UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ACANTHA LLC, Plaintiff, vs. DEPUY SYNTHES SALES, INC., DEPUY SYNTHES PRODUCTS, INC., DEPUY SYNTHES, INC., JOHNSON & JOHNSON, INC., SYNTHES, INC., SYNTHES USA, LLC, DEPUY ORTHOPAEDICS, INC., and DEPUY SPINE, LLC, Defendants.	)	Case No. CV 15-1257 Green Bay, Wisconsin August 14, 2018 8:30 a.m. **JURY TRIAL** **DAY 2**

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE WILLIAM C. GRIESBACH
UNITED STATES CHIEF DISTRICT JUDGE

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P R O C E E D I N G S

THE COURT: We're back on the record in the Acantha versus DePuy Synthes matter, Case No. 15-C-1257. And appearances are as they were yesterday. We're outside the presence of the jury.

08:30

And at the end of the day yesterday, counsel raised a particular issue concerning the expert testimony of the of plaintiff's witness with respect to reasonable royalty. And at the end of the day I was handed the slides so I would have an idea of what, in particular, was at issue.

08:31

This was an issue that I addressed in a motion excluding portions of the expert's conclusions as to the royalty that he arrived at, for reasons that are set forth in that order. And, as I understand it, the defense believes that the plaintiffs are trying to circumvent that ruling by discussing patent defense and share of sublicense revenue in relation to the -- what a reasonable royalty would be, and as -- part of their explanation as to why the 4.25 royalty granted to Stryker, originally in 2003, was unreasonably low, and that they expected a higher royalty.

08:31

08:32

And as I look at what they're explaining, is they're indicating the reasons why they agreed to such a royalty even though they believe that a reasonable royalty or that the royalty in this case should be higher.

08:32

Among the reasons they set forth in the slide that I

was presented in similar and other slides, is that the validity and infringement were not assumed at the time the royalty was granted. In other words, patent apparently had not been granted and the re-issue was still going on.

08:32 They originally communicated a significantly larger royalty to Stryker. Stryker -- they gave Stryker a first mover discount. It was taking a risk on this technology. It was unproven technology.

The royalty floor and invalidity protection that 08:33 Stryker agreed to provide or they understood Stryker would provide.

And then, lastly, and this is the disputed reason patent defense and share of sublicense revenue. And as I understand it, this patent defense is pretty much invalidity 08:33 protection, or they assumed Stryker would defend the patent. And then they also included in their royalty agreement grant their license agreement with Stryker a provision where if Stryker had an exclusive license, but it would also be if it sublicensed the product or the invention, it would provide a 08:33 revenue. It would still give a royalty to the plaintiffs.

I don't find anything objectionable about any of that. It's not inconsistent with my ruling. That's their explanation for why they believe a 4.25 percent royalty that was granted to Stryker as an exclusive license is too low and, in fact, it 08:34 should be higher here.

What I said with respect to Stryker in the decision granting the plaintiff's motion, and maybe I should say partially granting the defendants' motion to strike the expert, or the expert's opinion, was that Acantha could not make the argument that they should be -- that the damages they sustained were the royalty that Stryker would've received had it sublicensed the invention to DePuy or Synthes, when at the time when Stryker held an exclusive license.

And as long as they don't go into that kind of calculation and make an argument that they're entitled to those types of damages, it seems to me that they can generally refer to these reasons as justification or as an explanation of why their view, and the view of their expert, the 4.25 percent, or whatever percentage, you know, whether it's a 3.25 or 4 1/4 royalty that they granted to Stryker is unreasonably low or too low.

Does that help with where we're going? Let me ask you first, Mr. Caldwell?

MR. CALDWELL: Yes, Your Honor.

THE COURT: And, Mr. Griffith. You can object, but that's my ruling.

MR. GRIFFITH: Again, Your Honor, we do object. We don't believe that that subject matter is relevant to the royalty rate, and it is implicitly injecting the very improper analysis that was excluded. It's sort of backdooring it, and it

doesn't otherwise relate to what the jury should determine in terms of a reasonable royalty. It's going to coax them to factor in that Stryker would be getting a large portion, but possibly allowing for that to be the award and resulting error.

08:36 THE COURT: Well, you can certainly -- and the record is made as to that objection. But as the testimony comes in, if there are questions that go beyond this is a factor calculated in this fashion, you know, you can raise that objection, I'll address it. I don't expect to hear any of that. I think my 08:36 ruling on this issue is pretty clear.

And I certainly don't -- I certainly believe that the plaintiffs have -- their expert has relevant testimony to give on the general question of the *Georgia-Pacific* factors and how they should affect a royalty.

08:36 I also want to give you a heads-up on one of the other issues that was raised yesterday, and this was a question of whether or not the defense are entitled to introduce evidence of their own patents. I've gone back over the cases that were cited. And certainly it's clear that the fact that they have 08:37 patents on technology involved in these products is not a defense to infringement, there is no dispute over that. The question is whether it's relevant as to the other issues that defendants have argued arise here.

Specifically, damages, royalty, what's a reasonable 08:37 royalty? The question of willfulness, not obviousness, doctrine

of equivalents. And I'm satisfied from my review of the cases cited by the defense that they very well might be and may perhaps are directly relevant to that.

Of course, I haven't seen those patents. I haven't heard how -- what testimony or what evidence the defense wishes to admit. But, in my view, the cases stand for the clear rules that, number one, they are not admissible for purpose of infringement, but they very well might be relevant depending on the patents themselves, which I haven't seen, and depending on how these issues surface as to the issues of certainly willfulness, damages, royalty, and some of the other -- non-obviousness and doctrine of equivalents.

Now, as to where that goes, I think you need to talk to each other. If there's still objections as to specifically what evidence is going to be introduced, if you can show me, if there are documents you can give me ahead of time, we can do -- again, like this works -- I appreciate the fact that you let me know ahead of time and I can take the time to take another look at the cases and, of course, we have been looking at these for a while. But I do have other things that sometimes come up, and I have to remind myself as to what happened.

So, in any event, I appreciate the heads-up you can give me, especially early in the morning or end of the day, and I think we can do pretty well in making a good record.

I can be better prepared to give you a good ruling, or

at least a ruling I think is solid. And, of course, then, we don't take up trial time and we're not having the jury sit out in a hot jury room instead of being out here and listening to the evidence.

08:39 So whatever you can do in that regard, I would appreciate.

One last thing I want to talk about is, you gave me a heads-up on --

MR. CALDWELL: On that one topic.

THE COURT: Yeah.

MR. CALDWELL: I think most of our discussion was in chambers, and so I want to make sure that at least our objections are preserved. It sounds like we're going to take it up again later, but I didn't want silence to be acquiescence.

08:39 And so I'm not trying to take up time now. Just -- I want to make sure that our -- so we didn't believe that temporally they link it to willfulness or that their expert or anyone ties it to doctrine of equivalents or separate patentability.

And then, if it goes forward kind of as Your Honor has

08:40 laid out, we'll probably want to make sure there's an instruction on the issue of it's not a defense to infringement. And I'm happy to take that up later. I just didn't want the fact that we discussed it sort of without a reporter in chambers to have that be lost.

08:40 THE COURT: No, no. And certainly I haven't ruled on

any admissibility, other than I granted the request to mention it during opening statements. But I wanted you to know where I am on that to help you in going forward.

And, as I said, I haven't ruled because I haven't seen the evidence. I have not seen the patents. But from what I can discern from the opposition brief to your motion in limine, it seems to me some of that evidence will be admissible or very well might be admissible.

MR. GRIFFITH: Your Honor, in the same vein, if I could hand the Court a bench brief that we prepared on the issue concerning Mr. Malackowski, simply, again, to preserve our record and our rationale for our objections. And, of course, if Your Honor has a chance to look at it and is persuaded to reverse course, that would be great.

But I would like to hand that up now and give a copy to opposing counsel.

THE COURT: That's fine.

MR. CALDWELL: If Your Honor is entertaining reversing course, obviously we'd want to file a response.

THE COURT: I'm not inclined to reverse, but, as you know, I've done that before. But I'm confident that I can serve you best by giving you rulings that will at least last through the day.

MR. CALDWELL: Yes.

THE COURT: And hopefully -- but you preserve your

record. I have no -- you know, I realize this is an important case.

The other thing I wanted to mention is there was some discussion in chambers about potential objections that were going to come up regarding documents or statements that the defense believes the plaintiff will try to introduce through experts. And I just wanted -- you're probably familiar with this but -- and have been studiously looking at it.

But I just wanted to point to, of course, Rule 703 of the Rules of Evidence, which clearly indicate that's not admissible just because an expert relied upon it. But, if experts in the -- the way the rule reads is: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data, informing an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial affect."

So obviously I need to know exactly what you're talking about, and I need to hear the argument on prejudice and why it's important for the expert -- for the jury to hear this.

So to the extent you have those issues, if you could

bring them to my attention ahead of time, I think that will also allow us to more smoothly conduct the trial with fewer interruptions, which I think we would all agree is much better to have the jury, when they're in the -- at court in the jury box instead of back in the jury room.

08:43

MR. CALDWELL: Yes, Your Honor.

And I would also note, one of the qualifications there towards the end of that, was if they were otherwise inadmissible. So, in addition to the whole "substantially outweighs the prejudice part," there's also the "if they are otherwise inadmissible." And many of these are admissions of party opponent, as well. We don't believe they're inadmissible.

08:43

THE COURT: Yeah. But there are disputes over that too, so ....

MR. CALDWELL: There are. I just wanted to point out --

08:43

THE COURT: I certainly recognize I'm not dealing with all these. My request is you look at the rule and let me know what the objections are and what documents are. And if you can do that the night before, that helps a lot.

08:44

MR. GRIFFITH: In that regard, Your Honor, as I understand -- I think it was the standing order. I mean, we had some debate yesterday about publishing documents to the jury before they've been admitted. And I went back and looked at it. I believe it was the Court's standing order, but it was an order

08:44

of this Court that said that the rule is documents can't be shown to the jury until they've been admitted into evidence. Or, you know, is not objected to.

THE COURT: That's right. You should not be showing things to the jury without agreement or a ruling from the Court; agreement between yourselves that they're admissible and may be shown, or ruling of the Court on their admissibility.

MR. STEWART: Your Honor, can I address that one more time?

THE COURT: Yes.

MR. STEWART: The issue that -- about documents being admissible through expert testimony is likely to come to a head this afternoon. I expect Dr. Sachs will probably take the stand after lunch.

THE COURT: Okay.

MR. STEWART: So to the extent you want to hear argument on those issues, we have discussed some objections to certain documents that he -- we are seeking to admit through his testimony, and show at least parts of demonstrative, in his testimony.

THE COURT: Okay.

MR. STEWART: So I'm happy to address that now or we can do it at lunch break, whatever your preference is.

THE COURT: You know, we have a few minutes, why don't you give me what you have. If you have copies, show them to me

and we'll -- we can address them during the lunch break. Maybe we'll take a longer lunch if there's a lot. Is there a lot?

MR. STEWART: Your Honor, I think it's probably eight or nine documents. I think from the discussions we've had with opposing counsel, they're sort of bucketized in a way they can be ruled on just up or down, yes, you agree with our position or theirs. So if I can frame that for you first.

THE COURT: Sure.

MR. STEWART: The main issue here is whether or not these documents, for which there is no dispute about authenticity, they're defendant's own documents produced in discovery about the development of the accused products, and their only other objections are hearsay and foundation, whether we can discuss those documents with our expert and admit them into evidence because there are no legitimate disputes as to their admissibility.

So what we have is eight or nine documents about the development of these accused products. Dr. Sachs intends to discuss the background of those accused products and how they were developed as important predicate testimony as to him giving an expert opinion about infringement.

He, in his slides discussing the background of those products, is going to show clips from some of these documents. So at least under Rule 703 for demonstrative purposes, that's, I think, an easy question. They're just simple clips to show the

jury that he actually did consider these documents when reviewing the background of the accused products.

There's also the issue of the separate admissibility of those documents, and I think their real objection is this notion of foundation that an expert, who didn't personally deal with those documents, can't lay a foundation for their admissibility. And I just don't think that makes sense under the rules of evidence because foundation is only an objection to the extent you are required to lay a foundation for some other criteria for admissibility.

So if there's an objection as to hearsay and you need to lay the foundation for business records exception, you can object to foundation if it hasn't been laid. Or, if there is a dispute about authenticity, you have to lay a foundation maybe through a person with knowledge that the documents are authentic.

What we have here are documents for which there is no dispute about authenticity. The only hearsay objection is easily overruled because they are admissions by a party opponent, they are defendants' own documents, and so what we think is that pursuant to Your Honor's -- or the agreed trial procedures about streamlining, we should just be able to have a ruling from Your Honor now that those are admissible, and that we can just sort of show them without interruptions in the testimony through Dr. Sachs's testimony consistent with his

report.

And my colleague pointed out there's also, under that 703 balancing test, no real argument that there's prejudice. These are documents from their development of the accused products that are obviously probative of the background of those products helpful to the jury in understanding Dr. Sachs's opinions.

THE COURT: Do you have a representative sample?

MR. STEWART: I can certainly provide one. It actually might be helpful if defendants can identify one of the ones subject to an objection?

MR. GRIFFITH: I don't have a number for you. May I, Your Honor, while we're waiting for that, may I provide comments?

THE COURT: Yes.

MR. GRIFFITH: So first, I believe Mr. Stewart is saying, well, we understand you can't publish to the jury, you can put it on a demonstrative slide --

THE COURT: No.

MR. GRIFFITH: I mean, that's the same thing.

THE COURT: It's not demonstrative if it's a document for review. That's not demonstrative evidence. It's got to be admissible.

MR. GRIFFITH: Right. And then, second, the presumption on their part is that every document that comes from

our files is an admission of a party opponent. That's incorrect. And we don't know for many of these documents the authorship.

They were -- for example, one involved a meeting that included people from outside the company. And so who was recording and who was writing things down is unknown, for what purposes unknown. There is -- the foundation here completely matters, and is more complex than simply saying that it's a document that came out of our files.

08:49 This is not -- it's not like a shipping invoice or something like that. I think one is a PowerPoint presentation from maybe 1999. I can't recall for sure. Chris?

But who prepared it, under what circumstances, for what purpose, all unknown. And so you don't get an admission -- 08:50 you don't establish admission of a party opponent by simply saying it came out of our files.

But that's their theory. That's their theory. Because we produced it, it's an admission of a party opponent, and that's not correct.

08:50 THE COURT: Authenticity. Do you dispute authenticity?

MR. GRIFFITH: No, we don't. I mean, I don't have any reason to believe that the documents were doctored. So I'm not disputing that.

08:50 THE COURT: They are not statements against interest,

they're not -- what is your hearsay objection?

MR. GRIFFITH: Well, all of them. I mean --

THE COURT: They're all hearsay. And they haven't laid a foundation that they are --

08:50 MR. GRIFFITH: Correct.

THE COURT: If they're -- well, let me go back to Mr. Stewart.

MR. STEWART: Your Honor, I've honestly never heard a defendant say we produced this document from our own files that

08:51 says ACCS, Vectra, Zero-P VA on the top header. They don't dispute that it is what it says or purports to be, it's authentic, but it's somehow not an admission of a party opponent. That's never happened in any trial I've been apart of where a defendant says their own documents they produce that

08:51 they agree are authentic are not subject to the exclusion in 801(b)(2), admission of a party opponent.

THE COURT: And since you've both had this issue in mind for a while you can give me the citations to the cases upon which you're relying in support of your position other than I've

08:51 never seen this before?

MR. STEWART: I have at least a case, Your Honor, for the proposition that foundation is not a distinct objection from authenticity and hearsay, if that's helpful.

THE COURT: Give me your cites, or be prepared to give

08:51 me your cites when we take it up later in support of your

respective positions. Both rules of evidence on which you're relying, and the citation to cases on which you're relying. And keep in mind, that's helpful on any issue you want to raise where you have a dispute. Because, obviously, both of you see the law very differently, and the way those are resolved is I need to look at the law that you're relying on. Anything else?

MR. STEWART: If I can approach Your Honor, I have an example document.

THE COURT: Sure. And then we'll go into recess, wait for the jury to assemble. But this is the kind of issue that I appreciate you bringing to my attention.

Okay. We're in recess then until the jury is present.

We're going to have Mr. Talaber back on the stand?

MR. CALDWELL: Yes, Your Honor.

THE COURT: How long do you anticipate his cross?

MR. GRIFFITH: I think I have an hour.

THE COURT: Thank you.

(Break.)

THE COURT: We'll bring the jury in, but they conveyed that some of them were having trouble hearing so make sure you keep your voices up. The acoustics in this place aren't the best, but counsel, especially, have -- you know, make sure your question is heard by the jury as well as the witness. And then witnesses, of course, want to make clear that they use the microphone. I appreciate you want to convey to the jury, but

maybe sit closer to the microphone if that gets to be a problem. We've asked them to raise their hands if they can't hear, and that will be an indication.

We can bring the jury in.

09:02 (Jury present.)

THE COURT: Good morning, ladies and gentlemen. Please be seated.

And, Mr. Talaber, you can retake the stand. We won't re-swear you. You're still under oath. And Mr. Griffith was in

09:03 the midst of a cross-examination that will continue.

MR. GRIFFITH: Your Honor, I have a notebook of exhibits that also includes the witness's deposition testimony. May I hand a copy up to the court, a copy for opposing counsel and a copy for the witness as well?

09:04 THE COURT: Yes, you may.

DAVID TALABER, PLAINTIFF WITNESS, PREVIOUSLY SWORN

CONT'D CROSS-EXAMINATION

BY MR. GRIFFITH:

Q. Good morning, Mr. Talaber?

09:04 A. Good morning.

Q. I would like to start off this morning with just a couple of questions about Errico?

A. Okay.

Q. Do you remember that patent?

09:04 A. Yes.

Q. I said "a couple" of questions. That means more than a couple, but that's lawyer-speak for "a few."

Now, yesterday you said that the Errico patent was related to hips. Do you recall that?

09:05 A. I did. The original Errico patent did.

Q. And can we go to the figure about which I was asking?

And this is the figure about which I was asking you at the time, right?

A. Right. I didn't recognize the number at the top.

09:05 Q. And could we go to Defendants' Trial Exhibit 1028, which, Mr. Talaber, is at tab 15 of your exhibit notebook? And this is the Errico '402 patent; is that right?

A. That's correct.

Q. And the title is, "Anterior Spinal Polyaxial Locking Screw,

09:06 Plate Assemble Having Recessed Retaining Ring," correct?

A. That's correct.

Q. So, in fact, it does -- this Errico '402 patent does relate to anterior cervical plates and not hips, right?

A. Yes, sir. I was confused because the construct is the same

09:06 as the hip construct.

Q. And sometimes one's memory can get a little bit crossed up after all these years, right?

A. I'm sorry?

Q. Sometimes one's memory can get a little crossed up after all

09:06 these years, correct?

A. No, sir. I just misread that yesterday. I'm aware of the Errico patent.

Q. Now, I want to go back to your patent, the patent in suit, and go to figure 5 of that.

09:06 MR. GRIFFITH: If we could put that up on the screen?

A. Okay.

BY MR. GRIFFITH:

Q. And figure 5 is one of three embodiments shown in your patent, correct?

09:06 A. That's correct.

Q. And the screw head in this figure 5, we've colored in red, right?

A. That's correct.

Q. And that what's colored in red is also the enlarged integral

09:07 portion, correct?

A. That's correct.

Q. And it's the same thing in this figure, correct?

A. Pardon me?

Q. It's the same thing in this figure.

A. Yes.

Q. Enlarged integral portion and screw head?

A. It is.

Q. And the screw head is entirely below the stopping member, right?

09:07 A. Yes.

Q. It is between the stopping member and the hole in the bottom of the plate, correct?
A. That is correct.
Q. It's entirely in the posterior bore portion of the plate, correct?
A. Enlarged portion is, yes.
Q. There is no part of the screw head that is in the anterior bore portion, correct?
A. That's correct.
Q. No part of the screw head projects into the upper area of the bore, correct?
A. No, sir.
Q. No part of the screw head projects into the anterior bore portion, correct?
A. That's correct.
Q. And if we could go to figure 6?

Even when you angulate the screw, the head does not touch the stopping member, correct?

A. That's correct.
Q. It's still in the posterior bore portion, correct?
A. Yes.
Q. It never hits the stopping member unless there's a screw backout, which is essentially a failure situation, correct?
A. In this depiction, yes. In this figure.
Q. In this embodiment, right?

A. In this figure.
Q. But this figure --
A. It doesn't reflect all embodiments of this type.
Q. And this embodiment that you show in the patent, it would never hit the stopping member, correct?
A. Figure 6, it shows that, yes.
Q. Right. And that's true for all of the other embodiments you show in the patent, correct?
A. In those figures, yes.
Q. Can we go to figure 14?
So this is another embodiment of your invention, right?
A. That's correct.
Q. And, again, even when you would angulate the screw, the head would not touch the stopping member, right?
A. Well, it's not angulated here, that's correct.
Q. It is not angulated here, but, even if it did, it wouldn't touch the stopping member, right?
A. It may not. Do you have a figure of that?
Q. Pardon me?
A. Do you have a drawing of that?
Q. I don't.
A. Okay.
Q. Let me check. The patent doesn't show an angulated version of that.

A. Okay.
Q. You never depict in your patent an embodiment, an embodiment in which the screw head extends throughout the entire bore, correct?
09:09 A. We don't depict it in the figure, sir.
Q. You don't depict it in the patent, correct?
A. We don't exclude it in the patent claims.
Q. I'm just talking about the specification right now. You never show that in the patent, right?
09:10 A. We never illustrate it.
Q. And you never describe that as approximating your invention, correct?
A. Correct. We never eliminated it either.
Q. All right. Now, I want to switch topics. I'm going to
09:10 switch to the time period of around 2013, 2014.
In 2013, you entered into an amendment in the Stryker license, correct?
A. That's correct.
Q. And it basically turned it into a paid-up license, right?
09:10 A. It converted it from an exclusive to a nonexclusive.
Q. And made it paid up, right?
A. It did.
Q. Okay.
A. Except with certain exceptions, yes.
09:11 Q. With certain exceptions, right.

And after that, you started to market your patent to others to see if you could get interest in someone buying it or engaged in forcing it or licensing it, correct?

A. That's not correct. In buying it.

09:11 Q. Pardon me?

A. Purchasing the patent.

Q. You tried to get people to purchase the patent, right?

A. That's correct.

Q. And you also tried to see if there was interest in a

09:11 license. For example, you contacted Medtronic about interest in a license, correct?

A. No, sir. We contacted Medtronic about a purchase.

Q. Okay. And one of the firms you contacted about buying the patent was IP Navigation, right?

09:11 A. Actually, sir, a broker of ours contacted IPNav.

Q. Fair point. So you engaged a broker, Dean Becker, right?

A. That's correct.

Q. To contact potential purchasers for your patent, right?

A. That's correct.

09:12 Q. And one of the ones that you contacted through Dean Becker was IP Navigation, right?

A. That's correct.

Q. And I think you mentioned them in your testimony yesterday. Do you recall that?

09:12 A. I did.

Q. And you said that IP Navigation initially offered you 20 million dollars for the patent?
A. That's correct.
Q. And then you said that the more you learned about IP Navigation, you wondered if these were really the kind of people you wanted to deal with, right?
A. That's correct.
Q. But you left out a few facts, right?
A. Pardon me?
Q. You left out a few facts, correct?
A. I'm not sure what you mean, sir.
Q. Well, you said IP Navigation initially offered you 20 million dollars?
A. Yes.
Q. But you did not say what their final offer was, did you?
A. I didn't.
Q. And after their initial offer, IP Navigation did some due diligence, didn't they?
A. A minimal amount was what I had heard. I don't know what kind of diligence they did, actually.
Q. And after they studied whatever facts they studied, IP Navigation told you, through Dean Becker, that there was no way they would pay you 20 million dollars for the patent, right?
A. They sent a communication saying that.
Q. And the best offer that IP Navigation could do was 3 million

to 5 million dollars, correct?
A. That was calculated on faulty numbers that they assumed from Stryker.
Q. But they said that's the best offer that they could do, correct?
09:13
A. At that point in time, we were withdrawing from the deal and, yes, both sides were pulling back.
Q. They said that was the best offer they could do, correct?
A. At that time, yes.
09:13
Q. And that's why you did not do a deal with IP Navigation, correct?
A. That was not the reason why.
Q. You didn't do a deal with IP Navigation because you wanted more money, not because you didn't like the type of people they
09:14
were; isn't that right?
A. There were multiple factors in there that were involved. If IP Navigation had offered us a huge amount of money, might we have reconsidered it, yes. But they were in a business that we didn't want to be associated with.
09:14
Q. But if they had paid you more money, you would have held your nose and done business with them, right?
A. We would have considered it. I'm not saying we would have done it one way or the other. It was significantly undervalued.
Q. But you did report the 20 million dollar number to the jury
09:14
yesterday, but you did not report the 3 to 5 million number,

correct?
A. That's correct.
Q. Now, Mr. Talaber, you have a 75 percent interest in the outcome of this litigation, correct?
09:14 A. That's correct.
Q. Now, could we go to Exhibit 1015, which is tab 12 in your exhibit binder.
A. Okay.
Q. Now, this is a copy -- this Exhibit DTX-1015 -- is an email
09:15 chain between you, Dean Becker, and Eric Spangenberg of IP Navigation, correct?
A. That's correct.
Q. And you received copies of these emails through Dean Becker, right?
09:15 A. That's correct.
Q. And they're in the 2014 timeframe, right?
A. Yes.
MR. GRIFFITH: Your Honor, we move to admit defendants' Exhibit 1015 into evidence.
09:15 THE COURT: Any objection to 1015?
MR. CALDWELL: No, Your Honor.
THE COURT: The exhibit is received. It may be published.
(Defendant Exhibit 1015 received in evidence.)
09:15 BY MR. GRIFFITH:

Q. Now, yesterday you said that an outfit called Acacia --

MR. GRIFFITH: I'm sorry, Mr. Ferry. I'm done with that exhibit. I'm moving on to something else.

BY MR. GRIFFITH:

09:16 Q. Mr. Talaber, yesterday you said that an outfit called "Acacia" offered you 12 million dollars in upfront money for the patent. And again, this is in around the 2014 timeframe, right?

A. That's correct.

Q. But that offer was subject to due diligence, wasn't it?

09:16 A. And the lockout period.

Q. Correct. And a lockout period.

And Acacia never got into due diligence, did it?

A. We would not agree to the lockout period.

Q. Right. You didn't like the lockout period. And as a

09:16 result, you didn't go further with them, and they never did due diligence, right?

A. Acacia approached us a number of times, and as far as I know, they did not conduct due diligence because we never agreed to the upfront regulations, rules that they wanted to impose.

09:17 Q. So we don't know what would have happened to Acacia's offer if they had done due diligence, do we?

A. No, sir. But I do know that they approached us multiple times and had a significant interest in our design, in our concept.

09:17 Q. And we do know that IP Navigation offered you 20 million

dollars, subject to due diligence, and after due diligence they said, no way, we'll only pay you 3 to 5 million dollars, and that was for buying the entire patent, correct?

A. Yes.

09:17 Q. And so, in other words, what IP Navigation and you were talking about was a purchase of the patent and not merely an exclusive -- an exclusive license or even a nonexclusive license, right?

A. That's correct.

09:17 Q. And generally speaking, a nonexclusive license would be worth a lot less than buying the whole patent. Fair?

A. Yes. And that was not for the whole patent. None of those discussions included the entire patent.

Q. But they were not for nonexclusive licenses?

09:18 A. They were carve-outs in that. In the deal with IPNav in any deal that we were going forward, there were carve-outs. There were companies, the significant companies in the market were carved out of that, including DePuy Synthes.

Q. IP Navigation was not negotiating taking a nonexclusive

09:18 license from you, correct?

A. I'm not sure how you would term it, sir.

Q. I thought you said earlier that when you had discussions with companies in 2014, that it was on purchasing the patent, and I asked you if it was about licensing and you said no. Are

09:18 you changing that testimony?

A. Absolutely not.
Q. So the discussion with these companies were about purchasing your patent right?
A. Purchasing the patent with carve-outs. If you want to call
09:19 that an entire purchase of the patent as you just characterized it, that's incorrect.
Q. Sir, you called it a purchase earlier, right? It's a purchase?
A. A purchase of sorts, yes.
09:19 Q. And it wasn't a nonexclusive license that you were talking about with IP Navigation, correct?
A. That's correct.
Q. All right.
A. That's correct.
09:19 Q. Now, you mentioned -- I mentioned Medtronic. And Medtronic was a company that you approached directly or indirectly about them purchasing the patent; is that right?
A. Yes.
Q. And basically they said no, right?
09:19 A. They had told us they had made significant investments in other intellectual properties and weren't interested in it at the time.
Q. So they were taking a different approach and weren't interested in your technology, correct?
09:20 A. That's correct, yes.

Q. Nothing wrong with that, right?
A. Correct.
Q. So, over the years, you have contacted a number of companies about selling or licensing your patent, right?
09:20 A. I wouldn't say -- characterize it that way, for years. During one time period, we did attempt to market the patent.
Q. The patent has been in existence now for 19 years; is that right?
A. Correct.
09:20 Q. And it has less than a year left, right?
A. Actually, 17 years. It issued in 2003. You're right. Okay.
Q. All right. I apologize. My questions may have been confusing. So let me kind of be a little more deliberate with
09:20 this and make it a little more clear.

So you filed for your patent application -- I'm sorry. I botched it again.

You filed your application for your patent in July of 1999, right?
09:21 A. That's correct.
Q. It issued a couple years after that, right?
A. That's correct.
Q. It will expire in July 2019, correct?
A. That is correct.
09:21 Q. So either as an application or an issued patent, your

property has been in existence now for about 19 years?
A. That is correct.
Q. And the only license you have been able to do is with Stryker, right?
09:21 A. For a number of reasons, that's correct.
Q. And that's not because you weren't trying, right?
A. For eight of those years, sir, we were under a re-issue, and we had no idea what claims, how many claims, what type of claims were coming out. More or less our hands were tied on anything
09:21 we wanted to do regarding sales or licensing or anything else. So we absolutely did not pursue anything during that eight-year period. And prior to that, we were licensed with Stryker and we weren't pursuing anything at that time.
Q. I thought you said yesterday that -- let me back up.
09:22 In 2006 was during that eight-year re-issue period, correct?
A. That's correct.
Q. And I thought you said yesterday that you approached, with Stryker's permission, you approached DePuy about the possibility
09:22 of a license; isn't that right?
A. No, sir. About the possibility of a sublicense through Stryker.
Q. Okay. I got it.
So I didn't use the word "sublicense." That was the
09:22 problem, right?

A. Pardon me?
Q. So over this 18- or 19-year period, the only license or sublicense that you've been able to do was with Stryker, correct?
09:22 A. We have given Stryker an exclusive license, and they were alone, the only ones that could license the patent, sublicense the patent.
Q. Yeah, but they gave you permission, at least in one instance, to go out and try to sublicense, right?
09:22 A. They gave us permission to talk to DePuy at that time. I didn't have permission to sign anything to grant anything, to offer any kind of terms on anything.
Q. Why were you doing it?
A. Simply -- Dr. Lloyd was implanting DePuy implants. They
09:23 were failing in his patients. He suggested maybe our IP could help DePuy out of the mess they were in.
So we -- and he talked to the representatives, his DePuy reps, on a regular basis, and asked them if they might be interested in seeing this. That's how it came about. You can
09:23 ask Dr. Lloyd for more detail.
Q. Okay. But you -- with that backdrop, you felt that you were able to talk to them, and I think you sought permission from Stryker to do that, right?
A. We had a limited approval to speak to them, not for any kind
09:23 of business dealings, any kind of terms or any kind of

sublicensing.

Q. And then ever since the Stryker license became nonexclusive in 2013 -- so that's five years now -- you've had unlimited ability to license, sell, or sublicense, or covenant not to sue, or however you want to put it, your patent, correct?

A. Yes, sir. The patent had been out for 10 years. And during that time period, what was a new technology to the market in 2002, had been around a long time. And we were a small company and trying to come out, and with a technology that had already been out 10 years with Stryker, and had been out since 2005 with the infringing product from DePuy Synthes, the market was a little bit already taken. Market share was gone because of the Stryker license and the infringing products. And from a business perspective, it didn't make a lot of sense to go in and try and fight these people.

Q. However you slice it up, Mr. Talaber, nobody has been willing to pay you what you want for your patent, correct?

A. That's not the case.

Q. Stryker did, right?

A. Stryker did?

Q. Stryker paid you what you wanted, right?

A. Stryker -- in the total package, Stryker gave us what we wanted. We wanted a higher royalty rate, but they offered other aspects to the deal that were particularly appealing to a small company.

Q. But the money was 4 1/4 percent, 3 1/4 if it was nonexclusive?
A. 5 percent, right.
Q. I'm talking about the actual agreement, not negotiations.
09:25 The agreement said 4 1/4 percent, right?
A. It was reduced from 5 to 4 1/4, yes.
Q. You never had an agreement, signed agreement that sought 5 percent?
A. That's correct. That's correct. Not a signed agreement.
09:25 Q. There's one and only one written agreement that has a royalty rate in it, right?
A. That's correct.
Q. And it's got 4 1/4 for nonexclusive, 3 1/4 for -- I'm sorry. I botched it again. I didn't get enough sleep last night.
09:25 All right. There's one or only one actual license that's been entered into, and the royalty rate in that is 4 1/4 percent for exclusive and 3 1/4 percent for nonexclusive, correct?
A. Specifically for Stryker.
09:26 Q. Correct?
A. The Stryker agreement, that is correct.
Q. And in the five years since that license has ended -- the exclusivity has ended, and you've been free to peddle your patent, nobody has been willing to pay you what you want, right?
09:26 A. We have not marketed the patent. Since then we've talked to

those groups, and after we talked to those groups, the Acacia and the IPNav, we've stopped approaching people and we went and talked to Johnson & Johnson, or DePuy Synthes. And we talked to you in 2014. And after that discussion, we've entered into this litigation, and that's stopped anything else we were doing.

Q. Sir, nobody has been willing to pay you what you want since 2013, for your patent, whether as a purchase or as a license, right?

A. The licensing entities that we spoke with, that's correct.

Well, it wasn't -- no, I can't say that. There were other things with Acacia that stopped us from dealing with them, and that was the lockout period. So I don't know if they would have paid us what we wanted or not, sir.

Q. After -- well, you knew you didn't do a deal with them, right?

A. That's correct.

Q. Now, and you might have been -- strike that.

Now, another outfit that was approached about interest in you patent was called WiLan, right?

A. There were minimum discussions with them, yes.

Q. And they didn't take one, right? They didn't buy it, they didn't take a license, nothing, correct?

A. We never had substantive discussions with them.

Q. And it was reported to you by Mr. Becker that they just didn't see the size of the market warrants any upfront payment,

correct?
A. That is correct. WiLan was not in the industry that we were in and didn't know the industry.
Q. Now, the Stryker amendment we said was entered into in 2013, right?
A. That's correct.
Q. And you gave them a paid-up license, nonexclusive, subject to some exceptions for possibilities of royalties, for the period from 2013 to the expiration of the patent, right?
A. That's correct.
Q. So that's approximately a six-year period, right?
A. That's correct.
Q. And so for that six-year period, Stryker paid Acantha 2.995 million, right?
A. That's correct.
Q. And that amount is for all of Stryker's sales for the period from 2013 through expiration, right?
A. That's correct.
Q. Pardon me?
A. That's correct.
Q. No matter how much it is, right?
A. That's correct.
Q. And if it's 200 million dollars, the price stays the same, 2.995 million, right?
A. That's correct.

Q. And my question might have been unclear. Perhaps that was a reason for the pause.

If Stryker has 200 million dollars in revenues of sales of products covered by that license, the price stays at 2.995 million, correct?

A. Hypothetically, sir, that is correct. We knew at the time that the Stryker sales were decreasing significantly, and that's why we agreed to that amount, as well as buying out the license.

Q. And so if it was 100 million dollars in sales over that period, that would convert to a 3 percent royalty, right?

A. Yes, sir.

Q. Approximately.

A. And if it was 20 million dollars in sales?

Q. I'm sorry?

A. And if it was 20 million dollars in sales?

Q. It would be higher as a percent, right?

A. Yes.

Q. They can sell as much as they want, right?

A. Yes.

Q. And if the product is great and everyone likes it, it will sell like hotcakes and they'll sell a couple hundred million and then the royalty would be 1.5 percent, right?

A. Yes, sir, although that's mischaracterizing the sales at the time.

Q. All right. I'm going to come back to that, Mr. Talaber.

But I want to go to a slightly different topic right now.
A. Okay.
Q. And I want to go to some of those letters that you wrote to companies back in 2002. All right?
09:30 Now, I think there were four letters that you testified about yesterday, right?
A. Yes.
Q. And one was to Synthes, and three were to DePuy AcroMed, DePuy Orthopaedics, and Codman, respectively, right?
09:30 A. Yes, that's correct.
Q. And Codman -- I'm sorry, let me back up.
You were offering -- in those letters you were trying to gauge interest in a license, or partnering with them, with respect to your patent, right?
09:31 A. That's correct.
Q. And Codman didn't take a license, right?
A. Communication I had from Codman was they were referred to J & J Orthopedics.
Q. Okay. But Codman didn't take a license, right?
09:31 A. That is correct.
Q. And Codman instead continued to sell Cam-Loc plates, right?
A. That is correct.
Q. For example, Codman ACP, right?
A. Yes.
09:31 Q. And Slim-Loc was the second generation of that, right?

A. That's correct.
Q. And Skyline the third generation of that, right?
A. That is correct.
Q. And those are all successful -- commercially successful
09:31 anterior cervical plates, right?
A. I'm assuming so.
Q. And is it your belief that those are more commercially successful than any plate product has been that's been covered by your patent?
09:31 A. I don't know that.
Q. Okay. You would be unable to deny that, right?
A. That's correct.
Q. Now, there's nothing wrong in Codman declining to accept your offer of a license or a business arrangement with respect
09:32 to your patent, right?
A. Excuse me sir, repeat it?
Q. Sure. There's nothing wrong with Codman's decision not to accept your offer of a license or a business relationship respecting your patent, correct?
09:32 A. Absolutely. Yeah.
Q. There's nothing wrong with that, right?
A. There's nothing wrong with it.
Q. And, in fact, lots of people have declined to go forward with a license or a partnership on your patent, right?
09:32 A. For one reason or another, correct.

Q. All right. So one of the other outfits you wrote to was DePuy Orthopaedics and Jorge Orchoa?
A. Dr. Ochoa, yes.
Q. Dr. Ochoa. And, again, you offered them a business
09:32 relationship or a license on the patent, right?
A. That's correct.
Q. And your understanding was that DePuy Orthopaedics sells knees and hip products, right?
A. I wasn't sure of the entire product line they sold at the
09:33 time, but I knew they sold hip and knee products.
Q. And you believe that your invention might have applicability in areas outside the anterior cervical spine, correct?
A. That's correct.
Q. And DePuy Orthopaedics didn't take a license, right?
09:33 A. DePuy Orthopaedics what?
Q. I apologize. I'm speaking too fast. DePuy Orthopaedics did not take a license, correct?
A. That's correct.
Q. And, again, there was nothing wrong with DePuy Orthopaedics
09:33 declining to take a license, right?
A. That's correct.
Q. They went another direction, and that's okay, right?
A. That's correct.
Q. Now, I want to come back to this point about the patent
09:33 possibly being able to be used in other areas beside the

anterior cervical spine?
A. Okay.
Q. Okay? I think you testified yesterday that your patent can be used in other areas, outside the front of the spine, right?
09:34 A. Correct.
Q. And, but in the almost 20 years since you filed your patent application, no one, to your knowledge, has produced any products covered by your patent besides anterior cervical products, right?
09:34 A. The best of my knowledge, that's correct.
Q. So, for example, you're not aware of any posterior cervical products covered by your patent, right?
A. I'm not -- yes, I'm not -- I'm unaware of any.
Q. You're not aware of any long bone, like in the leg, long
09:34 bone products covered by your patent, right?
A. No. Correct.
Q. Any knee products covered by your patent?
A. That's correct.
Q. Any hip products covered by your patent, right?
09:34 A. That's correct.
Q. So, to your knowledge, your patent has only been used in the anterior cervical spine area, correct?
A. To my knowledge, yes.
Q. So when you said it could be used in other areas, that was
09:35 not based on that actually ever having happened, correct?

A. That is correct.
Q. It was based on your speculation that it could happen, right?
A. That is correct.
09:35 Q. Now, I want to go to the letter --
There was a letter to Chris Fair of DePuy AcroMed. So that's the third of those three letters to various Johnson & Johnson entities. All right?
A. Okay.
09:35 Q. Again, they did not take a license, right?
A. That is correct.
Q. And they didn't infringe your patent, right?
A. That's correct.
Q. And back in 2002, there was no infringement by DePuy, right?
09:35 A. That is correct.
Q. They're not affiliated with Synthes at this point in time, correct?
A. That is correct.
Q. No infringement by them in 2003 or 2004, right?
09:35 A. Right.
Q. 2010, 2011, correct? No infringement?
A. That I knew of.
Q. Right. And, again, DePuy AcroMed did not take a license, right?
09:36 A. That's correct.

Q. Nothing wrong with that, right?
A. Right.
Q. So you have no beef with DePuy from 2002 to 2011, right?
A. Yeah. That's -- that I know of, correct.
09:36 Q. Your gripe with DePuy is that they bought Synthes in 2012, correct?
A. Correct. I'm not exactly sure when the Zero-P was introduced, whether it was pre- or post-acquisition, but about the same time.
09:36 Q. But if it was pre-acquisition, that was Synthes and not DePuy, right?
A. That's correct.
Q. So, again, you had no beef with DePuy until they bought Synthes, right?
09:36 A. That's correct.
Q. Now, you talked about discussions with DePuy in 2006. I think we mentioned that a little bit this morning, right?
A. Yes. Yes.
Q. And, again, this is before they're ever affiliated with
09:37 Synthes, right?
A. That was correct.
Q. And you said they were having problems with a couple of products, right?
A. Correct.
09:37 Q. Eagle and Swift, right?

A. The screw backout, and then they had screw breakage in the Codman Skyline, or whatever generation was going on at that point.

Q. You didn't have the discussions with DePuy personally, did you?

A. With whom?

Q. Strike that.

The discussions were not on Codman. They were on Eagle and Swift, right?

A. That's correct. Well, the discussions that I'm aware of were on Eagle and Swift. Could there have been other discussions that, for example, Dr. Lloyd was involved with? I don't know.

Q. Okay. Fair point. I'm just asking about yours. Okay?

A. Sure. Sure.

Q. So your discussions were about Eagle and Swift, not about Codman, right?

A. That's correct.

Q. And DePuy, again, did not take a license or did not pursue a possibility of a sublicense or other arrangement at that time, right?

A. After -- yes. After a number of discussions or phone calls, they decided not to pursue that, correct.

Q. And they found a different solution, right? As far as you know.

A. Well, to us it looks like the solution is they bought an infringing printout and are selling an infringing product, to get around that issue.
Q. I'm talking about 2006, sir.
09:38 A. Oh, okay. 2006, yes.
Q. In 2006, they said no thanks, and they went on and did further revision to Eagle and Swift to make that Eagle and Swift Plus, right?
A. That's correct.
09:38 Q. And so they found a different solution to the problem from what your patent offered, right?
A. That's correct.
Q. And by the way, Eagle and Swift are auto-locking plates correct?
09:39 A. They're auto-locking plate, yes.
Q. And they're rigid, right?
A. Pardon me?
Q. They're rigid, correct?
A. I'm not sure of that.
09:39 Q. Okay. All right.
I mentioned that I wanted to come back to some of your discussion about how sales have been more recently. And I'm going to ask you questions respecting the Stryker Reflex product. Okay? And that was a product that Stryker paid you
09:39 royalties on, right?

A. That's correct.
Q. Anterior cervical plate, right?
A. That's correct.
Q. It was the primary -- so you entered into that license
09:39 originally with Stryker in 2003?
A. Yes.
Q. And the Reflex was the primary licensed product then, right?
A. Initially, it was.
Q. Yeah. And then, for example, there became a Reflex Hybrid,
09:40 right?
A. Yes.
Q. And a couple of others, right?
A. Yes.
Q. DynaTran, right?
09:40 A. Yes.
Q. Now, by 2012, sales of Reflex and Reflex Hybrid were
declining, right?
A. That's correct.
Q. And they had been declining for a couple of years, right?
09:40 A. That's correct.
Q. And in around 2010 or so, Stryker had introduced a product
called Aviator, right?
A. That's correct.
Q. And your partner and coinventor, Dr. Lloyd, believes that
09:40 Aviator does not practice the Acantha patent, right?

A. I haven't discussed that.
Q. On behalf of Acantha, Dr. Lloyd filed a declaration in this case with the Court in which he stated that Aviator does not practice the Acantha patent, correct?
09:41 A. Okay.
Q. You never saw that?
A. If I did, I'm sorry, I forget.
Q. That's okay. And, conveniently, I have a copy in your exhibit notebook.
09:41 A. Okay.
Q. So if you could go to tab 8. And that is a copy of Defendants' Trial Exhibit 1255; is that right?
A. Yes.
Q. And then if you could go to the second page of that. Do you
09:41 see paragraph 3?
A. 3?
Q. Paragraph 3. Not page 3, paragraph 3. Do you see that?
A. Yes.
Q. Does that refresh your recollection that Dr. Lloyd took the
09:41 position with this Court that Aviator is not covered by the patent, right?
A. That's correct.
Q. And it has a surgeon-activated step in it, right? It's a two-step --
09:42 A. A secondary step.

Q. Secondary step. So that's a second step that the surgeon has to do to finalize the stopping member process, right?
A. Much like the Codman, yes.
Q. Right. And so basically what was happening was, Stryker was
09:42 moving to this two-step design and away from the auto-blocking one-step design started in and around 2010, right?
A. I'm not exactly sure of Stryker's marketing strategics. All I could see was what was happening with the products that we were involved in.
09:42 Q. And what you could see from where you sat was the one-step products that you were getting paid royalties on were declining.
A. That's correct.
Q. What you believe the Aviator product, the two-step, were increasing. That was your belief, right?
09:43 A. What I saw of the -- first, I didn't see anything about the Aviator sales. So it was speculation. It seemed like the Reflex product sales were going down, and we didn't know for sure what was happening with the Aviator sales. But they did introduce that product.
09:43 Q. You had no reason -- strike that.
All right. Let me take this in steps. So if you could go to tab 6, which is a copy of Defendants' Trial Exhibit 1271?
A. I'm sorry, where are we again?
09:43 Q. Yeah. It's tab 6 of your exhibit notebook.

A. Okay.
Q. Do you have that?
A. I do.
Q. And that's Defendants' Trial Exhibit No. 1271?
09:44 A. Yes.
Q. And this is an email chain between you and Chris McDonald, right?
A. That's correct.
Q. From March of 2012, right?
09:44 A. Yes.
Q. And it's about the Acantha license agreement. That's your agreement with Stryker; is that right?
A. Where are you seeing that?
Q. Well, the re: line at the top of the first page says
09:44 "Acantha license agreement"?
A. Oh, okay. Yes.
Q. Correct?
A. Yes.
Q. So that's what, in this case, we've been calling the
09:44 "Stryker license"?
A. Right.
Q. And when they're on the other side, I guess they call it the Acantha license, right?
A. Yes.
09:44 Q. Okay. So you have --

MR. GRIFFITH: And we move to admit Defendants' Trial Exhibit 1271 into evidence.

THE COURT: Any objection?

MR. CALDWELL: No objection, Your Honor.

09:45 (Defendants' Exhibit 1271 received in evidence.)

BY MR. GRIFFITH:

Q. Now, if we could go to the second page?

Can we put it up?

And go to the second paragraph, and highlight the

09:45 second sentence of that paragraph. Perhaps blow it up so the jury can see it.

So this second page is an email from you to Chris McDonald of Stryker, and you cc Al Zarnowski of Stryker, correct?

09:45 A. Yes.

Q. And you state in the second paragraph: "For various reasons Stryker's sales of products with Acantha IP are at their lowest levels since 2004, and have been decreasing steadily for two years." Right?

09:45 A. That's correct.

Q. Okay. Now, if we could go to tab 7 in Defendants' Trial Exhibit 1272.

A. Okay.

Q. And this exhibit, again, is an exchange of emails between

09:46 Mark Schroeder and you and persons at Stryker, correct? And

it's in around November of 2012?
A. Yes.
Q. Okay.
MR. GRIFFITH: And we move to admit Defendants' Trial Exhibit 1272 into evidence.
(Defendants' Exhibit 1272 received in evidence.)
MR. CALDWELL: No objection.
BY MR. GRIFFITH:
Q. And then in the next-to-last paragraph on the first page -- strike that. Let me back up.
So this email on the first page is an email from a co-owner of Acantha, Mark Schroeder, and Mark Mania, right, of Stryker?
A. Yes.
Q. And you are cc'd on it, right?
A. Correct.
Q. Do you remember this email exchange?
A. Yes.
Q. Okay. And then in the next-to-last paragraph, your co-owner, Mark Schroeder, says: "We also believe that at this time, Aviator would generate greater royalties than the Reflex line." Do you see that?
A. Yes.
Q. So that reflected your belief that Aviator sales were going up, and that it was generating more sales and therefore would

generate more royalties than Reflex, right?
A. Yes, sir.
Q. So, again, two-step was competing just fine against one-step, right?
09:47 A. That was an opinion on our part. As I said before, we had no sales numbers to substantiate that, but anecdotally we thought that this is what was happening. And we asked about the Aviator, yes.
Q. And that was the inference you drew at the time, and it was
09:47 a reasonable inference to draw, correct?
A. We thought so.
Q. Okay. And it was a reasonable inference to draw that Stryker and its customers preferred Aviator to the patented product Reflex, correct?
09:48 A. No, I wouldn't agree with that. For all I know, Stryker was preferring to sell the Aviator -- by the way, when we further looked into the Aviator and we talked to our attorneys about it, and we heard from Stryker that they had a freedom to operate, we backed off that whole assertion. And that's where, I'm
09:48 guessing, Dr. Lloyd came in with what he was saying.
Q. So -- let's parse that out a little bit.
So Stryker told you they had a "freedom to operate" opinion on Aviator, right?
A. That's correct.
09:48 Q. Meaning a legal clearance opinion, right?

A. That's correct.
Q. And so their lawyers said, Stryker, you don't infringe, or you're not within the scope of and, therefore, not within the license of the Acantha patent, right?
09:49 A. That's correct.
Q. And so they told you that, and you said, okay, we got it, that that's your position, right?
A. Right.
Q. But they were -- at this point in time, we're in 2012, it's
09:49 your belief they're selling more Aviator than they are Reflex, right?
A. That's what we were speculating, correct.
Q. And it's a reasonable inference that their customers, at least, preferred Aviator to Reflex, right? The Reflex sales are
09:49 going down and the Aviator sales are going up. That's your belief, right?
A. Yes, that's the belief. I'm not believing that the customers necessarily preferred. If the Stryker introduced a new product and decided to promote it and not promote the
09:49 existing products, that could also influence sales significantly.
If Stryker made more money on the Aviator, higher profit margins, they may opt to sell that over this more simple design of the Reflex. Which is not customer preference, that's
09:50 just a company doing what makes it the most money.

Q. Right. So there's a lot of reasons why somebody might choose a two-step non-auto-blocking stopping member design over a one-step. And it might not even have to do with the preference between one-step or two-step, right?

09:50 A. You just said there may be a reason that they chose that. They may be more or less fed this product, I suppose, and the other one withdrawn.

I don't know what was going on within the Stryker sales force. I have nothing to indicate that the customers

09:50 preferred one over the other.

Q. But you've never heard that there was a revolt among Stryker customers saying, hey, we got to have the one-step design, get this two-step design out of here. You never heard that, did you?

09:51 A. No, I didn't.

Q. Okay. Now, over this same time period, are you aware of whether Vectra sales were declining 2012 to the present? Strike that. Let me make it more clear.

For the period from around 2012 to the present, are

09:51 you aware of whether Vectra sales had been declining?

A. I'm not exactly sure. They may have been.

Q. Is that your impression, sir?

A. Yes.

Q. Over the same time period is it your impression that sales

09:51 of two-step Skyline with the cam have been increasing? You

don't know?
A. I have no idea.
Q. Okay. So you don't know if Vectra users have been switching to Skyline or not, right?
09:51 A. That's correct. Yes.
Q. All right. I want to go back to this -- we're still on Aviator, but it's a slightly different topic here.
Sir, reasonable minds can disagree about whether a given product infringes a patent, correct?
09:52 A. If you say so.
Q. And I would like to discuss an example of that with respect to the Acantha patent. All right?
A. Okay.
Q. At one point, you strongly believed that Aviator, this
09:52 two-step design, was covered by or would infringe the Acantha patent, correct?
A. Mr. Griffith, you said I strongly believe that? No. This was an initial feeling. We saw the sales of Reflex going down. We speculated that maybe sales were going someplace else.
09:53 Q. But my point is, it was the company's strong belief in 2012, Acantha's strong belief in 2012 that Aviator was covered by the Acantha patent, right?
A. I would not characterize it as a strong belief, no.
Q. Your co-owner, Mark Schroeder, characterized it as such in a
09:53 communication with Stryker, right?

A. Yes, sir. Mr. Schroeder is not a patent attorney.
Q. Okay. And you aren't either, right?
A. I am not.
Q. But Mr. Schroeder is a lawyer though, right?
09:53 A. But not a patent attorney, but he is an attorney.
Q. But the point is he went out and said it was Acantha's strong belief, that it was the company's strong belief that Aviator --
A. It was not our strong belief, sir.
09:53 Q. Well, you told Stryker --
A. We speculated that that may be happening. I wouldn't characterize that as a strong belief. We had not talked to our patent attorneys about it. This was the initial discussions we were having with Stryker. And they came back and said they had
09:54 a freedom to operate, and we didn't push back after that.
Q. Your personal belief was that it was covered, albeit, apparently, not a strong one, correct?
A. We had suspicions, put it that way. We suspected there was a possibility that it was infringing, but we also knew that the
09:54 operation was different from the Reflex and the Reflex Hybrid. And so we did not know for sure.
Q. All right. Let me put it this way: You recall that there was a letter from Mark Schroeder to Stryker relating that it was his strong belief that Aviator was covered by the Acantha
09:54 patent, correct?

A. I don't know if it was Mr. Schroeder's strong belief on that, but he presented that to Mark Mania running -- throwing the question out there to see what Stryker had to say about all this. They were our licensees. This was an issue. We were attempting to cover that issue with them.

Q. He presented to Stryker the position that the product was covered by the patent and therefore royalty bearing, correct?

A. That was what he said in that letter.

Q. Right. And Dr. Lloyd takes the position that the product is not covered by the patent, right?

A. Yes. As I said, we subsequently -- that letter had more information. We had more feedback and that's what formed the opinion that it did not infringe.

Q. And the fact that there's a disagreement between people as to whether there's infringement or not, does not mean that that's bad faith, right?

A. I don't think there was disagreement between people. It was at two points in time. The first opinion that was sent in the letter did not have the benefit of the additional information that we received, that Dr. Lloyd received afterward.

And on Mr. Schroeder, I'm sure would agree at this point, that the Aviator does not infringe.

MR. GRIFFITH: One moment, sir.

(Brief pause.)

BY MR. GRIFFITH:

Q. Okay. Let's go back to tab 7, and that's Defendants' Trial Exhibit 1272.
A. Okay.
Q. And if you could put up the second paragraph from the
09:56 bottom?
A. Okay.
MR. GRIFFITH: And if you could highlight, Mr. Ferry, the second sentence?
THE WITNESS: Yes.
09:57 BY MR. GRIFFITH:
Q. So, again, this is a letter from Mark Schroeder to Stryker, right?
A. Yes.
Q. And he says: "Another issue to consider is the Aviator. We
09:57 strongly believe that Stryker's Aviator is covered by our patent, and that Acantha is owed both past and future royalty payments." Correct?
A. Correct.
Q. So, in fact, it was his strong belief?
09:57 A. Mr. Schroeder's strong belief.
Q. He wasn't lying in this letter as far as you know?
A. That's correct. Although it's not Mr. Schroeder -- I'll let him speak, but it's not Mr. Schroeder's strong belief today that that's the case.
09:57 Q. He's changed his mind?

A. He changed his mind when we received additional information from our attorneys and we heard from Stryker about their freedom to operate.
Q. But you did know at this point in time that it was two-step, correct?
A. Yes, sir.
Q. And, in fact, Dr. Lloyd had actually used it in a surgery, right?
A. I'm not sure of that.
Q. Well, didn't he send you some information about it?
A. Pardon me?
Q. You recalled him sending you some information about the Aviator design that he added?
A. Yes.
Q. So you knew how it worked, right?
A. Yes.
Q. Okay. Some and substance, back in 2012, Mr. Schroeder strongly believed that the two-step Aviator design was covered by your patent, correct?
A. That's what the letter says.
Q. And then, since then, you all have changed your mind and believe it's not covered by the patent?
A. Shortly after the letter was written and we consulted with our attorneys, yes, we were enlightened, if you will.
Q. What attorney?

A. Which attorney? Mr. Venturino.
Q. Have you produced those communications to us?
A. No.
Q. Why not?
09:59 A. I'm not -- I didn't know that that -- there was anything to produce. It was a discussion.
Q. Okay. You testified yesterday that the reason -- I'm going to switch topics. All right?
You testified yesterday that this reason that Stryker
10:00 did not sue Synthes a long time ago, back in the 2006 timeframe or so, is because, I think you said, the big players all leave each other alone, right?
A. This is what we were told by an employee of Stryker, yes.
Q. Okay. And could I direct your attention to tab 16 of your
10:00 exhibit notebook?
A. 16?
Q. 16.
A. Okay.
Q. And do you see that that is a copy of a complaint filed by
10:00 Synthes USA against Stryker Corporation and others?
A. Yes.
Q. And looking at the top, you can see it was filed in 2006, right?
A. Yes.
10:00 Q. And if you could direct your attention to the third page.

Do you see that Synthes is asserting a patent infringement claim against Stryker?
A. Yes.
Q. And if you look at paragraph 9, it's on a patent entitled, 10:01 "Threaded Insert For Bone Plate Screw Hole," right?
A. Yes.
Q. And so, in fact, the big players didn't leave each other alone, did they?
A. This is a singular example, yes, sir. In general, though, 10:01 the market stays at equilibrium with the large players. Occasionally there's interruption, and that's what we were told. Occasionally they'll sue each other. But for the most part, you leave me alone and I'll leave you alone.
Q. Well, on this occasion, Synthes was not leaving Stryker 10:01 alone, right?
A. That's correct.
Q. And Stryker did not countersue on the Acantha patent, did they?
A. They did not.
10:01 Q. And they could have, as far as you know, right? They had the legal power to under the license, right?
A. That's correct.
Q. And is it possible that the reason Stryker didn't countersue was because they viewed the claim as weak?
10:02 A. That's speculation, sir. I have no idea what was in

Stryker's mind.

Q. You don't know?

A. I do not.

Q. All right. Could you look at tab 16?

10:02 MR. GRIFFITH: I would ask to move --

I'm sorry. I failed to properly identify it earlier. In tab 16, the Synthes complaint we were talking about? That's Defendants' Trial Exhibit 1314. Correct?

THE COURT: Any objection?

10:02 MR. CALDWELL: No objection.

THE COURT: Received.

(Defendants' Exhibit 1314 received in evidence.)

BY MR. GRIFFITH:

Q. Then if you could go to tab 17.

10:02 A. Okay.

Q. And that's a copy of a complaint that Howmedica Osteonics Corporation and Stryker Ireland filed against DePuy Orthopaedics, right?

A. Yes.

10:02 Q. And this was filed in 2011, right?

A. I didn't see a date.

Q. If you look at the top of the first page, Mr. Talaber?

A. Yes, I see it.

Q. It's a complaint for patent infringement, right?

10:03 A. Correct.

Q. Okay. And you can see on page 3 that there's a patent infringement claim, right?
A. Yes, sir.
Q. And these companies are Stryker affiliates, right?
10:03 A. Yes, sir.
Q. So Stryker, in fact, wasn't shy about suing other of the big players if it felt appropriate to do so, right?
A. These are a couple of lawsuits that were filed, yes, sir. Out of how many disputes or potential infringement cases, I have
10:03 no idea. It could be hundreds for all I know.
Q. Okay. I apologize for cutting you off.
And while they elected to file a suit in this case, again, they didn't sue on the Acantha patent, right?
A. They did not.
10:04 Q. Possibly because they viewed it as a weak claim, right?
A. I have no idea why.
Q. Okay. Let me switch topics.
A. Sure.
MR. GRIFFITH: I ask to move into evidence Defendants'
10:04 Trial Exhibit 1315?
MR. CALDWELL: By comparison to the other one, I do object to this one as being hearsay. This isn't a complaint they filed. The other one was their own statements. So this is a different action and I object on this one as hearsay, Your
10:04 Honor.

MR. GRIFFITH: Okay.

BY MR. GRIFFITH:

Q. Let me switch topics a little. You talked some yesterday and today about the re-issue patent and the re-issue process. Do you recall that?

A. I do.

Q. And what happened was your original patent issued in 2001 with 28 claims, right?

A. That's correct.

Q. And as a result of the re-issue process, you added a bunch more, right?

A. That's correct.

Q. But the initial 28 claims have virtually the same scope as the additional claims added during re-issue, correct?

A. I'm sorry. I didn't hear your question.

Q. Let me try it again. All right. I'll go a little slower.

The initial 28 claims have virtually the same scope as the additional claims added during re-issue, correct? That's your belief?

A. Essentially the same scope as the 28 claims.

Q. Is that different from virtually the same scope?

A. Is it different?

Q. Is that different from virtually the same scope? Are you parsing between the word "virtually" and "essentially"?

A. Yes. They're essentially the same scope.

Q. Okay. The --
A. With the exception with the one claim that was changed from a "biased stopping member" to a non.
Q. Right. So there was one claim where instead of saying
10:06 "biased stopping member" it just says "stopping member," right?
A. Yes.
Q. But you reviewed the independent claims as having essentially the same, scope whether they're in the re-issue claims or in the original 28, correct?
10:06 A. It covers exactly the same territory that was in the opening and the background.
Q. All right. It just added a lot more claims and a lot more detail, right?
A. That's correct.
10:06 Q. All right. You mentioned yesterday that there's only -- at least at the time of your patent -- re-issue patent issuing -- there were only 43,000 or so re-issue patents, right?
A. Based on the re-issue number we received.
Q. Fair deduction. Your re-issue patent number is 43,000
10:07 something, right?
A. Yes.
Q. And so I think you noted that, you know, that's a lot fewer re-issue patents than there are of regular patents, right?
A. Correct.
10:07 Q. And that's because, in fact, there were a lot fewer re-issue

applications than there are regular applications, right?
A. That's correct.
Q. And --
A. I'm assuming so. I don't know that.
10:07 Q. Okay. And you filed for re-issue because of errors you made in the original patent, not because of errors that the patent office made, correct?
A. Yes. "You" meaning Acantha, its attorneys or whoever.
Q. Mr. Talaber, yesterday you testified how it felt fantastic
10:08 to get a patent, do you recall that?
A. Yes, sir.
Q. And you felt it was quite an achievement, fair?
A. Yes, sir.
Q. And if others besides you were to get a patent, you would
10:08 say they have made an achievement too, right?
A. I would.
Q. And they should be proud like you, right?
A. Yes, sir.
Q. And they should be given credit, right?
10:08 A. Yes, sir.
Q. And they should be respected, right?
A. Yes, sir.
Q. Even if they work at DePuy, right?
A. Pardon me?
10:08 Q. Even if they work at DePuy or Synthes, right?

A. Yes, sir.

Q. Okay?

MR. GRIFFITH: Okay. That's all I have, Your Honor.

THE COURT: We'll take our morning break, ladies and gentlemen.

(Jury not present.)

THE COURT: There was an objection.

We're outside the presence of the jury. Almost outside their presence. Please close the door. Thank you. Okay. Now we're outside the presence of the jury.

There was an objection to Exhibit 1315, the complaint in the *Howmedica Osteonics Corp and Stryker vs DePuy*, the New Jersey action.

What's the objection?

MR. CALDWELL: My objection was this is just not a document from them. It's -- this is a document that someone else wrote and filed. It was a hearsay objection. And my other point to you was the complaint that he admitted before was a complaint they filed. So it is an admission of party opponent.

I mean, I realize I'm not the one that's approving it, but that's why there's no point in objecting to the other one. This is one they can't establish the bases of any of the statements therein or anything, they can only establish that a complaint was filed.

But it has -- it contains a lot of statements about

infringement and damages and all these sorts of things that they can't substantiate or prove. So it's a hearsay objection.

THE COURT: So, are you trying -- are you offering it for the truth of the matter asserted?

10:10 MR. GRIFFITH: No, we're not. So we're offering it because --

THE COURT: Just to show they sued.

MR. GRIFFITH: Pardon me?

THE COURT: Just to show they sued.

10:10 MR. GRIFFITH: Correct. Exactly.

THE COURT: So it doesn't need to go to the jury, but it will be admitted.

MR. GRIFFITH: Okay.

THE COURT: Okay. But with the understanding we'll 10:10 have a different discussion when it gets to the point of which exhibits go to the jury, just so you don't feel you're waiving anything if the exhibit is received.

MR. GRIFFITH: Okay.

THE COURT: Is that your -- I mean, I take it that's 10:11 something you understood or --

MR. CALDWELL: No, no. Well, I mean, I would assume if they're admitted, they go to the jury, because that's what I gathered "admission" meant.

I would like to put something else sort of on the 10:11 record as to this point. They are, by introducing their own

litigation now in two instances, after having stomped their feet that we can't be talking about other litigation like *Globus* and whatnot, if they haven't opened the door, they're dangerously close. And I don't know that we have to take it up now because
10:11 that's not a redirect point for Mr. Talaber. I just wanted to put it on the record now so it doesn't appear to be something that comes up later.

And that doesn't mean we have to go into the royalty rates and things like that, but, I mean, choosing to call
10:11 themselves out as litigious, you can't use it solely for the benefits of it but not also take the rest of that picture if you're going to present that actually people are suing each other in this industry, there's more to that picture. And I just wanted to put that on the record.

10:12 MR. GRIFFITH: May I respond?

So yesterday Mr. Talaber essentially told the jury that the reason that Stryker didn't sue is because the big companies don't sue each other. We're simply introducing these exhibits to show that they're, in fact -- that that assumption
10:12 of his that he said to the jury is not correct. It's not that -- and that's why I didn't go into the details of any these cases. It's not that the cases per se are relevant, it is that the mere fact that they were filed shows that his theory as to why Stryker didn't bring a claim --

10:12 THE COURT: That's the way I understood it. It

doesn't open any doors. Let's move on.

MR. GRIFFITH: Okay.

THE COURT: With respect to the timing of things, this was longer than you expected?

10:13 MR. GRIFFITH: But only a little bit. I think I said an hour and I --

THE COURT: You're going to have redirect?

MR. CALDWELL: I will. I imagine we're talking about 20 minutes.

10:13 THE COURT: Okay. All right. Get your next witness ready then and we'll move on. We'll take 10 minutes.

MR. CALDWELL: I believe he's sitting outside the courtroom.

THE COURT: Okay. We'll take a 10-minute recess.

10:13 MR. CALDWELL: Sure.

(Break.)

(Jury present.)

THE COURT: Mr. Talaber, you can come up. Mr. Talaber is retaking the stand.

10:28 We'll have some redirect and then we'll be done with this witness.

MR. CALDWELL: May I proceed, Your Honor?

THE COURT: Yes, you may.

REDIRECT EXAMINATION

BY MR. CALDWELL:

Q. Okay. Good morning.
A. Good morning.
Q. Now, it may be a little hard to remember back to yesterday, but do you remember Mr. Griffith spent probably 10 minutes or
10:28 something talking about whether your patent was -- or your patented invention was semiconstrained? Do you remember that discussion?
A. Yes, sir.
Q. Do your claims require semiconstrained anywhere in the
10:28 claims?
A. No, sir.
Q. Is the word "semiconstrained" an element of a claim that needs to be proven or disproven in order to determine whether a design fits in or outside of your patent?
10:29 A. No, sir.
MR. CALDWELL: Mr. Diaz, can I have, in the patent, that figure 6?
BY MR. CALDWELL:
Q. Do you recall seeing this figure 6 in your cross-examination
10:29 today?
A. Yes, sir.
Q. Do you recall a series of questions about, well, in your patent, does the top of the head tilt up and touch the stopping member?
10:29 A. Yes, sir.

Q. Did you write in your claims "top of head cannot touch stopping member when the screw is tilted"?
A. No, not at all.
Q. Did you write in your claims "top of head must touch stopping member when tilted"?
10:29
A. No, we didn't write that either.
Q. Slightly off topic. There was a discussion today about how IP Navigation Group offered to you a variety of different ranges of money as part of the discussion. Do you remember that generally?
10:30
A. I do.
Q. We didn't belabor this yesterday, but at this point, why don't you tell the jury why you didn't want to deal with IP Navigation Group?
10:30
A. IPNav has sued probably hundreds of people. They go in and they squeeze the person that has the patent, and then they go out and they squeeze whoever they can to extort money, get money from people practicing or they allege are practicing the patent.

And so it's a shakedown on both sides. They get the
10:30
inventor and then they get the licensees. And they've done this, to the best of my knowledge, you know, multiple, you know, maybe hundreds of times.

And that's not the kind of -- that's not the kind of person I wanted to deal with. We wanted to work an upfront,
10:31
honest business deal, and not go to somebody that made it a

practice of shaking different parties down. And so when we realized this was the type of organization it was, we backed away from it. And as we were backing away, they knew we were backing away, and the offerings that they saw reflected that.

10:31 Q. Mr. Talaber, on this discussion about whether your licensee Stryker wanted to go file a lawsuit. Do you remember this discussion generally?

A. I'm sorry? Stryker follow-up to what?

Q. Do you remember the discussion about whether Stryker would

10:31 want to go file a lawsuit on your patent?

A. Yes.

Q. And yesterday you described -- I mean, I don't want to put words in your mouth, but you described sort of the equilibrium state and rocking the boat. That sort of thing?

10:32 A. Yes.

Q. Did Stryker indicate why they were reluctant to rock the boat?

A. It was more or less the equilibrium question that I had mentioned. They start a fight with one party and they can

10:32 expect -- if they sue one party for our patent then someone comes back and sues them for what went on with their knees or hip implants or whatever else. And so it was a tit for tat.

Q. In fact, let's look at Defendants' Exhibit 1272.

MR. CALDWELL: I don't know, is that something that

10:32 you have, Mr. Diaz, or do we have to have them pull it up?

BY MR. CALDWELL:

Q. Do you remember Defendants' Exhibit 1272. This is a document, Mr. Talaber, it's also tab 7 in the binder that you were handed by the lawyer for defendants?

10:32 A. Yes.

Q. Okay. And he admitted this exhibit during your cross-examination, correct?

A. I'm sorry?

Q. Do you remember that Mr. Griffith showed you this exhibit,

10:33 DTX-1272, and then he asked that it be admitted into evidence?

A. Yes.

Q. Okay. Now, I would like to direct you to the middle paragraph that begins with "in the past."

A. Okay.

10:33 Q. What is the first sentence right there in Defendants' Exhibit 1272?

A. Well, here it is. "In the past we've been told that Stryker has not pursued infringement suits because of its concern about exposure to countersuits."

10:33 Q. And then if we back up to Defendants' Exhibit 1271, second page.

MR. CALDWELL: Can you pull out that second paragraph, Mr. Diaz?

BY MR. CALDWELL:

10:33 Q. And what's the last sentence that begins with the word

Stryker? What does that say, Mr. Talaber?
A. Stryker has determined not to incur the expense and risk of countersuit inherent in suing these competitors, but that determination continues to place Stryker at a competitive
10:34 disadvantage with infringers.
Q. So you realize this email, the one you just read, was written by you back in 2012 before the renegotiation?
A. Yes.
Q. And then the one that we read before was written by Mr. Mark
10:34 Schroeder of Acantha in November of 2012, correct?
A. That's correct.
Q. So are you making up in court your belief that Stryker was trying to avoid countersuits?
A. No, absolutely not.
10:34 Q. And, in fact, if we look at what's tab 16 in your binder, which was just admitted as Defendants' Exhibit 1314.
MR. CALDWELL: You don't have it?
Can I ask the defense graphics to pull up 1314, please?
BY MR. CALDWELL:
Q. It's in your binder, sir. If you want to pull it up at 16?
A. What section?
Q. Just first page for now.
A. Tab 16?
10:35 Q. Tab 16.

A. Okay.
Q. This document, in fact, confirms that Synthes is willing to sue Stryker, correct?
A. That's correct.
10:35 Q. Did you come to an understanding of why Synthes -- I'm sorry -- why Stryker would view that as a threat to their business?
A. Why they would sue Synthes?
Q. No. Why would Stryker view a lawsuit from Synthes as a
10:35 threat to their business?
A. I'm not sure I understand your question.
Q. Okay. That's fine. I'll take you through this. Can we flip to what's page 4 of that document?
MR. CALDWELL: Can you pull up all of 1, down to 2?
10:36 THE WITNESS: Okay.
BY MR. CALDWELL:
Q. Do you understand that when Synthes sued Stryker, they asked for an order that would take Stryker products off of the market?
A. Like a cease and desist? I guess, yes.
10:36 Q. Yes, sir.
Thank you.
Mr. Talaber, why did you have to do a deal with Stryker in 2013?
A. They were refusing to pursue infringers. You know, our
10:37 patent was getting gutted. And so we needed to convert the

patent -- or the license from an exclusive license to a nonexclusive license so that we could defend ourselves.

Q. So in a world where they've been a licensee at this point for, what, approximately 10 years?

10:37 A. Yeah, a little over.

Q. In the circumstance where you get to 2013, and you have a limited life on your patent -- are you with me so far?

A. Yes.

Q. Do you view the amount of money that you had to take in that

10:37 renegotiation as a fair royalty?

MR. GRIFFITH: Objection. Leading.

MR. CALDWELL: I didn't suggest an answer to the question.

THE COURT: Overruled.

10:37 THE WITNESS: I thought that that amount of money we received was extremely low. But I also knew that we were in a bad deal, and it might have been costing us more to stay in the exclusive license than to get out of it.

BY MR. CALDWELL:

10:38 Q. You were asked some questions about whether the Codman plate has been out for a while and about the evolution. Do you remember that generally?

A. I do.

Q. Do you have any disagreement that Codman, or derivatives

10:38 therefrom, have been commercially successful?

A. I don't know the sales numbers, but I would assume so. It's been out for a while.
Q. Now, if the defendants had just stuck with Codman and not released Vectra or Zero-P VA, would we even be in this lawsuit?
10:38 A. Absolutely not. We wouldn't be here.
Q. In 2002, you sent letters to those companies you've mentioned, correct?
A. That's correct.
Q. Who are the companies you sent them to that have now kind of
10:39 rolled up into the defendants?
A. Yes, sir.
Q. Who were they?
A. DePuy Orthopaedics and DePuy Spine, I think it was. Chris Fair.
10:39 Q. And Synthes Spine?
A. Synthes Spine, yes.
Q. What about Codman?
A. Yes. That's all.
Q. Do you remember Mr. Griffith asking you some questions about
10:39 how they weren't interested in taking a license?
A. Well, that's what they said, yes.
Q. But in 2002, were any of them using your patented technology?
A. Using the patent --
10:39 Q. Any DePuy or Synthes?

A. No. Not that I know of.
Q. So does it surprise you that they didn't take a license in 2002?
A. I didn't quite understand it at the time. We thought it was
10:39 a good idea, but they declined.
Q. If they weren't going to release a product in 2002, did they even need a license at that time?
A. No. No.
Q. What would you expect to happen then in 2005 when Synthes
10:40 decides to release the Vectra?
A. Obviously, we were a little disappointed of what went on with that. But with regard to what?
Q. Would you expect them to take a license in 2005?
A. Absolutely.
10:40 Q. And in 2006, when you guys communicated with DePuy, at that point in time was DePuy practicing the invention in your mind?
A. No, they weren't. Synthes was but DePuy was not.
Q. Well, what do you believe DePuy should do, then, once they take on the Synthes portfolio and add Vectra and Zero-P VA to
10:41 their portfolio?
A. After we had approached them multiple times, one would expect that they would have come back to us and said, you know, Acantha, we have this product now, we're interested in licensing discussions.
10:41 Q. Did you invent all anterior cervical plates?

A. No.
Q. I mean, not to be redundant, but you've never taken that position, have you?
A. No.
10:41 Q. And in your mind, are there other successful anterior cervical plates?
A. Absolutely.
Q. If the companies that make these kinds of plates determine that despite other successful designs that they still need to
10:41 offer products employing Acantha's design, do you believe you should get a fair royalty?
A. They should be paying royalties on it, yes.
Q. If the defendants or their lawyers are so confident that the one-step design isn't all that important, have they ever
10:42 explained to you why they haven't just taken the Vectra and the Zero-P VA off the market?
A. No, they haven't.
Q. Mr. Talaber, did you want to be in a lawsuit against these companies?
10:42 A. This is the most difficult thing I've had to do in 67 years of living here. I absolutely dreaded doing this. I didn't want to have to come up and take the stand. I want no part of this. I did everything I possibly could or that I could think of to avoid coming to trial and having to litigate this. You know, I
10:43 have no other options.

MR. CALDWELL: No further questions, Your Honor.

THE COURT: You can step down, Mr. Talaber. Thank you.

Plaintiff may call their next witness.

10:43 MR. STEWART: Plaintiffs call Dr. James Lloyd.

JAMES ROBERT LLOYD, PLAINTIFF WITNESS, DULY SWORN

THE CLERK: Please state your full name for the record. Please spell both your first and last names.

THE WITNESS: James Robert Lloyd, J-A-M-E-S,

10:44 L-L-O-Y-D.

THE COURT: Thank you, Dr. Lloyd. You may proceed.

MR. CURRY: Thank you, Your Honor. Let me introduce myself to the Court. I'm Austin Curry.

DIRECT EXAMINATION

BY MR. CURRY:

Q. Would you please introduce yourself to the jury?

A. (No response.)

Q. Would you please introduce yourself to the jury?

A. I am Dr. James Lloyd.

10:45 Q. Did you co-invent the '008 patent with Mr. Talaber?

A. Yes, I did.

Q. Now, I referred to you as "Dr. Lloyd." Are you a medical doctor?

A. Yes I am.

10:45 Q. What type?

A. I'm a neurological surgeon.
Q. Do you actually use your invention in surgeries?
A. Yes, I do.
Q. With what plates?
10:45 A. I most recently have used the Vectra system.
Q. Do you always use your invention for anterior cervical spinal surgeries?
A. No, I do not.
Q. Why is that?
10:45 A. Certain situations require certain plate systems, and I try to use the best plate system that's available to me.
Q. Do you prefer to use your invention oftentimes in your surgeries?
A. I prefer to use it because I feel it is a robust system.
10:46 Q. Well, I want you to give us more detail with your invention. But first, I want you to tell us more about you personally. How old a man are you?
A. I am 64 years old.
Q. And where do you live?
10:46 A. I live in Elm Grove, Wisconsin which is a suburb of Milwaukee.
Q. Do you have a family?
A. Yes, I do.
Q. Who is your wife?
10:46 A. My wife is Karen. She's sitting in the first row there with

the orange sweater on, next to Mr. Talaber's wife. We've been married for 42 years, and she's my practice manager and she's a CPA.

Q. Thank you. And do you and Ms. Karen have kids?

10:46 A. Yes, we do.

Q. How many kids do you have?

A. I have a son who is 30, and a daughter who is 25.

Q. Any grandkids?

A. My son and his wife have two children, ages 2 1/2 and 10

10:47 months. They're both boys.

Q. What do you like to do in your spare time, Dr. Lloyd?

A. I like to work on my house, and I also like to work on automobiles, and I like to take vacations with my family, and visit my grandchildren.

10:47 Q. Where did you grow up?

A. I grew up in Chicago.

Q. What did your dad do for a living?

A. My father was a metallurgical engineer for Argonne National Laboratories.

10:47 Q. What type of engineer?

A. Metallurgical.

Q. Okay. Well, there aren't very many metallurgical engineers. What had your dad doing that?

A. I think it has to do with when he grew up. He went to

10:47 college in the early 1940s. And then after college, he worked

at Battelle Memorial Institute in Pittsburgh, and worked on a project that was related to the Manhattan project, which was the development of the nuclear bombs. And then he enlisted in the navy. And then after he enlisted in the Navy, he went to graduate school, and then went into nuclear engineering trying to develop means of using this new energy source for peaceful purposes.

And that kind of was the up and coming thing at the time and where all the smart people were gravitating towards.

10:48 Q. And when you were growing up, did you see your dad actually doing engineering work?

A. Yes. Both at work and around the home.

Q. Well, let's talk about your educational background. Where did you go to college?

10:48 A. I went to college in Galesburg, Illinois. Knox College. It's a small liberal arts school.

Q. Is that where you met your wife?

A. Yes, I did.

Q. When did you graduate from Knox College?

10:49 A. I graduated in 1975.

Q. What degree did you get?

A. I received a bachelor's of arts in chemistry.

Q. And after college, where did you go to medical school?

A. I went to medical school at the University of Illinois in

10:49 Chicago.

Q. How long is medical school?
A. My medical school was four years long.
Q. Is it four years of just attending lectures?
A. The first year and a half are attending lectures and the
10:49 next 2 1/2 years are doing clinical rotations.
Q. What are rotations?
A. Rotations refer to being assigned to different services in the hospital. You may be doing surgery for the first two months, and then the next two months you may be doing medicine,
10:50 and then you may be doing radiology. You may be doing pediatrics.
Q. Were your rotations in med school that led you want to be a surgeon?
A. Yes, they were.
10:50 Q. Why is that?
A. I liked the pace of surgery. And I liked the people and the camaraderie that they provided.
Q. So once you completed your rotations in med school and graduated from med school, did you then go into private
10:50 practice?
A. No. To become a licensed physician, you need to at least do one year of post-graduate work as an intern, and you must also pass the national board examination.
Q. And did you pass your boards?
10:51 A. I passed my boards, yes.

Q. And does the internship that you have to do after medical school have a name?
A. The internship that I did was a general surgery internship.
Q. And that's referred to as a residency?
10:51 A. The residency is after the internship.
Q. Oh, I see. So what residency did you do?
A. I initially started my residency in general surgery and then switched to neurological surgery.
Q. Why did you switch from general surgery to neurological
10:51 surgery?
A. I felt neurological surgery was a very challenging field, and I got to know the neurological surgeons in the program. And I respected the chairman, and I thought that it would be a good fit for me.
10:52 Q. And where did you do your residency?
A. At the Medical College of Wisconsin, in Milwaukee.
Q. What years was that?
A. I did my residency from 1980 to 1986.
Q. Now, does neurological surgery actually involve operating on
10:52 the brain?
A. Yes, it does.
Q. Does it include other things as well?
A. It includes operating on the spine and peripheral nerves.
Q. When you're in residency is that a pretty intensive program?
10:52 A. It's challenging. Many hours of work are required. It's

basically an apprenticeship that we do.
Q. Did you say apprenticeship?
A. Apprenticeship, yes.
Q. Okay. Thank you.
10:52 About how many hours per week are you at the hospital in your residency?
A. We probably averaged over 100 hours a week.
Q. Now, did you do any training beyond the neurological surgery residency?
10:53 A. I also did a fellowship in spine and spinal cord injury at the VA hospital in Milwaukee.
Q. And how long was that fellowship?
A. That was a two-year fellowship.
Q. And in your fellowship at the VA hospital, where was that
10:53 again?
A. In Milwaukee.
Q. Okay. What type of work were you doing in that fellowship?
A. We were taking care of veterans with spinal cord injuries. And it was only one of six that was in existence around the
10:53 country, so we had a fairly large catchment area and we had a fairly large population of patients.
Q. All together, how many years of training and education did you get after high school and before you started your solo practice?
10:54 A. Fourteen years.

Q. After those 14 years after high school, was it then that you started your solo practice?
A. Yes, I did.
Q. What year was that?
10:54 A. 1986.
Q. What are you showing on the screen here, Dr. Lloyd?
A. That's a picture of me when I was a young pup. When I first finished my residency.
Q. And when you decided to start a solo practice, where did you
10:54 set up your practice?
A. I stayed in the Milwaukee area.
Q. Why did you choose to stay in the Milwaukee area?
A. It seemed like a good fit for myself and my wife. My wife was employed by a company, and she was controller, so I didn't
10:54 want to, you know, move her and take her away from her job and her career.

And also, we felt it was a good area to raise a family. It wasn't a large metropolitan area like Chicago, but it had all the advantages of a metropolitan area but not a lot
10:55 of the disadvantages.
Q. Do you make it up to Green Bay much?
A. We try to come here once a year and go to a Packer game. My wife is a big Packer fan.
Q. So how long have you been practicing as a neurosurgeon since
10:55 1986?

A. 32 years.
Q. And what's your day to day like in your practice?
A. Every morning I get up, and I do my workout. I have to stay up with all the young pups, the Marines and the sailors. That's challenging.
10:56
And then on Mondays I'll see patients in the hospital, they have in the hospital, and then I'll go to my office and see patients in the clinic.
And then on Thursday, I do the same routine. And then
10:56
on Tuesday, Wednesdays and Fridays, I do not have office hours but I have surgeries scheduled. So I'll do surgeries in the morning and then what's needed in the afternoon.
Q. And at this point, about how many surgeries have you done since you've been practicing?
10:56
A. We averaged over the years about 150 surgeries. So 32 years, puts it over 4,000.
Q. And what are some of the types of surgeries that you do?
A. We do surgeries on the brain including removing tumors, removing blood clots, repairing ruptured blood vessels. On the
10:57
spine we'll remove damaged discs. We'll take care of people that have spinal injuries from car accidents, falls. We'll remove tumors that are in the spine, and we'll also do peripheral nerve surgery, people that have nerves that are crushed in their wrist or their elbow.
10:57
Q. Well, other than being a full-time doctor, do you have any

side jobs?
A. I'm a commissioned officer in the United States Navy Medical Corps. I'm a Commander Select, an O5.
Q. How is it that you became an officer in the U.S. Navy
10:57 Medical Corps?
A. It was always something that was in the back of my mind. But two years ago, I got a letter from an admiral Beal saying they were in need of neurological surgeons, and I applied and, you know, was accepted.
10:58 Q. Was your dad still with us when you decided to join the U.S. Navy Medical Corps?
A. No. He passed away in 2005.
Q. But did your dad serving in the Navy bear on your decision to join?
10:58 A. Yeah. I always had an inkling for the Navy because he always had fond memories, kind of the greatest generation, the best years of their lives.
Q. Now, as part of the U.S. Navy Medical Corps, are you someone that would actually be deployed overseas if your country needed
10:58 you?
A. Yes, I could. We're a force in ready.
Q. And besides just that, do you have other responsibilities as part of the U.S. Navy Medical Corps?
A. Once a month I go to Great Lakes Naval Base. That's north
10:59 of Chicago. And we take care of our reservists and, again, we

make sure that they're, both Marines and the sailors, are ready to be deployed, you know, both physically and mentally.

Q. Do you have any other responsibilities besides going to the Great Lakes Naval Base once a year -- or once a month?

10:59 A. We also do two weeks of active duty where we can go to other installations and practice neurosurgery.

Q. And how many other neurosurgeons are there in the U.S. Navy Medical Corps?

A. In the reserve component, there's a total of 10, and two of

10:59 those are still in training. They're still residents. So only eight are fully trained.

Q. And what is your rank?

A. I'm a commander select, or an O5.

Q. In front of you you have a binder that contains the slides

11:00 that you prepared. Will you please turn to slide 3.3?

A. Yes.

Q. What is that?

A. That's a photograph that was taken of me in my dress blue uniform when I was -- went to my officer's commissioning school

11:00 in Rhode Island last year.

MR. CURRY: Your Honor, may Dr. Lloyd show his official officer's Navy picture?

THE COURT: Yes.

MR. CURRY: Thank you.

11:00 BY MR. CURRY:

Q. Have you testified as an expert witness in a trial before?
A. Yes, I have.
Q. What types of trials have you testified in?
A. I testified in murder trials for the district attorneys in both Milwaukee County and Washington County, as a medical expert.
Q. Any other types of cases that you've testified in?
A. I've also testified for plaintiffs in injury cases such as automobile accidents and workman's comp injuries.
Q. Now, in this case are you here to offer opinions on infringement in this case?
A. In this case, yes. No. Are you asking me am I a medical expert?
Q. No, I'm not sir. I'm asking are you the guy that's going to come in and explain how the defendants infringed?
A. No, I'm not.
Q. Who is?
A. Dr. Sachs.
Q. Okay. Why did Acantha retain Dr. Sachs for infringement instead of having you testify on that?
A. Well, we thought this was a very important trial for our company, and we wanted an independent medical opinion regarding infringement.
Q. Why is this case important to you?
A. Because we feel we've developed a unique product that has

helped thousands of people, and has also helped many hundreds of doctors help people get better and make their lives better. And it's something that I think we need a fair compensation for the ideas that we put forward.

11:02 Q. Let's now talk about how Acantha came to be. When did you first meet Mr. Dave Talaber?

A. I met Mr. Talaber in the early '90s.

Q. And how was it that you came to meet Mr. Talaber?

A. Mr. Talaber at the time was working for another medical

11:02 device company, Artifex.

Q. And what were you doing at that time?

A. I was in my neurosurgical private practice and using Artifex products.

Q. Now, when you first met Mr. Talaber in the early '90s, is

11:03 that when you and him formed Acantha?

A. No, it was not.

Q. Are you friends with Mr. Talaber?

A. I think we're friends. At least I hope so.

Q. Did you and Mr. Talaber talk about the needs in the medical

11:03 device field based on your experience as a surgeon?

A. Yes, we did.

Q. And what were some of the problems that you eventually identified to him?

A. At the time, cervical plating systems were in their infancy,

11:03 kind of first being developed. You know, we noted a number of

problems with the existing systems, and we thought we could, you know, do better and build something that would address these problems.

Q. And at a high level, what were some of the problems that you were experiencing with plates on the market at that time?

A. Plates in the market, one, would have screws that would break; and, two, the screws would loosen from the plate and back out and then impinge upon the structures in the neck.

Q. And were those problems what eventually led to you and Mr. Talaber to conceiving the invention that became the '008 patent?

A. Yes, and some other issues that we felt we could address.

Q. Did becoming an inventor remind you of your dad?

A. Yes, it did.

Q. How so?

A. My dad was always someone who, when presented with a problem, would be able to find a simple solution. It wouldn't take him very long. You know, he was always somebody who was a hands-on type person, and he would figure out how to fix it and then it would get done.

Q. And even after having an invention, getting your patent issued, starting Acantha, have you continued to work as a surgeon?

A. Yes, I've continued with my practice.

Q. And do you feel like your invention has helped people?

A. Yes, I do.
Q. How so?
A. I feel that we have provided a solution that is robust and prevents the problems that we noted with the earlier cervical plating devices.
Q. Now, when you and Mr. Talaber were getting going, did you want to bring products to the market in applying your invention?
A. Yes, we did.
Q. And when did you first learn that the patent office was going to grant a patent for your invention?
A. June of 2001.
Q. How did that make you feel?
A. I felt, you know, quite proud. And I felt especially, you know, happy for Mr. Talaber because he put a lot of effort in all the things that are needed to present the patent to the office and get it approved.
Q. And when you got that good news from the patent office, did you and Ms. Karen do anything to celebrate?
A. Yeah. Karen, myself, my two children, Mr. Talaber, his wife and his child, we took a vacation later that year.
Q. If you look at the next slide in your binder, can you describe what that is?
A. That's a picture of our children and Mr. Talaber and his wife's child when they were real young.
Q. Is it from that vacation?

A. Yes, it is.

MR. CURRY: Your Honor, may Dr. Lloyd show the picture from that trip?

MR. NORTON: No objection, Your Honor.

11:07 THE COURT: That's fine.

MR. CURRY: Thank you.

BY MR. CURRY:

Q. Did you assign all of your rights and a patent to Acantha?

A. Yes, I did.

11:07 Q. Now, I want to learn more about a scenario in which a cervical implant system might actually be used in surgery.

Have you prepared some slides to walk us through a surgery like that might involve?

A. Yes, we have.

11:07 Q. We've heard the term "anterior cervical implant." I want to take that in pieces. What does "cervical" mean?

A. Cervical is the part of the spine that's in the neck region. It's the first seven bones of the neck, or the first seven bones of the spine in the neck, and it's represented in this by the

11:08 red.

Q. I think the laser pointer won't work on the monitor?

A. I don't think it projects. But it's the red that you see in the box.

Q. So then what does "anterior cervical" mean?

11:08 A. "Anterior" refers to the front of the neck. So it would be

approached from the front.
Q. In these surgeries, why is the implant put on the front of the neck instead of just going to the back?
A. In a lot of cases, the disease process is in the front of the neck. It's either the discs, which are the cushioning pads in between the vertebra, or it's actually the vertebra. So in approaching it from the front you have a fairly direct access to the problems.
Q. And what specifically -- what types of issues might require the use of an anterior cervical implant?
A. Problems with the discs of the neck, herniated discs, degenerative discs, problems with the vertebrae such as fractures or tumors, and then infections that can also occur.
Q. When a patient comes to your office with a problem in their neck, does treatment always involve anterior cervical implants?
A. No, it does not.
Q. How do you diagnose whether surgery is needed?
A. We first interview the patient. We do an examination. And then we'll do our imaging studies, x-rays, MRI scans, CT scans. And then we'll try to, you know, fit the pieces of the puzzle together to determine what's causing their problems, and then if surgery is needed or if more executive measures should be tried.
Q. Do you try to avoid surgery, if possible?
A. I would say that it's always preferable to not do surgery. And I would say I average probably, for every six to eight

people I see in the office, only one needs surgery.
Q. When you diagnose that surgery is more appropriate or becomes appropriate after more conservative measures, can you take us through the steps of what that looks like?
11:10 A. These slides, which are from my website, we can go through each one.
Q. And what are you showing on the screen here, Dr. Lloyd?
A. The first diagram on the left, in the upper corner, is the relationship of the cervical spine to the structure of the neck.
11:11 And it gives you an idea that the neck is not -- or the neck bones just under the surface. They're in about 3 1/2 inches deep.
Q. Are the five steps that you're showing here the steps involved in the surgery like this?
11:11 A. Yes.
Q. And at the top, it says "steps in anterior cervical discectomy." What does "discectomy with fusion" mean?
A. "Discectomy" means to remove the damaged disc. And then "fusion" means to join the adjacent bones or vertebrae together.
11:12 MR. CURRY: Your Honor, Dr. Lloyd brought a sawbone and some instruments to step through how a surgery like this might work. May he leave the witness stand so we can approach the jury with a table and go through those steps?
MR. GRIFFITH: No objection, Your Honor. I would like
11:12 to go up there, too, if he does.

THE COURT: Sure. You may do so.

MR. CURRY: And for the record, everything that we're about to go through has been inspected by the defendants.

THE COURT: Right. It's demonstrative.

11:12 MR. CURRY: And may I help Dr. Lloyd set up?

THE COURT: Yes.

MR. CURRY: Thank you.

It's my understanding we have a lapel mic for Dr. Lloyd to use.

11:13 THE COURT: We do in my courtroom. I don't know if we have one here.

Here we go.

MR. CURRY: Thank you.

Just a test. Can you state your name?

11:14 THE COURT: Dr. Lloyd, you're a little bit soft-spoken, so just project and let's get going, though. Your pretty close.

THE WITNESS: What I have here --

BY MR. CURRY:

11:14 Q. Here, Dr. Lloyd, let me ask you real quick.

A. Sure.

Q. With the bone that's mounted to the wood, what is that depicting?

A. That's a plastic model that depicts the cervical spine. The

11:14 top part is where the skull would be, or the head, and the

bottom part is where the shoulders would be.

Q. And in this model that you have on the mock operating table, the spinal column is fully exposed. How do you actually expose part of the spine so that you can operate on it?

11:15 A. We make an incision in the front part of the neck. Because I'm right-handed I need to make it on the right side. And the incision goes through the skin, and the structure of the neck we have to move aside. The middle is your trachea, your larynx. And that's your breathing pipe. And then, under that is the

11:15 esophagus which connects your mouth to your stomach.

So those two structures have to be moved to the side.

And then on the outside is the carotid artery which supplies blood to your brain.

And the jugular vein, which takes blood back from the

11:16 brain. So those two structures have to be moved to the outside.

And that gives us a keyhole to work through. And I say, it's represented by this piece of 1 1/2-inch plastic pipe. So we're looking down probably a channel about that dimension.

THE COURT: I'm going to just ask if you could -- you

11:16 know, it's hard to hear. And keep in mind, you're not just speaking to the jury, the court reporter has to hear you.

THE WITNESS: Okay.

THE COURT: Maybe if the table it moved back a little bit so you're not so far turned away from him. That would be

11:16 great.

THE WITNESS: Again, we're working through a keyhole about this dimension, and we're working at a distance of about 3 1/2 inches.

So we have special tools in surgery that we can pull aside the important structures. So we're working through a channel of about that distance and that dimension.

BY MR. CURRY:

Q. And, Dr. Lloyd, if the patient's breathing or windpipe is moved to the side, how does the patient breathe?

A. The anesthetist or the person that puts the patient to sleep at the time of surgery puts a rigid tube into the esophagus -- or into the trachea, and that prevents the trachea from collapsing when we move it to the side.

Q. And did you actually cut that PVC pipe to represent the amount of space that you work in?

A. Yes. I thought that was a good representative model.

Q. And that's with respect to the area, but also the height of the patient's neck?

A. Yeah. The distance that we have to work from and the dimension of exposure.

Q. And then after the incision is made and the structures of the neck are pulled aside, what do you do then?

A. If it's a disc problem in the neck, which we're trying to show on the diagrams, we'll remove the damaged disc. And we represented that by removing the plastic model here. I don't

know if you can see it, but these other areas have the disc filled in. And this one. Okay?

So that's the first thing we do. We have special tools that allow us to do that.

11:18 Q. And then after you've removed the damaged disc, what do you do next in surgery?

A. We'll prepare the surfaces of the vertebrae or the bones that were exposed during removal of the disc. We'll prepare that. And we'll put either a bone graft material in there or

11:18 we'll put a prosthetic spacer or cage.

Q. And when that bone graft material, or the spacer, is put in between the vertebrae, what do you do next?

A. After it's seated in there, we'll put a cervical plate over the front part of the vertebra.

11:19 Q. What's the purpose of the plate?

A. The plate is to provide backout prevention of the -- you know, the part that we put in between the vertebrae. Either the cage or the bone graft.

Q. And how is the plate kept in place?

11:19 A. The plate is secured with pairs of screws, top and bottom.

Q. Now, I see that you also have tools in front of you. Can you just illustrate what that might look like?

A. Yes. So to put the plate system on, we have to drill holes with the screws. And we're, again, working at a distance, so

11:20 they give us long instruments. And this represents the drill

that we have to drill the holes with. And this represents a tap, a tap device that allows us to cut threads in the bone so the screw will mate with that.

We have to tap the hole. And then there's a special screwdriver that holds the screws so we can put the screws in.

Now, this is all done using x-rays, so we know we're putting the screws in the right spot. We're not putting screws in the wrong place that can damage the nerves of the spinal cord. So we have an extra x-ray machine in the operating room that gives us, you know, the information to prevent injury.

And then once the plate is secured, we'll then remove our tools that are holding the structures apart, let the structures go back to their normal position, and we'll sew the tissue back together.

Q. Thank you, Dr. Lloyd. Will you please return to the witness stand.

And in your binder do you have a slide 3.12? What is that slide showing?

A. That's a picture of myself and one of my scrub techs, in surgery.

MR. CURRY: Your Honor, may Dr. Lloyd show a picture of himself in the operating room?

MR. NORTON: No objection, Your Honor.

THE COURT: Yes.

BY MR. CURRY:

Q. Thank you.
A. I'm on the left and the tech is on the right.
Q. Now, how long does the actual surgery part of this last?
A. The actual time that when we cut the skin to sewing up the
11:22 skin is about 90 minutes.
Q. And who was in the operating room with you when you're performing a surgery like you just took us through?
A. There's myself and eight other people.
Q. Who are the eight other people?
11:22 A. There's the anesthetist, the person that puts the patient asleep.

There's a tech that helps the anesthetist.

There's a neuromonitoring tech who monitors the function of the spinal cord and the nerves so that we don't
11:22 cause any injuries to those structures.

There's the scrub tech which you see pictured here.

There's also a surgical assistant that helps me during the surgery.

There's a circulating nurse or a registered nurse, and
11:22 she's not scrubbed in surgery.

There's a radiology technician that runs the x-ray machine.

And then there's a representative from the implant company.
11:22 Q. What's the representative from the implant company doing in

the operating room with you?
A. Well, they're helping make sure that the implants are all appropriate, that we don't have any issues with installing the implants. Making sure that we have varying sizes of implants so
11:23 that we can, you know, make sure that they fit properly. And then they also provide any support if we need, you know, further knowledge about the implants.
Q. And how are the implants actually brought into the operating room?
11:23 A. You can see on that picture, you can see these metal trays to my right, and that's how -- well, they're wrapped in sterile coverings, but they're brought to the operating room in those trays.
Q. And do you understand how these implants are actually sold?
11:23 A. They're sold on a per-use basis. So what we use in surgery they're charged to the patient by the hospital.
Q. And that's what the hospital is charged for as well?
A. Yes.
Q. Now, when you're in the operating room doing surgery, is
11:24 there also any documentation about the implant that's being used?
A. The circulating nurse fills out --
MR. NORTON: Your Honor, may we approach for a minute?
THE COURT: Yes.
11:24 (Bench conference held off the record.)

(In open court.)

BY MR. CURRY:

Q. Are there surgical technique guides as well in the operating room?

11:26 A. There are either paper guides or electronic guides.

Q. And have you seen a surgical technique slide for the Vectra product?

A. Yes, I have.

MR. CURRY: Mr. Diaz, could I have the slide after the

11:26 next one, please?

BY MR. CURRY:

Q. Is that what you're showing on the screen here, Dr. Lloyd?

A. Yes, that is.

MR. CURRY: And for the record, that's PX-11.

BY MR. CURRY:

Q. Now, earlier you mentioned that you wanted to start Acantha to address screw backout and screw breakage with some of the anterior cervical plates. Do you remember that?

A. Yes, I do.

11:27 Q. In your experience, what plates were experiencing these problems?

A. The screw breakage was fairly common in the Codman ACP, and the screw backout was common in the DePuy Swift plate.

Q. Well, for the problem of screw backout, why can't you do

11:27 something like just put a lock washer on the screw and then put

that down into the -- screw it into the plate?
A. I would be afraid if you used a system such as that, that it would rigidly secure the screw to the plate and then you would have screw breakage like you did in the Codman ACP.
11:27 Q. So are you saying that you actually want the screw to have some movement but not back out?
A. Well, the neck is a dynamic system. Every time we lay down the weight of the head is released from your neck, and every time we stand up or sit, the weight is put back on. So that the
11:28 neck is always being put in some motion. And if the implant does not have some movement between the screw and the plate, then all the stress is put on the screws from that movement, and they tend to break.
And the Codman ACP is a very good example of a rigidly
11:28 affixed screws to the plate, and that's why you see the problems. And I would be afraid that if you put a lock washer and secured the screw to the plate, that it would cause it to break or it wouldn't be strong enough and then the screw will start to back out.
11:29 Q. And is there a term for implants that provide a little bit of give with respect to the screw and the plate?
A. It's referred to in the literature as being "semiconstrained."
Q. And what about the implants that are locked on firmly, what
11:29 are those called?

A. They're referred to as "constrained."
Q. In your experience, are constrained plates like Codman more susceptible to screw breakage?
A. Yes, they are.
11:29 Q. And can you turn to slide 3.15 in your binder?
A. Yes, I have it.
Q. What is that?
A. That's a radiograph or an x-ray --
MR. NORTON: Your Honor, may we approach? This is an
11:29 exhibit we have an objection to. And I would like to --
(Bench conference held off the record.)
(In open court.)
THE COURT: Proceed.
BY MR. CURRY:
11:33 Q. Thank you, Your Honor.
Dr. Lloyd, what are you showing on the screen here?
A. This is an x-ray of one of my patients that had a Codman ACP or anterior cervical plate placed. And there's pairs of screws at each of the levels. The two pairs on the top, the two pairs
11:33 on the bottom are intact. And then the pair here on the bottom have broken. And along with the breakage of the screws, you can also see that the heads of the screws are starting to back out. And the esophagus is in that region, so they could also damage the esophagus.
11:34 Q. And just to be clear, this isn't an image of something you

got online, right? This is from your practice.
A. No. This is a gentleman that I operated on.
Q. And what plate did you use there?
A. It was a Codman anterior cervical plate or the Codman ACP.
11:34 Q. Why is screw backout a problem?
A. Screw backout can lead to trouble swallowing because, again, the structure that connects your mouth to your stomach is right up against the front part of your neck bones. And any impingement upon that structure can cause difficulty swallowing,
11:35 and also can rupture the esophagus and cause leakage of the contents and cause an infection.
Q. Is screw breakage something that might require a second surgery?
A. Yes, it may.
11:35 Q. Is screw backout something that might require a second surgery?
A. Yes, it may.
Q. And what are you showing on the screen here, Dr. Lloyd?
A. Those are examples of four anterior cervical implant
11:35 systems. They were available in the '90s.
Q. And you don't claim to have invented all ways of trying to prevent screw backout, right?
A. There are other systems that address the issue, and I'm not the one that was first to do that, no.
11:36 Q. And do some of these systems that you're showing on the

screen here, systems that attempted to prevent screw backout?
A. All four of them did, yes.
Q. All right. Let's take the first bullet point. It says "bicortical screws." What is a bicortical screw?
11:36 A. It's a screw that attaches the plate to the cervical spine, but it's longer than other types of screws.
It goes through both the front part of the vertebrae, or the bone, as well as the back part of the vertebrae, and is into the spinal canal. And the spinal canal has a spinal cord,
11:37 and the fear there is that you can injure the spinal cord with placing those screws.
Q. All right. Well, I want to try to unpack that a little bit. What does having a longer screw do, if anything, for screw backout?
11:37 A. It fixates more of the bone. Again, I was told earlier that the bone has an outer, hard surface of the vertebrae and a softer middle, and if you can engage or put the screw in those hard outer surface and hard inner surface, that the screw can be fixed to a greater degree than if it wasn't.
11:37 Q. And is that how the Caspar implant worked?
A. Yes, it is.
Q. And I see that you are depicting risks. What are the risks of using the long bicortical screws?
A. Again, as I said, the longer screws are -- their tips or
11:38 ends are placed in the spinal canal, where the spinal cord is,

and it could risk injuring the spinal cord.
Q. And the second bullet point you have is "separate locking screws." Did you actually have experience using systems like that?
11:38 A. Yes, I did.
Q. And in the parenthetical you denote Synthes CSLP. Is that something you've actually used?
A. Yes, I have.
Q. Did that come before the Vectra?
11:38 A. Yes, it did.
Q. All right. How did that work?
A. It had a shorter screw, and so you didn't have to put the screw all the way through the vertebral body so risk of injury to the spinal cord wasn't possible. But to hold the screw in
11:39 and prevent it from backing out, a separate small screw had to be put in the head of the screw that you placed, and then that would be tightened down to expand the head and lock it into the plate.
Q. So did that require a second step?
11:39 A. Yes, it did.
Q. Did surgeons actually lose that second smaller screw?
A. I have on occasion had that smaller screw drop in the wound, and had to retrieve it.
Q. Now, what happens if you lose that second smaller screw in
11:39 surgery?

A. Well, hopefully you can retrieve it, but if you can't, then you risk injury to the structures in the neck, especially the esophagus.

Q. And the third bullet on your list is "rigid locking mechanisms."

What is an example you give on that one?

A. It's the Codman ACP, which was demonstrated in the radiographs -- or the x-rays that we just saw.

Q. And how do systems like that work?

A. It had a separate step. There was a cam or an oblong structure that was in the plate, and you would -- there's a screw head on the structure, and you would turn this into the head of the screw that was placed into the bone, and you would pin it up against it and hold it.

Q. And in your practice did you experience any downsides using the Codman ACP?

A. The most issue I saw was, one, difficulty swallowing after surgery, because it's a thicker plate than the others were so people would have trouble swallowing. And then, also, we would see screw breakage.

Q. When you refer to screw breakage, is that what you showed us with the x-ray?

A. That's correct.

Q. Was Codman the solution or the problem, to you?

A. What do you mean by solution or problem?

Q. Was Codman more of a solution or more of a problem with respect to your invention?
A. I felt our invention addressed the problems that the Codman ACP generated.
11:41 Q. And are you familiar with the Skyline plate?
A. Yes, I am.
Q. And are you aware that Codman eventually became the Skyline plate?
A. They stopped the -- or stopped making the common plate, and
11:41 then redesigned it by using the same locking mechanism. And it's called the Skyline plate, yes.
Q. And have you actually experienced screw breakage with Skyline?
A. Yes, I have.
11:42 Q. And do you have a slide that you can show us?
A. I do.
Q. Is it the next slide?
A. It's 3.18.
MR. CURRY: Your Honor, may I show a picture of how
11:42 Skyline has caused screw breakage in Dr. Lloyd's patients?
MR. NORTON: Your Honor, I would have the same objection to this one as I did before, but I'm fine with publishing it to the jury.
MR. CURRY: Thank you, Your Honor.
11:42 THE WITNESS: This is a gentleman that I operated on

last October. And these are x-rays that were taken in April of this year.

The lower four pairs of screws are intact, but the very upper screws are broken. You can see how straight the four pairs of screws are on the lower part, and you can see that acute angulation that -- that's in the upper set of screws, and that's because they broke.

The screws won't bend. They'll only break. And that's the only way you can see an acute angulation like that is with a break.

BY MR. CURRY:

Q. Thank you.

And now, back to the list of products that you're familiar with that attempted to address screw backout. The last one is "collar tension locks." What is an example you gave there?

A. We gave the DePuy Swift implant system.

Q. And is that an implant that you actually had experience with?

A. Yes, I did.

Q. How did that work?

A. The system worked well in terms of placing, and it was fairly easy to use, but we saw, you know, quite a number of cases the screws would back out.

Q. And are you aware of anyone else having problems with the

DePuy Swift system?
A. Yes, I am.
Q. Can you tell me about that?
A. This problem I started noticing in around 2005, and I spoke
11:44 with a representative, a sales representative from DePuy, a Mr. Steven Lampkins, and he told me that other physicians were also experiencing the same issue.
Q. At a high level, how does your invention solve the problems and the shortcomings of the other products that attempted to
11:44 address screw backout?
A. Screw backout? I feel, our system provides a robust, or sort of say bulletproof way of preventing the screw from breaking out. And it also, because it doesn't rigidly lock the screw to the plate, it -- we don't see screw breakage with it.
11:45 Q. Now, does your invention have to be semiconstrained?
A. No, it does not.
Q. And all things being equal do you prefer to use Acantha's technology in your surgery?
A. Yes, I do.
11:45 Q. Now, currently do you use the licensed Stryker Reflex or DePuy's Vectra?
A. I currently use the Vectra system.
Q. Why is that?
A. Because our hospital system has gone to a two-vendor spinal
11:46 implant model, and the two vendors are Medtronic, which is

another spinal company, and DePuy Synthes.

Q. But you're the neurosurgeon in the operating room, why can't you have your hospital buy the Reflex product at least for your surgeries?

11:46 A. I have fought that battle and I have been bloodied.

Q. Can you tell me about that?

A. The system -- or the hospitals try to get the best price they can. And we do that by volume. And they tell implant companies if we buy "X" amount of product from you, can you give

11:47 us a discount? And they have to buy the "X" amount of products from them.

If they don't, they don't get the discount. So they tell all the surgeons you have to use these implants so we get our discount.

11:47 Q. But is there a process by which you can ask your hospital to buy something else?

A. It depends on the hospital system. Some hospital systems, they don't give you an option, and other hospital systems, they do give you an option. You have to present your case to a

11:47 committee, and you have to prove that the system that you're using is fundamentally different, it is different than what's available. And I can't -- you know, with the Reflex product from Stryker and the Vectra product, I can't --

Q. Why not?

11:47 A. -- I can't distinguish the two.

Q. Why is that?
A. There is no fundamental difference between the two.
Q. Now, if DePuy had never sold Vectra and your hospital would only buy Skyline plates for your operations, would that be
11:47 acceptable to you?
A. No. I would not be able to provide the level of care that I can provide with the Vectra system. My patients would end up needing resurgeries that wouldn't be needed with the Vectra system.
11:48 Q. And in that scenario, if your hospital either didn't have Vectra or Vectra never were a product to begin with, and all you could use was Skyline, could you then go to your hospital and convince them to buy Reflex?
A. I may or may not. You know, they may say that a cervical
11:48 plate is a cervical plate and you're going to have to use it.
Q. If you and Mr. Talaber had actually gone into the business of manufacturing cervical implants that practiced your invention, do you think you would be able to compete these days and sell your products?
11:49 A. Not in this market. We wouldn't be able to compete with the big companies because we wouldn't be able to provide the discounts that the big companies can.
Q. Dr. Lloyd, I would like for you to show the jury how your invention works using the Reflex product.
11:49 MR. CURRY: Your Honor, the screws are small.

Dr. Lloyd, I think, could be better able to either reapproach the mock operating room or use the document camera if you give us permission. May he leave the stand?

THE COURT: Any objection?

11:49 MR. NORTON: No, Your Honor.

THE COURT: Use the stand. Make sure you speak loud. Whichever way, make sure you speak loudly.

MR. CURRY: Dr. Lloyd, do you prefer to use the operating table or the document camera?

11:50 THE WITNESS: I can use the document camera, but I think if it's just for the jury's edification, I could probably just do it on the railing.

MR. CURRY: Would that be acceptable, Your Honor?

THE COURT: No. I think we ought to keep it to a

11:50 table.

THE WITNESS: I can bring the table to them.

MR. CALDWELL: Your Honor, maybe we can slide this to get the microphone a little bit closer to the --

THE COURT: Sure. Are you going to do it at the

11:50 document?

THE WITNESS: Can I show them just what it is to start with?

MR. CALDWELL: Show them on the document table.

MR. CURRY: Before you begin, let's make sure we have

11:51 a signal for the record.

BY MR. CURRY:

Q. What is this that you put on the document camera, Dr. Lloyd?

A. Again, it's a plastic model of a human cervical spine.

Q. And what's on top of the plastic spinal column that you have?

A. It's a cervical plate from the Stryker Corporation, it's called Reflex.

Q. And does the Reflex product have a stopping member?

A. Yes, it does.

Q. All right. Where can we see that?

A. That, I'm not sure. I can show you, you know, by pointing to it, but I'm not sure that people can see it very well. But it's a little gold ring that's in this opening.

Q. And do you have screws with you, Dr. Lloyd?

A. Yes, I do.

Q. Is there anything special about these screws?

A. These screws are designed so that their dimension goes through that hole. And it has a expanded portion, and a head that goes through the ring, and the ring will expand, and then contract, and hold the screw in place.

Q. All right. Can you show us how that looks when you actually screw in the screw?

A. Okay. Remember that we're working through a small channel. Okay? So we have an exposure about like that (indicating). So we have to work through there. We initially have to drill our

hole for the screw, again, using our long instruments. And then we tap the hole, using the tap. Okay? And then if we place the screw, you know --

Q. Now, you're doing it by hand for the sake of this demonstration --

A. Yes.

Q. -- but how do you do it in practice?

A. Well, the drill is, you know, by an electric drill. The other instruments are all by hand.

Q. Okay.

A. You know, they're all, you know, hand driven.

Q. All right. So show us how the screw and the Reflex product actually goes down and secures the plate to the bone.

A. Okay. So the screw will engage the bone, and then as we drive it down, it then goes up against the ring. Okay? And that's here (indicating.)

And then as we continue to screw it into the bone, the head of the screw expands the ring. And then as we drive it down further, the ring will snap back. You can hear a little click. You can feel the click of the ring closing back down.

Q. Why is the stopping member like in the Reflex important to you as the surgeon?

A. Well, it provides us the ability to prevent the screw from backing out, which we talked about all the problems that can occur.

It also, because it doesn't rigidly lock the screw to the plate, it provides that micromotion or that small motion between the plate and the screw and prevent the screws from breaking. And it's a one-step mechanism. We don't have to put a separate tool in there to lock it in, or a small little screw in the head that would be lost.

Q. Now, when you say that it's not rigid, are you able to take the bone and shake it around and see that it's not rigid?

A. No, it's not a motion that you can really demonstrate by, you know, moving it. It's more of a micromotion.

Q. I see. Thank you. Please return to the witness stand.

Now, Dr. Lloyd, does the stopping member in your experience have to be a ring?

A. No, it does not.

Q. What are some of the other shapes it could take?

A. It could be a finger like a latch on a door that's in the opening where the screw goes and the latch moves back and then back over the head of the screw as it passes. It can be the head of the screw actually will contract, and then as it goes in the bore it can expand.

MR. CURRY: And, Your Honor, just to let you know, I'm about to move into a different section. I didn't know if you wanted me to go through until noon?

THE COURT: No. If this is a good breaking point, let's take our afternoon -- or our noon break for lunch.

Please be back in the jury room at 1:00. Again, I remind you not to discuss the case. The usual.

(Jury not present.)

THE COURT: Okay. We're outside the presence of the jury. Anything to put on the record?

MR. CURRY: Not at this point, Your Honor.

THE COURT: Mr. Norton, do you want to make a record on the objections?

MR. NORTON: Yeah. Just briefly.

THE COURT: Go ahead. Be seated.

MR. NORTON: The objection with respect to the two slides having to do with the x-ray of Codman and the x-ray of Skyline, the Codman x-ray that Dr. Lloyd testified about was not produced to us in discovery as such. That photograph was in an interrogatory answer. That was it. It was not identified in any respect as having anything to do with Codman or Dr. Lloyd.

THE COURT: The question it was given in response to?

MR. NORTON: I believe it had to do with secondary considerations of nonobviousness and failure of others and problems in the art, generally, which was the basis that you allowed it in the opening statement.

And so, anyway, so that document was not produced to us. The Skyline slide that Dr. Lloyd testified to us was also not produced to us in discovery. That was not in an interrogatory or anywhere about it. We got it for the very

first time in -- two days ago, a Saturday night.

And I think based on his testimony, that it was an x-ray from April. So if this was something that was going to be a trial exhibit or a theme of their case, we were getting ready to go to trial in June, and the first time we saw this x-ray was on Saturday evening.

11:58

So that's my objection for the record.

Yeah, and one other thing. As I mentioned to you, Your Honor, at the sidebar, both of those x-rays would be part of a complete medical file. They would have information about when they happened. They might provide verification, for example, of Dr. Lloyd's testimony, when the surgery was done, what the complications were, when the alleged broken screw occurred, and none of that information was produced. So we didn't have an opportunity to really cross-examine him on the file.

11:58

11:59

THE COURT: Mr. Curry.

MR. CURRY: I think Your Honor's rulings were correct. As Mr. Norton admitted, the Codman x-ray was produced to them, and specifically called out in an interrogatory response that actually asked about the failure of other products. There is --

11:59

MR. NORTON: Did you identify it as Codman?

MR. CURRY: I'm actually addressing the Court, Mr. Norton.

We put witnesses up to testify about that

11:59

interrogatory response. They had every opportunity to pose to our witnesses whatever questions that Mr. Norton just posed to me.

Further, we established an actual foundation for these documents. These documents show the problems of the same systems that led to the invention and are directly contrary to their assertion that they could have never sold Vectra and, instead, pick up every sale, every lost sale of that was Skyline. Surgeons like Dr. Lloyd had problems with Skyline, and he laid the proper foundation for that.

The plate that broke, broke recently in his patients. He testified that he has done thousands of surgeries. As we were preparing for trial, we asked him: Do you have any Skyline x-rays? And that's when we got it, and that's when defense counsel got it.

THE COURT: Well, I obviously overruled the objections. It seems to me that -- an undisputed fact that there are -- there is breakage. Whether this particular breakage was due to some other factor, I don't think is all that significant. The testimony of this particular witness is that the invention provides the kind of flexibility that avoids some of that breakage.

You're perfectly free to challenge that. If there's a dispute that properly used, these things don't break. I certainly haven't heard that. I haven't heard that argument.

It seems to me that this is fair here. And the mere possibility that you find something in the file, given the circumstances here, I don't think justifies exclusion of the evidence. Especially if this were something that defense was really concerned about. In discovery they asked for other evidence of failure, they were given that it sounds like.

Am I correct on that? You were given the reasons why they thought this was defective? You could have asked, you know, other questions.

MR. NORTON: I don't think we were. That was the point.

MR. CALDWELL: I would like to explain that if you like.

THE COURT: You can make the record, complete a record here.

MR. CALDWELL: Yes, sir.

There was an interrogatory answer about what are called secondary considerations of non-obviousness. And we gave a many-page narrative response, and supplemented it. Then counsel for defendants put out a 30(b)(6) topic on that exact interrogatory, saying the factual bases for Acantha's response to interrogatory No. 7.

Then Mr. Norton came -- and Mr. Talaber was actually designated on that. Mr. Norton came and took his deposition and never even asked about it. And then 2 1/2 months later they

depose Dr. Lloyd for a full day and never asked about it.

So, I mean, we had narratively addressed it and put a corporate representative.

THE COURT: If there are any such records relating to this breakage, produce them immediately, if you can.

MR. CALDWELL: I think the one concern we have is HIPAA type concerns on a patient's records.

MR. GRIFFITH: Those names can be blacked out.

THE COURT: If you have anything, produce it.

MR. CALDWELL: Okay.

THE COURT: But, again, I don't think that this -- I view the failure to provide the full information, if that's what it was was inadvertent, and I don't think exclusion is the appropriate remedy here, certainly on this record. So that was the reason.

MR. GRIFFITH: Your Honor? You asked for authority from us?

THE COURT: Yeah.

MR. GRIFFITH: I've got some authority.

THE COURT: Good. I'll take it. And if you have anything on the other side yet? And are we going to get to this witness this afternoon? This is Dr. Sachs?

(No audible response.)

THE COURT: Okay. All right. We're in recess then.

(Lunch recess taken at 12:04 p.m.)

(Jury not present.)

THE COURT: Dr. Lloyd, please take the stand and we'll begin with testimony.

Bring the jury in.

01:04 (Jury present.)

THE COURT: Be seated, ladies and gentlemen.

Mr. Curry, you can proceed.

MR. CURRY: Thank you.

BY MR. CURRY:

01:05 Q. Good afternoon, Dr. Lloyd.

A. Good afternoon.

Q. I want to talk about your interaction with DePuy. Now, you told us that you had experience with DePuy Swift plates, right?

A. Correct.

01:05 Q. And what was the problem you were experiencing with those plates?

A. Back in the mid 2000s, we noticed that the screws were backing out of the systems.

Q. And did you tell DePuy about those problems with their Swift

01:05 implant?

A. I spoke to a region sales representative from DePuy, Mr. Steven Lampkin, and showed him the issues and problems we were having.

Q. What year was that?

01:05 A. I believe it was 2005.

Q. Now, when you met with Mr. Lampkin regarding the problems with the DePuy Swift system, did you go by yourself?
A. No, I did not.
Q. Who went with you?
01:06 A. Mr. Talaber and Mr. Schroeder from our company, and then Mr. David Salb. He was the regional distributor of the DePuy products.
Q. And did you bring any materials with you to that meeting?
A. I brought extras or radiographs of patients that had the
01:06 problem with me.
Q. And did you tell Mr. Lampkin in that 2005-2006 meeting about Acantha's intention?
A. Yes, I did.
Q. Were there any follow-up meetings?
01:06 A. I did have a meeting in Massachusetts with DePuy representatives regarding the issue.
Q. Why did you go to Massachusetts?
A. That's the corporate headquarters outside of Boston.
Q. And when was that meeting?
01:07 A. It was in July of 2006.
Q. Now, for this meeting in DePuy's headquarters, was it just you from Acantha?
A. It was just me from Acantha, correct.
Q. Who all was there from DePuy?
01:07 A. Mr. Curt Cooper, he was Mr. Dave Salb's partner from the

regional distributor.

Mr. Steven Lampkin, the regional sales representative from DePuy.

Mr. Aldo Denti. I believe he was marketing person for the cervical spine group.

Mr. Joseph Ross, he was a vice president.

A Dr. Richard Tacelli.

And Mr. Ian Burgess, he was an engineer.

Q. And how did that meeting in 2006 at DePuy's headquarters go?

A. It was cordial. They were receptive to my concerns.

Q. And at that time, did you think that DePuy had any products on the market that infringed your patent?

A. No, I did not.

Q. So this wasn't a confrontational meeting then.

A. I never thought it was.

Q. And did the people at DePuy seem interested in Acantha's patent?

A. We also discussed our intellectual property patent as a means by which they could address the issue of screw backout and they seemed interested.

Q. Were there any follow-ups from that 2006 meeting in DePuy's headquarters?

A. Yes, there was. There was emails as well as conference phone call.

Q. And is this what you're showing on the slide here?

A. Yes it is.

MR. CURRY: And for the record, that's PX--74.

BY MR. CURRY:

Q. You also mentioned phone calls. Who did you have follow-up phone calls with?

A. We had a conference call with myself, Mr. Talaber, Mr. Schroeder, Mr. Denti, and Mr. Ross in September of that year.

Q. And at this point in time, you've already given an exclusive license to Stryker, right?

A. That is correct.

Q. Did that cause any concern for DePuy?

A. It did. They were wondering how they could secure the intellectual property or patent with the -- Stryker having an exclusive license.

Q. Ultimately, did DePuy take a license to your patent?

A. No, they did not.

Q. Now, even though they didn't take a license in 2006, do you believe they eventually started infringing your patent?

A. I believe when they purchased Synthes in 2012, that they started infringing on our patent.

Q. And what about the purchase of Synthes made it to where you started believing that now DePuy is infringing your patent?

A. Synthes, at the time, was selling their Vectra plate system as they are now. I'm forgetting whether there was VPA at the

same time, but definitely they were selling the Vectra line.

Q. Now, did any of the people you had spoken with in 2006, at DePuy, contact you or reach out to you in any way before they bought Synthes?

01:10 A. No, they did not.

Q. Nonetheless, did you start try to restart the negotiations with J & J and DePuy after the merger with Synthes?

A. Yes, we did.

Q. What year was that?

01:11 A. 2014.

Q. And who did you talk to?

A. I spoke directly with Mr. Marc Peterman. He was a vice president for DePuy Synthes Spine.

Q. How did that conversation go?

01:11 A. A few conversations I had with him were not cordial.

Q. Why do you say that, Dr. Lloyd?

A. They -- or he told me that they did not believe that any of their products infringed on our patent. They did not require, you know, a license from us.

01:11 Q. Did Mr. Peterman say anything else to you?

A. Well, he also told me that if we assert our patent rights on them --

MR. NORTON: Your Honor, may we approach for a second.

THE COURT: You may.

01:12 (Off-the-record bench conference.)

(In open court.)

BY MR. CURRY:

Q. What did Mr. Peterman say to you in 2014?

A. He said to me that they were not interested in taking a license for the patent, and that if we asserted our patent rights on them, that they would invalidate our patent and that they would bankrupt our company. I felt like he was basically telling me that the hammer was going to fall if we dared to do anything.

Q. When J & J and DePuy didn't take a license, what options were you left with?

A. There was only two options. One is just to accept that they were infringing on our patent and let things go as they've been, or, two, to take legal action.

Q. Were you at opening statements?

A. Yes, I was.

Q. Did you listen to DePuy's lawyer's opening argument?

A. Yes, I did.

Q. Do you get a sense that he's trying to make good on Mr. Peterman's threats on you?

A. I believe that their opening statement is in the same vein as Mr. Peterman's conversation with me.

Q. What are you asking the jury to do in this case?

A. I'm requesting that we, as a small company, be treated fair, and that we have fair compensation for our patent.

MR. CURRY: Thank you. I pass the witness.

MR. NORTON: Your Honor, I have a binder for Dr. Lloyd.

Your Honor, I have a binder for Dr. Lloyd.

If I may proceed, Your Honor?

THE COURT: You may.

CROSS-EXAMINATION

BY MR. NORTON:

Q. Good afternoon, Dr. Lloyd.

01:15 A. Good afternoon.

Q. My name is Patrick Norton. I'm representing DePuy Synthes in this matter.

I have a few questions for you. Okay?

A. That's good.

01:15 Q. So I want to start with the fact that you are one of the three owners of Acantha, correct?

A. That's correct.

Q. And you have a 12 1/2 percent ownership interest in Acantha; is that right?

01:16 A. Not quite that much.

Q. How much is it?

A. 12.46.

Q. 12.46. Okay.

And so you'll get a 12.46 percent of any recovery

01:16 should Acantha get one in this case; is that right?

A. Of the total that Acantha gets, correct.
Q. Now, Dr. Lloyd, you testified this morning about your patent, and I've got a copy of that for you in your binder. It's at tab 1. I think that's PX--1 in the case.
01:16 Now, that is the only United States patent on which you are an inventor; is that right?
A. That's correct.
Q. And you never obtained any patents before that patent?
A. No, sir.
01:17 Q. And you haven't obtained any patents since then, right?
A. No, sir.
Q. And that patent is Acantha's only asset, right?
A. Repeat the question?
Q. That patent is Acantha's only asset, right?
01:17 A. Asset?
Q. Yes.
A. Yes, that's correct.
Q. It's the only source of revenue that Acantha has as a company, right? It would be licensing or royalty revenues from
01:17 that patent.
A. That's correct.
Q. Now, earlier this morning, Dr. Lloyd, you were talking about the Reflex product. Do you recall that?
A. Yes, I do.
01:18 Q. And that's Stryker's product?

A. That's owned by Stryker Corporation, correct.
Q. And I just wanted to make sure it was clear for the jury. You did not design the Reflex implant, did you?
A. What do you mean by the "implant"? What part of the implant
01:18 are you referring to?
Q. You weren't involved in actually designing the Reflex product, the commercial product, were you?
A. They use our intellectual property as their locking mechanism for the screw on the plate.
01:18 Q. Right. I understand that your testimony is that it's covered by your patent, and it's covered by your license with them, but that product was designed without any engineering input from you, correct?
A. Other than our patent?
01:18 Q. Well, the product was developed before they took a license, wasn't it?
A. I did not see the product on the market before a license was -- before license was given to them.
Q. So you're not aware that it was on the market before you
01:19 entered the license?
A. That is correct.
Q. Okay. Now, as a surgeon, you've used a number of various different spinal implants, right?
A. That's correct.
01:19 Q. And this morning you were giving the jury a little bit of

demonstration with the Reflex product, correct?
A. That's correct.
Q. And you made some reference to the various tools that are used in implanting the product, right?
01:19 A. That's correct.
Q. And for any given implant system, there's typically a whole set of tools, right?
A. There is a tray of tools that we utilize, correct.
Q. And those tools are typically specifically designed and
01:20 developed to be used with a given implant system?
A. That's correct.
Q. And there's a lot of work that goes into creating the instruments for the surgeons to use with the products, right?
A. There is a certain amount of work that goes with it,
01:20 correct.
Q. And those are all important in supporting a good product that helps surgeons in surgery, right?
A. Yes.
Q. Now, you testified this morning, I believe, that you've been
01:20 in private surgical practice since 1986; is that correct?
A. That's correct.
Q. And during your career as a surgeon, you have extensively used DePuy's products, is that fair?
A. I have throughout the years.
01:21 Q. And you would agree that they make good spinal implant

products?
A. I believe their products are at par with other manufacturers.
Q. And at least in one point in your career, you were the
01:21 number one user of DePuy's products for DePuy's Wisconsin distributor; is that right?
A. Well, it actually was -- I was the second solo practitioner that was using DePuy products for the Chicago -- Wisconsin distributor.
01:21 Q. Okay. So you were fairly high volume user of DePuy's products, right?
A. Correct.
Q. And you wouldn't have used those products with your patients if you didn't believe they were the best product to help your
01:21 patient, right?
A. I thought they had a good product line, and that I would be able to get good results with their products.
Q. Now, you testified about an issue with DePuy's Eagle and Swift products. Do you recall that?
01:22 A. Yes, I do.
Q. And you testified that you had an issue relating to some of the screws backing out of the plates?
A. That's correct.
Q. And that was in the 2005-2006 timeframe?
01:22 A. That's correct.

Q. And you reported that issue to DePuy, right?
A. Yes, I did.
Q. And you told them about it because you were concerned that it might be an issue and you wanted to see if it could be
01:22 resolved?
A. That's correct.
Q. Now, the Eagle Swift product has what you referred to I think in one of your slides this morning as a colat tension lock; is that correct?
01:22 A. I don't think I referred to it. It may have been -- I wasn't here for the testimony this morning. I talked about that.
Q. This was on one of your slides that you testified about this morning?
01:23 A. I testified about the Eagle Swift -- the swift system, but I don't know if we mentioned the locking mechanism.
Q. Okay. Are you familiar with the locking mechanism on the Swift product?
A. Yes, I am.
01:23 Q. And is it a colat?
A. I would refer to as a collar.
Q. Collar, yeah?
A. Collar.
Q. Like a bushing?
01:23 A. Well, it's a collar that the head of the screw sits in.

Q. And when you say a collar that the screw fits in, it screws in and that collar squeezes on the screw head and rigidly locks it in place. Is that your understanding of how it works?
A. Well, my understanding is the screw head crams onto the collar and engages the collar.
Q. Okay.
A. So I'm not sure if the collar expands or, you know, what the specific mechanism is, but it engages the collar and the collar supposedly prevents it from backing out.
Q. Right. And that's a rigid plate system, correct?
A. It gives some translation when you use the Swift version of it because the Swift version was a translational plate. So it wasn't a rigid system when you used the Swift version.
Q. Okay. And so maybe for the jury's benefit, when you say a translational, the Swift version had little slots that allowed the plate to move relative with the bones?
A. The plate was in two pieces. And the top end of the plate and the bottom end of the plate could move up and down from one another.
Q. And when we've been talking about rigid plate systems and semiconstrained plate systems this morning in your testimony, you were primarily -- you were focusing on the relationship of the screw to the plate, right?
A. That's correct.
Q. And with respect to that motion between the screw and the

plate, the Swift product is a rigid product, correct?
A. I don't know if they ever purported as being a semiconstrained system or not. But I, for the most part, used the translational system, and I wasn't really concerned that the
01:25 screw could move independently from the plate.
Q. Okay. Now, so you brought this issue that you were having the screw backout to DePuy's attention?
A. Yes, I did.
Q. And you were aware that they made some design modifications
01:26 to the design of the Eagle and Swift products, right?
A. After I spoke to Mr. Aldo Denti, they came up with a design where the collar was reconfigured so that it had a lip that the last end of the thread of the screw would engage.
Q. Right. And that was a design modification that they made
01:26 internally, the DePuy engineers, right?
A. That is correct.
Q. And to your knowledge, that resolved the screw backout issue?
A. I never felt confident that that was going to resolve the
01:26 issue. So I basically stopped using the system.
Q. Right. So you don't have any personal knowledge of any screw backout issue with respect to the redesigned Eagle and Swift products, right?
A. No, I do not.
01:26 Q. And so DePuy was able to resolve that issue of screw backout

that you were having without taking a license or using any intellectual property of Acantha, right?

A. I have no knowledge of that.

Q. Well, you know they didn't take a license, right?

01:27 A. That I know.

Q. And you know they redesigned the product?

A. That I know.

Q. And you don't contend that the redesign product infringes, do you?

01:27 A. I have never, never contended to that. But you asked me if they resolved the issue, and I don't know if they resolved the issue.

Q. Right. But you don't have any information that there's any screw backout issue with respect to that product either.

01:27 A. I have no knowledge either way.

Q. Now, you testified also about DePuy's Skyline product, correct?

A. That's correct.

Q. And Skyline has a two-step Cam-Loc mechanism, right?

01:27 A. You mean by two-step, you place the screw and then you have to do a separate step to lock the screw in place?

Q. Correct.

A. Yes.

Q. And you used that product?

01:28 A. I use that product, correct.

Q. And the fact that it is a two-step screw-blocking mechanism doesn't preclude you from using it.
A. No, it does not.
Q. So I want to switch topics now for a minute, Dr. Lloyd. And
01:28 I want to talk about some of the advantages and benefits of your invention as you testified about this morning. Okay?
A. Yes.
Q. So just to be clear, anterior cervical plates were known before your invention, right?
01:28 A. That's correct.
Q. And, in fact, I think you testified this morning that anterior cervical plates at the time of your invention were in their infancy. Is that what you testified?
A. Yes, I did.
01:29 Q. And isn't it a case, sir, that anterior cervical plate systems have been used for decades?
A. In 2018, that is correct.
Q. And in 1999, they had been used for decades?
A. The systems that did not require bicortical screws had been
01:29 out for about 10 years.
Q. Okay. You refer to that as being in its infancy?
A. Yes, I do.
Q. Okay. Now, you talked about some of the benefits of your invention as being semiconstrained, variable angle, with a
01:30 preattached one-step locking mechanism; is that fair to say?

A. Those are benefits of our patent.
Q. And you were not the first to invent the spinal implant with a variable-angle feature, right?
A. No, I was not.
01:30 Q. And anterior cervical plates that had variable-angle screws were known before your invention, right?
A. That's correct.
Q. And the Codman plate that we've heard so much about in this case, is one such variable-angle anterior cervical plate, right?
01:30 A. That's correct.
Q. And there were anterior cervical plates with preattached screw backout mechanisms prior to your invention as well, right?
A. That's correct.
Q. And Codman is another -- it has a preattached screw backout
01:30 prevention mechanism, right?
A. That's correct.
Q. And another such product that was on the market before your invention was a product from Medtronic called Atlantis?
A. Yes.
01:31 Q. And that has a two-step, preattached blocking mechanism, right?
A. That's correct.
Q. And semiconstrained plates were known before your patent, too, right?
01:31 A. They weren't called that, but there definitely were

semiconstrained plates that predated our patent.
Q. You don't believe you invented a spinal -- semiconstrained spinal implants, right?
A. No, I'm not. No, we do not.
01:31 Q. So let's talk a little bit more about this concept of semiconstrained. You would agree that your patent never mentions semiconstrained, right?
A. It is not in the verbiage of our patent.
Q. Right. It's not in any of the words of the patent, right?
01:32 A. That's correct.
Q. So if you could go back to the patent in your binder.
MR. NORTON: Steve, if you could pull up figure 5?
BY MR. NORTON:
Q. But I believe, Dr. Lloyd, I'm going to ask you some
01:32 questions about figure 5 from your patent?
A. Figure 5?
Q. Yes, sir. I'll pull it up on the screen if that's easier?
A. I have the copy.
Q. And you believe that -- by the way, figure 5, that's one of
01:32 the examples of your invention?
A. That's correct.
Q. And it's your understanding that that figure illustrates and depicts the semiconstrained feature, right?
A. It can.
01:32 Q. And there are two aspects of that figure that help

facilitate this notion of a semiconstrained implant; is that right?

A. (No response.)

Q. Why don't I take you through -- the left figure, it shows this screw head as a spherically-shaped head, right?

A. Correct.

Q. On the underside?

A. It has a curved head to it.

Q. Yeah. And the interior of the hole that it sits in has a spherically-shaped surface as well?

A. A curved surface, yes.

Q. And that facilitates a semiconstrained feature, right?

A. I believe it does not rigidly lock the plate to the screw, that aspect of it.

Q. Right. And so that facilitates it being semiconstrained.

A. That aspect can.

Q. Right. And the other aspect shown in figure 5 that facilitates semiconstrained, is the screw head sitting below the stopping member, right?

A. The enlarged portion that sits below the retaining -- or the biased member, and that allows for movement.

Q. Yeah. The whole screw head in the figure 5 sits below, right?

A. The screw head sits below the stopping member.

Q. Right. And that's another aspect of your -- of figure 5

that facilitates a semiconstrained device, right?
A. And I also believe that the distance between the screw head and the -- or the enlarged portion of the screw or the screw head, the distance between that and the retaining member
01:35 facilitates the ability to be semiconstrained.
Q. Correct. And that's what's illustrated in figure 5, right?
A. That's correct.
Q. Dr. Lloyd, are you familiar with something called Wolff's Law?
01:35 A. Yes, I am.
Q. And Wolff's Law is something that you've been familiar with since your residency; is that right?
A. Probably before that. Probably medical school days.
Q. And Wolff's Law is something that basically says that if the
01:35 bone shares some of the load with the implant, that can facilitate fusion. Is that roughly your understanding?
A. Roughly, but it basically says that if it shares a load, that the construct of the bone will be stronger.
Q. So if the bone shares some of the load with the construct,
01:36 or the implant, then that will promote the fusion; is that --
A. Well, promote fusion, promote a strong fusion.
Q. Okay. And sometimes that's called load sharing?
A. That's correct.
Q. And that is one of the principles behind some of the
01:36 semiconstrained system, right?

A. That's correct.
Q. That it facilitates load sharing?
A. Without stressing the implant.
Q. Right. And you don't mention anything about Wolff's Law or
01:37 load sharing in your patent, though, right?
A. No, we do not.
Q. So in 1999, when you filed your patent, were you aware of any articles or studies that provided scientific support for a semiconstrained system?
01:37 A. What do you mean by scientific studies?
Q. Articles published in journals.
A. That's not a scientific study.
Q. Well, were you aware of any published literature that discussed the benefits of semiconstrained system?
01:37 A. Yes, I was, but it was all anecdotal evidence. It wasn't scientific evidence.
Q. So just to make sure the jury got that. You were aware of anecdotal evidence but not any published materials on it?
A. Scientific evidence.
01:38 Q. Right. And so by anecdotal, you mean hearing stories from other doctors?
A. Well, doctors publishing articles in what they're seeing rather than doing a study that actually spells out the science of the problem.
01:38 Q. Okay. So, Dr. Lloyd, if you can turn to tab 2 in your

binder. That's a document that's been marked as Plaintiff's Exhibit 79.

Do you recognize that as an email chain between yourself and someone named Ira Benson?

01:38 A. Yes, I do.

Q. And it's an email dated July 23rd, 2005?

A. Yes, I do.

Q. And is that an email that you sent to Mr. Benson?

A. Yes, it was.

01:39 MR. NORTON: Your Honor, I would move to admit Plaintiff's Exhibit 79.

MR. CURRY: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 79 received in evidence.)

01:39 BY MR. NORTON:

Q. If you can go to the bottom email.

So this is an email that you sent to Mr. Benson, correct?

A. That's correct.

01:39 Q. And just for clarity's sake, the email indicates it's from your wife. Is that your home email account?

A. That's my home email account, correct.

Q. So you sent that email, not your wife?

A. No. Yeah. The reason, I don't want to use my work email, you know, for obvious reasons.

Q. Yeah. I wasn't suggesting anything inappropriate, Dr. Lloyd. I was just classifying that that was your email even though it's your wife's name.

And Mr. Benson was, at least at this point in time, an employee of Stryker; is that right?

A. He's an engineer for Stryker, correct.

Q. I'm sorry?

A. Yes. He was employed by the Stryker Corporation.

Q. And your email to Mr. Benson writes:

"Recently, Dave Talaber and I were discussing the benefits of a semiconstrained device, particularly the benefits with respect to load sharing and micromotion."

And it goes on:

"Though I think the concept may have some merit, I am unaware of any articles or studies that lend scientific support to such a design."

Is that right?

A. That's correct.

Q. So in 2005, you were writing it to Mr. Benson at Stryker looking for scientific support for the benefits of a semiconstrained device; is that fair?

A. That is correct.

Q. But your testimony here is that semiconstrained is one of the benefits of your patent, right?

A. That is correct.

Q. Now --
A. But this email chain was sent to Mr. Benson because it was in reference to their developing a DynaTran, a translational plate. And I wanted to see if there was any scientific evidence
01:41 for a semiconstrained system because I wanted to develop a patient model where we could show that the difference between the three types of plate systems — the rigid or constrained, the semiconstrained, and the translational — and see if we could determine if there was healing differences, times of healing.
01:41 So I wanted to get as much information in it if we were going to develop a study.
Q. And you never completed such a study, did you?
A. No, we never were able to come up with the scientific evidence.
01:42 Q. Okay. And so the topic of semiconstrained systems and the benefits of such systems is not a subject that you've published articles on, right?
A. That's correct.
Q. So I believe you testified earlier that one of the benefits
01:42 of your invention is that it's a one-step securing of the screw; is that right?
A. That's correct.
Q. And it eliminates the need for an additional step by the surgeon to activate the backout mechanism?
01:42 A. That's correct.

Q. And you were testifying this morning about a procedure -- you know, a typical spinal procedure -- to do a discectomy, an anterior cervical discectomy. Do you recall that?
A. Yes, we did.
01:42 Q. And you went through all the various steps of the surgery. And these surgeries can range in length, right?
A. Yes, they can.
Q. Depending on whether it's a simple procedure or something more complex?
01:43 A. That is correct.
Q. And so I think you testified this morning that a simple procedure would take 90 minutes or so?
A. That's correct.
Q. Do you recall at your deposition thinking that might take as
01:43 long as 2 1/2 hours for a simple procedure?
A. I never said that.
Q. You never said that?
A. No.
Q. Do you recall having your deposition taken in this?
01:43 A. Oh, are you talking about last year or today?
Q. I'm talking about last year, when we took your deposition.
A. Okay.
Q. I'm sorry if there was lack of clarity on that.
A. Okay.
01:43 Q. And do you recall that you said that at the deposition?

A. Yes. Yes. And that was total length of procedure from when the patient got in the room and out of the room because there's a lot of setup time.

Q. Right. And a longer more complicated procedure could take as long as eight hours I think you testified.

A. Yes.

Q. Now, we've already talked about it, you've performed surgeries with Skyline, right?

A. Yes, I have.

Q. And that has a two-step securing mechanism?

A. Yes, it does.

Q. And you've performed surgeries with Vectra, right?

A. Yes, I have.

Q. And that's a one-step securing mechanism?

A. Yes.

Q. And you would agree with me that the amount of time for surgery does not differ depending on whether you were using a Skyline plate versus a Vectra plate.

A. Not in my hands. But in other people's hands they may be able to speed up the system with a one-step blocking mechanism.

Q. In your experience it hasn't made any difference in the amount of time it takes to do the surgery.

A. No, it does not.

Q. So I want to switch topics.

We talked a little bit about the Codman anterior

cervical plate in your testimony earlier today, Dr. Lloyd. Now, that was a product that was on the market in the mid-1990s, right?

A. That's correct.

01:45 Q. And you were using the Codman ACP system at that time, right?

A. Yes, I was.

Q. And you used it frequently in that time period?

A. Yes, I did.

01:45 MR. NORTON: Your Honor, may I approach?

BY MR. NORTON:

Q. Dr. Lloyd, these are in a baggy so I'm going to give them to you. This is, for the record, Defendants' Exhibit 1155. I'm going to ask you if you recognize that as a Codman ACP plate?

01:46 A. Yes, that's a Codman anterior cervical plate.

Q. And that's a -- is that a two-level plate?

A. It has three pairs of screws. So it's for two levels, correct.

Q. And there's some screws in there, correct?

01:46 A. That's correct.

MR. NORTON: Your Honor, I move to introduce Defendants' Exhibit 1155.

MR. CURRY: No objection.

THE COURT: Received.

01:46 (Defendants' Exhibit 1155 received in evidence.)

BY MR. NORTON:

Q. So, Dr. Lloyd, that plate is going to be hard for the jury to see. So I have a slide I've prepared which we're going to put up on the screen.

01:47 So, Dr. Lloyd, do you see the slide up there that has the picture of the Codman plate on the left and on the right there's a model? Do you see that?

A. Yes, I do.

Q. And the Codman plate has holes for receiving the screws?

01:47 A. Yes, it does.

Q. And it's got spherically-shaped screws, right?

A. Yes, they do. The heads of them are.

Q. The heads.

A. Yes.

01:48 Q. And those screws are inserted through the holes?

A. Yes. Yes, they are.

Q. And Codman is a variable-angle system, right?

A. Yes, you can use the screws in multiple angles.

Q. And we talked about it has a Cam-Loc system that you

01:48 described as, you know, two-step where the surgeon turns the cam, right?

A. That's the gold device depicted in the model, correct.

Q. And when that cam is turned, it engages the screw head to prevent it from backing out of the plate, right?

01:48 A. That is correct.

Q. Now, in Codman, that cam is to the side of the screw. Is that your understanding?
A. Yes, it is.
Q. Now, you testified earlier that you consider Codman to be a
01:48 constrained system; is that correct?
A. Yes, I do.
Q. And you consider it constrained or rigid because the cam presses up against the screw head; is that fair?
A. That's correct, and pushes the screw further up against the
01:49 hole in the plate.
Q. There's no space between the screw head and the cam?
A. No, there is not.
Q. And that's unlike your patent, correct?
A. We don't engage the side of the screw in our patent.
01:49 Q. Right. The stopping member in your patent sits above the top of the screw head, right?
A. The stopping member of the top of the screw head, correct.
Q. Now, we talked a little bit ago about how you were looking for studies on semiconstrained systems, correct?
01:49 A. Correct.
Q. And you were looking for any scientific literature on that that you could possibly do a study of your own, right?
A. That's correct.
Q. And so you're trying to keep up with the current thinking in
01:49 the industry?

A. That's correct.
Q. If you could turn to tab 4 in your binder.
Now, that's a 1998 article. Do you have that?
A. Yes, I do.
01:50 Q. And it's in a journal entitled, "Operative Techniques in Neurosurgery"?
A. That's correct.
Q. And if you could turn to the second page, there's an article entitled, "Techniques of Anterior Cervical Plating." Do you see
01:50 that?
A. Yes, I do.
Q. And there are a number of surgeon authors listed there. Do you see that?
A. Yes, I do.
01:50 Q. Is this an article that you've ever seen?
A. I don't know if I've seen this article directly.
Q. If you could turn to the page at DTX--1174-009. Do you see that? Are you there, Doctor?
A. Yes, I am.
01:51 Q. And there's a table there. Do you see it? Table 3?
A. Yes, I do.
Q. And it's labeled, "Comparison of Anterior Screw Plate Systems"?
A. Yes.
01:51 Q. And do you see it lists the Codman system?

A. Yes.
Q. And do you see it identifies it as being a non-constrained system?
A. It listed it as a constrained system, and the answer was no, is how they listed it in this article.
Q. So it says at the top, it says, "Constrained System." Do you see that?
A. That column, yes.
Q. And then for Codman, it says "no"?
A. That is what they list in this --
Q. So that indicates it's not constrained?
A. According to these people, yes.
Q. Right.
MR. NORTON: Your Honor, I would move to admit DTX--1174.
MR. CURRY: No objection.
THE COURT: It's received.
(Defendants' Exhibit 1174 received in evidence.)
MR. NORTON: Steve, if you could put that --
Steve, if you can just go to page 9. And blow up the table.
BY MR. NORTON:
Q. Dr. Lloyd, just for the benefit of the jury, this is what we were talking about that identifies the Codman system; is that correct?

A. The one that you're pointing to says it's the Codman system, correct.
Q. And it asks whether it's a constrained system, and the answer is no?
01:53 A. According to these authors, yes.
Q. Do you know if you located this article when you were looking for articles in 2005 regarding semiconstrained systems?
A. It was not considered to be a scientific article so it was never considered as something we were looking for.
01:53 Q. Because you were looking for studies?
A. Yes.
Q. So if you could turn to tab 5 in your binder. It's the document marked for identification as DTX--1176.
MR. NORTON: Your Honor, I'd move for introduction of
01:54 this article. If there's no objection, we'll publish it and go through it a little more quickly.
MR. CURRY: No objection.
THE COURT: Received.
(Defendants' Exhibit 1176 received in evidence.)
01:54 BY MR. NORTON:
Q. So, Dr. Lloyd, this is another article. This one is from 2002. Do you have that?
A. That's correct.
Q. And it is authored by another group of surgeons, Drs. Haid,
01:54 Foley, Rodts, do you see that?

A. Yes, I do, and Barnes.
Q. And if we could turn to page 3 of the exhibit, Steve.
Down in the lower left-hand column there's a heading "Semiconstrained, Rotational Devices"?
01:55 A. Yes.
Q. At about the middle of the paragraph there's a sentence that begins: "The design of the screw-plate interface is such that the graft subsidence through a pivot or interface" -- all the coloring through me off there.
01:55 "The design of the screw-plate interface is such that graft subsidence through a pivot or rotational mechanism was developed, thereby increasing load on the graft and allowing for its controlled subsidence."
Do you see that?
01:55 A. Yes, I do.
Q. This is another article that's described in Codman that's described as being semiconstrained?
A. Are you referring to the next paragraph where they say:
"Excellent outcomes in patients who receive the Codman
01:56 and other similar types of semiconstrained, rotational plates have been reported ..."
Is that what you're referring to?
Q. Referring to the fact that the heading of the paragraph is semiconstrained, rotational devices and it's discussing Codman.
01:56 A. Yes, I do.

Q. So this article is describing Codman as semiconstrained as well, right?
A. These authors say that it is, yes.
Q. And they're discussing the benefits of that system as that it allows for this load sharing.
A. That is what they're purporting.
Q. And if you could turn to tab 6 in your binder, which is Exhibit DTX-1175?
A. Yes.
MR. NORTON: And I move to introduce this exhibit as well?
MR. CURRY: No objection.
THE COURT: Received.
(Defendants' Exhibit 1175 received in evidence.)
BY MR. NORTON:
Q. So, Dr. Lloyd, this is another article. This one is from 2004.
If you could turn to page 5 of the exhibit. There's a heading in the left-hand column, "Semiconstrained Plates"?
A. Correct.
Q. And in the second paragraph, down in about the middle of it there's a sentence that begins with the Atlantis plate?
A. Yes.
Q. And this is another article identifying Codman as being a semiconstrained plate; is that right?

A. They do purport that the Atlantis plate and the Codman plate are examples of plates that allow for rotation of the screws in the plate as settling takes place. That is what they purport.
Q. That's talking about settling and load sharing, right?
01:58 A. That is what I think they're referring to.
Q. So despite the fact that the literature consistently refers to the Codman plate as being semiconstrained, it's your position that it's a rigid plate system?
A. That is my position.
01:58 Q. And in your mind, whether something is semiconstrained is in the eye of the beholder; is that fair to say?
A. That's how it functions.
Q. Well, do you think that the surgeons who wrote all these other articles don't know how the product functions?
01:59 A. I think that they were paid by DePuy to say this. Because a lot of these surgeons are a physician, you know, experts for DePuy, and I think there was some monetary emphasis being placed on them saying that.
Q. Sir, you understand that the authors of that article are
01:59 some of the surgeons who designed the Codman plate in conjunction with the Codman engineers, right?
A. Yes, I do.
Q. All right. So is it your testimony that you know better how the Codman system operates than the people who designed it?
02:00 A. I know how the Codman works for my patients.

Q. But you're not saying you know it better than the people who designed it, are you?
A. I do not purport to know anything more than what I see in my practice on my patients.
02:00 Q. And in your opinion, it's a rigid system?
A. In my opinion, it's a rigid system, correct.
Q. And whether or not something is semiconstrained to you is something that's in the eye of the beholder?
A. It is from my experience and what I have seen that I can say
02:00 that the Codman system is a rigid system.
Q. Even though all of the published literature says the opposite?
A. I don't know if this is all the published literature, no. So I cannot make a statement that -- true or false.
02:00 Q. You haven't offered the jury any published articles describing Codman as being a rigid system, have you?
A. I do not have anything that says that, no, except my experience as a surgeon.
Q. And you haven't provided any articles to the jury that
02:01 credit the Acantha patent as coming up with the idea of a semiconstrained anterior cervical system, have you?
A. When you mean coming up with the idea it was the first one to have the system? Is that what you mean?
Q. The Acantha patent was not the first patent on a
02:01 semiconstrained system, was it?

A. No, it's not the first patent that utilized semiconstrained screws in the cervical plate.
Q. Now, you testified this morning about issues you had with respect to screw breakage in Codman. Do you recall that?
02:01 A. Yes, I do.
Q. And do you recall at your deposition being asked about Codman and screw breakage?
A. Yes, I do.
Q. And do you recall testifying that you could not recall how
02:02 many times you had had an issue with screw breakage in Codman?
A. I don't know if I was asked to provide a number. I don't believe I was.
Q. You don't believe you were asked how many times you had had experience with screw breakage with Codman?
02:02 A. I do not remember being asked a number, no.
Q. You couldn't answer whether it had happened even as many as five times; is that right?
A. I was not asked that question.
Q. Okay. So you do recall having your deposition taken in this
02:02 matter?
A. Yes, I do.
Q. And you understood that you were under oath?
A. Yes, I do.
Q. Okay.
02:02 A. Are we talking about what I just said this morning?

Q. No. I'm talking about when we took your deposition earlier in this case.
A. Are you talking about last year?
Q. Yes.
02:03 A. Okay.
Q. Do you want to change your testimony?
A. Yes. And I would have to refer back to that to see what I said.
Q. Okay.
02:03 A. Because you keep going back to the deposition and what I testified this morning. So I get some confusion there.
Q. Well, I'm trying to make sure that what you testified to this morning is the same as what you testified about at your deposition. Okay?
02:03 A. And this morning I was not asked a number of times that I saw that happen.
Q. Right. And last year when we took your deposition, you were asked that question.
A. You would have to show me the deposition so I could see it.
02:03 MR. NORTON: Your Honor, we'll play the video clip from his deposition.
(Video deposition played in open court.)
BY MR. NORTON:
Q. So does that refresh your recollection on that subject?
02:05 A. It doesn't change my opinion that I have a number for you.

Q. Right. But you couldn't recall more than -- whether it was even as many as five times?
A. I couldn't give you a number.
Q. So as a surgeon, with over 30 years of experience, you do understand that screws can break from time to time; is that right?
A. I have seen screws break on numerous occasions.
Q. You're not testifying that screws never break.
A. I have never purported that.
Q. And screw breakage can happen with all types of spinal implant systems, right?
A. Certain ones I haven't seen it, but I've seen it in a number of them.
Q. You understand there can be many reasons for screw breakage?
A. Yes, I do.
Q. One common way that a screw might break is if fusion doesn't take place; is that fair?
A. That can happen.
Q. So when you do these surgeries, the goal is to obtain a bony fusion; is that accurate?
A. You want the two elements that you're joining together to become rigidly as one.
Q. And you want that to happen by the bone growing stronger. And you put graft in the disc space, right?
A. Or the interbody device that's used that it grows into the

interbody device.
Q. Yeah, and so you'll have a bony fusion in a successful implant, right?
A. You'll have a solid unit, yes.
02:06 Q. And if that bony fusion doesn't take place, then that is going to be a prolonged period of stress on the metal implant, right?
A. It can happen.
Q. And so if the fusion doesn't take place, you would agree
02:07 that there's an increased risk of the screws breaking when the bones don't fuse?
A. It does put more stress on the instrumentation.
Q. And that can lead to the screws breaking?
A. Screws can break with pseudarthrosis, correct.
02:07 Q. Now, you did not report any issue or concern about Codman screw breakage to DePuy, did you?
A. No, I just reported it to the regional salespeople. Their independent contractor.
Q. But when you were having the issue with Eagle and Swift, you
02:07 made sure DePuy knew about that issue, right?
A. Yes, I did.
Q. But you didn't make sure DePuy was made aware of any issue with Codman?
A. I talked to my regional salespeople, and I don't know where
02:08 they took it.

Q. But that wasn't somebody at DePuy?
A. Not that I talked to directly.
Q. Or to be clear, it wasn't someone at Codman?
A. Not directly to Codman people, except the people that were
02:08 selling it.
Q. And to be clear, you're not testifying that screw breakage doesn't take place with semiconstrained systems, are you?
A. I have no answer either way. Because of the semiconstrained systems that I feel are semiconstrained, I have not seen screw
02:08 breakage.
Q. But you would agree that that can happen.
A. I don't know if it can happen or not. I've never experienced it, so I can't say that it's happened.
Q. Now, you've had it occur with Codman, right?
02:09 A. I've had it occur with constrained systems, yes.
Q. Well, again, not to belabor the point. You consider Codman to be a constrained system, but the articles we talked about all call it a semiconstrained, right?
A. The people that wrote the articles purport it as being
02:09 semiconstrained, correct.
Q. And you don't have any data or information that would illustrate the rates of screw breakage for Codman with respect to or relative to any other product, do you?
A. No, I do not.
02:09 Q. Now, you testified also about a recent case you had with

Skyline. Do you recall that?
A. Yes, I do.
Q. And I believe you said you had the x-ray taken in April of this year?
02:10 A. That's correct.
Q. Okay. Now, there was a -- was that a four- or a five-level plate?
A. It had five screws, four levels, correct.
Q. So that's a pretty involved long plate, isn't it?
02:10 A. Yes, it is.
Q. That's not a common use of -- I mean, the -- a long plate like that is used less frequently, right?
A. Less frequently than the shorter plates, correct.
Q. Now, you didn't report that issue of the Skyline screw
02:11 breakage to DePuy either, did you?
A. I told it to one of the sales reps that I work with.
Q. You told that to Mr. Speers?
A. Yes.
Q. So if Mr. Speers said otherwise, he would be wrong?
02:11 A. That is correct.
Q. Now, you're still using Skyline, right?
A. I use it on occasion, correct.
Q. And, in fact, you have a case scheduled coming up in a couple weeks with Skyline; isn't that right?
02:11 A. That's correct, but it also involves putting posterior

instrumentation. So I feel more confident that the screws will not break.

Q. You didn't have any posterior instrumentation in the case you testified about this morning, did you?

02:12 A. No, I did not.

Q. And that was despite the fact that it was a five-level plate?

A. That is correct.

Q. Do you think that you might have been able to avoid the

02:12 screw breakage issue that you had if you had used posterior stabilization along with it?

A. I do not know. The gentleman was not healthy enough to undergo a posterior stabilization procedure along with the anterior. He's a 62-year-old man that has chronic obstructive

02:12 pulmonary disease. He has a cardiomyopathy. He has rheumatoid arthritis and he has lupus. And he was not a candidate to undergo a two-stage procedure. This was all we could do for him.

Q. But if you had put in posterior instrumentation along with

02:13 the Skyline plate you used, that might have reduced the chances of the screw breaking, right?

A. It might have killed him. I wasn't going to take the chance of killing him.

Q. When you use the Skyline system, you use the variable-angle

02:13 screws?

A. Yes, I do.
Q. So for the benefit of the jury, you understand Skyline is what's called a "hybrid" --
A. It can be.
02:13 Q. -- system?
A. It can be used both fixed and variable angles.
Q. And so it sells -- the Skyline plate comes with fixed-angle screws and it also comes with variable-angle screws?
A. That's correct.
02:14 Q. And if you use them together in the same construct, that would be a hybrid?
A. If you use both, yes.
Q. And if you used the rigid screws, you would get a rigid construct, the fixed-angle screws?
02:14 A. Well, they're all rigid screws because of the locking mechanism.
Q. Well, they're also -- they're called variable-angle screws, right?
A. That refers to the ability of placing the screw at what
02:14 angle -- what angle you put -- what angle -- what angle the screw is placed. That's what that refers to.
Q. So --
A. All the screws that are placed in a Skyline plate are rigidly fixed to the plate, and, therefore, it is always a
02:15 constrained system no matter if you use the variable-angle

screws or the fixed-angle screws.
Q. And that's in your opinion.
A. That is my opinion, and I'm giving my opinion throughout this testimony.
02:15 Q. So I want to switch gears for a minute, Dr. Lloyd.
In 2003, Acantha entered into a licensed agreement with Stryker; is that right?
A. That's correct.
Q. And as one of the members of Acantha, you agreed to that
02:15 agreement?
A. Yes, I did.
Q. And pursuant to that agreement, you agreed that Stryker would pay a 4.25 percent royalty in exchange for an exclusive license to your patent, right?
02:15 A. That is the terms of the contract.
Q. And the contract also set forth at nonexclusive rate, a license -- a royalty rate that would come into effect if it were nonexclusive in certain circumstances. Do you understand that?
A. That is correct.
02:16 Q. And the royalty rate that you agreed to there was 3.25 percent, right?
A. That's -- that was what was in the contract.
Q. And in 2013, Acantha entered into an amendment to the Stryker license; is that your recollection?
02:16 A. That's correct.

Q. And pursuant to that amendment, the license was converted to a nonexclusive license and Stryker paid a one-time lump sum payment; is that your understanding?
A. That's correct.
02:16 Q. And that lump sum amount was 2.995 million?
A. I believe it was.
Q. And that was for all sales of any products covered by the license until the expiration of the patent, correct?
A. That was my understanding.
02:17 Q. And that would have been anywhere in the world that Acantha's patent was in force, right?
A. I don't know if it included all all-world sales.
Q. You don't know if it was just U.S. or all of them?
A. All of them.
02:17 Q. Okay. But in any event, anything Stryker sold subject to that license was covered by the 2.9 million dollar one-time lump sum, right?
A. That's correct.
Q. And at the time that product was entered into in 2013, there
02:17 were six years of life remaining on the patent, right?
A. The patent expires in '19, correct.
MR. NORTON: Steven, if you could put up PX--21.
BY MR. NORTON:
Q. Dr. Lloyd, in tab 8 of your binder is a copy of the
02:18 amendment.

Dr. Lloyd, do you recall that one of the reasons for this amendment was the parties' disagreement about what products Stryker should be paying royalties on?

A. Yes.

02:18 Q. And there was a dispute about whether or not some of Stryker's products should be royalty bearing, including a product called Aviator; is that right?

A. Are you saying this agreement? There was a disagreement when this agreement was made?

02:19 Q. Let me take a step back. Acantha was having a disagreement with Stryker about whether or not Aviator was covered by the patent. Do you recall that?

A. I don't know if it was ever addressed to Stryker.

Q. Well, that was one of the reasons for the amendment, wasn't

02:19 it?

A. What are you referring to?

Q. So if you could look on the first page of the agreement, it says: "Whereas, there have been disagreements between the parties, including, without limitation, regarding the scope of

02:19 the licensee's obligation to pay royalties." Do you see that?

A. Yes.

Q. So does that refresh your recollection that Acantha was having a disagreement with Stryker about whether or not they had to pay royalties on certain products?

02:20 A. I don't recall the specifics of it, no.

Q. Well, you were familiar with the Aviator product, right?
A. Yes, I am.
Q. And that's an anterior cervical plate product from Stryker?
A. Yes, it is.
02:20 Q. And you've used that in surgery.
A. Yes, I have.
Q. And you were aware of the fact that Mr. Talaber and Mr. Schroeder, your business partners, believed that Stryker or Stryker's Aviator product was covered by your patent, right?
02:20 A. I don't know if I ever heard them say that definitely, but they were questioning if it was. I don't think that it ever came to, you know, be a definite determination by them.
Q. Okay. But you recall they had at least some belief that the Aviator product was covered?
02:21 A. They had some questions.
Q. Now, you submitted a declaration in this case stating that you do not think Aviator is covered by your patent; is that right?
A. No, I do not.
02:21 Q. Just so we're clear on it, you do recall submitting a declaration, right?
A. Yes.
Q. And you do not believe that Aviator is covered by your patent?
02:21 A. No, I do not believe it's covered by our patent.

Q. And part of the reason why you don't think Aviator is covered by your patent is because it has a two-step blocking mechanism for the screw?
A. The door has to be locked by a second mechanism, yes.
02:21 Q. And in your view, that takes it outside your patent?
A. That's my view, correct.
Q. But Mr. Talaber and Mr. Schroeder were less certain about that?
A. I knew they had questions about it.
02:21 Q. Now, leading up to the 2013 amendment, Reflex sales were going down, right?
A. I don't recall the numbers, no.
Q. Your royalties were going down, right?
A. We were seeing less reimbursement, but I don't recall why.
02:22 I don't recall the numbers, though.
Q. I realize you don't recall the precise numbers, but if your royalties were going down, that sort of necessarily means that it was because there were fewer sales, right?
A. I, again, would have to look at the numbers. I don't know
02:22 if there was -- you know, what the reason was, but we weren't seeing as much from Stryker.
Q. Well, you get paid royalties on sales, right?
A. That's correct.
Q. So if royalties go down, that means the sales were going
02:22 down, right?

A. I would guess.
Q. Now, you're aware of the fact that Stryker did not believe that Aviator was covered by your patent, right?
A. They never told us that it was covered by our patent, no. You're correct.
Q. And, in fact, they disagreed, they felt it was not covered by the patent, right?
A. I do not know if I had any direct communication with the people at Stryker either way.
Q. Are you aware of the fact that Stryker had a "freedom to operate" opinion from their lawyers?
A. What do you mean by that?
Q. They had an opinion from their attorneys saying that Aviator was not covered by the Acantha patent. Were you aware of that?
A. I never saw the document.
Q. You never saw the document, but were you aware that Stryker had told you they had an opinion, from their attorneys?
A. I remember hearing it secondhand. I don't remember hearing it from Stryker.
Q. You heard it from Mr. Talaber?
A. Correct.
Q. And he told you that Stryker said they had an opinion from their attorneys?
A. That's correct.
Q. And you never saw that opinion?

A. No, I did not.
Q. But you believe Stryker was acting in good faith when they denied that Aviator was covered by your patent, right?
A. I did not feel there was an issue of infringement.
02:24 Q. Right. You agreed with Stryker?
A. That's correct.
Q. You agreed with Mr. Talaber, right?
A. I don't think we disagreed.
Q. Well, if he felt that it was infringing, then you disagreed
02:24 with him, right?
A. If. If.
Q. Yeah.
A. If.
Q. And just because you disagreed about whether or not Aviator
02:24 was covered, wouldn't mean that Mr. Talaber was acting in bad faith, would it?
A. No, it's an opinion.
Q. Under the 2003 Stryker agreement, Stryker had the right to enforce the Acantha patent against third parties, right?
02:25 A. That's correct.
Q. And by enforce, I mean they could sue people for patent infringement?
A. That's correct.
Q. And that would have included Synthes, right?
02:25 A. That's correct.

Q. They could have filed a lawsuit at any time alleging that the Vectra product infringed, any time after 2005 or '6, right?
A. After the product was released, correct.
Q. And in 2004, you notified Stryker that you believed Vectra was infringing?
A. Actually, it was probably 2005. Probably it was March of 2005.
Q. Okay. So in 2005, you notified Stryker that you believed that Vectra was infringing?
A. Correct.
Q. And Stryker told you that they weren't interested in pursuing that matter, right?
A. They never really said, you know, either way, that -- you know, we said there was an infringing product, and they just, you know, didn't really get back to us.
Q. Okay. Could Acantha have brought a lawsuit on its own?
A. It could have, but we couldn't have licensed the product. And there would have been no -- very difficult road. And we probably wouldn't be able to, you know, afford doing it.
Q. So you could have brought the suit in 2005, but it would have been difficult and it would have cost you money.
A. Well, I don't think we had the resources to do it, no.
Q. I want to switch topics, Dr. Lloyd. You testified about a meeting at DePuy in 2006?
A. That's correct.

Q. And DePuy was not selling any product that you believed was an infringement at that time?
A. I do not believe there was any infringing products that they sold at that time.
02:27 Q. And DePuy declined to pursue a license from Acantha at that time?
A. At that time, we did not come to an agreement, no.
Q. You didn't even get to the point of discussing a license, right?
02:28 A. We did discuss it, but it never got more than, you know, just the initial stages.
Q. So since 2013, and the amendment with Stryker was entered, Acantha has put considerable effort into trying to find a license or a buyer -- a licensee or a buyer for your patent,
02:28 right?
A. That is correct.
Q. And you've tried to sell your patent to any number of patent assertion entities, right?
A. I don't know what you mean by "try." Have we had
02:28 negotiations? Have we discussed it with other people? Yes.
Q. Right. And none of those companies were willing to buy the patent at a price you were willing to sell it to them, right?
A. No, we never came up to any agreements.
Q. And since 2013, Acantha has also contacted several spinal
02:29 implant companies to see if they were interested in taking a

license; isn't that right?
A. That's correct.
Q. And you personally contacted Medtronic, correct?
A. That's correct.
02:29 Q. And Medtronic told you that, thank you very much, we are not interested.
A. That's correct.
Q. And, in fact, none of the other spinal implant companies that you contacted decided to take a license, right?
02:29 A. We have had nobody take a license as of yet.
MR. NORTON: That's all, Your Honor. No further questions for Dr. Lloyd.
THE COURT: Any redirect?
MR. CURRY: Yes, Your Honor.
THE COURT: Stretch?
(Brief pause.)

REDIRECT-EXAMINATION

BY MR. CURRY:
Q. Dr. Lloyd, how many surgeries roughly have you done in your
02:30 career?
A. I think we this morning said around 4,000.
Q. And do you keep records on your patients?
A. I do.
Q. To figure out the number of times that you used Codman back
02:31 in the day, would you have to go through each of your patient's

records one by one?

A. Unfortunately, I don't keep the data. So to try to generate that, it would be difficult. We only keep records for 10 years, paper records. So I would only have things back until 2008.

02:31 MR. CURRY: And, Mr. Diaz, can I get PX-29?

BY MR. CURRY:

Q. You were asked questions about this document, PX-79 when you were asking for scientific support for the benefit of some semiconstrained devices, do you remember that?

02:31 A. Yes.

Q. Now, at that time, did you know that semiconstrained devices had benefits?

A. I did, but only on a hearsay basis.

Q. And so, in your practice, did you see patients benefiting

02:31 from semiconstrained devices?

A. Yes, I did.

Q. Did you see literature discussing those benefits as well?

A. Yes, I did.

Q. So why were you asking for scientific studies in this email?

02:32 A. At the time, Stryker was coming out with a translational plate system, the DynaTran that was going to use our intellectual property, and I was wondering if there was somehow we could construct a study with patients. In comparing the benefits of a constrained system versus semiconstrained versus

02:32 translational, and try to determine if the healing process is

increased the more -- the more the plate can move and -- can move.

Q. Can you give me an example of what a scientific study is?

A. A scientific study is set up where you have guidelines. And you take a group of patients and you do one thing to them, you take another group of patients and you do another, and then you compare and you see the differences in the outcomes.

Q. So does that process, is that something that can quantify the benefits of semiconstrained devices?

A. Yes, it can quantify it.

Q. And now, how does that fit into what you were hoping to do with respect to the new Stryker plate?

A. I was trying to, you know, get a feeling. The less constrained the system is the greater the healing is or the -- you know, the greater the speed of the healing, and just try and compare the three major types of cervical plates.

Q. Now, switching gears. You were asked about the time it takes for you to implant one plate versus another. Do you remember that?

A. Yes.

Q. Now, in your practice, does it save you time to do Vectra as opposed to the Skyline?

A. Not really.

Q. Why is that?

A. Because I'm not one to try to speed through things. Early

in my training, I saw surgeons, you know, different -- you know, all different types, and I kind of thought that the surgeons that sped through things were kind of the Top Gun type guys. But then I realized that when you speed through things, you can
02:34 be sloppy. And I found that take your time and do it right.

And so that's how I've kind of ended up. You know, I will take a little extra time, I'll do it right. So in taking an extra little bit of time, I don't really look at, you know, a one-step locking mechanism versus a two-step locking mechanism
02:35 is, you know, a benefit. For me personally. But for other physicians that, you know, do the surgery, they may find that as a benefit, they may find saving a minute or two is preferable.

Q. Now, you were also asked about semiconstrained with respect to your patent. Do you remember that?

02:35 A. Yes.

Q. Are your claims limited to semiconstrained?

A. No, they're not.

Q. Is that a word that appears in the claims of your patent?

A. No, they do not.

02:35 MR. CURRY: Could I get the document camera, Mr. Diaz?

BY MR. CURRY:

Q. I've put on the document camera a color-coded figure 5 from your patent. Have you seen that in this trial in opening?

A. Yes, I have.

02:36 Q. Now, is it possible to have a screw without a head?

A. If you had a screw without a head, there would be nothing to hold the plate onto the body or the interbody device in and the plate would fall off. So it would be a total worthless system.
Q. Now, in your figure 5, do you see this dotted line within
02:36 this screw head?
A. Yes, I do.
Q. What do you call that?
A. That's the portion of the screw head that engages the dry device for the screwdriver.
02:36 Q. Now, in your figure 5, you have the driving mechanism within the screw head, right?
A. It's depicted on the drawing as that, yes.
Q. Now, in the claims, does it specify that that's a requirement?
02:37 A. No, it does not.
Q. Could you separate the driving mechanism from the screw head?
A. You can put the driving mechanism on top of the screw head.
Q. Would that change what the screw head is?
02:37 A. No, it does not.
Q. And is that something you typically see in medical device screws?
A. Yes, I do.
Q. Why?
02:37 A. It has to do with the size of the screws. They're very

small. The heads of the screws are small. And if you would put the drive mechanism in the head of the screw completely, it would weaken the head of the screw to the point that it will snap off, and then it would be not functional.

02:37 Q. So I've drawn some orange here on top of the screw head. If you put the driving mechanism in the orange, does that change where the screw head is?

A. No, it does not.

Q. Would that device still be semiconstrained?

02:38 A. It could be.

Q. You would have to look at the design, right?

A. Yes, and the specifications and the distance between the locking ring and the head of the screw.

Q. And you testified that Codman is constrained or rigid,

02:38 right?

A. Yes, it is.

Q. And Mr. Norton showed you a lot of articles calling Codman semiconstrained?

A. Yes, he did.

02:38 Q. Did those articles un-break the screws in your patient's neck when you used Codman?

A. I don't believe that that -- I don't believe that their articles would repair what I saw.

MR. CURRY: No further questions, Your Honor.

02:39 THE COURT: Okay.

MR. CURRY: Thank you.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Let's take our afternoon break.

02:39 (Break.)

(Jury not present.)

THE COURT: We're outside the presence of the jury. Who is your next witness?

MR. CURRY: Before we get to the next witness, I have

02:39 just a couple housekeeping matters, Your Honor.

THE COURT: Sure.

MR. CURRY: Dr. Lloyd is a practicing surgeon, may he be released?

THE COURT: Certainly. That's entirely up to him.

02:39 MR. CURRY: Thank you. And then the next is that, we had a question about Your Honor's preference for whether you allow slides to be moved into evidence as demonstratives, or whether you don't -- whether that's not your practice. Different judges do it differently.

02:40 THE COURT: Yeah. Well, I think the underlying evidence is what I'm concerned with. But I think an appellate court may like slides, you may like slides. However you'd like to do it. I don't have any hard and fast rule on it.

MR. CURRY: Would Your Honor prefer that we move our

02:40 slides or offer our slides into the record now or when the jury

gets back in?

THE COURT: You can do so now. We don't --

MR. CURRY: Plaintiffs offer into evidence Mr. Talaber's slides as well as Dr. Lloyd's slides as demonstratives.

THE COURT: Now, the slides you're talking about --

MR. CURRY: The PowerPoint docs that we've shown in court.

THE COURT: Were they exhibit numbers?

MR. CURRY: Your Honor, I'm talking about the --

THE COURT: The demonstratives.

MR. CURRY: Demonstratives.

THE COURT: What are you referring to -- why don't you talk with Mr. Norton later and figure out if there's any disagreement, tell me what you've agreed on and if there's a dispute I'll resolve it.

MR. CALDWELL: To answer your question, our next witness is Dr. Barton Sachs.

THE COURT: And Dr. Sachs is the one in which you have a number of slides that deal with the documentation that the defendants object to.

MR. STEWART: That's right, Your Honor. And if it makes it any easier, we prepared a brief, two-page trial brief, after we saw that they submitted one. Obviously it's maybe too late for you to read it.

THE COURT: Show me what it is -- what are the documents that you object to. I have a couple of those that you showed me.

MR. STEWART: If I can approach, Your Honor?

02:41 MR. GRIFFITH: If I can explain Your Honor?

THE COURT: Yes, Mr. Griffith.

MR. GRIFFITH: So it's, quite frankly, not merely an issue to me about the documents, although I think the documents clearly cannot be shown. They're not admitted into evidence.

02:42 And the proper basis hasn't been established to do that.

But, beyond that, my concern is that Dr. Sachs is going to do -- try to do a lot more than just opine on whether there's infringement or not. And I think he had a topic of -- on acceptable alternatives. But instead, he wants to talk about

02:42 alleged intent or what the defendants knew. He wants to talk about development history of products and so forth. And those things don't have to do with -- don't have anything to do with whether there is infringement or not.

Now, those things possibly could be relevant. Some of

02:42 that stuff could be relevant to invalidity issues, and he may come back and testify on those subjects. And I understand. So, for example, you could get into secondary considerations, failure by others, that type of thing.

But whether Vectra or Zero-P VA are covered by the

02:43 claims is a straightforward analysis of what these products are

and what the claims are.

And then on active inducement, which is the other infringement issue we have in the case, there are things like specific intent and knowledge that he shouldn't be testifying on. Okay? So that's well within the realm of the jury's expertise and not a technical expert's requirement.

I don't have a problem with Dr. Sachs talking about if you use these products, you know, this way, they will be within the scope of the claim.

So, for example, if there's method claims, Your Honor. And that's an issue in this case is whether when you use the product supporting the method are we inducing infringement. And so I don't have a problem with him talking about if you follow the surgical technique, then in his opinion you get something -- that method is within the scope of these claims.

But as to whether there's intent, as to whether there's willful infringement, as to the state of mind or knowledge of the plaintiffs, that's not the ken of his expertise, and, frankly, any expert. That's where the jury comes in on those things.

And so what I see them attempting to do -- and it's improper from an evidentiary perspective, but it's also just improper because he shouldn't be doing it as an expert -- he wants to put his spin on how our development program worked and what happened before our witnesses testify. And they're going

to have every opportunity to cross our witnesses on the development of these products. They're coming here to testify. But he wants to put his spin on that before they testify. That is not relevant to whether we infringe or not.

02:45 So, you know, he should be talking about these products, what they are, how they work. Of course, given his background of -- you know, for expertise for them to qualify him as an expert. And, as well, you know, he can explain the understanding that he's developed of the products, that he's 02:45 looked at engineering prints and so forth. No problem with any of that. But his fundamental analysis needs to be and should be limited to these issues that I've just described.

As I've said, it's possible that some of these things may come back into play. And it would just be some. It's not 02:45 going to be this willful infringement stuff. But it's possible that some of the stuff would come back into play on the invalidity side.

After our expert testifies, he may -- you know, he's offered an opinion that the patents have not been proven 02:45 invalid. So he's, for example, talked about long-felt need and things like that. I get it. That stuff, you know, he's free to explain how that relates to those validity issues, but long-felt need doesn't relate to whether there's infringement or not.

So I say that because that's kind of what's going on 02:46 here. This is why they want him to talk about it is to give

this spiel about what's happened leading up to these devices. And he shouldn't be doing that. Free to talk about why he thinks there's infringement, but this other stuff --

THE COURT: This is a very different objection to the one raised earlier because now you're making the argument. And this isn't a criticism, it's an observation that what I looked at earlier was hearsay and the use of -- the admissibility of evidence that an expert relies upon to give the basis of his opinion. Now you're saying that he's not entitled to opine on issues of willfulness, for example.

MR. GRIFFITH: Correct.

THE COURT: And that that's beyond -- that's improper expert testimony.

MR. GRIFFITH: Yeah. But, I mean, the problem with the exhibits are the evidentiary ones that we raised. But my concern that I see coming with the testimony, is that he's going to try to expand what he's talking about beyond these infringement issues into areas where he should not be talking about them. So it is a testimonial issue. I mean, the questions haven't been asked so, I don't know, but --

MR. STEWART: May I respond Your Honor?

THE COURT: Yes.

MR. STEWART: This is why we have expert reports. You disclose them months and months in advance, they contain exactly the contents and boundaries of the opinions the expert is going

to offer.

Defendants didn't move to exclude any of Dr. Sachs's opinions. Didn't move to exclude any parts of his report. He's going to testify consistent with that report, which included a lengthy discussion of the background of the development of defendants' products based on his analysis of defendants' documents, which is crucial background to the jury understanding that this isn't just some fly-by-night. He is not putting the claim boards up there and saying, oh, yeah, that looks like that, that looks like that. He's actually dug into the documents, understands how they were developed, why they were developed, what else they were looking at when they developed them, and then he's going to move into his infringement analysis with that fulsome background.

And so that's what the exhibits that are objected to are defendants' own development documents that are not hearsay because they're admissions of a party opponent under 801(d)(2). There are no disputes about authenticity. In fact, I move them into evidence right now to the extent Your Honor would accept that motion at this time because there is no --

THE COURT: Without seeing them I'm to admit them?

MR. STEWART: Well, no, I can pass them up to you.

THE COURT: A stack two inches thick and I haven't seen them and you want me to order their admission?

MR. STEWART: Your Honor, I can certainly pass them up

to you and explain to you why each one of them is a document produced by the defendants in this case with all the bearings necessary to overcome a hearsay objection.

My point is simply that this is part of his report, this is going to be helpful to the jury in understanding his testimony.

And on the inducement and willfulness issues, he's not going to testify about their state of mind. His report expressly says: I do not offer an opinion as to state of mind, that's outside my expertise. However, to help the jury understand the infringement issues I'm opining about, here is some evidence they might consider in their deliberations related to defendants' development of these products and what they were looking at.

THE COURT: Okay.

MR. GRIFFITH: Your Honor, I'm sorry. I apologize. But, so they say things like he's not going to talk about state of mind, and here's a slide, here's a slide of theirs. They had the intent to encourage infringement by someone else.

I mean, my God! Really! Do I have to move -- make a *Daubert* motion on that, every crazy thing they put in their expert report? These things went on forever. The briefing -- the pretrial briefing that we would have done was lengthy enough. For me to attack every improper thing in this report is an unworkable task.

Look at that. They had the intent to infringe encouragement by someone else. And he just said he's not going to do that and it's on the slide.

THE COURT: Mr. Stewart, why do you tell me one thing when you report and your slides say another?

MR. STEWART: Your Honor, the heading of the slide says the "Elements of Induced Infringement." He's going to tell the jury: These are the elements that the Court will instruct you you need to find to find induced infringement.

And then the next sentence he's going to say is: I don't have an opinion as to the second and third, the ones about intent.

MR. GRIFFITH: Yeah, right after he says "defendants knew of Acantha's patents." This isn't knowledge. It doesn't say knowledge, it says defendants knew of Acantha's patents.

Second bullet: They, defendants, had the intent to encourage infringement by someone else.

He is telling them on this slide that there's intent to infringe. He's got no business doing it. And then they say, oh, but he's going to say I am not offering an opinion, just showing you a slide. This is doublespeak.

THE COURT: Let me look at the evidence you want to introduce. Give me the report as well, the expert report. I don't have my copy handy. And give me your brief.

MR. GRIFFITH: And, Your Honor, he's not a lawyer.

He's not competent to testify on opinions of counsel.

THE COURT: Well, why is he offering the elements? That's a jury instruction issue, isn't it? Why are you having an expert testify about the elements?

02:51 MR. CALDWELL: While Mr. Stewart is grabbing the expert I'll try and address that.

I think that the way that this has happened, and I would venture it's happened in many of Mr. Griffith's trials as well, is he's saying I'm allowed to -- I'm organizing the

02:51 evidence and helping the jury understand different categories of evidence. And then he presents, I have seen things that happened during development and whatnot. He simply says that these are the elements of the test, but he's not opining that, from this, I tell you what's in their state of mind.

02:51 THE COURT: I repeat, why do you have an expert talking about telling him what the elements are?

MR. CALDWELL: Well, it's the same thing as the expert, like their expert is going to come up and say, well, for anticipation, you have to find a reference that meets all of the

02:51 elements -- a prior art reference that meets all the elements of the claim. For obviousness, you might find it and more, and it would be obvious to a person of skill in the art.

I mean, it's the most basic of things. He's not saying -- he's not opining on any validity conclusions that are

02:52 required, you know, psychic powers or anything of that nature.

It's really that most -- and I think actually a great analogy -- think about even their damages expert will come up and talk about the *Georgia-Pacific* factors, right?

So it's meant in that vein. If there was a *Georgia-Pacific* factor that had something to do with mental state, I assume that their expert, Mr. Haas, wouldn't say, you know, I used my psychic powers to tell you the mental state.

But it's nothing that's nefarious about that. If it needs to be organized with a header that says --

Okay, I was pressed to note there's an agreed instruction on how willfulness works, I believe.

But, in any event, it's nothing different than just saying this is how you prove infringement, we have to look at the Court's claim construction. So it's not --

THE COURT: Let me look at the reports, the exhibits or slides, whatever it is you wish to introduce, and the brief that you said you prepared.

MR. GRIFFITH: And it's fine, it's fine for the expert to say I understand that all elements of a claim have to be present.

THE COURT: Go ahead.

MR. GRIFFITH: It's fine for an expert to say all elements of a claim have to be present, here's what I understand the claim constructions are. But his function in service and help to the jury is explaining these technical things and why he

thinks it's within the scope of the claim so they can understand.

Inducement and whether we induce or not is not something that is his area of expertise. I grant you that talking about if you follow the instructions will you be within the scope of the claim. Got it on that. But knowledge and intent, that's not something that should be going to the jury through an expert's mouth.

02:53 THE COURT: Okay. Let me take -- we'll be in recess and let me take a look at these things.

(Recess taken.)

(Jury not present.)

THE COURT: Go ahead, be seated.

03:14 Now, before I forget, I don't need to hear about the next witness's wife and father and children. I assume we're done with that sort of thing? But now defense might feel they're entitled to. That goes a little far. And nobody objects, of course. But this is about certain facts. I recognize you want to humanize your clients, and they're very human without going into the background. So let's try and keep to evidence that really is material. I'm not saying you can't tell me about the background. And I'm going to leave defendants to their own discretion as to how far to go into those things. But certainly we don't need that on other witnesses.

03:15 I'm not saying anything unusual, am I, here?

Mr. Caldwell?

MR. CALDWELL: I've never heard anyone have an issue with it. So I -- no one's ever raised it, Judge, or opposing counsel. So, I don't -- it's not that you're saying something that's offensive or anything. Whether it's unusual, it's unusual in my practice, but that's fine. It's totally fine.

And I would say with the next two, given that they're experts, we at least need to go through qualifications --

THE COURT: Sure. Their education, their experience, their education, those sorts of things. And since they're not the parties, I assume we'll have a much more direct examination.

MR. CALDWELL: Yes, sir.

THE COURT: Somebody wanted to put something on the record or make an argument based on the cross-examination now?

MR. CALDWELL: Your Honor, I actually have a -- I have a couple of points that I would like to raise.

First of all, on the demonstratives, like just opening slide for both sides. I think, actually, Mr. Griffith and I are in agreement on an interim stage. We don't want to get to a point where five days into the trial there's no good way to identify things that have been used as demonstratives. And we're still going to continue to confer about whether we think things are part of the appellate record or to the jury. But at least so that we don't have trouble identifying things, we want to be able to sticker demonstratives and consider things part of

the demonstratives that have been used.

And so I think my understanding with Mr. Griffith is, for example, that our opening slides could be PDX--1, and then with Mr. Talaber PDX-2. With Dr. Lloyd, PDX-3. We would propose to mark this PDX-4. And there may be others with Dr. Sachs. And I suspect that counsel for the defense have ones they're going to mark, and we agreed we'd just do PDX and DDX, with the middle being demonstrative, and we'll continue to confer about the process beyond that.

03:16

03:17

MR. GRIFFITH: Your Honor, you will be pleased to hear I do agree.

THE COURT: Good. And just make sure the clerk has a copy of them. And obviously if they've been shown to the jury, they should be considered received as demonstrative exhibits.

03:17

MR. CALDWELL: Yes, sir.

THE COURT: Okay.

MR. CALDWELL: I had a different issue here.

THE COURT: Yeah.

MR. CALDWELL: So, I don't know if the Court caught it, but there was something that was a little bit odd that happened in cross-examination when Mr. Norton actually asked Dr. Lloyd, "Do you have an upcoming surgery using a certain plate?" And, I mean, obviously, you can tell by the microphone situation Dr. Lloyd is not really a super pepped-up person, but when I walk out in the hall and there's steam coming out of his

03:17

03:17

ears because at this point it appears maybe -- maybe they had their sales rep look through his plans for upcoming surgeries today. We don't know. We don't know where that information came from. But I know that our client is pretty upset that it appears somebody has gone and investigated surgeries he has, that he has on the schedule for his patients, and we don't know where that came from.

And so our request to defendants was simply, where did you get that, that -- when you asked him that question. And they told us they would take it under -- that request under advisement.

So at this point, maybe there's not an issue, but our request is that we be told where they got the information that he has an upcoming surgery using a certain product.

THE COURT: I don't know enough about this field to know if that's something that's held in -- I mean, the patient information is certainly confidential, but I don't know how that works --

MR. CALDWELL: And that's why -- and that's what I'm saying at this point. I think -- I mean, if it's not confidential certainly they should tell us where they got it from, and if it is confidential, then maybe for a different reason they should tell us.

That's why at this point we're merely asking to find out where they got that information because they can't find it

on our doctor's website.

THE COURT: Yeah.

MR. NORTON: Your Honor, I can address this.

So, first of all, just for context, as you recall, the first time we ever heard anything about the Skyline issue was on Saturday night when we got these exhibits. I won't belabor that.

But we did investigate that issue and -- by contacting our employees. The way these procedures work is --

THE COURT: The representative --

MR. NORTON: The representative. And they have to contact the company to have a product in the operating room and they schedule these surgeries out.

So, yes, we did investigate the fact that he has an upcoming Skyline case. And I thought it was relevant given that he testified that he had a screw break with it and he's suggesting that it's a bad product, and yet he's scheduled a case for next couple weeks from now. So that's the story of that.

MR. GRIFFITH: It was a sales rep, not an employee.

THE COURT: Yeah, I assumed it was a sales rep. I'm not sure where else he could get it. And if that's improper I'll leave you to talk to your medical boards or whoever makes those determinations. Or if there's something else you want from me, you can file an appropriate motion, tell me the

authority.

MR. CALDWELL: Thank you. They weren't even willing to tell us that when we asked on the break. So, thank you.

THE COURT: Okay. With respect to the documents here, let me go through. I'm not sure what their use is and that makes it hard, and I'm not sure what the testimony is and that makes it difficult.

But let me just ask a couple questions about -- from defendants about -- first of all, Exhibit 172, PX-172, which is -- appears to be this memo or report from Bill McDonough who you have described as the major force behind the Zero-P VA.

MR. GRIFFITH: Yeah. He's going to be testifying.

THE COURT: And this seems to be a report about that particular product, what it does, what it -- how it works. Is that objectionable if he relies on that in part on his description of how it works and as a foundation for his conclusions on why he thinks it infringes?

MR. GRIFFITH: I don't think he's going to be using that to talk about how it works. I think he's going to be using it to allege what motivation there was. Again, that's something he should be talking about. The Synthes motivation to do their development work and to say things like they were doing this because they had to get in the semiconstrained. Which, again, is not -- he doesn't need that -- I believe that's a market research.

THE COURT: Well, there's also Exhibit PX-272, which looks like the market weekly update, and I can't -- "ACCS Test Market Weekly Update."

MR. GRIFFITH: That's a different situation. We don't even know the author of that document. They represented that all of those people are employees of the company. I don't believe that's correct.

That document is more mysterious to us. The marketing report Your Honor is referring to, he's not a marketing expert. I mean, this isn't marketing testimony. That's got market share information in it.

And what his point, I believe, is to testify about the alleged motivation for Synthes to do what it's doing. It's not because he needs -- there's nothing -- I don't think there's anything in there about the structure of the product. And so this goes to what I'm saying earlier in part. It's a marketing document. It's a marketing --

THE COURT: Yeah. But to the extent -- I mean, that the testimony would be in response to the same problems of screw backout or addresses that sort of thing, I assume that's part of the testimony and this document talks about it.

MR. GRIFFITH: I'm guessing. It just doesn't seem to me that it should be. I mean, he's not a fact witness, he's an expert, and he's opining on whether -- he's supposed to be opining on whether the products are within the scope of the

claims or not.

Your Honor, I don't have that document right now in front of me. They gave you a copy, they didn't give me one. But, I believe, if I can look at it --

03:23 THE COURT: Yeah. It is a marketing report.

MR. GRIFFITH: This is a draft. And this is going to our point. I mean, these are problems with these documents, to be using a draft memo. You know, that's not a business record. I'm not even -- and 801(d)(2) is a lot more complex than

03:24 everything that comes out of your files is an admission against interest. This is a draft document.

Interest. I'm sorry, I'll slow down.

THE COURT: All right. Mr. Stewart.

MR. STEWART: Your Honor, admission against interest

03:24 is a different rule of evidence than admission by a party opponent. The document itself indicates because it talks about the ACCS, it includes a discussion of competing products in that field, it talks about the development of the clip design. That by a preponderance of the evidence at least, it is one of

03:24 defendants' documents and their statements in a test market update.

So that gets it into the exclusion under 801(d)(2) and there's no further hearsay problem.

THE COURT: Call your witness, don't introduce any of

03:24 these documents without laying a foundation. And, yes, they're

authentic, but I want to hear what their use is.

My experience with experts is you go through the expert's credentials, you ask what your assignment was, you ask did you reach any opinions, you lay out those opinions, and then the basis for the opinions.

It seems to me -- I can't tell how these are relevant and how they bear on the testimony in the abstract. So I'm simply going to have to hear the testimony, and we'll have to have the objection contemporaneous and we'll address it.

03:25 MR. STEWART: And just to give you a preview, it's the background of his investigation into the development of those products.

THE COURT: I don't want to hear the background. The background can be a lot of things that has nothing to do with 03:25 the ultimate opinions. It doesn't go in just because he looked at it. It doesn't go in just because it came from the defendant. It comes in if it's relevant to an opinion, if it's a basis of an opinion that he is entitled to give that is relevant to this case.

03:25 So just because he looked at something as part of background doesn't make it admissible. Nor does the fact that it came from the defendants' discovery materials make it admissible. All right?

MR. STEWART: Understood, Your Honor.

03:25 THE COURT: Bring the jury in.

(Jury present.)

THE COURT: Sorry, that was longer than we planned. Please be seated.

We have our next witness. You may proceed,
03:26 Mr. Stewart.

MR. STEWART: Your Honor, Acantha calls Dr. Barton Sachs.

THE COURT: Okay. Dr. Sachs, please come forward and be sworn.

03:27 DR. BARTON SACHS, PLAINTIFF WITNESS, DULY SWORN

THE CLERK: Please be seated. Please state your full name for the record. Please spell both your first and last names.

THE WITNESS: My name is Barton Lewis Sachs.
03:27 B-A-R-T-O-N, L-E-W-I-S, S-A-C-H-S.

THE COURT: Okay. Thank you, Dr. Sachs.

You may proceed.

DIRECT EXAMINATION

BY MR. STEWART:

03:27 Q. Good afternoon?

A. Good afternoon.

Q. Dr. Sachs, what do you do for a living?

A. I am a medical physician, professor of orthopedics and spine surgery and rehabilitation medicine. And I perform surgery, I
03:28 see patients. I am a researcher, and also an educator and

teacher. And I've had administrative responsibilities as well.
Q. Are you an MD?
A. Yes, I am.
Q. Are you an Acantha employee?
03:28 A. No, I am not.
Q. Are you what's called an expert witness?
A. Yes, I am.
Q. Can you explain to the jury what the role of an expert witness is in a case like this?
03:28 A. The role of an expert is that I have -- I've been asked to look at material here, which is open material, confidential material. I've been asked to rely on my personal experience. I've been asked to render an analysis of the material that I've looked at, and do an analysis according to specific categories
03:29 as to comparing the issues at stake here and offer an opinion.
Q. Dr. Sachs, how is that different than a fact witness?
A. The difference is that, as an expert, I have an opportunity and the privilege of viewing additional material beyond that which would be in the public domain, more confidential material
03:29 than even documents that both parties at stake here have available and they make available to me.
Q. Do you testify or are you here to testify about things you actually experienced and facts that you witnessed or about the things you learn for purposes of this case?
03:29 A. I am here to testify about what I've learned in the process

of preparing and educating myself in this case and the material that I've reviewed. Of course, that's colored somewhat by the fact that I have experience in this field.

Q. Are you being compensated for your time?

03:30 A. Yes, I am.

Q. And what's the rate of your compensation?

A. I'm compensated at 750 dollars an hour.

Q. Does your compensation have anything to do with the outcome of the case?

03:30 A. Not in any way.

Q. At a high level, what are you going to talk with us about today?

A. At a high level, what I intend to talk about is an analysis -- since we're talking about a patent infringement case, an

03:30 analysis of the '008 patent, going and trying to help provide information to the jury as to what the elements of the claim and of the patent actually mean. And, since there is contested devices, how those devices compare to the elements of the patent, and offer an analysis and my opinion of that.

03:31 Q. Before we get into that analysis, let's talk a little bit more about your qualifications. Where do you live, Dr. Sachs?

A. I live in Charleston, South Carolina.

Q. What's in Charleston that keeps you there?

A. I am an employed physician at the Medical University of

03:31 South Carolina. Not the University of South Carolina, just the

Medical University. So that's in Charleston.

Q. Before you went to medical school what other sort of schooling did you have as an undergrad?

A. Similar to what you folks have already heard about. It's a detailed background.

I grew up in upstate New York in a smaller town. I went to high school there. I attended Harvard University College. I attended four years of medical school back at the state university of New York, the upstate medical campus in Syracuse, New York on a scholarship. And then I -- and that was the basis of most of my formal education before going into training.

Q. Where did you do your residency after medical school?

A. After medical school, I was accepted into the Case Western Reserve University Hospital program in Cleveland, Ohio, where I spent six years. I was a resident in orthopedics. Actually, I had some advanced standing, and I was able to participate in doing a year of basic science research while I was there, and also a six-month spine fellowship while I was there during that six-year period.

Q. After your residency, do you just stop learning about medicine?

A. No. Absolutely not. It doesn't end there.

Q. Are you certified in any particular specialities?

A. Yes. I am board certified as an orthopedic surgeon. And

I've been -- board certification in orthopedics, actually, is time-limited these days, it's only for ten years. So I've been recertified every ten years, and I recently recertified just last year. So I -- and I'm also board certified in spine surgery.

Q. Now, in addition to the teaching we discussed, which we'll discuss more in a moment, do you also conduct research?

A. Yes, I do.

Q. What sort of research do you do nowadays? What is it geared towards?

A. I've been involved in various forms of research throughout my career.

I started out in -- as a biology major, and I've been involved in molecular biologic research. I particularly study cartilage growth and cartilage cells, doing analysis, and I've continued with that, collaborating with basic science Ph.D. researchers at my institution.

I'm involved in biomechanical research. I've been involved in developing and studying the biomechanics of implants and of bone growth, both at a basic science level in the laboratory, studying the research with animal research. And I've also been involved in the research of cost containment and how to improve health care for patients, which I've become much more involved with over the last five to seven years.

Q. Dr. Sachs, have you ever developed products for companies

like the defendants?
A. Yes, I have.
Q. Have you ever helped develop products for these specific defendants?
03:34 A. Yes, I have. I actually helped to work on a project with DePuy years ago, in the 1990s, which started out before it was DePuy, when it was AcroMed, called the Discovery Screw System, which was percutaneous screw system. And then I also worked with Synthes when Synthes was still an independent company, not
03:34 combined with DePuy, particularly on an anterior lumbar plate system called the Antegra-T plate system.
Q. As part of that process, have you had to study and research the biomechanics and the engineering that goes into spinal implants like what we're talking about today?
03:35 A. Yes I have. I have spent quite a bit of time in my career studying the biomechanics, looking at biomechanics, developing a biomechanics lab when I was at the Albany Medical Center years ago, and following that through, and I still do some biomechanical development work even where I am at Medical
03:35 University now.
Q. Did you also obtain an MBA in 1998?
A. Yes, I did.
Q. With that additional experience, have you ever started your own company in the spinal implant space?
03:35 A. Yes. I have. I've started some companies.

Q. Can you describe one example in the spine field of a company you started?

A. One of those companies that I was involved with, which was -- grew into a lot was when I was at the Texas Back Institute a number of years ago. And I was recruited there to help capture the intellectual property, the ideas that the surgeons that Texas Back had, and how could we take those ideas and turn them into products.

So I put together a business plan. I raised several million dollars, to begin with. We started capturing those ideas and turning the ideas into patents. And then grew the company. We brought in professional administrative leadership. And then raised a lot more venture capital. And the company grew into a company called Innovative Spine Technology and eventually moved to Boston, where it became a full spine company.

Q. In working with that company, did you gain exposure to the importance of patents and intellectual property?

A. That was only one of the experiences that I had with patents, yes. I did gain it through that company and over the years with a lot of the other work that I've been involved with as well.

Q. Now, on top of being a practicing surgeon and starting companies, you also teach at University, right?

A. That is correct.

Q. Do you teach lecture classes where there a lot of students sitting out in chairs, or do you do something else?
A. I don't give a formal lecture class as one might consider like a college course. I do give formal lectures, formal
03:37 didactic lectures to medical residents, orthopedic residents, physician's assistants, and students of the College of Health Professionals on a regular basis.

I also teach, as we have conferences in my department of orthopedics, for an hour every day, early in the morning
03:37 before the clinical activities begin, and then I teach in a preceptorial basis for in a Socratic method where I have young physicians, orthopedic surgeons who are in training that spend rotation schedules with me. So I have somebody with me when I see patients in my clinical office, and I have a resident or two
03:38 when I perform surgery and I'm in the operating room.
Q. Do you ever teach the sort of techniques that are at issue in this case with anterior cervical implants?
A. Yes, I do. I perform one or two of these type of operations generally each week, and I have for many years.
03:38 Q. Have you previously testified as an expert in patent cases?
A. Yes, I have. But I might add I don't do this for a living. I don't make my living going from one to another. I don't want to make it sound like that.
Q. Does the limited experience you've had in patent cases, plus
03:38 all that other experience we just described, qualify you to

opine on infringement in this case?
A. I believe that it does.
MR. STEWART: Your Honor, plaintiff offers Dr. Sachs as an expert in orthopedic surgery and spinal implants.
03:39 MR. GRIFFITH: No objection.
THE COURT: Foundation has been laid. You may proceed to ask opinion questions.
BY MR. STEWART:
Q. Now, Dr. Sachs, are you a lawyer?
03:39 A. No, I am not.
Q. Do you have to be a lawyer to understand patents like the ones in this case?
A. No. One does not need to be a lawyer for understanding patents.
03:39 Q. Who are these patents like the one in this case designed to be understood by?
A. Patents are actually not written for lawyers. They're written for technical experts and people like ourselves and the public to be able to understand and then learn from the patents.
03:39 The patent is a way of showing others what an invention is and how to recreate that invention and what the composites of that invention are.
MR. STEWART: Mr. Diaz, can I have slide 3?
Next one. Sorry.
BY MR. STEWART:

Q. Dr. Sachs, in this case, what technical background does someone have to have to be able to understand these patents?
A. As we have listed here, we put down that -- I believe, that a person of ordinary skill in the art should have some basic
03:40 credentials, at least a bachelor of science or mechanical, biomedical or biomechanical engineering, which is related in the field of science, as well as, I believe, five to 10 years of related experience in the field, in particular for this case anterior cervical spine implants, or the -- a practicing
03:40 orthopedic or neurosurgical physician like myself with at least, again, five years of experience performing anterior cervical spine surgeries, as well as some experience in the design of orthopedic implants.
Q. Dr. Sachs, will you give a brief summary of the topics we're
03:41 going to cover today?
A. Sure, I would be glad to.

I put down here on the slide for everybody that I was going to intend to cover five areas.

One is, provide a summary of my opinions to begin
03:41 with.

Then talk about an overview of the accused products that are at issue in this case.

Deal with infringement by the accused products, going through claim by claim and element by element from the patent '008.

And then talking about defendants' acts of infringement, which is part of the issue in this particular case.

And then talking about a lack of non-infringing alternatives, which has been brought up as part of this case as well.

Q. Starting with the first topic, Dr. Sachs, can you give us a sense of where we're headed? What conclusions did you ultimately reach about defendants' Vectra products?

A. I believe that the Vectra family of products, as we're seeing here and as you folks have seen on slides earlier, do infringe on at least nine of the claims in patent '008.

Q. Now, your opinion about the Vectra, does it depend on whether it's the Vectra, Vectra-T, or Vectra-One products shown there on the screen?

A. No. It does not depend on which one of those particular products because the elements and the claims are infringed by any one of those three versions of the product.

Q. And then what was your conclusion about the Zero-P VA product?

A. I believe that the Zero-P VA product also infringes on six of the claims from the '008 patent. Those six claims are overlapped with the nine claims that I've already mentioned for Vectra, but it doesn't match up with three of the others.

Q. So they're overlapping?

A. The six are overlapping with the nine that I just mentioned before.
Q. Were you here the last day or so when Mr. Talaber and Dr. Lloyd explained their idea for a one-step blocking mechanism
03:43 using a biased stopping member?
A. Yes. I've had the privilege of sitting and listening to that.
Q. Did you find that feature in defendants' products?
A. Yes, I did.
03:43 Q. Now, do Acantha's claims only cover just the biased stopping member?
A. No. Acantha's claims don't just cover the biased stopping member. There are various components of the orthopedic assembly.
03:43 Q. What are the three main components of the orthopedic assembly claimed by Acantha?
A. The three major components of the Acantha invention are: We've talked about a biased stopping member. Also, a securing member, which basically is the plate that you've heard about.
03:44 And -- I'm sorry, the securing member, which is the screw that you've heard about. And then, the stabilizing member or the plate. So there's a plate, a screw, and the stopping member.
Q. In Acantha's invention are all of those different components interrelated?
03:44 A. Yes. They are all are interrelated and they work together,

and it's defined how they work together and the claims of the patent.

Q. So in your opinion when you're using Acantha's invention, are you essentially creating an entirely new system?

03:44 A. Yes, I believe it is describing a new development and a new system that is coming into use.

MR. STEWART: Mr. Diaz, can you pull up PX-1 at page 13.

BY MR. STEWART:

03:44 Q. Now, Dr. Sachs, you talked about the Acantha patent covering the infringing devices. What part of the patent do we look at to actually determine infringement?

A. The part of the patent that we use to determine infringement are the claims. And I believe that that has been stated. But

03:45 -- so I don't mean to be redundant for the members of the jury, but it's the claims at the end of the patent.

Q. Do these claims represent the property right or the boundaries of Acantha's invention?

A. Yes. The claims lay that out.

03:45 Q. So what does the specification, the preceding several pages, what does that provide to a reader for the patent?

A. The specification gives us background on the invention, how the invention might be used, where it could be used. It provides some preferred embodiments. It doesn't describe every

03:45 conceivable way that the invention might be created, but it

gives us a background on several ways that it might look or might act or might function.

And it usually provides some pictures with it. Sorry.

Q. So to determine whether a product infringes the patent, do you look at the pictures and the preferred embodiments and the specification or the language of those claims?

A. No. To determine infringement, we actually have to look at the claims. And we go through each of the claims and the numbered claims and the elements of the claims. The infringement is not based on the pictures or on the specification which is before the claims.

Q. Now, talking about the claims, has Judge Griesbach provided definitions for some of the terms within those claims to help the jury understand the words there?

A. Yes. The Court has given us some claim construction, as it's described, which defines certain words that have been used in the claims.

Q. Did you consult those claim constructions when you did your analysis?

A. Yes, sir, I did.

Q. And is that the -- are those claim constructions the things the jury has in their notebooks?

A. I believe so. I haven't actually seen their notebooks so I don't know that. I would hope so.

Q. All right. Now, if you have the claims, you have the

Court's constructions, and you know how defendants' products work, what's the process for going through and determining infringement?

A. The process for determining infringement is to have the -- in this case, the device in question and go through the claims, claim by claim and step by step, and actually word and phrase by phrase, and compare the description in the claim and the elements of the claims with the actual product that is at issue here.

03:47 Q. Now, once we go through those claims step by step, do the accused products have to have those claim elements and nothing more, full stop?

A. No. If the product has elements of the claims, then it is infringed. If there are additional elements in the product or a 03:48 different changes in the product that are added on to what the basic claims are, there's still infringement.

Q. Now, did you find that the accused products infringed every single one of the claims listed in the back of Acantha's patent?

A. No, they didn't infringe upon every single one, as I've 03:48 said. I talked about the nine claims for one group of products and six claims for the other group of products.

Q. Did you find that the Vectra infringes on claims 3, 9, 21, 36, 37, 59 --

A. 72, 79, and 85. Those are the nine.

03:49 Q. And then you said Zero-P VA infringes six of those nine,

right?
A. It infringes six of those nine there. Three out of those nine that actually don't match up, claim 3, claim 9, and I believe it's claim 72, which are not infringed because of a
03:49 certain type of stopping member.
Q. How many claims need to be infringed for there to be liability for infringement?
A. Only one.
MR. STEWART: Mr. Diaz, if we could go back to the
03:49 slides at slide 8.
BY MR. STEWART:
Q. All right. So talking about the accused products, can you explain to the jury what you looked at to gain an understanding of how these products work?
03:49 A. Yes, I will be glad to. I started out, my analysis does include, as I said, I'm a surgeon and I perform surgeries. So that came into my analysis. It certainly gives me a strong background to begin with.
I studied the public materials, the material that is
03:50 in the public domain that people have. As well as, I actually pulled up and looked at the websites and things that have been online. I did some online research at various stages.
I studied surgical technique guides which, again, -- not necessarily -- they would be in the public domain, they're
03:50 more technical guides that have been referenced here.

I studied defendants' internal technical documents, and some of the marketing documents and material that was specifically confidential and provided me, and I reviewed depositions and transcripts and other material, discovery from this case.

Q. When you talk about the internal technical and marketing documents, are you referring to those confidential materials that the general public is not allowed to see?

A. Yes. Those are the documents I'm referring to that an expert is allowed to see, whereas a fact witness would not be able to see.

Q. Did you prepare a written report about your opinions and provide that to defendants?

A. Yes, I did. Actually, more than one written report throughout the time of this case.

Q. Has Dr. Lloyd or has Mr. Talaber been able to review your report?

A. My understanding is they have not seen my report. That's not -- that's more confidential, and it's not available to them to review.

Q. All right. Now, before we talk about the infringement, I want to go into a little bit of the background you investigated on these accused products.

Do you recall Dr. Lloyd explaining how anterior cervical spine surgery worked up here at the table?

A. Yes, I was here during that presentation, as we all were.
Q. Do you agree that screw backout is a big problem in anterior cervical surgery?
A. Yes, I believe that that's a problem. And that's a problem
03:51 that has been dealt with and we've been trying to solve for quite some time, as people who work in the spine surgical field.
Q. Now, can you explain in your own words how exactly screw backout occurs? What causes the screw to come loose?
A. Well, if we -- there are some easy ways to think about it.
03:52 Our spine is composed, as was stated before, as a series of vertebral bodies, which are like building blocks, held together by soft tissue, ligament structures and discs. And we have a lot of motion. Our neck is actually one of the most mobile parts of our spine because there are no ribs around it to
03:52 restrict it. So we do a lot of moving. And as we move our neck, if we try to -- if a surgeon tries to stabilize the neck and restrict it and put material in that locks it down, we still have some motion and that motion constantly, back and forth, will tend to loosen the screws or sometimes break the screws.
03:53 Much like we can think about a doorknob. As we keep turning a doorknob back and forth and you use it over and over again, eventually that doorknob might become loose and we actually have to tighten the set screw to make it work again. And that's what happens when things loosen up in the neck.
03:53 Q. Now, Dr. Sachs, in your review of defendants' documents, did

you see evidence that they understood this problem of screw backout?

A. Yes, I believe that the defendants understood that, as most -- most people that work in the field of spine surgery, whether 03:53 they're surgeons or others, understand that to be a problem.

Q. Back in the early days of anterior cervical spine surgery, what was one of the solutions for preventing screw backout?

A. Well, the solutions that were developed to prevent screw backout had actually -- you've heard some of them. The earliest 03:54 ones were to develop a system for putting a screw all the way through two cortices of bone from the front to the back, which still was an unconstrained system. And then the movement went to a fully constrained system where the screws would be locked to the plate so they couldn't move. And it was a tight lock.

03:54 Q. Are you familiar with defendants' CSLP product that has been discussed earlier in the trial?

A. Yes, I am.

Q. And that's a product that has a tiny set screw you place inside the main screw; is that right?

03:54 A. Yes. That was one of the early locking products. It involved a plate with a screw that was a wider cancellous bone screw. So it was a wide screw that went into the bone, and then a tiny little set screw would go into the center of the head of that screw, which expanded the head and locked that head to the 03:54 plate.

Q. What's the downside to using a tiny little set screw like that?

A. And I apologize for being redundant for the jury, since you've heard this. But the problems were that the tiny set screw was difficult to fit onto a screwdriver and keep it on the screwdriver as it was being put in.

At various times it would fall off of the screwdriver, or it wouldn't line up exactly right. As we were trying to put it into the larger screw, it could fall off in the wound, and then we would have to look for it.

And, technically, the space that we're operating in the retropharyngeal space, actually connects right down into the pericardial heart category -- heart area. So that screw, if it's lost, is a very dangerous thing.

Plus, it takes extra time. So using the set screw is not a safe -- it's not timely, it adds time, and it just didn't work as as well for people. It was a futzy system, and surgeons hate futzy systems in general.

Q. Now, Dr. Sachs, certainly not to be redundant, but to inform the opinions about non-infringing alternatives that we'll give at the end of this case, do you agree with Dr. Sachs -- or, sorry -- Dr. Lloyd about the problems with --

A. I do agree with myself.

Q. You do agree with Dr. Sachs?

A. Yes, sir.

Q. Do you agree with Dr. Lloyd about the issues with screw breakage that are seen sometimes in rigid plating systems?
A. Yes. And that is something you've heard. And that was another major problem. If screws, once they were locked to the
03:56 plate, there was no ability for motion, micromotion during the healing phase, and the screws therefore would take the load and they would break at a stress riser point, usually just below the plate.
Q. Is there a clinical theory that relates to this notion of
03:56 screw breakage and compression of the spine?
A. Yes, there is. And you folks were hearing about it earlier. It might have been bastardized a little bit, but it's called Wolff's Law. And what Wolff's Law really states, in essence, is that bone heals better under compression than it does under
03:57 tension.

So bone wants to heal under compression, and we have compression in the front of the spine. During micromotion of healing of bone, there's resorption of some of the cellular material, and new bone is made. So during that resorption and
03:57 re-healing process, there's compression and the bone will settle down. And that's what Wolff's Law is referring to, healing under compression.
Q. Now, in a rigid system, is there also still the potential for screw backout?
03:57 A. Yes, there is. There's some systems where the screw could

back out or break. Those were the two major complications.

Q. Are you familiar with rigid plating systems that don't have anything overtop of the screw to actually run into the screw on backout?

03:58 A. Sure. Yes, I am. And we've talked about some. You've seen some of those that have been brought up earlier.

Q. Now, some surgeons actually prefer those rigid constructs for various clinical reasons, right?

A. Sure. Yes. It gets to be a decision that surgeons make

03:58 depending on the patient they're treating, the type of problem they're treating, and the area that they're working in. And all of those are put into a mix. And the surgeons -- some surgeons like those constructs, some surgeons don't.

Q. Have you heard of a -- strike that.

03:58 What's the alternative philosophy that we've heard some about in this trial to a rigid plating system?

A. The alternative philosophy is to develop a system which allows some motion within the screw.

The two points that we like to achieve are capturing

03:59 the screw and keeping it -- keeping it within the plate. So the plate becomes fixed to the spine and helps to stabilize the spine, but still allowing some toggle and some motion within the screw.

And there are two aspects to that which I also believe

03:59 have been sort of mushed together here, in front of you, that

there are ways to put the screws in at various angles, which is one way to accomplish better fixation, and then there's a way of providing, once the screw is in, the ability to toggle and continue to move as the spine heals and moves together.

03:59 MR. STEWART: Mr. Diaz, can we have slide 14?

BY MR. STEWART:

Q. Is this an image of the Stryker Reflex product?

A. Yes, it is.

Q. And how exactly does that yellow clip -- you can see in

04:00 yellow on the screen -- provide a semiconstrained blocking system?

A. The yellow clip is an expandable stopping member. And it's fixed within the plate so it stays within the plate. There's a groove. And that clip has -- is made of metal, but it has some

04:00 flexibility to it so it can expand as the head goes through. And then it pops back into position.

And the clip, in the closed position -- starts out closed, goes to open and then comes back to closed -- and in the closed position it's smaller in distance and diameter than the

04:00 head of the screw, the largest portion of the screw that sits below it.

Q. Dr. Sachs, would you turn in your small binder there to slide 15?

A. I'm sorry. These right hand numbered pages.

04:01 Q. At the bottom left there should be 4.15 numbering.

A. Okay. Yes, sir, I have it. Thanks.
Q. Is this one of the documents from defendants that you received and reviewed through your analysis in this case?
A. Yes. This was one of the documents we're talking about.
04:01 Q. And is this a document that gives you an understanding as to whether defendants knew about this Stryker Reflex product in the 2001 timeframe?
MR. GRIFFITH: Objection.
THE WITNESS: Yes, this document.
04:01 THE COURT: Just a minute. Approach.
(Bench conference held off the record.)
(In open court.)
BY MR. STEWART:
Q. All right, Dr. Sachs. Did you review documents about
04:03 defendants first attempt to develop a semiconstrained system?
A. Yes, I did.
MR. STEWART: If we could have slide 17, Mr. Diaz?
BY MR. STEWART:
Q. What product is this?
04:04 A. This is the ACCS -- this is a visual picture, an artistic drawing of the ACCS system. Implant system, I'm sorry. Cervical spine.
Q. Now, I'm going to use my laser pointer on this screen over here, and hopefully it's visible to you. But do you see this
04:04 protrusion in the ACCS that extends over the clip?

A. Yes, sir.
Q. Is that different than the accused product, the Vectra?
A. It is different from the accused product of the Vectra, in that -- that this piece, which is -- the clip is in silver and
04:04 this piece which is over the top of the silver is larger than the section below the silver.
So this is actually -- it looks like a groove in here. And that clip -- I mean, that top piece, which is right up here (indicating), comes down on the edges here and sort of blocks
04:05 the view of that silver area sitting in there, the silver clip.
Q. Dr. Sachs, is there a downside to having that widest portion of the screw head overtop of the clip like that when you're doing a surgery?
A. Yes. The downside, the difficulty with having that large
04:05 section of the head sitting on top -- and I've used this system myself, and I used to have the same problem is -- we're looking down through a small corridor hole, as we saw that Dr. Lloyd showed us this morning, and in that small hole, we have to use our hands, we have to use our tools, and we have to put the
04:05 screw onto a long screwdriver and put it in, and if all we can see is the top head of the screw, the problem was, as I had, I don't know how deep that screw is and whether it actually becomes engaged with the clip that we're seeing there. And the whole idea is to make sure that the screw is engaged or it's not
04:06 held in.

Q. Dr. Sachs, did defendants, after this product, develop the Vectra and remove that protrusion over the top of the clip?
A. Yes. They altered this product all of a sudden. I was using this product. It was available, and then my rep came to me and said, well, we have a new product, and now you might like it better because you won't have that problem that you had before of not being able to see. So the new product was the Vectra. It didn't have that large -- enlarged piece over the top of the heads so we can see things as it went in.
04:06 Q. Do you remember how long ago that was?
A. The mid-2000s years. It was when I was at Texas Back Institute. I don't remember the exact year.
Q. Did Synthes later develop the Vectra-T and Vectra-One products following on the Vectra?
04:07 A. Yes. My understanding that -- I don't know whether they came out simultaneously or they were coming out in series, but, yes, there were a series of three different types of products within that family.
Q. And what are the differences between the Vectra and then the
04:07 Vectra-T and the Vectra-One?
A. The Vectra-One is a single-slot plate. So it has screws in an alignment. And it could be a longer plate, it could have just -- two screws, three screws, five screws, et cetera, but one line of screws.
04:07 The Vectra-T is a collapsable plate so it had a little

clip that we could remove, and the plate actually could collapse to provide greater motion and mobility. And the Vectra product itself, the standard Vectra, was a little bit -- it was a wider than a single, and it had rows of two -- two lines of screws coming down, depending on how many screws we wanted to put in and how many levels we were fusing.

Q. And, Dr. Sachs, would you turn in your small binder to slide 21?

A. Yes, I am there.

Q. At some point after the Vectra was introduced, did defendants introduce the Zero-P VA?

A. Yes. The Zero-P VA. It didn't come out, that I know of, with the Vectra. I learned about it later on.

Q. And the Zero-P VA -- strike that.

Slide 21, does that show a document you reviewed about the background and introduction of the Zero-P VA product?

A. Yes. This does. This is a background of information about the Zero-P VA compared to the Zero-P, which was the predecessor product to the Zero-P.

MR. STEWART: Your Honor, if I can approach to show a background document about the Zero-P.

MR. GRIFFITH: That's fine.

MR. STEWART: Mr. Diaz, can we have slide 21, please.

BY MR. STEWART:

Q. Now, what was the difference between the Zero-P VA and the

predecessor product shown up there, the Zero-P?
A. The pointer works over here, so I'm going to use the pointer here because it won't show up on the board. Just to let you know what I'm pointing at.
04:09 The Zero-P is the top product there. As we can see, it has four screws, and the screws are locked to the -- to that surface of the plate. Whereas the Zero-P VA has two screws.
The screws, as you can see, are wider, they've got greater thread depth, and they're not locked to the plate. So
04:10 they can seek different angles. Where these four screws are locked into position, these two screws can be placed at various angles and they're allowed to be mobile within the plate.
Q. Dr. Sachs, does the Zero-P VA use the exact same blocking mechanism as the Vectra product?
04:10 A. No. The Zero-P VA does have a blocking mechanism. It's not the same mechanism that's used in the Vectra product. And I guess we're going to get -- we'll get to the point where we can explain what the differences are.
Q. All right. Are you at a point where we can start talking
04:10 about how those accused products infringe Acantha's patent claims?
A. I believe we progressed there.
MR. STEWART: All right. Mr. Diaz, if we can have slide 25.
BY MR. STEWART:

Q. Dr. Sachs, as I progress through this slide, would you briefly recap for the jury how the Vectra blocking mechanism and plate system works?

A. Sure. The Vectra product that we're seeing here has three components.

The plate component is the light blue. The purple is the screw component. And the blocking mechanism is a small clip, which is the gold or yellow component there.

And what happens is we place the plate against the spine, which has the clip already integrated in it, as we can see. And then we have the screw on a screwdriver, and we turn the screw and drive it in. And we can see the head of the screw, which is the largest extended portion.

The widest portion then passes through the clip. It widens the clip from a closed position to a more open position. And then, as it passes by, then the clip pops back into the smaller position, to retain the enlarged integral portion or the head of the screw down below.

Q. Then what about the Zero-P VA? Could you explain how it works in this video?

A. Okay. This is just how the Zero-P VA is grasped with a grasper to be able to place it into the spine. We can see the plate is in green now.

And in this image/depiction, the implant goes into position, but it goes in a different way from the other type of

implant. It goes into the intervertebral space.

And then the plate is the green, which is in the intervertebral space. And, again, we take the screw with the screwdriver and screw the screw through the plate into the
04:12 intervertebral bone, where you can see. And relief, it's inside between the -- where the disc was, in between there.

And, again, you'll see an enlarged portion here. We can see how the retractable finger works. As the screw comes down and screws in, that finger is narrowing the entranceway.
04:13 As the head of the screw passes by, it moves the blocking mechanism aside, and then the blocking mechanism pops back so the screw head is retained below the blocking mechanism, which is that little retractable finger that we saw.

So it has the same three components as we've talked
04:13 about. Works in a similar fashion, in a similar way, but the stopping member is a different design.

MR. STEWART: Your Honor, may I approach the easel?

THE COURT: You may.

BY MR. STEWART:

04:14 Q. All right. Now, for the fun part. Taking a look at the foam board I've just placed, does that show claims 1, 2, 3, and 9 of the '008 patent?

THE WITNESS: Your Honor? Would you mind if we moved that board back a little bit just so I can see it? Because I
04:14 can't --

THE COURT: Move it back so the witness can see it as well.

THE WITNESS: I'm trying to read in relief here. Thank you.

04:14 THE COURT: Is that better?

THE WITNESS: Thank you. Yes.

THE COURT: And these are the same claims that the jury has the copy of the patent. So they have it in their notebook also; is that right?

04:14 MR. STEWART: That's right.

THE COURT: Just so you're aware.

BY MR. STEWART:

Q. Now, Dr. Sachs, now that you can read it, does the Vectra product infringe claims 3 and 9 of Acantha's patent?

04:14 A. Yes. The Vectra product does infringe on claims 3 and 9.

Q. Is claim 3 a dependent claim?

A. Yes, claim 3 is a dependent claim.

Q. And what does that mean?

A. By being dependent, it means on claims -- as it talks about,

04:15 it's dependent claim 3 is dependent on claim 2, which is referenced above, and claim 2 is dependent on claim 1.

So all the information and the material that's the elements that are written into claim 1 and 2, are then referenced and contained in claim 3. So everything through 1,

04:15 2, 3 are in claim 3.

Q. Now, Dr. Sachs, although Acantha is only asserting claim 3, is the reason you just described why we also have claims 2 and 1 shown on this board?
A. Yes, that's correct, because if we only looked at 3, we would be missing the components that are referenced by claim 3, which we have to deal with and we have to first look at in claim 1 and claim 2.
Q. All right. So starting with claim 1.
MR. STEWART: And, Mr. Diaz, if you would please go to slide 27.
BY MR. STEWART:
Q. Dr. Sachs, what have I put on the screen next to the claim board?
A. On the screen we have a visual depiction of the Vectra plate, screw system product, which again is the artistic drawing in the upper left. And then we have designs which are more technical drawings down below in the other three drawings. And we see a design of the screw on the right, the clip, which is in the lower position in the middle, which references the same gold clip up above. And we see the plate in relief, as if we were looking at a one-level plate from the topdown on the lower left, and then the plate from the side, which is all part of that.
Q. Starting with the first element of claim 1, which is element A, I'll read it from my page over here, since it's far away from me: "A stabilizing element having an anterior surface, a

posterior surface, and at least one bore, the bore having a first opening in the anterior surface, a second opening in the posterior surface smaller than the first opening, and a transverse passageway extending from the first opening to the second opening."

Dr. Sachs, does the Vectra product have a stabilizing element that meets that claim language?

A. Yes, it does. The Vectra stabilizing element is the purple plate that we see, or in the lower left, that -- left section. And we can see that there -- what's referenced as openings, are the openings where the screw passes.

Q. And what is the anterior surface and posterior surface referring to?

A. The anterior surface of the plate is the surface that's closest to the surgeon and furthest away from where the screw will actually go into the bone. And the posterior surface is described as the lower surface of the plate, which is also the closest area to the bone where the screw will then enter the bone.

Q. And so why does the claim require that the second opening in the posterior surface be smaller than the first opening?

A. Actually, that's something that you folks also heard about earlier in testimony.

The second opening, which is the posterior opening, has to be smaller than the first opening. The first opening

allows the enlarged portion of the screw or the head of the screw to enter, but the second opening down below has to be smaller so the screw just doesn't pass all the way through. So it becomes captured within the plate and it stays within that bore section.

Q. Now, to help the jury understand the rest of that claim language, what is the bore and the transverse passageway?

A. The bore is the opening where the holes that are prepared for the screws. So they're called bores or they're openings, which are -- holes through the plate which allow the screw to enter, as I said. And they're built so that the largest portion of the screw head, or the enlarged integral portion, however we want to term it, actually remains in that section of the plate. So it doesn't stick out and it doesn't go through the bottom.

Q. Now, we talked about anterior and posterior surfaces. Did the Court provide a definition for those terms?

A. Yes, the Court did give us claim construction for that.

Q. Would you read that?

A. The term "posterior" should be understood to mean an inner portion of the assembly closer to the bone to which the assembly is attached, and the term "anterior" should be understood to mean an outer portion of the assembly farther away from the bone.

Q. Did you consult that guidance when you did your analysis?

A. Yes, I did. I used that claim construction.

Q. All right. Now, turning to the second element.

"The biased stopping member defining at least in part a reversibly expandable passageway having a smaller diameter configuration and a larger diameter configuration."

04:20 Are there any special meanings for the terms "biased" and "stopping member"?

A. Yes. The Court gave us claim construction for those two terms as well that are up here.

And would you like me to read them?

04:20 Q. Yes, please.

A. Okay. "Biased is the tendency" -- I shouldn't say "is."

"Biased. The tendency of a structure or a component to return to a certain position or shape absent external force.

"Stopping member. A mechanical component that

04:21 prevents the securing element from backing out of the stabilizing member."

Q. Now, just to clarify Dr. Sachs, when you're analyzing the claims using definitions like this, how do you apply that? Do you replace the word with the language in these constructions?

04:21 A. Yes. So if I was interpreting "biased" on the screen up here, and I wanted to know how I should interpret or use biased, I could actually plug in biased means, the tendency of the structure as we've written up there, that the Court instructed us.

04:21 And stopping member. Again, we would plug in. If we

wanted to define what "stopping member" was, it's defined down there as a construction that was provided by the Court.

Q. Now, turning back to the Vectra product. What is the biased stopping member?

04:22 A. The biased stopping member is the clip. So we're seeing it in the gold or yellow at the top section on the left. And we're seeing it -- if we're looking down from the top -- in what we'd call a transverse axial view, in the center technical drawing down below.

04:22 Q. So how does that clip interact with the screw to prevent screw backout as required by the Court's construction?

A. As we've talked about, the clip is biased. So the clip starts out in a more closed position. And it has elasticity to it. It's still metal, but it has enough elasticity to be able

04:22 to expand into a larger position as the screw head, which is larger, passes by it, and then the clip elastically will go back into its original position which is the more closed position.

So it sits within the plate, as we see there the gold, and we showed the video before that the head passes by it.

04:23 Q. How does that clip create smaller and larger diameter configurations, according to the claim?

A. It's reversibly expandable in the passageway, and it expands as the head passes by it. The head of the screw, I'm sorry, which is the securing element.

04:23 Q. Do you see in the wishbone clip -- and I'll use my laser

pointer on the far screen back here -- how it has two straight edges on the sides?

A. Yes.

Q. Does it still form a smaller and larger diameter despite those straight edges?

A. Yes, it does form a smaller and larger diameter. And the way to think about that is -- actually, two ways: One, just basically if we look up the word "diameter" by Merriam Webster dictionary, diameter does not always have to refer to a circle. It refers to a distance, a distance between points.

If we want to be very, very strict and we say diameter always has to be a circle, in this case, the clip sits within a circle. So the clip has two edges, and it sits within the circle to close up some of the space of the diameter of that circle. And in its closed position it has a smaller diameter; in its open position, as it expands it creates a larger diameter or distance.

Q. Now, Dr. Sachs, the next element, element C. It's a little long, but we'll go through it bit by bit. What is the securing element in the Vectra?

A. It states that: The securing element, having an elongated body, and a head at one end of the body and integral therewith --

And if you can bear with me I'll go through the components of it as I -- after I read it.

-- the head having a maximum diameter greater than the smaller diameter configuration of the passageway, defined by the biased stopping member and greater than the second opening in the stabilizing element, so that the head is retained within the transverse passageway between the biased stopping member and the second opening in the stabilizing element.

And what this is referring to is, it's describing the screw that we're seeing on the technical drawing on the right, or in purple on the top drawing on the left, that it's stating that the screw has an elongated body, which is the threaded portion up and down --

Thank you for pointing that out.

-- with the shank of the screw, so that's the shank of the screw. It has a head at one end -- which is the wider portion being pointed out right there -- and that head has to be integral with the body. So it's not a separate piece. It's actually attached and it flows right into the shank of the screw.

Q. Dr. Sachs, if I can stop you there, to help you out a little bit with a slide.

A. Okay.

Q. What do these red lines here show about the diameter configurations and dimensions described in that element?

A. Okay. The three lines represent different measurements, if you will. The middle line there, with the two arrows, is the

widest distance of the head of the screw.

The lowest line is the more narrow distance of the bore, which we already talked about. The bore is the opening in the plate. And the upper line is the smallest-size distance when the clip is in the closed position.

So what it represents is that we can see, the middle line, the head of the screw, is larger than the smallest distance of the bore. So it can't pass through. And the head of the screw, that middle line, is also smaller than the clip when it's in its closed position.

So, therefore, it meets what we're talking about as the claim because the head of the screw sits between the clip, which is the top line, in the closed position, and the bore, small opening of the bore, which is the lowest line. So it's captured within the bore and sits there.

Q. Now, looking at the box I've just added to the slide, isn't there a portion of the screw that sits up above the clip?

A. Yes. We see that.

Q. Is it still your position that the screw head is retained between the stopping member and the bottom opening?

A. Yes, it is my contention that the screw head is contained because the screw head is that largest portion of the screw expanded shank. And what is sitting up above that is -- it's really superfluous. It was an add-on part of the screw to allow for capture of the screwdriver so the screw wouldn't wiggle

around, it wouldn't fall off as actually you heard about earlier this morning with the short screws.

Q. Dr. Sachs, can defendants avoid infringement of this claim by adding something extra on top of the screw head?

04:28 A. No. As I stated a bit earlier, the claim talks about certain elements. And other additives on top of those elements don't negate infringement. So that's an added piece on top of the head of the screw, but it doesn't avoid infringement.

Q. Is there a definition the Court provided for the word

04:29 "head"? What's head mean?

A. Yes. The Court was nice enough to give us a definition. And "Head: Portion of the securing member anterior to the elongated body," as we quoted up there.

Q. Now, what you pointed to as the head, is it portion anterior

04:29 to the elongated body?

A. Yes.

Q. Now, let's say defendants got up here and said no, no, the protrusion there in the middle, that is part of the head.

If that was true, if you took them at that

04:29 representation, would you find noninfringement of that element about it being between the stopping member and the second opening?

A. No. It would still -- it would not avoid infringement. It's still -- head is still captured within the bore. And it's

04:30 between the lowest opening, the lower part of the bore, and the

closed position of the clip.

Q. Dr. Sachs, looking at the claim at element C, does it require that the entire head is retained within the transverse passageway?

04:30 A. No. We noticed that the word entire, that Mr. Stewart used, is nowhere in there. So it just states that head is retained within there. It doesn't state that the entire head needs to be within that area.

Q. Okay. Let's say it did say entire. Let's say the entire

04:30 screw head included the protrusion in the middle, and the claim did require the entire head to be below that clip. Would there be a doctrine that comes into play and still leads to a finding of infringement.

A. I believe the doctrine we're talking about is what we call

04:30 doctrine of equivalents. And that's -- doctrine of equivalents is represented by a function way result analysis. Meaning that the way that this screw functions is that it separates the clip as it passes through, the way that it stays in position, and the end result is that it stays in position because the clip expands

04:31 and contracts and holds the screw in position. So the function/way/result is the same.

Q. So in your opinion, does this screw and the way it interacts with the biased stopping member perform the same function, the same way with the same result as a screw that just had that

04:31 protrusion cut off?

A. Yes, it does. So whether that top cap is there or not, it has the same functional way. And we could think about it almost like a hat on our head. That the hat sits on the head, but does it really sit on top of our head or if it sits above our eyebrow it's still on our head.

Q. Now, Dr. Sachs, do you find that any differences between the claim language and what is shown there in the Vectra screw are insubstantial?

A. There's no substantial difference between -- I'm sorry -- no substantial difference between the claim language and what we're seeing in the Vectra product.

Q. But just to be clear, what is it that you believe in your opinion is the head that meets those claims in the Vectra screw?

A. In my opinion, the head is the widest portion of that screw, which is integral right there, that somebody just drew the line across. That section I believe is the head and that's what I would call the head, which is logical, and that would fit with the claim language.

Q. All right. Now, we've made it through claim 1. Should we move to claim 2?

A. Yes. Claim 2 now.

Q. So claim 2 adds to claim 1 an assembly wherein the biased stopping member comprises a color.

Dr. Sachs, is there a special definition for the word "collar"?

A. Yes. The Court also supplied us with a definition for "collar," as we can see there. It says: "A component or part of a component that is generally round and is used to restrain motion and hold something in place."

04:33 Q. And what is the definition for the word "annular collar"?

A. "Annular collar" is defined up there, "a ring-like collar with an opening."

Q. Now, does claim 2 require an annular collar, that ring-like collar, or just collar by itself?

04:33 A. Claim 2, as we see on -- I'm sorry -- on the claim language says "a collar" defining a passageway. It doesn't say -- it doesn't define any more than collar. So we would plug in the definition that the Court gave us to what collar is.

Q. Now, in the Vectra products, did you apply that definition

04:34 of collar and determine whether that wishbone clip meets the claim?

A. Yes, I did. And the wishbone clip is generally round, and it meets the definition that we were given of collar. "Defining a passageway enlarging from an unexpanded inner diameter to an

04:34 expanded diameter."

Q. Dr. Sachs, can you analogize this collar concept to a shirt collar?

A. Yes. I mean, we use the word "collar" every day. And for each of us as we wear a shirt collar, we button it, we unbutton

04:35 it, but it's not round. It's generally round, but it's not an

exact circle. So that's what a collar is.

Q. Now, the remaining words in that claim 2 limitation, talking about the collar being enlargeable, and then returning to a smaller inner diameter, is that talking about the same expansion and retention of the clip we just discussed?

A. Yes.

Q. So are the elements of claim 2 met by the Vectra system?

A. Yes, they are.

Q. Now, claim 3 adds "the assembly wherein the head of the securing element has a curved posterior surface."

Did you find that in the Vectra system?

A. Yes, we did.

Q. What curve surface is it referring to?

A. The curve surface is the extension of the shank -- if I point over here.

The extension of the shank, which comes down here (indicating) in this curved surface, this is the head, and as we come down you see this curved surface which comes down and then meets the shank on both sides because the screw is circular, so it's a conical curved surface.

Q. Does that feature, the curved surface, contribute to angulation of the screw?

A. Yes. Yes, it does.

Q. Now, does claim 9 on the board there add a little more color to this curvature issue?

A. Yes. Claim 9 is wherein the posterior portion of the transverse passageway is also curved to conform to the curved posterior surface of the head.

So, therefore, we have a curved surface of the bore, which is the hole in the plate, and a curved surface of the screw head, which is stated.

Q. Now, talking about the angulation of that Vectra screw. Does this document show that the Vectra plate is designed for angulation of the screws?

A. Yes. That's what this document is showing. And this is something that was put out by DePuy Synthes. And they actually show on here that the screws, as they're placed in the plate, had the capability of what's listed there as range -- range is in red.

So it has the range of motion listed. I believe, 28 degrees. Cephalad caudad, which is an up/down direction. And then it shows, on the right-hand blowup, again, a range of what appears to be 14 degrees. So the screw can move medial lateral 14 degrees.

Q. Now, do you see the reference on this slide to variable-angle and fixed-angle screws?

A. Yes, I do.

Q. And what are those referring to?

A. The variable-angle screws are the screws that we talked about and we've shown up to now with the curve.

The fixed-angle screws have a little bit less curve to it and more of a notch, which tends to reduce the amount of motion that it has. And this is the technical drawing that we're looking at here of the variable versus the fixed.

04:38 We see the variable-angle screw on the left. And that nice curve --

My pointer won't work so if you can indulge me over here.

It's this curve (indicating) with the variable-angle

04:38 screw, smooth all the way down to where we get the first line of the screw.

The fixed-angle screw is here, where it's less of a curve. It still has a curve but less of a curve. And then it notches off here (indicating). So it tends to reduce the amount

04:38 of motion that that screw can perform.

Q. So do both of those types of screws infringe claims 3 and 9 with respect to their curved surfaces?

A. Yes.

Q. Now, going back to claim 3 to finish the last few parts of

04:39 that, do you see where it says that the curve surface has a minimum diameter smaller than the unexpanded inner diameter of the collar?

A. You're talking about --

Q. That's right.

04:39 A. Yes. The element has a curved posterior surface which has a

minimum outer diameter, smaller than the unexpanded inner diameter of the collar, yes.

Q. So what does that mean with respect to the Vectra screws?

A. It basically is telling us that when the clip is in the closed position, that the screw head is kept in place and the clip holds the screw head in place. It cannot back out.

Q. What about when it's talking about the minimum diameter of that curved surface of the screw head being displaceable posteriorly -- posteriorly of the collar? What feature is that referring to?

A. The head of the securing element has a curved posterior surface. It has a minimum outer diameter, smaller than the unexpanded inner -- figured to be displaced posteriorly of the collar, through the passageway.

Basically it's telling us that the curved surface at the bottom of the screw is curved -- which I just pointed to right there (indicating) -- curved, and it's smaller in the closed position of the clip. So it makes it easier to pass through the clip as it passes through. And it starts its way into the clip, but it's not being blocked. And once it's inside, because of that curved surface, it allows the clip to then expand.

Q. What's the benefit to having a screw design that can allow you to actually pass the screw head through the clip?

A. The benefit is that it's a one-step motion. As long as the

screw is on the screwdriver we can just screw it in and the clip opens and closes and captures it.

Q. Is that one-step process important?

A. It is for a surgeon. It saves time. It's more efficient. It's more effective, and it's safer. It adds to patient safety.

Q. Now, Dr. Sachs, now that we've gone through all the elements of claims 1, 2, and then asserted claims 3 and 9, can I check those boxes off as being infringed by the Vectra product?

A. Yes, sir.

MR. STEWART: Your Honor, may I approach the easel?

THE COURT: You may.

BY MR. STEWART:

Q. Okay. Now, on the board I just took down, there was no box for the Zero-P VA, right?

A. Yes, sir.

Q. Why is there no infringement of the Zero-P VA or by the Zero-P VA of claims 3 and 9?

A. The reason that the Zero-P VA did not infringe in claim 3 and claim 9 was the reference to collar. As we saw, collar was found in claim 2, which was referenced in claim 3, which was referenced in claim 9.

So because collar was used, Zero-P VA does not have a collar mechanism. It has a different type of stopper mechanism.

Q. Dr. Sachs, can the Zero-P VA still infringe other claims that don't require a collar?

A. Yes, it can.

Q. Okay. Let's turn to one of those now. Claim 21.

Now, Dr. Sachs, do we have to go through each of these claims one by one to show infringement?

04:43 A. Yes. Part of the analysis is going through each claim one by one and each step, but it will get faster from here because I've done that analysis and we can make it easier for the jury to go --

Q. So will there be some overlap in the rest of the claims we

04:43 go through?

A. Yes, there will be.

Q. Okay. So claim 21, is it a device claim like claims 3 and 9, or a method claim?

A. Claim 21, as we see right at the beginning, this is a method

04:43 claim.

Q. How is that different from a device claim?

A. The method claim is describing the technique. It's more of a technique claim. It's describing how the apparatus or device is used, how it's manipulated and how it's placed.

04:43 Q. Who directly infringes a method claim? Who actually practices the method in the abstract?

A. The method is actually practiced in this case by a surgeon because we're talking about a surgical implant product. So the surgeon who's practicing the technique is infringing, according

04:44 to the method.

Q. And so what sort of behavior would defendants do to contribute or induce that infringement by the surgeons?

A. Well, the surgeon, in this case -- I, as a surgeon -- no one is a surgeon. We don't make our own products and we don't bring them in from home and we don't prepare them.

04:44

So we rely on, in this case, a company or an organization to supply us with the products, and the tools that we use, and to provide us support and teach us how to use the product and how to use the tools and how to get the process done. So it's -- we rely on the organization that supplies us with what we need.

04:44

Q. Will we talk about that issue a little more later?

A. Yes.

Q. All right. Now, looking at the first three elements that I'm pointing to in claim 21. A, a prime, and B. They talk about a stabilizing element, a biased stopping member, and a securing element.

04:45

Are those the same three elements we just looked at in claim 1?

A. Yes. Those are the same elements that we just went through on the previous board, where we're talking about the stabilizing element that we talked about, which is the plate, the biased stopping member, which is the retaining clip or the stopping member, and the securing element, which is the screw.

04:45

Q. So are those three elements met by the Vectra product the

same way we just described for claim 1?

A. Yes, they are, in this claim. They're met the same way we've gone through and described.

MR. STEWART: Mr. Diaz, can we have slide 39?

BY MR. STEWART:

Q. Now, what about the Zero-P VA? What is the stabilizing element, biased stopping member, and securing element in the Zero-P VA?

A. Okay. The stabilizing element in the Zero-P VA is, again, the plate, which is in green in the top right, in green in the top left, and then in the lower right. That's the plate. That's the stabilizing element.

It looks a bit different from the plate that we saw in the Vectra, but it's still a plate, and it has bores and it has holes and it meets all the same specifications in a posterior and anterior section.

The biased stopping member is the -- what we would term and what we can call as the retractable finger. And that's the composite apparatus that we see in the lower left, which is a spring, an extension of that spring, which is the gold and yellow on the upper left, and there's a screw which hold it all together. So it's the entire apparatus that serves as the biased stopping member or retractable finger that can come in and out. Much like you've heard several times today like the stopper for the door that comes in and out as we open and close

the door.

And the securing element is the screw. Again, the screw looks a little bit different than what we saw before. It's in the middle picture down at the bottom in the technical drawing, and it's in purple up above. And we can see what the screw looks like, as I describe. So we got the same three elements in the Zero-P VA.

Q. Dr. Sachs, have you heard the biased stopping member you mentioned up there called a snapper assembly?

A. Yes. I've heard that term.

Q. Now, you said that the Zero-P VA plate, it doesn't sit on top of the spine, like the Vectra. It goes somewhat in between two vertebrae, right?

A. Yes, sir.

Q. If it's between two vertebrae, does it still have an anterior and posterior surface according to the definitions the Court gave?

A. Yes, it does. And if I --

THE WITNESS: Your Honor, may I use a model here in front of me --

THE COURT: Yes.

THE WITNESS: -- that they saw this morning?

Yes. So this is the model of the spine that everybody saw this morning. This is the anterior spine. This is as if -- I was sitting like this (indicating).

And if we look at the spine in this (indicating) direction, and I point to this (indicating) surface, which is in here (indicating), which is the surface -- the intervertebral disc surface, if the disc was taken away this (indicating) becomes the surface of the bone where the screw goes in.

So if a plate is sitting against that surface and the screw can pass through the plate into this (indicating), then that becomes the posterior surface of where the plate sits. And the anterior surface is further away, which is where the screw would enter up in here (indicating). It just comes in at an angle rather than straight down from the top.

BY MR. STEWART:

Q. So does that Zero-P VA plate meet the Court's definition and the claim element of anterior and posterior surface?

A. Yes.

Q. Now, looking back at these images, is the posterior surface in the Zero-P VA, does it have an opening that's smaller than the opening in the anterior surface?

A. Yes, it does. And we've depicted that. We've taken the technical drawing on the right and we've drawn two circles in it, a green circle and a red circle.

The red circle is the smaller diameter of the bore, which will retain the head of the screw because it's smaller than the head of the screw.

The green is the more anterior surface -- or anterior

surface of the bore or anterior surface of the plate. So the screw can easily pass and it's less than that green circle, the head of the screw, but it's larger than the red circle.

Q. Now, let's talk about the biased stopping member. How is it that the snapper assembly you talked about a minute ago is biased? What makes it biased?

A. The spring makes it biased.

Q. Is that spring part of the overall snapper assembly that is the biased stopping member in your opinion?

A. Yes. The stopping member. Stopping member is the whole apparatus, which includes that gold extension or the yellow extension, plus the gold spring, and the screw that holds it together. So that's the entire biased stopping member.

Q. Now, element C, I'm going to point out, it talks about "positioning the body of the securing element in the transverse passageway and advancing the head of the securing element therein."

Is that describing the way the Vectra clip expands and contracts, like we talked about earlier?

A. Yes, it is. It describes the same thing that we talked about and that this is the technique or method that we see advancing that screw through and the clip opens and closes.

Q. Now, when we talk about the words "posteriorly advancing the head," can you explain what direction that's going? What that means?

A. "Posteriorly advancing the head" references the fact that we were holding the screw from the -- from the top, where the screwdriver engages, and we advance that screw through the bore.

So the posteriormost portion of the head is the lower portion of the head advancing to where the posterior portion of the plate is, where it enters and abuts up toward the bone. The anterior portion of the screw is furthest away from the bone.

Q. And then in element D, Dr. Sachs, it talks about attaching the stabilizing element, and then the stopping member returns to the smaller diameter configuration. Is that what's shown here as the clip returning to its original position?

A. Yes, it is. The clip starts out in a more -- a smaller position, which is what it's talking about in a more smaller diameter configuration. And as the head of the screw passes by it, it enlarges to a larger diameter position and then it returns to the smaller diameter position.

Q. In the Zero-P VA, does the stopping member work essentially the same way with respect to element C and D?

A. Yes. It functions exactly the same way that the biased stopping member moves -- moves from a smaller position to a larger position, allowing the screw head to pass by. The screw head actually moves it as it passes by. And then the biased stopping member, which in this case is the retractable finger, or the snapper, pops back over the top of the screw head to retain that screw head in position.

Q. Now, does the fact that the biased stopping member, the snapper assembly only sticks out in one part of the bore, does that affect whether it forms smaller and larger diameter configurations?

04:53 A. Well, it affects -- it does create a smaller and larger diameter. Because we can -- in the smaller position, if we were to draw a circle through there, it's a certain size circle that can fit. In the larger position, we can fit a larger circle in. So it moves from -- it creates a smaller and a larger diameter.

04:53 Q. Now, in the bottom of claim 21, it talks about positioning the body of the securing element within the patient's bone.

Is that just talking about advancing the threads into the bone?

A. Yes. That's what it's talking about. We just advance the

04:53 screw into the bone so it's secured and secures the whole apparatus to the bone.

Q. Now, above and below that it talks about "retaining the head of the screw between the biased stopping member and the second opening in the stabilizing element." Do you remember discussing

04:54 that about the Vectra screw head?

A. Yes. We did talk about that with the Vectra.

Q. Now, in the Zero-P VA, is it screw head retained between the stopping member and the bottom opening?

A. Yes. We can see that that's what's happened.

04:54 The screw head is retained below the snapper or the

retractable finger, as depicted here and pictured here, and on the upper left, and it cannot pass all the way through because of that narrower section which is more posterior.

We can see the narrowed section which is smaller than the size of the screw head which blocks the screw head from passing all the way through. And it -- therefore, the screw head is retained within the bore between the snapper and the smaller opening of the bore.

04:54

Q. Now, if you look at the big screen back here, I'm going to demonstrate with my clicker. Do you see how there is a portion of this internal snapper assembly that is sort of parallel with the screw head?

04:55

A. Yes.

Q. Does that change your opinion as to whether this screw head is held between the snapper and the bottom opening?

04:55

A. No. And just as we said before, as we talked about the screw head for the Vectra, there's nothing that says the entire portion of the screw head needs to be below the retention snapper stopper. In this case, there's nothing that says the entire snapper mechanism or retractable finger has to be above the head of the screw.

04:55

So it's the same explanation, but the reverse. There's nothing that uses the word "entire." And because that's retained, the head of the screw is still below that portion of the snapper mechanism which holds it in place.

04:55

Q. Now, if defendants tried to argue otherwise and said, well, some internal portion of that snapper is below the head, would the same discussion we had earlier about the doctrine of equivalents apply?

04:56 A. Function, way, and result is the same, that it functions the same. It serves a purpose of holding the screw in position. It retracts and reverts back to a smaller diameter, smaller position to maintain the screw from backing out.

Q. Looking at this next slide. If we were to cut off the top

04:56 of the Vectra screw head and extend the length of that snapper assembly as shown here, would that change anything about the function, way, or result of these screws and stopping members?

A. No. It doesn't. We're looking at the same result. This is a created diagram at the bottom which is the Vectra apparatus

04:56 and artistic drawing without that extension would work the same way, as we can see.

And, again, just filling in the part of the snapper extension that sticks out, it just pushes the screw down a little bit further, but it still retains that screw in position

04:57 between an anterior opening portion and the more posterior narrow portion of the bore.

Q. Dr. Sachs, in your opinion, can defendants avoid infringement of this claim simply by adding something extra or removing a little piece of the snapper as shown here?

04:57 A. No. That's what we said before. The claims are met. The

claims are met and infringed. And by adding something in addition does not negate the fact that the claims have already been met and infringed.

Q. Dr. Sachs, can we check off claim 21 for both Vectra and Zero-P VA?

04:57

A. Yes, I believe we can.

MR. STEWART: Your Honor, may I approach?

THE COURT: Yes. This might be a good place to stop for the day.

04:58

Okay. Ladies and gentlemen, we'll break for the day. Please be back in the jury room at 9:00. We'll try and start promptly at 9:00.

Have a good evening. Don't forget not to discuss the case, research it, or do anything else you're not supposed to.

04:58

Have a safe trip back and forth. See you tomorrow. Have a good evening.

(Jury not present.)

THE COURT: Anything to put on the record?

MR. CURRY: One thing that occurred to me, Your Honor, you sustained an objection to the surgical technique guide with our patent number marked.

THE COURT: Pardon?

MR. CURRY: I wanted to put on the record that Your Honor had sustained the defendants' objection to the surgical technique guide with Acantha's patent being marked?

THE COURT: Right. I don't think -- the surgical guide wasn't kept out, it's just we didn't allow you to elicit testimony concerning the marking because that issue -- I had decided that issue as a matter of law. And, of course, you have the appeal on my decision there.

MR. CURRY: Right. I just don't want there to be any mistake. Since my understanding is our bench conferences aren't transcribed, I just wanted to put it on the record.

THE COURT: No. You're correct.

Did you want to put something on the record on that? Was that you, Mr. Griffith, on that issue? Or was that Mr. -- that was Mr. Norton.

MR. NORTON: It was me.

THE COURT: Right.

MR. NORTON: No. Just for the record, I would point out that our objection was due to the fact that they were eliciting kind of irrelevant testimony in light of the fact that your ruling had already addressed the marking issue.

THE COURT: Yeah. I thought the ruling addressed it, and, of course, that's appealable. So there was no reason to go into marking on the technical guide. I think that's already clear. It's in the technical guide.

MR. CURRY: I'm not trying to reargue anything. I was just making a record that Your Honor had sustained that objection.

And with respect to marking, is it the case that Your Honor would sustain objections to any of our marking proof, or would Your Honor prefer us to make an offer of proof?

THE COURT: I think we went through summary judgment on that, or a type of -- you know, I think the record is there. I don't think there's any dispute that the technical guide contained markings. At least, am I correct? The argument was that it did not comply with the statute and that it was, of course, not on the product, but not on the packaging.

MR. NORTON: You're right, Your Honor. You already decided this issue. We had summary judgment briefing on it. The record is in on that.

THE COURT: And if I'm wrong I think the record is fine. You can appeal. I don't think you need to keep adding evidence that is not disputed.

MR. CALDWELL: I actually think something is being conflated. And I apologize if I'm misunderstanding.

I think Your Honor's summary judgment ruling is premised on the notion that the marking statute requires that it be in a certain place, such as on the product or on the packaging. And because Your Honor felt that that wasn't complied with to get those damages prior, we couldn't get the damages prior. But it's not -- it's not that you excluded the general notion that Stryker was identifying their product as practicing our patent, it's that we can't put in that document

for the notion that, according to Your Honor's ruling, that that ticks the box under the marking laws and opened the door to past damages.

It's actually a distinct -- it's for a distinct purpose. I mean, the industry was still aware from seeing competitors' surgical technique guides of whatnot. It wasn't a secret that Stryker identified it.

I think the problem was maybe a little bit more complicated than that. I don't know that Your Honor categorically excluded it. Because nobody is trying to do an end around. It's not like we're going to present to the jury, you know, give damages prior to the time period Your Honor set in the ruling on summary judgment. I hope that helps a little bit. I'm not actually sure that this particular point was wiped away by the summary judgment.

THE COURT: I'm not sure what your point is.

MR. CALDWELL: Well, it's just an obvious willfulness fact that Stryker puts it on documents, for example, the documents that competitors see and it's made publicly available on the website. The fact that that might not comply with the hypertechnical requirement of it being on the product doesn't make the fact that they still identify --

Like, for example, if Stryker were talking about it at industry conferences, the practices of this patent, maybe that wouldn't meet the marking requirement, but it's still evidence

of it being known in the industry that this patent is associated with that product.

So what I'm saying is, even without trying to undue or circumvent Your Honor's ruling, because we're not telling the jury to give damages prior to that date, this still has independent relevance. It makes facts more likely than they otherwise would be. And this is just a publicly known thing. It's a surgical technique guide that doctors use as we've already heard.

So I feel like all of us sort of kind of treating this as though it were dismissed with the marking is unfair. It is still a relevant fact for other things even if it doesn't meet this -- the very particular confines of marking for that statute.

MR. GRIFFITH: I haven't really thought about that, Your Honor. It hit me for the first time. I would have to think about it. I don't think it is relevant right now. It could be --

THE COURT: Well, if your argument -- I didn't appreciate that argument. It might be relevant for willfulness. I didn't think there was any dispute that everyone knew of the patent and that this --

MR. GRIFFITH: That's correct.

THE COURT: This complied with the patent. And I guess the concern was that this was going to reintroduce the

marking issue here. But if that's your purpose, it's not -- I don't think it's prejudicial in that sense and you wish to put that in.

MR. CALDWELL: I agree, Your Honor. And, again, I mean, there's no way we reargue the marking or we reintroduce that because it's not like we're going to say, hey, guys, let's talk about something the judge got wrong because he didn't consider this.

THE COURT: And my sense is if I'm wrong on that and you win on infringement, that's going to be a simple matter of calculation. I mean, the key thing is the infringement.

MR. CALDWELL: I think, as to that point, like if you could extrapolate rates and, you know, and figure out damages, there's a good chance that is correct. I mean, it kind of depends, I guess, how things go.

But my point is it's still just -- I mean, if in the industry a big player in the industry is promoting that this is sort of an Acantha-type design, that's still -- that's still a relevant fact. And as you say, there's certainly nothing prejudicial about it. It's true.

And that's why I wanted to -- I'm afraid that things keep getting conflated and we go into these quick arguments.

THE COURT: All right. Well, let's look at that again. And if we -- unless there's some argument against it, we can open the record or allow that in. We can revisit that.

MR. STEWART: May I, Your Honor, make a record? You sustained an objection to Dr. Sachs presenting evidence about the background development of defendants' products including their knowledge of the Stryker Reflex product and the reasons they went to the designs they went to, what they were discussing internally. And I believe I understood your ruling to also sustain an objection to him discussing evidence defendants -- or the jury could consider relevant to intent.

Even though we didn't intend to actually have Dr. Sachs opine on intent, we thought because he's giving an infringement analysis, it would be helpful to the jury -- and that's usually the standard for expert testimony, if it's helpful for the jury's understanding -- for him to be able to at least tell them the evidence that he's been able to see, unlike any of our other witnesses, that could be relevant to that determination if they're not offering an actual opinion on that.

And maybe one more thing.

(Brief pause.)

MR. STEWART: Your Honor, obviously to the extent you would like us to re-argue this issue when that testimony comes about induced infringement tomorrow, to the extent you don't think you've already sustained the full scope of what I just said, I would appreciate that opportunity. But I did want to note the sustained objection as to Dr. Sachs's discussion of the Reflex.

THE COURT: Okay.

MR. CALDWELL: My understanding is we were going to wait and see how that comes up in context and what they can prove up, was my understanding. That's what I was trying to tell Mr. Stewart. I'm not sure Your Honor has ruled on that. And I'm not trying to have you second guess it.

But my understanding was obviously he's not going to opine on somebody's state of mind. We know that. We'll stipulate to that. And if it's a matter of clarifying slides to indicate that, we certainly will. He was just trying to outline the test in that regard.

So that's all I was trying to clarify to Mr. Stewart, but I thought we were going to wait and see what the prove-up was.

THE COURT: Mr. Griffith, the question in the record we're making now.

MR. GRIFFITH: So I think my position on this is reasonably clear. I don't have anything necessarily to add at this point beyond what I've already said.

I did think that -- the way I understood it was Your Honor said when we come to a document or a question, if I object, or something, then you'll deal with it. Because then you have context to figure out whether, you know, the thing they want to ask, the information they're eliciting or the document they're seeking is, in fact, relevant or pertinent to

Dr. Sachs's analysis.

And then we had one objection to that affect, and it was sustained, but then we moved on. And since then, there weren't -- I don't think there were any more objections in Dr. Sachs's testimony.

So I think I tend to agree with Mr. Caldwell that this is -- we're handling this on -- they have to lay the foundation for whatever they want Dr. Sachs to say. You know, if they asked him something that shouldn't be asked, then I will object, and if they lay a foundation for it being proper, you know, then we'll deal with it.

THE COURT: I think it also -- I mean, in the context at which it arose, I don't think it's in the full context in which I think you're seeking to introduce it.

It seemed to me, and I don't have the specific question in front of me, but it was like have you reviewed other material. I'm not sure it was much more specific than that.

And I think just to have him, as I said, repeat statements from documents that he reviewed simply because they were provided by the defense, without showing a relevance, and also that they are admissible, that was where it was at that point.

But on the issue of -- I mean if I see how they're relevant, if I see why they're reasonably admissible, I think I can revisit that ruling, but you're going to have to give me

more context than I was given at the sidebar and in the course of that question. I'm going to look at the transcript again and see where we are.

MR. STEWART: Thank you.

THE COURT: All right.

MR. GRIFFITH: I have one issue that I think ought to be brought up, and that is, we have a witness, Markus Hunziker, who lives in Switzerland. And he was the designer of the snapper mechanism, actually. And the primary witness on that Zero-P VA, as Your Honor pointed out, is Will McDonough who is going to come and testify about that.

THE COURT: McDonough is going to testify?

MR. GRIFFITH: Yes, he is.

THE COURT: Just on an aside, he would be the person that would testify about that?

MR. GRIFFITH: Yes.

THE COURT: And introduce these documents with. Obviously, you don't -- who knows. You're not calling him, but --

MR. GRIFFITH: I agree with Your Honor on that.

THE COURT: Are they getting in anyhow through Mr. McDonough?

MR. GRIFFITH: They may. I mean, they're going to be able to cross-examine Mr. McDonough. So, you know, they'll have to get it in through Mr. McDonough. So I would expect that some

of these things that are from him, that they'll be able to put to him and handle that. But what I was --

THE COURT: You need to call a witness out of order?

MR. GRIFFITH: No, no. I'm sorry. We had -- at the final pretrial conference, there was some complaining about us having too many live witnesses.

On top of that, it's an awful long way for Mr. Hunziker to come. And he's a single father, so it's a bit of an imposition. And so what we proposed to them, it was to designate some of his deposition testimony. It's around, I understand it, 18 minutes worth, it's not a lot. They objected and said you're not allowed to play deposition testimony of an employee. We researched it and you are. It was the deposition they took.

So, but they objected, and we invited them to designate cross-designations and they said, we will do that subject to our objection, we're not giving that up. We don't think you should be doing this. But I think you guys cross-designated some -- or you're going to maybe, I can't remember. I don't know where that is exactly.

But anyway, they have an objection to us playing deposition testimony of Mr. Hunziker, and I wanted to bring that to the Court's attention. We probably ought to give the Court, you know, something on that -- or what cases we have that supports us and they can give what cases they have that supports

them.

THE COURT: Okay.

MR. CALDWELL: Yes, Mr. Griffith has not provided us with whatever authority he's talking about. It's one of their own employees. They've made no indication that he's unavailable. In fact, I think they originally told us they were going to bring him and then later wanted to take him -- wanted to have him play just by deposition.

But he's one of their own corporate witnesses, and they've made no indication that he's not available. And so unless there's unintentional vilification going on, the actual issue I raised at the pretrial was not that there were too many, but that it seemed unlikely they were calling eight, and they wouldn't answer us when we asked if all of them were coming.

That was actually the issue that I had raised. So if you would like to provide us with the authority, we're certainly happy to consider it, but, I mean, at this point -- my recollection of the rules, I mean, if it's your own guy and there's no unavailability or anything of that nature, that you don't have the luxury of merely just playing a deposition because I think, in that context, it deprives the jury of the opportunity of a live cross-examination and things of that nature.

You know, part of it is we take depositions, we take depositions, in part, because we're trying to have a record that

would be useful if we were to cross-examine someone. I mean, you don't always make all of your points. And so then if they just choose to bring the person you get to make your points, if they choose not to it's kind of a consequence on them.

But that's where we are. But I'm happy to look at his authority. I just wanted to respond.

MR. GRIFFITH: And I'll look at his authority I've been chastised for not giving them mine, they didn't give me theirs. So we'll swop authority and, if necessary, get it into the court.

THE COURT: Anything else to put on the record today?

MR. CALDWELL: No, Your Honor. It's just that Federal Rule of Evidence 804(a)(5) is my primary authority.

THE COURT: See you tomorrow at 8:30. See counsel at 8:30.

(Trial adjourned for the day at 5:14 p.m.)

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C E R T I F I C A T E

We, JOHN T. SCHINDHELM, RMR, CRR, and RICHARD E. EHRLICH, RMR, CRR, Official Court Reporters for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the original machine shorthand notes taken in the aforementioned matter to the best of our skill and ability.

Signed and Certified August 14, 2018.

/s/John T. Schindhelm

John T. Schindhelm

/s/Richard E. Ehrlich

Richard E. Ehrlich

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