things. 25 So then I listened to the evidence come in and
1701 1 I am a little more concerned. I still think the better 2 course would be I don't have to say anything. But I am a 3 little worried, especially given your remarks just now, 4 that I may have to, after closings, say something about 5 what it is. 6 And I can guarantee you, in the event I don't 7 say something and we get a question about plain and 8 ordinary meaning like the question I got in that last 9 trial, which I read into the record for you, I'm telling 10 the jury what the plain and ordinary meaning is. There's 11 no question, I'm telling them. That's where we are. 12 I think you could have tried it consistent with 13 the opinion that you measure at 7 and 9 and you could have 14 emphasized, "We're reading 'at a plug' to mean 7 and 9." 15 But although I think there is an evidentiary basis for you 16 to argue that, I think the way it was presented by 17 Antonsson is much more like the construction you wanted me 18 to adopt that I rejected. 19 All right. So you need to think about that 20 when you do your closing. All right? 21 MR. LoCASCIO: I believe we tried our case at 7 22 to 9. I understand there were answers from Dr. Antonsson 23 that Your Honor raised previously. We are going to try 24 our case between 7 and 9 as that's what it means, and that 25 we think that's the plain and ordinary meaning, Your	1702 1 Honor, in the sampling channel from 7 to 9. 2 THE COURT: Right. 3 MR. LoCASCIO: At the plug. 4 THE COURT: But it's at the plug. That's the 5 key. 6 MR. LoCASCIO: I understand. Well, 7 is at the 7 plug. And I apologize that I'm getting animated, Your 8 Honor. 9 THE COURT: No, no. But that's what I'm 10 getting at, is what I don't understand is why didn't you 11 say 7 is at the plug? See, that's what I don't get. But 12 he didn't. But you can still do it. There's an 13 evidentiary basis to do it in closing. But if it's not 14 going to be that, if it's like it's not 7 and 9, it's you 15 can take the... You can move 7 an inch to the right or, 16 you know, whatever and do it there, then I think I might 17 have to step in. 18 MR. LoCASCIO: I don't believe we've tried that 19 in any way throughout this case, Your Honor, and I have no 20 intention of doing that. 21 THE COURT: I think Antonsson made sentences 22 that said you can do the pressure differential basically 23 anywhere within the sampling channel. So it's that 24 testimony that concerns me. 25 So here's what I'm going to do. Mr. Block, I

1703 1 am going to leave it the way it is right now, but I think 2 I've made it really clear that if I think that there's 3 been a deviation from what the plain and ordinary meaning 4 is -- 5 MR. BLOCK: May I be heard just briefly on 6 this, Your Honor? 7 THE COURT: I've heard so much. I gave you a 8 lot of argument yesterday. It's 6:00 and, I mean, it's a 9 Friday and I really appreciate... I think you've 10 preserved your issue. All right? You've got it preserved 11 and let's see how closings go. Okay. 12 I think, Mr. Block, for what it's worth, I will 13 say one more comment. And I don't mean this to sound 14 threatening. It's not, because, like I said, I think very 15 well of all the lawyers here. They have done an 16 outstanding job. Without exception, by the way, all the 17 oral advocates did a great job. The crosses in 18 particular. 19 There's a real risk to Mr. LoCascio. And I 20 don't believe he'd do it intentionally. But if he slips 21 such that I believe that it requires a construction, you 22 know, I don't know what we're going to do. I mean, in 23 other words, it could be much more difficult for Kurin 24 because I'm going to have to instruct them and it's not 25 going to be in the written instructions.	1704 1 MR. BLOCK: Just a few sentences, Your Honor. 2 THE COURT: No. I'm just telling you -- 3 MR. BLOCK: Okay. 4 THE COURT: -- that's where we are. 5 MR. BLOCK: Fair enough. 6 THE COURT: What you might want to do is you 7 might want to prepare an alternative to Page 24 that has 8 the third instruction so that if we have to move quickly 9 on Monday, we can. All right? 10 In fact, I would do that. I would ask you to 11 do that. In fact, I'm going to do that for both sides. 12 So I think coming in, I'm not doing it. Prepare an 13 alternative sheet to be substituted for Page 3.3, which I 14 give what the plain and ordinary meaning for pressure 15 differential is. Okay? 16 MR. LoCASCIO: Just so I understand, though -- 17 THE COURT: "Pressure differential between." 18 MR. LoCASCIO: And that page will go in if, 19 Your Honor, the conversation we just had takes -- 20 THE COURT: Yeah. If I thought in your 21 closing -- 22 MR. LoCASCIO: Yes. 23 THE COURT: And not that you wouldn't be trying 24 to do anything untoward, but just if I thought, you know 25 what, I'm sorry, I have got to intervene here, I want to
1705 1 be able to do it quickly. 2 MR. LoCASCIO: And I just wanted to ask because 3 I wanted to make sure there was not a scenario where we 4 just get here in the morning and you -- and that's ended 5 up in there. 6 THE COURT: I am only doing it based on how the 7 closings go, if I feel there is a need to do it. And 8 then, like I said, my own feeling is I wouldn't be 9 surprised if we get a note. 10 MR. LoCASCIO: We'll see. And they can't cause 11 that. You're looking in this direction as the cause of 12 this change. Like, because you could -- you could -- 13 THE COURT: Well, they want it, so -- 14 MR. LoCASCIO: You're opening your own door but 15 they can't, you know, argue, well, you heard them say X 16 when that's -- it could be done -- 17 THE COURT: Oh, no, no. Yeah, don't do that. 18 MR. LoCASCIO: There is a rhetorical way you 19 could trigger this issue on their side of the table as 20 well. 21 THE COURT: Yeah. 22 MR. BLOCK: Well, my question is, if you were 23 under the impression that it means the space between 24 instead of a comparison between pressures at the plug and 25 at the outlet, that impression is wrong and you will not	1706 1 hear the other side contradict it. The space between is 2 not the requirement. This requirement is the pressure 3 differential, a comparison of a pressure at the plug to a 4 pressure at -- et cetera. 5 THE COURT: Yeah, I think you could say that. 6 If you go first, so I think that, you know, if you say, 7 "And, by the way, it's got to be measured at the plug." 8 MR. BLOCK: And not -- 9 THE COURT: And if I were him, I'd say 7 is at 10 the plug. And then I don't have to construe it. Then I 11 don't have to construe it. So if you say in your 12 opening/closing it's at the plug and we say 5 is at the 13 plug and you go, you know, 5 and 9, you know, that's the 14 pressure differential, you sit down. 15 And he gets up and... Sorry. And if you said, 16 and if you hear something different, like you heard from 17 Dr. Antonsson it could be, like, two spots over there by 18 the outlet as long as they are in the sampling channel, 19 that's not the plain and ordinary meaning. If you say 20 that, I think you're fine. 21 MR. BLOCK: Right. And just to be very 22 specific, I would like to be able to say that -- I'm not 23 going to say they asked for a construction, it's wrong, 24 but I want to be able to tell the jury, if you were under 25 the impression that "insert Kurin's rejected meaning" is

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1 the meaning of this term, it's not. It does not -- they
2 asked you to give a narrowing construction to define the
3 term "space that separates in a spatial way." We should
4 be able to tell them that is not the meaning of the term.
5 **THE COURT:** No.
6 **MR. BLOCK:** This is the issue because -- sorry.
7 I do want to give the argument, but Dr. Antonsson did talk
8 about it has to be in the space. And we now have a scope.
9 It's pure scope because under their argument, right, the
10 only way they establish non-infringement on their argument
11 is if "at the plug" excludes the bottom side. It has to
12 exclude it, remember, because they are arguing for
13 non-infringement. So if "at the plug" means at the plug,
14 could be above it, could be below it, then there is no
15 non-infringement argument.
16 **THE COURT:** No, no.
17 I'm lost. Why does it have to exclude it?
18 **MR. BLOCK:** Because if it includes below the
19 plug, they don't have an argument.
20 **THE COURT:** I think what they say is "at the
21 plug" is you do it at 7.
22 **MR. BLOCK:** They cannot do it -- this is why I
23 think it's a scope issue now. Because they have to say,
24 in order for it to be a non-infringement argument, that it
25 can only be done at 7 and cannot be done elsewhere. That

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1 **MR. BLOCK:** Thank you, Your Honor.
2 **THE COURT:** It's its plain and ordinary
3 meaning. I think there's some real risk here. It's going
4 to depend how it comes out.
5 **MR. BLOCK:** Thank you, Your Honor.
6 **THE COURT:** Okay. Next?
7 **MR. ZEMOUDEH:** Next dispute is at Page 27.
8 **THE COURT:** First of all, why is the word
9 "inequitable" in there?
10 **MR. ZEMOUDEH:** I think because there is, you
11 know -- I mean, there is this risk of unfair prejudice,
12 but I think --
13 **THE COURT:** I mean, who cares if it's
14 inequitable? I just want it to say nothing improper or
15 illegal.
16 **MR. ZEMOUDEH:** Yeah. I think that would work
17 for us.
18 **THE COURT:** Okay. I'm fine with that. I am
19 going to let it in. It applies to both sides. So this is
20 Magnolia's thing on Page 27.
21 **MR. LoCASCIO:** So if I can be heard for a
22 second on that, Your Honor.
23 **THE COURT:** No. I'm sorry. I've already
24 indicated, I actually said at sidebar we would have an
25 instruction to this effect. Do you recall that? So it's

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1 is based only on, in the space between, which is the
2 rejected argument.
3 **MR. LoCASCIO:** No. Let's be clear. "Between,"
4 even in the Court's language, doesn't get removed from the
5 language. We've tried the whole case under the guidance
6 that it is between those -- between two measuring points,
7 between two measuring points. You say 5 and 9 on that
8 side, we say 7 and 9.
9 So what was just discussed was that, no, no,
10 now we should be neutered over here to not even be able to
11 say it's between two things, between 7 and 9, and it just
12 sort of generically "at the plug." That's not the claim
13 language and nor is it Your Honor's plain and ordinary
14 meaning.
15 **THE COURT:** My plain and ordinary meaning is at
16 the plug.
17 **MR. BLOCK:** That's the space between, not a
18 comparison between. That was the dispute.
19 **THE COURT:** The dispute was pressure
20 differential between, right?
21 **MR. BLOCK:** And the arguments presented to you
22 were: Does between, in that term, mean --
23 **THE COURT:** You asked can I argue this, I said
24 no. I can only do so much. You know, I can't reach
25 perfection. I'm doing as best I can.

1710

1 going in. It applies both ways.
2 **MR. LoCASCIO:** I understand that. The language
3 they have, that's not -- Judge Bryson had language, I
4 don't think it has "illegal" or "exclude" in it.
5 **THE COURT:** What did it have in it? That's
6 why, I mean, "inequitable," I told you, it's not going in.
7 What was in the case?
8 **MS. CADE:** So in the -- Ashley Cade, Your
9 Honor.
10 In the -- I will say the *Eli Lilly* case, easier
11 to say, the language that Judge Bryson used was: It is
12 not improper for patentees to seek claims in the original
13 or continuation application. That's in the footnote from
14 Magnolia.
15 **THE COURT:** It's not in quotes either. Is that
16 actually what he said?
17 **MS. CADE:** It's in the footnote from Magnolia.
18 **THE COURT:** I know it's in the footnote.
19 **MS. CADE:** It's in quotes.
20 **THE COURT:** It is? Oh I'm looking on --
21 **MS. CADE:** It's slightly above our footnote, so
22 if you go above.
23 **THE COURT:** Oh, so you mean Magnolia's footnote
24 it's in quotes.
25 **MS. CADE:** Yes.

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1 **THE COURT:** Okay. I was looking in your
2 footnote and it as not in quotes. All right. Here's the
3 case from Bryson in quotes. All right. Fine, I agree
4 with that.

5 **MR. ZEMOUDEH:** Judge --

6 **THE COURT:** Change it. There's nothing
7 improper. There's nothing improper in filing a patent
8 application for the purpose. I am deleting "illegal" and
9 "inequitable."

10 Next?

11 **MR. ZEMOUDEH:** Can I be heard on that?

12 **THE COURT:** No. Next issue, please. Sorry.
13 (Reporter clarification.)

14 **THE COURT:** Okay. So now we are in, it says,
15 "Disputed, indirect infringement by active inducement."
16 Okay.

17 **MR. ZEMOUDEH:** So the first dispute here is
18 whether to list the claims. And I think, based on the
19 prior discussion, you know, we'll --

20 **THE COURT:** I think it's resolved. Okay.
21 Great.

22 **MR. ZEMOUDEH:** So I think the next dispute,
23 which is on 31, is effectively a dispute about our
24 understanding of what you had discussed yesterday.

25 **THE COURT:** Okay. So a suggestion. I mean,

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1 What's Number 2?

2 **MR. ZEMOUDEH:** Then we have knowledge of the
3 patent.

4 **THE COURT:** All right. And now you guys
5 dispute it.

6 **MR. ZEMOUDEH:** Well, yeah. We have included
7 here -- our proposal here on 31 is the patent owner must
8 be aware of the patent or believe there's a high
9 probability that the patent --

10 **THE COURT:** All right. I can tell you right
11 now, no.

12 Number 2 is that the accused infringer had
13 knowledge of the patent before the infringement.

14 And Number 3, that the accused infringer, or if
15 you want to call it inducing infringer, I'll play with you
16 on that, that's fine, but had knowledge that the acts, if
17 taken by those who used the Kurin Jet, would constitute
18 infringement. That's 3.

19 Okay? Then immediately after that, we have an
20 instruction called knowledge. Now, where is your
21 knowledge proposal?

22 **MS. CADE:** It's going to be in Paragraph 5, on
23 Page 36. We've got competing knowledge proposals.

24 **THE COURT:** Okay.

25 I think the title of 4.3 should really be

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1 you've agreed to inducement, infringement by active
2 inducement. I'm just curious, why don't we call it just
3 induced infringement? I mean, you've agreed to
4 inducement, infringement by active inducement. Everybody
5 referred throughout the case to the jury that way. What's
6 the theory?

7 **MR. ZEMOUDEH:** I think it would be -- we just
8 wanted to make clear that it's a subset of indirect
9 infringement, but I think we're happy to call it
10 inducement.

11 **THE COURT:** Okay. So let's do 4.3 should be
12 induced infringement. It would say: To show induced
13 infringement of a claim, a patent owner must prove, I
14 mean, shouldn't he prove: One, that the claim was
15 directly infringed; and, two, that the... and then now
16 we're into the disputes.

17 But, overall, I think this all needs to be
18 redone, so let's step back and go, like, what are the
19 elements.

20 So what's the first element, in your opinion,
21 it has to be direct infringement, right?

22 **MR. ZEMOUDEH:** Direct infringement.

23 **THE COURT:** Do you agree with that?

24 **MS. CADE:** I do, Your Honor.

25 **THE COURT:** All right. That's Number 1.

1714

1 "Elements of Induced Infringement." Okay? Actually, wait
2 a second. Step back.

3 Why didn't we start with direct? Oh, we do
4 have direct infringement. Okay. Great. All right.

5 So the next one is going to be titled
6 "Knowledge." Did anybody look up the criminal instruction
7 for knowledge that I asked, pattern instructions for the
8 Third Circuit?

9 **MS. CADE:** Your Honor, we didn't quite look up
10 the instruction, but I understand from Ms. Farnan that you
11 previously provided the parties with a knowledge
12 instruction in the prior litigation, and so we tried to
13 map that prior knowledge instruction there.

14 **THE COURT:** Okay. Great.

15 Where is it again? I'm sorry. Where did you
16 say?

17 **MS. CADE:** So our proposal, it's a little
18 confusing to follow with all the brackets and bold, but
19 our proposal starts at that bottom paragraph of Page 36.
20 We titled it "Knowledge" in the bucket, the big header on
21 5. That was what we understood Your Honor had put
22 together on knowledge standard.

23 **THE COURT:** Do we have the original instruction
24 I gave from the other case?

25 **MS. FARNAN:** So, actually, your Honor, it was

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1 in this case, the first trial. You worked on it. We
2 ended up not putting willfulness to the jury, so it didn't
3 get read, but you had told us to save it as a model
4 because you had worked on it. So I think I have the Word
5 version somewhere, happy to send it to you, but that's
6 what we used.

7 **THE COURT:** Yeah. If I worked on it, I think I
8 remember writing it that morning, I would like to have it.

9 **MS. FARNAN:** I have it. Do you want me to
10 e-mail it to you?

11 **THE COURT:** Sure.

12 **MS. FARNAN:** Sorry, Your Honor. It's not auto
13 filling. That's probably good for you.

14 **THE COURT:** Yeah.
15 (A discussion was held off the record.)

16 **THE COURT:** While she is getting that, so what
17 I think you should do, you send me the proposed work on
18 Sunday, right? And then in a separate document, put the
19 alternative claim construction issue. Put it in a
20 separate Word document. All right? And then if we have
21 to print out, we get to that, we do.

22 And, Mr. LoCascio, I'm just warning you, I am
23 like 51/49 on this. So I may not be able to articulate
24 it. It could just be I listen to the closings and go, you
25 know, I think we need it. Okay? Anyway.

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1 And I think, you know, it would be most appropriate --

2 **THE COURT:** Where is yours?

3 **MR. ZEMOUDEH:** Our instruction is right above
4 Kurin's. Our proposal --

5 **THE COURT:** What page?

6 **MR. ZEMOUDEH:** 36.

7 **THE COURT:** Let me just look at it.
8 The elements I gave you are verbatim what your
9 second sentence is. Right? You have to know that the
10 patent has been issued and you have to know that the
11 product infringes the patent. Right? Those are already
12 the elements. All right?

13 Now, the next sentence you're saying you got
14 from *Global-Tech*?

15 **MR. ZEMOUDEH:** Yes.

16 **THE COURT:** Hold on a second.
17 Well, I've got news for you, this is very, very
18 similar to my instruction. I'm not even sure how it's
19 really different. I mean, my instruction is, "Under the
20 law, to prove that a defendant knows something, a
21 plaintiff must show actual knowledge or willful blindness
22 on the part of" you know, you put it, "the accused."
23 "And a defendant cannot avoid liability by
24 deliberately shielding itself from clear evidence of
25 critical facts that are strongly suggested by the

1716

1 **MS. FARNAN:** Your Honor, I just sent it to you.
2 It's all the context of willful infringement.

3 **THE COURT:** What page is it on? Oh, I see. It
4 wasn't a separate page for knowledge.

5 **MS. FARNAN:** Right. You didn't break it out.
6 But my understanding at the time --

7 **THE COURT:** All right. Actually --

8 **MS. FARNAN:** -- was that you focused on the
9 knowledge piece.

10 **THE COURT:** Yes. All right.
11 So did you copy verbatim the paragraph that I
12 put on the bottom of Page 6?

13 **MS. CADE:** For the whole instruction, I don't
14 believe so because that was for willfulness. I tried to
15 adapt it for inducement and contributory infringement
16 since they both have similar knowledge requirement. That
17 was the intent. So it can't say it's verbatim because of
18 that.

19 **THE COURT:** Okay. Are you familiar with the
20 instruction we're talking about?

21 **MR. ZEMOUDEH:** I'm not familiar with the exact
22 instruction, but I just wanted to say that our instruction
23 is adopted from the *Global-Tech* case which, you know,
24 speaks to the issue of induced infringement and it does
25 not relate to, you know, the standard for willfulness.

1718

1 circumstances." That's verbatim what you have.
2 My sentence says, "A defendant."

3 I'm sure I consulted *Global-Tech* when I wrote
4 this. "A defendant"...

5 Actually, just go with mine. I spent time on
6 it. It's on Page 6 and into Page 7. It just needs to be
7 changed.

8 And, by the way, what I also say there, I added
9 was that proof that the accused person, or whatever word
10 you all want to put in, should have known that whatever
11 the accused device infringed was not sufficient.

12 In other words, proof that that accused party
13 was negligent or reckless in infringing the asserted
14 claims is not sufficient to prove willful blindness. Just
15 change it to willful blindness. Okay?

16 **MR. ZEMOUDEH:** Okay.

17 **THE COURT:** Thank you. Everybody good on that?

18 **MS. CADE:** Yeah. I think the only change I
19 would make is I realize that this is plaintiff and
20 defendant and I think this instruction is going to apply
21 to both parties.

22 **THE COURT:** I agree. That's why I just said
23 you guys come up with the words. I think it would be like
24 accused infringer or whatever you want. Perfect.
25 That's done. Next.

1719

1 **MS. CADE:** I think -- so, Your Honor, just to

2 stay on Page 37, there's a dispute right at the bottom of

3 that knowledge paragraph.

4 **THE COURT:** Yeah.

5 **MS. CADE:** Magnolia is proposing to include an

6 instruction about the belief of invalidity of a patent is

7 relevant to induced infringement.

8 **THE COURT:** Wait a second. Where is this?

9 **MS. CADE:** It's on Page 37, kind of in the

10 middle of the page there, right under the "Knowledge"

11 instruction.

12 **THE COURT:** Oh, yeah. A decision I just ever

13 don't understand.

14 I don't even think it's relevant. Did we have

15 anybody even assert it? So it just didn't come up.

16 **MR. RAMANI:** It absolutely came up, Your Honor.

17 Bob Rogers testified that when he was shown the '081

18 patent, he said that it looks like it's trying to cover

19 the Jet. And then his response to that later on down the

20 questioning, both in deposition and when I cross-examined

21 him, was that the Jet came first. That was his subjective

22 belief of invalidity as a defense.

23 **THE COURT:** Yeah.

24 **MR. RAMANI:** Which does not suffice under

25 *Commill*.

1721

1 responding to.

2 **MR. LoCASCIO:** On the last part of this charge,

3 there was a proposal from Kurin. We heard -- a lot of

4 people were asked about FTOs, freedom to operate opinions.

5 **THE COURT:** Where is that?

6 **MR. LoCASCIO:** It's the Kurin proposal, right

7 after the sentence you were just looking at, 37.

8 **THE COURT:** Oh, on the lawyer.

9 **MR. LoCASCIO:** It's 35 U.S.C. 298.

10 **THE COURT:** I'm not putting it in, and I trust

11 counsel knows, he's not going to open that door. So

12 that's good. It's out. So bottom line is, it's my

13 knowledge instruction. Ms. Farnan has it. It's page 6

14 and 7 of those instructions. You need to adjust it as we

15 discussed.

16 Next. Anticipation.

17 **MR. ZEMOUDEH:** Yes. If you are looking at

18 Page 42, Your Honor.

19 **THE COURT:** Okay. So the first issue, it is

20 only certain, isn't it? Are you saying all the claims are

21 anticipated?

22 **MR. ZEMOUDEH:** Your Honor, I think we're good,

23 too.

24 **MR. RAMANI:** Not on this one.

25 **THE COURT:** Wait. Are you saying all the

1720

1 **THE COURT:** Okay. So it doesn't suffice. And

2 if Mr. LoCascio tried to argue it, I'll read it, but I'm

3 not putting an instruction in unless that's the case.

4 There's no requirement that I instruct the jury about

5 that. They can't try to establish invalidity by resorting

6 to it. I frankly don't understand why Justice Scalia

7 wrote the thing he did. I'm very surprised at the

8 opinion, but It was 5-4, I think, right? Which is very

9 rare in the Supreme Court.

10 Anyway, I see the other side of that. That's

11 for sure. So I'm not injecting it into the case.

12 **MR. RAMANI:** Okay. Then, Your Honor, would we

13 have the ability to request it, depending on how the

14 closings go?

15 **THE COURT:** Sure. Like I said, if he stands up

16 and he says: Nobody here believed they were invalid, you

17 know, and, therefore, you can't. By the way, if he's

18 responding because you say something, like about their

19 motives or something like that, it might be relevant, you

20 know. We'll see.

21 **MR. RAMANI:** We're definitely going to say

22 something about that, Your Honor, because we have to show

23 knowledge.

24 **THE COURT:** Well, we'll see how it goes. I'm

25 just going to have to see how it goes, what it's

1722

1 claims were anticipated?

2 **MR. McELDOWNNEY:** On the Rogers '445, yes.

3 **THE COURT:** So then I don't understand, why is

4 Magnolia's proposal certain?

5 **MR. ZEMOUDEH:** Your Honor, we're okay with

6 dropping this one.

7 **THE COURT:** Okay. That's good. So it's "the."

8 and then --

9 **MR. ZEMOUDEH:** Same thing with the next one.

10 **THE COURT:** Yeah. I assume you want "the."

11 Okay. All right. That's resolved.

12 **MR. ZEMOUDEH:** Same thing with the next

13 bracketed portion of 42. We'll drop that.

14 **THE COURT:** Okay. Excellent.

15 All right. So then we're on Page 43.

16 **MR. ZEMOUDEH:** Yeah. For this one, we have

17 decided to drop it as well.

18 **THE COURT:** Okay. That's a very wise decision

19 on your part. Well done for such a young lawyer. Next?

20 Page 48.

21 This cracks me up. I mean, did we have, what,

22 ten seconds of testimony on secondary considerations? And

23 we're going to instruct these poor people? Oh, my

24 goodness.

25 All right. Seriously, is the only testimony it

1723

1 was commercial success based --

2 **MR. LoCASCIO:** Of the infringing products.

3 **THE COURT:** Right. Of the defendant's product.

4 **MR. LoCASCIO:** There is a motion in limine.

5 **MR. RAMANI:** That's routinely done, Your Honor.

6 I mean, it is routine to satisfy objective indicia by

7 citing the accused product in response to this factor, and

8 saying that the accused product, because it embodies the

9 claimed invention, its commercial success should be --

10 **THE COURT:** I know. But actually what I'm

11 getting at is, it's 15 to 20 percent of the market, I

12 think, was your slide, right?

13 **MR. RAMANI:** 18 to 20, something like that.

14 **THE COURT:** 18 to 20, yeah. And that's like,

15 man, they must be infringing because they are so

16 successful. I don't even think that qualifies as

17 commercial success.

18 **MR. RAMANI:** No, this isn't infringement. This

19 is a response -- this is the patent owner's ability to

20 respond to an allegation of obviousness.

21 **THE COURT:** Right. Their response is they have

22 a better product. I mean --

23 **MR. RAMANI:** That sounds like weight, Your

24 Honor, doesn't sound like a legal question.

25 **THE COURT:** I'm not giving all these objective

1725

1 remember.

2 **THE COURT:** Pile of money. That's probably why

3 I thought it was damages. You guys are great.

4 Well, anyway, here's the deal. You've got to

5 change the instruction, if you want it. I heard no other

6 testimony about secondary considerations.

7 **MR. RAMANI:** I beg to differ, Your Honor.

8 There was testimony that the claimed invention satisfied a

9 long-felt need that others had tried to --

10 **THE COURT:** Wait. Where was that? Who gave

11 that?

12 **MR. RAMANI:** That was from Mr. Bullington

13 about -- doesn't have to come from an expert.

14 **THE COURT:** I didn't say it did, but where was

15 talking about the long-felt need?

16 **MR. RAMANI:** About the genesis of the company

17 and how they came up with these inventions.

18 **THE COURT:** Time out. About ISDD generally,

19 yeah. I mean, maybe. Actually, I don't even know there's

20 that. In fact, I've got to tell you, for what it's worth,

21 I thought about this, about if we get to an injunction

22 from either side about the public interest factor, you

23 know what you haven't convinced me? Is that this is

24 anything but a manufactured need. Right?

25 It's funny because I have a lot of doctors in

1724

1 indicia because they weren't even mentioned to the jury.

2 So I think if you want to pare it down, one

3 thing you can think about is the commercial success...

4 So, you know, one thing we can consider is

5 whether they were commercially successful as a result of

6 an inventive aspect. Was there is any testimony of that?

7 Did he say what it was that led to their commercial

8 success in his testimony?

9 **MR. McELDOWNNEY:** No.

10 **THE COURT:** I don't think he did.

11 **MR. McELDOWNNEY:** Did not.

12 **THE COURT:** I don't know that you have an

13 evidentiary basis even to argue that.

14 **MR. RAMANI:** Because of Professor Meinhart's

15 testimony?

16 **THE COURT:** Yeah. In other words, I mean, what

17 I remember is him throwing up...

18 Not Meinhart. I remember the only mention of

19 it came through the damages expert. Did it come through

20 anybody else?

21 **MR. McELDOWNNEY:** It was Dr. Meinhart.

22 **THE COURT:** It was Meinhart? Okay.

23 **MR. McELDOWNNEY:** He had one slide with, like, a

24 pile of coins.

25 **MR. LoCASCIO:** Pile of money on the slide. I

1726

1 my family. And you go to a doctor and you say...

2 Because I did after the first trial. I went to

3 my oldest son, like look at this device, it's incredible,

4 like, it's so cool, you know. And the response was that

5 it's not worth it. It's too much time, and we do this.

6 And I would love to know from an objective person, are

7 false positives really that big of a deal, you know? And

8 I know Mr. Block is nodding his head, but I don't know.

9 And I think it's funny, all the lobbying everybody is

10 doing to create this. I don't know. I'm going on an

11 aside and it's too late. I do when I'm tired. I

12 apologize.

13 If you want this stuff in, you have to come

14 Monday morning with specific evidence that would support,

15 and don't bother putting in any kind of secondary indicia

16 for which you do not have a specific evidentiary basis.

17 **MR. RAMANI:** Understood, Your Honor.

18 **MR. LoCASCIO:** Could I modify the Court's

19 request?

20 **THE COURT:** Okay.

21 **MR. LoCASCIO:** To suggest that if there's going

22 to be an effort to put more into the charge on this beyond

23 the success one, or even on that, I think it would be

24 useful to see the record when we get the transcript to see

25 what actually came in.

1727

1 **THE COURT:** Yeah.

2 **MR. LoCASCIO:** I think on Sunday, when we're

3 getting it to the Court, they should be identified then.

4 **THE COURT:** I agree.

5 We better make it by noon on Sunday.

6 **MR. RAMANI:** Excuse me, Your Honor, just a

7 point of clarification. I think what I -- just to make

8 sure I understand, we're to identify the objective indicia

9 we'd like listed by --

10 **THE COURT:** If you want an objective indicia --

11 **MR. RAMANI:** Yeah.

12 **THE COURT:** -- it says, "You should also take

13 into account" and then --

14 **MR. RAMANI:** We just provide the narrowing by

15 subject or are you saying you want us to provide the

16 narrowing as well?

17 **THE COURT:** If you want an objective indicia,

18 you're going to have to show where there was testimony and

19 you need to submit the rough transcript cites with it so I

20 can look at it.

21 **MR. RAMANI:** Sounds good.

22 **MR. LoCASCIO:** And it would be limited to what

23 they previously disclosed during the case, which is still

24 the pending MIL 3. Because you may recall their

25 Interrogatory responses were absent of any objective

1729

1 instruction that we do not contend that we practice our

2 patents and, you know, this is something we've discussed

3 before.

4 **THE COURT:** Let me just think.

5 So why is it relevant?

6 **MS. CADE:** So I think it goes to the nexus

7 point that we're talking about as to whether they have a

8 sufficient evidentiary basis. And just to address a quick

9 point from my --

10 **THE COURT:** Wait, wait, wait. So that they

11 have a sufficient evidentiary basis...

12 **MS. CADE:** It's the nexus point. So if they're

13 not practicing their patents and they're trying to put in

14 evidence -- and to be clear, the instruction says the

15 products that were discussed in this case. So this is

16 excluding the Flow. Just products at issue here.

17 Whether or not they're asserting or practicing

18 their patents is relevant to nexus and whether any of this

19 evidence can even get -- or is even relevant in the first

20 instance.

21 **MR. ZEMOUDEH:** Your Honor --

22 **THE COURT:** I'm still at a loss why you would

23 want this. I'm just trying to think.

24 So let's say commercial success, let's say I

25 let it in. So we have an instruction that says: You

1728

1 indicia with respect to the Bullington patents. They only

2 related to the Patton Patent, and that was MIL 3 that

3 you've not ruled on. Motion in Limine 3 to prevent

4 evidence of copying and other objective indicia that were

5 not tied to these patents in their disclosures, Your

6 Honor, in their expert report.

7 **THE COURT:** Sorry. I don't remember.

8 **MR. LoCASCIO:** It's okay. They didn't --

9 **THE COURT:** Bottom line is this. If they don't

10 have an evidentiary basis for it, I'm not putting it in

11 the jury instructions. Okay? And they've got a mention

12 of commercial success, and then we can look at it.

13 I have to tell you, you know, in a way I would

14 say to Kurin, you should just go for it, just let it go in

15 because it's going to create a stupid appeal issue because

16 there's just no way this jury is going to give any weight

17 to his testimony about commercial success. It is a

18 nonissue. That's why I would say, just put it in.

19 The other stuff, I just think it's unfair to

20 the jury. I think it's really mean to send them all these

21 objective indicia and they have no idea what we're talking

22 about.

23 Next.

24 **MR. ZEMOUDEH:** Your Honor, the next dispute is

25 on Page 50 at the top. Kurin is trying to include an

1730

1 should also take into account the law... I would change, I

2 would just do a riff. I would be, like: Now, the law

3 says that there's certain things called objective indicia

4 that may show whether or not a claimed invention is

5 obvious. One of those indicia is what the law calls

6 commercial success. So if you find that a product covered

7 by the claims was commercially successful as a result of

8 an inventive aspect of a claim rather than success due to

9 unclaimed features, design needs, market pressure,

10 advertising, or similar things, then...

11 Okay. Now, actually, I'm not giving the

12 instruction as written because you've got to say what

13 happens, what do you do then. So if you find it, what do

14 you do with objective indicia? How would you want to

15 finish up that instruction?

16 **MR. ZEMOUDEH:** Well, I think we would say:

17 Given this objective indicia suggests that Magnolia

18 Medical's patent is non-obvious.

19 **THE COURT:** All right.

20 So then you follow up with the sentence, which

21 is the law, right, "When considering these factors, there

22 must be a connection between the commercial success and

23 the inventive aspect of the claim." Right? We do that.

24 All right.

25 Now, so let's say that's the instruction. I

1731

1 don't understand why, then, you want to follow with
2 Magnolia --

3 **MR. ZEMOUDEH:** Your Honor, I'm sorry to
4 interrupt. We would just say, "An inventive aspect"
5 instead of "the inventive aspect."

6 **THE COURT:** That's fine. That sounds good.
7 So then I don't understand why you follow
8 with -- who cares about the other stuff?

9 **MS. CADE:** May I have a moment, Your Honor?

10 **THE COURT:** Yes.

11 **MS. CADE:** So I think, Your Honor, I think the
12 risk here is, Element Number 1, if we go to Page 49 --

13 **THE COURT:** Yeah.

14 **MS. CADE:** -- it talks about whether the
15 products were covered by the claims were commercially
16 successful as a result --

17 (Reporter clarification.)

18 **THE COURT:** Actually, time out. Time out.
19 I figured out what it is.

20 The risk is that if you just read the
21 instruction like that and they had commercially successful
22 products, the jury may conclude, ah-ha, we've got
23 objective indicia. And since especially this is such a
24 confusing instruction, you know what, I'm going to let it
25 in. If you want an instruction for objective indicia,

1733

1 objective indicia, would this fall away?

2 **THE COURT:** Everything is out. They're not
3 getting to introduce anything about whether your patents
4 read on your own patents. No way. It's not relevant
5 except for the indicia.

6 Okay. Page 51. I don't know why this is
7 coming in. What's the basis for this? Why do you want
8 it, Magnolia?

9 **MR. ZEMOUDEH:** We already discussed this.

10 **THE COURT:** It's out? Okay.

11 Then you've got a proposal on written
12 description, Page 54. I mean, why does Kurin object to
13 this?

14 **MS. CADE:** So, Your Honor, if -- and I didn't
15 have -- apologize, I just didn't have time to read all of
16 the cases they cited. But if my memory serves, this is a
17 very specific place marked precedent from the Federal
18 Circuit on written description that typically applies in
19 the context of Life Sciences cases.

20 I'm not saying it's irrelevant to written
21 description, but it's just -- it's not something found in
22 any model instructions. I think it has a very specific
23 place and specific purpose that doesn't apply here.

24 **THE COURT:** All right. I think the
25 instructions are too long anyway, so I think it's

1732

1 you've got to modify it, as I said, and I am going to
2 include Kurin's proposal that Magnolia doesn't contend
3 that its product read on these patents.

4 **MR. ZEMOUDEH:** Your Honor, if I can say one
5 thing.

6 **THE COURT:** No, that's it. I already ruled.
7 All right?

8 **MS. CADE:** Your Honor, I hate to interrupt.
9 There's a second portion of our instruction that is not
10 talking about the nexus point.

11 **THE COURT:** I'm getting there.

12 **MS. CADE:** Okay. I just wanted to make sure.

13 **THE COURT:** Yep. So even if you conclude...
14 Yeah, I'm going to include it, again, because I
15 think it's very confusing, this objective indicia not
16 having been mentioned. So I'm going to include the
17 bracket...

18 I'm including Kurin's proposal on Page 50, to
19 the extent they still want an objective indicia
20 instruction, and then all of this will be submitted by
21 noon on Sunday with competing proposals.

22 All right. Page 51.

23 **MR. ZEMOUDEH:** Can I clarify one thing?

24 **THE COURT:** Yes.

25 **MR. ZEMOUDEH:** If we weren't to introduce

1734

1 necessary. I'm cutting it.

2 **MR. ZEMOUDEH:** Can I have a response?

3 **THE COURT:** Yes. You can have a response.

4 **MR. ZEMOUDEH:** This is -- we need this for
5 accuracy because the instruction, without it, suggests
6 that you can look to the entirety of the written
7 description and find that that satisfies the requirement.
8 But this clarifies, under Federal Circuit law, that you
9 cannot pull from different embodiments unless they are
10 linked.

11 So we need it for accuracy. And, of course, as
12 you know, the fact that something isn't in model
13 instructions doesn't mean it's right or wrong.

14 **THE COURT:** Right. So if they argue in closing
15 argument that it is sufficient to just recite the elements
16 and not link them together, if they recite something that
17 violates this, what you're telling me is a holding, you
18 can raise it, and I'll address this. All right?

19 I see this in patent law all the time.
20 Actually, we even see it now in the other cases. Lawyers
21 start to think you need to get a jury instruction for
22 every legal principle. You just don't. You can't
23 instruct juries like that.

24 All right. Next?

25 **MR. RAMANI:** Your Honor, could I just ask a

1735

1 point of clarification on the ruling you just made?

2 **THE COURT:** Yes.

3 **MR. RAMANI:** What we are planning on doing is

4 we see the situation, based on the evidence as it came

5 out, very -- on all fours with the *Care DX* JMOL that you

6 granted.

7 **THE COURT:** I don't remember it, but okay.

8 **MR. RAMANI:** It's cited here.

9 **THE COURT:** I just can't remember what I said

10 in *Care DX*.

11 **MR. RAMANI:** So in *Care DX*, there was an

12 attempt to put together a pastiche of different

13 embodiments to find written description support.

14 **THE COURT:** Oh, okay.

15 **MR. RAMANI:** And Your Honor rejected that.

16 **THE COURT:** Right.

17 **MR. RAMANI:** The point being that you can't do

18 that. If you don't have an instruction that there's an

19 integrated whole to tell one to pull from different

20 embodiments, you lack written description support. We

21 have strong testimony of that from the inventor Bob

22 Rogers.

23 **THE COURT:** Right. Okay.

24 I don't know. I mean, look, I'm just not

25 adding. We've got enough.

1737

1 have both discussed the *Panduit* factors. It's relevant.

2 I don't see why we would exclude instructions on each

3 *Panduit* factor when the jury needs guidance in order to --

4 **THE COURT:** Do they not have a lost profits

5 instruction?

6 **MR. ZEMOUEH:** Well --

7 **MS. CADE:** We do, Your Honor, it's on Page 58.

8 I think that to boil this dispute down to make it real

9 simple, we just don't see a need to burden the jury with

10 pages and pages and pages of instruction on the *Panduit*

11 factors when there's a page and a half long instruction on

12 lost profits.

13 **THE COURT:** Hold on.

14 It's way too long, but I'm willing to give them

15 something. So if you want to take a stab at cutting it

16 back, I mean, it's ridiculously long, and yet I can see

17 putting some more meat on the bones.

18 **MR. ZEMOUEH:** Okay. Your Honor, we're okay

19 with dropping it.

20 **THE COURT:** With what?

21 **MR. ZEMOUEH:** We'll drop it.

22 **THE COURT:** Okay. All right.

23 What's next?

24 **MR. ZEMOUEH:** That takes us to, I believe,

25 Page 65. And -- actually, sorry. Yeah, that takes us to

1736

1 **MR. RAMANI:** It's fine.

2 **THE COURT:** Be prepared.

3 **MR. RAMANI:** I just wanted to make sure. We

4 can argue that affirmatively in closing, because that's

5 what we are planning on doing.

6 **THE COURT:** Yeah, I mean, if they think that

7 you overstepped the bounds, they will object and I will

8 deal with it.

9 **MR. RAMANI:** Okay. Thank you.

10 **THE COURT:** I think if you're going to argue

11 it, what you're going to have to do is you're going to

12 have to tie it to one of the more general principles that

13 are asserted in the instruction. All right?

14 You know, sufficient detail. It's got to be

15 enough to show they actually possessed it. So, anyway,

16 you can do it. It's kind of like obviousness, where you

17 list your prior art references, but then you're not really

18 supposed to just check every box, you know, from each

19 prior art.

20 Okay. Next?

21 **MR. ZEMOUEH:** I believe the next dispute is on

22 Page 60.

23 **THE COURT:** Yeah.

24 **MR. ZEMOUEH:** Magnolia wants to list, provide

25 instructions on the *Panduit* factors. The damages experts

1738

1 Page 65 at the bottom.

2 **THE COURT:** Okay.

3 Can I ask you something? I've got to tell you,

4 why does the hypothetical negotiation, why does everybody

5 have full knowledge? That's not reality. When you

6 negotiate, you don't have full knowledge.

7 **MR. ZEMOUEH:** My understanding is that with

8 full knowledge, they come with the most accurate

9 reasonable royalty rate. So I think that's the -- that's

10 the primary justification.

11 **THE COURT:** Doesn't make any sense. Does

12 anyone else know?

13 **MR. SMITH:** Your Honor, all I would say is it

14 would distort the negotiation, then, to say if there's

15 asymmetric knowledge that would tend, then -- I think

16 Mr. Zemoudeh's point is it would change where your

17 endpoint would be in the negotiation based on asymmetry.

18 **THE COURT:** Well, why is it you have to prove

19 what the party would have known at the time, and then you

20 prove what each side would have known, and that would be a

21 much better way of doing it, I think.

22 **MR. SMITH:** You may have asymmetric knowledge

23 or you may have -- a powerful party has lots of

24 information and less powerful --

25 **THE COURT:** That's the real world, so why are

1739 1 we doing this? 2 MR. LoCASCIO: It's a wildly inefficient 3 attempt to try to make it objective and not subjective, 4 which ends up sort of -- the looking forward part of the 5 Book of Wisdom is when I lose my mind. 6 THE COURT: I wrote down two things to ask you 7 all, so that was my next question is, how can you possibly 8 see in the future? 9 MR. LoCASCIO: Never understood it. If the 10 business went out of business, then I guess it would be 11 zero. I don't understand that one. 12 MR. RAMANI: Your Honor, not to add to your 13 woes, but it was just raised to my attention that I 14 misspoke. I thought when I told Mr. Zemoudeh to -- that 15 we didn't want to take up your offer to narrow the 16 <i>Panduit</i> -- additional <i>Panduit</i> instructions -- 17 THE COURT: You'd like to do it? 18 MR. RAMANI: We'd like to do it. 19 THE COURT: Go ahead. We need something. You 20 should be able to work this out. Look at my last. Here's 21 the problem: We do the jury instructions at 6:30 on a 22 Friday night and we only have, like, two more minutes so 23 let's hurry up. 24 So what else, then? So dispute of evidence of 25 things that have happened before. No, I'm not adding that	1740 1 paragraph. We don't need it. 2 All right. Next. 3 MR. ZEMOUEDEH: All right. I think this is the 4 last dispute. 5 THE COURT: Seventy-one? 6 MR. ZEMOUEDEH: Which you'll be happy to hear. 7 MS. CADE: And it's on Page 71. 8 THE COURT: Okay. 9 MR. ZEMOUEDEH: So in the prior case, there 10 wasn't a special instruction on apportionment. 11 THE COURT: Yep. 12 MR. ZEMOUEDEH: And we don't think there should 13 be one here. But if you do choose to provide a special 14 instruction on apportionment, we have proposed language 15 that we think comports with the case law. And that 16 language is on Page 72 at the top of the footnote. 17 THE COURT: I mean, what's the difference 18 between what you are proposing and what they are 19 proposing? 20 MR. ZEMOUEDEH: Yeah. So their proposal on 21 Page 71 in the middle. Let's see, the second sentence. 22 So it starts: "A royalty compensating the patentee for 23 damages must reflect the value attributable to the 24 infringing features of the product." 25 Now, infringing features isn't just -- well,
1741 1 infringing features can be more than just the features 2 that are novel. And really, in the hypothetical 3 negotiation and for purposes of apportionment, a damages 4 analysis must isolate the novel feature. 5 THE COURT: Okay. 6 MR. ZEMOUEDEH: And we have -- 7 THE COURT: Yep. All right. And what do you 8 say to that? 9 MS. CADE: I would like to confer on that 10 point. If the question is just switching out "infringing" 11 to "novel features," may I have one moment on that? 12 THE COURT: Time out. Well, wait. Can you 13 work it out or not? 14 MS. CADE: So I think -- I tend to think that 15 the infringing features is the appropriate way to look at 16 this -- 17 THE COURT: Let me just ask. Is it true that 18 yours is verbatim the model patent instruction from the 19 2020? 20 MS. CADE: I tried very hard. I do not think I 21 changed anything, but I would like to confirm that before 22 I say it on the record. 23 MR. ZEMOUEDEH: Your Honor, so I just want to 24 emphasize again that in the last case between the parties, 25 there was no apportionment instruction. We don't need one	1742 1 here. 2 THE COURT: So wait. Hold on. 3 How can I not give an apportionment instruction 4 and not get reversed -- 5 MR. ZEMOUEDEH: Well -- 6 THE COURT: -- if there's a damage award? I 7 mean, seriously. I don't mean to be, like, unless you 8 both agree. 9 MR. LoCASCIO: A couple judges might drive up 10 just to tell us before Monday that there -- 11 MR. ZEMOUEDEH: So, Your Honor, I'm sorry. It 12 was just there was no special instruction on 13 apportionment. There was the <i>Georgia-Pacific</i> factors 14 listed there, and so -- 15 THE COURT: Well, wait. Is there an 16 apportionment in the <i>Georgia-Pacific</i>? 17 MR. ZEMOUEDEH: Yes. 18 THE COURT: Well, that might be all right. 19 Where is it? 20 MR. ZEMOUEDEH: It's Factor 13, Your Honor. 21 THE COURT: Okay. I still, frankly, am a 22 little hinky about that. I can't do it. 23 MR. LoCASCIO: I am doing a side-by-side right 24 now to tell you if it's verbatim or not. 25 THE COURT: Okay. Thank you very much.

1743 1 All right. If it's verbatim, I'm just going to 2 just give it. I am not taking that risk. And actually, I 3 haven't even gotten to the verdict form, but I don't know 4 how they are going to apportion. 5 I mean, was there any testimony from either 6 side about how they should apportion? 7 MR. ZEMOUDEH: Yes, Your Honor. 8 THE COURT: There was? Okay. 9 MR. ZEMOUDEH: Yes. 10 And again, I just want to make clear that I 11 apologize for misspeaking. I didn't mean to say that 12 there was no apportionment instruction, but it was there 13 was no special apportionment instruction. 14 THE COURT: Oh, don't worry about it. That's 15 fine. You don't need to apologize. 16 MR. ZEMOUDEH: Well, thank you. And I just 17 want to say that I just think that our proposal here at 18 the top of the footnote accurately reflects the Federal 19 Circuit case law that we've cited. 20 THE COURT: Well, and it does cite a case and 21 that's fair, but it's a model jury instruction and it's 22 now 6:45 and I'm going to go with it. All right? 23 Assuming there's no material change. 24 Okay. Can you walk me through... we're waiting 25 on that. We're done with the jury instructions. We have	1744 1 to tie that up, right? And let's go to the verdict form. 2 MR. RAMANI: Yeah, Your Honor. 3 THE COURT: Mr. Ramani, did you have something 4 else on jury instructions? 5 MR. RAMANI: I do. 6 THE COURT: Okay. Quickly. 7 MR. RAMANI: We have some logistics for closing 8 but I -- do you want to do verdict form? 9 THE COURT: No, no. If we are done with the 10 instructions. 11 MR. LoCASCIO: Have the answer. 12 THE COURT: Yes. 13 MR. LoCASCIO: If you can look back at Page 71. 14 THE COURT: Yes. 15 MR. LoCASCIO: The only change -- so from the 16 Federal Circuit Bar Association Model Patent Jury 17 Instruction 5.12. 18 THE COURT: Yep. 19 MR. LoCASCIO: The only departures are as 20 follows. Fourth line down, the proposed says "a royalty 21 compensating the patentee for damages." The model says 22 "the patent holder." 23 THE COURT: Fine. 24 MR. LoCASCIO: Sixth line down, the model says 25 "value of the alleged infringing features from the value
1745 1 of all other features." So it does not say "of the 2 product." 3 THE COURT: Sorry. 4 MR. LoCASCIO: Which is better. I think we 5 remove -- so delete "of the product" after "allegedly 6 infringing features," Your Honor. 7 THE COURT: I don't see that. Oh, yes. Okay. 8 "Allegedly infringing features" of the what? 9 MR. LoCASCIO: Delete "of the product." That's 10 not in the model. 11 THE COURT: Okay. 12 MR. LoCASCIO: That's the entirety -- the 13 sentence reads: "The process of separating the value of 14 the alleged infringing features from the value of all 15 other features is called apportionment." 16 THE COURT: Okay. Keep that. 17 MR. LoCASCIO: That's it. That's the only 18 changes. 19 THE COURT: All right. I am going to just take 20 that with that revision. 21 All right. Now let's go to the verdict form. 22 How would you summarize the difference in the verdict 23 form? Like what should I be focusing on? 24 MR. ZEMOUDEH: Your Honor, if I could just 25 refresh my memory.	1746 1 THE COURT: Sure. 2 MR. ZEMOUDEH: The first big dispute is that 3 Kurin wants to have a single infringement instruction 4 where there's multiple types of infringement. And 5 Magnolia proposes that we separate out the different types 6 of infringement given the different standards. 7 THE COURT: Okay. And I agree with Magnolia. 8 So you need to do that. All right? And it will just 9 follow the instruction that we talked about. All right? 10 MR. ZEMOUDEH: And it's essentially the same 11 thing for invalidity. 12 THE COURT: Do the same thing. It has got to 13 be by type and claim. All right? Is that it? 14 MR. ZEMOUDEH: Let me just make sure that 15 there's... 16 So for -- sorry. Let me just go through this 17 just to make sure. 18 MR. RAMANI: Your Honor, I've made it through. 19 I think the only other dispute is that Magnolia proposes 20 in the reasonable royalty charge to -- or aspect of the 21 verdict form question to let the jury write in a rate and 22 Kurin does not. 23 THE COURT: Why not? 24 MR. LoCASCIO: I think just because our form 25 had an amount because the witnesses asked for an amount.

1747 1 There are rates that were in the mix but the parties asked 2 for an amount so there is an amount of damages. 3 I will tell you my sort of experience and view 4 on this is the amount jurors decide in the box, the black 5 box in the jury room of what amount they think of damage 6 is appropriate, forcing a rate sort of takes some of that 7 freedom away from them because they have numbers and they 8 think, "Well, who am I to pick a different number?" 9 THE COURT: Why do I need a rate? 10 MR. ZEMOUDEH: Because that way the parties 11 could accurately determine what the jury's conclusion was. 12 I mean -- 13 THE COURT: Well, we give the jury a 14 calculator, and I know from experience, they do the math. 15 They do exactly that. They write the products and they do 16 the math and I've seen it afterwards. I've talked to 17 them, they do it. I see it up on the board. 18 MR. ZEMOUDEH: I mean, I don't doubt that at 19 all. And I just would say, you know, we don't want to 20 have any uncertainty. 21 THE COURT: Yeah. 22 MR. ZEMOUDEH: And, also, it would make it -- 23 yeah. Yeah. And, also, it would allow us to calculate 24 running royalties forward looking -- 25 THE COURT: I like that.	1748 1 MR. LoCASCIO: That can be done after the fact 2 by the lawyers because if no lost profits are awarded, you 3 know the units because we've all put units into this case 4 and we can calculate that. 5 Mr. McEldowney points out to me, the risk of 6 the inconsistent verdict happens often and is much higher 7 in habit because then we get an award of royalties, we 8 know the actual units and then the rate doesn't add up. 9 THE COURT: All right. Hold on. Now... 10 MR. ZEMOUDEH: Your Honor? 11 THE COURT: Yes. 12 MR. ZEMOUDEH: Kurin's damages expert 13 challenged the units that our damages expert put forward 14 so we wouldn't be able to know exactly what units were 15 used. 16 THE COURT: Right. You don't think it's 17 reversible error if I don't put a rate, do you? 18 MR. ZEMOUDEH: I think it's possible. 19 MR. RAMANI: No. 20 MR. LoCASCIO: Both sides want you to say no. 21 THE COURT: You finally have agreement for the 22 parties. I'm not going to do a rate. 23 Now, I'm just doing straight. It's reasonable 24 royalty and it's lost profits for everybody. 25 I want to ask you, what happens if it's a split
1749 1 verdict? 2 So how are we going to know if they apportion 3 damages on a patent basis? Is that known? 4 MR. ZEMOUDEH: Well, our damages expert -- our 5 damages expert -- well, as an initial matter, they're from 6 the same family, so it would be reasonable to think that 7 the parties would come to a single rate for all three 8 patents. 9 Also, our damages expert, there's support for a 10 single rate for any infringed claim. 11 THE COURT: All right. They didn't ask for a 12 breakout anyway, right? 13 MR. ZEMOUDEH: No, it's just one reasonable 14 royalty. 15 THE COURT: All right. So are there any more 16 issues with the verdict sheet? 17 MR. ZEMOUDEH: I think there's just one. 18 THE COURT: Okay. 19 MR. ZEMOUDEH: And it's Magnolia would like to 20 include a phrase, for example, on Page 11 of Magnolia's 21 proposed verdict form. 22 THE COURT: Page 11? 23 MR. ZEMOUDEH: Yeah. 24 THE COURT: Okay. Yeah. 25 MR. ZEMOUDEH: It's effectively that reasonable	1750 1 royalty damages must compensate for the infringement. 2 THE COURT: Wait. Wait. I'm sorry. Where did 3 you say it is? 4 MR. ZEMOUDEH: It's on Page 11, Question 8. 5 So three lines down is the phrase, "would 6 compensate Magnolia Medical for Kurin's infringement." 7 We think that phrase should be in both sets of 8 verdict forms for damages, the entire -- 9 THE COURT: I'm sorry. It's late. So this is 10 your proposal? 11 MR. ZEMOUDEH: Right. 12 THE COURT: And you want to say "would 13 compensate," and you want to do it when it comes to the 14 Kurin patent as well, right? 15 MR. ZEMOUDEH: Yes. So -- 16 THE COURT: What do they want? 17 MR. ZEMOUDEH: They don't want to use that 18 phrase. 19 THE COURT: What do they want to use? 20 MR. ZEMOUDEH: They just omit the phrase. 21 THE COURT: What do they have? Oh, I'm sorry. 22 Okay. What's wrong with this? 23 MS. CADE: I think -- I'll be honest, I just 24 saw their updated jury verdict form a little earlier 25 today. I think it's just an issue -- it's re-instructing

1751

1 the jury on the law when they're going to have the jury
2 instructions back with them.

3 We're just asking them what damages they're
4 going to be awarding. I don't think we need to remind
5 them that it needs to be compensatory, not punitive,
6 especially when we don't have any willfulness allegations
7 in this phase of the case.

8 **THE COURT:** I am going to go with Magnolia's.
9 **MR. LoCASCIO:** One point on that last point.

10 **THE COURT:** You are getting rid of all the
11 footnotes, right?
12 **MR. ZEMOUDEH:** Yes.
13 **MR. LoCASCIO:** We will go back and forth and
14 proof these if we have other issues. But on the
15 inducement verdict form on Magnolia's.

16 **THE COURT:** Yeah.
17 **MR. LoCASCIO:** If you could contrast -- turn to
18 Page 3, Question 2.
19 **THE COURT:** Page 3, Question 2.
20 **MR. LoCASCIO:** And see where it says, "Evidence
21 that Kurin actively induced others."
22 So the question is: "Did Magnolia prove Kurin
23 actively induced others?" See that at the top?
24 **THE COURT:** Yeah.
25 **MR. LoCASCIO:** Now, turn to Page -- I just saw

1753

1 **MR. RAMANI:** Yes, Your Honor. On closings.
2 **THE COURT:** Yeah.
3 **MR. RAMANI:** Mindful of the hour. We just want
4 to make sure that we're aligned.
5 **THE COURT:** Okay. Yeah.
6 **MR. RAMANI:** So Mr. LoCascio and I had
7 discussed earlier today, and he'll correct me if I'm
8 wrong. If he disagrees, but my understanding is Magnolia
9 will start, close on the entire case. Kurin will then go,
10 close on the entire case.
11 **THE COURT:** Okay.
12 **MR. RAMANI:** Magnolia will provide a rebuttal
13 on its case. Kurin will provide a rebuttal on its case,
14 and then we're done.
15 **THE COURT:** Okay. And you're good with that?
16 **MR. RAMANI:** I'd like to have the last word, as
17 the plaintiff, but you had suggested before that you were
18 disinclined to grant that.
19 **THE COURT:** I just don't know how to do it. I
20 mean, because they get the last word on their
21 counterclaim. You know, it's like we could keep doing,
22 like we did the trial, right, it will take forever.
23 **MR. RAMANI:** Right.
24 **THE COURT:** So that's why I thought this was --
25 **MR. RAMANI:** I mean, in theory, the way to do

1752

1 this. Turn to page -- the matching one, Kurin's patent is
2 Page 13. Kurin had to prove that Magnolia actively
3 induced medical professionals --

4 **THE COURT:** Maybe I shouldn't, but I'm going to
5 assume that's just a mistake.
6 **MR. LoCASCIO:** My read was an ambitious evening
7 move, but I don't know, Your Honor, maybe it's a clerical
8 error.

9 **THE COURT:** You have to be on your toes with
10 you guys. How do you explain it?
11 **MR. ZEMOUDEH:** I --
12 **THE COURT:** I really feel pity for you.
13 **MR. ZEMOUDEH:** I mean, I --
14 **THE COURT:** You're doing a great job but you're
15 getting served up by the partners here.
16 **MR. RAMANI:** I will take responsibility for it,
17 Judge, as I should.
18 **THE COURT:** What do you think? Why are we
19 doing medical professionals for Kurin and then not --
20 **MR. RAMANI:** It's got to be consistent.
21 **THE COURT:** It's a mistake, right?
22 **MR. RAMANI:** Of course it's a mistake. Yes.
23 It should be consistent with one way or the other.
24 **THE COURT:** Sounds good. That's great. We end
25 on a high note. Anything else?

1754

1 it would be to have us go again, and then we would respond
2 only on our written description defense to their patent.
3 That seems somewhat unwieldy.
4 **THE COURT:** I mean, if you really wanted to do
5 it. So what do you propose?
6 **MR. LoCASCIO:** We're amenable to that. Because
7 I think the --
8 **THE COURT:** Amenable to what Mr. Ramani just
9 said?
10 **MR. LoCASCIO:** Yes.
11 **THE COURT:** Okay.
12 **MR. LoCASCIO:** So, essentially, I think the
13 reason I think it was raised was I suspect he had a
14 question as to his original closing only on his case.
15 Because the way Your Honor had described it back at the
16 pretrial conference, this phasing started drifting into
17 the closing discussion. And I recognize that the
18 artificiality of that would be impossible, or at least it
19 wouldn't be -- I think either of us would want to do.
20 So if Mr. Ramani wants to give a proper main
21 closing --
22 **THE COURT:** On all issues.
23 **MR. LoCASCIO:** -- on all issues, and then I
24 have a main closing on all issues, then he has a chance to
25 rebut, and then I have a chance to rebut on my case,

1755

1 that's how it should work.

2

3 **MR. RAMANI:** I guess we just need clarification

4 on what each side's case is.

5 **THE COURT:** That becomes so hard. See, I don't

6 know how to do that.

7 What have you done in other cases like this?

8 Have you ever had a case where you had both sides going at

9 each other?

10 **MR. RAMANI:** I have. In that case, I had the

11 defendant, and the judge gave the plaintiff the last word

12 because they filed the case, as is conventional.

13 **MR. LoCASCIO:** Actually, I have had a couple

14 times discussed this with judges. My recollection -- I

15 don't have it here with me in Wilmington -- I think the --

16 I don't know if the Judicial Center's manual. One of them

17 says that even in a regular patent case, there might often

18 be four, four closings, two and then two, because the --

19 **THE COURT:** That's what I was thinking.

20 **MR. LoCASCIO:** Correct. In that situation,

21 there wouldn't be a scenario where there would be five.

22 **THE COURT:** Oh, I see.

23 **MR. RAMANI:** Just as a way of reminder, Your

24 Honor, just like Your Honor had invoked Magnolia having

25 asserted over 90 claims for action.

1757

1 **MR. LoCASCIO:** You said this the other day.

2 **THE COURT:** All right. It's rebuttal on your

3 case. I'm actually going to explain that to the jury

4 before it starts.

5 **MR. RAMANI:** To be clear, do you mean by "your

6 case," the affirmative patent case each of us has brought,

7 or do you mean the issues --

8 **THE COURT:** Well, if you're complaining about

9 last word, like, you as a plaintiff don't get it, then

10 that's why I'm saying if you want to limit it that way,

11 we'll do it. But I think the better way to do it is you

12 still keep it full case, and you go first, he goes second,

13 you can rebut and you can respond to what he raised in his

14 arguments. And I don't think I'm going to try to parse

15 whether it was in your affirmative or your defensive case,

16 and then he does the same.

17 Or, you know, the other way to do it, your

18 proposal, as I understood it, was you go first on

19 everything, he goes second on everything; you rebut

20 anything he said, he gets to rebut what you said.

21 Is that what I understand?

22 **MR. RAMANI:** That is except one thing, Your

23 Honor, is I thought it was limited to our respective

24 cases-in-chief, if you will.

25 **THE COURT:** Right.

1756

1 **THE COURT:** I didn't do it in front of the

2 jury, though.

3 **MR. RAMANI:** No, of course not.

4 **THE COURT:** No.

5 **MR. RAMANI:** During objections at sidebar.

6 Just a reminder that the only reason Kurin has

7 a counterclaim patent is that they filed for it.

8 **THE COURT:** After the case started.

9 **MR. RAMANI:** And they got it. And Your Honor

10 exercised your discretion to permit them to add it as a

11 counterclaim.

12 **THE COURT:** Good. And you know what? I'm so

13 glad I did. I'm serious. I really am. I think it's the

14 fairest way to address this. I would be very interested

15 what the jury's take on it.

16 **MR. RAMANI:** Another way to do this, Your Honor

17 would be to do --

18 **THE COURT:** Hold on a second. I'm sorry. You

19 have to go, sir? Thank you very much. I really, really

20 appreciate it. Catch up with you. Thank you.

21 **MR. RAMANI:** Another way to do it would be two

22 full closings and give us a short rebuttal. That would be

23 a more conventional option.

24 **THE COURT:** Sorry. I hear you. Now, you've

25 got to really, really limit it, I mean, both of you.

1758

1 **MR. RAMANI:** I wasn't sure what exactly that

2 would entail, if it was just -- so when we rebut, do we

3 only talk about the Magnolia patents?

4 **THE COURT:** See, I think the reason why we

5 can't do that is the way I envisioned was, we were going

6 to have six closing arguments, right? I was game for

7 that. I think the jury is going to hate you guys.

8 **MR. LoCASCIO:** Yeah, I don't want to be the

9 person that says at 6 --

10 **THE COURT:** I mean, absolutely hate you guys.

11 I hate to be the... standing up again.

12 **MR. RAMANI:** Can I ask this?

13 **THE COURT:** Yeah.

14 **MR. RAMANI:** If Your Honor -- if Your Honor

15 likes the four-closing approach, can we have the option to

16 have them go first so we get the last word?

17 **THE COURT:** I don't know how you do that the

18 way you presented the case. Frankly, it was a... I made

19 it a real point when I introduced this case to say you

20 were the plaintiff, you started the case, and I did it at

21 your request and your urging and you persuaded me that it

22 ought to be said and I did.

23 And you have made a theme, which, as a legal

24 matter, shouldn't, but there's no question, you have

25 planted the seeds. Frankly, you did it very... from a

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1 professional advocate point of view. I mean, I
 2 appreciated how you did it. It wasn't over the top but it
 3 got the point across.
 4 You've got it so I don't think it's unfair.
 5 I'm just going to do this. You go first, you go second,
 6 you get rebuttal on anything he says, you get rebuttal on
 7 what he says.
 8 How much time?
 9 **MR. RAMANI:** I would suggest 45 minutes for
 10 initial, 10 minutes for response.
 11 **THE COURT:** Want to do that or you pick your
 12 total time and you allocate it how you want.
 13 **MR. RAMANI:** I don't think we should do 30/30,
 14 for example.
 15 **THE COURT:** No. I said if I basically give you
 16 an hour and a half or whatever you think and then you
 17 split up your hour and a half as you deem fit. Or an hour
 18 and you split it up as you deem fit.
 19 **MR. RAMANI:** No, no. What I meant by when I
 20 said 30/30 is if you give us each an hour, I would
 21 recommend that you put some cap on rebuttal so that one of
 22 us doesn't say 30 minutes for the closing but then 30
 23 minutes for the rebuttal.
 24 **THE COURT:** I see. That's a good point.
 25 **MR. LoCASCIO:** Actually, and I'm -- sometimes

1761

1 **THE COURT:** Hour and ten.
 2 **MR. LoCASCIO:** I don't think I -- I'd be
 3 brokenhearted maybe the night before and stressing about
 4 the --
 5 **THE COURT:** Okay. You get an hour and ten.
 6 You get an hour for your opening, you get ten minutes for
 7 rebuttal each. That's it, ten minutes. All right?
 8 And a sure sign it's not rebuttal is if a
 9 brand-new slide comes up that I hadn't seen and then I
 10 might stop you.
 11 **MR. RAMANI:** The last thing I'd like --
 12 **THE COURT:** I've stopped the Government from
 13 doing it, by the way. Ms. Farnan has seen it.
 14 All right. I think we're done.
 15 **MR. RAMANI:** That's incredible for the
 16 Government to do that.
 17 Can I just ask Your Honor just one more thing
 18 just for planning? I -- really the last thing, I promise.
 19 We're contemplating splitting the closing. I just want to
 20 make sure you're okay with that. One of us does the
 21 initial, one does the rebuttal.
 22 **THE COURT:** Yeah. But then I'm even more hard
 23 on the rebuttal. That's where I stopped the Government.
 24 They were trying to do two closings.
 25 **MR. RAMANI:** Understood.

1760

1 I've had it where it's laid out and sometimes a matter
 2 where it's divvy your time as you want. Your comment the
 3 other day of, you know, this is like rebuttal is rebuttal
 4 and don't have, like, a whole rebuttal deck, that it's all
 5 canned and ready to rock. Like, that suggests, from my
 6 perspective, that, like, yeah, we are talking, like,
 7 45/15, maybe 50/10 depending on how it plays out.
 8 **MR. RAMANI:** Yeah. I'm okay with that.
 9 **THE COURT:** Okay. Here's what I'm going to do.
 10 Good. All right. You like that? And is an hour enough
 11 total, you think?
 12 **MR. RAMANI:** Hour is enough.
 13 **MR. LoCASCIO:** I think so.
 14 **THE COURT:** Really?
 15 **MR. RAMANI:** Absolutely.
 16 **MR. LoCASCIO:** You've seen a lot of them. I
 17 mean, after two hours --
 18 **THE COURT:** Right.
 19 **MR. LoCASCIO:** -- the jury --
 20 **THE COURT:** I know. It just depends. This has
 21 been a lot of information to digest. It may be really
 22 hard to do it.
 23 But so you tell me.
 24 **MR. LoCASCIO:** Say an hour and -- sorry. Give
 25 us hour and ten.

1762

1 **THE COURT:** So be forewarned. Okay?
 2 So what did I say, an hour and ten?
 3 **MR. LoCASCIO:** Hour and ten.
 4 **THE COURT:** Hour and ten. One hour for the
 5 opening, ten for the rebuttal. All right. Everybody have
 6 a good weekend.
 7 Noon on Sunday.
 8 (The proceedings concluded at 7:03 p.m.)
 9
 10
 11 CERTIFICATE OF COURT REPORTER
 12
 13 I hereby certify that the foregoing is a true and
 14 accurate transcript from my stenographic notes in the
 15 proceeding.
 16
 17 /s/ Bonnie R. Archer
 18 Bonnie R. Archer, RPR, FCRR
 19 Official Court Reporter
 20
 21
 22
 23
 24
 25

1763

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3 MAGNOLIA MEDICAL)
4 TECHNOLOGIES, INC.,)
5 Plaintiff,)
6 v.)
7 KURIN, INC.,)
8 Defendant.)
9
10
11 Monday, December 15, 2025
12 8:45 a.m.
13 Jury Trial

14 844 King Street
15 Wilmington, Delaware

16 BEFORE: THE HONORABLE COLM F. CONNOLLY
17 United States District Court Judge

18
19 APPEARANCES:

20 MORRIS NICHOLS ARSHT & TUNNELL
21 BY: RODGER D. SMITH, II, ESQ.
22 BY: ANTHONY D. RAUCCI, ESQ.

23 -and-

24
25

1765

1 **THE COURT:** Good morning. Please be seated.
2 All right. I guess we have some quick issues
3 we wanted to address.
4 There were three issues with the jury
5 instructions, I see?

6 **MR. RAMANI:** Good morning, Your Honor.
7 Ashok Ramani for Magnolia Medical.
8 We confirmed, Your Honor, what we discussed in
9 chambers, that -- the three tabs. The first tab is simply
10 for the alternate claim construction instruction that Your
11 Honor will decide --

12 **THE COURT:** Let me rule on that first.
13 So what I've done is we are printing out, I
14 guess, Page 19 and 20; is that right?

15 Yes, Page 19 and 20, 3.3. We will have them
16 ready for the eight versions that will go to the jury.

17 And after I hear closing arguments, I will
18 decide whether or not I am going to send back
19 construction... I am just using it loosely, construction,
20 an explanation of two terms or three terms. I am going to
21 decide that based on the closing, I said on Friday night.
22 You know, it's 51, 49 percent call. It's virtually a flip
23 of a coin and I'm just going to decide.

24 **MR. RAMANI:** Understood, Your Honor.
25 And then we also confirmed the other two tabs,

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1 APPEARANCES CONTINUED:

2
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5 BY: MICAH G. BLOCK, ESQ.
6 BY: SERGE A. VORONOV, ESQ.
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20 -and-

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27 Counsel for the Defendant/Counterclaim
28 Plaintiff Kurin, Inc.

29
30 - - - -

31 P R O C E E D I N G S

32
33 (Proceedings commenced in the courtroom beginning at
34 8:45 a.m.)
35

1766

1 the start of infringement and the start of invalidity.
2 Those are simply for a proposed curative instruction, if
3 necessary, as to the irrelevance of a patent holder
4 practicing their products in determining infringement or
5 invalidity, should that arise during Kurin's closing.

6 **THE COURT:** I am sure Mr. LoCascio knows well
7 the law and now he knows what you are anticipating he
8 might do.
9 Do you want to say anything?

10 **MR. LoCASCIO:** All I'd say about the proposed,
11 I guess, preemptively curative instruction is on
12 infringement, I don't disagree that that's the law.

13 On did you possess the invention, did you ever
14 make the thing to make it work, it's not the law. I think
15 it would be in error to put the instruction they suggested
16 in the validity section, Your Honor.

17 **THE COURT:** That's my understanding of the law
18 as well. I do think it's a relevant issue to the case
19 whether or not... At least it would be probative, let's
20 put it that way, of some of the invalidity arguments.

21 I'm not preparing those because I don't
22 anticipate having to do it and I want to move quickly, but
23 I intend to move really quickly on the issue of the two
24 versus the three.
25 Other issues?

1767

1 **MR. RAMANI:** I'm sorry, Your Honor.

2 **THE COURT:** No, go ahead.

3 **MR. RAMANI:** The final issue that we had was

4 related to --

5 **MR. BLOCK:** DTX-89C.

6 **THE COURT:** Okay.

7 **MR. RAMANI:** Which is the document that counsel

8 and I discussed.

9 **THE COURT:** When you say discussed, we had a

10 brief session in chambers before we came out to see how

11 the day would unfold.

12 **MR. RAMANI:** Correct.

13 Your Honor, may I approach and hand you two

14 copies?

15 **THE COURT:** I think I have a copy. I think

16 somebody handed it up kindly. Thank you.

17 **MR. RAMANI:** So this is the issue, Your Honor.

18 This document is in evidence and it's a black and white

19 version that's in evidence, and as I mentioned yesterday,

20 it was inadvertence --

21 **THE COURT:** You didn't mention it to me

22 yesterday. You mean this morning.

23 **MR. RAMANI:** I mentioned it this morning. So I

24 mentioned to Kurin's counsel yesterday, it was an

25 inadvertence on our part not to provide this at the start

1769

1 **MR. RAMANI:** So it was introduced through

2 Mr. Bullington as soon as he testified, so the first

3 witness of the trial. We had the black and white version

4 then, and it was my error for not realizing that we hadn't

5 provided the color version at that point.

6 So when Mr. Gaw testified -- excuse me. Then

7 when -- I believe when Dr. Antonsson was cross-examined,

8 he was asked about it, and I believe the color version was

9 used with him, but I'm not certain of that. I am certain

10 that when Mr. Gaw testified, the color version was used

11 with him, both on direct and cross.

12 **THE COURT:** Thank you.

13 **MR. RAMANI:** Thank you, Your Honor.

14 **MR. LoCASCIO:** If I could use the ELMO just to

15 give Your Honor some context on this.

16 This is DTX-89 as it was produced, and the only

17 version we had until last night at around 9:00 or 10:00.

18 And you will see --

19 **THE COURT:** And it's in evidence?

20 **MR. LoCASCIO:** This is the version in evidence,

21 DTX-89.

22 If you go through it, you'll see that

23 throughout some of these witnesses -- you can certainly

24 read stuff, you can't read some stuff.

25 You get to the last pages, for instance, this

1768

1 of the trial. It has been shown to the jury I think at

2 least two, if not on three occasions in color form. The

3 pertinent slide is going to the last page that says

4 Trap Door 1.

5 So there are two issues, Your Honor. The first

6 is whether or not this color version can be substituted

7 for the black and white version that's currently in the

8 admitted exhibits, and then the second issue -- and, Your

9 Honor, may I approach the set of easels over here?

10 **THE COURT:** Yeah, sure.

11 **MR. RAMANI:** Opposing counsel has seen this.

12 We have a demonstrative board that we're intending to use

13 with the jury. And even if Your Honor does not permit the

14 swap of the color exhibit, we would ask that we be able to

15 use this color demonstrative. It would simply be a

16 demonstrative, and the jury would have the black and white

17 version with them for deliberations.

18 There's no dispute that the demonstrative is

19 from the color version of the document that is in

20 evidence. So no changes have been -- alterations, et

21 cetera, have been made, except for blowing up some

22 portions of the document.

23 **THE COURT:** What's your recollection when this

24 document was introduced and through what witness during

25 the trial?

1770

1 is another one of the valves, okay. You can't really tell

2 much of that. And then the one they care the most about

3 that they've now tried to sort of hinge their validity

4 case on is Trap Door 1. This is how it was produced in

5 its best case, its best day, in discovery and moved into

6 evidence.

7 And to correct what was said a minute ago, the

8 first time I believe we saw the color version was actually

9 during Mr. Gaw's examination where this is what went down.

10 Bottom of the page, this is rough transcript 1454.

11 "Turn to DTX-89 in the binder. It's in

12 evidence. Mr. Smith can display it. Do you have a color

13 version by any chance?"

14 And then after another introductory, "what is

15 this document," the version in evidence, DTX-89, black and

16 white.

17 Then "Thank you, Mr. Smith" is when the color

18 one sort of shows up on the screen. And then there was a

19 suggestion that on cross he was asked this. Hard no

20 because our version that we have in our binders, our paper

21 one and on our screens, was this black and white version.

22 And why does this all matter?

23 **THE COURT:** Can I see the original? Can I see

24 the black and white that's in evidence?

25 **MR. LoCASCIO:** Do you want me to pass it up?

1771

1 **THE COURT:** Please.

2 **MR. LoCASCIO:** I took the pages apart, but this

3 is the page of key interest.

4 **THE COURT:** Okay.

5 **MR. LoCASCIO:** At base, if this was the key

6 document and the key evidence in the case, okay, well,

7 they could have produced it during discovery, they could

8 have supplemented it. The parties did add things and

9 exchange, saying, "Hey, do you have a better version of

10 this, do you have a better version of that so we can use

11 it?"

12 That never happened. We never got anything

13 until a PDF last night, which was created at 8:59, we got

14 it at 9:00. Presumably it came from a native, which we

15 have never gotten and don't have.

16 At base, the version in evidence, the version

17 the jury saw, is the black and white version in evidence.

18 Their proposal now is to have an 89 and the 89C, which was

19 never moved in, what a bonus to have the document they

20 like maybe the most, to now have two of them back with the

21 jury, so that's further problematic.

22 And so if they have colorized it or done

23 something or used it on their demonstrative board, like,

24 fine. But we shouldn't move into evidence something that

25 wasn't moved into evidence tactically to have an advantage

1773

1 slide? I mean, in other words, what's the difference

2 between a board and putting it up on a slide?

3 **MR. LoCASCIO:** The version that's not evidence,

4 I don't know that they could put it up on a slide.

5 **THE COURT:** You guys don't color stuff in your

6 PowerPoints? You don't things shade things?

7 **MR. LoCASCIO:** We annotate things in a way

8 that -- okay, we put arrows on stuff, we do that. We

9 don't modify the underlying documents that are in

10 evidence, Your Honor.

11 But what I told Mr. Ramani last night is on the

12 board, that wasn't a hill I was going to die on and,

13 ultimately, you know, out of maybe some professional

14 courtesy and respect, he has got a board right there,

15 could he have a black and white? Should he have either

16 given it to us earlier or had a black and white one?

17 Probably yes. But on that score, Your Honor, I think the

18 line is it doesn't go to the jury.

19 **THE COURT:** I get that. That's the

20 admissibility thing.

21 Like, for instance, neither of you are using

22 animation during your PowerPoints?

23 **MR. LoCASCIO:** So everything we've -- this is

24 actually an interesting question Your Honor asked because

25 I asked it last night, which is we provided all the slides

1772

1 they want to point to.

2 **THE COURT:** Was this subject of deposition

3 testimony?

4 **MR. LoCASCIO:** It was, and all we had time for

5 the deposition -- so, for instance, if we were asking

6 folks about the trap door or how these things worked, we

7 had that -- their black and white version the whole time.

8 We never had the version they want to point to now that

9 you could actually see where these colored lines were or

10 anything of the sort.

11 So our ability to talk through with Mr. Gaw how

12 these colored lines work was -- we never had it.

13 **THE COURT:** Now there's two proposed uses of

14 it. One is to introduce it into evidence, and then the

15 second is to use it as a demonstrative.

16 Do you object to both?

17 **MR. LoCASCIO:** I have objected to both. I

18 object to it coming into evidence.

19 **THE COURT:** Yeah, I get that.

20 **MR. LoCASCIO:** In our -- we provided all our

21 slides, they gave us objections, we changed all the things

22 they objected to.

23 For them to use it on a board and it's not in

24 evidence, I have objected to it.

25 **THE COURT:** But what if they put it up on a

1774

1 we would possibly use because recall, Magnolia wanted to

2 have closing exchanged so we said okay. So we pushed all

3 ours out. We got back about -- ours is over 100 slides

4 that we may use, but theirs is about 20 or 30.

5 I said -- we asked a question and said, "Well,

6 are you planning to do anything else that is sort of

7 prebaked or in the can with the graphics folks?" The

8 answer was no, it was all going to be live and they would

9 just show stuff on the ELMO. I said, okay, if they didn't

10 want to turn anything else over, that's fine. But we did

11 raise an issue with that, too, of, okay, the disclosures

12 here are pretty different in terms of we showed them

13 everything we are going to use, the testimony we are going

14 to use, the exhibits we are going to use. And on their

15 slide, they essentially say, "We are just going to do that

16 live with the graphics folks."

17 **THE COURT:** Well, we will have to deal with

18 that because the proposal to have a preview was theirs.

19 **MR. RAMANI:** Correct, Your Honor. I'm happy to

20 address that, Your Honor.

21 **THE COURT:** Let's do this. I am not letting

22 the exhibit in, the proposed exhibit. It wasn't

23 introduced. I don't think it would be fair. So it's not

24 coming in.

25 Then we have the board, and your bottom line on

1775

1 the board is you are not objecting to it or you are
2 objecting to it?
3 **MR. LoCASCIO:** I think I'm objecting to it.
4 I'm just -- for the record, Your Honor.
5 **THE COURT:** The truth be told, you know,
6 Mr. Ramani is holding it over there, I can't see it.
7 So what I'm going to do is I'm going to let him
8 use it but I am not going to let you proceed with the
9 board beyond this line right here.
10 **MR. RAMANI:** Understood.
11 **THE COURT:** You are not allowed to walk up to
12 them. Mr. LoCascio needs to be able to see what you're
13 doing.
14 And it's not going back to the jury, all right?
15 **MR. LoCASCIO:** Thank you, Your Honor.
16 **MR. RAMANI:** Can I address the other point,
17 Your Honor, on the disclosure?
18 **THE COURT:** Sure.
19 **MR. RAMANI:** So the PTO was clear that premade
20 slides need to be disclosed. The things that are, for
21 example, testimony that you might put up on the ELMO, does
22 not. The things that you do live in court --
23 **THE COURT:** I agree.
24 Testimony, I mean, did you guys agree on that?
25 **MR. RAMANI:** It's in the PTO. So that's why --

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1 **THE COURT:** Okay.
2 **MR. RAMANI:** And, Your Honor, in that regard,
3 may we ask the Court for time warnings?
4 **THE COURT:** Yeah, what would you like?
5 **MR. BLOCK:** Ten minutes, perhaps, Your Honor.
6 **THE COURT:** Yeah, sure.
7 Usually I would be like, hey, you've got a
8 minute. I mean, what do you want?
9 **MR. BLOCK:** That would be great too. I hope I
10 won't get to within a minute but that would help. Thank
11 you, Your Honor.
12 **THE COURT:** Okay. All right.
13 **MR. RAMANI:** Could I just get a minute for
14 rebuttal, Your Honor?
15 **THE COURT:** Yeah, a minute I'll just do for...
16 how about I do a minute for both of you?
17 **MR. LoCASCIO:** I will take the minute, and if
18 you could also just let me know when I've got 15 left in
19 the first part too, that'd be great.
20 **THE COURT:** 15, jeepers, you're making --
21 **MR. BLOCK:** I can take 15. Either one.
22 **THE COURT:** I might throw you both. I'll give
23 you, like, 11 and see if you can react.
24 Okay. Are you ready?
25 **MR. BLOCK:** Your Honor, is it okay if I have a

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1 we received 155 slides from them for the 60-minute
2 closing. We had, I think, 18.
3 Our intention to is put up the daily transcript
4 for much of the rest of it, and occasional documents as
5 well on the ELMO. It's going to be through the ELMO.
6 **THE COURT:** Yeah. I think that's fine.
7 **MR. LoCASCIO:** That's fine.
8 **THE COURT:** Okay. Yeah, I think what the
9 concern was would be is if you had one slide and then it
10 ended up you really were going to, you were going to
11 animate it, for instance. You are not doing something
12 like that?
13 **MR. RAMANI:** No. We are not doing anything
14 like that.
15 **THE COURT:** Okay. So that addresses --
16 **MR. RAMANI:** In fact, I think except for a
17 revised timeline, all of the slides that we've disclosed
18 are from prior demonstratives that were used in the trial.
19 **THE COURT:** Okay. All right. And then we're
20 going to go 60 minutes followed by ten minutes rebuttal.
21 And you're capped. If you use 30 minutes for your
22 opening, you still only get 10 minutes at the end.
23 Have you decided, are you splitting it or not?
24 **MR. RAMANI:** We are. Mr. Block is going to
25 handle the initial closing and I will do the rebuttal.

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1 stopwatch running up at the podium?
2 **THE COURT:** Yeah.
3 **MR. BLOCK:** Thank you.
4 **THE COURT:** You ready?
5 We're good. We will bring them in.
6 **MR. RAMANI:** All set, Your Honor. Thank you.
7 And, Your Honor, we'll start with us resting?
8 **THE COURT:** Yes. Are they ready to go?
9 **MR. RAMANI:** Your Honor, is it okay if we leave
10 the boards? We will flip them, obviously, but is it okay
11 if we leave --
12 **THE COURT:** You can leave them, yeah, but flip
13 them while the jury is out.
14 **MR. RAMANI:** Yeah, no problem.
15 **THE COURT:** Have you ever noticed, I mean, how
16 the slides... I mean, I noticed in particular, a couple
17 jurors don't even look at the witness and they stare at
18 the slide the entire time.
19 While we're waiting, I just really want to
20 commend the attorneys who handled the jury instruction
21 stuff at 6:00 to 7:00 on a Friday night. I thought they
22 did a very nice job under trying circumstances. I don't
23 know if they are still here, but...
24 **MR. LoCASCIO:** Ms. Cade is here.
25 **MR. RAMANI:** Mr. Zemoudeh is here as well.

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1 **THE COURT:** All right. Nicely done.
 2 (The jury enters the courtroom at 9:11 a.m.)
 3 **THE COURT:** All right. Good morning. Please
 4 be seated. Please be seated, everybody. So I hope you
 5 all had a good weekend. We were here until 7:00 Friday
 6 night, all the lawyers, finalizing jury instructions, and
 7 then they had to file by noon yesterday and so we sorted
 8 out and then finalized stuff this morning, which is why
 9 we're a little bit late. But we're ready to go now.
 10 So, first of all, can you all confirm by nods
 11 of your heads that you haven't researched the case or
 12 talked about the case or heard about it since you were
 13 last here, right? Thank you.
 14 And now we are going to have closing arguments.
 15 All right? Now, I've timed this. So the way closing
 16 arguments work is Magnolia, you know, they started the
 17 suit so they go first and they get up to an hour, no more
 18 than an hour. And then Kurin responds, and Kurin gets up
 19 to an hour. And then Magnolia gets to rebut. It's very
 20 limited. And, in fact, it's limited to ten minutes, no
 21 more than ten minutes; they get to respond to stuff that
 22 Kurin said. And then Kurin gets rebuttal for no more than
 23 ten minutes, and it gets to respond to things that
 24 Magnolia said. All right. Doesn't get to redo
 25 everything, it's limited to ten minutes. You know, I'll

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1 evidence. I have no stake in this case or opinion. And
 2 if anything I've ever said or done during this trial makes
 3 you think I have an opinion, that's just not right. I
 4 don't. You are the fact finders. This is going to be
 5 your decision. All right?
 6 Mr. Block.
 7 **MR. RAMANI:** Your Honor, if I may --
 8 **THE COURT:** Oh, actually, we have one formality
 9 to do. Thank you, Mr. Ramani.
 10 **MR. RAMANI:** Thank you, Your Honor.
 11 Your Honor, Magnolia Medical rests.
 12 **THE COURT:** All right. Thank you very much.
 13 All right. Mr. Block.
 14 **MR. BLOCK:** Thank you, Your Honor. If I may
 15 have a moment to set up.
 16 May I proceed, Your Honor?
 17 **THE COURT:** You may.
 18 **MR. BLOCK:** Good morning. Last week was a long
 19 one. You've heard a lot from both sides, but I want to
 20 start by thanking you again for your time and for your
 21 attention this week and in the time to come once the case
 22 is back with you. I'm sure I speak for both sides when I
 23 say that we appreciate your time in this case.
 24 Now, my colleague, Mr. Ramani, showed you this
 25 slide during opening statements. He promised that over

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1 time it.
 2 Then, now, you know, when you think about that,
 3 so if you can, I think ideally we would just go through
 4 that and get that done and then maybe have a bathroom
 5 break, and then I would read you the instructions, and
 6 then you will be going to the deliberation and start. All
 7 right?
 8 I guess if somebody feels like they really need
 9 to use the restroom, it's probably best to break in
 10 between the closing arguments, so just think about that.
 11 Okay?
 12 All right. Now, I also want to remind you that
 13 what attorneys say is not evidence. And now, this is
 14 argument. In opening statements, it's not supposed to be
 15 argument, although attorneys will kind of wade into
 16 argument, but it's supposed to be a road map.
 17 But now, this is argument. And that means that
 18 the attorneys, their job, actually, for their clients is
 19 to pull together their best arguments as to why you ought
 20 to rule in their favor. All right. But it's argument.
 21 And so if an attorney says something that just doesn't
 22 ring true with you, doesn't seem to comport with what you
 23 recall, it's your recollection that governs. All right.
 24 That's really important.
 25 By the way, the same thing, what I said is not

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1 the course of this trial, we would show you three things:
 2 That Magnolia Medical is a pioneer; that Kurin used
 3 Magnolia Medical's three patents without permission; and
 4 that Magnolia Medical does not use Kurin's patent.
 5 The evidence is in. We proved what we
 6 promised. There's no question Magnolia Medical came
 7 first.
 8 Let me start with this timeline. You heard a
 9 lot of dates and so there's some picking and choosing of
 10 what to actually put on a slide because if we put it all
 11 there, you wouldn't be able to see anything. But I want
 12 to focus on a few of the dates that are on this slide.
 13 You heard testimony from Dr. Patton and
 14 Mr. Bullington about founding Magnolia Medical in 2008.
 15 You heard that the first thing Magnolia Medical did was
 16 clinical research. Dr. Patton conducted that study, the
 17 first one, to prove that the diversion technique works to
 18 help solve this problem of reducing false positives in the
 19 blood culture tests.
 20 By December of 2011, Magnolia Medical had
 21 developed dozens of device designs and was already in the
 22 process of down selecting to choose which device, which of
 23 its inventions it would bring to market.
 24 You heard Mr. Gaw talk about the vented
 25 diverter design, a passive device that Magnolia had

1783 1 invented in 2011. You heard him talk about Concept 2 Squeeze, which became the part of the -- which developed 3 into that original Steripath device that Magnolia Medical 4 brought to market early on. All this while Kurin did not 5 yet exist. That is undisputed. 6 Mr. Rogers corresponded with Mr. Bullington 7 through a personal connection in 2013. He already knew 8 then that Magnolia Medical had five patents in its growing 9 portfolio. And then you heard a lot about a meeting 10 between Mr. Rogers and Mr. Bullington at the fish market 11 in San Diego in 2015. 12 Mr. Rogers called it a very important meeting. 13 That meeting was very important. Shows the character of 14 both men and we'll come back to it. 15 Now, within ten days of that meeting, 16 Mr. Rogers is doing market research. He says if the 17 opportunity is big enough, we should discuss. And then 18 Kurin is formally founded soon after in July of 2015. 19 And you know Kurin claims a 2016 invention date 20 in this case. We will talk more about that. 21 During this time, Kurin expressly recognized 22 Magnolia as a pioneer, as a trailblazer. Mr. Heindel, one 23 of Kurin's founding group, talked about that. Talked 24 about how Magnolia had blazed the trail. Magnolia had 25 done all of this work to educate the marketplace and	1784 1 customers about this problem of false positives in the 2 blood culture tests. Kurin's strategy was to follow the 3 trail that Magnolia had done all that hard work to blaze 4 to free ride on Magnolia Medical's years of hard work by 5 targeting Magnolia Medical's customers. 6 Now, something else happened in December of 7 2017 which is important for this case. You remember 8 Mr. Ramani suggested to you in opening that one of the 9 things you ought to look out for is who was first with 10 this idea of a movable plug or valve that moves or 11 transitions because of a pressure differential. Well, now 12 that the evidence is in, let's look at that question. 13 This is a document you saw during the trial. 14 Mr. Gaw testified about it. Magnolia Medical had this in 15 2017, December of 2017. Let's look at how it works. 16 The needle is inserted into the patient. The 17 transfer adapter is pressed onto the collection bottle or 18 the collection syringe is drawn back. That is a vacuum 19 source here at the outlet. The vacuum of the collection 20 bottle or syringe draws blood through the diversion 21 spiral. That's this portion here. There's actually a 22 spiral connecting that all together. So this red line 23 shows the blood coming in and filling up the lower 24 chamber. It fills up that diversion spiral up to this 25 yellow hydrophobic membrane.
1785 1 When it reaches the hydrophobic membrane, that 2 means the liquid cannot pass through it. The air has been 3 passing out, but the liquid can't. So pressure builds in 4 this chamber down here. Once the hydrophobic membrane is 5 wetted, pressure on the plug builds, and then this plug 6 pops as a result of the different pressure, the higher 7 pressure below and the lower pressure from the vacuum 8 source at the outlet. That opens the flow path toward the 9 outlet and into the collection bottle or syringe. 10 So that was December 2017. Mr. Gaw talked 11 about it. He talked about how Magnolia wrote down in its 12 September 2018 patent applications what it had invented 13 all in the September 2018 applications. That's the 14 invention date for the Magnolia Medical patents in this 15 case. 16 Here is the '081 patent. Mr. Gaw talked about 17 it. We will come back to it. Column 66, I believe you 18 have this in your notebooks, this is where that 19 description is. The key parts of it are all in that 20 column. 21 What about Kurin? Mr. Nason testified live and 22 by video. He was Kurin's primary engineer -- the primary 23 design engineer for the Jet. Remember he told you that 24 Kurin called that project which became the Jet Project 25 Dakota and he told you it started -- they started work on	1786 1 that project in March of 2019. 2 And then we showed Mr. Nason the stopper 3 concept document. And here's what Mr. Nason said. 4 DTX-1085, which I'm going to show you in just a moment. 5 "You created that?" 6 "Yes, I did. 7 "From May 15 of 2020?" 8 He created for purposes of a patent 9 application. Kurin identified this in May of 2020 as 10 something new that it wanted to bring to the Patent Office 11 to cover different concepts for the stopper. 12 You might remember I asked Mr. Smith to do 13 graphics Olympics. And we walked through the '052 patent, 14 their patent in this case, and the patent application that 15 they filed in June of 2020, right after this document. 16 These diagrams are in June of 2020. They are not in the 17 '052 patent, which Kurin asserts in this case. 18 How do the stopper concepts work? Well, you 19 attach a vacuum source at the outlet, blood flows in down 20 here until it reaches this air permeable membrane. So 21 it's hydrophobic, liquid can't go through it, air 22 permeable, gas can. The gas vents out, the liquid flows 23 in, pressure builds up until the differential between this 24 side of the stopper, high pressure below, low pressure 25 from the vacuum causes that stopper to pop up, and then

1787 1 blood flows up through the sample path and out to the 2 outlet. That's what Kurin had in May of 2020. 3 Let's go back to our timeline. Kurin launches 4 the Jet, which is Kurin's device with a movable plug. 5 Small trials, they say, at the end of 2021; a launch in 6 February of 2023; all long after the invention date for 7 Magnolia Medical's patent that it asserts in this case, 8 which is September of 2018. 9 Now, when Kurin announced that Jet, Magnolia 10 took prompt and responsible action. Mr. Bullington sent a 11 letter to Mr. Rogers. He asked for samples because Kurin 12 hadn't described the Jet in that press release. He 13 reminded Kurin about Magnolia's patents in this space, 14 including two of these three, which had already issued at 15 that time. 16 Kurin did nothing, sent no samples, even after 17 seeing Mr. Bullington's letter. In two of the three 18 patents in this case, Kurin took no steps. 19 As Mr. Bullington explained to you from the 20 stand, Magnolia was finally able to see a device in August 21 or September of 2023, and the rest I think you know. 22 Magnolia Medical analyzed that device, saw that it was 23 using Magnolia Medical's patents from September of 2018, 24 filed suit. Then Kurin tried to get new claims on a 2016 25 application, and they countersued.	1788 1 Ladies and gentlemen, we submit to you that 2 Magnolia Medical was the pioneer, it came first. Magnolia 3 Medical created the ISDD market and was first to use a 4 movable plug with pressure differentials in an ISDD. 5 Next, Kurin uses Magnolia Medical's patents 6 without permission. Now, you saw both sides brought in 7 expert witnesses to talk about the patent claims, and let 8 me pause on that. 9 The Court gave some instruction before the 10 trial started, if you remember. One thing you heard in 11 those instructions is that it's part of your job to assess 12 the credibility of witnesses, and that includes expert 13 witnesses. One of things you consider under the law when 14 you are thinking about the credibility of expert witnesses 15 is their qualifications. 16 Magnolia Medical brought you Professor Carl 17 Meinhart, a world leader in fluid dynamics, fluid 18 mechanics, which I think we can all agree goes right to 19 the heart of the technical issues in this case. He had 20 over 106 publications. He's been cited over 17,000 times. 21 He works regularly on blood devices. 22 Who did Kurin bring you? They brought you 23 Dr. Erik Antonsson. And, respectfully, whatever you think 24 of Dr. Antonsson's qualifications, they do not match 25 Professor Meinhart's qualifications and expertise for this
1789 1 matter. 2 Do you remember this from Kurin's opening? 3 Kurin introduced Dr. Antonsson to you as the Kurin medical 4 technology expert. 5 This is also from Kurin's opening. I'll get to 6 that one. In Kurin's opening, they also told you that 7 Dr. Antonsson was a professor at CalTech who used to be at 8 Mass General Hospital and Harvard Medical School. And 9 when Dr. Antonsson took the stand -- oh, here it is. 10 Here's what they told you in opening. And then when 11 Dr. Antonsson took the stand, they offered him as an 12 expert in mechanical engineering, including in connection 13 with the design and operation of medical devices. They 14 didn't even offer him as an expert in fluid mechanics. 15 Now, what did the evidence show about 16 Dr. Antonsson's qualifications? Before litigation between 17 Kurin and Magnolia Medical, Dr. Antonsson had only worked 18 on one project involving fluid dynamics in medical 19 devices. That was more than 20 years ago. His current 20 job, when he's not testifying as a hired expert, is for a 21 company called Streetscope that works on traffic. When he 22 was a professor, I think two or three jobs ago, he never 23 did any work in the field of these patents. None of his 24 other work as a paid expert has related to fluid dynamics 25 and medical devices.	1790 1 This business about Mass General Hospital and 2 Harvard Medical School, that was in 1984 for less than a 3 year. It involved orthopaedics and analyzing how humans 4 walk. It did not relate to blood cultures or blood 5 collection devices. So you can consider the experts' 6 qualifications when you weigh the evidence in this case. 7 Now, you'll recall Professor Meinhart walked 8 you through every single asserted claim. I know it was 9 time consuming. That is our burden as plaintiff. We 10 embrace that burden. He explained his test set up, which 11 is here in the courtroom with us. Gave you chapter and 12 verse on how the Kurin Jet meets every requirement of the 13 claims. Then Dr. Antonsson took the stand, and as far as 14 I can tell, there's actually very little in dispute about 15 how the Jet works. 16 Now, before we get to that expert testimony, 17 let me start on this point. You'll recall seeing this 18 from Mr. Rogers. 19 "Question: Why do you say that it looks like 20 this '081 patent is attempting to cover the Jet?" 21 "Answer: I just look at the claims." 22 "Question: Doesn't that suggest to you that 23 the Jet infringes the '081 patent?" 24 "Answer: The third element is a movable plug 25 disposed in the housing. Yes, that suggests the Jet."

1791 1 So Mr. Rogers knew that the Jet infringes 2 Magnolia Medical's patents as soon as he looked at the 3 claims. 4 Now, let's talk about Dr. Antonsson's opinions. 5 There was some suggestion, I thought, that the Kurin Jet 6 does not have a movable plug. I don't think we need to 7 spend time on that. Mr. Rogers admitted that it does. 8 Mr. Nason admitted that it does. I doubt Kurin is going 9 to argue that. 10 The main thing Dr. Antonsson said is that he 11 doesn't think the Jet meets the pressure differential 12 requirements. The independent claims in all three patents 13 have slightly different language, but they all talk about 14 a pressure differential between the movable plug and the 15 outlet. Movable plug or the valve, for the '709, and the 16 outlet. 17 Professor Meinhart explained to you that a 18 person of ordinary skill in the art in this field would 19 understand that language to be talking about a comparison 20 between two different pressures, specifically a difference 21 between a pressure at the plug or valve and a pressure at 22 the outlet. Does that happen in the Kurin Jet? Yes, it 23 does. Professor Meinhart told you so. He explained that 24 you can measure. In the Jet, you can see one pressure at 25 the plug, specifically at the bottom of the plug, one	1792 1 pressure at the outlet. The difference between those two 2 causes that plug to move. That's how the Kurin Jet works. 3 That's what the claims require. 4 Kurin's expert, Dr. Antonsson, agrees about how 5 the Jet operates. The plug moves in response to a 6 difference between one pressure on the bottom surface of 7 the stopper, another pressure on the top surface of 8 stopper, and the pressures on the top of the stopper 9 that's basically the same all the way to the outlet. 10 Dr. Antonsson also agreed that a person reading 11 the Bullington patents, that's these three Magnolia 12 Medical patents in the case, would understand that the 13 principle of operation that the patents describe requires 14 a pressure differential across the plug or valve. That's 15 what the Jet does. 16 Now, what did Dr. Antonsson say? He said, 17 despite everything we just looked at, that if you want to 18 think about infringement, you should think about whether 19 there's a pressure differential between Number 7 and 20 Number 9 on this diagram. He says there's no infringement 21 unless there's a pressure differential between the top of 22 the plug and the outlet, even though he knows that's not 23 the principle of operation that the patents describe, and 24 it's impossible for that differential that he chooses, 25 it's impossible for that to move the plug or transition
1793 1 the valve. He chose a test that was impossible and that 2 departs from the claims. 3 Now, he's all about two pressures in the space 4 between the plug or valve, but that's not what the claim 5 language means. Professor Meinhart explained to you his 6 understanding, this language requires a difference between 7 a pressure at the plug or valve and a pressure at the 8 outlet. 9 This is Dr. Antonsson's testimony, and it's 10 important. We asked him about that. Doesn't this mean a 11 pressure differential, a difference between a pressure at 12 the plug or valve and a pressure at the outlet? He said 13 at the plug, at the outlet, that's a reading of the claim. 14 "It's not the one you used, sir?" 15 "That is correct." 16 So he applied his own meaning that these claims 17 require two different pressures in the space between the 18 plug and the outlet. That's how he came up with his 19 non-infringement opinion, and that opinion is incorrect. 20 Now, there was also some discussion of this language. 21 I'm showing you language from Claim 17 of the '081 patent. 22 You can see here that this talks about "wherein the 23 pressure differential is in" -- "wherein" -- excuse me -- 24 "wherein the pressure differential in at least the portion 25 of the sampling channel between the plug and the outlet,"	1794 1 and it goes on. This is in 17 of the '081. It's in the 2 claims of '863 patent. It's not in any of the other 3 claims of '081. It's not in the '709. So we told you 4 before there are similarities between the claims, but 5 there are also important differences, and this is one. 6 Let's get oriented. So when Professor Meinhart 7 looked at this language, he identified what the sampling 8 channel is in the Kurin Jet. It's the green that you see 9 here. And the movable plug or valve is right in that 10 sampling channel. Sampling channel begins below it. 11 Sampling channel, just the path that the blood takes to 12 get from the inlet out to the sample bottle through the 13 outlet. So it begins above where that blood departs from 14 what goes to the containment channel. 15 Here's Professor Meinhart's testimony. 16 "Can you explain what the evidence is with respect to 17 whether the Jet satisfies that claim language we've just 18 been looking at?" 19 "Yeah," he says. What that language, in at least a 20 portion requires, is that at least one of the two 21 different pressures -- remember, pressure differential; 22 we're comparing one pressure to another -- at least one of 23 those pressures has to be in the sampling channel. Here, 24 both of the pressures between the bottom of the plug and 25 the outlet, they are both in the sampling channel. So

1795 1 those claims are satisfied as well. 2 Now, Kurin suggested at some point that it doesn't 3 infringe the claims that require temporarily locked. 4 Recall that language? They made the argument that in 5 order to be temporarily locked, you need something holding 6 you in place, like a door lock. That can't be right. 7 Dr. Antonsson, this is Dr. Antonsson's testimony. He 8 admitted on cross-examination, these patents aren't using 9 "locked" like a door lock. In the patents, temporarily 10 locked only requires the plug or valve to be temporarily 11 maintained in the desired position and does not require 12 action or prevention by a locking member. You don't need 13 a latch or something holding it in place. 14 And then Dr. Antonsson also admitted, agreed that at 15 least for a period of time after the stopper in the Jet is 16 dislodged, it remains in the second position. So the Jet 17 infringes the claims that require temporarily locked. 18 Remember Professor Meinhart walked you through all of 19 the claims, so that's direct infringement. 20 Now, for two of the claims, these ones in red here, 21 for these two, Kurin not only directly infringes but also 22 induces others to infringe. That's Claims 12 and 13 of 23 the '081 patent. The language is not in dispute. 24 Claim 12 talks about the device becomes coupleable to a 25 syringe. Claim 13 talks about the device being coupleable	1796 1 to a sample bottle. 2 We already saw that Kurin directly infringes these 3 claims. When it makes the Jet, that Jet is coupleable. 4 It's made to be attached to a syringe or a sample bottle. 5 That's direct infringement. 6 Kurin also induces the people who use the devices to 7 infringe. Now, you will receive instructions from the 8 Court about what induced infringement is. When you do 9 direct infringement, you're just asking does the Jet match 10 every requirement in the claims? When do you inducement, 11 we have to prove a little more. There will be precise 12 language in the Court's instructions to you. We have to 13 prove that there was direct infringement, that Kurin knew 14 about the patent, and that Kurin knew that the acts, if 15 taken by those who use the Kurin Jet, would constitute 16 infringement of the claims. 17 And that knowledge requirement, that can be satisfied 18 by actual knowledge or willful blindness. Let's go 19 through them. 20 Direct infringement by the users. The Court will 21 instruct you that under the law, making or using an 22 infringing device is direct infringement so no dispute; 23 Kurin's customers used the device. If you agree that the 24 device satisfies the limitations of the claims, that is 25 direct infringement by the users as well.
1797 1 Knowledge of the patent, we've shown you that. 2 Magnolia Medical told Kurin about the patents almost 3 immediately after Kurin announced the Jet in February 4 2023. Mr. Rogers admitted that he received that letter, 5 knew about them; they had knowledge of the patents. 6 And then, finally, knowledge that the acts, if taken 7 by those who use the Jet, would constitute infringement of 8 the claims. Remember, Mr. Rogers testified that as soon 9 as he looked at the claims, he knew that they covered the 10 Jet. So that's knowledge that if a user was to use the 11 Jet, that use would be infringement as well. 12 Okay. Next -- oh, sorry. We don't need that slide, 13 Actually. 14 Next I want to talk about validity. So Kurin's 15 raised some invalidity defenses against Magnolia's 16 patents. Now, the judge will instruct you on this as 17 well. For infringement, it's Magnolia's burden to prove 18 by a preponderance of the evidence -- that's, basically, 19 the 50-50, just a little more than half, 51, 49 that's 20 preponderance. 21 Invalidity is different. Kurin has to prove by clear 22 and convincing evidence that the patents are invalid if it 23 wants to prevail on one of these arguments. 24 Now, the majority of the evidence on this issue was 25 from the same two experts with the same qualifications we	1798 1 talked about. Professor Meinhart on the one hand for 2 Magnolia, Dr. Antonsson for Kurin. Professor Meinhart 3 looked at every argument Dr. Antonsson put forward for 4 invalidity. He showed you that the prior art does not 5 match Magnolia Medical's patents and the patents explain 6 everything that's in the claims. 7 Let's start with this idea of written description. 8 So Dr. Antonsson told you that the Magnolia Medical 9 patents don't show that the inventors possessed the idea 10 of a movable plug that moves -- or a valve that moves in 11 relation to -- in response to a pressure differential. 12 You saw this disclosure. Mr. Gaw talked to you about 13 it. This is Column 66 from the '081 patent, which 14 Magnolia wrote into the patent not long after that trap 15 door design that we've been talking about. 16 You might remember Kurin tried to say this language 17 is all about these diaphragms up here. And the diaphragms 18 aren't the movable plug. It's important to look at the 19 language: "While the diagrams are described herein as," 20 and it goes on, "in other embodiments"... 21 So this is not just the diaphragms, it's more. "In 22 other embodiments, a fluid control device can include any 23 suitable actuator or the like configured to transition, 24 move, flip, and/or otherwise reconfigure in response to 25 being configured to a desired and/or predetermined amount

1799 1 of negative pressure." That's the vacuum source. 2 I encourage you to read the entire column when you're 3 back in the jury room, so let me highlight a little more 4 language. I'm looking at Line 39 now. "After 5 transferring the initial volume of bodily fluid and after 6 the flow controller is transitioned to its second state, 7 an amount of negative pressure exerted on a surface of the 8 movable member or the like may build until an amount of 9 negative pressure exerted the surface of the movable 10 member or the like may build until a magnitude of the 11 negative pressure is sufficient to pull or move the 12 movable member out of the opening, thereby allowing the 13 fluid of bodily fluid through the opening that was 14 otherwise occluded by the movable member. It can be a 15 elastomeric plug, cork, plunger, that can be moved or 16 popped out of such an opening." 17 That is what the claims require. It's also what the 18 Jet does. 19 One more quickly on this. We've been talking a lot 20 about the plug. This is Column 20, just as one example. 21 In some embodiments, the actuator 250 can be a valve, 22 plunger, seal, membrane, flat plate, and/or the like. So 23 that Column 66 supports the '709 patent. This is 24 additional support for the valve that's in the '709 here 25 in Column 20 of the '081 patent.	1800 1 Okay. Next, Kurin says there's anticipation. The 2 Court will explain this to you. Invalidity by 3 anticipation means a single piece of prior art discloses 4 each and every element or limitation of the claimed 5 invention. And the single piece of prior art must 6 disclose all of the elements of the claim and the elements 7 must be arranged in the same way as in the claim. 8 This is Figure 24C from Rogers '445. That's the one 9 that Dr. Antonsson says anticipates. He says that Rogers 10 '445 has everything in the Magnolia Medical patents. 11 Do you remember this figure? This is the one with 12 the inner chamber housing, sort of this cylinder here and 13 then blood flows and it moves to the right. You can use 14 your common sense in addition to Professor Meinhart's 15 expert testimony. 16 First, Rogers '445 does not have a movable plug or 17 valve. This inner housing chamber, this cylinder, the 18 whole thing slides to the right when blood flows in. 19 Second, it does not move because of a pressure 20 differential between the plug or valve and the outlet. 21 The pressure differential in this device is across this 22 semipermeable or air-permeable barrier here at the very 23 end. So blood flows in and this thing moves the entire 24 cylinder to the right. 25 That's not moving out of the way so that blood can
1801 1 flow past it. It's not a pressure differential that 2 causes the plug or valve to move the way that the Magnolia 3 patents claim. That means Rogers '445 does not disclose 4 what's in Magnolia Medical's claims. 5 Now, even Mr. Rogers doesn't actually think this '445 6 application -- this is from 2017. Even he doesn't think 7 it has the movable plug. Here's Mr. Rogers' testimony 8 after he admitted that the claims cover the Jet. 9 Mr. Rogers said that so far as he knows, the Jet is the 10 first device with a movable plug that's moved by a 11 pressure differential. 12 Now, he's wrong about that. Magnolia Medical was 13 first and put it in its patents in September of 2018. But 14 the important point here is that Mr. Rogers did not say he 15 came up with this idea when he had a sliding cylinder 16 design in 2017. He said: "I came up with it in the Jet." 17 And as we've discussed at length now, design work on the 18 Jet didn't even begin until March of 2019, which is long 19 after the September 2018 date for Magnolia Medical's 20 patents. So Mr. Rogers knows that if the Jet was his 21 first device that had this idea, then this patent 22 application from December 2017 did not. 23 Okay. Professor Meinhart told you some other things 24 about Rogers '445. It fails in a number of ways. I don't 25 want to walk you through every single claim but there is	1802 1 one that I wanted to touch on. Remember some of the 2 claims require an elastomeric plug or valve. 3 And Dr. Antonsson admitted: "When Mr. Rogers and his 4 team came up with whatever is in that '445, they did not 5 include an elastomeric plug or valve?" 6 "Not explicitly, no." 7 So that's just one more reason. That's '081 8 Claim 16, '863 Claim 26, '709 Claim 17. They have an 9 additional requirement that is not in Rogers '445. 10 So when you come to the part of your verdict form 11 that asks about anticipation we ask you to select "no." 12 Next is obviousness. Same burden for Kurin, they 13 have to prove obviousness by clear and convincing 14 evidence. This one is even harder for them because 15 they're taking different things from different documents 16 and trying to combine them together, and they have to 17 prove to you that the combination makes sense, that 18 someone actually would have had a reason to do it. The 19 Court is going to instruct you on the law about that. 20 Dr. Antonsson proposed a combination between the 21 Kurin Lock, which Kurin released in January of 2017, and 22 Kurin's '682 patent from April of 2016, just like the 23 '052. 24 Now, you've got to ask, and especially when someone 25 says to combine two things from the same person, if it was

1803 1 so obvious, why didn't it happen at the relevant time? 2 Why didn't Kurin make that combination? 3 Dr. Antonsson says that the reason for this 4 combination, he says it would have been obvious to change 5 the Lock at the time of the Magnolia Medical patents in 6 September of 2018 because the Lock was slow, the Lock 7 required extra steps. Without a drawing force at the 8 outlet, you had to wait for blood to flow in and only then 9 attach a bottle for collection. 10 Now, Kurin suggested to you that the Jet is the 11 combination of the Lock and the '682 patent from even 12 before the Lock in 2016. Did they show you the Jet in 13 that combination? 14 In any event, the Lock comes in 2017. The '682 is a 15 year before. Kurin, itself, didn't change the Lock to get 16 to its next product until December of 2021, if you count 17 that trial. 18 It wasn't obvious to Kurin, at least, in September of 19 2018. And it wasn't obvious to anyone else either. In 20 all that time, this is Dr. Antonsson's opinion, no one 21 else even tried to make the combination. That's how 22 obvious it is. 23 And then, when Kurin finally got to the Jet, you all 24 remember the press release because you saw it maybe a 25 dozen times during the trial, the one that calls the Jet a	1804 1 quantum leap, fundamentally different from the Lock. It's 2 not just the next iteration, the obvious continuation on 3 from the old Lock product, according to Kurin's words. 4 And it's going to be hard to see this. You may 5 remember this easel. Mr. Ramani put this together when 6 Mr. Rogers was on the stand. 7 THE COURT: You can move it up. 8 MR. BLOCK: Thank you, Your Honor. It's going 9 to fall off of the easel. I'll just put it here. 10 Remember, the Lock had no drawing force at the 11 outlet and no movable plug. Instead it had this vent. So 12 the combination that they are proposing between the Lock 13 and the '682 patent that came even earlier, that doesn't 14 make a lot of sense. Professor Meinhart explained that to 15 you. 16 So that's Kurin's invalidity case. Written 17 description, anticipation, obviousness, they did not carry 18 the burden to prove those by clear and convincing 19 evidence, and when you reach that part of the verdict 20 form, we will ask you to rule -- to find -- excuse me -- 21 in Magnolia's favor. 22 Okay. That brings us to the damages case. 23 Mr. Napper presented his analysis. I want to take a 24 moment on his credentials. He's one of most experienced 25 intellectual property experts in the country. He's
1805 1 testified at more than 50 trials. He does it for 2 plaintiffs and defendants. 3 He talked about two forms of damages: Lost 4 profits and a reasonable royalty. For lost profits, 5 Mr. Napper gave you a couple of scenarios. He did not try 6 and suggest that 100 percent of the infringing sales would 7 have come to Magnolia in the absence of infringement. He 8 chose particular subsets of customers and gave you reasons 9 why it's reasonable to think they would have chosen 10 Magnolia's Micro if they couldn't buy a Jet because the 11 Jet was infringing and not on the market. That's the 12 but-for analysis. 13 He analyzed that market. He gave you his 14 numbers. Here's what he said to you about a reasonable 15 royalty. Remember he analyzed the contribution of the 16 patents and looked at the portion of the profit that they 17 make up and he came out with this analysis of a \$3.05 18 royalty per unit. 19 Now, in cross-examination, you may remember 20 Kurin's lawyer suggested that Mr. Napper had done his math 21 wrong, and they were crossing numbers out on the sheet. 22 But, if you recall, Kurin's lawyers, what they wanted to 23 do was take a lower component cost up in the numerator. 24 They said, "Hang on, if we get to automation, these 25 individual components are going to cost less," but then	1806 1 they didn't make the same adjustment in the denominator. 2 Now, if the individual components in the numerator cost 3 less, the total costs in the denominator is going to cost 4 less, too. 5 Mr. Napper explained that to you. We don't 6 have to spend a lot of time with his testimony, but he 7 said to you -- they were asking these questions. Sure, it 8 would go down if you did flawed math. 9 And, again, "Did Ms. Farnan suggest any 10 assumption about what would happen to the total cost in 11 the denominator in the event of full automation?" 12 "She did not." 13 "Could that have an impact of the math?" 14 "Of course it could." 15 So they took apples and oranges, Mr. Napper 16 compared apples and apples. His \$3.05 opinion is correct. 17 Now, finally, here are the numbers that 18 Mr. Napper presented to you at the end of his 19 presentation. Recall the total number of infringing Jet 20 sales through September 30, 2025, is 1,238,025 units. 21 1,238,025 infringing sales. So each of those sales is to 22 be compensated by lost profits or a reasonable royalty. 23 One more point. Because all these patent 24 claims come from the same patent family, the only 25 difference, if you conclude that less than all the claims

1807 1 are valid and infringed, is to look at the date the patent 2 issued. The '081 patent came first. If any claim of the 3 '081 is valid and infringed, whether it's one claim or all 4 six, the damages are the same and it's these numbers that 5 Mr. Napper gave you. 6 If, for some reason, you find infringement and 7 validity only of the '861 [sic] or the '709, you need to 8 consider that they issued a little bit later. Those dates 9 are in your evidentiary record, although we don't think 10 you will need to dig and find them. 11 So when you get to the verdict form on damages, 12 you will have an opportunity to write down one figure for 13 lost profits, one for the reasonable royalty. If you 14 agree with Mr. Napper's analysis, we ask you to write down 15 for lost profits \$4,992,848, and for the reasonable 16 royalty \$2,112,209. Okay. 17 THE COURT: Mr. Block, you have about 15 18 minutes, all right? 19 MR. BLOCK: Thank you, Your Honor. 20 Magnolia Medical does not use Kurin's patents. 21 Professor Meinhart brought you two arguments. Both of 22 them apply to every single one of the claims. 23 First, we talked about this bladder. Now, in 24 the Micro, you attach a vacuum source to the outlet. That 25 vacuum source does not apply a drawing force to the	1808 1 chamber. Instead, it causes a bladder to invert, and the 2 inversion of that bladder is what causes the blood to flow 3 in. There's really no dispute about how the device works. 4 As Professor Meinhart explained, this is not 5 what Kurin's patents describe. Now, Mr. Bullington 6 described to you the reason for that change. It avoids 7 vein collapse. You don't want to apply the entire 8 pressure from a vacuum bottle or a pull on a syringe to 9 veins, particularly in sick patients who can have damaged 10 vasculature. Mr. Gaw explained the same thing to you. It 11 is an important innovation of Magnolia's to protect the 12 patients and improve the efficacy of the device. So that 13 is no small thing. 14 If you agree with Professor Meinhart that's how 15 the device works and that the drawing force comes from the 16 bladder instead of from the vacuum at the outlet, that is 17 no infringement for all of Kurin's claims. 18 Kurin also requires a housing that defines the 19 sampling channel, and the Micro does not have that. This 20 is an engineering document that Magnolia created long 21 before this litigation, before anybody was fighting about 22 a housing that defines Kurin's patent language. Everybody 23 agrees that the button is not part of the housing. In the 24 Micro, the button gives you the blood path. Without the 25 button, there is no sampling channel. And that's also no
1809 1 small thing. 2 You may have heard some -- you may recall some 3 testimony from Mr. Nason about how, in the Jet, there's 4 mixing between the containment channel and the sampling 5 channel. They are not sure how much of the dirty blood 6 might end up passing out through the sampling channel. 7 Because in their design, they don't have the separation 8 that Magnolia chose for the device that it took to market. 9 Magnolia uses this button to separate the dirty blood from 10 the later blood for the sample. 11 That's why Magnolia's device is different from 12 what Kurin described in its claims. Kurin described using 13 a housing to define the sampling channel. Magnolia used a 14 button. 15 Next, Kurin's patent is invalid. Now, here, 16 it's our burden to show invalidity. We have to carry that 17 burden by clear and convincing, just the same way as it 18 was on the other side, when Kurin was trying to prove 19 invalidity of our patent. 20 The problem with Kurin's patent is that it does 21 not describe the housing that defines limitation. As 22 Mr. Ramani told you in opening statements, when Kurin 23 first went to the Patent Office in 2016, they have this, 24 and then in 2024, when they got these claims, they said 25 they had this.	1810 1 Professor Meinhart showed you that -- he showed 2 you Kurin's written description problem. Kurin's problem 3 is that the only part of the '052 patent that talks about 4 the drawing force from the outlet is in Figure 23, but 5 Figure 23 does not have the housing. And that's important 6 because when do you this written description analysis, you 7 can't pick and choose. You have to find the elements 8 together in embodiments that are linked together in the 9 patent. 10 So here's the testimony of Mr. Rogers. 11 "So Figure 23 and its associated text, that's 12 the only embodiment that discusses the use of a drawing 13 force at the outlet in the '052 patent, right?" 14 "I think that's true." 15 "The housing that defines is not present in 16 Figure 23 but, instead, in other figures, right?" 17 Mr. Rogers, again, "That's true." 18 Here's Figure 23. This is the one with the 19 vacuum. It's the only one in the patent with the drawing 20 force -- source, the vacuum source that pulls from the 21 end. No housing. You can see that for yourselves. That 22 means the device in these claims that has a drawing force, 23 it doesn't have the housing that defines. 24 Now, I want to talk to you about the burden of 25 proof for a moment. Remember, I told you clear and

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1 convincing evidence. For Kurin's patent, this issue is
2 pretty straightforward. Either the housing is there or it
3 isn't. Either it discloses the device in the claims, a
4 device with a drawing force from the outlet and a housing
5 that defines the inlet, the sampling channel, and the
6 outlet; or it doesn't.

7 And those admissions are clear, and this
8 diagram shows it. The only embodiment that has that
9 drawing force does not have the housing. If you agree,
10 that is clear and convincing evidence and Kurin's patent
11 is invalid for lack of written description.

12 Okay. If you go past that question on the
13 verdict form, there will be instructions. It will say
14 don't go to damages for Kurin unless you have found one of
15 their claims both valid and infringed. So we really do
16 not think that you will need to do a damages assessment
17 for Kurin.

18 However, if you do, we want you to look very
19 closely at the evidence. Kurin seeks lost profits and a
20 reasonable royalty. For lost profits, they have to prove
21 to you that the Gen2 is not an acceptable alternative.
22 Mr. Bullington addressed that on the stand. He told you
23 that Magnolia was selling the Gen2. It had great
24 efficacy, great uptake. There is no reason to think that
25 that Gen2 would be unavailable or unacceptable.

1813

1 on the verdict form. We talked about the merits in
2 Magnolia's case, all of their defenses, talked about the
3 claims that Kurin has brought and Magnolia's defenses.

4 Before I sit down, there is just a couple more
5 things I would like to cover. First, I want to recognize
6 my team for their efforts this week. We had graphics
7 support from Mr. Smith and others who aren't here in the
8 courtroom today. You saw several of my colleagues here at
9 the podium. Several others who weren't able to stand up
10 before you. They have worked very hard to present this
11 case to you, and I want to recognize their efforts in
12 front of you.

13 I'm sure, Mr. LoCascio, Mr. McEldowney, same
14 thing on their side, a lot of hard work has gone into this
15 presentation.

16 Now, finally, I want to propose another lens
17 that you can use to think about this case. In a lot of
18 ways, this whole case is really about two men and one very
19 important meeting.

20 You've heard about that day on March 26, 2015,
21 when Mr. Bullington flew down to San Diego to meet
22 Mr. Rogers at the fish market. You can learn about
23 everything you need to know about this case and these
24 companies from how those two men approached that meeting.

25 Mr. Bullington was humbly asking advice from a

1812

1 As a result, Kurin should not get lost profits
2 damages. If you agree with their case, they should get,
3 at most, a reasonable royalty.

4 Ms. Distler gave you her royalty rate. It was
5 far too high, and Mr. Napper explained that to you. He
6 explained that the appropriate rate is 29 cents per unit.
7 He did that based on the exact same math that he applied
8 on Magnolia's side of the ledger.

9 If you look at the contribution of patent --
10 and you may remember the testimony -- Kurin's patent went
11 to the Patent Office. With the claims as originally
12 drafted, it got rejected because every single requirement
13 was already in something that Dr. Patton had invented in
14 2008 for Magnolia. And they added one thing. They added
15 this housing that defines.

16 I don't think -- we have submitted to you that
17 their patent doesn't describe that housing that defines
18 with their other elements. However, that's the
19 contribution, at most. That's what you value. And
20 valuing that is how Mr. Napper got to his rate.

21 So if you do fill out damages for Kurin, and we
22 submit that you should not get there on the verdict form,
23 Kurin would receive no lost profits, and a reasonable
24 royalty through September 30 of \$389,213.

25 Now, that was a walk through all the questions

1814

1 senior entrepreneur in his field. He was open, he was
2 honest. He trusted Mr. Rogers because of a personal
3 connection. Remember, Mr. Rogers had an investor,
4 Mr. Sparacio, whose son was one of Mr. Bullington's early
5 employees. Mr. Bullington knew he didn't need an NDA
6 because he had patent protection. So he could speak to
7 Mr. Rogers about Magnolia's ideas, about Magnolia's
8 technology, about its product.

9 Magnolia Medical had seen this problem and
10 solved it. They had already developed dozens of
11 solutions, and they were in the process of launching their
12 original Steripath device. Magnolia had spent seven years
13 before that meeting focused on medical science and
14 research.

15 That is exactly how you would want someone
16 starting a business in our society to behave. That is the
17 sort of behavior our legal system and our patent system
18 should reward and protect.

19 What about the other man at that very important
20 meeting? Mr. Rogers was opportunistic, even predatory.
21 He was looking for his next big thing. When
22 Mr. Bullington reached out, Mr. Rogers could have
23 respectfully declined, or he could have told
24 Mr. Bullington that he was thinking of starting a
25 competing venture. That's not what he did.

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1 Instead, after Mr. Bullington asked him for a
2 meeting in 2015, Mr. Rogers let Mr. Bullington fly all the
3 way down to San Diego and sat face to face with him over
4 lunch as Mr. Bullington sought his advice. And within
5 days, Mr. Rogers was e-mailing with Gino Kang. He was
6 trash talking a Magnolia device behind Mr. Bullington's
7 back. He was getting market research done to see how big
8 this thing is. He was evaluating whether to make it his
9 next project.

10 Remember, these men had known each other
11 through a personal connection. Mr. Rogers' investor, an
12 investor in Kurin, father to an employee of
13 Mr. Bullington.

14 Back then, remember, Mr. Rogers had known about
15 Mr. Bullington since 2013. There was early correspondence
16 at that first introduction. Mr. Rogers knew that Magnolia
17 had patents and he was talking about how important patents
18 are and getting the freedom to operate, looking at the
19 prior art.

20 Mr. Rogers never took Mr. Bullington up on
21 Mr. Bullington's invitation to collaborate. Never asked
22 Magnolia Medical for a license to its patents.

23 Mr. Rogers' own words give you all the picture you need of
24 how he behaved.

25 Mr. Rogers was -- you saw before that he was

1817

1 **THE COURT:** Do you want to go to the next one,
2 right? Or --

3 **THE JUROR:** Could I get a quick bathroom break?

4 **THE COURT:** Okay. Let's do that. We'll take a
5 quick, then but we're not going to break then after the
6 second. We are going to go straight through. Okay? All
7 right. This is our morning break.

8 (The jury exits the courtroom at 10:15 a.m.)

9 **THE COURT:** Please be seated. Can we just
10 clear up that.

11 We have a young coffee drinker, obviously, on
12 the jury. So why don't we take a ten-minute break now,
13 all right, so that we can go straight through.

14 (Whereupon, a recess was taken.)

15 **MR. RAMANI:** Your Honor, it feels like you have
16 an outdoor courtroom.

17 **THE COURT:** I was going to say that they left
18 the windows open, but we don't have windows so that can't
19 be it, but it is freezing.

20 **MR. RAMANI:** It feels like the air conditioning
21 is on.

22 **THE COURT:** Well, it's GSA. It probably is on.
23 I told you the great line, I heard a chief judge of
24 another district talk about GSA. They are not happy if
25 you're not unhappy.

1816

1 thinking about a new business when he e-mailed Gino Kang.
2 Here, Mr. Rogers was posing as a friend. He's having his
3 contact, Mr. Lloyd, connect Magnolia Medical with
4 distributors. He testified: "Working with someone is not
5 the same as helping."

6 All this while Mr. Rogers never told Magnolia
7 Medical that he was planning on competing. Wouldn't it
8 have been honorable to just call the guy and say, "Hey,
9 listen, I'm going to do a competing venture against you"?

10 The answer Mr. Rogers gave is: "I don't know
11 if it's honorable or not. It's pretty stupid."

12 Then Kurin and its lawyers come into this
13 courtroom and tell you that this case is about Magnolia
14 Medical trying to take credit for Kurin's ideas. That's,
15 basically, the first thing out of Kurin's lawyers' mouths
16 in opening statement, if you recall.

17 Ladies and gentlemen, that one very important
18 meeting in March of 2015 tells you about everything you
19 need to know in order to decide this case. Magnolia
20 Medical's behavior, Mr. Bullington's conduct, is what our
21 patent system should protect and reward. Kurin's
22 behavior, Mr. Rogers' conduct is not what our system
23 should protect and reward. This is the sort of defendant
24 that our patent system should hold accountable. Thank
25 you.

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1 All right. You ready?

2 (The jury enters the courtroom at 10:28 a.m.)

3 **THE COURT:** Please be seated. Mr. LoCascio.

4 **MR. LoCASCIO:** Thank you, Your Honor.

5 Good morning. When I first spoke with you last
6 week, I told you this case was a great example of why we
7 have a jury system in America. Because you came here,
8 each of you, knowing you shouldn't take credit for someone
9 else's work. You also came here with your common sense
10 and your ability to figure out who was telling you the
11 truth and who wasn't.

12 That's why we have trials, to get to the truth.
13 And as the evidence showed, the truth of the matter is
14 that for the patents and the inventions in this case,
15 Kurin came first.

16 There is -- for all we just heard, there's no
17 dispute, none at all, that Kurin's patent priority date is
18 first. There's no dispute at all that Kurin's prior art
19 came first. And there's no dispute, and the evidence
20 showed -- and we'll walk through that -- that Magnolia
21 developed the Micro and drafted all three of their patents
22 after studying and analyzing Kurin's prior art. None of
23 that is disputed in this case.

24 I'm now going to walk through the evidence you
25 saw and heard and how it applies to the questions you are

1819 1 going to be asked on the verdict form. Before I do, of 2 course, I want to thank you on behalf of Kurin and my 3 whole team for your dedication, your commitment, your 4 attention to reaching what is the right, just verdict in 5 this important case. So this is a lot of work to do. A 6 lot of evidence has come in over our time together, so let 7 me get right after that. 8 We heard in opening statement from Mr. Ramani 9 that there was a leader and a follower, an innovator and 10 an imitator. Let's look what the evidence showed. From 11 the very first document, what we've done with all the 12 exhibits that you will see on the screen is we put the 13 exhibit sticker up there on the top. You will have all 14 the exhibits in the back and so if you want to look at any 15 of these facts, you say, okay, this is DTX-296, for 16 instance. 17 Kurin's first business plan from the gate, as 18 Mr. Rogers -- and we'll get to that -- told Mr. Bullington 19 when they first met, he said this idea has a lot of 20 shortcomings, poor design, high cost, it's expensive. It 21 changes the practice of the nurse. This will never be 22 well-accepted or easy to use. Doesn't even fit in the 23 sharps container, you heard. 24 His idea, far simpler, far less expensive, and 25 you saw that when you passed them around. You will have	1820 1 them in the back, what a Kurin Lock and a Kurin Jet 2 actually look like. 3 So what's the timeline? Mr. Block walked 4 through the whole timeline and he left out the Rogers '445 5 publication, the Lock itself, the '682 disclosure and 6 patent, all of which are undisputedly prior art, came 7 first, but you will see the evidence showed not only were 8 they just out there in the public, the folks at Magnolia 9 were watching that, following it, and imitating it. 10 The marketplace in 2017, Kurin Lock, was 11 partially automatic. It only used .15 milliliter of blood 12 in the waste area. Magnolia's product, ten times or more 13 wasted blood. So much so -- I don't know if you noticed 14 this -- when one of their inventors testified, he got a 15 little emotional because in hindsight, he realized they 16 were wasting so much blood from patients that he 17 emotionally thought we wish we could have lowered the 18 volume sooner. 19 As soon as Kurin's Jet come out, the inventors 20 on their patents start making prototypes of Kurin's 21 product. DTX-102 and 237, they're tracking it -- their 22 own words, they wanted to mimic it. 23 Mr. Gaw testified. He also said, okay, what's 24 the chronology here? Kurin launches, Magnolia prototypes 25 Kurin's device, Mr. Bullington thinks it's urgent and they
1821 1 need to go grab some IP. 2 Except in Mr. Gaw's own e-mail, he noted: "We 3 need to actually understand how these things work. Do 4 they work? What variables affect performance?" 5 And you saw, and you will see throughout this 6 case and all the evidence, that this is a difference in 7 approach. This is a difference between Mr. Bullington's 8 approach. He wants to -- no need to make prototypes. We 9 didn't see any in this case. No need to actually build 10 products to see if things work. 11 Instead what they do is they just file patents 12 to cover everything. Except you'll see with the patents 13 in this case, they are flawed because they didn't even 14 understand how Kurin's product they were trying to copy 15 worked. 16 You also saw Mr. Miazga had his prototype 17 mimicking the Kurin device, DTX-243. 18 Then in the summer of 2017, spring, May, and 19 carries into June and July, they had their heads down in 20 Kurin's patent application. The very same disclosure 21 that's the prior art. They read it, they studied it to 22 figure out how to make it work. And Figure 23 was in 23 Magnolia's files in their disclosure as they were trying 24 to develop competing products. So much so that they had a 25 list of possible options and they made one that they	1822 1 called the Me Too because it was Kurin's device that they 2 had prototyped and thought, well, maybe we can do this 3 too. 4 Now, you were shown -- 5 Can we switch to the ELMO for a second. 6 -- this image of Trap Door 1 to suggest that -- 7 their argument now is we actually did come up with 8 something first, except there's a lot of flaws with this 9 and we are going to talk about them, but the one that they 10 didn't talk about is how did they get to this in December 11 2017? 12 That was the whole project. Remember, you saw 13 Project Suntory. You will see documents on that. After 14 the Me Too discussions and after looking at Kurin's patent 15 applications, they started looking at those and figuring 16 out how can we do this also. 17 So even what they suggest is their idea -- 18 which we will get to that because it's not in the patents 19 that they are asserting -- it was built off the back of 20 Kurin's work that they were studying and copying. 21 Thank you, Mr. Urban. 22 Their primary goal during this time frame was 23 to have a competitive response to Kurin. And if they 24 didn't, there would be a significant strategic failure. 25 So they start trying to work on what becomes

1823 1 the Micro. Now, the Micro, you remember has a lower 2 volume because they realized they were wasting too much 3 blood and they wanted to get closer to Kurin. It was 4 still four or five times more blood, it's still not 5 automatic, but that's what they started working on. 6 In their own business documents. 7 Mr. Bullington tried to deny them. He said, well, that's 8 not my words. It's a consultant we hired to try to figure 9 out why our business was failing. 10 Okay. They had a board meeting and they talked 11 about that Kurin's product was better, it had less blood, 12 it didn't distract the clinicians, it was elegant and easy 13 to use, and their product, the Gen2, was more expensive 14 and didn't work as well. 15 And so what was -- what are consultants telling 16 them about the management going on over there? Well, 17 we're having lower sales because we're so in love with our 18 offering and blinded to its challenges. They couldn't get 19 away from the idea that you needed to take more blood out, 20 that you had to use your hand squeeze to do it. They 21 underestimated the competition. They didn't have as good 22 a product. And that's how competition works. 23 And then they do come out in 2020 with the 24 Micro. Partially automatic, draws the first amount of 25 blood in from a vacuum force, and then you have to press a	1824 1 button as a second step. Now, in this same time frame, 2 Kurin realized, okay, well, there's a delay when you use 3 the Lock because you have to wait for the blood to go in 4 the containment channel and then you put on the 5 vacutainer. And you heard Mr. Rogers and Mr. Nason talk 6 about how they got from the Lock to the Jet, because they 7 solved that problem before Magnolia as well. 8 The Jet was already sold in December of 2021. 9 And we hear a lot about, well, there was one or two and 10 this trial or something. You heard evidence from 11 Ms. Distler that almost 10,000 of them were sold before 12 2023. You can be sure their primary competitor out there, 13 Magnolia, was doing everything they could, and you saw 14 evidence of this, to get their hands on one. 15 So what happens? You heard Mr. Bishop. He was 16 the chief operating officer to Mr. Bullington's CEO, sort 17 of a two-man show. He says when I got the news that they 18 were releasing the Jet, I called my director of 19 engineering, increased the urgency, gave him a swift kick 20 in the butt. 21 That renewed urgency was to figure out if they 22 can secure additional funding and resources because they 23 were trying to figure out how can we compete? Can we? 24 We've been losing money. Are we going to be able to come 25 up with a product like this?
1825 1 And you heard five days of testimony and now 2 closing argument, and at no point did the folks at 3 Magnolia demonstrate that they had developed that effort, 4 that their next general production or manufacturing or 5 development work led to the patents in this case. 6 Instead, you saw that they had business plans 7 talking about the risks. The Jet was underway. It was 8 garnering new interest. And that their button version in 9 the Micro was less desirable than the automatic system. 10 And so then you saw Mr. Bishop and you'll -- 11 we'll talk about this a little bit more with credibility. 12 This is why we have juries, for you to decide who is 13 honest, who is telling the truth and who's not. 14 And Mr. Bishop, in his own deposition that you 15 saw played, said, okay, there was a plan to do CT scans of 16 the Jet but we didn't do it. 17 Said: "Okay, where is the document shutting 18 down this plan which exists in written form? 19 "Well, I did it verbally." 20 Except then what also was in his files? CT 21 scans of the Jet because they did do those tests. 22 In fact, he tried to say he didn't have any. 23 They didn't have them in time. Except he had them in his 24 desk drawer before they filed this case. In fact, even 25 when some of the patents were being prosecuted.	1826 1 So who is the imitator and who is the 2 innovator? The record and the evidence in this case is 3 that Magnolia followed, Magnolia imitated. And their 4 story on this has been, "Well, we've got this 5 Richie Patton, and Dr. Patton had come up with some 6 stuff." Except, you notice, none of the work they showed 7 you, none of the patents in this case have anything to do 8 with that. 9 Were they founded first? Yes. That's 10 literally the only metric on which they're first. They 11 spent, like, a decade to come up and have this in the 12 market. They were told, the first time Mr. Rogers saw it, 13 "That doesn't look like such a great idea, guys." 14 So let's talk about infringement. And this is 15 a patent case and you're going to be asked to look at 16 patents and look at claims. On your verdict form, there's 17 questions: Is this particular claim infringed? Is this 18 claim? 19 And on the other side, in closing argument, 20 this is what you were provided, essentially. You weren't 21 shown claims in full. You weren't shown the claim 22 language. You weren't shown what the elements are and how 23 they are met. They glossed over the whole thing. 24 You might ask yourself why are there 12 patent 25 claims being asserted? Three patents. You heard

1827 1 Mr. Block himself say they are kind of all the same. 2 Think about that. Like, why would you do that? Because 3 they're hoping to just throw enough spaghetti against the 4 wall and something will stick or some argument will be 5 made, and well, this one claim might be valid, even though 6 the other 11 aren't. That's what they are doing here. 7 And they didn't even walk you through infringement on a 8 single one of them. 9 So Magnolia infringes Kurin's patents, and 10 we're going to look at the actual claim language and the 11 evidence. So the burden of proof. The burden of proof 12 for infringement is a preponderance. It's more likely 13 than not. Now, I've heard a lot, I expect we will hear a 14 little bit more, about the burdens of proof in this case. 15 And their argument that, well, their patents are valid, 16 and even if you are not so sure and it is a close call, 17 clear and convincing is a high burden. 18 Lawyers say if you have the facts on your side, 19 you argue the facts. We have the facts. If you have the 20 law on your side, if you don't have the facts, then you 21 argue the law. If you don't have the facts and you don't 22 have the law, what are you left with? You are left with 23 arguing the burden of proof to say, okay, I get it, maybe 24 Kurin's proven their case, maybe their evidence is better, 25 but they can't reach a particular standard. You are going	1828 1 to see, as we go through the standard, we 100 percent meet 2 the burdens of proof because we have the facts and we have 3 the law on our side. 4 So how about the Micro? The Micro infringes 5 Kurin's '052 patent. We are asserting three claims. This 6 is them in full. The reason we are asserting more than 7 one is because some require the needle in the blood sample 8 collection device. That's Claim 10. And Claim 12 is 9 specifically focused on the volume limitation, so anything 10 less than one and a half cubic centimeters. 11 So let's look at the evidence on this. 12 Magnolia admits -- admits, no dispute in this case, you 13 heard no argument to this effect, they don't dispute it 14 now -- that the inlet and outlet port are met. The 15 sampling channel with that inlet and outlet port is met. 16 The limitations of Claim 10 met, and Claim 12 met. So 17 there's two in dispute. 18 Let's look at the evidence on those. First, is 19 the blood sample, when you use a Micro, under a drawing 20 force applied from the outlet? Well, Mr. Miazga says yes. 21 How does it work? Well, having negative pressure applied 22 to the outlet is a drawing force. 23 Their own documents, they've tried to suggest, 24 well, this bladder is doing the work. And you may 25 remember in opening, I said, well, if I pull you over with
1829 1 a rope, what's pulling on you? Is it me? Well, it is, 2 but the rope, at a physics level, is putting the force on 3 your hands. That doesn't make their infringement go away. 4 Mr. Gaw, we went through this when he was on 5 the stand. You may remember I put their product on the 6 ELMO, the doc cam, we moved it around. The bladder flips 7 because of a force applied from the outlet port. 8 And the claim language in every one of these 9 claims matters. This claim says the blood sample, when 10 under a drawing force -- collect the blood sample when 11 under a drawing force applied from the outlet. Okay, is 12 drawing force applied from the outlet in the Micro? Of 13 course it is. They all admitted it. 14 They said, well, the bladder is in the middle. 15 Except, Mr. Gaw said a causal affect of pulling the 16 drawing force of the syringe flips the bladder, and that 17 causes the blood to come in. 18 Mr. Gaw admits they infringe, and he admits he 19 knew they infringed. Because their own video, you saw, 20 describes how it works as being infringing, the negative 21 pressure that diverts the initial specimen into a chamber. 22 So how about Dr. Meinhart? Because we heard a 23 lot of trust their expert, ignore our expert. Look, 24 credibility matters. And I take matters more than 25 anything else in this room. You are asked to figure out	1830 1 who to believe and who not to, based on your life 2 experience. 3 Let's look at some of the things Dr. Meinhart 4 said. Okay, to figure out how this bladder works, who did 5 you talk to? Greg Bullington. Only person you talked to? 6 Yes, the only person. 7 You may remember -- we will see a lot of it -- 8 all the things Mr. Bullington says, "I don't know," "I 9 don't remember," "I'm not really sure," "I don't know what 10 pressure is." 11 That's who Mr. Meinhart, their technical 12 expert, thought, "That's the source I want. That's the 13 resource I should use." Not Mr. Gaw, not Mr. Miazga, not 14 the other inventor, Mr. Ramsey. He didn't talk to those 15 people. 16 Okay. Well, we asked Mr. Meinhart, "Okay, 17 well, they admit they infringe. Do you take their word 18 for it?" 19 "It depends." 20 "Well, how about their engineering documents? 21 Do you take their word for it?" 22 "Well, that depends, too." 23 I guess, maybe it depends who is paying him. 24 I'm not sure what it depended on. 25 "How about if an engineer testified under oath

1831 1 about how the Micro works? Would you take their word for it?" 2 3 "I'd have to see the video." 4 "So you're not sure?" 5 "It depends." 6 "What does it depend on?" 7 "How qualified they are." 8 But then he ultimately says Mr. Gaw, who admits 9 infringement, is qualified. Perhaps we've persuaded 10 Dr. Meinhart. He still tried to sort of avoid it because 11 then Mr. McEldowney showed them a document, their own 12 technical document that says to fill the diversion 13 chamber, you apply vacuum to the device. 14 He's asked, "Hey, sir, you see this? You agree 15 with that or you disagree with that one?" 16 Notice how he answered. He tried to dodge it. 17 He says, "I see it, yes." 18 That's not a credible witness. 19 So then, only when pinned down, "Do you agree 20 with this one or you disagree with it? Is that how the 21 Micro works, sir?" 22 "Yes, it is." 23 And he showed you a test. Just think about how 24 much time and effort, how many people are here to put on a 25 case like this. Why would someone go through the trouble	1832 1 of rigging up this whole test that is unrelated to 2 anything in the real world? 3 The question to Mr. Meinhart -- Dr. Meinhart, 4 "Was this actually how it worked with a nurse?" 5 "No, these valves wouldn't be there." 6 "Okay. Well, if Mr. Reed hadn't pulled the 7 syringe, would the blood have come in?" 8 "No, it wouldn't." 9 He showed you this and said, "Lookie here, I 10 pull the syringe, I turn this little valve. Now I get rid 11 of the syringe and viola, it still works." It's 12 contrivance. 13 And so is this element met? Indeed, it is. 14 And the evidence is uniform on that. 15 So what's the last one? The last one there, it 16 doesn't have a housing. Okay. Well, the Court's 17 construed this term. The construction is "casing that 18 fixes or marks the limits of." 19 Now, you weren't shown this and the whole 20 discussion about what the housing is, you were never shown 21 this is in your binder. The housing is the casing that 22 fixes or marks the limits of. Does it say the blood can't 23 be touched by a button? Does it say the blood can't be 24 contacted by anything else along the way? Absolutely not. 25 And Mr. Gaw admits the housing marks the limits
1833 1 of the sampling channel. He says, yeah, at the outer 2 boundary it does. It marks the limits of the sampling 3 channel. The Micro infringes and meets this limitation 4 also. 5 You may remember with Mr. Gaw, we walked 6 through an actual Micro on the ELMO. And he said the 7 words -- and I wrote them on the label, "There is a 8 housing, an inlet, an outlet, and a sampling channel," and 9 the sampling channel is always inside the housing. 10 There's no evidentiary argument that's 11 credible. Their own witnesses have admitted that the 12 housing limitation is met also. 13 And then there was the button. The idea, well, 14 the blood sort of going through the button. Mr. Gaw said 15 no, it doesn't actually go through the button. There is 16 no hole in the button. The entirety of the sampling 17 channel is surrounded on the outside by the housing. 18 There is just a slot or channel in that button, is what he 19 had to admit. Remember the meh emoji. They didn't love 20 that as a design. 21 Dr. Antonsson also walked you through 22 infringement on this element. Even their internal 23 documents, they called it a housing. 24 So all elements of Kurin's '052 patent claims, 25 Claim 1, Claim 10, and Claim 12 are infringed. The	1834 1 evidence on that is clear. The Micro infringes the '052 2 patent. 3 Now, there's one other question you will be 4 asked, if that infringement is induced for Claim 10, 5 because that means do they instruct or direct other people 6 to attach these devices, the blood sample collection 7 device or a needle. There is no dispute about that. The 8 evidence came in. You heard about how it's actually used. 9 One of the elements for that in the charges, 10 they knew about the patent, and the evidence was, and is 11 stipulated to, Magnolia knew about the '052 patent, at 12 least as of November 12, 2024, and that they knew users 13 would infringe. 14 So one thing you are not going to hear, you 15 didn't hear, is any argument by Magnolia that there's any 16 prior art, any other patents, any closures, any products, 17 that did this before. Because they don't have any. 18 There's none. They recognize that the inventions of the 19 '052 patent weren't anywhere. Not obviousness, not 20 anticipation. They don't argue anyone came up with that. 21 So their only other defense to this is to say, 22 well, there's no housing. Except you will have the DTX-1. 23 I think there's 51 references in there to a housing, and 24 different flow paths that can be included inside the 25 housing. There's images of it, et cetera.

1835 1 Now, what you heard -- we'll get to that in a 2 second. 3 So that's Kurin's patent. Let's talk 4 Magnolia's patent. As they said, their claims are 5 substantially the same. So let's look and see if the Jet 6 infringes Magnolia's patents. 7 You've seen this figure. There is no figure of 8 any device that works this way, any movable plug being 9 moved by a pressure differential, anywhere in the actual 10 '863 patent. So the picture that everybody shows, it's 11 actually not their idea or their patent. It is a picture 12 of the Kurin Jet in cross section. 13 And for this limitation or element, "pressure 14 differential, in at least a portion of the sampling 15 channel between the movable plug and the outlet." The 16 experts look at several points. Mr. Meinhart, he says if 17 you measure that between Point 7, at the top of the plug 18 at the plug on the top, and 9, that's in the sampling 19 channel. If you measure it, 7 compared to 9, well, there 20 would be no infringement because the plug wouldn't move. 21 Okay. Well, Dr. Antonsson says the same thing. 22 So if the measurement is between 7 and 9, both experts 23 agree Kurin doesn't infringe. Dr. Meinhart agrees as 24 much. 25 He said, though, remember, "Well, that's	1836 1 nonsense. That's just impossible. That would be nuts. 2 No one worth their salt would ever suggest that." 3 Except do you recall he was cross-examined by 4 saying he had submitted his own expert report in this case 5 that talked about measuring it between 7 and 9. 6 Okay. Seems like a credibility problem for 7 Dr. Meinhart. He was asked: "When you read the claim 8 originally, did you think what they were really trying to 9 claim was 5 to 9 across the plug?" 10 His testimony at his deposition was: "No, 11 that's not what I thought this claim meant." 12 And then we showed Dr. Meinhart that not only 13 did he take that position, but Magnolia previously agreed 14 with Kurin's reading of this patent also. Said Magnolia 15 pointed to 7 to 9. The application of this claim 16 language, all parties and the expert originally looked at 17 7 to 9. 18 Now, we also asked Dr. Meinhart: Well, how 19 about this 5 to 9, because on the '863 patent, the claim 20 language says pressure differential in at least a portion 21 of the sampling channel between the movable plug and the 22 outlet. We said, well, what you have at 5, can we agree 23 that's not in a portion of the sampling channel between 24 the plug and the outlet? 25 He agreed.
1837 1 Did you ask any of the inventors about this, 2 where do you take the measurement? 3 He did not. He didn't talk to them. It was 4 not necessary in his view. 5 We asked Mr. Bullington, the -- allegedly, he's 6 the first inventor on all these patents: "Well, where do 7 you have to take this measurement from? Could it be on 8 the other side of the plug 5 or does it have to be on 7? 9 Because you claimed it as between the plug and the 10 outlet." 11 He says: "I don't know." 12 Except you also see when you look at the 13 claims, the claims contain two different pressure 14 differentials, one between inlet and outlet and one 15 between the plug and the outlet, except Dr. Meinhart only 16 measured one of those. He measures from 4 to 9. That's 17 where those two black lines go into the product for 18 everything, inlet and outlet, measure 4 to 9; plug to 19 outlet, between the movable plug and outlet, 4 to 9. 20 He says it's 5 to 9 because he says, well, 21 there's no difference between 4 and 5. 22 Magnolia's measurement is at the wrong place. 23 You saw Dr. Meinhart on the stand. Mr. McEldowney said, 24 okay, let's just talk about what between the plug and the 25 outlet means. If I said stand between me and the door,	1838 1 does that mean you should go on the other side of the door 2 and look in the window at me? 3 No. That wouldn't make any sense. 4 Okay. "How about between 1 and 2, is .99 5 between 1 and 2?" 6 In his deposition, Dr. Meinhart said: "Yeah, I 7 think it could be." 8 We all know that's not right. 9 Mr. Bullington was shown a piece of paper with 10 three dots, said can you tell me, is B between A and C? 11 His answer was: "Yeah, I'm not sure." 12 Credibility matters. Think about it. He was 13 asked again, okay, think about it. He said it may depend. 14 He says in what context or world could C be 15 between A and B? 16 He asked for a pen. And you remember, I think 17 he waited two minutes staring at it with a pen and at the 18 end he's like: "Yeah, there's probably lots of ways, I 19 just can't come up with one." 20 Mr. Gaw also recognized that the measurement 21 should be 7 to 9. Now, that means the claims aren't 22 infringed. And you heard their witnesses say that's nuts, 23 it doesn't make sense. They showed you Mr. Nason that 24 said at Kurin they knew how to make a design that had a 25 pressure differential and a plug or a stopper or a valve

1839 1 because it was already in the Rogers prior art. 2 Except, well, why -- how did this happen? They 3 chose how to draft these claims. They put the words they 4 wanted in the disclosure and the claims and those are the 5 words and the patent that you have to decide is it 6 infringed or is it invalid, et cetera. The reason those 7 claims, they say they don't make any sense is because they 8 just didn't understand how it worked. They were trying to 9 copy Kurin and at the same time trying to draft claims on 10 something they couldn't figure out. 11 So is it any surprise that their view now is, 12 yeah, okay, the claim says between 7 and 9, so let's read 13 it at 5 and sort of give us a break on the claim language? 14 They drafted a claim, they made a disclosure based on a 15 theory that apparently wasn't the case. 16 The Court will instruct you that if the 17 independent claims, those three I just showed you, are not 18 infringed, then dependent claims as a matter of law cannot 19 be infringed because you need all the elements of the 20 independent claim to infringe the dependent claims. 21 The burden of proof is clear and convincing for 22 invalidity. That's not proof beyond a reasonable doubt. 23 The judge will instruct you it just means you have to 24 think something is highly probable. In your mind, is it 25 clear? Are you convinced?	1840 1 You will see the evidence showed that 2 Magnolia's patents don't have adequate written description 3 for the invention. 4 Now, interestingly, Mr. Block, when he was 5 talking about Kurin's patents, said you're not going to 6 see a picture -- remember this -- of Figure 23 surrounded 7 by a housing. And because there's no picture and no 8 figure, well, I guess there's no written description. 9 What he didn't tell you was they don't have a 10 single disclosure or picture of their alleged invention 11 with a movable plug moved by a pressure differential 12 anywhere in the disclosure. You may remember I asked 13 Mr. Gaw, I said: "Hey, that photo, the one they want to 14 put on that board, did you put that in the patents?" 15 "No, we didn't put that figure in our patents." 16 A mere wish or plan for obtaining the invention 17 is not enough to satisfy the written description 18 requirement. You will read that in the charge; you will 19 have your own copy. 20 Well, what's this whole written description 21 thing? It means you don't take credit for something you 22 didn't invent. It's simple. And the evidence is clear, 23 Magnolia didn't invent these patents. They looked at the 24 prior art, they tried to draft claims to copy it and they 25 weren't successful in drafting particularly good claims
1841 1 that actually understood how it worked, and it's also not 2 valid because it was all disclosed in Mr. Rogers' own 3 work. 4 They went through the time and effort to get 5 you a big chart. 6 May I move, Your Honor? 7 THE COURT: Sure. 8 MR. LoCASCIO: And they put some dates on top, 9 December 2017, to suggest, I guess, maybe that they're 10 first somehow. They pointed to a stopper design, which 11 isn't the patent -- that's not what this patent's related 12 to. May 15, 2020, the shape of the stopper is not what's 13 in play here. But they put this on here. Why do you 14 think they did that? They put this on here to try to come 15 up with a way to say, hey, hey, we're first. 16 Now, remember, Kurin planted its flag in 2016, 17 Problem 1 for them. Problem 2 is they admitted: 18 "Magnolia does not contend that any of these three patents 19 was conceived and reduced to practice earlier than 20 September 12, 2018." If they wanted to have told you, 21 well, hey, we came up with this idea -- that's 22 conception -- you may remember from the first video we saw 23 back in 2017 or maybe even earlier, well, they could have 24 done that. They admitted they hadn't. 25 What did the evidence show? We saw a couple	1842 1 pages of a transcript from Mr. Block and his recitation of 2 events. We spent five days, I don't know, with nine 3 witnesses, something like that. We had -- there's a stack 4 of exhibits you all have to go through back there. The 5 actual exhibits show they tried to capture IP on things 6 they didn't understand and things they didn't invent. 7 DTX-102 here, thinking about which exhibits are the ones I 8 want to look at and we're trying to answer some of these 9 questions. Like DTX-102 is an important one. 10 Okay. Well, we asked Mr. Miazga: "Do you 11 think you came up with anything new?" 12 "Yeah, I'm uncomfortable answering that. You 13 are trying to put words in my mouth. 14 "Okay. Well, when you did that work, was it 15 patentable? 16 "Engineers aren't so good at figuring that out" 17 was his answer. 18 Magnolia filed these claims. They listed 19 Mr. Bullington as the first inventor. Mr. Bullington was 20 running the business at the time. And did anybody go back 21 and talk to Mr. Miazga, say, "Hey, we are going to draft 22 claims to try to cover the Jet? Did you guys actually 23 invent that?" 24 Silence. They never talked to him. 25 Mr. Gaw, another one of the inventors, did he

1843 1 ever see these claims before they were -- while they were 2 being filed or submitted? He didn't recall. 3 So how about Mr. Bullington? Does he even 4 understand this invention? Upper right: "Did you 5 understand what caused the plug or the valve to move?" 6 "Not at a detailed level, no. 7 "Well, over there on the left, do you know 8 anything about the pressure differential that causes the 9 plug or the valve to move?" 10 "I wouldn't want to guess." 11 This is their inventor, allegedly. 12 Okay. "Well, let's look at some of the claims, 13 Mr. Bullington. Do you know whether the pressure 14 differential is on this line or the same?" 15 "Yeah, I don't know about fluid dynamics and 16 pressure dynamics. 17 "Does the pressure differential work the same 18 in this claim as this claim?" 19 "I don't know. 20 "How about Claim 22, in one of these patents, 21 is it different from the other patent?" 22 "I don't know." 23 If they had possessed the invention, the 24 written description test, do you think the inventor of 25 that might actually be able to answer any of these	1844 1 questions? 2 However: "Mr. Miazga, what's a movable plug in 3 these patents?" 4 "Yeah, I really don't know what was intended. 5 I don't understand what that is." 6 They didn't possess the invention. 7 "Is there a figure, Mr. Bullington, anywhere in 8 there that uses this pressure differential?" 9 "Yeah, I don't know. 10 "Any figures at all here with respect to the 11 claims asserted?" 12 "I don't know." 13 Their conceptions, what they came up with, were 14 these -- other than Mr. Patton, he is the one in the 15 middle that's a waste tube, the rest of these were 16 complicated designs that never came to market, that needed 17 a lot of parts, hard to make, expensive, disruptive to the 18 nurses. 19 The thing they now point to, Trap Door 1, 20 isn't -- you can look through the patents all you want. 21 You are never going to find this figure because it's not 22 what they patented. Even making -- putting aside the fact 23 that they came up with this having looked at the Lock and 24 the Jet for a long, long while. Or pardon me, the Lock at 25 that point in the prior art.
1845 1 Dr. Antonsson walked you through it and said 2 there's no written description of the invention. 3 So how about prior art, the Rogers work? That 4 means anything that came before, anything in the world 5 before the priority date, so those dates really matter. 6 Their date's 2018; our priority date is 2016. 7 They had a demonstrative -- I don't know if you 8 recall this -- with Mr. Rogers on the stand. I said, 9 okay, well, they kind of left off some key stuff. Where 10 is your date? 11 We drew a flag in 2016 because it came first. 12 Their own expert, Dr. Meinhart, admits -- this is what I 13 said when I started: "There is no dispute over these core 14 facts. Kurin and Bob Rogers came first in the timeline?" 15 He agrees. 16 And the prior art that's in this case shows 17 DTX-7, DTX-11 and the Lock itself all predate Magnolia's 18 work. 19 There was the suggestion that, well, nobody's 20 going to put these things together, nobody would combine 21 them. The jury, you, will be instructed by the Court on 22 what's level of ordinary skill. The last sentence is, I 23 think, an interesting one: A person of ordinary skill is 24 a person of ordinary creativity that can use common sense 25 to solve problems in this field. Meaning they're not	1846 1 unable to look around them, they're not unable to look at 2 other things, they're not unable to say, okay, if I look 3 at Figure 23 and I look at Figure 24, I'm an engineer, I 4 can understand that's a valve, valves are also plugs and 5 seals and other fluid-control devices. 6 And you heard Dr. Antonsson say: "Well, why 7 would someone combine the Lock with Figure 23?" 8 Well, because the Lock told you, okay, wait for 9 the blood to stop, and you knew you wanted to streamline 10 nurses' procedures. So you said, well, how can we 11 accelerate that? What can we do? 12 Dr. Meinhart and Mr. Block both said, well, if 13 this was so obvious, why didn't Kurin just do it? Except 14 you heard testimony that they did. Mr. Nason said: 15 Mr. Rogers gave me Figure 23B of his patent, '682 patent, 16 which is prior art, and a Lock and we started rigging 17 something up. And he showed you -- I don't know if you 18 remember this -- on the right it looks like a cooler as a 19 prototype that he made. You didn't see stuff like from 20 Magnolia where they were actually making stuff, actually 21 testing things, actually designing product. They have a 22 lot of CAD drawings and they file a lot of patents and 23 then they have two products that don't look anything like 24 those. 25 Took him two days, two days to go from the

1847 1 Figure 23 and a Lock to designs for what would become 2 Dakota or a Jet. They had the work. It was their own 3 work. They continued to build on it, and it would make 4 total sense to combine them because that's actually what 5 happened. 6 They also -- Mr. Rogers, in 2017, had an idea 7 for how we can do this automatically. That's Figure 23 of 8 the Rogers '445 application, which is also prior art. And 9 you saw various explanations of how this works. And what 10 it does is it addresses all of the claims, first of all. 11 These prior references go across all claims. 12 Let me show you -- let's talk about pressure 13 differentials, because Magnolia's argument is Figure 24 14 doesn't actually show a valve opening in response to a 15 pressure differential. Well, even Mr. Bullington says, 16 okay, people have been using pressure differential to move 17 fluids for a long, long while. Sure. 18 What about the claim language itself? Are 19 these claims -- are the claims of -- again, we will look 20 at the actual claims. 21 Magnolia's patent, are they invalid? Well, 22 they admit most of it is in the prior art. And then the 23 question mark, the disputed part is, okay, is there a 24 movable plug that responds to a pressure differential? 25 They say, well, the words aren't always there. Sometimes	1848 1 the prior art says valve or a plug. Mr. Meinhart himself 2 says, okay, sometimes you call it a valve, a plug, a 3 stopper, a closing mechanism. To engineers, those are all 4 ways to control fluid. They are all synonyms. 5 How about Rogers '445, does it have a movable 6 plug? Well, it has a valve. That can be a valve or any 7 type of closing mechanism. 8 And then, in Figure 24C, you saw this with 9 Dr. Antonsson's testimony, what an engineer, when they 10 look at the figure, would understand it to mean. And 11 there's a sliding chamber, and as the pressure builds in 12 that chamber, the force on it, it slides open and the 13 valves open up, and that is a movable plug. That 14 limitation is met in the Rogers '445. 15 And does it respond to a pressure differential? 16 Dr. Meinhart himself said, "Yeah, I do remember now that 17 the inner housing, 24, moves in response to a pressure 18 differential." 19 And when -- his own analysis, he said, "Look, 20 here's how I think it works. The flow comes in, it stops, 21 and the force between the barrier and the outlet," meaning 22 the force or the pressure inside the chamber from the 23 other side, the vacuum side of the chamber, "causes it to 24 move." That is a pressure differential. 25 Dr. Antonsson says the same thing. Blood and
1849 1 the pressures that apply would provide a force to move it 2 to the second state. 3 So the evidence from both experts and fact 4 witnesses is that the '445 disclosure has a movable plug 5 in response to a pressure differential. All -- the 6 independent claims are invalid, all of them, based on 7 Rogers '445, as well as the Lock plus the '682. 8 So what does that mean for all these dependent 9 claims? All the spaghetti that they want? Like, this is 10 why you bring 12 claims, because you think, okay, maybe 11 one will sink through. 12 First of all, there's -- that covers all of 13 them except the one limitation of an elastomer. So all 14 that other stuff falls down with it. 15 And then we said to Dr. Meinhart, hey, wait, at 16 the time in question, you knew what an elastomer was. 17 It's a silicone, it's rubber, it's essentially any product 18 like that. 19 And he said -- he originally said there were no 20 elastomeric valves at the time at Kurin. Except, then he 21 was forced to admit, "Yeah, there's one in the Lock." 22 So there's no need to go to other prior art, 23 although we've identified it as well, showing that 24 everybody knew. 25 It is as if you came up with an idea and you	1850 1 put a bulb in it, and then you said, "Well, what's your 2 proof that people knew about bulbs?" You say, "Well, 3 Thomas Edison." And then they came and said, "Well, 4 that's really old, though." Yeah, because everyone has 5 known about bulbs for a long, long while. That's what an 6 elastomer is. 7 All the claims are invalid over the Rogers 8 prior art. 9 So why are we here? What's going on? Well, 10 we're here because from the get-go, Magnolia's business 11 and Mr. Bullington's approach has been about -- focused on 12 money. What do I mean by that? He is a finance guy who 13 decided to get in this space and found Magnolia. Well, 14 what was the goal? From the get-go, it was, okay, let's 15 raise some money, let's come up with some ideas, then 16 let's sell it. That's what people do when they start up 17 businesses. And he had his own M&A playbook, notably with 18 Mr. Rogers' company on it. 19 Part of that strategy was get as many patents 20 as you can because they thought it would help them seem 21 more valuable. And Mr. Gaw was a carefully worded guy. I 22 don't know if you remember that. And I said, "Well, hey, 23 wait a minute. Do you think all this stuff is 24 patentable?" 25 He's like, "Well, you know, I have a different

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1 view maybe than Mr. Bullington on patents."
 2 Mr. Bullington's view is, "Let's file more applications.
 3 Let's see if we can get even more patents."
 4 Mr. Gaw is like, "Yeah, there is a difference
 5 between us."
 6 Mr. Gaw's view, presumably, is, "We have to
 7 actually invent something before we go get more patents on
 8 it."
 9 **THE COURT:** Mr. LoCascio, you have 15 minutes.
 10 **MR. LoCASCIO:** Thank you, Your Honor.
 11 So during their time there, how was this
 12 strategy working out for Mr. Bullington? Well, they
 13 raised and lost over \$100 million with this strategy. How
 14 did they view competition? Are they going to leverage the
 15 strategy?
 16 You saw an e-mail, it's DTX-351, when they
 17 first saw Kurin's product. You may remember the
 18 discussion about the Stone work. Mr. Stone had already
 19 come up with a product called Clean Collect, and it was to
 20 use waste tubes, basically, but they would be hermetically
 21 sealed and it would be more sterile and it would be easier
 22 for nurses to draw that first aliquot of blood off.
 23 Internally, they are having conversations.
 24 Well, we have got to kill off competition from what they
 25 call the lower end of the market, meaning easier to make

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1 could sell this business for a whole lot more."
 2 And what you saw was, okay, well, that didn't
 3 really work out.
 4 And let's go to Slide 142, Mr. Urban.
 5 Because Mr. Bullington came in here -- he's
 6 been here every day -- and everybody acted like he was
 7 still running the show over there. He talked a lot on
 8 direct how, "We are doing this and we've got these plans
 9 and we are going to make this happen."
 10 Except, you may remember, I asked him on
 11 cross-examination, "Hey, you kind of left out a really big
 12 fact." He got fired in July of 2025 because this strategy
 13 wasn't a good one. They weren't doing well in the
 14 marketplace, and they had been hemorrhaging money.
 15 So what did they do there? How does Magnolia
 16 operate? They decide to pay Mr. Bullington about \$650,000
 17 as part of that, and they agree to pay him to come here
 18 and purport to be the Magnolia representative, except you
 19 may have noticed -- back to 141 for me, Mr. Urban. 141.
 20 You heard from three witnesses on the Kurin
 21 side. They all told you the truth; they were credible
 22 with you. They answered the questions even if they didn't
 23 think the answer was going to be good for them. On the
 24 flip side, Mr. Bullington did the opposite. But notably,
 25 both witnesses they called, neither of them works for

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1 cheaper, lower priced products. Ultimately, that's what's
 2 better for customers. That's the market Kurin has met.
 3 They wanted to get rid of that competition.
 4 So they talked about something that rings
 5 pretty true here today. We'll need to consider a legal
 6 attack on Stone if that happens. They were pretty candid
 7 internally. They didn't think anybody would ever see this
 8 e-mail. It may not work because it could kill his patent
 9 protection and, perhaps, ours because people may find that
 10 their patent and his were invalid.
 11 But it will still -- it will require a bunch of
 12 money from him. What does that mean? That means these
 13 things cost money, they take years, and you can try to
 14 bully people or push them around and say, "I'm going to
 15 file lawsuits 'I'm going to file a lawsuit. I'm going to
 16 get as many patents as I can, whether they are valid or
 17 not, whether they are my idea or your idea, and then I'm
 18 going to sue you." It's going to cost a bunch of time and
 19 effort to defend. They admitted this is what they wanted
 20 to try to do to their competition, whether it would work
 21 or not.
 22 Why would they want to eliminate competition?
 23 In some businesses, you'd say they want to sell more
 24 product. That wasn't Mr. Bullington's approach. It was,
 25 "If we could become exclusive, market exclusivity, then we

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1 Magnolia. Mr. Gaw is a freelancer, Mr. Bullington has
 2 been fired.
 3 So for this whole case, for all it's worth, and
 4 everybody here, they had two paid experts and two paid
 5 witnesses, both who admitted while they were testifying
 6 they were being paid hourly for it.
 7 145, please, Josh.
 8 Mr. Bullington said for each day he was here,
 9 while we were all here, he was making \$2,100 a day to come
 10 in here, toe the party line, and tell you what they want
 11 you to hear. Why? Well, one, I think he's got -- you
 12 know, this was his idea, it failed, the business lost
 13 money, and he's here to try to defend that. But more
 14 importantly, he negotiated, in that same deal where he got
 15 650 grand and 200 bucks an hour plus 500 a day, that his
 16 options -- he has a quarter of the company's options. And
 17 even though he was terminated, they wouldn't go away. He
 18 would have three more years to see, if they could get
 19 Kurin out of the market, sell this business. He could
 20 pocket a lot of money.
 21 There's one fact in here that's pretty telling.
 22 There's a date where the board of directors is going to
 23 decide if they extend his options or not. It's Thursday
 24 of this week. That's not a coincidence, ladies and
 25 gentlemen. Not a coincidence at all. They could have

1855 1 just approved it when they signed this deal. They didn't. 2 They wanted to have some stick. There's a carrot and a 3 stick. The carrot is the money, the stick is, "If you say 4 stuff we don't like, we will take the money back or maybe 5 we don't approve the options." 6 So let's look at witness credibility, 7 generally. You saw Dr. Meinhart. You saw 8 Mr. Bullington's inability to answer. 9 Mr. Miazga, I don't know if you remember this 10 from the video, "Do you have some challenges getting the 11 device to work?" 12 "You really need to define 'work.'" 13 "Do you have some challenges getting it to 14 function?" 15 "I mean, I'd ask the same thing. I really need 16 to know what you mean by the word 'function.'" 17 "Do you have some challenges getting it to 18 function properly?" 19 "The word 'properly' is even more subjective 20 and vague." 21 These are not people who are here to tell you 22 the truth. These are people who are trying to convince 23 you to agree with them, and with disregard for the truth 24 and credibility. 25 Slide 123, please, sir.	1856 1 So what's the remedy here? Well, Kurin's 2 patents infringed by Magnolia. There's no credible 3 evidence to the contrary. The patent is valid. Damages 4 are to be awarded. If you find infringement and the claim 5 is valid, you must award some damages, either in lost 6 profits or reasonable royalty. 7 We contend it is a lost profits case. Why? 8 Well, first of all, it's 9.958234 as the lost profits 9 amount. How do you get there? Well, there are 10 1.334 million units sold. If it was a royalty, it would 11 be a dollar a unit, but it's not. It's lost profits 12 because Ms. Distler walked you through the factors, and 13 those factors are all met here. We're not going to 14 belabor them, but the Jet is successful. 15 The question at hand is if the Micro wasn't 16 available, what would people use? Well, Ms. Distler said 17 they would use a Lock or Jet. 18 Magnolia says, "No, no. They would go back to 19 this guy." The one they are discontinuing, by the way. 20 But they would go to this. That is not an acceptable 21 non-infringing alternative, which is why lost profits are 22 appropriate. 23 Of the 1.334 million units sold, you heard 24 evidence that Kurin has the capacity, would have made 25 those, and even after paying costs to do so, would have
1857 1 made \$9.9 million in profits. 2 Mr. Napper came up during Mr. Block's 3 discussion, and on their side, Mr. Napper's credibility I 4 think is also -- rides about the same as Dr. Meinhart's 5 and Mr. Bullington's because -- 6 Go to 135, please, Josh. 7 -- he somehow says the Gen2 would be a 8 acceptable non-infringing alternative in this case, in 9 this market. People might go there if one product was 10 taken off the market. But he says the Lock is not, even 11 though the Lock is far more advanced and well-received and 12 still used by millions of people. 13 He, when asked to figure out how much is this 14 worth, he's trying to get to a really low number for 15 Kurin. He says, well, I'm just going to look at the lower 16 part, that little plastic part that's in pink. That's how 17 he did his math. 18 He used what was admitted in evidence. The 19 only evidence is Kurin is fully automated. Except does 20 Mr. Napper used automated cost? No, he uses a bigger 21 number. 22 Why does he use a bigger number? There's one 23 obvious answer. Because it generates more damages for 24 them and less for us. And in his world, the two parties 25 would meet twice, close in time, and negotiate what they	1858 1 pay each other. And in his version of the hypothetical 2 negotiation, Mr. Rogers will come over, chat with 3 Mr. Bullington, he'd say, okay, I'm going to pay you \$3.05 4 for every one of my units sold. 5 Then they'd have another meeting. 6 Mr. Bullington would go over there and Mr. Bullington 7 would say: How about 29 cents? 8 And in their room, Mr. Rogers is, like, great. 9 I love that deal. That's a great deal. 10 This is not a credible hypothetical 11 negotiation. 12 THE COURT: You have about four minutes. 13 MR. LoCASCIO: Thank you, Your Honor. 14 I want to wrap up here for this portion with 15 the following. You heard something about honor and 16 integrity a minute ago. And the suggestion was, well, 17 Mr. Bullington was really comfortable in 2015 sharing 18 information with Mr. Rogers. 19 By the way, all he shared -- showed him was 20 this guy. Was -- he was talking about he told him he had 21 patents. That's 2015. There are no patents in this case 22 asserted or alleged by Magnolia from 2015. So this idea 23 that Mr. Rogers came and got those ideas and used the 24 things, but it was all good, Mr. Bullington, the finance 25 guy, didn't need an NDA because he had patents. Those

1859 1 patents aren't in this case. They are not even asserting 2 them here. 3 This is a case about two businesses but also 4 two businessmen. One who has been successful and one less 5 so. One who testified truthfully and one who did not. 6 One who built a product and a business that is winning in 7 the marketplace and one whose effort to do so didn't work 8 out and was fired because of it. 9 What is dishonorable is taking credit for 10 someone else's idea. What is dishonorable is to sue 11 someone for their use of their own idea. 12 The company, Kurin, Mr. Rogers, had great 13 ideas. They patented those. They disclosed them. 14 Magnolia then looked at those and tried to figure out how 15 they could come up with a plan because they couldn't 16 compete in the marketplace. So much so they didn't come 17 up with something that they could make it work, they took 18 CAT scans and made proxies and mimicked it. 19 Kurin inserted the Jet technology and you can 20 see it. Mr. Rogers showed it to you in the prior art. 21 The only dishonor here is that Magnolia has made Kurin 22 spend millions of dollars defending that idea. We believe 23 the evidence is clear and supports a finding for Kurin on 24 all issues in this case. But that is up for you to 25 decide.	1860 1 Now, Magnolia gets to say a few more words and 2 then I will have a brief opportunity to respond. Thank 3 you very much. 4 THE COURT: Mr. Ramani. 5 MR. RAMANI: Is it okay if I give Mr. LoCascio 6 a moment to move some stuff and I also move this lectern 7 out of the way? 8 THE COURT: Sure. 9 MR. RAMANI: Great, thank you. 10 MR. LoCASCIO: It's heavier than it looks. 11 12 MR. RAMANI: It is a workout. 13 May I proceed? 14 THE COURT: You may. 15 MR. RAMANI: Your Honor, thank you. 16 Good morning. This past weekend was lovely. 17 The snow was wonderful waking up on Sunday near Christmas 18 and seeing snow covering all the trees. We had about 19 4 inches on the ground where we were. A good amount but 20 maybe could have been more. 21 It wasn't the first snowstorm, however, that 22 the eight of you have been hit with. As you just saw in 23 this closing argument, and as you heard all last week, 24 Kurin has been trying to white you out with as much 25 irrelevant information as they possibly can. It appears
1861 1 to be that they think that's the only way for them to 2 prevail in this case. 3 You've been paying very careful attention. 4 We've seen. Many of you have taken notes. Those of you 5 who haven't, you have been watching the witnesses. You 6 can decide who you think should be believed. 7 You only need to know four points to find 8 completely for Magnolia. Just four. Let's cut through 9 all of that that you just heard. 10 Point Number 1: Magnolia was the first in the 11 world to come up with the concept of using a movable plug 12 or valve that moves based on a pressure differential from 13 the bottom of the plug and the outlet to allow the clean 14 blood to flow and the dirty blood to stay down here when 15 the plug pops. This is not in dispute. This was from 16 December 2017, the IP update presentation that 17 Mr. Bullington and Mr. Gaw spoke with you about. 18 Now, an attempt has been made to say, no, no, 19 Magnolia didn't actually come up with this. You can see 20 it. You heard the testimony about it. That's Point 21 Number 1. 22 Point Number 2 is that Kurin admits they 23 infringe. Mr. Rogers, could you please stand up. Thank 24 you, sir. You can sit down. I just wanted to make sure 25 that you knew he was still in the courtroom, because you	1862 1 saw 155 slides from his lawyer, didn't talk about the guy 2 once. 3 Can I get the document camera, please. Thank 4 you. 5 Do you wonder why? Well, let's see what 6 Mr. Rogers testified. 7 "Why do you say that it looks like the '081 8 patent is attempting to cover the Jet? 9 "ANSWER: I just look at the claims. 10 "QUESTION: Doesn't that suggest to you that 11 the Jet infringes the '081 patent? 12 "ANSWER: The third element is a movable plug 13 disposed in the housing. Yes, that suggests the Jet." 14 You've seen this several times. That's the 15 ballgame. He has conceded infringement. Preponderance of 16 the evidence, 51/49. We don't need to show you a thing 17 more than that testimony for to you find for Magnolia. 18 Now, we focused on the second question and 19 answer a lot, but the first one is worth your attention as 20 well. 21 "Why do you say that it looks like the '081 22 patent is attempting to cover the Jet? 23 "I just look at the claims." 24 He looked at the claims of the patent and 25 that's what he said under oath. That's Point 2. They

1863 1 infringe. 2 Point 3 is that they started working with a 3 movable plug much later than Magnolia. We see this 4 document from them. Kevin Nason testified about this 5 document. This shows in May of 2020 the first time Kurin 6 started working with what they call a stopper, which 7 several of their witnesses admitted was the movable plug. 8 This is two and a half years after Magnolia. This is 9 nearly two years after Magnolia had already put its flag 10 in the ground in September of 2018. So is it any wonder 11 that Kurin's prior art that they say invalidates 12 Magnolia's patents doesn't do so? 13 It can't. They only started working with this 14 stopper years later. Think about it. 15 That leads to the fourth point. Now, there was 16 a suggestion, and you heard this a lot during the prior 17 closing, "Magnolia witnesses, they admitted infringement. 18 They admitted they infringed Kurin's patent." 19 Well, let's actually take a look at what 20 Mr. Gaw said here just about one point about the button in 21 the Steripath Micro. 22 "So, Mr. Gaw, you were shown this demonstrative 23 and you said during questioning the button is required. 24 What did you mean? 25 "ANSWER: This line drawing that's just, again,	1864 1 pointed here, the only way for that to hold true is with 2 this button in place and in position. 3 "You said 'in position.' What did you mean by 4 that? 5 "It starts with the button out. In this 6 position, there's a flow path that fills or helps fill it 7 up. It gets filled. It gets filled up with the blood, 8 you push the button. It's only until you push the button 9 that the sampling channel opens up. Prior to that, there 10 is no sampling channel." 11 That's it. Without that button, there's no 12 sampling channel. Full stop. So Magnolia is not using 13 Kurin's patent. And it shouldn't be a surprise because as 14 you saw, Kurin only got the patent to retaliate against 15 Magnolia. 16 And Mr. Rogers wouldn't even admit -- you want 17 to talk about credibility? You watched all the witnesses 18 testify. He wouldn't admit when I was cross-examining him 19 that that was why they filed for the patent. No, he said, 20 oh, it was a just a coincidence. The timing was 21 coincidental that we applied for this thing. 22 Those four points, you can find for Magnolia 23 across the board in this case. 24 So where does that leave us? Mr. Block said 25 that you learned all you needed to know about this case
1865 1 ten years ago from that lunch in the fish market. One 2 side approached it with humility, another side approached 3 it as a predator. So is it any surprise that when 4 Magnolia saw that the Kurin Jet came on the market, within 5 eight days, Mr. Bullington wrote Mr. Rogers a letter and 6 Mr. Bullington asked Mr. Rogers, "Hey, can you give me 7 some samples? And do you happen to have -- to know about 8 these patents of mine?" 9 And he identified the two patents for him. And 10 what did you hear that Mr. Rogers did once that happened? 11 Absolutely nothing. 12 You see that right here. Mr. Bullington 13 identified the patents. Mr. Rogers didn't do any kind of 14 freedom to operate as he had done before he launched the 15 Kurin Lock, and you saw why. As soon as he saw the '081 16 patent claims, he knew the Jet infringed and then they got 17 their patent in retaliation. 18 I said at the very beginning of this case that 19 we're the only country in the world that has juries handle 20 patent cases. We think that's a good thing. It's an 21 important thing. It's in your hands to decide how this 22 case should end. Kurin has been competing unfairly 23 against Magnolia, using Magnolia's own intellectual 24 property since February of 2023. Since Magnolia put them 25 on notice and they did nothing different. They put profit	1866 1 over principle from the start. The only question is are 2 you going to let them get away with it? 3 THE COURT: All right. Mr. LoCascio. 4 MR. LoCASCIO: If you recall, I said 5 credibility matters. Look at the actual testimony. You 6 were just shown a piece of Mr. Rogers' testimony. We 7 talked about Mr. Rogers a fair amount. His work, his 8 invention, his idea. During my examination, the 9 suggestion was made. Nobody ever talked to Mr. Rogers? 10 Mr. Ramani showed you this language he likes 11 from Page 467 of the trial transcript right above the 12 highlight. Except what he never showed you was the line 13 right after that where Mr. Rogers was asked: So it's your 14 understanding, again, as a layperson -- Mr. Ramani asked 15 him -- as CEO, the '081 covers the Jet? 16 He says: I disagree. I disagree. 17 Okay. Well, maybe they probably should have 18 shown you that. But he also then pointed out, I think 19 it's trying to patent something that already existed 20 because he knew that he had come up with the first 21 automatic blood diversion device and it used a movable 22 plug. 23 Now, notably, Kurin has such a product. They 24 have a product that they've made that actually does this. 25 Well, you saw this blow-up -- I'm sure it's down here --

1867 1 from Mr. Ramani a couple of times now. They are putting a 2 lot of weight on this drawing. They say, well, in 3 December 2017 we had something. Except you can look all 4 you want in their patents, you're not going to find this 5 figure. It's not there. 6 They also never showed you a prototype, any 7 indication they ever made it. Mr. Block and Mr. Ramani 8 have said they are the first to use a pressure 9 differential with a movable plug. No, they didn't put on 10 a single piece of evidence that they ever used, made, or 11 showed anybody a device like this. Never once. Yet they 12 say they invented it. 13 If magnolia actually came up with this idea, 14 why didn't any witness come explain how they came up with 15 it or show you anything indicative that they had? 16 They want to claim now they invented the idea 17 of a movable plug. The claim language is specific. You 18 get an invention, you heard that the first day, it will be 19 in the Court's instruction, the language of the claims is 20 the scope of their invention. They didn't invent a 21 movable plug. They invented a particular series -- they 22 claimed a particular series of steps. 23 Are those steps met or not? And they want to 24 point to their disclosure, Column 66. You can look at 25 Column 66 all you want, there's no version that gets	1868 1 anywhere near what they say they invented. 2 The suggestion of how should people conduct 3 themselves, Mr. Bullington, Mr. Rogers, you saw during 4 trial a video clip from Mr. Rogers' deposition that was 5 played and is now in the trial record. 6 Mr. Urban, can we run that. 7 (Deposition designation of Bob Rogers plays as 8 follows: 9 Q. If it were up to you, how would this lawsuit end? 10 A. If it were up to me? 11 Q. If it were up to you. 12 A. Well, I would start with no loss to Kurin. We're 13 still in the market. How would I like for it to end? I'd 14 like for us to just shake our hands today and cease these 15 stupid litigation activities, both ways. 16 Q. You feel like the litigation activity is stupid? 17 A. I generally do, yeah, because people are stretching 18 the meaning of whatever they invented -- I'm talking about 19 your side -- and attacking us. And I think that the way 20 this should work is the market should dictate who's the 21 winners and the losers. 22 Q. So you think Magnolia is stretching the meaning of 23 what they invented as part of this lawsuit? 24 A. Absolutely. 25 (Conclusion of videotaped deposition excerpts of Bob
1869 1 Rogers.) 2 MR. LoCASCIO: Mr. Rogers was spot on. They 3 are stretching what they invented, but they are also 4 stretching the facts. One -- two e-mails and a lunch has 5 now been turned into some, "Well, we shared all our 6 secrets with you and you are a predator." 7 These are two businessmen, one who twice 8 reached out and said, "Hey, will you be on my board? Will 9 you invest in my company? Want to have lunch?" 10 Mr. Rogers, you saw the evidence, said, "I'm not really 11 interested. If you are going to be down here, fine, but 12 don't come down just for me." Mr. Bullington went and 13 showed him the product, and he said, "I think it's too 14 complicated." 15 That's the extent of their relationship, yet 16 now, maybe, just maybe, because they know their patent 17 case is really weak and their patents are invalid, they 18 are now trying to spin this yarn of, "I was taken 19 advantage of. I was just taken advantage of by this 20 successful businessman." Mr. Bullington knows exactly 21 what he's doing. It was in their earliest e-mails. 22 "Let's try to claim stuff we didn't invent. Let's sue 23 people so I can sell this business to make some more 24 money." 25 We believe the evidence has shown, when you get	1870 1 your verdict form, that the answer should be in Kurin's 2 favor. But as you make your overarching decision of what 3 guides you on who came first for the patents in this case, 4 priority dates, Kurin's first. Prior art, Kurin is first. 5 The development of products, Kurin is first. 6 As you answer that, there are some exhibits you 7 may want to sort of look -- make sure you look at. I 8 think those are DTX-102, 180, and 296. But it's time for 9 you deliberate and answer these questions for yourself. 10 As I said at opening, Kurin has been waiting 11 two years for this trial, for Magnolia to be held 12 responsible, responsible for using Kurin's patented 13 inventions without permission, responsible for trying to 14 take credit for Kurin's work for years, and responsible 15 for trying to salvage its sagging business by litigation 16 instead of innovation. 17 We respectfully ask you return a verdict for 18 Kurin, protect actual innovation and fair competition in 19 this country. Thank you very much. 20 THE COURT: All right. Give me one second. 21 We're going to hand out now the jury 22 instructions and we are going to hand out verdict sheets, 23 or a verdict form. 24 MR. RAMANI: Your Honor, may we briefly 25 approach?

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1 **THE COURT:** Sure. While that's being done, I'm
2 just going to speak to the lawyers.

3 By the way, your lunch is here. I assume it's
4 probably better, let's get through the jury instructions
5 and then you control the calendar. All right. Thank you.
6 (Whereupon, the following occurred at sidebar:)

7 **THE COURT:** Mr. Ramani.

8 **MR. RAMANI:** Your Honor, we request a curative
9 instruction based on --

10 **THE COURT:** Which curative instruction?

11 **MR. RAMANI:** Curative that Magnolia doesn't
12 practice any of its patents, as was said by Mr. LoCascio
13 during his closing.

14 **THE COURT:** I didn't think what he said in any
15 way suggested that that was a grounds or a basis for them
16 to find infringement, no infringement, invalidity, or...
17 Well, with infringement. And I think it's relevant for
18 invalidity. It's relevant for credibility, which both of
19 you emphasized throughout. I think both sides made this
20 very personal. They tried a case that was largely a
21 non-patent case. I understand why they did that. I think
22 you received a very fair trial, both sides. I'm convinced
23 of that more than ever, as I listened to it.

24 By the way, the closing arguments -- Mr. Block
25 is not here -- they were really superlative. I just

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1 commend counsel, and I commend counsel just generally for
2 the way this trial was conducted by both sides. It was
3 very enjoyable to watch the quality of the
4 professionalism.

5 But I'm not going to give a curative
6 instruction.

7 **MR. RAMANI:** Thank you, Your Honor.
8 (Whereupon, the discussion at sidebar concludes.)
9 - - -

10 **THE COURT:** All right. So we're stapling the
11 jury instructions because they are thick. I don't want
12 you to lose them.

13 So you've got already, though, the verdict
14 form. It's pretty self explanatory. Well, let's cover it
15 first, all right?

16 So when you go back... Now, by the way, sir,
17 you are seated as Juror Number 1, and by tradition, that
18 means you are the foreperson, but however you all discuss
19 back there is up to you, but what does matter for the
20 foreperson for sure is, as I'll discuss when we talk about
21 the instructions, is if there is a note, then you will
22 sign it. And the ultimate verdict form is signed in our
23 courtroom just by the jury foreperson. Your signature
24 will be redacted and never seen in the public, so nobody
25 will know your name or anything like that based on that,

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1 but that's how we do it.

2 All right. Now, here come the instructions.

3 We will hand that out.

4 So as you look at the verdict form, because it

5 is going to be a better way to start, these are the

6 questions that you have to answer. Now, based on your

7 answer to certain questions, as you see when you go

8 through the form, you may or may not have to answer other

9 questions. It's very self explanatory.

10 Does either party want me to read the verdict

11 form? I had no intention of doing that because I think

12 it's self explanatory.

13 **MR. RAMANI:** Not necessary from our side, Your

14 Honor.

15 **MR. LoCASCIO:** Same, Your Honor.

16 **THE COURT:** You are a very attentive jury. I

17 have noticed that. It's a good thing.

18 So just read the instructions. One thing I

19 want to point out to you, just look at the first question,

20 and you will see this with all the questions, it's in this

21 question, Number 1, "Did Magnolia Medical prove, by a

22 preponderance of the evidence, that," and then things that

23 follow, right?

24 And then you will see the same when it comes to

25 the counterclaims that Kurin asserted. And you heard both

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1 attorneys speak to this, actually, all three attorneys
2 speak to it, that goes to the burden of proof. That's
3 very important in law, right? It's not like... This is
4 not a question of your opinions. This is... The question
5 is, your opinion, did a party meet its burden of proof
6 with whatever the particular issue is.

7 And in a patent case like this, there's two
8 different burdens of proof. So when it come to
9 infringement, and both sides are alleging infringement
10 against the other, right, the burden of proof is by a
11 preponderance of the evidence, all right?

12 And a preponderance of the evidence, remember I
13 told you at the very beginning, it's as if you had...
14 looking at a scale, right? An old fashioned butcher
15 scale, right? And for whoever has the burden of proof,
16 they have to tip the scales just slightly in their favor
17 to meet their burden.

18 And if that party who has the burden tips the
19 scales, if you look at the evidence and you think that
20 that party has tipped the scales slightly in its favor,
21 that party wins.

22 Now, if you decide it's 50/50, the evidence is
23 50/50, or they didn't tip the scales in their favor, went
24 the other way, then that party loses, all right? It's
25 kind of baseball analogies, tie goes to the runner. The

1875 1 runner is the party that's accused, right, of something 2 when it comes to burden of proof, all right? 3 Now, for the invalidity, and both parties have 4 asserted the invalidity cases, it's a higher standard of 5 proof. It's by what we call clear and convincing 6 evidence, all right? In that, the question is, is it 7 highly probable? Did the party prove that what they say 8 happened is highly probable to you, right? 9 It's not proof beyond a reasonable doubt. 10 That's reserved for criminal cases. That burden of proof 11 is not before you here, all right? And your job is to 12 apply the burden of proof to the facts as you saw them and 13 decide did whatever party who had the burden meet its 14 burden. 15 Let's go through the verdict form, sorry, the 16 instructions now. Now, a lot of these, I've already read 17 you and you have your preliminary instructions back with 18 you. Let's walk through these. You are going to have 19 these instructions with you. 20 So this is when I instruct you about the law, 21 and please listen carefully to what I say. And then also, 22 as I say, if you are back there discussing it and you need 23 to think about what was the law, it's right here for you. 24 Let's talk about your duties on Page 5. So you 25 have two main duties. First, you decide what the facts	1876 1 are from the evidence that you saw and heard in court. 2 And, again, that's your job, that's not mine. Nothing 3 I've said or done during this trial was meant to influence 4 your decision in any way. You are the sole judges of 5 fact. 6 Your second duty is to take the law that I give 7 you, apply it the facts and decide, under the appropriate 8 burden of proof, which party should prevail on each of the 9 claims and defenses presented. 10 Now, you took an oath. You are bound by oath 11 to apply the law that I give you. Even if you don't think 12 that's what the law should be, you have to apply that law. 13 The law is these instructions and what I gave you earlier. 14 And perform your duties fairly. I told you 15 that at beginning. Do not let any bias, sympathy, or 16 prejudice that you may feel toward one side or the other 17 influence your decision in any way. 18 The burden of proof I've covered, I think, 19 right? And, you know, we've got... Just remember, they 20 both have infringement and invalidity claims. Magnolia 21 has asserted three patents against Kurin. Kurin has 22 asserted a patent against Magnolia, right? 23 Both sides have challenged and made defenses 24 with respect to the validity of the patents that were 25 asserted against that particular patent... party, and we
1877 1 talked about what the burden of proof for that is. Is it 2 clear and convincing, is it highly probable in your 3 estimation, and it's not beyond a reasonable doubt, all 4 right? 5 Let's go to Page 8. So, again, I covered this, 6 but the evidence is limited to what I admitted into 7 evidence. It's the witness testimony that you heard live 8 and through the depositions. It's the exhibits that I 9 introduced and that you are going to have with you. It's 10 not the demonstrative exhibits, you know, the fancy 11 beautiful PowerPoints and the charts and all that. I 12 mean, that's demonstrative, and so the attorneys can use 13 it to try to assist you interpreting the evidence, but 14 that's not the evidence. 15 Don't let rumors or suspicions or anything 16 else, don't let anything you heard outside the courtroom, 17 although all you said you didn't hear anything, which is 18 great. 19 Use your common sense. That's why we have 20 juries. You bring the community's common sense to this 21 proceeding. So weigh the evidence in view of your common 22 sense. That means view it in light of your everyday 23 experiences with people and events to give whatever weight 24 you think the evidence deserves. And if your experience 25 tells you that certain evidence reasonably leads to a	1878 1 conclusion, you are free to reach that conclusion, all 2 right? 3 I think we talked about this already, 4 objections, all that legal stuff, that's not evidence. 5 And don't hold it against anybody for objecting. My 6 rulings are all legal issues. Don't let that influence, 7 in any way, what weight or not weight to give a particular 8 piece of evidence, except to the extent I instructed you. 9 Let's say if I sustained an objection, so that means, you 10 know, you were supposed to agree that the question 11 shouldn't be put, all right? If I overruled it, it came 12 in. 13 Next page, 10, we talked about direct and 14 circumstantial evidence. You remember the rain, right? 15 Direct is coming out of the witness's mouth, "I observed 16 something." Circumstantial is you put things together and 17 you draw conclusions based on your everyday experience. 18 The law doesn't distinguish between those two types of 19 evidence. You can give as much weight to circumstantial 20 evidence as to direct and vice versa. You are the one who 21 decides what weight to give evidence. 22 Next, credibility of the witnesses. 23 Credibility is a question of fact. You are the sole 24 judges of witnesses' credibility. And you can believe 25 everything a witness said, part of it, or none of it. You

1879 1 should consider for each witness the means of knowledge of 2 that witness, their strength of memory, how reasonable or 3 unreasonable that witness's testimony was, was the 4 testimony internally consistent or not, was it consistent 5 with other evidence that you thought was credible, was it 6 inconsistent with other evidence you thought was credible, 7 did the witness have any biases or prejudice or interests 8 in the outcome of the case, what about the witness's 9 manner or the demeanor on the witness on the stand or on 10 the video? Those are all circumstances that can you 11 consider and you should consider in assessing a witness's 12 credibility. 13 And remember, it doesn't matter the number of 14 witnesses that a particular side had. I don't even know 15 if they had a different number. But it's all about: look 16 at each individual witness, assess that witness's 17 credibility, all right? And then give it as much weight 18 as you think it deserves. 19 Next is the exhibits and demonstratives. I've 20 covered that, right? 21 So now let's get to the issues presented, 22 Page 13. So Magnolia Medical contends that Kurin 23 infringes its asserted patents by making, using, selling, 24 and offering for sale in the United States the Kurin Jet, 25 and by inducing others to use it.	1880 1 Kurin denies that it is infringes Magnolia 2 Medical's asserted patents, and it says that the asserted 3 claims of those patents are invalid. And if you find that 4 Kurin infringes any valid claim of Magnolia Medical's 5 asserted patents, you would need to decide at that point 6 monetary damages to be awarded to compensate Magnolia 7 Medical for that infringement, all right? 8 For purposes of assessing infringement, 9 invalidity, and damages in this action, all Kurin Jet 10 products are identical. So if you saw something in an 11 exhibit that talked about different model numbers or 12 something like that, they are all the same for purposes of 13 infringement, invalidity, and damages. 14 Kurin contends that Magnolia Medical infringes 15 the Kurin-asserted patent by making, importing, using, 16 selling, or offering for sale in the United States 17 Magnolia Medical's Steripath Micro, and by inducing others 18 to use it. 19 Magnolia Medical denies that it infringes the 20 Kurin-asserted patent and further contends that the 21 asserted claims of that patent are invalid. 22 If you find that Magnolia Medical infringes any 23 valid claim of the Kurin-asserted patent, you will need to 24 decide any monetary damages to be awarded to Kurin to 25 compensate it for that infringement.
1881 1 And, again, here, same thing, for purposes of 2 assessing infringement, invalidity, and damages in this 3 action, all Steripath Micro products are identical. Same 4 thing, if there happens to be back there different product 5 numbers, whatever, you can treat it as, essentially, one 6 product, all right? 7 Now, let me summarize the issues you've got to 8 decide, and then we will follow with some more specific 9 instructions. 10 Let's start with the three Magnolia-asserted 11 patents. That's the '081, '863, and '709, right? 12 The first issue is whether Magnolia Medical has 13 proven by a preponderance of the evidence that Kurin 14 directly infringes any of the following claims. So they 15 are going to be in the verdict sheet, so don't worry, you 16 don't to have memorize them. They are here in the 17 instruction and they are in the verdict sheet. 18 So for the '081 patent, it's Claims 12, 13, 15, 19 16, 17, and 18. 20 For the '863 patent, it is Claims 26, 27, and 21 28. 22 And for the '709 patent, it's 12, 16, and 17. 23 Issue 2, whether Magnolia Medical has proven by 24 a preponderance of the evidence that Kurin induced others 25 to infringe any of the following claims.	1882 1 And here, it's Claims 12 and 13 of the '081 2 patent. 3 Third issue when it comes to the Magnolia 4 Medical-asserted patents, whether Kurin has proven by 5 clear and convincing evidence that any of the following 6 claims are invalid. 7 And then it's all these claims, right? It's 8 Claims 12, 13, 15, 16, 17, and 18 of the '081 patent. 9 Claims 26, 27, and 28 of the '863 patent. 10 And Claims 12, 16, and 17 of the '709 patent. 11 Next, the last issue for these asserted patents 12 is whether Magnolia Medical has proven by a preponderance 13 of the evidence the amount of damages, if any, that is 14 adequate to compensate it for Kurin's infringement of 15 those patents. 16 Now let's turn to the one patent asserted by 17 Kurin, the '052 patent. So the issue here, the first 18 issue, is whether Kurin has proven by a preponderance of 19 the evidence that Magnolia Medical directly infringes any 20 of the following claims. 21 And it's Claims 1, 10, and 12 of the 22 Kurin-asserted patent. 23 The next issue is whether Kurin has proven by a 24 preponderance of the evidence that Magnolia Medical 25 induced others to infringe Claim 10 of that patent.

1883 1 The third issue for this patent is has... 2 whether Magnolia Medical has proven by clear and 3 convincing evidence that any of the following claims are 4 invalid. 5 And it's Claims 1, 10, and 12 of the 6 Kurin-asserted patent. 7 Lastly, the issue is whether Kurin has proven, 8 by a preponderance of the evidence, that the amount of 9 damages, if any, that is adequate to compensate Kurin for 10 Magnolia Medical's infringement of the Kurin-asserted 11 patent. 12 For both sets, you know, patents -- and you 13 will see this in the verdict sheet -- you only get to 14 damages if you find infringement. The verdict sheet will 15 walk you through it. 16 Okay. Now, let's turn to patent law, all 17 right? I gave you... you know, at the beginning, you had 18 the video and a brief overview. I'm going to give you 19 more detailed instructions now. Again, when you hear 20 this, don't forget you have it in writing when you go back 21 there, but it's good to listen and read along, all right? 22 So the first thing you need to understand is 23 the role of claims in a patent, and the patent claims are 24 numbered sentences and they are at the end of the patent. 25 Some of the sentences are long, but that's how we claim	1884 1 inventions. It's one sentence so it has a lot of clauses 2 a lot of times. It doesn't have to, but it can. 3 You will see it go to the very end of the 4 patent. They have got these names for each claim. 5 The claims are important because it is the 6 words of the claim that define what a patent covers. The 7 figures and the text and the rest of the patent are what 8 we call the written description, you've heard that word 9 used, they provide a description of the invention and they 10 provide the context for the claims, but only the claims 11 can be infringed. 12 So, and although you have heard discussions 13 during the trial as to embodiments or examples in the 14 patent description, a claim is not necessarily limited to 15 such embodiments or specific examples in the patent. 16 Now, each claim is made up of claim elements. 17 Sometimes we call them limitations. So it's limitations 18 or elements. And a claim element is another word for a 19 requirement of a claim. And a patent claim is only 20 infringed if each and every element of the claim 21 element -- or rather, if each and every element is 22 infringed, okay. 23 So, in other words, if you have an accused 24 product, the accused product, for it to infringe the 25 claim, would have to have each element, each requirement
1885 1 of the claim. All right? And if you had a method, let's 2 say, that was claimed, then that method, for it to 3 infringe the claim, would have to perform each and every 4 element of the claim. 5 Now there's two general types of claims. The 6 first we call independent claims. Then we have dependent 7 claims, which depend on or depend from the independent 8 claim, right? So you can't infringe a dependent claim 9 unless you also infringe the independent claim from which 10 the dependent claim depends. 11 All right. And an independent claim sets forth 12 all the requirements that must be met in order for an 13 accused product to infringe that claim, thus it is not 14 necessary to look to any other claim to determine what an 15 independent claim covers. You only look to that claim. 16 By the way, when you go back, what you're going 17 to see -- I don't know if you noticed it during the 18 trial -- but when you have a dependent claim, it literally 19 will say, you know, like, if it's a device and let's say 20 the independent claim is 1, and let's say for argument's 21 sake the dependent claim is 2, so Claim 2 will say the 22 product claimed in Claim 1 and then it will add 23 limitations. 24 All right. So you will see it. It's very 25 clear in the patent once you start looking at the patents.	1886 1 You're going to get this. 2 Now, a dependent claim then does not itself 3 recite all the requirements of claim, right, because it 4 refers to an independent claim for some of its 5 requirements. Or another claim. It could refer to 6 another dependent claim too. 7 In this way, the claim depends on another 8 claim. A dependent claim incorporates all the 9 requirements in the claim to which it refers and then it 10 adds additional requirements. 11 So to determine what a dependent claim covers, 12 it is necessary to look at both the dependent claim and 13 any other claim to which it refers. An accused product 14 infringes a dependent claim if the accused product meets 15 all the requirements of both the dependent claim and any 16 other claims from which the dependent claim depends. 17 All right. Let's go to Page 19 and this is the 18 construction of claim terms. 19 So it's my job as the judge to define any 20 meaning, or the meaning, rather, of any claim language 21 that must be interpreted. You must accept the meanings 22 that I give you and use them when you decide whether any 23 claim has been infringed or whether any claim is invalid. 24 So we've got here a list of terms I've defined 25 or to which the parties have agreed. So the first term is

1887 1 in the Magnolia Medical patents and that term is 2 "proximal." Okay? You will see that in Claim 22, from 3 which the asserted Claims 26, 27, and 28 depend. All 4 right? And again, it's in here so you can just use this 5 when you are walking through your deliberations. And I 6 have construed that term "proximal" to mean the direction 7 closer to a user who would place the device into contact 8 with a patient. 9 There's a term in the Kurin asserted patent 10 which I defined and the term is "a housing that defines." 11 And I have interpreted that to mean, and this is the 12 application, or rather the interpretation you will have to 13 apply, "a casing that fixes or marks the limits of." 14 Now, as I say, you must accept these 15 definitions as being correct, and it's your job to take 16 the definitions and apply them to the issues you are 17 deciding, including both issues of infringement and 18 validity. And you should not take any definition of the 19 language of the patent claims as an indication that I have 20 a view regarding how you should decide the issues that you 21 are being asked to decide. The issues for you to decide 22 are for you to decide. 23 Now, if I have not given you a definition of a 24 claim, then you should use its ordinary meaning within the 25 context of the patent in which the claim term is used and	1888 1 in the field of the patent. 2 All right. Page 21, let's talk about 3 infringement. Infringement is decided on a claim-by-claim 4 basis. So there may be infringement as to one claim but 5 no infringement as to another claim. And we've talked 6 about this at length, but to prove a claim of patent 7 infringement, to prove that a claim is infringed, the 8 party alleging infringement must persuade you by a 9 preponderance of the evidence. In other words, it's more 10 likely true than not true that the claim is infringed. 11 All right. Now, there's two ways a claim may 12 be infringed. The first we call direct infringement, and 13 the second is induced infringement. Okay. And there 14 cannot be induced infringement without someone having also 15 engaged in direct infringement. 16 Let's talk about direct infringement. 17 All right. To determine direct infringement, 18 you must compare the accused product with each patent 19 claim that the party asserts is infringed. So in this 20 case, you must compare the Kurin Jet with each asserted 21 claim of the Magnolia Medical asserted patents. And you 22 must also compare the Magnolia Medical Steripath Micro 23 with each asserted claim of the Kurin asserted patent. 24 A patent claim is directly infringed only if 25 the accused product meets each and every element of the
1889 1 claim and where the accused product meets each and every 2 element, whoever makes, uses, sells, or offers to sell the 3 accused product, or whoever imports... we don't have any 4 importation here... without authority during the term of 5 the patent is liable for direct infringement. All right. 6 If an accused product does not satisfy one or 7 more elements, that product does not infringe. There is 8 nothing improper in filing a patent application for the 9 purpose of obtaining patent rights that would exclude a 10 competitor's product that is already on the market. 11 As a reminder, you must determine infringement 12 with respect to each asserted claim individually. 13 Now let's talk about induced infringement. 14 Magnolia alleges that Kurin has induced those who use the 15 Kurin Jet to directly infringe Claims 12 and 13 of the 16 '081 patent. Kurin alleges that Magnolia Medical has 17 induced those who use the Magnolia Steripath Micro to 18 directly infringe Claim 10 of the '052 patent. 19 As with direct infringement, again, you do this 20 on a claim-element-by-claim-element and a claim-by-claim 21 basis. All right? 22 So to show induced infringement of Claims 12 23 and 13 of the '081 patent, Magnolia Medical must prove by 24 a preponderance of the evidence: 25 One, that the claims were directly infringed by	1890 1 those who used the Kurin Jet; 2 Two, that Kurin had knowledge of the '081 3 patent before the infringement; 4 And three, that Kurin had knowledge that the 5 acts, if taken by those who used the Kurin Jet, would 6 constitute infringement of those claims. 7 Now, likewise, to show induced infringement of 8 Claim 10 of the '052 patent, Kurin must prove by a 9 preponderance of the evidence: 10 One, that the claim was directly infringed by 11 those who used the Magnolia Medical Steripath Micro; 12 Two, that Magnolia Medical had knowledge of the 13 '052 patent before the infringement; 14 And three, that Magnolia Medical had knowledge 15 that the acts, if taken by those who used the Magnolia 16 Medical Steripath Micro, would constitute infringement of 17 that claim. 18 So you saw in those instructions there is a 19 finding of knowledge, so let's talk about, well, what does 20 knowledge mean under the law? 21 All right. That's the next instruction, 26. 22 So under the law, to prove that an accused 23 infringer knows something, a patent holder must show 24 actual knowledge or willful blindness on the part of the 25 accused infringer. An accused infringer cannot avoid

1 liability by deliberately shielding itself from clear 2 evidence of critical facts that are strongly suggested by 3 circumstances. An accused infringer is willfully blind to 4 a fact if: 5 One, it subjectively believes that there is 6 high probability that the fact exists; 7 And two, the accused infringer took deliberate 8 actions to avoid learning of that fact. Proof that an 9 accused infringer should have known that the accused 10 product infringed the asserted claims is not sufficient. 11 In other words, proof that the accused infringer was 12 negligent or reckless in infringing the asserted claims is 13 not sufficient to prove willful blindness. 14 All right. Let's turn to invalidity. Now, 15 again, to prove invalidity, you have to do it by clear and 16 convincing evidence. So for that to happen, you must be 17 left with a belief that it's highly probable that the 18 claim is invalid. 19 And, now, again, this is all done on a 20 claim-by-claim basis. All right? So there may be, just 21 as there might be infringement as to one claim but not 22 another, similarly, one claim might be invalid but another 23 claim may not be invalid. 24 Next, level of ordinary skill. So the question 25 of invalidity is determined from the perspective of a	1891 1 person of ordinary skill in the art in the field of the 2 invention at the time the invention was made. The person 3 of ordinary skill is a hypothetical person who is presumed 4 to know all pertinent prior art which is listed and 5 defined below, the next instruction. And the person of 6 ordinary skill is also a person of ordinary creativity 7 that can use common sense to solve problems in this field. 8 In this case, the parties agree that for both 9 sets of patents, both the Magnolia patents and the Kurin 10 patents, a person of ordinary skill in the art is. So 11 it's an individual that has at least a bachelor's degree 12 in mechanical engineering, or the equivalent, and several 13 years of experience in bioengineering and medical device 14 design and/or has a medical degree coupled with experience 15 in mechanical engineering and design. 16 The individual would also have a working 17 knowledge of fluid flow, particularly in small-diameter 18 channels and tubing. 19 Now we are going to turn to the definition of 20 prior art. You heard that word used a lot. Under the 21 patent laws, a person is entitled to and may properly be 22 granted a patent only if the invention claimed in the 23 patent is new, useful, and not obvious in light of what 24 came before the date of the invention. 25 And you've heard the priority date, that's the 1892
1 date of the invention. All right? 2 So that which came before the priority date we 3 call prior art. And what does prior art include? Well, 4 publications such as published articles or patents or 5 patent applications from anywhere in the world. 6 The invalidity of a claim is based on the 7 priority date, as I mentioned. And it can also include 8 devices, not just articles. All right? 9 So Kurin asserts the following prior art 10 against the Magnolia Medical asserted patents: 11 One, the Rogers patent, which we heard that's 12 the '445 publication right there, which folks have been 13 referring to it as the Rogers '445; 14 Two, the Kurin Lock; 15 Three, '579 patent, which folks refer to it as 16 the Villa-Real patent; 17 And then there was the '682 patent. That's 18 another Rogers patent. So that's the Rogers '682. All 19 right. 20 Page 30, now we're talking about anticipation 21 because remember, the invention must actually be new for 22 it to be valid, and the person who has it asks for the 23 patent to be entitled to it. And Kurin contends that the 24 asserted claims of the Magnolia Medical asserted patents 25 are anticipated. In other words, that they are not new. 1893	1 And we've talked about it has to prove this by a clear and 2 convincing evidence standard. 3 Now, Kurin contends that the Rogers '445 4 anticipates the asserted claims of the Magnolia Medical 5 asserted patents. Invalidity by anticipation means that a 6 single piece of prior art discloses each and every element 7 of the claimed invention such that a person having 8 ordinary skill in the art in the technology of the 9 invention looking at that one reference could make and use 10 the claimed invention. 11 So to anticipate the invention, i.e., patent 12 claim, because you're on a claim-by-claim basis, the prior 13 art does not have to use the same words as the claim, but 14 the single piece of prior art must disclose all the 15 elements of the claim and the elements must be arranged in 16 the same way as in the claim. The claim elements may 17 either be disclosed expressly or necessarily imply, that 18 means definitely present, even if not explicitly stated. 19 If the prior art discloses, whether expressly 20 or inherently, a device that would practice the claim, the 21 claim is anticipated. If a dependent claim is anticipated 22 by the prior art, then the claims from which it depends... 23 That should be independent. All right. So 24 there is a typo there so why don't you all... This is a 25 good reason I read these things, right? Because it is if 1894

1895 1 an independent claim -- 2 MR. LoCASCIO: Your Honor, it is correct. 3 MR. RAMANI: It is correct. 4 THE COURT: Sorry, hold on a second. 5 Sorry, yes. It is correct. I apologize. 6 It's if a dependent claim is anticipated by the 7 prior art, then the claims from which it depends are 8 necessarily anticipated as well, all right? That makes 9 sense, all right? 10 So if a dependent claim is anticipated by the 11 prior art, then the claims from which it depends, from 12 which it depends, are necessarily anticipated as well. 13 All right. Now, we have another theory of 14 invalidity, a defense called obviousness. Kurin contends 15 that the asserted claims of the Magnolia Medical-asserted 16 patents would have been obvious. If a patent claim is 17 obvious, it is invalid. Kurin must prove this by clear 18 and convincing evidence. 19 Now, even though an invention may not have been 20 identically disclosed, identically disclosed or described 21 in the prior art before it was made by an inventor, in 22 order to be patentable, the invention must also not have 23 been obvious to a person of ordinary skill in the field of 24 technology of the patent at the time the invention was 25 made. The issue is not whether the claimed invention	1896 1 would have been obvious to you, as a layperson, or to me, 2 as a judge, or to a genius in the field, but it is whether 3 it would have been obvious to one of ordinary skill in the 4 art at the time the invention was made. 5 You should not consider what is known today or 6 use what is taught in the challenged patent as a roadmap 7 for selecting and combining items of prior art. So do not 8 use hindsight. Instead, put yourself in the place of a 9 person of ordinary skill in the art as of the date of the 10 invention. Assume the date of the invention is before the 11 patent was issued and before it could have been relied 12 upon. 13 In determining whether an asserted claim would 14 have been obvious, you must consider the scope and content 15 of the prior art, the level of ordinary skill in the field 16 of the invention that someone would have had at the time 17 the patent was filed, and any differences between the 18 prior art and the claimed invention. 19 In considering whether a claimed invention is 20 obvious, you may, but are not required, to find 21 obviousness if you find that, at the time of the claimed 22 invention, a reason existed that would have prompted a 23 person of ordinary skill in the art in the relevant field 24 to combine the known elements in the same way the claimed 25 invention does, taking into account such factors as:
1897 1 One, whether the claimed invention was merely 2 the predictable result of using prior art elements 3 according to their known functions; 4 Two, whether the claimed invention provides an 5 obvious solution to a known problem in a relevant field; 6 Three, whether the prior art teaches or 7 suggests the desirability of combining elements claimed in 8 the invention; 9 Four, whether the prior art teaches away from 10 combining elements in the claimed invention; 11 Five, whether it would have been obvious to try 12 the combinations of elements, such as where there is a 13 design incentive or market pressure to solve a problem and 14 there are a finite number of identified predictable 15 solutions. 16 You should also consider whether a person of 17 ordinary skill would have had a reasonable expectation of 18 success in making or carrying out the invention through 19 combining or modifying the prior art building blocks 20 without the benefit of the challenge patent and its 21 disclosure. 22 Importantly, a claim is not proved obvious 23 merely by demonstrating that each of the claim's elements 24 or requirements was independently known in the prior art. 25 Most, if not all, inventions rely on building blocks of	1898 1 prior art, and claim discoveries will likely be, almost 2 out of necessity, combinations of what is already known. 3 In determining whether the claimed invention is 4 obvious, consider each claim separately, but understand 5 that if a dependent claim is obvious, then the claim from 6 which it depends aren't necessarily obvious as well. 7 We're almost done. 8 Now, we've heard a lot about written 9 description, which is another basis of invalidity. A 10 patent must contain a written description of the invention 11 claimed in the patent to ensure that the patent owner 12 actually invented the claimed invention. 13 To satisfy the written description requirement, 14 the patent specification must describe each and every 15 limitation of a patent claim in sufficient detail to show 16 that the inventors actually possessed the claimed 17 invention at the time that the patent application was 18 filed. However, the exact words found in the claim need 19 not be used as long as the patent demonstrates that the 20 inventor possessed the full scope of the claimed 21 invention. 22 The issue of written description is decided for 23 each claim individually, and a party must prove, again, 24 its invalidity theory by clear and convincing evidence 25 that a given claim fails to satisfy the written

1899 1 description requirement. 2 Kurin contends that the asserted claims of the 3 Magnolia Medical asserted patents are invalid because they 4 fail to satisfy the written description requirement. 5 Magnolia Medical contends that the asserted claims of the 6 Kurin asserted patent are invalid because they fail to 7 satisfy the written description requirement. So both 8 sides, you'll see in the questions, have invalidity 9 arguments based on inadequate written description. 10 The written description requirement is 11 satisfied if persons of ordinary skill in the field of the 12 invention would have recognized, from reading the patent 13 specification, that the inventor possessed the full scope 14 of the claimed invention when considering the claims as a 15 whole. It is unnecessary to spell out every detail of the 16 invention in the specification, use the exact words found 17 in the claim, or provide specific examples, but a mere 18 wish or plan for obtaining the claimed invention is not 19 adequate written description. 20 In evaluating whether the specification... By 21 the way, remember, specification is all the written 22 description and the figures and the claims together. It 23 is the entirety of the patent. 24 In evaluating whether the specification has 25 provided an adequate written description, you may consider	1900 1 factors such as: 2 One, the nature and scope of the patent claims; 3 Two, the complexity, predictability, and 4 maturity of the technology at issue; 5 Three, the existing knowledge in the relevant 6 field; 7 And four, the scope and content of the prior 8 art. 9 All right. Now, let's talk about damages. The 10 damages you award for either party must be adequate to 11 compensate it for the other party's infringement. Damages 12 are not meant to punish an infringer. Your damages award 13 should put the party in approximately the same financial 14 position it would have been in without the infringement. 15 Damages have to be proven by a preponderance of 16 the evidence. While neither party is required to prove 17 the amount of its damages with mathematical precision, 18 each party must prove them with reasonable certainty. 19 You may not award damages that are speculative, 20 damages that are only possible, or damages that are based 21 on guess work. In other words, you should award only 22 those damages that a party has established they have more 23 likely than not suffered. However, mere difficulty in 24 ascertaining damages is not fatal to either party. 25 The damages you award for either party should
1901 1 not take into account any damages you may award for the 2 other party. In this case, both sides seek lost profits 3 and a reasonable royalty. They both contend that the 4 other party cannot prove lost profits and would only be 5 entitled to a reasonable royalty. But regardless of the 6 type of damages you choose to award, you must be careful 7 to ensure that the award is no more and no less than the 8 value of the patented invention. 9 All right. Page 38, let's just talk about lost 10 profits. To recover lost profits, the party must prove, 11 by a preponderance of the evidence, that there is a 12 reasonable probability that but for the other party's 13 infringement, that party would have earned higher profits. 14 In other words, to recover lost profits, each side must 15 prove that had there been no infringement by the other 16 side, it would have made some portion of the sales of the 17 infringing product. 18 So to meet that burden, the party must 19 establish: 20 One, that there was a demand for the patented 21 product, for the patent holder's product, that directly 22 competes with the infringing products; 23 Two, that there were no available acceptable 24 non-infringing substitute products; 25 Three, had the manufacturing and market	1902 1 capability to make the sales it said it lost; 2 I should say "it had." So the third factor is 3 that you would have to show that it had the manufacturing 4 and marketing capability to make the sales it claims to 5 have lost by the infringement; 6 Lastly, that the amount of the profit that it 7 would have made if the other party had not infringed. 8 Next is reasonable royalty. If you find 9 that... If you found infringement and you then find that 10 the party, though, bringing the infringement claim had not 11 proved its claim for lost profits or had proved its claim 12 for lost profits for only a portion of the infringing 13 sales, then you must award the party a reasonable royalty 14 for all infringing sales for which it has not been awarded 15 lost profits. 16 So if you find infringement, the base, you must 17 compensate by way of a reasonable royalty at least, all 18 right? Both sides are asking for lost profits. To the 19 extent you found infringement, they had... that party had 20 won on infringement but had not proved lost profits, then 21 you need to find a reasonable royalty to compensate it, 22 all right? 23 A royalty is a payment made to a patent holder 24 in exchange for the right to make, use, sell, or import 25 the claimed invention. A reasonable royalty is the amount

1 of a royalty payment that a patent holder and the 2 infringer would have agreed to in a hypothetical 3 negotiation taking place at a time just prior to when the 4 infringement began. 5 So when you consider this hypothetical 6 negotiation, you want to focus on what the expectations of 7 the parties would have been had they entered an agreement 8 at that time, and you have to assume they acted reasonably 9 in their negotiations. You have to assume that both 10 parties believed that the patent in question was valid and 11 infringed, and that the patent holder and the infringer 12 were willing to enter into an agreement, all right? So 13 it's not the royalty that one party would have preferred, 14 it's the royalty they would have agreed to. 15 Now, you heard both experts talk about these 16 quote/unquote <i>Georgia-Pacific</i> factors. You can consider 17 those factors or anything else you think is reasonable in 18 deciding what a reasonable royalty is. I'm not going to 19 go through those factors. The experts discussed them, and 20 they are listed here. So you can look at them in 21 deciding, if you found infringement of a patent, what the 22 reasonable royalty would be for that infringement, all 23 right? 24 Let's go to Page 44, apportionment. Now, I 25 mentioned that the amount you find as damages must be	1903 1 based on value attributable to the patented invention, as 2 distinct from unpatented features of the accused product, 3 or other factors, such as marketing or advertising or the 4 patent holder size or market position. 5 A royalty compensating a patent holder for 6 damages must reflect the value attributable to the 7 infringing features of the product and no more. The 8 process of separating the value of the allegedly 9 infringing features from the value of all other features 10 is called apportionment. 11 And when the accused infringing products have 12 both patented and unpatented features, your award must be 13 apportioned so that it's based only on the value of the 14 patented features and no more. 15 All right. So that's all the substantive law. 16 Let's just talk about process. All right. Now, we're 17 going to swear in a jury officer. They are going to bring 18 you back to the jury room. The door will be shut. That 19 jury officer will stand there. Kind of tradition. 20 Obviously the door is locked. But the idea of the 21 tradition is because your deliberations are confidential, 22 and it is important that you keep them to yourselves. 23 So I told you you couldn't talk about the case 24 when this started. Well, now you can talk all you want, 25 and you should listen. You want to talk, and you want to 1904
1 listen. 2 You don't want to tell me about your 3 deliberations. So let's say you had a question. The 4 foreperson will write it out, unless he doesn't have 5 legible handwriting. Then have something else write it. 6 Then he will sign it and give it to the jury officer. The 7 jury officer will give it to me. Then I will take it from 8 there. I'll probably talk with the lawyers, get back to 9 you. Probably have a sidebar. 10 Really be careful when you write a note that 11 you don't reveal your deliberations. So, for instance, 12 never put... Let's say you took a tentative vote, don't 13 put that in there. It's really just for questions. 14 Next, so your verdict must be unanimous, all 15 right? Now, it must respect the considered judgment of 16 each of you, all right? But for you to return a verdict 17 as a jury, you each have to agree. In other words, your 18 verdict must be unanimous. 19 So I told you go back there and talk but 20 listen, and that's because you have a duty. You have 21 taken this oath to consult with each other and to 22 deliberate with a view towards reaching an agreement if 23 you can do so without disregarding your individual 24 judgment. Each of you must decide the case for yourself, 25 but to do so only after a full and impartial consideration 1905	1 of the all the evidence with your fellow jurors. So 2 listen carefully to each other. 3 Feel free, during the course of deliberations, 4 to reexamine your own views, to change your opinion, based 5 on evidence, if convinced that your initial opinion was 6 erroneous. But do not give up your honest convictions 7 about the evidence just because of the opinions of your 8 fellow jurors, just because of those opinions. Nor should 9 you change your mind just for the purpose of obtaining 10 enough votes for a verdict. 11 Remember at all times that you are not 12 partisans. You are the judge of the facts. Your sole 13 interest is to seek the truth from the evidence in this 14 case. And remember, you are making those based on the 15 instructions that I give you as a whole. Don't single out 16 any one instruction. Look at them as a whole. 17 We talked about the verdict form already. 18 Next, last, is the duty to deliberate. I don't think 19 there's anything I need to repeat there. 20 Counsel, you agree, right, I've already said 21 all these things? 22 MR. RAMANI: Agreed, Your Honor. You said it 23 all. 24 MR. LoCASCIO: Agreed, Your Honor. 25 THE COURT: So then we have the social media 1906

1907 1 warning. We are actually going to take your phones from 2 you, so you won't be able to use your phones in there. 3 To the extent you are going to want to look at 4 any electronic exhibits, we're going to give you a 5 computer that will not be able to access the Internet so 6 you won't be able to be influenced by social media, and 7 then don't be doing any sign language out the window at 8 anybody out there to try to communicate, all right? 9 In a way, this instruction is somewhat not 10 needed, but it could be needed. Let's say you don't 11 conclude your deliberations today and you want to come 12 back tomorrow, so then you could not, and it would just be 13 so catastrophic, really, for you to try to consult with 14 external media or research or do anything. 15 Remember, at the end of the day, you are basing 16 your decision on evidence, only on the evidence. 17 Lastly, I have no opinion, okay? So don't let 18 anything I have said or done influence you, except to the 19 extent I gave you the law, obviously. That needs to 20 influence you very much. But as far as what your verdict 21 should be, it has no influence. 22 All right. Can we have the jury officer, 23 please. 24 Any applications from counsel while we are 25 waiting?	1908 1 MR. RAMANI: Not here, Your Honor. 2 MR. LoCASCIO: No, Your Honor. 3 THE COURT: All right. Thank you. 4 THE CLERK: Please raise your hand. 5 (Jury officer sworn.) 6 THE COURT: Thank you very much. 7 You will now be escorted out. 8 By the way, again, you control the clock. And 9 what I'll probably do as we get towards 5:00, maybe we'll 10 have somebody knock on the door just to see where you are, 11 whether you want to keep going or come back tomorrow. But 12 you control the clock at this point. All right. Thank 13 you very much. 14 (The jury exits the courtroom at 12:39 p.m.) 15 THE COURT: Please be seated. All right. 16 I said at sidebar but Mr. Block didn't have the 17 benefit. I thought the closings were just superb. But I 18 think the lawyering generally has really been outstanding 19 in this case in the civility the folks have shown. Really 20 very, very enjoyable for me and my clerks. 21 And I also commend both firms for using a 22 number of folks to make arguments. I referenced the 23 Friday night arguments. I mean, who wants to argue at 24 6:00 p.m. on a Friday. And they were great and, you know, 25 I know I ask questions out of nowhere and it can be very
1909 1 hard, but the lawyers were very responsive. I appreciate 2 it. 3 Anything else we need to... We have got to talk 4 about scheduling. Maybe we should talk before we break 5 for lunch and let's figure out the schedule. 6 So inequitable conduct, I heard from the 7 parties when I met with them briefly in chambers before we 8 started that we can't do until Wednesday. 9 Can we begin Wednesday morning? 10 MR. LoCASCIO: We can, Your Honor. 11 What do you anticipate about the length of 12 that? 13 MR. McELDOWNY: Your Honor, it's depending on 14 the length of cross-examination. A day, maybe a day -- 15 probably a day and a half, seeing how things have gone 16 here. 17 THE COURT: All right. We'll begin at 18 10:00 a.m. on Wednesday, all right? That's for 19 inequitable conduct. Now, actually, I say that, though we 20 first have to address willfulness. 21 MR. RAMANI: May I interrupt briefly just 22 before we wrap inequitable conduct? 23 Just a reminder to the Court that Your Honor 24 deferred ruling on two <i>Daubert</i> motions that we had filed 25 that relate to the inequitable conduct issue.	1910 1 Their legal expert, Mr. Slifer, and on certain 2 of Dr. Antonsson's materiality. 3 THE COURT: Yeah. I think my recollection is 4 thinking some of this looks like it wouldn't be helpful to 5 me, as the decision fact finder, but others, it might be. 6 I think it was more of a time constraint, is my 7 recollection. I was trying to be practical about it. 8 I mean, a lot of it seemed wasteful. But, you 9 know, I could just stop it as it's coming in if I don't 10 think it's going to be helpful to me. By the way, I'm 11 sure your side will no doubt point out what I should 12 ignore as irrelevant material, and that's something I can 13 do. I mean, I will be able to make that call, I think. 14 MR. RAMANI: Understood. 15 THE COURT: So let's just go forward. But keep 16 in mind, I have limited... I mean, I have a lot of other 17 stuff I'm doing, so keep that in mind. I'm directing that 18 comment to Kurin. 19 MR. McELDOWNY: Absolutely, Your Honor. 20 THE COURT: Of course, we may not get to 21 Wednesday, depending on how willfulness goes. 22 I guess willfulness, you are prepared to go 23 forward with right away? 24 MR. RAMANI: Yes, Your Honor. 25 THE COURT: I don't think this is going to

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1 happen, but let's say they came back at 2:30, I look at it
 2 we've got to go right away. These people are waiting.
 3 We've got to move.
 4 **MR. RAMANI:** We will be prepared to go right
 5 away.
 6 **THE COURT:** And then you think that could spill
 7 into tomorrow?
 8 **MR. RAMANI:** For our part, I wouldn't think so.
 9 **THE COURT:** You are sure?
 10 **MR. RAMANI:** We would be quick.
 11 **THE COURT:** Defense thinks they are longer, I
 12 understand, right?
 13 **MR. McELDOWNEY:** Unless there is a JMOL motion
 14 that's granted after the close of their case, Your Honor.
 15 **THE COURT:** Here's the thing, I'm not going to
 16 grant it because there's no point. Like, I mean, I put on
 17 the record... actually, I don't think I have put on the
 18 record.
 19 Let me make it very clear, I'm the one who
 20 decides, and I don't mean it to sound presumptuous but the
 21 statute says it, right? We all agree it is the judge who
 22 decides. I feel the way Judge Bryson has felt in prior
 23 cases, and even, I believe, published a decision to that
 24 effect, which is I cannot envision, given what's been
 25 proffered so far, that I would ever award enhanced damages

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1 **THE COURT:** But you're going to say it shares
 2 similarities. It's not the identical, though, written
 3 description, correct?
 4 **MR. RAMANI:** Correct.
 5 **THE COURT:** Correct.
 6 And, you know, when you think about how much
 7 time we have spent the last week parsing what's in these
 8 written descriptions, I don't find that very probative to
 9 willfulness, or to willful infringement of the asserted
 10 patents.
 11 And then the third piece of evidence is the
 12 Jarmon references, correct? Is that his name? What the
 13 heck is his name?
 14 **MR. RAMANI:** The Hammer references.
 15 **THE COURT:** Hammer. Jarmon?
 16 **MR. RAMANI:** Jeremy Hammer.
 17 **THE COURT:** Oh, Jeremy. I knew it was a J.
 18 Okay. That's what it is. Jeremy Hammer. I combined the
 19 two names Okay. Not very well.
 20 And, you know, this is, as I recall, a fellow
 21 who calls up... you know, now, I guess you are going to
 22 shed more light on who he is, but unless he's a neutral, I
 23 don't know how it would be probative of infringement. I
 24 mean, to me, my initial take is he's trying to extort
 25 money. You know, he, like both sides in this case, is all

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1 in this case.
 2 Now, that's based on the proffers, and that's
 3 based on... it was off the record so let me put it in the
 4 record. It's what was adduced at trial, and then adding
 5 to it the e-mail that was sent to Mr. Rogers in February
 6 of '23. Was it '23?
 7 **MR. RAMANI:** It was May and June of '23, Your
 8 Honor.
 9 **THE COURT:** The first e-mail was --
 10 **MR. RAMANI:** I'm sorry, Mr. Bullington's letter
 11 was in February '23.
 12 **THE COURT:** Which attached some 80 patents,
 13 something like that, right?
 14 **MR. McELDOWNEY:** 350, Your Honor.
 15 **THE COURT:** Is that what it was?
 16 **MR. McELDOWNEY:** Patents and patent
 17 applications, to be clear.
 18 **THE COURT:** Right, okay. But anyway, well, put
 19 it this way, if it were 80, I wouldn't have found it
 20 probative. If it's 350, it's even less probative.
 21 And then it's a board presentation in which a
 22 reference is made to an application that is not one of the
 23 asserted patents, that did not result in one of the
 24 asserted patents, correct?
 25 **MR. RAMANI:** Correct.

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1 about money. It's let's get money, let's exert leverage,
 2 let's figure out a way. You know, they are
 3 businesspeople. And that's what he is.
 4 And so if there's not anything more, I don't
 5 envision how I could possibly award enhanced damages.
 6 Now, if there is, I'm open. But that's where I'm coming
 7 from. And so I just don't see a world where I would award
 8 damages.
 9 So I actually see putting the willfulness
 10 question, frankly, is a waste of the jury's time. I
 11 really do. And...
 12 **MR. McELDOWNEY:** Your Honor, there's one thing
 13 I would add to the chronology that you set out, Your
 14 Honor, which is that the patent application that's
 15 referenced in that PowerPoint deck, it gets rejected over
 16 the Rogers '445 and abandoned, which is the whole defense
 17 that will take some time to put on in front of the jury,
 18 to be honest, Your Honor.
 19 **THE COURT:** Yeah.
 20 **MR. McELDOWNEY:** Is that hundreds, probably
 21 thousands of Magnolia patent applications with this
 22 pressure differential limitation have been rejected by the
 23 Patent Office over the last five years. And Kurin pays
 24 attention to that, and their view is -- has been that's
 25 because Rogers '445 is the invention of the pressure

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1 differential.

2 **THE COURT:** Right.

3 **MR. McELDOWNNEY:** That's the defense, but it

4 does take a bit of time to put on.

5 **THE COURT:** Yep. Well, and the other thing,

6 and I've only written a couple of opinions, that I recall,

7 about enhanced damages, but my recollection, I certainly

8 was cognizant of this in writing at least one opinion,

9 which is, you know, the manner that it's litigated. And

10 I'm not taking away from... as I said, I have nothing but

11 kudos to the lawyers in this case, but I think we are

12 going too far. And I believe that I can consider, because

13 it is a purely equitable remedy, enhanced damages, the

14 fact that you wanted the jury to come back to this.

15 And that just influences me because I really

16 view this as a waste of time. I mean, we're talking how

17 much money? You know, that's another consideration. And

18 the big issue in this case, it seems to me, is injunctive

19 relief. That's the big issue. And that's what's going to

20 drive leverage and get people to the table and come up

21 with a real, quote/unquote, reasonable agreement.

22 So think about all that because we need an

23 answer if the jury comes back with a verdict in favor of

24 Magnolia on the infringement of its patents, so we need to

25 know that.

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1 dropping willfulness.

2 **THE COURT:** I think that's a great decision.

3 Thank you.

4 For what it's worth, I was literally about to

5 walk out and consult two of my colleagues. I was actually

6 thinking I could probably just cancel it, if I'm going to

7 do it. I think this is a better way. I think it's

8 appropriate.

9 One thing about these cases I will comment on

10 is, you know, you really -- neither client is here. You

11 know, you can see both sides of the world when you sit

12 here a lot easier than when I used to sit there. But it

13 makes life harder, in a funny way.

14 Okay. You are all still waiting. What does

15 this do to scheduling? That means we can relax or you can

16 also relax, except to get ready for Wednesday.

17 **MR. RAMANI:** Correct, Your Honor. We were

18 speaking to see whether or not it might be possible to

19 begin the inequitable conduct proceeding tomorrow. It

20 doesn't appear that way. It looks like it has to be

21 Wednesday at 10:00 to begin.

22 **THE COURT:** Okay. There's that, and the other

23 thing you could do is begin it today. We could do it

24 while they are in deliberations, as far as I'm concerned,

25 right?

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1 All right. Anything else?

2 **MR. RAMANI:** The only other issue, Your Honor,

3 as relates to willfulness, I think there are some

4 deposition objections but no reason to do that now. That

5 can wait, I think, until lunch, if you like, or we can do

6 it now, as you prefer.

7 **THE COURT:** Oh, I don't want to do it now

8 because I want you to think about it.

9 **MR. RAMANI:** Sure.

10 **THE COURT:** And maybe have your client read the

11 statute and look at the case law and how it's purely

12 discretionary. And have him read Chief Justice Roberts'

13 opinion about that this is piracy. That it is egregious.

14 That is what should be guiding the Court. It is not just

15 is it willful behavior, it's was it an egregious case that

16 called for enhanced damages. So do that and then give

17 your cell phones up and we will be in touch with you.

18 **MR. McELDOWNNEY:** Thank you, Your Honor.

19 (Whereupon, a recess is taken.)

20 **THE COURT:** Please be seated. You want to put

21 something on the record?

22 **MR. RAMANI:** Yes, Your Honor. Good afternoon.

23 Ashok Ramani for Magnolia Medical.

24 We consulted with our client. We took Your

25 Honor's words to heart, and so Magnolia Medical is

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1 **MR. LoCASCIO:** Well, I know on our side, the

2 overnight crowd was working on willfulness. So I'm not so

3 sure that the inequitable conduct engine is ready to be

4 spun up.

5 **THE COURT:** We are stuck here no matter what

6 until Wednesday.

7 So I know we've got Californians here. I know

8 as much as you like this weather, as you just told the

9 jury. I didn't know where you were going with that, by

10 the way.

11 **MR. SMITH:** I thought it was a joke.

12 (Speaking simultaneously.)

13 **THE COURT:** I liked it. I think I would prefer

14 to kind of do some other things for 24 hours, start at

15 10:00 on Wednesday.

16 **MR. RAMANI:** That works great for all of us.

17 **MR. LoCASCIO:** We were having a sidebar. I

18 think we can use tomorrow to sort of tighten it up, make

19 it so it is efficient on Wednesday.

20 **THE COURT:** That would be great. Thank you

21 very much. I'll see you all pretty soon.

22 (Whereupon, a recess is taken.)

23 (A discussion was held off the record.)

24 **THE COURT:** Have a seat. They have a computer

25 issue. Now, by the way, that computer is... I hope it

1 cannot seek Wi-Fi, right? Did you all check on that? 1919 2 MR. RAMANI: We did. 3 THE COURT: Okay. Good. 4 MR. RAMANI: We did on our side. 5 THE COURT: Yeah, all right. Good move. 6 All right. What do you want to do, though? 7 How do you educate them to use the computer? That's the 8 problem. You know, last time this happened, it was the 9 Court's computer and we sent an IT person in. I could 10 send in an IT person. 11 Do we do that? 12 (Speaking simultaneously.) 13 MR. LoCASCIO: In the first instance, that's 14 the best answer. 15 MR. RAMANI: I mean, if they can't -- maybe, 16 Your Honor, maybe give them an instruction, if they are 17 not able to resolve it, if they just pull the computer out 18 so they can get it to us and we can collaborate and see 19 what -- 20 MR. LoCASCIO: Yeah, we can get another one 21 fired up with the stuff on. 22 THE COURT: All right. Now, what is it? What 23 do you have on the computer? 24 MR. LoCASCIO: I believe it's just the natives, 25 Your Honor. So, like, Excel spreadsheets, videos.	1 MR. RAMANI: Yeah, I think it's -- 1920 2 THE COURT: But when you say it's on it, in 3 other words, is there software on it? Is there Outlook on 4 it? 5 MR. RAMANI: They're loaded locally. There's 6 files that are saved locally. And then whatever software 7 is required to view them is also on the laptop. 8 THE COURT: All right. So they should click on 9 a file, essentially? 10 MR. LoCASCIO: Presumably, yes. 11 THE COURT: And, like, how many of the exhibits 12 are we talking about that are on there, roughly? 13 MR. RAMANI: I'm not sure. To my 14 understanding, I think it's mostly damages related, kind 15 of spreadsheets and stuff. 16 THE COURT: How about videos? None of the 17 videos are in there? 18 MR. LoCASCIO: They are. 19 MR. RAMANI: The videos are on there too. 20 MR. McELDOWNEY: I would think that that would 21 be the ones that they may be trying to look at, because 22 there were a handful of videos with the products and those 23 should all be on the laptop. 24 THE COURT: Right. And given that it's this 25 early, if they're at damages that quick, there are other
1 issues, I guess. But so that probably makes sense, but 1921 2 then you'd think they'd just click an icon, I assume, for 3 a video, right? How is it -- 4 MR. RAMANI: They say it's not working. I 5 don't know if it's a password issue. I -- it's not -- 6 MR. LoCASCIO: Power supply. Like it's a -- 7 it's like the IT department would say, have you tried 8 turning it on and off? Do you have a power supply? 9 THE COURT: Okay. Now, did you give them a 10 password? 11 MR. RAMANI: I don't think either of us did but 12 I believe our teams collaborated on that. 13 THE COURT: No, but, I mean, like, was there a 14 yellow sticky? How would they know the password? 15 MR. RAMANI: That I am not sure. 16 MR. LoCASCIO: I have a feeling that the people 17 that know the best answers to these questions are not in 18 this room right now. 19 THE COURT: Are they in the building? 20 MR. RAMANI: We can find them. I think ours 21 have maybe gone back to Morris Nichols but we can track 22 them down. 23 THE COURT: Okay. I think you should get your 24 IT people. 25 What if I just go in there and ask them what	1 the issue is? Are you good with that? 1922 2 MR. RAMANI: That's fine with us. 3 MR. LoCASCIO: That's fine with us. 4 THE COURT: I'll do that. We're calling an IT 5 person because I want to move on this. 6 I will go in and ask them. If you guys could 7 just call, get your IT people here just in case. 8 MR. RAMANI: We have permission to use our 9 phones in here? 10 THE COURT: Yes. And I will be right back. 11 THE CLERK: All rise. 12 THE COURT: Okay. You may be seated. 13 So I knocked on the door. I said, "Please do 14 not tell me about your deliberations." I said, "You have 15 a computer problem. What is it?" 16 And he said, "It won't even go on. ^." 17 I said, "Do you have a password?" 18 They said, "No." 19 They did say -- one person said, "Oh, we have 20 another question." 21 I said, "No, no, no. Don't tell me about it." 22 This is what they have. So I am going to give 23 you all the computer and you can figure out... 24 Wait, hold on a second. I just realized, there 25 is a yellow sticky in the back, which is not a password.

1923 1 So what I'm going to do is this. I am going to 2 leave it with you two. I am going to leave you all with 3 it and if you could just knock on chambers when you figure 4 it out and we will come back in. All right. Thank you. 5 (Whereupon, a recess was taken.) 6 THE COURT: All right. Please be seated. 7 So, actually, let's put on the record, the note 8 says: "Could we receive a model of the Kurin Jet?" 9 I thought they did get a Kurin Jet. 10 MR. LoCASCIO: I believe they do have one. I 11 am going to run down the exhibit number on that. Just 12 give me a second -- 13 THE COURT: Yeah. 14 MR. LoCASCIO: -- on that. 15 THE COURT: I mean, presumably, they mean 16 model, the -- 17 MR. RAMANI: I am actually wondering if they 18 mean model as in mock-up. 19 THE COURT: I agree with that. And that's -- 20 MR. RAMANI: Yeah. 21 THE COURT: But I don't think there was a 22 mock-up. There was just an illustrative. 23 MR. LoCASCIO: There was not. 24 THE COURT: So either one. 25 MR. LoCASCIO: You're right, so --	1924 1 MR. RAMANI: They definitely do have a Kurin 2 Jet, if you find the exhibit number. 3 This is a pretty active jury, Your Honor. 4 THE COURT: Yeah. There's a lot to get 5 through, though. I mean, they were very attentive. Don't 6 y'all agree? 7 MR. RAMANI: They were very attentive. I've 8 rarely had a jury that attentive in this kind of case. 9 Your Honor, if I may for the record? 10 THE COURT: Yeah. 11 MR. RAMANI: We are grateful to our IT 12 colleague Sam Delgado for racing over here and fixing the 13 computer problem. 14 THE COURT: Yes. Thank you as well. 15 MR. LoCASCIO: So -- 16 THE COURT: All right. 17 MR. LoCASCIO: -- for the record, I believe, 18 and we'll get it double-checked on your side. So, you 19 know, I do not have that in the exhibit list. I don't 20 know if -- but I do have, though, we put the exhibits onto 21 my closing slides, which I have, and the Jet is DPTX8, 22 DPTX, which makes sense, Defendant's Physical Trial 23 Exhibit 8 is what I believe is the Jet. 24 THE COURT: All right. We'll double-check what 25 we have.
1925 1 (A discussion was held off the record.) 2 MR. LoCASCIO: DPTX0008, DPTX8 is the Kurin 3 Jet, and it is in evidence. 4 THE COURT: Is there something different 5 between 0008 and 8? 6 MR. LoCASCIO: Formally under the Court's rules 7 we put four digits. I don't know if it is in the Court's 8 order or in our pretrial, how the zeros got in there. 9 THE COURT: It ain't my order. 10 MR. LoCASCIO: Somebody on our team once told 11 me you have to say the zeros. So it's 8, DPTX8. 12 MR. RAMANI: Your Honor, we do have another, 13 like, exploded diagram, including the cross-section that 14 they were showed repeatedly, if that would be of interest. 15 THE COURT: You mean that's also in evidence? 16 MR. RAMANI: Yes, it is. 17 MR. LoCASCIO: So mechanical drawings of the 18 Jet are also in evidence. 19 THE COURT: Why don't we give the universe of 20 exhibits of the Kurin Jet and let them decide. 21 MR. RAMANI: Okay. 22 THE COURT: So right now is eight. 23 MR. RAMANI: Your Honor, we have got a lot of 24 those from Professor Meinhart. 25 MR. LoCASCIO: It's DTX-93.	1926 1 THE COURT: So wait a second, then. 2 MR. BLOCK: The universe may be difficult. 3 THE COURT: Let's just put right now... we will 4 do it incrementally. Let's first do the actual model. By 5 model, I think we are interpreting that to mean a model 6 number. 7 MR. RAMANI: Just physical device, sure. 8 THE COURT: I cannot write anymore so we are 9 going to just type it up and send it in. 10 For the record, I can't write because I have a 11 cast on so that nobody on appeal thinks whatever they 12 might think. 13 Okay. The Kurin Jet is DPTX-8. 14 MR. LoCASCIO: Correct. 15 MR. RAMANI: That's fine, Your Honor. 16 THE COURT: Thank you. We will be back. 17 MR. RAMANI: I suspect we will see you shortly, 18 Your Honor. 19 THE COURT: All right. So I've raised with the 20 parties briefly off the record that I'm concerned that the 21 jury would be very, maybe, disgruntled and frustrated if 22 they were to find out, after they return a verdict on 23 Phase I, that there is no Phase II because it may 24 influence, for instance, whether they decide to stay late 25 for the day.

1927 1 So I've met with the parties and we discussed 2 and they are here and they agree I will inform the jury 3 right now that there will be no further phases, and I will 4 also remind them they have as long as they want to 5 deliberate this Phase I. 6 MR. RAMANI: Agreed, Your Honor. 7 MR. LoCASCIO: Agreed. 8 (Whereupon, a recess was taken.) 9 THE COURT: Have a seat. We cannot get 10 security after 5:00. So it also occurred to me they left 11 at 5:00 pretty much on the dot. I think somebody has a 12 train for a couple of days. 13 So I told you my original thought was I would 14 go in at 4:30 and say what do you want to do. I think the 15 better course right now would be to wait until, like, 16 4:50, and then have them come in here. And they have to 17 order lunch, that's the other thing. We have to take 18 lunch orders for tomorrow. So anyway, right before, five 19 of 5:00, I was going to bring them in and say, okay, you 20 know, we will have you order lunch and just come back 21 tomorrow. 22 Does that work? 23 MR. RAMANI: Fine with us. 24 MR. LoCASCIO: Fine, Your Honor. 25 THE COURT: Then we'll do that.	1928 1 Now, while I've got you, let's talk about 2 timing. 3 So the inequitable conduct, what's the case 4 going to look like? 5 MR. LoCASCIO: So Mr. McEldowney had a point on 6 that. He's back there working on it right now. So I 7 apologize I can't directly answer that. I have a sense 8 for -- I'm actually not going to get it wrong, just punt, 9 if that's okay with Your Honor. I will get Mr. McEldowney 10 in here in a hot minute, if you want. 11 Or I will have him here when the jury comes in, 12 and that way, after that, if we can talk about it for a 13 minute on the record, if you would like to? 14 THE COURT: All right. Let's do that. 15 MR. LoCASCIO: Thank you. Appreciate the 16 courtesy. 17 THE COURT: Okay. All right. 18 Anything else? 19 MR. RAMANI: Nothing on our end. 20 MR. LoCASCIO: No, Your Honor. 21 THE COURT: Okay. I'll see you certainly 22 within 40 minutes. Thank you. 23 (Whereupon, a recess was taken.) 24 THE COURT: Did you all see the note? 25 MR. RAMANI: We did.
1929 1 THE COURT: So for the record, the note reads: 2 "May we receive a complete timeline of patent applications 3 displayed in Court for both Kurin and Magnolia?" 4 Thoughts? 5 MR. RAMANI: I don't know that we have any such 6 single timeline, Your Honor. I suppose what we could do 7 is take a demonstrative from each side and submit that or 8 collaborate and put together something that's just neutral 9 with facts. 10 MR. LoCASCIO: Yeah, I think my inclination 11 would be the latter. We know what patent applications 12 are -- were used in the timelines or are evidence and we 13 could just put the -- what it is and what the date is and 14 sort of put them in a chart, but I don't know that either 15 of the parties' demonstratives would be the right answer 16 to this question. 17 THE COURT: Well, I have to say, it's a first. 18 I've never had parties agree to create evidence after the 19 fact and put it in. I mean, my reaction is can't help 20 you. 21 MR. RAMANI: I was just going to say, they were 22 so diligent, Your Honor, I would probably just be -- 23 hearing what you both have said, I would probably be 24 inclined to say just go with your notes, your memory. 25 THE COURT: Well, I'm not going to say go with	1930 1 your notes. I know what you mean but I -- 2 MR. RAMANI: Yeah, yeah, Your Honor. 3 THE COURT: -- am not literally going to say 4 that. 5 So I propose that we say the answer is: May we 6 receive a complete timeline? The answer is: 7 Respectfully, no. The evidence, the record of evidence is 8 complete and you should rely on the exhibits that have 9 been introduced. Or, actually, you should rely on the 10 evidence that you heard and that was introduced at trial. 11 MR. RAMANI: That's okay with us, Your Honor. 12 MR. LoCASCIO: That's fine with us, Your Honor. 13 THE COURT: All right. We will print it out 14 and we'll get a final copy. 15 MR. RAMANI: Your Honor, I've just got a few 16 outstanding -- 17 THE COURT: You want to go off the record? 18 MR. RAMANI: Yeah, off the record. 19 THE COURT: Off the record. 20 (A discussion was held off the record.) 21 THE COURT: All right. So: Respectfully, no. 22 The record of evidence is complete and you should rely on 23 the evidence that you heard and that was introduced at 24 trial. 25 MR. RAMANI: That's fine with us, Your Honor.

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1 **MR. LoCASCIO:** Same here, Your Honor.

2 **THE COURT:** I'll hand that note back and we can

3 go back off the record.

4 (A discussion was held off the record.)

5 **THE COURT:** We'll go on the record.

6 **MR. McELDOWNEY:** So I wasn't here so I don't

7 exactly know the context.

8 **THE COURT:** So I just need to know, like,

9 what's this inequitable conduct? What's your case look

10 like? I know I denied the motion to dismiss but, you

11 know, I did it because, I mean, largely, there were some

12 pragmatic concerns which guided the decision.

13 So what is your case?

14 **MR. McELDOWNEY:** Sure. So let me give you the

15 short version of the case and then the witnesses that we

16 will use to establish it. So it's a little bit of a

17 unique inequitable conduct theory, and it really stems

18 from the fact that Magnolia has for ten years, at least,

19 been just flooding the Patent Office, in our view. So

20 they have nearly 300 patent applications they've filed,

21 thousands and thousands of claims, and one particular

22 thing that they did impacts the three patents that are at

23 issue in this very case.

24 So there were two patent applications where

25 they were in front of an examiner named Examiner Kremer.

1933

1 in our view, disclose everything that had happened in the

2 first examination. They didn't come in and say, "Here are

3 some claims, they are very similar to what was just

4 rejected by one of your colleagues." They came in and

5 flooded the new examiner with hundreds of references.

6 They did ultimately disclose the office action rejections

7 from the first examiner in a huge stack of other stuff.

8 But they never, I don't think, disclosed the patent

9 prosecutor's responses to those rejections.

10 **THE COURT:** I think you should know that before

11 you try the case.

12 **MR. McELDOWNEY:** Yes, Your Honor. Yes.

13 **THE COURT:** You should know whether they did or

14 they didn't.

15 **MR. McELDOWNEY:** What I do remember --

16 **THE COURT:** I know you are on the spot now, but

17 I am just saying if we are going to try this in 48 hours.

18 **MR. McELDOWNEY:** 100 percent, and I have been

19 focused on the liability phase. So I just turned back and

20 so there are a few details that I was in the office

21 getting back refreshed in my memory.

22 **MR. LoCASCIO:** Until about two hours ago,

23 Mr. McEldowney was prepared to open the willfulness trial.

24 **THE COURT:** I don't say it critically. I say

25 it like you should know.

1932

1 That examiner said these claims are invalid over Rogers

2 '445.

3 The prosecution counsel ultimately agreed after

4 going back and forth a few times and said, okay, fine,

5 that's all in Rogers '445, but we're going to amend the

6 claims and get around your rejection.

7 They do that and they continue that prosecution

8 in front of Kremer with different claims after having said

9 we agree Rogers '445 had everything that was in the

10 original claim.

11 Four days later they take those two claims, or

12 those two applications, they take the claims that were

13 rejected and four days later file them in the applications

14 that became the '081 and the '863. They made, in our

15 view, some very small word changes so you can't say that

16 they are verbatim identical, but in substance they are the

17 same claims.

18 When they put them in the new applications for

19 the '081 and '863, that was a different family. And if

20 you're a patent prosecutor, you know that if you file

21 claims in a different family, you will get the examiner

22 who is -- who is already sort of in charge of that family.

23 So they knew they would get a different examiner, and they

24 did.

25 When they got the second examiner, they didn't,

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1 **MR. McELDOWNEY:** Absolutely.

2 And so at the end of the prosecution of the

3 '081, '863, they have to make a representation that there

4 are no omissions or impediments to issuing the claims.

5 And in our view, they should have told the new examiner,

6 "One of your colleagues rejected very similar claims, and

7 we, as the prosecutors, essentially conceded that Rogers

8 '445 had all those claims elements." That's the theory.

9 **THE COURT:** That's the case.

10 **MR. McELDOWNEY:** And very brief, the way we

11 plan on proving it --

12 **THE COURT:** All I need to know is time. I want

13 to make sure they get their chance. I don't want them to

14 leave here thinking this was such a one-sided

15 presentation.

16 **MR. McELDOWNEY:** It's three witnesses, and it's

17 very short dep designations, which I assume you will just

18 want in writing rather than video, but we can do it by

19 video if you prefer that, Your Honor.

20 **THE COURT:** I prefer video.

21 **MR. McELDOWNEY:** Okay. So it will be three --

22 or a few very short deposition videos of the inventors,

23 and -- let me back up.

24 The case will start with a Patent Office

25 expert -- he is a former commissioner of patents -- to

1935 1 explain the procedures, and that when you move from one 2 family to another, you get the same examiner. Some things 3 like that. 4 Then Dr. Antonsson will testify that the claims 5 from the first prosecution that get moved to the second 6 family are, in our view, patently indistinct. He will 7 testify to that. 8 THE COURT: Let's talk about that, then. 9 What's he going to bring to the table? He says 10 they are not patently distinct. Why do I need him for 11 that? 12 MR. McELDOWNEY: Because the -- that's part of 13 the theory here, Your Honor, is that they took claims from 14 one application that were rejected and where they said, we 15 agree those are anticipated by Rogers, and they took those 16 claims, changed a few words -- 17 THE COURT: Why can't you just... Why can't we 18 have argument about that from both sides and I just look 19 at that? Why do I need Antonsson? 20 MR. McELDOWNEY: I am happy to do that. 21 THE COURT: Well, if you're happy to do that, 22 don't call Antonsson. I mean, I thought the Antonsson 23 <i>Daubert</i> was about materiality. 24 MR. McELDOWNEY: So -- 25 THE COURT: So I thought maybe he has got some	1936 1 term, you know. I'm vague but this is... a lot has 2 transpired since I ruled on that <i>Daubert</i>, but that is my 3 recollection. 4 MR. McELDOWNEY: So he does opine on 5 materiality, but it is materiality of the '445, which I 6 think his testimony already established that it was 7 relevant to prosecution. 8 The real piece that I think he planned to 9 testify about was that the claims that were moved were, 10 from a person of skill in the art's perspective, the same 11 claims. 12 THE COURT: Okay. 13 MR. McELDOWNEY: And then the patent prosecutor 14 is the last witness. 15 THE COURT: All right. 16 Let me hear from the other side. What we're 17 going to do, by the way, because it's seven of, we are 18 going to go get the jury and we'll bring them in. 19 (A discussion was held off the record.) 20 MR. BLOCK: A host of responses, Your Honor. 21 This is our first time hearing what their theory is. 22 THE COURT: And I will let you talk tomorrow 23 morning, for instance, if you want. You don't have to 24 speak now. But also you have a client here and you want 25 to make sure you feel like you didn't just have...
1937 1 I'm not leaving here with I've made up my mind 2 on it by any stretch. 3 MR. BLOCK: I appreciate it. I'll start where 4 we started with the motion to dismiss, which is that there 5 is nothing undisclosed. All of the art was before both 6 examiners, so before the examiner who they say there was 7 some engineering to get it. All of the art. There is no 8 allegation of an omission or a misstatement of fact. 9 THE COURT: It sounded like there was. It 10 sounds like there's failure to disclose the -- 11 MR. BLOCK: So -- 12 THE COURT: At least potentially -- he'll find 13 out, right -- the reason for rejection. 14 MR. BLOCK: We'll get into the details. There 15 is no practice, to my understanding, in the Patent Office 16 of filing the prosecutor's responses to office actions 17 because, as you can -- well, I don't want to speak to the 18 reason of that but my understanding is that's not a 19 practice in any event. 20 My understanding also is that these responses 21 that they point to, it's Magnolia saying, you know, you've 22 probably seen these office actions. It stands rejected. 23 We disagree with the rejection because Rogers '445 24 discloses at most, colon, block quote. So the thing that 25 was allegedly not disclosed is the thing -- is just a	1938 1 block quote from the art that was before the examiner. 2 There was a characterization that Magnolia 3 agreed with the first examiner about the '445 rejection. 4 That's obviously not the case. When you get a rejection, 5 you traverse, you amend, but that's not a concession or an 6 agreement. 7 I think it will be interesting for the Court to 8 look at what the differences are between the claims that 9 were in the one family and the claims that were in the 10 second family and how those differences relate to the 11 disclosures that are in the two families. 12 THE COURT: They're ready? Okay. 13 As soon as the jury leaves, we'll continue. 14 MR. BLOCK: Sure. 15 (The jury enters the courtroom at 4:55 p.m.) 16 THE COURT: Have a seat, please. 17 Well, thank you for your notes and my 18 responses. I can't write so that's why they're typed. 19 But we are getting to 5:00 so we thought we'd 20 bring you in, and then when you leave here, order lunch 21 and then take off and come back tomorrow morning. 22 8:30 work for everybody to come back? All 23 right. Okay. 24 Very important. I mean, you've got to be even 25 more careful now because you're in the middle of

1939 1 deliberations and your deliberations stay within the eight 2 of you. Okay. 3 But again, and we've gotten so far, you don't 4 want to contaminate your brain with evidence that's not on 5 the record, that's not in evidence. Okay? 6 So, and then tomorrow, take as long as you want 7 and we're here. If I can answer notes, I will. I'll do 8 my best and speak with the lawyers. Okay? 9 All right. Thank you very much. See you 10 tomorrow morning. 11 (The jury exits the courtroom at 4:57 p.m.) 12 THE COURT: Please be seated. Actually, one 13 thing I want to do. 14 (A discussion was held off the record.) 15 THE COURT: Okay. Mr. Block. 16 MR. RAMANI: Your Honor, may I ask you a 17 question first? 18 THE COURT: Yes. 19 MR. RAMANI: I was just talking with 20 Mr. LoCascio about it. What's Your Honor's preference 21 tomorrow? Would you like us here when the jury arrives in 22 the morning? Would you like us to be in the hallway, 23 close quarters? Are we okay being in our Delaware 24 counsel's offices? What's your preference? 25 THE COURT: I mean, my preference would be for	1940 1 you to be here just because of the notes. I mean, we've 2 already gotten two. 3 MR. RAMANI: We will be here. 4 THE COURT: They just seem like in a... I 5 wouldn't be surprised if we get a number of notes would be 6 my guess. 7 MR. RAMANI: Very good, Your Honor. 8 THE COURT: Does that work? Are you sure? 9 MR. RAMANI: Yeah, yeah, that's fine. 10 MR. LoCASCIO: That's fine with me. I just 11 have a question, which is: Is it your normal practice to 12 bring them back into the courtroom, or do they go straight 13 into the jury room and they start deliberating, just so we 14 know in terms of -- is it like this, where we are here and 15 they are here, or is it they do their thing, if a note 16 comes in, we will come in? 17 THE COURT: I have done it both ways. 18 What do you think? 19 MR. LoCASCIO: It's up to you. If you bring 20 them in, we will be here. 21 MR. RAMANI: I might suggest just sending them 22 back just so they go right to work. 23 I'm happy to do whatever you prefer, Your 24 Honor, obviously. 25 THE COURT: If you are both happy for them to
1941 1 just get in and get started, then let's just do that. 2 MR. LoCASCIO: Fine here, Your Honor. 3 THE COURT: The only downside of that is you 4 are not going to have an on the record confirmation that 5 nobody was contacted, but you have seen, I am really, 6 really vigilant about that and I'm confident that if one 7 of them did, they would let me know, is my sense. 8 MR. RAMANI: This also isn't a high press case. 9 I'm not concerned about that. 10 THE COURT: Thank you. 11 So, Mr. Block, do you want to just continue? 12 MR. BLOCK: Your Honor, what I would say is I'm 13 happy to address any questions that you have. Once we see 14 their case, we will decide who we want to bring. We may 15 bring Mr. Winternitz, who is the prosecutor who they are 16 accusing of having formed an intent to deceive the office 17 to the stand to speak to you. I anticipate that at the 18 close of their evidence there will be a very serious 19 motion about whether they brought you anything that would 20 be sufficient to find in their favor before we go. We may 21 have a responsive expert testimony. 22 And then I think, obviously, schedules have 23 been shifting so this is not intended as a shock, but if 24 there are to be videos played on Wednesday, their 25 disclosure would have been last night. So we just need	1942 1 those promptly so we can see what they are and try to get 2 any disputes, if there are any, timely to you before the 3 video would play. 4 THE COURT: Have you ever dealt with this 5 theory of shopping prosecutors? I mean, I will tell you 6 at first blush, you know, that is something I'm like, hmm, 7 that doesn't sound like a great thing. I'm surprised you 8 can do it. I would have thought you always get the same 9 prosecutor. I base that on some other cases I've had 10 where there's, you know, a prolific patentor who is always 11 in front of the same person. I don't even know if it's a 12 cognizable theory. 13 Has it ever been recognized, to your knowledge? 14 MR. BLOCK: Not to my knowledge, Your Honor. 15 I don't want to get over my skis on the 16 procedure, but when the second -- I think the second 17 filing was track one, and you don't even know where it's 18 going to land. I think that it did land with an examiner 19 who had prior experience. Anyway, I may get out of it, 20 but it's a question -- 21 THE COURT: I appreciate you don't want to get 22 over your skis, but you know what, I would encourage both 23 sides to look into that. Because, you know, just seems if 24 it's going to be a compelling theory, the premise would 25 have to be that... and I'm saying based on what's been

1 discussed by Mr. McEldowney, I think the premise would 2 have to be that absolute knowledge, that it would go to 3 another examiner. 4 MR. BLOCK: He would also have to show, I 5 think, to support that theory, that those claims could 6 have been filed in the original application and did not 7 have claim elements that tied to disclosure in the second 8 sort of separate application that they consider "shopped," 9 is my terminology. 10 THE COURT: That's where, though... it's funny 11 we talked about would I benefit from experts. See, that's 12 where I might benefit from experts because when you say 13 that, I'm thinking to myself, and this is the problem with 14 having a little bit of knowledge, is well, wait, well then 15 wouldn't it be like a provisional application or whatever, 16 a continuing... you would have to make a new root off of 17 the tree or something, you know what I mean? I don't 18 know. 19 MR. BLOCK: I think not because we're talking 20 about, one, to use the terminology from the trial, 21 Magnolia had planted two different flags, and those flags 22 had already been at the Patent Office and they had 23 different disclosures. And I think what you will find -- 24 and, again, I don't want to get over my skis on this, but 25 I think you will find that the differences that they say	1943 1 are not differences, claims that are indistinct, they are 2 different in ways that relate directly to the difference 3 between those different flags. 4 So it's not file continuation, change this one 5 to get that one. It's this one is trying to claim 6 something that's described under the one flag and not -- 7 or at least not as well -- not described under the first 8 flag. 9 We can consider whether expert testimony would 10 be helpful to Your Honor. There are disclosures on both 11 sides. I don't recall, as I sit here, whether either 12 expert has looked at that exact question, which is the 13 relationship to the disclosure. But it was, as I recall, 14 an issue in the prosecutor's deposition, and the ultimate 15 question will not be, "Is there clear and convincing 16 evidence that it would have been invalid if in the one 17 application?" But, no, it's going to be, "Is there a 18 basis on which you could find that this prosecutor formed, 19 in his mind, an intent to defraud and deceive the Patent 20 Office." 21 And so his testimony will be, here is a 22 specific reason. It has nothing to do with choosing 23 examiners, why the new claims that were brought in the new 24 application fit in that application. 25 I'm not sure that's necessary, frankly. I 1944
1 think if you are following the rules, you want to file 2 claims in an application you have open, go right ahead, so 3 long as you are not making omissions or misstatements, but 4 our facts are much better than that bare minimum. 5 THE COURT: Okay. Well, it will be very 6 interesting to see. 7 So if we start on Wednesday at 10:00 in the 8 morning, I guess we could spill over into Thursday if we 9 had to. 10 Sounds like we're talking two days at the most? 11 MR. McELDOWNEY: It's certainly not more than 12 two days. 13 And, Your Honor, I think earlier today I may 14 have said day, day and a half. I can't imagine that we 15 can't finish up by afternoon on Wednesday because it's 16 very short witnesses. We're spending today and tomorrow 17 tightening this up to the key nub of the facts and the 18 opinions so that we can present it very efficiently. I 19 think we should be able to finish by sometime in the 20 afternoon on Wednesday. 21 THE COURT: You know, I'm a fact finder in 22 this, right? 23 MR. McELDOWNEY: Yes. 24 THE COURT: So, you know, get ready for a bench 25 ruling. I don't think we need to write, as... I don't 1945	1 like to write because I think of the unintended 2 consequences that follow. And so I only write if I feel 3 like I need to write, is kind of my general approach to 4 things. This sounds like I may not need to, but we'll 5 see. Okay. 6 So then, I guess, you'll be in the building at 7 8:30, reachable, and see you tomorrow. Thank you. 8 (The proceedings concluded at 5:06 p.m.) 9 10 <u>CERTIFICATE OF COURT REPORTER</u> 11 I hereby certify that the foregoing is a true and 12 accurate transcript from my stenographic notes in the 13 proceeding. 14 15 16 17 <u>/s/ Bonnie R. Archer</u> 18 Bonnie R. Archer, RPR, FCRR 19 Official Court Reporter 20 U.S. District Court 21 22 23 24 25 1946