



IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,  
MIKE HUNTER,  
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

v.

PURDUE PHARMA L.P., *et al.*,

Defendants.

Case No. CJ-2017-816

Judge Thad Balkman

STATE OF OKLAHOMA } S.S.  
CLEVELAND COUNTY }

**FILED**

MAY 31 2019

In the office of the  
Court Clerk MARILYN WILLIAMS

**DEFENDANTS JANSSEN PHARMACEUTICALS, INC. AND JOHNSON AND  
JOHNSON'S RENEWED MOTION TO EXCLUDE AND OBJECTION TO  
TESTIMONY ABOUT DOCUMENTS AND TOPICS FOR WHICH A WITNESS LACKS  
KNOWLEDGE**

Defendants Janssen Pharmaceuticals, Inc. ("Janssen")<sup>1</sup> and Johnson & Johnson ("J&J") respectfully renew their motion that the Court enforce 12 O.S. § 2602 and bar the State from questioning witnesses about subjects and documents on which they lack personal knowledge.

**I. INTRODUCTION**

In ruling on Defendants' in limine motions, this Court indicated that it "would probably be inclined to grant an objection where a witness is testifying outside their own personal knowledge," and "invite either party to object at trial if they feel that the witness is giving testimony outside the scope of the rules of evidence." Hr'g Tr. (May 14, 2019) at 80:13-21, Ex. 1. Only three days into trial, the State has already laid waste to the Oklahoma evidence code, questioning Kimberly Deem-Eshleman at length about documents concerning Noramco and Tasmanian Alkaloids—subjects

<sup>1</sup> "Janssen" also refers to Janssen Pharmaceuticals, Inc.'s predecessors, Ortho-McNeil-Janssen Pharmaceuticals, Inc. and Janssen Pharmaceutica, Inc.

she has “no ... personal knowledge” about, May 30, 2019 Trial Tr. 39:21-23, Ex. 2, and that are “so outside her understanding” that she “ha[s] no idea” about them. May 29, 2019 PM Trial Tr. 43:17-18, Ex. 3. Undeterred by her lack of any knowledge on those subjects, the State has consumed 40 transcript pages questioning her about them, frequently by reading at length from documents and asking Ms. Deem-Eshleman if she “see[s] that.” *See* May 29, 2019 PM Trial Tr. 41:7-75:23, Ex. 3, May 30, 2019 Trial Tr. 34:13-42:13, Ex. 2.

That questioning flatly violates 12 O.S. § 2602’s personal-knowledge requirement, wastes time under 12 O.S. § 2403, and turns ordinary courtroom procedure upside down: A lay witness is not a prop for counsel to read into the record piles of documents the witness has never seen and knows nothing about. If the State wishes to introduce evidence about Noramco and Tasmanian Alkaloids, non-parties to this action that are not mentioned in the State’s Petition, it will have every opportunity to do so through witnesses knowledgeable about those subjects. It should not be allowed to abuse the Oklahoma Rules of Evidence by questioning Ms. Deem-Eshleman—or any other witness—about documents and subjects outside their personal knowledge.

## **II. REQUIRING A LAY WITNESS TO TESTIFY ABOUT DOCUMENTS OUTSIDE HER PERSONAL KNOWLEDGE VIOLATES RULE 2602 AND WASTES TIME UNDER RULE 2403**

Rule 2602 could not be clearer: “**A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.**” 12 O.S. § 2602. That principle is one of the most basic precepts of American evidentiary and trial procedure. And the State has flagrantly violated it by asking Ms. Deem-Eshleman to nod along while its counsel reads documents she has never seen and knows nothing about.

The State’s justification for its abusive procedure is that Ms. Deem-Eshleman is Johnson & Johnson and Janssen’s corporate representative at trial. To be sure, Ms. Deem-Eshleman was

designated to testify as Defendants' representative on certain topics during discovery. But that status during *discovery* does not license the State to abuse her as a *trial witness*. Section 2602 contains an express exception for *expert* witnesses, who are allowed to testify outside the scope of their personal knowledge. See 12 O.S. § 2602 ("This rule is subject to the provisions of Section 2703 of this title"). It contains no such exception for witnesses who served as corporate representatives during discovery. For good reason. Corporate-representative status is meant to further the "purposes of discovery," but "does not govern the admissibility of testimonial evidence at trial." *Sabre Int'l Sec. v. Torres Advanced Enter. Sols., LLC*, 72 F. Supp. 3d 131, 146 (D.D.C. 2014).<sup>2</sup> Quite the contrary, deposition testimony can be used at trial only "so far as admissible under the Oklahoma Evidence Code," 12 Okla. Stat. § 3232—including Rule 2602. Accordingly, while corporate designations "streamline the discovery process," Rule 2602 continues to "limit[] ... *trial* testimony to matters that are within ... personal knowledge." *Indus. Eng'g & Dev., Inc. v. Static Control Components, Inc.*, 2014 WL 4983912, at \*3 (M.D. Fla. Oct. 6, 2014) (emphasis added), Ex. 4; see also, e.g., *Raynor Mfg. Co. v. Raynor Door Co.*, 2009 WL 211942, at \*5 (D. Kan. Jan. 27, 2009) (holding that under Rule 602, a plaintiff could not use its corporate representative's testimony to authenticate document about which the representative lacked personal knowledge), Ex. 5; *Roundtree v. Chase Bank USA, N.A.*, 2014 WL 2480259, at \*1 (W.D. Wash. June 3, 2014) ("FRCP 30(b)(6) is inapplicable to the issue of witness testimony at trial."), Ex. 6. Put more briefly, a witness who served as a corporate representative at an

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<sup>2</sup> Oklahoma Rule 3230(C)(5) is substantially similar to Federal Rule of Civil Procedure 30(b)(6), and Oklahoma courts "look to discovery procedures in the federal rules when construing similar language in the Oklahoma Discovery Code." *Crest Infiniti, II, LP v. Swinton*, 2007 OK 77, ¶ 2, 174 P.3d 996, 999.

earlier stage is treated like any other witness once trial starts. Any other approach violates the express language of Rule 2602.

The State's reliance on corporate-representative status is especially incoherent because Ms. Deem-Eshleman was *never designated* to represent Janssen with respect to Noramco and Tasmanian Alkaloids—her corporate representative status extended only to various marketing and sales issues. *See* May 30, 2019 Trial Tr. 17:21-23, Ex. 2 (noting that “Ms. Eshleman was designated on certain topics ... none of which was Noramco”); *see* 12 O.S. § 3230(C)(5) (requiring corporate-representative subpoenas to “describe with reasonable particularity the matters on which examination is requested”). Noramco and Tasmanian Alkaloids therefore would have been completely improper subjects for the State to broach at her deposition. Its attempt to do so for the first time at trial—in violation of Rule 2602—is all the more egregious, and not in the least excused by her designation to testify about *different* subjects during discovery.

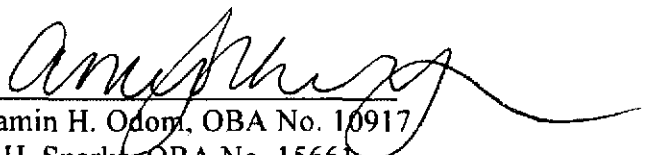
Spending hours going through documents with a witness who knows nothing about them is also plainly a waste of time under Rule 2403. The State will have ample opportunity to introduce evidence about Noramco and Tasmanian Alkaloids through its “witnesses who will be called to testify related to Noramco issues who do have knowledge about Noramco issues.” May 30, 2019 Trial Tr. 34:13-42:13, Ex. 2. But there is no sound reason to let it read such evidence into the record through a witness who knows nothing those subjects and has never been designated to speak to them, creating a one-sided record with little evidentiary value. The Court should put a stop to the State's abusive tactics and enforce Rules 2602 and 2403.

**III. CONCLUSION**

The Court should enter an order excluding any testimony for which insufficient evidence was introduced to support a finding that the witness has personal knowledge of the matter.

Dated: May 31, 2019

Respectfully submitted,

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**CERTIFICATE OF MAILING**

Pursuant to OKLA. STAT. tit. 12, § 2005(D), this is to certify on May 31, 2019, a true and correct copy of the above and foregoing has been served via email to the following:

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AND ORTHO-MCNEIL-JANSSEN  
PHARMACEUTICALS, INC. N/K/A/  
JANSSEN PHARMACEUTICALS, INC.**

# **EXHIBIT 1**

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IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., )  
MIKE HUNTER )  
ATTORNEY GENERAL OF OKLAHOMA, )  
  
Plaintiff, )

VS

Case No. CJ-2017-816

- (1) PURDUE PHARMA L.P.; )
- (2) PURDUE PHARMA, INC.;/ )
- (3) THE PURDUE FREDERICK COMPANY; )
- (4) TEVA PHARMACEUTICALS USA, )
- INC.; )
- (5) CEPHALON, INC.; )
- (6) JOHNSON & JOHNSON; )
- (7) JANSSEN PHARMACEUTICALS, )
- INC.; )
- (8) ORTHO-MCNEIL-JANSSEN )
- PHARMACEUTICALS, INC., )
- n/k/a JANSSEN PHARMACEUTICALS; )
- (9) JANSSEN PHARMACEUTICA, INC. )
- n/k/a JANSSEN PHARMACEUTICALS, )
- INC.; )
- (10) ALLERGAN, PLC, f/k/a ACTAVIS )
- PLC, f/k/a ACTAVIS, INC., f/k/a )
- WATSON PHARMACEUTICALS, INC.; )
- (11) WATSON LABORATORIES, INC.; )
- (12) ACTAVIS LLC; AND )
- (13) ACTAVIS PHARMA, INC., f/k/a )
- WATSON PHARMA, INC., )

Defendants. )

**PORTIONS OF THE TRANSCRIPT ARE COVERED UNDER THE PROTECTIVE ORDER**

TRANSCRIPT OF MOTIONS HEARING  
HAD ON THE 14TH DAY OF MAY, 2019,  
BEFORE THE HONORABLE  
THAD BALKMAN, DISTRICT JUDGE

REPORTED BY: Tanya Burcham, CSR, RPR



1 witness they're going to try that with. I think they may try  
2 with several. But the fact of the matter is, eliciting  
3 testimony from fact witnesses, regarding the statistics that he  
4 or she didn't prepare and can't answer cross-examination about,  
5 because he or she or (indistinguishable) referred, whoever  
6 prepared it isn't appropriate.

7           They've got a witness who prepared the statistics.  
8 That's the witness they need to be offering the testimony  
9 through.

10           THE COURT: Thank you.

11           MR. MERKLEY: Thank you, Your Honor.

12           MR. WHITTEN: If I can just real briefly, I know  
13 we're on a short timeframe.

14           I think they have forgotten who we're trying this  
15 case to. We're not trying the case to the television cameras.  
16 We're really not. I know they're going to be here. We're  
17 trying the case to the Court. And it's -- broad motions like  
18 this aren't favored. It's almost like they're filing a motion  
19 trying to protect us from ourselves. We should not have  
20 imaginary, hypothetical motions like this. I have -- I still  
21 don't have any idea. I asked Brad, do you have any idea who  
22 he's talking about? It's not appropriate to ask, and we don't.  
23 None of us do. We shouldn't have a motion ordering us not to  
24 do something that we -- we said we don't know what you're  
25 talking about.

1           Now, I can give you an example. It was on the other  
2 issue that I mentioned that you'd already ruled on this. There  
3 was a motion previously filed on Professor Susan Sharp who is a  
4 sociology professor here at OU. And they asked about, to  
5 prohibit her from testifying about personal experiences that  
6 she had, i.e., her husband, her son-in-law. They were addicted  
7 to prescription opioids. And the Court did already overrule  
8 that.

9           So, you know, I will just leave it at that, Judge.  
10 This motion is so broad. There's no authority for it. It's  
11 premature and we should handle it in the customary manner of  
12 just having objections at the trial.

13           THE COURT: Okay. I think a prophylactic ruling on  
14 this is unnecessary. I would probably be inclined to grant an  
15 objection where a witness is testifying outside their own  
16 personal knowledge or statistics; however, if that happens, I  
17 don't see that that's any -- any undue prejudice to the  
18 parties. And so I'm going to deny this motion in limine and,  
19 again, expect or invite either party to object at trial if they  
20 feel that the witness is giving testimony outside the scope of  
21 the rules of evidence. Okay?

22           MR. MERKLEY: Thank you, Judge.

23           THE COURT: All right. I think we'll go ahead and  
24 call it a morning. We will see the parties again here on  
25 Thursday. I think we set on Thursday -- I don't have my

1 schedule in here, did we say 8:30 or 9:00? We'll keep it at  
2 9:00 o'clock.

3 MR. MERKLEY: Judge, on the basis of we're going to  
4 have a pretrial conference, are you going to hear any more in  
5 limine arguments after that's over or?

6 THE COURT: We need to get them heard so I would  
7 like to -- I think we have it 9:00 to 12:00. Is that what we  
8 have on the calendar?

9 MR. WHITTEN: I couldn't remember.

10 MS. PATTERSON: I think you also had the motion on  
11 the trial subpoena --

12 MR. WHITTEN: Yes.

13 MS. PATTERSON: -- on the schedule for Thursday as  
14 well, Your Honor, which we do need to get that one heard.

15 MR. WHITTEN: We're basically going 9:00 to 12:00 on  
16 Thursday, you think?

17 MR. MCCAMPBELL: And I think that's a key question,  
18 Your Honor. I'm unaware of the Court giving us any guidance on  
19 how long we would go Thursday.

20 THE COURT: Let me look on my calendar.

21 MR. MCCAMPBELL: I appreciate it.

22 THE COURT: I have all day marked off.

23 MR. WHITTEN: That's good. I was trying to plan.

24 THE COURT: I know you'd miss me if it wasn't all  
25 day. So we'll start at 9:00. We'll plan on taking an extended

# **EXHIBIT 2**

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IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., )  
MIKE HUNTER )  
ATTORNEY GENERAL OF OKLAHOMA, )

Plaintiff, )

vs. )

Case No. CJ-2017-816

(1) JOHNSON & JOHNSON; )  
(2) JANSSEN PHARMACEUTICALS, )  
INC.; )  
(3) ORTHO-McNEIL-JANSSEN )  
PHARMACEUTICALS, INC., )  
n/k/a JANSSEN PHARMACEUTICALS; )  
(4) JANSSEN PHARMACEUTICA, )  
INC., n/k/a JANSSEN )  
PHARMACEUTICALS, INC., )

Defendants. )

**PORTIONS OF TRANSCRIPT MAY BE COVERED UNDER PROTECTIVE ORDER  
TRANSCRIPT OF PROCEEDINGS  
HAD ON MAY 30, 2019 (MORNING SESSION)  
AT THE CLEVELAND COUNTY COURTHOUSE  
BEFORE THE HONORABLE THAD BALKMAN  
DISTRICT JUDGE**

REPORTED BY: ANGELA THAGARD, CSR, RPR

1 MS. STRONG: So we have one other issue, your Honor,  
2 that we would like to -- or two more.

3 Would you like to do this first?

4 MR.. BRODY: Why don't you do that first. I'll switch  
5 places. It makes it easier.

6 MS. STRONG: Okay. Sounds good.

7 Your Honor, we would like to raise more formally and  
8 reiterate what we raised yesterday, an objection to having  
9 Ms. Deem-Eshleman testify about materials for which she has no  
10 personal knowledge. This was raised in the motions in limine.  
11 It was motion in limine No. 8 for Teva, filed by Teva.

12 And in that motion, we asked the Court to get to order  
13 that the State be precluded from offering at trial testimony  
14 from lay witnesses that are not based on personal knowledge  
15 and, therefore, not appropriate to be offered at trial.

16 Of course, that's premised on Rule 2602, which says: A  
17 witness may not testify to a matter unless evidence is  
18 introduced sufficient to support a finding that the witness has  
19 personal knowledge of the matter.

20 You, at the time of that argument, your Honor, made very  
21 clear that you would ask us to raise it again at trial. And  
22 you said: I think a prophylactic ruling on this is  
23 unnecessary. I would probably be inclined to grant an  
24 objection where a witness is testifying outside their own  
25 personal knowledge.

1           You went on to say: I'm going to deny this motion  
2 in limine. And, again, expect or invite either party to object  
3 at trial if they feel that the witness is giving testimony  
4 outside the scope of the rules of evidence.

5           So we ask, your Honor, that Ms. Deem-Eshleman not be  
6 permitted to be examined on materials for which she lacks  
7 personal knowledge under Rule 2403, your Honor. It's a waste  
8 of time. It is not helpful to you as the trier of fact, given  
9 that all that can be done is for her or counsel to read the  
10 documents into the record. And you can learn nothing more than  
11 that what the documents say. If that's the point, they can be  
12 submitted and you can read them on your own, your Honor. But  
13 they do not need to be presented to a witness for that purpose.

14           In addition, your Honor, we understand that there will be  
15 witnesses who will be called to testify related to Noramco  
16 issues who do have knowledge about Noramco issues, including  
17 Bill Grubb, your Honor. And that would be the appropriate time  
18 to address documents and materials related to Noramco issues,  
19 to the extent that that witness has personal knowledge of the  
20 materials at the time.

21           Ms. Eshleman was designated on certain topics as the  
22 corporate representative during discovery, 13 topics, none of  
23 which was Noramco. She has no knowledge of these Noramco  
24 materials, and it's not appropriate to have her sit on the  
25 stand and be faced with documents that she cannot explain or

1 understand why they were written or what they mean. She cannot  
2 add anything to you about those documents for purposes of  
3 trial, your Honor.

4 MR. BECKWORTH: May I respond real quickly?

5 THE COURT: Yes.

6 MR. BECKWORTH: Well, that's a breach of the  
7 agreement that Mr. Ottaway and I had. The agreement we had was  
8 that she would be designated as a corporate representative, and  
9 while Mr. Ottaway said that there may be topics that she  
10 wouldn't have knowledge of because you -- I think you said  
11 there was no way for you to prepare for 80-something topics, we  
12 said very clearly that I would be able to ask her any questions  
13 about those issues. And if she didn't know, she didn't know.

14 But I can't imagine that Johnson & Johnson and Janssen  
15 would bring a corporate representative into this case that's  
16 about Noramco and what's in those boxes and suggest that they  
17 have no idea what's in them. That's more troubling than  
18 probably anything I've seen in the facts of this case.

19 Drew, do you have something else on the --

20 We're not finished.

21 MR. PATE: All I would ask, your Honor, is she is not  
22 Ms. Kimberly Deem-Eshleman right now when she is sitting in  
23 that chair. She is Johnson & Johnson and speaking on behalf of  
24 the company. So her personal knowledge, as far as what she  
25 dealt with at the company as an individual is not the question.



1 testimony, we are going to have to approach. We're not going  
2 to be able to do it --

3 MS. STRONG: There's no reason we need to place -- we  
4 can just move it to the side.

5 MR. PATE: Your Honor, if I can make a suggestion.  
6 We are going to -- I'm not the examining attorney, but I'm  
7 guessing he's going to move to admit these fairly early in the  
8 examination this morning, and then they can be moved on our  
9 first break.

10 THE COURT: Let's just do that. It's a compromise.

11 MR. BRODY: Over our objection to having them in  
12 front of her during the --

13 THE COURT: I understand.

14 MR. PATE: If we need to come over there for a bench  
15 conference, we can do that.

16 THE COURT: Okay. All right. Let's go ahead and  
17 resume with Ms. Deem-Eshleman. You may return to the stand.  
18 Proceed.

19 KIMBERLY DEEM-ESHLEMAN  
20 resumed the witness stand and, after having been previously  
21 duly sworn, testified as follows:

22 MR. BECKWORTH: Thank you, your Honor. May it please  
23 the Court.

24 DIRECT EXAMINATION CONTINUED

25 BY MR. BECKWORTH:

1 Q Good morning, Ms. Deem-Eshleman. How are you?

2 A Good morning.

3 Q Hope you had a good night last night?

4 A I did, thank you.

5 Q I did. I got to go -- my parents are here. We sat in the  
6 rocking chairs over at the Montford Inn last night for a little  
7 while, really cool, nice night. I enjoyed it. So we're back  
8 here --

9 MR. OTTAWAY: Excuse me, your Honor. Do we have a  
10 question and answer or speech --

11 THE COURT: It's coming.

12 MR. OTTAWAY: Thank you.

13 MR. BECKWORTH: She asked me. So I was being polite.

14 Q (By Mr. Beckworth) Thank you for asking. If we could go  
15 back to State's Exhibit 1048, it was the last document we were  
16 on last night. We were looking at the market share of Noramco  
17 that was stated for the three years June of 2013, 2014, and  
18 2015. And we looked at that and you'll see there, just to  
19 refresh your memory, what does it say for oxycodone and in the  
20 year 2015, the last one?

21 MR. BECKWORTH: May I approach, your Honor?

22 THE COURT: Yes, you may.

23 MR. BECKWORTH: We'll just do it this way.

24 Q (By Mr. Beckworth) So this tall graph right here on the  
25 far right of the oxycodone column, there's a number. What is

1 that?

2 THE WITNESS: 65 percent.

3 Q BY MR. BECKWORTH: Then if we go next to it in  
4 hydrocodone, what number is that?

5 A 54 percent.

6 Q And for both oxycodone and hydrocodone, Noramco lists a  
7 number for where it stands in the market domestically. What  
8 number is attached to each of those?

9 A Are you referring to the No. 1 on top of that?

10 Q Yes, ma'am. Do you see that?

11 A I do.

12 Q Okay. Now, you were here for opening statements in this  
13 case?

14 A I was.

15 MR. BECKWORTH: Mike, can we show this?

16 Q (By Mr. Beckworth) So your -- this is a -- we took your  
17 market share there and just made it in color because it was a  
18 little hard to see. But this is the same graphs for  
19 hydrocodone and oxycodone that you see, right?

20 A It appears to be, yes.

21 Q Okay. Now, do you remember at opening statement there was  
22 a graph that showed hydrocodone and oxycodone? What we didn't  
23 see there was if you took the percentage of market share that  
24 Noramco had in the year 2013, it looks a little different when  
25 we put those up on that graph, doesn't it?

1 A Well, I think that the other graph was referring to the  
2 API.

3 Q Yes, ma'am. Your opening statement was trying to show  
4 that there were state made prescriptions during that year that  
5 were so large and that Johnson & Johnson and Janssen had  
6 nothing to do with it, right? That was the intent?

7 A I think the intent was that the end product of hydrocodone  
8 and oxycodone had a significant volume of prescriptions.

9 Q And if we overlay the -- okay. Because that was a little  
10 hard to hear, I think what you said was the intent of the slide  
11 used in opening statement was to show that the end product was  
12 what the State paid for for hydrocodone and oxycodone. And  
13 that's what you said?

14 A I believe that's what it meant, yes.

15 Q Now, when we overlay that with the active pharmaceutical  
16 ingredient that Noramco made, that graph looks quite different,  
17 doesn't it?

18 A In what respect?

19 Q Well, if we look at hydrocodone, then you color it with 65  
20 percent, which is what your market share was for -- sorry for  
21 Oxy -- let's go to oxycodone. If you go to oxycodone on the  
22 right and you color up about 65 percent or 64 percent of that  
23 stack, which would represent your market share for oxycodone,  
24 then that graph looks a little different than what was shown to  
25 the Court during opening statement, doesn't it?

1 A Again, I would repeat that I believe what the Noramco  
2 slide was showing was the API, the percentage of the API that  
3 was made for oxycodone and hydrocodone.

4 Q That's right and oxycodone is API. OxyContin is a brand  
5 name?

6 A Correct.

7 Q And so when we look at API for oxycodone, during 2013 in  
8 State-paid prescriptions, it looks different, doesn't it?

9 A I don't understand what you're saying. How it looks  
10 different. It's colored.

11 Q It's colored, right? So that orange, that would represent  
12 how much of the market your company had for oxycodone that was  
13 supplied in this country to drug companies, right?

14 MR. OTTAWAY: Excuse me, your Honor, your company, if  
15 he would just specify the company for the purposes of the  
16 record.

17 MR. BECKWORTH: Sure.

18 Q (By Mr. Beckworth) Noramco, a subsidiary owned by  
19 Janssen, owned by Johnson & Johnson, a company for families.  
20 Are we clear?

21 MR. OTTAWAY: For purposes of the record, not a  
22 defendant in this case.

23 MR. BECKWORTH: Johnson & Johnson's not a defendant?

24 Q (By Mr. Beckworth) Ma'am, is Johnson & Johnson a defendant  
25 in this case?

1 A Yes.

2 Q Does Johnson & Johnson own Noramco prior to the time they  
3 sold it?

4 A Yes.

5 Q Okay. And you get the point here. If we look at  
6 oxycodone as a percentage of what you owned in the market, it's  
7 a lot, right?

8 A Again, I would go back to Noramco supplied the API the  
9 ingredient, but market-share-wise I think you're -- market  
10 share of the API market, yes.

11 Q Thank you very much. And let's look at hydrocodone. Same  
12 principal there. When you add on what the market share was for  
13 hydrocodone, it's more than half. Right?

14 A Again, the percentage of API that Noramco supplied, yes.

15 Q Okay. Thank you very much. Now, we talked about  
16 yesterday that supply's an important part. We saw the letter  
17 between PF Laboratories and the supply agreement between  
18 Noramco and PF Laboratories. You recall looking at that  
19 yesterday?

20 A I do.

21 MR. BECKWORTH: Your Honor, may I approach?

22 THE COURT: Yes, you may.

23 Q (By Mr. Beckworth) Ma'am, I'm going to hand you what's  
24 State's Exhibit 2373. And this is a document that was provided  
25 for us by Purdue, and under a stipulation in this case, Purdue

1 has agreed that this is a business record, that -- from their  
2 company. Now, it's redacted because of some confidentiality  
3 issues. I have one sentence that we'll turn your attention to  
4 at the very bottom.

5 MR. BECKWORTH: Your Honor, at this time, we would  
6 offer Exhibit 2373. Do you need a copy, your Honor?

7 THE COURT: I have it here. 2373?

8 MR. BECKWORTH: Yes, sir. I'll just give you that  
9 one, too, just for convenience so you have it.

10 THE COURT: And it's in Stipulation No. 2?  
11 Any objection by the defendants?

12 MR. OTTAWAY: Absolutely. This is a Purdue document.  
13 Relevance and prejudice and we would also reassert the hearsay  
14 objection before.

15 MR. BECKWORTH: Your Honor, do you need me to make a  
16 record on that?

17 THE COURT: No. Consistent with my previous ruling,  
18 I'm going to overrule the defendant's objection and admit  
19 State's Exhibit 2373 into the record.

20 MR. OTTAWAY: Thank you, Judge.

21 THE WITNESS: Judge, is it okay if I reiterate the  
22 fact that I have no knowledge, personal knowledge, of Noramco  
23 and of these dealings?

24 THE COURT: Yes.

25 MR. BECKWORTH: May I approach, your Honor?

1 THE COURT: Yes, you may.

2 MR. BECKWORTH: I wore my turtle tie today because  
3 we're going to have kind of a slow and methodical day but we're  
4 going to have to kind of work through these. So if you'll just  
5 bear with me, we've got a lot to go over. If at any time I'm  
6 going too fast, please let me know.

7 Q (By Mr. Beckworth) This is a letter -- I realize you  
8 haven't seen it before, just want to talk about one thing. But  
9 you see here at the top it's from Michael Friedman. Michael  
10 Friedman was the CEO of Purdue. Did you know that?

11 A No.

12 Q He also was someone who pled guilty to a federal crime  
13 when Purdue pled guilty to itself a felony. Did you know that?

14 A I did not.

15 Q And you see that this is to Mortimer, Raymond, and Richard  
16 Sackler. Do you see that?

17 A I see that, yes.

18 Q Now, if we'll go down, you see it says, Purpose, and the  
19 first line is, To report on sales results and review the  
20 projects and prospects for the balance of 1999. Do you see  
21 that?

22 A I see that.

23 Q Okay. So let's just step back. Yesterday we talked about  
24 how there was correspondence between PF Laboratories and  
25 Noramco about the need to have supply for anticipated business



1 demand. Do you recall going over that yesterday?

2 A I do.

3 Q And you also recall when we read the letter from Mr. Fist  
4 about Tasmanian Alkaloids and its history, one of the things  
5 that he talked about was how the Norman poppy was created to  
6 help in the anticipated growth or need for supply of oxycodone.  
7 Do you recall that?

8 A I remember that, yes.

9 Q And there was also a discussion in the letter with PF  
10 Laboratories and Noramco about how this dialogue about supply  
11 has been going on for many years. Do you recall that?

12 A I do.

13 Q Okay. So if we look here where it says, Report on  
14 Sales --

15 MR. BECKWORTH: And, Mike, if you could scroll up  
16 just a little bit.

17 Q (By Mr. Beckworth) We had to redact this for  
18 confidentiality purposes. This is the only point I need to  
19 make with this. Here at the bottom it says "The principal  
20 barrier to a higher sales achievement before year end is  
21 product supply." Do you see that?

22 A I do.

23 Q Do you agree with me that that's what it says?

24 A It says that. Yes.

25 Q Thank you. So just to kind of close this out, if you're

1 going to make something like OxyContin, you need an active  
2 pharmaceutical ingredient like oxycodone. We've discussed and  
3 established that yesterday, correct?

4 A As far as I know, yes.

5 Q And you know there was a dialogue that went on for many  
6 years between Purdue, PF Laboratories and Noramco about  
7 fulfilling that supply, correct?

8 A Based on the document that we read, we read that, but I  
9 don't know the context of that dialogue.

10 Q Okay. And as you just saw from Purdue's perspective, the  
11 principal barrier in growth for Purdue was supply. We just  
12 read that, correct?

13 A We did.

14 Q Okay. Thank you very much. Now, ma'am, you have worked  
15 for -- is it Janssen or Johnson & Johnson you consider your  
16 actual employer?

17 A Johnson & Johnson.

18 Q And you've worked in various areas of prescription drug  
19 marketing and sales, correct?

20 A I have, yes.

21 Q You understand that when you have a pharmaceutical product  
22 from time to time, the company will use what's called a sales  
23 representative?

24 A Yes.

25 Q Okay. And those are folks that you will hire and then

1 train in a product or a product area that you anticipate  
2 selling, correct?

3 A Correct.

4 Q So with respect to opioids, for example, you made  
5 Duragesic, an Ultram product, a tapentadol product called  
6 Nucynta, all those, correct?

7 A Correct.

8 Q Then you also had Tylenol with codeine, correct?

9 A A long time ago, yes.

10 Q And you had sales representatives, at least with respect  
11 to Ultram, Duragesic and Nucynta, correct?

12 A Correct.

13 Q You used those in states all across the company, correct?

14 A Sales representatives?

15 Q Yes, ma'am.

16 A Yes.

17 Q And oftentimes, those sales representatives would be folks  
18 you just hired right out of college, right?

19 A Rarely right out of college, but sometimes.

20 Q They were not required to be doctors?

21 A There were not, no.

22 Q They were not required to be pharmacists?

23 A They were not, no.

24 Q Often, they had a bachelor of arts and bachelor of science  
25 degree and that was all?

**EXHIBIT 3**

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IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., )  
MIKE HUNTER )  
ATTORNEY GENERAL OF OKLAHOMA, )  
Plaintiff, )

VS

Case No. CJ-2017-816

(1) JOHNSON & JOHNSON; )  
(2) JANSSEN PHARMACEUTICALS, )  
INC.; )  
(3) ORTHO-MCNEIL-JANSSEN )  
PHARMACEUTICALS, INC., )  
n/k/a JANSSEN PHARMACEUTICALS; )  
(4) JANSSEN PHARMACEUTICA, INC. )  
n/k/a JANSSEN PHARMACEUTICALS, )  
INC.; )  
Defendants. )

**PORTIONS OF THE TRANSCRIPT ARE COVERED UNDER THE PROTECTIVE  
ORDER**

**TRANSCRIPT OF PROCEEDINGS  
HAD ON THE 29TH DAY OF MAY, 2019 (AFTERNOON SESSION)  
BEFORE THE HONORABLE  
THAD BALKMAN, DISTRICT JUDGE**

REPORTED BY: Tanya Burcham, CSR, RPR

1 Q. That police officer saved potentially 3.4 million --  
2 no, 4.3 million-something lives. Right?

3 A. Potentially, yes.

4 Q. Yeah. So would you join me in commending the law  
5 enforcement officers of the State of Oklahoma, and thanking  
6 them for being so vigilant and diligent, in those drugs off our  
7 streets? Would you join me, and say, thank you?

8 A. For this specific situation, sure.

9 Q. The chief law enforcement officer for the State is  
10 sitting right here. You were here. You heard what was said  
11 yesterday. We should commend our officers for taking such bold  
12 steps, and being so good at their jobs to keep these deadly,  
13 dangerous drugs off our street. Right?

14 A. Sure.

15 Q. 19 pounds of Fentanyl, that's enough to wipe out an  
16 entire state. Right?

17 A. It appears that way, yes.

18 Q. We have about that much prescription Fentanyl coming  
19 in this state on an annual basis. Did you know that?

20 A. I did not.

21 Q. Hmm. You know what happens when you oversupply  
22 Fentanyl, right?

23 MR. OTTAWAY: Excuse me, Your Honor --  
24 (unintelligible).

25 THE COURT: Sustained.

1 MR. OTTAWAY: Thank you.

2 Q. (By Mr. Beckworth) Now, Johnson & Johnson owns a  
3 company, or used to own a company called Noramco. Right?

4 A. Yes.

5 MR. BECKWORTH: May I approach, Your Honor?

6 THE COURT: Yes, you may.

7 Q. (By Mr. Beckworth) Ma'am, I'm going to approach.  
8 I'll hand you what is 0494. There you go. Thank you.

9 Now, we'll move through this kind of quickly, but Johnson  
10 & Johnson at one time owned a company called Noramco. Right?

11 A. Yes.

12 Q. And here I have a document that was produced in this  
13 case, which is a letter from Noramco, dated October 15, 1998.  
14 Do you see that?

15 A. I do.

16 Q. And if you'll turn to the last page of that  
17 document, that letter is signed by someone from Noramco, named  
18 Michael B. Kindergan. Do you see that?

19 A. I do.

20 Q. Okay.

21 MR. BECKWORTH: Your Honor, at this time, we would  
22 offer State's Exhibit 0494. This is a letter from Noramco that  
23 was produced in this case.

24 MR. OTTAWAY: Again, I object to it, Your Honor.  
25 It's actually a referenced Purdue document.

1 MR. BECKWORTH: That is not correct. It is a  
2 document that is on Noramco of Delaware, Incorporated's  
3 letterhead, which was a wholly-owned subsidiary of Janssen and  
4 Johnson & Johnson in October of -- of 1998.

5 MR. OTTAWAY: If she has personal knowledge of it,  
6 she can talk about it.

7 MR. BECKWORTH: Your Honor, she's a J- --

8 MR. OTTAWAY: Just note my objections, Your Honor.

9 THE COURT: The objection will be overruled.

10 MR. OTTAWAY: Thank you, Your Honor.

11 MR. BECKWORTH: May we publish, Your Honor?

12 THE COURT: 0494 will be admitted, and permitted to  
13 be published.

14 (Exhibit 0494 admitted.)

15 Q. (By Mr. Beckworth) Now, ma'am, if -- we'll just  
16 look at this real quick --

17 MR. BECKWORTH: -- if, Mike, you can blow up the  
18 first part of it?

19 Q. (By Mr. Beckworth) Right here it says, this is to  
20 the vice president of supply management of PF Laboratories.  
21 Now, that's Purdue Frederick. Right? You know that name?

22 A. I know Purdue Frederick.

23 Q. And under the greeting it says, We are pleased to be  
24 working with PF Laboratories on the supply of oxycodone.

25 Do you see that?



1 A. I do.

2 Q. If you go down to the next paragraph it says, We  
3 have made significant progress since our meeting of July 29.  
4 First, we have received the high thebaine CPS from Tasmanian  
5 Alkaloids.

6 Now, do you see that?

7 A. I see that.

8 Q. Now, CPS means concentrated poppy straw. You're  
9 familiar with that term?

10 A. I am not.

11 Q. Ma'am?

12 A. I am not.

13 Q. Okay. I'll represent to you that's what it is;  
14 and if somebody wants to show me I'm wrong later, we can.  
15 Tasmanian Alkaloids was a company that Johnson & Johnson owned  
16 at this time as well. Correct?

17 A. Again, this is so outside of my understanding, that  
18 I -- the timing of this, I have no idea.

19 Q. Well, you understand that you're here in a case  
20 where your company is alleged to have been the supplier of a  
21 significant part of the active pharmaceutical ingredient of  
22 oxycodone and other drugs in the supply chain. Right? You  
23 understand that?

24 MR. OTTAWAY: I object to the form of the question.  
25 She's already testified that Noramco is a subsidiary. There's

1 been no -- Noramco is not a party to this case. It's a  
2 separate company. There's been no allegation. It was part and  
3 parcel. I have no intent to pierce the veil. Its involvement  
4 in this, in this context is improper.

5 MR. BECKWORTH: It's a wholly-owned company.

6 THE COURT: Objection overruled.

7 Go ahead, Mr. Beckworth.

8 Q. (By Mr. Beckworth) Now, ma'am, you understand that  
9 your company also owned Tasmanian Alkaloids. Correct?

10 A. Again, I -- I don't know.

11 Q. Well, here it says that the Tasmanian Alkaloids --  
12 after that part of the sentence, it says, Completed the lab  
13 work and are starting up production based on this material next  
14 week.

15 Do you see that?

16 A. I do.

17 Q. We jump down to the next paragraph. It says, The  
18 capacity expansions are still also on track. First the  
19 Wilmington facility to produce the penultimate and final steps  
20 of oxycodone will be completed by year-end.

21 Do you see that?

22 A. I see that.

23 Q. Second, the engineering for the expansion of our  
24 hydrogenation capacity is well under way.

25 Do you see that?

1 A. I see that.

2 Q. And third, the facility in Athens will be completed  
3 by year-end.

4 Correct?

5 A. I see that.

6 Q. Now, if you jump down to the next one, it says, The  
7 regulatory people got together yesterday.

8 Do you see that?

9 A. Yes.

10 Q. Now, if you'll turn to the next page. You see  
11 there's a heading that says, Thebaine. It says, As discussed  
12 in my letter of August 10th, and the context of a long-term  
13 agreement, Noramco will work with PF Laboratories to secure its  
14 entire world-wide requirements.

15 It says that. Right?

16 A. It says that, yes.

17 Q. Underlined. "Entire" is underlined. Right?

18 A. It is on this copy.

19 Q. "World-wide" is underlined too. Right?

20 A. It is on this copy.

21 Q. Well, what does it say next?

22 A. This is not a minor point. As we have discussed,  
23 access to raw materials is going to be critical to obtain  
24 security of supply.

25 Q. This is not a minor point. It says that right there

1 in black and white, doesn't it?

2 A. It does.

3 Q. Now, if we go down to where it says, Next step, it's  
4 very interesting. You see where it says, We have been  
5 discussing supply of oxycodone for many years now.

6 Do you see that?

7 A. Yes.

8 Q. Well, let's -- we're going to come back to that  
9 later, but I just want to be clear. It says, Many years now.  
10 Right?

11 A. It says that.

12 Q. This document is from 1998?

13 A. Yes.

14 Q. Oxycodone was launched in 1996. Right?

15 A. Yes.

16 Q. Okay. And here it says, The proposal we have made  
17 above involves commitment such as accelerating, bringing  
18 capacity on stream, dedicating capacity to PF Laboratories'  
19 requirements, and changing Tasmanian Alkaloids' cultivation and  
20 extraction strategy. Do you see that?

21 A. I do.

22 Q. Now, let's just stop for a minute, because we're  
23 going to come to this. Right there in black and white for you  
24 and me to see, and Judge Balkman to see, that third bullet  
25 point says, Changing Tasmanian Alkaloids' cultivation and

1 extraction strategy. Right?

2 A. It says that.

3 Q. That comes, in 1998, after they were discussing  
4 supply of oxycodone for many years now. Right?

5 A. That's what it says on this page, yes.

6 Q. Okay. Now if we go down, it says, With a long-term  
7 commitment, Noramco can work to provide even more capacity than  
8 in this proposal that we will give PF Laboratories the maximum  
9 security for supply for its franchise.

10 Do you see that? Are you with me so far?

11 A. I see that.

12 Q. By virtue of having two sources of supply, both  
13 approval compliance track records, and both the  
14 state-of-the-art facilities, and by gaining access to raw  
15 materials on a worldwide basis, which simply cannot be provided  
16 by any company.

17 It says it right there, doesn't it?

18 A. It says that, yes.

19 Q. Would you read for the Court the last sentence,  
20 please, ma'am?

21 A. Of course, we need long-term commitment from PF  
22 Laboratories to be able to provide the support this proposal  
23 envisions.

24 Q. Now, ma'am, I'll show you another document. That's  
25 one --

1 MR. OTTAWAY: Excuse me. Are you going to move for  
2 the admission of this one? All you did was move to publish.

3 MR. BECKWORTH: Just stay with me. We've got this,  
4 Larry. Mr. Ottaway --

5 MR. OTTAWAY: My objection to it is, publishing a  
6 document the witness claims no knowledge of, and then just  
7 having her read it doesn't help the Court, it wastes time.  
8 Particularly when the document is not --

9 THE COURT: I may be partially -- I think I already  
10 granted permission to enter it into the evidence and to  
11 publish. Maybe I wasn't clear on that.

12 MR. OTTAWAY: I note my objection to it being  
13 admitted for the reasons I stated. But simply having the  
14 witness read a document she's not familiar with, I think is a  
15 waste of time, Judge.

16 THE COURT: So noted. Thank you, Mr. Ottaway.

17 MR. OTTAWAY: Thank you.

18 MR. BECKWORTH: I thought I heard you admit it, too,  
19 Your Honor, but sorry if I misheard.

20 May I approach?

21 THE COURT: Yes.

22 Q. (By Mr. Beckworth) I'm going to hand you 1788,  
23 please, ma'am.

24 MR. BECKWORTH: Your Honor, just for purposes of  
25 timing, you said we're going to go a little long today. Are we

1 going to 5:30ish or what does the Court...

2 THE COURT: Yeah. 5:30ish.

3 MR. BECKWORTH: Okay. Perfect. I'll -- I'm gonna  
4 keep --

5 THE COURT: Ish.

6 MR. BECKWORTH: Ish. Got it. Okay.

7 Q. (By Mr. Beckworth) Ma'am, I just handed you a  
8 supply agreement.

9 MR. BECKWORTH: And before we go any further, Your  
10 Honor, we had an agreement with the defendants that some of  
11 these supply agreements we have talked about, we could offer  
12 into evidence but we wouldn't go into a lot of the specific  
13 details. I just want everybody to know I'm not going to. I'm  
14 just going to hit a few things here.

15 THE COURT: So these will not be published?

16 MR. BECKWORTH: They will not be published. That's  
17 correct.

18 THE COURT: Thank you.

19 Q. (By Mr. Beckworth) Ma'am, if you look here, you'll  
20 see a supply agreement, dated December 9, 1998. Do you see  
21 that?

22 A. I do.

23 Q. And do you see it's between PF Laboratories, Inc.  
24 and Noramco? Do you see that?

25 A. I do.

1 Q. And it says that is a division of Ortho-McNeil, Inc.  
2 Correct?

3 A. I see that, yes.

4 Q. Ortho-McNeil is a company owned by Johnson &  
5 Johnson. Correct?

6 A. That is correct.

7 Q. Okay. Now, if you'll turn to page 11 of that  
8 document, you will see that the document is signed by PF  
9 Laboratories, Inc. Do you see that?

10 A. What page?

11 Q. Page 11, 0011.

12 A. Say -- ask your question again.

13 Q. Do you see that it was signed by someone on behalf  
14 of PF Laboratories?

15 A. Yes.

16 Q. And it's -- that person is E.F. Miglarese, the VP of  
17 supply chain management. Correct?

18 A. I see that, yes.

19 Q. And it's countersigned by Noramco, by  
20 Michael B. Kindergan, VP of Administration. Do you see that?

21 A. I see that, yes.

22 MR. BECKWORTH: Your Honor, at this time we would  
23 offer into evidence State's 1788, the December 9, 1998, supply  
24 agreement between PF Labs and Noramco -- sorry -- it's  
25 something that needs to be kept under seal.



1 MR. OTTAWAY: Yes, again, Your Honor, we have an  
2 objection based on relevancy, based on statute 50 O.S. Section  
3 4. It's a document produced by Purdue. It is not kept by  
4 Janssen. It is kept by an independent company, Noramco. It  
5 doesn't come under the exception of hearsay of business records  
6 rule. So for those reasons, we object to it being in.

7 THE COURT: I will overrule the objections, and  
8 State's Exhibit 0494 will be admitted into the evidence, but  
9 under seal.

10 (Exhibit 1788 admitted under seal.)

11 MR. BECKWORTH: Thank you very much, Your Honor.

12 Q. (By Mr. Beckworth) Now, ma'am, we're going to talk  
13 about a few key terms here. I going to be careful not to go  
14 into certain specific quantities. If you'll look at  
15 paragraph 1.5. This document is --

16 THE COURT: Oh, hold on a second. I think I said  
17 the wrong exhibit. I meant State's 1788. Excuse me.

18 MR. BECKWORTH: You're better at this than I am,  
19 Judge. Thank you.

20 Q. (By Mr. Beckworth) Paragraph 1.5 of 1788. Do you  
21 see where it says, Term?

22 A. Yes.

23 Q. It lists a term here of January 1, 1999, terminating  
24 on December 31, 2003. Do you see that?

25 A. I see that, yes.

1 Q. And it goes on to say that, Provided that after that  
2 date the agreement shall renew for additional one-year terms  
3 upon mutual agreement of both parties, unless they're  
4 terminated six months prior.

5 Do you see that?

6 A. I see that, yes.

7 Q. Okay. Now, if you'll look at paragraph two,  
8 Purchase and Sale of Products?

9 A. I see that, yes.

10 Q. It says, During the term of this agreement, Noramco  
11 shall supply PF Laboratories with those quantities of the  
12 product as ordered by PF Laboratories pursuant to this  
13 agreement.

14 Do you see that?

15 A. I see that, yes.

16 Q. Okay. Now, if you'll turn over to the paragraph  
17 labeled five. Do you see that?

18 A. Yes.

19 Q. Okay. There it says, Quantity, and we're not going  
20 to go into it here in open court, but it lists specific  
21 quantities of product that may be provided. Correct?

22 A. It appears that way, yes.

23 Q. Okay. And one that we will list is in 5C, it says,  
24 at the end of Phase 1 to December 31, 2003, it lists very  
25 specific numbers there. Correct?

1 A. Yes, it does. It lists numbers.

2 Q. Okay. Now, if you'll go up to paragraph 3 where it  
3 says, Forecasts and Orders. Part A, it talks about how PF  
4 Laboratories will provide Noramco a forecast of PF  
5 Laboratories' expected requirements for the product for Noramco  
6 for the following 12 months, and it talks about how to do that.  
7 Do you see that?

8 A. I see that, yes.

9 Q. Okay. Now, we're jumping around a little bit.  
10 We're almost done with this document. If you'll turn to  
11 paragraph six on the right-hand side. There's one titled,  
12 Thebaine. Do you see that?

13 A. I do.

14 Q. Okay. It says that, Beginning January 1, 2000,  
15 Noramco and its affiliate, Tasmanian Alkaloids, will use  
16 reasonable commercial efforts to ensure PF Laboratories'  
17 current supplier in the United States, Mallinckrodt, and  
18 McFarlan outside of the United States, will have access to  
19 thebaine in sufficient quantity to produce PF Laboratories'  
20 worldwide requirements for product which are not reserved for  
21 Noramco under the terms of this agreement.

22 Do you see that?

23 A. I do.

24 Q. Okay. So we saw yesterday in the opening statement,  
25 a list of other API manufacturers. Do you remember that?

1 A. I do.

2 Q. And one of them was Mallinckrodt. Do you remember  
3 that?

4 A. I do.

5 Q. And according to this document, when you guys  
6 entered into an agreement to provide product to Purdue  
7 Laboratories, one of the things you also did was agree to  
8 supply Mallinckrodt with thebaine, such that Mallinckrodt could  
9 meet its supply quota to Purdue. Correct?

10 MR. OTTAWAY: Objection to the form of the question.  
11 "You guys" is not specified. If he means Noramco, again, an  
12 independent company.

13 MR. BECKWORTH: I did mean a plural, I apologize, I  
14 meant Noramco and Tasmanian Alkaloids. And y'all was what I  
15 would normally say, but I was trying to do it a little  
16 differently. But you all, Tasmanian Alkaloids and Noramco.

17 THE WITNESS: That is what it says here.

18 Q. (By Mr. Beckworth) Thank you.

19 Now, ma'am, we'll just move on again here. If you'll go  
20 to the very last page, page 11. Do you see that?

21 A. 11?

22 Q. Yes, ma'am. 0011.

23 A. With the signatures?

24 Q. Yes. We went over this earlier. You, being  
25 Noramco, a division of Ortho-McNeil, signed this document, this

1 supply agreement. Correct?

2 MR. OTTAWAY: Again, same objection, Your Honor.

3 THE COURT: So noted.

4 MR. OTTAWAY: Thank you.

5 THE COURT: And overruled.

6 THE WITNESS: Noramco signed this document.

7 Q. (By Mr. Beckworth) Thank you.

8 Now, Tasmanian Alkaloids is in Tasmania. Correct?

9 A. I would guess, yes.

10 Q. We'll help you with that.

11 MR. BECKWORTH: Your Honor, may I approach?

12 THE COURT: Yes, you may.

13 Q. (By Mr. Beckworth) I'm going to hand you State  
14 0006. It's a document I think you may have seen before. We  
15 will go over just a few things today. We will come back to it.

16 You see here at the top of this document, it is  
17 written by A.J. Fist, Tasmanian Alkaloids, PTY LTD, Westbury,  
18 Tasmania. Do you see that?

19 A. I see that, yes.

20 Q. And this document is entitled, A Tasmanian Poppy  
21 Industry: A Case Study of the Application of Science and  
22 Technology. Do you see that?

23 A. I do.

24 Q. Okay. This is a document where Mr. Fist writes  
25 quite a bit about the growth of the Tasmanian poppy industry.

1 Now, if you'll look down to the middle of the first page,  
2 there's a bolded part that says The Tasmanian Poppy Industry.  
3 Do you see that?

4 MR. OTTAWAY: Excuse me, Your Honor. She's [sic]  
5 just having her read from a document that's yet to be admitted  
6 into evidence, to which I have an objection.

7 THE COURT: Mr. Beckworth, I assume you're going to  
8 be asking her questions, subsequent questions from this  
9 document.

10 MR. BECKWORTH: Yes, Your Honor. To get it into  
11 evidence, I probably have to ask a few questions.

12 THE COURT: I'll give you this leeway. Go ahead.

13 MR. BECKWORTH: Thank you, Your Honor.

14 Q. (By Mr. Beckworth) Do you see there where it says,  
15 The Tasmanian Poppy Industry? It says, The Tasmanian poppy  
16 industry is based on the opium poppy.

17 Do you see that?

18 A. I see that, yes.

19 Q. Okay. Now, if you'll turn to page 003. Do you see  
20 that? It begins, Tasmanian Alkaloids was established.

21 A. Yes.

22 Q. Okay. There it says, Tasmanian Alkaloids was  
23 established in 1975 as a joint operation between Abbott  
24 Laboratories and Ciech Polfa. Abbott Laboratories had a  
25 codeine manufacturing plant in Kurnell, and were seeking to

1 establish their own source of raw materials.

2 MR. BECKWORTH: I'll get you spellings on this  
3 later, Miss Tanya.

4 Q. (By Mr. Beckworth) Ciech Polfa was a Polish company  
5 with experience in the cultivation of poppies and extraction of  
6 poppy straw.

7 Are you with me so far?

8 A. I am.

9 Q. We can skip a sentence. This is the important part.  
10 The company was purchased by Johnson & Johnson in 1982, who  
11 moved the codeine plant to the Westbury site.

12 Johnson & Johnson are manufacturers of the Tylenol-range  
13 of pain medication, and purchase of Tasmanian Alkaloids was  
14 made through a reliable source of raw materials.

15 Do you see that?

16 A. I do.

17 Q. Okay. Now, we saw during Dr. Portenoy's testimony,  
18 a blue document that showed that the Johnson Medal was given to  
19 a scientist, Mr. Fist, for creating the Norman strain of poppy.  
20 Do you remember seeing that during his testimony?

21 A. I do.

22 Q. Okay. If you'll turn back to the first page of this  
23 document, you'll see that the author is A.J. Fist. Do you see  
24 that?

25 A. I do.

1 Q. Okay.

2 MR. BECKWORTH: So, Your Honor, at this time we  
3 would offer this as a document written by Tasmanian Alkaloids.  
4 We would offer it into evidence.

5 MR. OTTAWAY: Again, lack of foundation, Your Honor.  
6 Lack of personal knowledge. Hearsay. Relevance. And the  
7 subjects I have raised previously.

8 THE COURT: Thank you, Mr. Ottaway. I'm going to  
9 overrule the objection, and I'm going to allow it to be  
10 admitted into the evidence.

11 MR. BECKWORTH: Thank you, Your Honor. If we could  
12 pull this up, Mike.

13 THE COURT: Permission to publish too.

14 MR. BECKWORTH: Thank you, Your Honor. I'm sorry I  
15 didn't ask permission.

16 THE COURT: That's all right.

17 MR. BECKWORTH: Mike, if you could pull to page 3,  
18 the one we were just on.

19 Q. (By Mr. Beckworth) Look down at the bottom of this  
20 document, you see where it says, Growth of Industry, and then  
21 below it it has this graph, Tasmanian poppy crop area. Do you  
22 see that?

23 A. I do.

24 Q. Okay. This graph shows that the area hectares  
25 involved in the Tasmanian poppy crop, something happened



1 between 1987 and 2000. Do you see that?

2 A. I see that, yes.

3 Q. It went up. And then when we get to 1996, what  
4 happens to it between there and 2000?

5 A. It appears to go up.

6 Q. Sharply?

7 A. It goes up.

8 Q. Okay. Now, if you will turn with me to the page  
9 labeled 006, please. You'll see example 3.

10 MR. BECKWORTH: Mr. Mike, will you blow that up?

11 Q. (By Mr. Beckworth) Do you see where it says,  
12 Development of the thebaine poppy?

13 A. I do.

14 Q. It says, Until 1996, Tasmania was a small producer  
15 of thebaine which was extracted from poppies grown primarily  
16 for morphine.

17 Do you see that?

18 A. I do.

19 Q. Okay. Now, if you'll go down below that graph,  
20 something happens. It says, A research project was established  
21 at Tasmanian Alkaloids in 1994 in order to develop a high  
22 thebaine poppy variety to meet the anticipated demand.

23 Do you see that?

24 A. I do.

25 Q. Now, we just looked at a document a moment ago that

1 was in 1998 that said PF Laboratories and Noramco had been  
2 talking about something for many years. Do you remember that?

3 A. I remember seeing that, yes.

4 Q. Many years. It didn't say how many but it said  
5 many. Right?

6 A. [Nonverbal response.]

7 Q. Correct?

8 A. It did.

9 Q. Okay. Now, if we turn to the next page, 07, we look  
10 to the second paragraph, let's just go over that for a moment.  
11 There we see something. The development of the Norman poppy  
12 coincided with the release of a slow-release formulation of  
13 oxycodone in the USA. Do you see that?

14 A. I do.

15 Q. Oxycodone is used in treatment of strong pain,  
16 mostly in terminally ill patients. The new formulation was  
17 very successful and there was greatly increased demand for the  
18 thebaine raw material used for its manufacture.

19 Do you see that?

20 A. I do.

21 Q. The high demand has caused an increase in crop area  
22 in India as well as the widened growth of thebaine crop area in  
23 Tasmania.

24 Do you see that?

25 A. I do.

1 Q. Now, if you skip down to the next paragraph. Let's  
2 skip two. It says, This innovation, like most of the plant  
3 breeding projects in the poppy industry, had virtually no input  
4 from the public sector.

5 Do you see that?

6 A. I do.

7 Q. The idea is developed from discussions in Tasmania  
8 Alkaloids and Johnson & Johnson research, at J&J company based  
9 in Sydney. It drew on the expertise of analytical chemists,  
10 geneticists and agriculturalists within the companies.

11 Do you see that?

12 A. I do.

13 Q. Now, let's go back up. This new poppy variety is a  
14 major turning point in alkaloid production. For the first  
15 time, thebaine can be produced efficiently without incompetent  
16 production of morphine.

17 Do you see that?

18 A. I do.

19 Q. High alkaloid poppies can be grown without risk of  
20 diversion for illicit purposes.

21 It goes on to say in the next sentence that thebaine can  
22 be converted into codeine, which is currently the largest  
23 volume API produced for opium alkaloids. So perhaps virtually  
24 all of the world's opium alkaloids will eventually come from  
25 poppies having the Norman mutation.

1 Did I read all of that right?

2 A. Yes.

3 Q. Okay. We'll probably come back to this document  
4 over the next few days.

5 Now, we just talked about Dr. Portenoy, and the slide we  
6 had on the Fist medal.

7 MR. BECKWORTH: Your Honor, may I -- may I approach?

8 THE COURT: Yes, you may.

9 Q. (By Mr. Beckworth) Ma'am, I'm going to hand you  
10 State's Exhibit 0340. 0340 is an e-mail from Mike Kindergan,  
11 Noramco. We just saw his name on the supplier agreement.  
12 Correct?

13 A. Yes.

14 Q. And it's to Rick Blockinger at J-A-N-U-S. Correct?

15 A. Yes.

16 Q. And can you tell the Court what J-A-N-U-S means in  
17 your e-mail world there at Johnson & Johnson and Janssen?

18 A. Again, it means Janssen US.

19 Q. Okay. This e-mail is dated May 30th, 2003?

20 A. Yes.

21 Q. And it says, By way of introduction, I am the VP  
22 Worldwide Bulk Analgesics for Noramco. Do you see that?

23 A. I do.

24 Q. Noramco reports -- I can't pronounce these words  
25 very well -- into A-C-H-I-E-L, Ossaer, and Janssen, Belgium and

1 is part of the CMC Group. We have facilities in Wilmington,  
2 Delaware, Athens, Georgia and Tasmania, Australia.

3 Do you see that?

4 A. I do.

5 Q. We are expecting to become qualified suppliers of  
6 Fentanyl from Athens, Georgia, and naltrexone from Tasmania, as  
7 part of the qualification of Block in the Manati facility.

8 I've attached a short presentation summarizing our  
9 involvement in the pain management franchise.

10 Do you see all that?

11 A. I do.

12 Q. And the pain management franchise at Janssen was  
13 what?

14 A. So say that again? What the pain management  
15 franchise is at Janssen?

16 Q. Y'all -- Janssen called something, the pain  
17 franchise, what - what did you mean by pain franchise when  
18 Janssen used those terms?

19 A. Well, in this timeframe, in 2003, the pain franchise  
20 would have been Duragesic.

21 Q. Now, you'll see, if you'll turn to the next page,  
22 there's a PowerPoint attached to this e-mail. Right?

23 A. Yes.

24 Q. And on it it says, Organizational Alignment. Do you  
25 see that?

1 A. I do.

2 Q. At the top, it lists something, what does it list?

3 A. Johnson & Johnson.

4 Q. And then under that it says, World Wide?

5 A. World Wide Chemical Production.

6 Q. If we go under there, we see Janssen on one side and  
7 Noramco on the other side. Correct?

8 A. Yes.

9 Q. And under Noramco, we see Tasmanian Alkaloids and  
10 two additional Noramco entities. Correct?

11 A. Correct.

12 MR. BECKWORTH: Your Honor, at this time we would  
13 offer State's Exhibit 0340 for the record. And ask it be  
14 published.

15 MR. OTTAWAY: Again, Your Honor, I don't want to  
16 stand up and repeat these objections all the time. This proves  
17 the point that Noramco is a separate entity and we filed a  
18 motion in limine on this at No. 4. We move on the basis of  
19 relevance and for all those reasons, but can I just have a  
20 continuing objection on that?

21 MR. BECKWORTH: We're happy --

22 MR. OTTAWAY: We already talked about it.

23 MR. BECKWORTH: We're happy to do that, if Your  
24 Honor's okay with it. Sure.

25 THE COURT: I'm going to overrule the defendant's

1 objection, and allow for State's Exhibit 0340 to be admitted  
2 into evidence and permission to publish.

3 (Exhibit 0340 admitted.)

4 MR. BECKWORTH: Thank you, Your Honor. And I'm  
5 happy to give them a running objection if you want to.

6 THE COURT: Yes.

7 MR. OTTAWAY: I think we already established that,  
8 but I'm trying it make a point. Thank you. Did I make the  
9 point, Mike?

10 MR. BURRAGE: You did.

11 MR. OTTAWAY: All right. Thank you very much.

12 Q. (By Mr. Beckworth) So let's just look here at this  
13 slide, Organizational Alignment. Ma'am, you see right there,  
14 at the top of this decision tree, or whatever you might want to  
15 call it, red and white, is what?

16 A. Johnson & Johnson.

17 Q. Okay. Thank you.

18 Now, we're going to go through this just real  
19 quickly. If you'll turn to the next page. It says, Noramco  
20 has three franchises. Do you see that?

21 A. I see that, yes.

22 Q. And there, at the second yellow line, it says,  
23 Opiate, narcotic, raw materials/API's. Do you see that?

24 A. I do.

25 Q. It says, Only global, vertically integrated company.

1 Do you see that?

2 A. I do.

3 Q. Now, we heard a lot in opening statement about DEA.

4 MR. BECKWORTH: Mike, can you blow up the next one  
5 for us?

6 Q. (By Mr. Beckworth) I've been over this document a  
7 dozen times and I was sitting here this afternoon looking at it  
8 one last time and I never noticed this before until it came up  
9 at this very phase.

10 MR. OTTAWAY: Your Honor, again, I make an  
11 objection. If he has a question, a question, but not...

12 THE COURT: He's getting to the question, correct,  
13 Mr. Beckworth?

14 MR. OTTAWAY: I haven't heard a question mark at the  
15 end of it yet.

16 THE COURT: It's coming.

17 MR. BECKWORTH: I -- I got it, Your Honor.  
18 Sometimes I like to have a conversation. We'll just get to it.

19 Q. (By Mr. Beckworth) Right here it says, Have played  
20 a significant role influencing INCB, comma, DEA, policies.

21 Do you see that?

22 A. I see that, yes.

23 Q. Now, that word is "influencing." Do you see that?

24 A. I see that, yes.

25 Q. That is not my word, is it?



1 A. It is not.

2 Q. Okay. But it is there?

3 A. It is there, yes.

4 Q. Okay. Now, if you'll turn to the next page. It  
5 lists Pain Management APIs. Do you see that?

6 A. Yes.

7 Q. And it lists quite a few, doesn't it?

8 A. It does, yes.

9 Q. Oxycodone hydrochloride. Codeine, morphine sulfate.  
10 Hydrocodone. Oxymorphone and others. Right?

11 A. Yes.

12 Q. Okay. Now, if you'll turn two more pages, we'll see  
13 a picture of Tasmanian Alkaloids.

14 Now, there's a poppy field on the left and I guess a  
15 facility on the right. And at the top it says, Tasmanian  
16 Alkaloids, The Poppy is the Foundation of the Opiates Business.  
17 Do you see that?

18 A. I see that, yes.

19 Q. If we go to the next page, we see what Dr. Portenoy  
20 was talking about. Here, we have a statement: Tasmanian  
21 Alkaloids Leads the World in Poppy Technology.

22 Do you see that?

23 A. I see that, yes.

24 MR. OTTAWAY: Again, objection to the form of the  
25 question. I don't recall Dr. Portenoy saying that. If he

1 wants to ask a question, he should just ask the question.

2 THE COURT: Sustained.

3 MR. OTTAWAY: Thank you.

4 Q. (By Mr. Beckworth) Ma'am, you see at the top what  
5 it says. Right?

6 A. I see what it says.

7 Q. Okay. Read for the Court what -- what it says under  
8 the poppy technology part, that first two sentences.

9 A. Starting with "patented"?

10 Q. Yes, ma'am.

11 A. Patented high thebaine poppy was a transformational  
12 technology that enabled the growth of oxycodone. Dr. Fist was  
13 awarded the Johnson Medal.

14 Q. Patented high thebaine poppy was a transformational  
15 technology.

16 Now, we just looked, a moment ago, that PF Laboratories  
17 and Noramco entered into a long-term supply agreement. Right?

18 A. Correct.

19 Q. And the letter that preceded that talked about how  
20 PF Laboratories and Noramco have been talking for a long time  
21 about supply needs. Right?

22 A. It talked about that, yes.

23 Q. And we just looked at selections from the Fist  
24 letter, that said they started developing this poppy as early  
25 as 1994, I believe it was, in anticipation of oncoming demand.

1 Do you see that? Do you remember that?

2 A. They were in development of that poppy, I remember  
3 seeing that.

4 Q. And here we go, we have this award, the Johnson  
5 Medal being given to the man that wrote that article for  
6 creating a poppy that was transformational technology that  
7 enabled the growth of oxycodone. Right?

8 A. It says that here.

9 Q. Okay. Thank you. I think we're done with that  
10 document, ma'am.

11 MR. BECKWORTH: Your Honor, may I approach?

12 THE COURT: Yes, you may.

13 Q. (By Mr. Beckworth) 1048, ma'am. Mr. Ottaway and I  
14 were just joking. He said, Please tell me we're not going to  
15 read this whole document. I promise you, we won't. I have a  
16 few questions about it, and then over the next few days, we may  
17 get into it in a little more detail.

18 This document says, Noramco World Wide Narcotics  
19 Franchise on the top. And it says, Overview prepared for the  
20 sale of Noramco World Wide Narcotics Franchise, Global Product  
21 Portfolio, including Noramco, Wilmington, Tasmanian Alkaloids  
22 and Athens Technical Center.

23 Do you see that?

24 A. I do.

25 MR. BECKWORTH: Now, Your Honor, at this time we

1 would offer 1048. This is a document created by Noramco in  
2 anticipation of its potential sale.

3 THE COURT: I'll recognize the defendants'  
4 continuing objection and overrule it.

5 MR. OTTAWAY: Thank you, Your Honor. That's much  
6 easier.

7 THE COURT: I will admit State's 1048 into evidence  
8 and permission to publish.

9 (Exhibit 1048 admitted.)

10 MR. BECKWORTH: Yes, Your Honor. I'm going to get  
11 through this document. If you can give me about a five-minute  
12 warning, we have one thing we need to do today before you  
13 break. So --

14 THE COURT: Okay.

15 MR. BECKWORTH: -- if you'll just let me know when  
16 we're there and we'll move to another area.

17 Q. (By Mr. Beckworth) So on page 5, it says, Strategic  
18 Rationale for Seller. Do you see that?

19 It says, Johnson & Johnson is exploring the sale of the  
20 global narcotics business for the following reasons: J&J  
21 strategy no longer includes narcotic analgesics.

22 Do you see that?

23 A. I do.

24 Q. Okay. If you'll turn to the next page, it says,  
25 Opportunity For Purchaser. It says, Acquire the No. 1 supplier

1 of narcotic APIs in the United States, the world's largest  
2 market.

3 Do you see that?

4 A. I do.

5 Q. And if you go down to the fourth line, it says,  
6 Become a key supplier to the world's largest multi-source  
7 generics. Do you see that?

8 A. I see that, yes.

9 Q. Now, if you will turn to page 7, the next page, it  
10 lists some examples there of the global product portfolio. And  
11 there, at the top, we see oxycodone. And beside it, it lists a  
12 representative brand and one of them is OxyContin; one is  
13 Percocet. And one is Roxycodone. Do you see that?

14 A. I do.

15 Q. And it shows Net Trade Sales out here of 94 million  
16 in 2014. Do you see that?

17 A. I do.

18 Q. On the left it says, hydrocodone, Vicodin, Lortab.  
19 And it shows 52 million in that trade sales. Do you see that?

20 A. I do.

21 Q. And there's others listed. Correct?

22 A. Yes.

23 Q. Okay. Now, if you'll turn with me, please, a few  
24 more, to page 18. There, it says, Over 80 percent of Noramco  
25 sales are via long-term supply agreements. Do you see that?4.

1 I would be happy to help you, if you don't mind.

2 A. I see that, yes.

3 Q. Okay. It says, Noramco has long-term agreements  
4 and/or majority-controlled substance share with all seven of  
5 the top US generic companies. Do you see that?

6 A. I do.

7 Q. And then it talks about typical supply agreement  
8 terms. And one of the things it says is they cover multiple  
9 controlled substances, products or more. And then it goes on  
10 to say that the agreements are for -- for more than 80 percent  
11 of a customer's volume. You see that?

12 A. I do.

13 Q. Now, you know that one of the products that Teva  
14 sold was a generic version of OxyContin, that it branded with  
15 Purdue. Did you know that?

16 A. I did not.

17 Q. Okay. Now, if you'll turn to the next page, I'll do  
18 two more real quick. You'll see that --

19 MR. BECKWORTH: One more, Mike.

20 Q. (By Mr. Beckworth) -- there we have a graph that  
21 says North America accounts for a very large part of global --

22 MR. BECKWORTH: I think we're on the wrong page,  
23 Mike. Go one more. There we go.

24 Q. (By Mr. Beckworth) You'll see a graph that y'all --  
25 that y'all created. It says, North America is 47 percent of

1 global consumption and is the key controlled-substance market.

2 Do you see that?

3 A. I do.

4 Q. And over on the right-hand side --

5 MR. OTTAWAY: Excuse me, Brad, I don't mean to --  
6 the form of the question (unintelligible) --

7 THE COURT: Are you referring to the Johnson &  
8 Johnson and Janssen defendants?

9 MR. BECKWORTH: Your Honor, I will stipulate that I  
10 am referring to Johnson & Johnson and Janssen. And then in  
11 this instance, their subsidiary is Noramco and Tasmanian  
12 Alkaloids. I can break it down if you'd like. It's just  
13 odd --

14 MR. OTTAWAY: But for my -- for purposes of the  
15 record, if he's referring to Noramco, he should say so, just  
16 for purposes of the record.

17 THE COURT: Thank you.

18 MR. BECKWORTH: Sure.

19 Q. (By Mr. Beckworth) So I screwed up, in the country  
20 a little bit, it's hard to talk a different way.

21 This one says 82 percent of the world's oxycodone, do you  
22 see that, is consumed in North America?

23 A. I see that.

24 Q. 99 percent of the hydrocodone, 99 percent of the  
25 oxymorphone, 79 percent of the hydromorphone. Do you see all

1 of those?

2 A. I do.

3 Q. Okay. Now, if you'll turn with me to the next page.  
4 There, Noramco lists: Steady growth from 2013 through '15. Do  
5 you see that?

6 And it shows the growth of the percentage share of  
7 oxycodone API, in those three years, growing from 55 to 65  
8 percent. Do you see that?

9 A. I do.

10 Q. No. 1 rank, do you see that?

11 A. I do.

12 Q. Hydrocodone, No. 1 rank. Do you see that?

13 A. I do.

14 Q. Going from 48 up to 54 percent. Correct?

15 A. I see that, yes.

16 Q. Okay. Thank you.

17 Now, if you'll turn to page 33. I think it will be  
18 the last one we cover. Oh, we have one more after this.

19 This is Wilmington API Volume Growth. You can just -- it  
20 speaks for itself. You can see that from 2006 to 2019, the  
21 growth of volume grew on a steady, upward curve according to  
22 Noramco. Correct?

23 A. The title says, The API Volume Growth.

24 Q. And you see that graph going up from the left to the  
25 right from 2006 to 2019?



1 A. I do, yes.

2 Q. Now, the last one will be on page 48. Mr. Fist, who  
3 got this medal, created the Norman strain of poppy. Here we  
4 see something titled, The Value of Agricultural Research. Do  
5 you see that?

6 A. Yes.

7 Q. It says, Narcotic raw material is the single biggest  
8 contributor to API costs.

9 A. I see that.

10 Q. Tasmanian Alkaloids has increased the alkaloid  
11 content by 300 percent over the last 15 years.

12 A. It says that, yes.

13 Q. And we see a graph showing that the percent thebaine  
14 and poppy average has done something from 1999 to 2015.

15 Has it gone up or has it gone down?

16 A. The percent thebaine in poppy has gone up.

17 Q. Okay. And I'm going to correct the record. My  
18 colleagues told me I said something wrong. Earlier, I was  
19 talking about that medal. I -- I called it a Noramco medal.  
20 Mr. Fist received the Johnson Medal, not a Tasmanian or Noramco  
21 medal. Thank you. Okay. We're done with that document.

22 THE COURT: I think we should just call it quits for  
23 today.

24 MR. BECKWORTH: Your Honor, we have --

25 MR. OTTAWAY: Excuse me, Your Honor, I would like to

1 approach the bench for just a second.

2 THE COURT: Okay. Come on up.

3 (The following bench conference was had:)

4 MR. OTTAWAY: I know that Mr. Burrage would not  
5 sanction, and Mr. Beckworth would not do an in-Court stunt like  
6 asking for five minutes to bring in a bunch of boxes with call  
7 notes in front of the media, that they can just as soon bring  
8 in tomorrow and have here.

9 So if that's the plan, I object to it.

10 MR. BECKWORTH: I've got to bring in the call notes.

11 MR. OTTAWAY: You can bring them in after we recess.

12 THE COURT: I think people have already seen the  
13 boxes. They're out in the hallway.

14 MR. OTTAWAY: Yes. Bringing them in here on a TV  
15 camera is just a stunt. Your Honor is correct. We should just  
16 adjourn, and let them do it, and have them here tomorrow.

17 MR. BECKWORTH: Your Honor, I asked to not have to  
18 do it, and they objected, and I have spent \$40,000 making the  
19 copies that they demanded we do.

20 MR. WHITTEN: That is true.

21 MR. BECKWORTH: That is absolutely true. You  
22 objected to it. I asked not to do it.

23 MS. STRONG: Of exhibits that are going to be used  
24 with the witnesses, are you going to use -- how many boxes are  
25 you going to use?

# **EXHIBIT 4**

2014 WL 4983912  
United States District Court, M.D. Florida,  
Tampa Division.

INDUSTRIAL ENGINEERING &  
DEVELOPMENT, INC., et al., Plaintiffs,  
v.  
STATIC CONTROL  
COMPONENTS, INC., Defendant.

No. 8:12-cv-691-T-24-MAP.

Signed Oct. 6, 2014.

#### Attorneys and Law Firms

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#### ORDER

SUSAN C. BUCKLEW, District Judge.

\*1 This cause comes before the Court on a Motion *in Limine* filed by Plaintiffs Industrial Engineering & Development Inc., Innovative Cartridge Technologies, Inc., Cartridge Corporation of America, Inc., American Imaging Cartridge, LLC, and Universal Imaging Holdings, LLC. (Dkt.205) Defendant Static Control Components, Inc. opposes. (Dkt.233)

#### I. BACKGROUND

On March 30, 2012, Plaintiffs filed a one-count complaint against Static, alleging Static breached a cross-license agreement by failing to pay royalties for products that infringed on Plaintiffs' patents. Static filed counterclaims and affirmative defenses alleging, *inter alia*, that several claims of patents owned by Plaintiffs—U.S. Patent No.

7,187, 874 ('874 patent); U.S. Patent No. 7,551,859 ('859 patent); and U.S. Patent No. 7,356,279 ('279 patent)-are invalid. (Dkt.25) According to Static, various products offered by Static and Lexmark International qualify as invalidating prior art because they preceded Plaintiffs' patents and anticipated Plaintiffs' patent claims.

In May 2013, Plaintiffs filed an Amended Complaint to add Count II, seeking a declaratory judgment that patents owned by Static—U.S. Patent No. 7,088,928 ('928 patent) and U.S. Patent No. 7,254,346 ('346 patent)-are invalid. (Dkt.86)

In May 2014, Plaintiffs filed a motion for summary judgment as to Count II, arguing that the parties were contractually barred from challenging the validity of each other's patents and therefore Count II, along with several of Static's counterclaims and defenses, should be dismissed. Plaintiffs alternatively argued that, should Count II remain in this case, summary judgment should be granted in their favor because Static's patents were invalid as anticipated. (Dkt. 153 at 26–33) According to Plaintiffs, Steven Miller had previously distributed a “demonstration” or prototype universal chip at an industry trade show in April 2004 (“Demo Chip”), which was an embodiment of inventions that were previously conceived by Miller and found in his notes (“Miller's inventor notes”). Plaintiffs asserted that the Demo Chip and Miller's inventor notes preceded Static's patents and anticipated Static's patents.

In June 2014, Plaintiffs filed numerous evidentiary motions, including this motion *in limine*, which seeks to: (1) exclude testimony from Benjamin Newman, a Lexmark employee who was designated as Lexmark's corporate representative for a deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure; (2) exclude testimony from Michael Shelby, a Static employee who was designated as Static's corporate representative for a Rule 30(b)(6) deposition; (3) preclude Static from challenging the authenticity of Miller's inventor notes; (4) exclude any document not produced in discovery; (5) exclude any testimony from or reference to David Abraham; (6) preclude Static from offering duplicative expert testimony; and (7) exclude testimony regarding the alleged theft of Static's code. A hearing on Plaintiffs' motion for summary judgment and motion *in limine* was held on August 12, 2014.

\*2 In August 2014, the Court ruled on Plaintiffs' motion for summary judgment. (Dkt.243) The Court dismissed Count II, finding that Plaintiffs were contractually barred from filing it. (*Id.*) The Court subsequently directed the parties to confer and identify any pending evidentiary motions that were mooted by the Court's summary judgment order. (Dkt.244) In response, the parties disagreed as to whether any portions of the instant motion—particularly, Plaintiffs' arguments regarding Miller's inventor notes—are moot. Plaintiffs contend their arguments regarding Miller's inventor notes are not moot because they may introduce the notes at trial:

Plaintiffs initially believed that [these arguments] were indeed mooted by this Court's [summary judgment] [o]rder preventing Plaintiffs from challenging the validity of [Static's] patents. However, [Static] disagreed because Plaintiffs may wish to introduce the notes and/or [Demo Chip] at trial, such as for development background and/or in response to [Static's] invalidity contentions [regarding Plaintiffs' patents]. Thus, because Plaintiffs are not willing to agree not to use the notes and/or [Demo Chip] at trial, these motions are not moot.

(*Id.*) Trial is set to begin on November 10, 2014.

## II. TESTIMONY FROM BENJAMIN NEWMAN

During a deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Benjamin Newman—a Lexmark employee designated as Lexmark's corporate representative—testified as to facts relating to Static's allegation that Plaintiffs' patents are invalid as anticipated by products sold by Lexmark International. Specifically, Newman testified about the functionality of various Lexmark products at the time they were offered for sale. However, Newman testified that his knowledge of such facts was based on information that Lexmark employees had pulled from various Lexmark databases. Plaintiffs contend (and Static does not dispute) that the database

records upon which Newman's Rule 30(b)(6) deposition testimony relied were not produced during discovery or Newman's deposition.

In the instant motion, Plaintiffs seek to preclude Newman from testifying at trial regarding the functionality and offer dates of Lexmark's products, arguing that Newman's testimony: (a) constitutes inadmissible hearsay; and (b) violates would the best evidence rule.

### A. Hearsay

Plaintiffs contend Newman's Rule 30(b)(6) deposition testimony regarding the functionality and offer dates of Lexmark's products was not based on his personal knowledge and was "hearsay upon hearsay." In response, Static asserts that Newman's Rule 30(b)(6) testimony was proper, because he need not have personal knowledge to testify about matters that are "particularly suitable" for Rule 30(b)(6) testimony. Citing *Sara Lee Corp. v. Kraft Foods, Inc.*, 276 F.R.D. 500 (N.D.Ill.2011), Static appears to argue that Newman's testimony regarding dates and functionality are matters within Lexmark's "corporate knowledge," as that concept is embodied in Rule 30(b)(6), and therefore the personal knowledge requirement set forth in Rule 602 of the Federal Rules of Evidence would be satisfied or can be disregarded at trial.

\*3 Plaintiffs' argument for excluding Newman's testimony at trial is based on his Rule 30(b)(6) deposition testimony. However, as pointed out by Static's counsel at the August 12, 2014 hearing, Plaintiffs' motion assumes that Newman's trial testimony will match his Rule 30(b)(6) deposition testimony. The Court will not make this assumption. Without the context of trial, the Court cannot rule on issues regarding the foundation for admitting Newman's testimony at trial. Accordingly, to the extent Plaintiffs seek to exclude Newman's trial testimony regarding the functionality and dates of Lexmark's products as inadmissible hearsay, Plaintiffs' motion *in limine* is **DENIED** without prejudice to Plaintiffs raising an objection at trial.

Nevertheless, the Court will address the parties' arguments as to whether Newman's testimony would be inadmissible at trial, where the Lexmark records upon which Newman's Rule 30(b)(6) deposition testimony relied are not introduced into evidence. The purpose of Rule 30(b)(6) is to streamline the discovery process by allowing for a specialized form of deposition for corporations.

See *Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir.1993). Rule 30(b)(6) allows a party to issue a notice for a corporation's deposition, "describ[ing] with reasonable particularity the matters for examination." Fed.R.Civ.P. 30(b)(6). The corporation must designate one or more persons to "testify on its behalf" at the deposition "as to the matters known or reasonably available to the organization." *Id.* In other words, the Rule 30(b)(6) deponent testifies "vicariously" for the corporation regarding matters within the corporation's knowledge. *Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir.1993).

Rule 30(b)(6) does not require the Rule 30(b)(6) deponent to have personal knowledge of the matters to which he testifies; this is because a Rule 30(b)(6) deponent presents the knowledge, opinions, or positions of the corporation, not of the deponent. However, if the Rule 30(b)(6) deponent lacks personal knowledge, the corporation must educate the deponent so that he is prepared to testify knowledgeably about matters within organization's corporate knowledge. Preparing the deponent includes providing him with documents, present or past employees, or other sources of information to review.

Given the Rule 30(b)(6) framework, Newman's deposition testimony regarding matters within Lexmark's corporate knowledge was proper, even though it was based on information from Lexmark records or Lexmark employees, rather than his personal knowledge. But this does not mean Newman may testify at trial as to matters that are not within Newman's personal knowledge and are hearsay. While Rule 30(b)(6) permits Newman's deposition testimony to be based on matters outside his personal knowledge, Rule 602 limits his trial testimony to matters that are within his personal knowledge. Fed.R.Evid. 602; see also *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & of Malta v. Fla. Priory of Knights Hospitallers of Sovereign Order of Saint John of Jerusalem, Knights of Malta, Ecumenical Order*, 702 F.3d 1279, 1295 (11th Cir.2012) (holding the district court erred when it permitted a lay witness—the head of an organization—to testify at a bench trial about the organization's history where the witness had no personal knowledge of the historical facts to which he testified).

\*4 The case, *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 Fed. Appx. 899 (5th Cir.2010), is illustrative.

*Union Pump* involved Union Pump's cause of action for spoliation of evidence against the defendant. *Id.* at 904. At trial, Union Pump's corporate representative, Mike Bixler, was allowed to testify about matters that were hearsay and not within his personal knowledge:

Bixler ... testif[ie]d] to facts that Union Pump learned during a series of internal investigations. Bixler did not conduct the investigations or have any role in them, no written reports were issued as a result of the investigations, and Bixler learned of the facts he testified to solely through conversations with others.

*Id.* at 907. The defendants appealed, arguing that a new trial was warranted because the district court improperly admitted "Bixler's testimony regarding facts that he learned through other people at the company." *Id.* Union Pump opposed, arguing that Bixler's testimony was properly admitted because "Bixler was permitted to testify to matters that, although they were not within his own personal knowledge, were within the knowledge of the corporation because Bixler was designated as Union Pump's corporate representative." *Id.* The Fifth Circuit rejected Union Pump's argument, explaining that Rule 602 "limits the scope of a witness's testimony to matters that are within his or her personal knowledge." *Id.* Despite Rule 30(b)(6) and the rules governing the use of such deposition testimony at trial, the Fifth Circuit found that a corporate representative is not permitted to provide hearsay testimony at trial:

Federal Rule of Civil Procedure 30(b)(6) allows corporate representatives to testify to matters within the corporation's knowledge during deposition, and Rule 32(a)(3) permits an adverse party to use that deposition testimony during trial. See *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir.2006). However, a corporate representative may not testify to matters outside his own personal knowledge "to the extent that information [is] hearsay not falling within one of the authorized exceptions." *Id.* at 435.

*Id.* at 907–08.

Thus, Rule 30(b)(6) does not eliminate Rule 602's personal knowledge requirement.<sup>1</sup> At trial, Static must establish the dates and functionality of Lexmark's products using admissible evidence. Such evidence may include Lexmark's records reviewed by Newman (assuming the records are properly authenticated and a proper foundation is laid); however, it does not include testimony from a witness who lacks personal knowledge.

<sup>1</sup> Because of Rule 602's personal knowledge requirement, the Court declines to adopt the approach set forth in *Sara Lee Corp. v. Kraft Foods, Inc.*, 276 F.R.D. 500 (N.D.Ill.2011), which held that a non-party designee's Rule 30(b)(6) deposition testimony may be admissible.

### **B. Best Evidence Rule**

Plaintiffs argue that, unless Static introduces the Lexmark records upon which Newman's testimony relies, Rule 1002 of the Federal Rules of Evidence bars Newman's testimony regarding the functionality and offer dates of Lexmark products. Plaintiffs contend Static is offering Newman to testify as to the content of Lexmark's records and is therefore required to introduce the records themselves. In response, Static argues that Rule 1002 does not require introducing the records, because Newman's testimony is being offered to prove the products' offer dates or functionality, not to prove the particular contents of any database record.

\*5 Under the best evidence rule, "the production of the original document is required to prove the contents of a writing." Fed. R. Evi. 1002. Determining whether testimony is being offered to prove the contents of the writing may depend on whether the witness's testimony is based on his personal knowledge of the event. *Simmons v. Allsteel, Inc.*, 1999 WL 1045214, at \*2 n. 6 (N.D.Ill.Nov.12, 1999) ("[T]he relevant question is whether Cosgrove's testimony proves an event from his firsthand knowledge of the event. If so, Rule 1002 does not apply. If Cosgrove's testimony goes to the contents of the leases or seeks to prove an event from his familiarity with the leases, Rule 1002 applies."). Specifically, "[i]f a witness's testimony is based on his first-hand knowledge of an event as opposed to his knowledge of the document, however, then Rule 1002 does not apply." *Waterloo Furniture Components, Ltd. v. Haworth, Inc.*, 467 F.3d 641, 648-49 (7th Cir.2006) (citing *Simmons v.* 1999 WL 1045214, at \*2). As one court explained:

The question is whether Hastings' [the plaintiff's former employee's] testimony would tend to prove an event from Hastings' firsthand knowledge of that event. If so, Hastings' testimony is not covered by Rule 1002. However, if Hastings' testimony goes to the contents of financial documents, or seeks to prove an event from Hastings' familiarity with documents recording the event, Rule 1002 bars his testimony.

*Middleby Corp. v. Hussmann Corp.*, 1993 WL 151290, at --- 14-15 (N.D.Ill. May 7, 1993) (holding the witness's testimony sought to prove an event from the written record because the witness's testimony was based on his review of unproduced records, rather than his personal knowledge, and was therefore barred by Rule 1002); see also *Waterloo*, 467 F.3d at 648-49 (the district court did not abuse its discretion in denying the plaintiff's motion to strike affidavit testimony regarding a settlement agreement because the affiant's statements were based on his personal knowledge of the settlement negotiations, not on his knowledge of the settlement agreement).

Unless Newman has personal knowledge obtained independently of any unproduced writing, Rule 1002 would bar Static from offering Newman's testimony as to the functionality and sales dates of Lexmark products where the relied-upon written records are not introduced. However, given that Static could seek to introduce the Lexmark records at trial, Plaintiffs' pretrial motion to exclude Newman's testimony on the basis of the best evidence rule is premature. Accordingly, to the extent Plaintiffs seek to exclude Newman's trial testimony regarding offer dates and functionality of Lexmark's products as inadmissible under Rule 1002, Plaintiffs' motion *in limine* is **DENIED** without prejudice to Plaintiffs raising any objections at trial.<sup>2</sup>

<sup>2</sup> Further, Plaintiffs contend Newman could neither sufficiently identify the records he reviewed nor distinguish between a product's announce date and the date that a product was offered for sale.

However, these are issues that go to credibility, not admissibility.

### III. TESTIMONY FROM MICHAEL SHELBY

Michael Shelby is a Senior Hardware Engineer employed by Static since 2005. Static designated Shelby as its corporate representative for Static's Rule 30(b)(6) deposition, which was taken on March 13, 2014. (Dkt.189) Shelby submitted a declaration, dated May 12, 2014, asserting various facts regarding the offer dates and functionality of Static's products in 2002 to 2005. (Dkt. 155 at ¶¶ 8-17) In their motion *in limine*, Plaintiffs seek to preclude Shelby from testifying about these facts.

#### A. Hearsay and Best Evidence Rule

\*6 Plaintiffs' arguments for excluding Shelby's testimony mirror their arguments for excluding Newman's testimony. Specifically, Plaintiffs contend Shelby's testimony constitutes inadmissible hearsay and violates the best evidence rule, asserting that Shelby's testimony is based on his review of Static's records, not his personal knowledge of Static's products.

In response, Static contends Plaintiffs' arguments for excluding Shelby's trial testimony should fail for the same reason that Plaintiffs' arguments for excluding Newman's trial testimony should fail. Specifically, Static asserts that Shelby properly testified to matters of "corporate knowledge" during his Rule 30(b)(6) deposition, and that the best evidence rule does not apply because Shelby's testimony is not offered to prove the contents of any particular record.

Given that the parties' arguments regarding Shelby are the same as their arguments regarding Newman, the Court adopts its reasoning set forth above in its rulings regarding Newman. Accordingly, to the extent Plaintiffs seek to exclude Shelby's trial testimony regarding the offer dates and functionality of Static's products as inadmissible because it is hearsay, the Court cannot rule without the context of a trial and Plaintiffs' motion *in limine* is **DENIED** without prejudice to Plaintiffs raising any objections at trial. However, Shelby's testimony in his capacity as a fact witness must be based on personal knowledge, because Rule 30(b)(6) does not eliminate Rule 602's personal knowledge requirement.

Further, to the extent Plaintiffs seek to exclude Shelby's trial testimony regarding the offer dates and functionality

of Static's products as inadmissible under the best evidence rule, Plaintiffs' motion *in limine* is **DENIED** without prejudice to Plaintiffs raising any objections at trial. However, it is the Court's position that, unless Shelby has personal knowledge obtained independently of any unproduced writing, Rule 1002 would bar Static from offering Shelby's testimony as to the functionality and offer dates of Static's products where the relied-upon records are not introduced.

#### B. Documents Relied Upon by Shelby

Plaintiffs also argue that, even if the documents upon which Shelby's Rule 30(b)(6) deposition relied were available to be introduced at trial, they should be excluded because Static failed to produce those documents during discovery or Shelby's deposition. In response, Static asserts that it did not preclude Plaintiffs from seeing any of the relied-upon documents. According to Static, Plaintiffs could have requested the relied-upon documents during discovery, but Plaintiffs chose to not request those documents as part of their strategy "to play a game of admissibility 'gotcha.'" (Dkt. 233 at 7)

However, the Court will not grant a blanket motion to *in limine* out all documents that were relied upon by Shelby during his deposition but that were not produced during discovery. Accordingly, Plaintiffs' motion *in limine* as to this issue is **DENIED** without prejudice to Plaintiffs raising any objections at trial, should Static seek to introduce documents that were relied upon by Shelby and that should have been produced during discovery but were not.

\*7 Further, Plaintiffs assert that Shelby is not Static's records custodian. (Dkt. 205 at 9) Plaintiffs appear to argue that Shelby cannot lay the foundation for admissibility of Static's records under Rule 803(6) of the Federal Rules of Evidence because he is not a records custodian. However, testimony from a records custodian is not the sole method for establishing the foundation for admissibility under Rule 803(6). *See Fed.R.Civ.P.* 803(6) ("testimony of the custodian or another qualified witness"). Accordingly, to the extent Plaintiffs seek to exclude the relied-upon records as inadmissible under Rule 803(6), Plaintiffs' motion is **DENIED** without prejudice to Plaintiffs raising any objections at trial.



#### IV. AUTHENTICITY OF MILLER'S INVENTION NOTES

In Count II of their Amended Complaint, Plaintiffs alleged that Static's patents are invalid. Plaintiffs' motion *in limine* asserts that “[s]hould invalidity continue to be an issue in this case, then Plaintiffs will rely on [Miller's inventor] notes in [their] invalidity claims against ... Static's patents.” (Dkt. 205 at 10) In this context, Plaintiffs seek to exclude Static challenging the authenticity of Miller's inventor notes.

Plaintiffs argue that Static has no evidence contesting the authenticity of Miller's inventor notes and therefore should be precluded from “cast[ing] unfounded aspersions as to the authenticity” of the notes. (*Id.*) Plaintiffs contend they have produced evidence of notes-testimony from witnesses who saw the notes, and a facsimile showing Miller's possession of the notes in September 2002, prior to Static's patents-whereas Static's only basis for challenging the notes is Static's mere speculation and an expert report opining that the facsimile dates could be changed.

In response, Static does not dispute that Miller created the inventor notes; rather, Static disputes the date of the notes' creation, a fact that is critical to Plaintiffs' allegation that Static's patents are invalid as anticipated. Static contends there is no legal basis for Plaintiffs' efforts to bar Static from disputing the authenticity of the notes, and, in any event, it has evidence that Miller altered the facsimile cover sheet.<sup>3</sup>

<sup>3</sup> These argument are addressed in Plaintiffs' Motion to Exclude Lyter (Dkt.211), and Static's response in opposition (Dkt.228), which the Court addresses in a separate order.

Although Count II is no longer at issue in this case due to the Court's summary judgment order, Plaintiffs assert that the instant argument is not moot because they “may wish to introduce [Miller's inventor] notes ... at trial, such as for development background and/or in response to [Static's] invalidity contentions [regarding Plaintiffs' patents].” (Dkt. 246 at 3) Static disagrees, arguing that these arguments are moot and that there is no reasonable probative basis for Plaintiffs to introduce the inventor notes at trial.

The Court disagrees with Plaintiffs that this argument is not moot. The parties' dispute regarding Miller's inventor

notes turns on the date of the notes, which is an issue of fact relevant only to Count II's allegations regarding the invalidity of Static's patents. Plaintiffs themselves state that they will rely on Miller's inventor notes in support of their invalidity claims against Static patents, “[s]hould invalidity continue to be an issue in this case.” (Dkt. 205 at 10) Following the dismissal of Count II, the Court fails to see how the date of Miller's inventor notes is relevant to any issue remaining in this case.

\*8 Further, it is unclear how Miller's inventor notes are relevant to the “development background” of this case or alleged invalidity of Plaintiffs' patents-in-suit. But even assuming Plaintiffs could demonstrate how the notes are relevant, the Court fails to see how the date of the PageID 8254 notes are relevant. Nonetheless, even if Plaintiffs' argument was not moot, the Court would not issue a blanket order barring Static from disputing the authenticity of the notes.

Accordingly, to the extent Plaintiffs seek to preclude Static from disputing the authenticity of Miller's inventor notes, Plaintiffs' motion *in limine* is **DENIED**.

#### V. DOCUMENTS NOT PRODUCED IN DISCOVERY

Plaintiffs seek to preclude Static from introducing into evidence at trial any documents or items not produced prior to the close of discovery, arguing that it would unfairly prejudice Plaintiffs. In response, Static argues that Plaintiffs' request for a blanket pre-trial order is improper, because the Court cannot rule in a vacuum regarding the admissibility of documents that may or may not ever be at issue. Further, Static asserts that Plaintiffs' discovery conduct was improper and therefore any discovery sanctions imposed by a blanket pre-trial order should not be limited to Static.

While evidence not produced in response to discovery requests before the close of discovery is generally not admissible, the Court will not grant a blanket motion to *limine* out any and all items not produced during discovery. Accordingly, Plaintiffs' motion *in limine* as to this issue is **DENIED** without prejudice to counsel raising any objections at trial, should a party seek to introduce items that should have been produced during discovery but were not.

## VI. DAVID ABRAHAM

David Abraham is a former friend of Miller and former employee of Inter Solution Ventures, Ltd. ("ISV"), a catalog business distributing printer cartridge components. According to Plaintiffs, Miller helped Abraham create ISV, and Abraham eventually turned over his control of ISV to Miller. Further, Abraham suffered from personal issues, including substance abuse, and was ultimately incarcerated in March 2003. In August 2013, Static filed a motion to take Abraham's deposition in jail, asserting that his testimony is relevant to the issues in this case. (Dkt.99) Over Plaintiffs' objections (Dkt.104), Static was permitted to take Abraham's deposition in jail. (Dkt.105)

In their motion *in limine*, Plaintiffs seek to exclude as irrelevant and unfairly prejudicial: (i) Abraham's testimony, (ii) references to Abraham, (iii) references to Abraham having been incarcerated, homeless, or suffering from substance abuse issues, and (iv) references to Miller concealing Abraham's identity. Plaintiffs contend Static seeks to present Abraham's testimony for the prejudicial purpose of presenting the jury with a deposition taken from jail.

In response, Static asserts that it has no intention of introducing Abraham's jail deposition at trial. Static also asserts that Abraham's relevance is not based on his drug issues or incarceration. However, Static contends that references to Abraham (and ISV) are relevant "to the story of Miller's entry into the remanufactured toner chip industry." As alleged in its 2004 lawsuit against Miller and entities related to Miller, Static contends Miller created ISV, and made Abraham (who was homeless at the time) ISV's nominal owner, for the purpose of concealing Miller's efforts to steal Lexmark's or Static's printer chip code. Further, Static contends that Miller's use of Abraham is relevant to Miller's credibility, "which will be a main issue at trial."

\*9 The Court is unable to determine at the pre-trial stage whether any or all evidence regarding Abraham is irrelevant or unfairly prejudicial. However, the fact that Abraham is incarcerated or suffered from substance abuse is irrelevant to any issues in this case. Accordingly, to the extent Plaintiffs seek to exclude any reference to Abraham's incarceration and substance abuse, Plaintiffs' motion is **GRANTED**. To the extent Plaintiffs seek to exclude any and all evidence or reference regarding

Abraham, Plaintiffs' motion *in limine* is **DENIED** without prejudice to Plaintiffs raising any objections at trial.

## VII. DUPLICATIVE EXPERT TESTIMONY

Plaintiffs contend that Static has listed three experts to offer opinions on the invalidity of Plaintiffs' patents-in-suit-Ligatti, Shelby, and Thacker-and that such testimony is overlapping and redundant. In their motion *in limine*, Plaintiffs seek to exclude Static from offering duplicative expert testimony. In response, Static argues that Plaintiffs' motion should be denied because it is premature and fails to identify what testimony is believed to be redundant. The Court agrees that expert testimony should not be redundant or duplicative. *See Tram v. Toyota Motor Corp.*, 420 F.3d 1310, 1315-16 (11th Cir.2005) (holding that the district court did not abuse its discretion when it excluded the trial testimony of a second expert, where the first expert had testified on the same topics and had similar qualifications). However, the Court is unable to determine whether such testimony is redundant or duplicative at the pre-trial stage. Accordingly, Plaintiffs' motion *in limine* regarding duplicative expert testimony is **DENIED** without prejudice to Plaintiffs raising any objections at trial.

## VII. TESTIMONY REGARDING ALLEGED STEALING OF STATIC'S CODE

Plaintiffs seek to exclude any testimony regarding Miller's or ISV's alleged theft of Static's code in 2003 as irrelevant and unfairly prejudicial. Plaintiffs contend that the alleged theft of Static's code relates to Static's 2004 lawsuit against Miller and other entities relating to Miller, alleging copyright infringement and theft, and are irrelevant to any issue in this case. Further, Plaintiffs assert that even if the alleged theft of Static's code is relevant, its probative value is substantially outweighed by the danger of unfair prejudice. Specifically, because "Static has not proven Miller and ISV stole anything, to cast them as thieves carries a real risk of unfairly prejudicing the jury against them." (Dkt. 205 at 18)

In response, Static asserts that the alleged theft of Static's code is relevant to: (1) the background relationship between the parties, (2) the development and manufacture of the technology at issue in this lawsuit, (3) the invalidity claims at issue in this case, and (4) Miller's credibility.

The Court is unable to determine at the pretrial stage whether any testimony regarding Miller's or ISV's alleged theft of Static's code would be irrelevant and/or unfairly prejudicial. Accordingly, Plaintiffs' motion *in limine* is **DENIED** without prejudice to Plaintiffs raising any objections at trial.

#### IX. CONCLUSION

\*10 Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiffs' Motion *in Limine* (Dkt.205) is **GRANTED IN PART AND DENIED IN PART**.

- A. To the extent Plaintiffs seek to exclude Newman's testimony regarding the offer dates and functionality of Lexmark's products, Plaintiffs' motion to exclude Newman's testimony is **DENIED** without prejudice to Plaintiffs raising any objections at trial.
- B. To the extent Plaintiffs seek to exclude Shelby's testimony regarding the offer dates and functionality of Static's products, Plaintiffs' motion is **DENIED** without prejudice to Plaintiffs raising any objections at trial.
- C. To the extent Plaintiffs seek to preclude Static from disputing the authenticity of Miller's inventor notes, Plaintiffs' motion is **DENIED**.
- D. To the extent Plaintiffs seek to preclude Static from introducing any and all document that should

have been produced during discovery but were not, Plaintiffs' motion is **DENIED** without prejudice to counsel raising any objections at trial.

- E. To the extent Plaintiffs seek to exclude any reference to Abraham's incarceration and substance abuse, Plaintiffs' motion is **GRANTED**; to the extent Plaintiffs seek to exclude any and all evidence or reference regarding Abraham, Plaintiffs' motion is **DENIED** without prejudice to Plaintiffs raising any objections at trial.
- F. To the extent Plaintiffs seek to exclude duplicative expert testimony, Plaintiffs' motion is **DENIED** without prejudice to Plaintiffs raising any objections at trial.
- G. To the extent Plaintiffs seek to exclude any testimony regarding the alleged theft of Static's code, Plaintiffs' motion is **DENIED** without prejudice to Plaintiffs raising any objections at trial.

**DONE AND ORDERED.**

#### All Citations

Not Reported in F.Supp.3d, 2014 WL 4983912, 95 Fed. R. Evid. Serv. 820

# **EXHIBIT 5**

2009 WL 211942  
United States District Court, D. Kansas.

RAYNOR MFG. CO., Plaintiff,  
v.  
RAYNOR DOOR CO., INC., and Kelly Stoner  
and Janet Stoner, individually, Defendants.

Civil Action No. 07-2421-DJW.

|  
Jan. 27, 2009.

West KeySummary

**1 Antitrust and Trade Regulation**  
— Manufacturers

A Robinson-Patman Act price discrimination counterclaim brought by a garage door seller against a manufacturer was subject to summary judgment because the seller failed to provide any evidence to show a competitive injury. The evidence on the record showed the annualized total amount spent by the defendant for all residential garage doors and for all of three kinds of commercial garage doors but did not show the net amount paid for each individual door. Furthermore, the record did not contain any invoices for the garage doors purchased by the defendant or a third garage door company from the plaintiff-manufacturer, which would likely show the net amount paid by the defendant or the third company. Without knowing the base price paid for each kind of garage door, it was not possible for a rational trier of fact to know or determine the price paid to the plaintiff-manufacturer by the defendant-manufacturer or the third garage door company for each door. Without knowing the price paid to by the defendant or the third company for each garage door, a rational trier of fact could not find a reasonable possibility that a price difference could harm competition. Robinson-Patman Act, § 1, 15 U.S.C.A. § 13.

1 Cases that cite this headnote

**Attorneys and Law Firms**

Richard P. Stitt, Russell S. Jones, Jr., Shughart Thomson & Kilroy, PC, Kansas City, MO, for Plaintiff.

Dan E. Turner, Phillip L. Turner, Turner & Turner Law Firm, Topeka, KS, for Defendants.

**MEMORANDUM AND ORDER**

DAVID J. WAXSE, United States Magistrate Judge.

\*1 Pending before the Court is the Motion for Summary Judgment on Counterclaim (doc. 65) filed by Plaintiff Raynor Mfg. Co. Plaintiff moves for summary judgment in its favor on Defendant Raynor Door Co., Inc.'s Robinson-Patman Act counterclaim.<sup>1</sup> The Motion is fully briefed and, thus, is ripe for consideration. For the reasons set forth below, the Motion is granted.

<sup>1</sup> The Court has reviewed the Memorandum in Support of the Response and Objection to the Motion for Summary Judgment (doc. 72) ("Memorandum in Opposition") and the Pretrial Order (doc. 63) ("Pretrial Order"), and it appears that only Defendant Raynor Door Co., Inc. has asserted a Robinson-Patman Act counterclaim against Plaintiff.

**I. BACKGROUND**

Plaintiff brought an action against defendants Raynor Door Co., Inc., Kelly Stoner, and Janet Stoner alleging trademark infringement and unfair competition, and Defendant Raynor Door Co., Inc. ("Defendant") counterclaimed for alleged violation of the Robinson-Patman Act, 15 U.S.C. § 13.<sup>2</sup> Plaintiff is an Illinois corporation in good standing with its principal place of business in Dixon, Illinois.<sup>3</sup> Plaintiff has been a manufacturer of sectional doors, including commercial and residential garage doors and related products, since 1944.<sup>4</sup> Defendant, a Kansas corporation formed in 1992, sells commercial garage doors and related products.<sup>5</sup> Defendant is 100 percent owned by Defendant Janet Stoner, and operated by Ms. Stoner and her husband, Defendant Kelly Stoner.<sup>6</sup>

2 See Pretrial Order, 1, 10, 18 and 21.

3 See *id.*, at 2.

4 See *id.*

5 See *id.*

6 See *id.*

Defendant claims that Plaintiff violated the Robinson-Patman Act based on the following allegations:

[R]elevant sales were made in interstate commerce; the products were of like grade and quality; the Plaintiff discriminated in price between the Defendant and another purchaser of the products in the Lawrence, Topeka, and Kansas City markets; and the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of the favored purchaser, i.e., the purchaser who received the benefit of such discrimination....<sup>7</sup>

7 *Id.*, at 10.

The only "favored purchaser" identified by Defendant is Raynor Door Company of Kansas City ("RKC").<sup>8</sup> Defendant claims that Plaintiff discriminated between Defendant and RKC by giving RKC "blanket discounts, free shipping, and or high discounts and incentives and other methods in which the costs of the products were reduced below what the Defendant was charged for the products."<sup>9</sup>

8 See Pretrial Order; see also Memorandum in Opposition, 2.

9 Pretrial Order, 12.

Plaintiff argues that Defendant's Robinson-Patman Act counterclaim fails for several reasons, including that Defendant failed to show the requisite harm to competition, Defendant's counterclaim is barred by the statute of limitations, and Defendant failed to show

the requisite contemporary purchases by Defendant and RKC.<sup>10</sup> Plaintiff now moves for summary judgment on Defendant's Robinson-Patman Act counterclaim.

10 See Mem. in Supp. of Pl.'s Mot. for Summ. J. on Countercl. (doc. 66) ("Memorandum in Support"), 1-2.

The Court notes that Defendant initially claimed that it was entitled to punitive damages because of Plaintiff's violation of the Robinson-Patman Act.<sup>11</sup> However, Defendant states in its Memorandum in Support of the Response and Objection to the Motion for Summary Judgment (doc. 72) that Plaintiff is correct in that Defendant is not entitled to punitive damages.<sup>12</sup> Thus, the Court will grant this portion of Plaintiff's Motion as unopposed.

11 See Pretrial Order, 10, 13, 18, and 21-23.

12 See Memorandum in Opposition, 14.

## II. SUMMARY JUDGMENT STANDARD

\*2 Under Fed.R.Civ.P. 56(b), "[a] party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim." Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."<sup>13</sup> A fact is only material under this standard if a dispute over it might affect the outcome of the suit under the governing law.<sup>14</sup> A dispute about a material fact is only genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."<sup>15</sup> When examining the underlying facts of the case, the Court is cognizant that all inferences must be viewed in the light most favorable to the nonmoving party<sup>16</sup> and that it may not make credibility determinations or weigh the evidence.<sup>17</sup> The Court further notes that while the parties need not provide evidence in a form admissible at trial, the content or the substance of the evidence must be admissible.<sup>18</sup>

13 Fed.R.Civ.P. 56(c).

14 See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

15 *Id.*

16 *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

17 *See Utah Lighthouse Ministry v. Found. for Apologetic Info. and Research*, 527 F.3d 1045, 1050 (10th Cir.2008).

18 *See Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1122 (10th Cir.2005).

A party seeking summary judgment bears the initial responsibility of identifying the portions of “ ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.”<sup>19</sup> “[A] movant that will not bear the burden of persuasion at trial need not negate the nonmovant’s claim.”<sup>20</sup> Thus, the Court must grant summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”<sup>21</sup> The moving party may meet its burden by pointing out to the court a lack of evidence to support an essential element of the nonmoving party’s claim.<sup>22</sup> In such cases, “[t]he moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.”<sup>23</sup>

19 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

20 *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir.2003) (citing *Celotex Corp.*, 477 U.S. at 325).

21 *Celotex Corp.*, 477 U.S. at 322.

22 *See Thom*, 353 F.3d at 851.

23 *Celotex Corp.*, 477 U.S. at 323.

If the movant meets its initial burden, then the nonmovant that would bear the burden of persuasion at trial must then “go beyond the pleadings and ‘set forth specific facts’ that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.”<sup>24</sup> Rule 56(e) provides:

24 *Thom*, 353 F.3d at 851 (citing Fed.R.Civ.P. 56(e)).

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in [Rule 56]—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.<sup>25</sup>

25 Fed.R.Civ.P. 56(e)(2).

In essence, “Rule 56(e) [ ] requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’”<sup>26</sup>

26 *Celotex Corp.*, 477 U.S. at 324.

### III. MATERIAL, UNCONTROVERTED FACTS

#### A. EVIDENTIARY ISSUES

\*3 There are technical and evidentiary issues the Court must consider before determining the material, uncontroverted facts in this case. In its reply memorandum, Plaintiff objects to Defendant’s method of responding to several of Plaintiff’s uncontroverted facts in its statement of uncontroverted facts, as well as to Defendant’s reliance on the “deal file,” Defendant Kelly Stoner’s deposition testimony regarding the “deal file,” and Defendant’s reliance on the “cash flow projections.” The Court will address each of Plaintiff’s objections in turn. The Court will also consider the impact of Plaintiff’s objections on Defendant’s additional statement of uncontroverted facts.

#### 1. Response to Plaintiff’s Statement of Uncontroverted Facts

In Plaintiff’s Motion, Plaintiff sets out in numbered paragraph format its statement of uncontroverted facts and provides the Court with a specific citation to the record for each fact, in compliance with D. Kan. Rule 56.1(a). Defendant chose to controvert many of Plaintiff’s facts in its statement of uncontroverted facts. Plaintiff argues that Defendant failed to fairly and specifically controvert the facts stated in Plaintiff’s statements of uncontroverted fact. Instead of meeting the substance

of Plaintiff's statement of uncontroverted facts, Plaintiff argues that Defendant "simply talk [ed] about something else."<sup>27</sup>

<sup>27</sup> Reply Mem. in Supp. of Pl.'s Mot. for Summ. J. on Countercl. (doc. 78) ("Reply Memorandum"), 2.

Under D. Kan. Rule 56.1(a), "[a]ll material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."<sup>28</sup> In addition, the responding party is required to fairly meet the substance of the matter asserted when responding to the statement of uncontroverted facts.<sup>29</sup> The Court finds that Defendant failed to meet these requirements in several instances. For example, rather than specifically controverting paragraph 4 of Plaintiff's statement of uncontroverted facts, which asserts that 90 percent of Defendant's sales to its customers, and purchases from Plaintiff, were products targeted to commercial, as opposed to residential, customers, Defendant attempted to deny paragraph 4 of Plaintiff's statement of uncontroverted facts "in part" by asserting that Defendant would have been able to compete in the residential garage door market if Defendant had received the same discounts which Plaintiff provided to RKC, the alleged "favored purchaser."<sup>30</sup> The Court finds that Defendant's attempt to deny this fact "in part" by making an additional assertion does not specifically controvert the fact or fairly meet the substance of the fact.

<sup>28</sup> D. Kan. Rule 56.1(a) (emphasis added).

<sup>29</sup> See D. Kan. Rule 56.1(c).

<sup>30</sup> See Memorandum in Opposition, ¶ 4.

Having reviewed and considered Defendant's responses to paragraphs 4, 6, 10, 20, 21, 23, 24, 26, 27, 28, and 29 of Plaintiff's statement of uncontroverted facts, the Court finds that Defendant failed to specifically controvert these facts under D. Kan. Rule 56.1(a) and failed to fairly meet the substance of these paragraphs as required under D. Kan. Rule 56.1(c). The Court further finds that Defendant failed to specifically controvert the first sentence of paragraph 30 of Plaintiff's statement of uncontroverted facts. For the purpose of ruling on Plaintiff's Motion, however, the Court need not consider these facts to be uncontroverted in order to grant Plaintiff's Motion. Thus, in ruling on Plaintiff's Motion, the Court will consider

each of these paragraphs to be fairly and specifically controverted either in their entirety or "in part," based on Defendant's response.

## **2. Deal File and Defendant Kelly Stoner's Deposition Testimony**

\*4 Plaintiff also argues that the "deal file" relied upon by Defendant and the deposition testimony of Defendant Kelly Stoner regarding the "deal file" constitute inadmissible evidence and, therefore, cannot be considered by the Court when deciding its Motion.<sup>31</sup> The Court has reviewed each of the exhibits attached to Defendant's memorandum in opposition and, although they are not labeled as such by Defendant, it appears that the set of documents Defendant calls the "deal file" is the set of documents attached to Defendant's memorandum in opposition as "Exhibit 2—Exhibit Deposition Exhibit 40." Plaintiff argues that the documents referred to by Defendant as the "deal file" are inadmissible because they are not authenticated as required by Fed.R.Evid. 901, and they are not sworn or certified. In support of this argument, Plaintiff claims that there is no admissible evidence in the summary judgment record as to what these documents are, whether they in fact constitute a single "file," who prepared the documents, who received the documents, what use was made of the documents, or what the documents mean.<sup>32</sup>

<sup>31</sup> See Reply Memorandum, 3-4.

<sup>32</sup> See *id.*, at 4 n. 2.

In addition, Plaintiff argues that the deposition testimony of Defendant Kelly Stoner, Defendant's designated corporate representative, regarding the "deal file" is inadmissible evidence because he lacks personal knowledge of the "deal file" and therefore is prohibited from testifying as to the "deal file" under Fed.R.Evid. 602. Plaintiff claims that Defendant Kelly Stoner's deposition testimony regarding the deal file is speculative and not based on first hand knowledge because Defendant Kelly Stoner received these documents after the state court litigation when Plaintiff produced the documents in response to a request for production for "all quotations, invoices, freight rates and discount documents and business agreements of any kind for" RKC and Plaintiff from 1993 to present.<sup>33</sup>



33 *Id.*

As the Court already explained, while the parties need not provide evidence in a *form* admissible at trial, the content or the substance of the evidence must be admissible.<sup>34</sup> Under Fed.R.Evid. 901, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”<sup>35</sup> Fed.R.Evid. 901 goes on to provide a nonexclusive list of the ways in which an exhibit may be authenticated, which includes testimony of a witness with knowledge that the document is what it is claimed to be.<sup>36</sup> Under Fed.R.Evid. 602, a witness cannot testify to a matter unless there is evidence to support a finding that the witness has personal knowledge of the matter. “A party may properly authenticate a document through a supporting affidavit or deposition excerpt from anyone with personal knowledge of the facts contained in the exhibit.”<sup>37</sup> “Unauthenticated documents, once challenged, cannot be considered by a court in determining a summary judgment motion.”<sup>38</sup>

34 *See Bryant*, 432 F.3d at 1122.

35 Fed.R.Evid. 901(a).

36 *See* Fed.R.Evid. 901(b)(1).

37 *Bell v. City of Topeka, Kan.*, 496 F.Supp.2d 1182, 1185 (D.Kan.2007) (quotation and citation omitted).

38 *Id.*, at 1184 (quotation and citation omitted).

\*5 Defendant has not provided any affidavit in support of its memorandum in opposition to Plaintiff's Motion. Instead, Defendant attempts to authenticate or identify the “deal file” through the deposition testimony of Defendant Kelly Stoner. Although this Court is not obligated to comb the record in order to make Defendant's arguments for it, the Court has reviewed all of the scattered pages of the deposition transcripts for Defendant Kelly Stoner attached to Defendant's memorandum in opposition to Plaintiff's Motion.<sup>39</sup> The Court can find no evidence that Defendant Kelly Stoner authored the “deal file” or that he has any personal knowledge of the facts contained in the “deal file.” Thus, the Court concludes that Defendant has failed to establish that Defendant Kelly Stoner has personal knowledge of the authenticity or identity of the “deal file,” and thus

his testimony is inadmissible under Fed.R.Evid. 602 to authenticate the “deal file.”

39 *See Cross v. Home Depot*, 390 F.3d 1283, 1290 (10th Cir.2004) (quoting *Downes v. Beach*, 587 F.2d 469, 472 (10th Cir.1978)) (“[I]t is the responding party's burden to ensure that the factual dispute is portrayed with particularity, without ... depending on the trial court to conduct its own search of the record.”).

Defendant has not identified any other evidence in the summary judgment record to support a finding that the “deal file” is what Defendant claims it is. Thus, the Court finds that the “deal file” has not been properly authenticated or identified as required under Fed.R.Evid. 901 and, therefore, the “deal file” is not admissible evidence. Accordingly, the Court will not consider the “deal file” for the purpose of ruling on Plaintiff's Motion.<sup>40</sup>

40 *See Ney v. City of Hoisington, Kan.*, 508 F.Supp.2d 877, 883 (D.Kan.2007) (“Court will disregard all statements in plaintiff's response that ... could not represent information based on plaintiff's personal knowledge”).

### 3. Cash Flow Projections

Defendant also relies on a document vaguely referred to as the “cash flow projections.” Plaintiff challenges Defendant's reliance on this document arguing that Defendant failed to authenticate the document as required under Fed.R.Civ.P. 56(e)(1). It appears to the Court that page 3 of the “cash flow projection” document is attached to Defendant's memorandum in opposition as “Exhibit 3—Exhibit Additional Exhibits” and is Bates stamped 000037. As explained above, “[a] party may properly authenticate a document through a supporting affidavit or deposition excerpt from anyone with personal knowledge of the facts contained in the exhibit.”<sup>41</sup>

41 *Bell*, 496 F.Supp.2d at 1185 (quotation and citation omitted).

However, after challenging the authenticity of the cash flow projection document, Plaintiff then admits that the first line of the projection projects “1st year [1993] commercial sales of \$995,000 and 5th year sales of \$1,203,950” and admits that Defendant Kelly Stoner testified that Plaintiff gave this document to Defendant in 1993.<sup>42</sup> Plaintiff also attaches to its reply memorandum

a letter from Plaintiff to Defendant dated February 19, 1993, which Plaintiff claims confirms Defendant Kelly Stoner's testimony that Defendant received the cash flow projection document from Plaintiff in 1993.<sup>43</sup> Thus, the Court finds that Plaintiff has (likely inadvertently) provided the necessary information to authenticate the cash flow projection document and, therefore, the Court will consider the document for the purpose of ruling on Plaintiff's Motion.

42 See Reply Memorandum, 5.

43 See *id.*

#### **4. Defendant's Additional Statement of Uncontroverted Facts**

\*6 Having found the "deal file" and Defendant Kelly Stoner's deposition testimony regarding the deal file to be inadmissible evidence, the Court will now turn to Defendant's additional statement of uncontroverted facts, which relies heavily on the deal file. Under D. Kan. 56.1(b), "[i]f the party opposing summary judgment relies on any facts not contained in movant's memorandum, that party shall set forth each additional fact in a separately numbered paragraph, *supported by references to the record*, in the manner required in section (a), above."<sup>44</sup> Having found the deal file and Defendant Kelly Stoner's deposition testimony regarding the deal file to be inadmissible evidence, the Court finds that several of Defendant's facts in its additional statement of uncontroverted facts are not supported by any evidence in the record.

44 D. Kan. Rule 56.1(b)(2) (emphasis added).

For example, in the last two sentences of paragraph 32 of its additional statement of facts, Defendant states that Plaintiff provided RKC with "preferential pricing."<sup>45</sup> In support of this fact, Defendant relies on the "deal file" and on the testimony of Defendant Kelly Stoner regarding the deal file. Because the Court has already deemed this evidence inadmissible for the purpose of ruling on Plaintiff's Motion, the Court finds that the last two sentences of paragraph 32 of Defendant's additional statement of uncontroverted facts is not supported by any evidence in the summary judgment record.

45 See Memorandum in Opposition, 6.

Another example can be found in paragraph 33 of Defendant's additional statement of uncontroverted facts, where Defendant claims that "based upon the deal file documentation" Plaintiff was giving RKC a 12.48 percent discount on garage doors and another five percent discount because of no freight costs in 2006.<sup>46</sup> In further support of this statement, Defendant relies upon the deposition testimony of Defendant Kelly Stoner regarding the deal file. Having found the deal file and Defendant Kelly Stoner's deposition testimony regarding the deal file to be inadmissible evidence, the Court finds that paragraph 33 of Defendant's additional statement of uncontroverted facts is not supported by any evidence in the summary judgment record.

46 See *id.*

The Court has reviewed Defendant's additional statement of uncontroverted facts. The Court will disregard all facts in Defendant's additional statement of uncontroverted facts that are not supported by the summary judgment record and will construe the evidence in the light most favorable to Defendant as the nonmoving party. Consequently, the Court will disregard the following paragraphs of Defendant's additional statement of uncontroverted facts for the purpose of ruling on Plaintiff's Motion: the last two sentences of paragraph 32, all of paragraphs 33 and 34, the first sentence of paragraph 35, and all of paragraph 36 of Defendant's additional statement of uncontroverted facts.

#### **B. STATEMENT OF MATERIAL UNCONTROVERTED FACTS**

The following facts are either uncontroverted, stipulated to, or viewed in the light most favorable to Defendant.<sup>47</sup> Plaintiff is a manufacturer of commercial and residential garage doors and related products sold throughout the United States. From 1992 or 1993 until August, 2005, Defendant was an authorized Raynor dealer. Defendant was headquartered in Topeka, Kansas. Defendant competes in a geographic market that consists of from just east of Kansas City, west to about Fort Riley, north to Nebraska and south to about Burlington, Kansas. Ninety percent of Defendant's business occurs between Topeka and Kansas City.

47 As explained above, the Court will consider paragraphs 4, 6, 10, 20, 21, 23, 24, 26, 27, 28, 29,

and 30 of Plaintiff's statement of uncontroverted facts to be controverted (either in their entirety or in part, depending on Defendant's responses) for the purpose of ruling on Plaintiff's Motion.

\*7 Defendant Kelly Stoner,<sup>48</sup> who has operated a business for 30 years, is responsible for bidding and sales for Defendant. The market in which Defendant competes is a competitive market, with "lots of" competitors. Defendant Kelly Stoner testified that "anybody that sells garage doors would be our competitors." While Defendant was a Raynor dealer, Plaintiff also had a dealer in Shawnee, Kansas—RKC. RKC and Defendant competed against each other for jobs specifying Raynor® doors. Defendant Kelly Stoner, testifying as the corporate representative of Defendant, testified that he did not know of any other Raynor dealers with whom Defendant competed besides RKC.

<sup>48</sup> Defendant Kelly Stoner testified as the corporate representative of Defendant.

Before 2005, CHI, Mahon and Raynor (Plaintiff's brand) were the three main brands sold by Defendant, with Raynor always being the most expensive. Over ninety percent of Defendant's sales to its customers, and purchases from Plaintiff, were products targeted to commercial, as opposed to residential, customers. However, Defendant asserts that it would have been able to compete in the residential garage door market had it received the same discounts which Plaintiff provided to RKC. Most of Defendant's business comes from bids that are solicited by contractors or owners. Defendant will learn of a project, either by finding it on-line or by receiving a request for a bid from a contractor. The contractors provide the specifications they want for garage doors and ask Defendant and others to bid based on the specifications. Usually, the specifications can be met by any of several different garage door manufacturers. When Defendant wanted to submit a bid on a job, it would contact Plaintiff to request a quote. For the purposes of this Motion, Plaintiff does not challenge Defendant's allegations that Plaintiff gave larger discounts and smaller freight charges to RKC.<sup>49</sup> Once Defendant obtained the quote from Plaintiff, Defendant would use that quote to submit its bid for the job to the contractor. If Defendant got the job, it purchased the door(s) from Plaintiff, installed them on the job and billed the customer. If Defendant did not get the job, it did not purchase product from Plaintiff.

<sup>49</sup> See Memorandum in Support, 2 n. 2.

Exhibit 10 to the Rule 30(b)(6) Deposition of Defendant Kelly Stoner (which was also marked as Exhibit 47 to his state court deposition) is a list prepared by Defendant Kelly Stoner of the jobs that Defendant bid on but allegedly lost to RKC.<sup>50</sup> Of the 15 jobs listed on Exhibit 10, Defendant Kelly Stoner identified five jobs that he believes he "lost because [he was] underbid." (1) Senne Construction/Topeka Spec Office Park; (2) Kelly Construction/Kansas Correctional Facility; (3) Kelly Construction/Douglas County Youth facility; (4) Miller–Stauch Construction/Airborne Express; and (5) Senne Construction/CJ Industries. Defendant Kelly Stoner testified that he lost the other jobs on Exhibit 10 because of "other circumstances," such as Plaintiff discontinuing business with Defendant.

<sup>50</sup> See Deposition Exhibit 10 (doc. 66–7).

\*8 The Senne Construction/Topeka Spec Office Park project was bid in 2002. The Kelly Construction/Kansas Correction Center job was bid in 1999. The Miller–Stauch Construction/Airborne Express job was bid in 1999. The Kelly Construction/Douglas County Youth job was bid in 1999. The Senne Construction/Topeka Industrial Park job was bid in 2002 or early 2003.

Defendant Kelly Stoner testified at the Rule 30(b)(6) deposition of Defendant that Defendant has not lost any sales or jobs to other Raynor dealers besides RKC because Plaintiff gave the other dealer a better price. He also testified that with respect to any of the jobs on Exhibit 10, nobody ever told him that Plaintiff quoted RKC a lower price than it quoted Defendant. Defendant Kelly Stoner also testified that he did not know by how much RKC underbid Defendant on any of the jobs shown on Exhibit 10.

Plaintiff provided Defendant with cash flow projections in 1993. In the first year of the projections Defendant was projected to have sales of \$995,000.00 and in the fifth year Defendant was projected to have sales of \$1,203,950.00. The actual commercial sales based upon the records of the Plaintiff for commercial sales were \$427,954.00 in 2003, \$373,686 in 2004, \$305,219.00 in 2005.

Plaintiff documented the actual aggregate annual sales of residential garage doors and residential operators

by Defendant and RKC in Exhibit A attached to the affidavit of Ann Conway. For the year ending 2003, Defendant purchased \$15,176 worth of residential garage doors and operators and RKC purchased \$545,326 worth of residential garage doors and operators. For the year ending 2004, Defendant purchased \$9,367 worth of residential garage doors and operators, and RKC purchased \$586,347 worth of residential garage doors and operators. Finally, in the year ending 2005, Defendant purchased \$6,450 worth of residential garage doors and operators, and RKC purchased \$526,279 worth of garage doors and operators.

Plaintiff also documented the actual aggregate annual sales of three types of commercial garage doors by Defendant and RKC. For the year ending 2003, Defendant purchased \$16,754 worth of Fire doors, \$165,186 worth of Rolling doors, and \$173,588 worth of Sectional doors. For that same year, RKC purchased \$4,705 worth of Fire doors, \$44,595 worth of Rolling doors, and \$262,391 worth of Sectional doors. In the year ending 2004, Defendant purchased \$31,155 worth of Fire doors, \$128,689 worth of "Serv. Gri & CtrShtr" doors, and \$155,631 of worth of Sectional doors. In that same year, RKC purchased \$6,724 worth of Fire Doors, \$14,404 worth of "Serv.Gri & CtrShtr" doors, and \$287,213 worth of Sectional doors. Finally, in the year ending 2005, Defendant purchased \$25,249 worth of Fire doors, \$107,842 worth of "Serv, Gri & CtrShtr" doors, and \$123,413 worth of Sectional doors. In that same year, RKC purchased \$39,266 worth of Fire doors, \$47,411 worth of "Serv, Gri & CtrShtr" doors, and \$281,937 worth of Sectional doors.

#### IV. ROBINSON-PATMAN ACT COUNTERCLAIM

\*9 Defendant contends that Plaintiff violated Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13. Section 2(a) of the Robinson-Patman Act states, in pertinent part,

It shall be unlawful for any person engaged in commerce ... to discriminate in price between different purchasers of commodities of like grade and quality, ... where the effect of such discrimination may be substantially to lessen competition or tend to create a

monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them....<sup>51</sup>

<sup>51</sup> 15 U.S.C. § 13.

"By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition."<sup>52</sup> There are "three categories of competitive injury that may give rise to a Robinson-Patman Act claim: primary-line, secondary-line, and tertiary-line."<sup>53</sup> This case is a secondary-line case. Secondary-line cases involve allegations of price discrimination that allegedly injure competition among the alleged discriminating seller's (Plaintiff's) customers—here, Defendant and RKC.<sup>54</sup> To establish a secondary-line injury, Defendant must show that (1) the relevant garage door sales were made in interstate commerce; (2) the garage doors were of like grade and quality; (3) Plaintiff discriminated in price between Defendant and RKC; and (4) the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage RKC.<sup>55</sup>

<sup>52</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993).

<sup>53</sup> *Volvo Trucks N. Am., Inc. v. Reeder Simco GMC, Inc.*, 546 U.S. 164, 176, 126 S.Ct. 860, 163 L.Ed.2d 663 (2006).

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*, 176–77.

The relevant issue in this case is the fourth element—competitive injury. To establish a competitive injury, a party must show "a reasonable possibility that a price difference may harm competition."<sup>56</sup> According to the Supreme Court, "[a] hallmark of the requisite competitive injury ... is the diversion of sales or profits from a disfavored purchaser to a favored purchaser."<sup>57</sup> In addition, "a permissible inference of competitive injury

may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.”<sup>58</sup>

56 *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434–35, 103 S.Ct. 1282, 75 L.Ed.2d 174 (1983).

57 *Volvo Trucks*, 546 U.S. at 177.

58 *Id.*

However, before the Court can determine whether there is a price difference that may harm competition or whether there is a significant price difference that has existed for a substantial period of time, the Court must be able to determine the *prices* paid by Defendant and RKC to Plaintiff for the garage doors. “The generally accepted rule is that ‘price’ for purposes of [the Robinson–Patman Act] means the amount actually paid by the purchaser, that is, the quoted invoice price less any discounts, offsets or allowances afforded the purchaser and not otherwise reflected in the invoice price.”<sup>59</sup> Thus, the relevant figure for the court to consider is the actual amount paid by the purchaser, *i.e.*, the invoice price less any discounts or other allowances not reflected in the invoice.<sup>60</sup> In short, “price” under the Robinson–Patman Act means the net price received by the seller.<sup>61</sup>

59 *Diehl & Sons, Inc. v. International Harvester Co.*, 445 F.Supp. 282, 286 (D.C.N.Y.1978).

60 *See Conoco Inc. v. Inman Oil Co.*, 774 F.2d 895, 902 (8th Cir.1985).

61 *See id.*

\*10 Finally, the Court notes that an action to enforce a claim under the Robinson–Patman Act must be “commenced within four years after the cause of action accrued.”<sup>62</sup> “Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff’s business.”<sup>63</sup>

62 15 U.S.C. § 15b.

63 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) (citations omitted).

## V. ANALYSIS

### A. PUNITIVE DAMAGES

As explained above, Plaintiff seeks summary judgment on Defendant’s claim for punitive damages in connection with Plaintiff’s alleged Robinson–Patman Act violation. Because Defendant admits that it is not entitled to punitive damages,<sup>64</sup> the Court will grant this portion of Plaintiff’s Motion as unopposed.

64 *See* Memorandum in Opposition, 14

### B. COMPETITIVE INJURY

The Court has examined the underlying facts of this case and has viewed all inferences in a light most favorable to Defendant. In addition, the Court has not made any credibility determinations or weighed the evidence. Having done so, the Court concludes that Plaintiff has met its initial responsibility of demonstrating the absence of a genuine issue of material fact by demonstrating that there is no evidence to support an essential element of Defendant’s Robinson–Patman Act counterclaim—a competitive injury. Accordingly, the burden is on Defendant to provide evidence from which a rational trier of fact could find a competitive injury.

To establish a competitive injury, Defendant must show a reasonable possibility that a price difference may harm competition. Defendant can meet this burden by showing a diversion of sales or profits from Defendant to RKC, or by providing evidence of a significant price reduction over a significant period of time from which the existence of a competitive injury could be inferred.

Defendant has shown a diversion of five sales from Defendant to RKC: (1) Senne Construction/Topeka Spec Office Park; (2) Kelly Construction/Kansas Correctional Facility; (3) Kelly Construction/Douglas County Youth facility; (4) Miller–Stauch Construction/Airborne Express; and (5) Senne Construction/CJ Industries. Each of these sales, however, occurred before early 2003. Defendant asserted its counterclaim against Plaintiff on December 20, 2007. Thus, it appears that any claims under the Robinson–Patman Act based on the loss of these five sales is barred by the four year statute of limitations.

Even if Defendant’s claims based on these sales were not barred by the four year statute of limitations, Defendant still fails to provide evidence from which a rational trier

of fact could find a competitive injury. This is because Defendant has failed to provide any evidence of *price*. Without evidence of the price paid by Defendant or RKC to Plaintiff for garage doors of a like grade and quality, Defendant cannot show a reasonable possibility that a price difference may harm competition or that a significant price difference existed for a significant period of time.

Price is the net amount paid to Plaintiff, which is the quoted invoice price less any discounts, offsets or allowances provided to the purchaser. It is clear from the record that Plaintiff sold both residential and commercial garage doors to both Defendant and RKC. It is also clear from the record that Plaintiff manufactured different kinds of residential doors and different kinds of commercial door. The record does not, however, provide any evidence with respect to the actual prices paid by Defendant and RKC to Plaintiff for these different kinds of garage doors. Indeed, although the record contains some evidence regarding to total amount of money paid by Defendant and RKC to Plaintiff for all residential garage doors for the years 2003, 2004 and 2005, there is nothing in the record which would allow a rational trier of fact to determine the net amount paid by Defendant or RKC to Plaintiff for any one of any kind of residential garage door. Similarly, while the record does contain evidence regarding the total amount paid by Defendant and RKC to Plaintiff for three kinds of commercial garage doors for the years ending 2003, 2004, and 2005, there is nothing in the record which would allow a rational trier of fact to determine the net amount paid by Defendant or RKC to Plaintiff for any one of any kind of commercial garage door.

\*11 This evidence in the record showing the annualized total amount spent by Defendant and RKC for all

residential garage doors and for all of three kinds of commercial garage doors does not show the net amount paid for each individual door. Furthermore, the record does not contain any invoices for the garage doors purchased by Defendant and RKC from Plaintiff, which would likely show the net amount paid by Defendant or RKC to Plaintiff. Without knowing the base price paid for each kind of garage door, it is not possible for a rational trier of fact to know or determine the price paid to Plaintiff by Defendant or RKC for each door. And without knowing the price paid to Plaintiff by Defendant or RKC for each garage door, a rational trier of fact cannot find a reasonable possibility that a price difference may harm competition.

Thus, the Court finds that Defendant has failed to meet its burden to provide evidence from which a rational trier of fact could find a competitive injury.

#### VI. CONCLUSION

For the foregoing reasons, the Court concludes that Defendant has failed to provide any evidence to show a competitive injury, an essential element of its Robinson-Patman Act counterclaim. The Court will therefore grant Plaintiff's Motion.

**IT IS THEREFORE ORDERED** that Plaintiff's Motion for Summary Judgment on Counterclaim (doc. 65) is granted.

**IT IS SO ORDERED.**

#### All Citations

Not Reported in F.Supp.2d, 2009 WL 211942, 2009-1 Trade Cases P 76,497

# **EXHIBIT 6**

2014 WL 2480259

Only the Westlaw citation is currently available.  
United States District Court, W.D. Washington,  
at Seattle.

Brian C. ROUNDTREE, Plaintiff,  
v.  
CHASE BANK USA, N.A., Defendant.

No. 13-239 MJP.

Signed June 3, 2014.

**Attorneys and Law Firms**

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**ORDER ON MOTION FOR ORDER  
AND LEAVE TO HAVE FRCP 30(b)(6)  
WITNESS APPEAR AT TRIAL VIA VIDEO  
CONFERENCE, OR ALTERNATIVELY, FOR  
FINDINGS PURSUANT TO FRCP 32(a)(4)(C)**

MARSHA J. PECHMAN, District Judge.

**\*1** THIS MATTER comes before the Court on Plaintiff's motion for order and leave to have FRCP 30(b)(6) witness appear at trial via video conference, or alternatively, for findings pursuant to FRCP 32(a)(4)(C). The Court has considered the motion (Dkt. No. 153), Defendant's response (Dkt. No. 163), Plaintiff's reply (Dkt. No. 169), all related documents, and rules as follows:

IT IS ORDERED that Plaintiff's Motion for order and leave to have Federal Rule of Civil Procedure ("FRCP") (30)(b)(6) witness appear at trial via video conference is DENIED.

IT IS FURTHER ORDERED that the alternative motion for findings pursuant to FRCP 32(a)(4)(c) is DENIED.

**Background**

This case involves contested charges to Plaintiff's Chase Bank credit card, which was used for travel and entertainment. (Dkt. No. 36 at 15.) Following Defendant's partially successful motion for summary judgment, Plaintiff's remaining claims concern the Fair Credit Banking Act ("FCBA"). (Dkt. No. 105.)

In October 2013, Plaintiff notified this Court of the scheduled deposition of Defendant's deponent, appointed under FRCP 30(b)(6) ("corporate deponent"). (Dkt. No. 154, Exhibit A.) Two such depositions occurred. (Dkt. 163 at 1.) In February 2014, Defendant informed Plaintiff of the corporate deponent's illness and related unavailability for trial. (Dkt. 153 at 2.) The corporate deponent is now well enough to work but asked to be released from further involvement with this matter. (Dkt. No. 163 at 1.)

**Analysis**

Plaintiff makes two requests. First, he asks this Court to apply a combination of FRCP 30(b)(6), 43, and 45 to compel Defendant's unwilling corporate deponent to testify at trial via live video link. Second, Plaintiff cites FRCP 32(a)(4)(C) and asks this Court to require Defendant to produce evidence substantiating the corporate deponent's unavailability. As explained below, Plaintiff's motions are not supported by the plain language of these rules.

**A. FRCP 30(b)(6) is inapplicable to the issue of witness testimony at trial**

Plaintiff asserts that the duties of Defendant's corporate deponent extend beyond discovery. (Dkt. 153 at 3.) This is incorrect. FRCP 30(b)(6) is a discovery rule applicable when a party wishes to depose an organization. Under the rule, the deposing party describes the subject matter of the proposed deposition and the organization produces the person(s) competent to testify on the described subject; i.e., the corporate deponent. Here, Plaintiff conducted two depositions of Defendant's corporate deponent. At that point, Defendant's obligations under FRCP 30(b)(6) were fulfilled; the rule contains no language compelling the corporate deponent's testimony at trial.

**B. FRCP 45 does not permit this Court to compel an Arizona-based corporate deponent to testify at trial in Washington State**



Plaintiff asks this Court to use its subpoena power under FRCP 45 to compel the Arizona-based corporate deponent to testify in Seattle, Washington. The Court does not read FRCP 45 to permit this. While it allows subpoena service anywhere in the country, a subpoena notice can only direct compliance as defined by FRCP 45(c), which states:

**\*2 (c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

If the subpoena falls outside of the scope of FRCP 45(c), FRCP 45(d)(3)(A)(ii) requires the Court to quash the subpoena following timely motion. Here, the corporate deponent resides and is employed in Arizona. (Dkt. 163 at 4.) Regardless of his status as nonparty witness, party, or party officer, he is more than 100 miles from Seattle and in another state. Therefore, the Federal Rules of Civil Procedure do not authorize this Court to compel his attendance.

Plaintiff attempts to avoid the geographic limits of FRCP 45(c) by arguing that trial testimony via live video link moves a trial to the physical location of the testifying person. Plaintiff contends that, during those minutes of testimony via live video link from Arizona, the trial in a Seattle courthouse would be transported to Arizona. Plaintiff provides no legal authority or compelling reason for this interpretation of Rule 45(c) and the Court declines to adopt it.

**C. FRCP 43(a) requires a witness willing or compelled to testify at trial**

FRCP 43(a) establishes the general rule that witnesses should give live testimony in open court. Under exceptional circumstances, it permits a Court to allow contemporaneous transmission of witness testimony from a different location; e.g., through video conference. Application of this exception, however, presupposes a witness willing or compelled to testify at trial. Here, the corporate deponent is not willing to testify at trial. Nor, as explained above, can Plaintiff compel the corporate deponent to testify at trial in Seattle. Therefore, there is no reason for this Court to consider whether this situation merits the exceptional use of video transmission of testimony.

**D. Motion for "findings" under FRCP 32(a)(4)(C) is inappropriate and unnecessary**

The Court finds that the corporate deponent is unavailable because he is unwilling to voluntarily appear and is outside the subpoena power of this Court. Defendant does not contest Plaintiff's freedom to introduce the deposition testimony into evidence (to the extent it is within the scope of the deposition notice). (Dkt. 163 at 7.) Thus, there is no reason to require "findings" in support of his unavailability.

**Conclusion**

The Court DENIES the motion to compel FRCP 30(b)(6) deponent to appear at trial via video conference because the Federal Rules of Civil Procedure do not require the deponent to appear. The Court DENIES the alternative motion for findings pursuant to FRCP 32(a)(4)(C) because there is no need for such findings.

**\*3** The clerk is ordered to provide copies of this order to all counsel.

**All Citations**

Not Reported in F.Supp.3d, 2014 WL 2480259