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STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, DR. JEFFREY DUBIN, deponent herein, do hereby certify and declare under penalty of perjury under the laws of the State of Nevada that the within and foregoing transcription, including any corrections reflected above, is a true and correct transcription of my testimony contained therein.

EXECUTED this _____ day of _____, 2006,
at _____.
(City/State)

DR. JEFFREY DUBIN, Deponent

In The Matter of:

*Landess v.
Gordon Family Trust*

DEPOSITION OF:

*Dr. Jeffrey Dubin
Volume 1
November 15, 2006*

*Associated Reporters of Nevada
Certified Court Reporters
2300 W. Sahara Avenue
Suite 770
Las Vegas, NV 89102
(702) 382-8778 FAX: (702) 382-2050*

Word Index Included

DISTRICT COURT
CLARK COUNTY, NEVADA

JASON G. LANDESS,)
)
)
Plaintiff,)
)
)

vs.) CASE NO. A449091
) DEPT. NO. 9
)

THE DENNIS P. GORDON AND)
JEAN T. GORDON FAMILY TRUST;))
DENNIS P. GORDON, M.D.,)
individually and as Trustee)
for the Dennis P. Gordon and)
Jean T. Gordon Family Trust;))
JEAN T. GORDON, as)
Co-Trustee for the Dennis)
P. Gordon and Jean T. Gordon)
Family Trust; MARILYN)
MIGLIN, an individual; DUKE)
MIGLIN, an individual; DOES)
I through X; and ROE)
CORPORATIONS I through X,)
)
Defendants.)

AND RELATED CLAIMS.)
)

DEPOSITION OF DR. JEFFREY DUBIN

Taken on Wednesday, November 15, 2006

At 9:15 a.m.

At 415 South Sixth Street, Suite 100

Las Vegas, Nevada

REPORTED BY: KIMBERLY A. PEREA, CA CSR, CCR NO. #781

1 (Prior to the commencement of the deposition, all of
2 the parties present agreed to waive statement by
3 the court reporter, pursuant to Rule 30(b)(4) of
4 NRC.P.)

5 Thereupon-

6 DR. JEFFREY DUBIN,

7 having been first duly sworn, was examined and
8 testified as follows:

9 EXAMINATION

10 BY MR. LOVATO:

11 Q My name is Mario Lovato. I'm one of the
12 attorneys for Plaintiff Jason Landess in this case.

13 Could you state your name for the record?

14 A Jeffrey Dubin.

15 Q Okay. And what is your current address?

16 A My business address is 301 North Lake Avenue,
17 Suite 330, Pasadena, California, 91101.

18 Q And I take it you expect to maintain this
19 business address through February of 2007?

20 A Well, our lease goes at least that long.

21 Q Okay.

22 MR. JACOBS: And he's on the lease.

23 THE WITNESS: That's correct.

24 BY MR. LOVATO:

25 Q And I take it you've had your deposition taken

1 APPEARANCES:

2 For JASON G. LANDESS:

3 MARIO P. LOVATO, ESQ.
4 Jimmerson * Hansen
415 South Sixth Street
Suite 100
5 Las Vegas, Nevada 89101
(702) 388-7171
6 mpl@jimmersonhansen.com

7 For the Defendants:

8 PAUL N. JACOBS, ESQ.
9 Jacobs & Dodds
881 Dover Drive
Suite 285
10 Newport Beach, California 92663-5962
(949) 645-7300
11 pauljacobs@newportbeachattorneys.org

12 Also Present:

13 JASON LANDESS

14 I N D E X

15 Witness

16 JEFFREY DUBIN

17 Examination by Mr. Lovato

Page

3

18 E X H I B I T S

19 Number Page Description

20 (No exhibits marked.)
21
22
23
24
25

1 before?

2 A Yes.

3 Q About how many times?

4 A Less than 20; more than maybe ten. I'd have
5 to look.

6 Q Okay. So you understand the basic rules of a
7 deposition. For example, you're under oath today, and
8 that oath that you're under is the same oath that you
9 would have in a court of law?

10 A Yes.

11 Q Okay. And that obviously I'll be asking
12 questions, and you'll be providing responses unless
13 your attorney instructs you not to, and that all of
14 this is being taken down on a transcript, so it's
15 important that we enunciate my questions and your
16 responses so that it is taken down in as clear a form
17 as possible.

18 You understand that; right?

19 A Yes.

20 Q And with that, I'll move forward, and just a
21 quick admonition that I'll certainly try not to step on
22 your answers, and if you wait until I'm finished asking
23 my question before responding, it will also make for a
24 clearer transcript.

25 And with that, who is your client in this

1 case?
 2 A My clients are the Gordons or Mr. Gordon and
 3 the Miglins.
 4 Q And when you say "the Miglins," it's both Duke
 5 and Marilyn Miglin?
 6 A I believe so, yes.
 7 Q About how many hours have you spent on this
 8 case?
 9 A Just give me a chance to think back through.
 10 MR. JACOBS: You want his hours just on the
 11 Nevada litigation?
 12 BY MR. LOVATO:
 13 Q Correct. The Nevada litigation.
 14 A I'm going to estimate 50.
 15 Q And how much have you been paid for your work
 16 in this Nevada litigation?
 17 A Maybe \$6,000.
 18 Q You're not sure?
 19 A Well, it's an estimate.
 20 Q So thus far, you've been paid \$6,000?
 21 A My firm has been paid maybe \$6,000 --
 22 Q Okay.
 23 A -- so far.
 24 Q But is that an approximate number?
 25 A Yeah, it is.

1 Q Okay. And who paid the funds to your firm?
 2 A There are two clients involved; the Miglins
 3 and Dennis Gordon, and Mr. Gordon's representation is
 4 being handled by Doreen Hartwell, and I'm on a retainer
 5 agreement with her firm.
 6 And in the other instance, the Miglins, I was
 7 contacted by something called the American Association
 8 of Scientific Advisors, and they actually pay funds and
 9 pass along basically my invoice to Mr. Jacobs, who then
 10 gets the funds from the Miglins, I believe.
 11 Q So who has paid what amount to you?
 12 A Well, I've been through the \$5,000 retainer
 13 for Mr. Gordon, and I think that the sum total of the
 14 bills for -- that have gone directly to the American
 15 Association of Scientific Advisors is maybe another 16-
 16 or \$3,000 --
 17 Q Okay.
 18 A -- and I mean, I'm sorry, the amount paid has
 19 been about \$1600; maybe it's more, slightly more.
 20 Q Okay. And I take it in coming to this
 21 deposition today, you reviewed the Expert Report that
 22 you've submitted in this case; is that right?
 23 A Correct.
 24 Q Along with the two Appendices, A and B that
 25 you attached to it?

1 A I didn't review my Curriculum Vitae --
 2 Q But --
 3 A -- if that was an Appendix.
 4 Q I take it you're familiar with it though?
 5 A Yes.
 6 Q Now, in your report, you don't have any
 7 finding or discussion of the Promissory Note obliga
 8 that Dr. Lehrer references in his report; is that
 9 right?
 10 A Correct.
 11 Q Okay. So you don't have any opinion as to
 12 Promissory Note?
 13 A I'm not sure that's correct.
 14 Q What is your opinion regarding the Promiss
 15 Note?
 16 A Well, first of all, my report was filed be
 17 I had seen any of Dr. Lehrer's Reports or Supplemen
 18 Reports, and I'll just give you, that's just as a
 19 matter of the timing, but with respect to the
 20 Promissory Note, it could be what it is. I didn't
 21 check the calculations. I don't really have an
 22 objection to the calculations.
 23 Q So then what is your opinion regarding the
 24 Promissory Note?
 25 MR. JACOBS: Objection; vague and ambiguou

1 Go ahead.
 2 THE WITNESS: I mean the Promissory Note i
 3 what it is. I mean it may be something that's
 4 collectable, and I don't have an opinion one way or
 5 other about whether the calculation is correct or
 6 incorrect. I didn't check it.
 7 BY MR. LOVATO:
 8 Q Okay. Is it your opinion, in your Expert
 9 Report, that 1 million units of the APN needle had
 10 be sold for Plaintiff Jason Landess to collect the
 11 funds under the two Redemption Agreements that you
 12 reference in here?
 13 A I think it was my opinion, or it is my opi
 14 that the 1 million units would need to be sold for
 15 Mr. Landess's obligations to be satisfied.
 16 In other words, I think, if I understood t
 17 facts correctly, and maybe I don't, there was sever
 18 million dollars involved, and if you looked at the
 19 royalty rate, you would need to sell 1 million unit
 20 get to that figure.
 21 Q Now, you made reference to Landess's
 22 obligations --
 23 A Oh, did I?
 24 Q -- to be satisfied.
 25 A Oh.

2 (Pages 5 to 8)

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1 Q what did you mean by that?
 2 A Well, the obligations to Mr. Landess that he's
 3 claiming. In other words, if he thinks that -- if it's
 4 proven that \$3 million is due him, and his royalty rate
 5 was \$3 a unit, it would take 1 million units to achieve
 6 that \$3 million.

7 Q Okay. Just so that we're clear for the record
 8 here, what are you referring to when you say the \$3
 9 million?

10 A I'm thinking about figures that are out of
 11 Dr. Lehrer's report; \$1 million from WMD and \$2 million
 12 from AMP, I think are the figures.

13 Q Would you also be making reference to the
 14 Redemption Agreement where one of these obligations is
 15 included as well as what's entitled a Consulting
 16 Agreement or another of these obligations to pay
 17 Landess is included?

18 A I can't really remember which agreement
 19 specified which dollar amounts.

20 Q Go ahead and open up your exhibit book that
 21 you have in front of you, and turn to Exhibit No.
 22 61.

23 A (witness complies.)

24 THE WITNESS: Okay.

25 ///

1 Q Okay. Well, in that case, it doesn't sound
 2 like you relied on it extensively or analyzed it in
 3 formulating your report; is that right?

4 A That's correct.

5 Q Okay. Instead you relied on Dr. Lehrer's
 6 report for these numbers that lead to the \$3 million
 7 figure that you referenced?

8 A That's correct.

9 Q Okay. Now, turn to Exhibit 58, please.

10 A 58.

11 Q This document is entitled "Consulting
 12 Agreement," and toward the top it has a date of
 13 February 18, 2002.

14 Did you review this Consulting Agreement in
 15 formulating your Expert Report in this case?

16 A I'm not sure I have this. If it was -- again,
 17 if this was part of what Dr. Lehrer submitted, then I
 18 think I have reviewed it, but I don't recognize this as
 19 something that was part of his report in the copy I
 20 received.

21 Q Okay. Did you rely on or analyze this
 22 Consulting Agreement in drafting up your Expert Report?

23 A Not particularly.

24 Q Okay.

25 A I'm not sure I've seen it.

1 BY MR. LOVATO:

2 Q Okay. And this exhibit is entitled
 3 "Redemption Agreement." At the top it also has a date
 4 of February 22nd, 2002.

5 Did you review this document in formulating
 6 your report?

7 A I didn't review this as part of my report. I
 8 reviewed it in the context of reviewing Dr. Lehrer's
 9 Reports that came out after I had written the
 10 report.

11 Q So, again, to be clear, then what you're
 12 saying is that you did not review this Redemption
 13 Agreement before drafting your report?

14 A That's correct.

15 Q Okay. Now, turn to Exhibit 58.

16 A Let me correct that. If this document was
 17 part of the original pleadings in the case, then I've
 18 probably seen it and I just don't remember. In other
 19 words, if this was part of the Second Amended Complaint
 20 as an attachment there, then I've seen it or I saw it
 21 before I wrote my report. I just can't recall.

22 Q Okay.

23 A I've certainly seen it recently because it was
 24 as an Appendix, I believe, or an exhibit to one of
 25 Dr. Lehrer's reports.

1 Q You can go ahead and close the exhibit book.

2 A Okay.

3 Q We'll get it out of your way.

4 Do you have any opinion in this case as to
 5 whether or not damages could be recovered under the
 6 Redemption Agreement or Consulting Agreement even if 1
 7 million units of the APN were not sold?

8 MR. JACOBS: Objection; vague and ambiguous.
 9 Calls for a legal opinion.

10 THE WITNESS: Yeah, I don't have a legal
 11 opinion about that or any other opinion, per se.

12 BY MR. LOVATO:

13 Q Okay. Do you have an opinion as to whether if
 14 fewer than 1 million APN units were sold, that Jason
 15 Landess would not be able to collect the full amount
 16 referenced under the Consulting Agreement and the
 17 Redemption Agreement of 2 million plus \$1 million?

18 MR. JACOBS: The same objections.

19 THE WITNESS: I mean to the extent that it
 20 calls me -- calls for me to offer you a legal opinion,
 21 I don't really -- I don't really know. I can read the
 22 document as a layperson and tell you what I think it
 23 says, but --

24 BY MR. LOVATO:

25 Q Okay. Do you have any opinion as to that

1 matter?

2 MR. JACOBS: well, he's here to testify as an

3 expert, not as a layperson.

4 BY MR. LOVATO:

5 Q Do you have an expert opinion?

6 MR. JACOBS: About -- hold on.

7 BY MR. LOVATO:

8 Q Do you have an expert opinion as to whether if

9 fewer than 1 million APN units were sold, that Jason

10 Landess would collect an amount less than \$3 million

11 under the Consulting Agreement and the Redemption

12 Agreement?

13 A I don't really have an opinion on that if it's

14 a legal matter.

15 Q Okay. So then in your Expert Report, you

16 don't see it as a condition for Jason Landess to

17 collect under these two agreements, that 1 million

18 units of the APN had to be sold?

19 MR. JACOBS: Objection; vague and ambiguous.

20 THE WITNESS: I'm not sure I follow you. By

21 condition of what?

22 BY MR. LOVATO:

23 Q Is Jason Landess's collection of funds under

24 the two agreements, the Redemption Agreement and the

25 Consultant Agreement, dependent or conditioned upon

1 sales of the APN needle?

2 A I think that's a legal issue as far as I

3 know.

4 Q Okay. So this isn't something that you

5 address in your report?

6 A No, I talk about the fact that fewer needles

7 than 1 million would be sold under any eventuality that

8 I can think of.

9 Now, you might envision that, for example,

10 irrespective of those agreements, a hypothetical

11 agreement that specifies that Mr. Landess was going to

12 be collecting royalties against the sales of some

13 units, it might take a very long time to get to a

14 million units. It wouldn't take three years, for

15 instance, but it's possible to get to that level.

16 Q And so in your Expert Report or in your expert

17 opinion in this case, is there a correlation between

18 the number of APN units that are sold and what Jason

19 Landess can collect under the Consulting Agreement and

20 the Redemption Agreement?

21 A No, I'd say there isn't a correlation.

22 Q Okay. But then in your Expert Report, you do

23 go through what you see to be the number of APN units

24 that were or could be sold in this case?

25 A That's correct, because I believe Dr. Lehrer

1 thinks that a million units could be sold, and that

2 would be a predicate for, in his damage calculation,

3 the collection of those funds by Mr. Landess in three

4 years' time.

5 Q Okay. So then in reviewing Dr. Lehrer's

6 report, is it your opinion or your view that he

7 premised Jason Landess's collection of damages in this

8 case strictly upon the sale of 1 million units or that

9 it somehow correlated to the sale of a certain number

10 of APN units?

11 A I think he says that -- yes, I guess I'd say

12 yes.

13 Q Okay. And that condition is a strict

14 condition, that there's a direct correlation between

15 sales and what Jason Landess can collect?

16 A I don't know what Dr. Lehrer had in mind when

17 he made those calculations. He says that 1 million

18 units would be sold in a three-year time span.

19 Q Okay. Do you have an opinion as to the amount

20 of damages that Jason can collect under the two

21 agreements, the Consulting Agreement and the Redemption

22 Agreement in this case?

23 A I don't.

24 Q Okay. Do you believe that his damages in this

25 case are zero?

1 A I don't know what Mr. Landess's damages are.

2 Q So it's not your opinion that his damages are

3 zero?

4 A I don't know what they are. I mean I don't

5 know that they are zero. I don't think that they are

6 zero. I don't think that they're not zero. I just

7 don't know.

8 Q Okay. Is it your opinion that there's no

9 plausible way that 1 million APN units could have been

10 sold by American Medical Products?

11 A That would be my opinion, yes.

12 Q What's your understanding as to who had the

13 control over marketing and sales of the APN needle?

14 MR. JACOBS: Objection; vague and ambiguous as

15 to time.

16 BY MR. LOVATO:

17 Q After the Redemption Agreement was entered

18 into and the Consulting Agreement was entered into in

19 approximately February of 2002?

20 A I -- I don't have an understanding of that.

21 Q Okay. Is it your understanding that Dennis

22 Gordon, Duke Miglin and Marilyn Miglin were in control

23 of American Medical Products after the Redemption

24 Agreement and the Consulting Agreement were entered

25 into?

4 (Pages 13 to 16)

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1 A Well, you want me to assume that those
2 agreements are legally binding; that they were
3 performed and all that sort of stuff, I suppose.

4 Q No, I'm not asking for any assumptions right
5 now.

6 A Okay.

7 Q I'm asking what your understanding is as to
8 whether or not the three people I referenced, who you
9 said earlier are your clients in this case, were in
10 control of American Medical Products, and the sales and
11 distribution of the APN after February of 2002?

12 A I don't know.

13 Q Okay. So you -- you don't have any knowledge
14 or understanding as to who is controlling American
15 Medical Products after February of 2002?

16 A I -- it seems to me it's a matter of what's in
17 the contracts and a matter of law, who controlled it.
18 It also probably is a matter of what the arrangement
19 between AMP and WMD was.

20 Q Okay. I'm not asking you for a legal opinion
21 here. I'm asking you for a factual understanding or
22 simply what has been conveyed to you as the facts in
23 this case for purposes of drafting your report.

24 Did you have any understanding as to who is
25 running American Medical Products after February of

1 type, what would you consider?

2 A I didn't really conduct a marketing
3 analysis.

4 Q Okay.

5 A I've thought about it, but I've not done a
6 marketing analysis. I don't know what the parties were
7 thinking about in terms of marketing.

8 Q What's your understanding as to the
9 background, business background, et cetera, of Marilyn
10 and Duke Miglin?

11 A I don't really have a basis other than what
12 I've read in the attachments that were in Mr. Howard's
13 report.

14 Q And can you tell me what that is?

15 A The documents, and I don't know what the
16 source is on them, say that -- I don't know much about
17 her son Duke Miglin, but Marilyn Miglin, apparently is
18 someone who built up a cosmetic firm, sells cosmetic
19 products, and it appears on, I think it's the Home
20 Shopping Network.

21 Q Okay. Now, with that type of a background, a
22 business where that involves a cosmetics company that
23 has marketing through, for example, the Home Shopping
24 Network, would that have or could that have an effect
25 on sales of a cosmetic device such as the APN

1 2002?

2 A No, I don't have an understanding of that.

3 Q Okay. In drafting your report, I take it
4 then, that you didn't go through of what the Miglins
5 could have done to market the APN needle?

6 MR. JACOBS: Objection; vague and ambiguous,
7 and calls for speculation

8 BY MR. LOVATO:

9 Q You can go ahead and answer.

10 A What the Miglins could have done? You're
11 asking me, did I consider what the Miglins could have
12 done?

13 Q Did you consider, in drafting your report,
14 what Duke and Marilyn Miglin could have done to market
15 the product, the APN needle, after February of 2002?

16 A I've considered the extra value of Marilyn
17 Miglin to this enterprise to some degree --

18 Q Does that --

19 A -- if that's the question.

20 Q Does that appear in your report anywhere?

21 A I don't think so. I don't think I speak to
22 that --

23 Q Okay.

24 A -- but I have thought about it.

25 Q In going through a marketing analysis of that

1 needle?

2 MR. JACOBS: Objection; incomplete
3 hypothetical. Vague and ambiguous

4 THE WITNESS: Well, I'm not sure this is a
5 cosmetic device, per se. It's a surgical instrument in
6 my mind, but could it have an effect, yes, it could.

7 BY MR. LOVATO:

8 Q Okay. But, then again, you didn't go through
9 that analysis in drafting your report, did you?

10 A I've thought about it, but not in the context
11 of anything I've put in the report.

12 Q Okay. What's your understanding as to the
13 efficacy of the APN needle as to clearing spider veins?

14 A My understanding at present is that the device
15 is not particularly efficacious; that it had some
16 limited success in short-term follow-up, maybe similar
17 to that of sclerotherapy, but certainly not much
18 better.

19 But that on further follow-up, it's efficacy
20 was actually potentially worse given the current design
21 of the needle, worse than sclerotherapy, and worse than
22 laser.

23 Q In your report, you give percentage rates for
24 clearance of sclerotherapy and laser treatment?

25 A Yes.

1 Q What's your understanding as to the clearance
2 rate for the APN needle?

3 A I think it was -- according to the limited
4 study I saw, it was reported to be somewhat similar to
5 that of sclerotherapy in short term follow-up.

6 Q So what figure, in your mind, do you assign to
7 that for clearance percentage?

8 A Maybe something like 75 percent.

9 Q You made reference to a limited study that you
10 reviewed.

11 what are you referring to?

12 A The limitations in the study I was referring
13 to was a limitation in follow-up patients. But the
14 study I was thinking of or the studies were the ones by
15 Dr. Woodson, and the small study done by Dr. Gordon
16 himself.

17 Q And you reviewed both of these before drafting
18 your report?

19 A Yes.

20 Q Did you review a study drafted by a
21 Dr. LaPierre?

22 A Yes, I did.

23 Q Could you tell me about that study, how it
24 effected your reviews?

25 A well, there were two documents; one was a

1 proposal to do a study, and I'm not sure that LaPierre
2 actually had a completed study. I'd have to look at
3 the documents to recall.

4 Q Okay. What's your understanding as to the
5 clearance rate for sclerotherapy?

6 A I thought it was roughly three-quarters, 75
7 percent.

8 Q And what's the clearance rate that you
9 understand to be for laser therapy?

10 A I think I've seen figures that say better than
11 90. It may not be quite that high.

12 Q Do you know where you saw these figures?

13 A I'd have to go back through my documents to
14 find a reference. I certainly have one.

15 Q You don't remember at this time where you saw
16 or learned of that figure, 90 percent?

17 A I can't recall.

18 Q Can you give me a brief overview as to what
19 the effect of branding or brand name can have on the
20 sales of a product?

21 A Branding can have a significant effect on the
22 sales of a product. Brands conveyed to consumers,
23 issues about quality, they convey reputation affects;
24 they convey the notion that you'll see the same thing
25 each and every time with that particular item.

1 Brands can convey value. They signal
2 information. There's a lot to be said about branding.

3 Q And can they have an effect on the amount of
4 sales that a product will have in the marketplace?

5 A Sure, yes.

6 Q So just looking at an example, for example,
7 Coca-Cola --

8 A Okay.

9 Q -- there are plenty who believe in the
10 mythical quality of the secret formula.

11 On the other hand, they look for the brand
12 name Coca-Cola that have on its sales versus simply the
13 quality of the product, just as a hypothetical?

14 A I'm sorry, is there a question there.

15 Q There is, and, you know, it's a little broad,
16 it's a little off beat, I admit.

17 MR. JACOBS: I didn't even hear a question
18 either, so maybe just go over it again.

19 BY MR. LOVATO:

20 Q well, for example, in the arena of Coca-Cola,
21 what can branding do to, for example, overcome quality
22 issues?

23 MR. JACOBS: Well, I'm going to object that
24 it's basically an incomplete hypothetical and very
25 vague and ambiguous for a product like Coca-cola.

1 THE WITNESS: Could I try a different product
2 for you?

3 MR. LOVATO: Sure.

4 THE WITNESS: Okay. How about orange juice.
5 Orange juice comes from oranges, and but yet Tropicana
6 does a much better job selling their orange juice than
7 other companies. So why is that? Is it a question of
8 quality in the minds of the consumer? Is it a question
9 of the amount of pulp or the notion that is it where
10 the oranges are coming from? And no one really knows,
11 although the basic research says that the differentials
12 are mostly in the minds of the consumer.

13 That's why people often pay more for gas at a
14 Mobile station than they will at a knock-off station
15 for the same quality of gasoline. We're sort of taught
16 to believe that there are differences, and we're
17 marketed to believe that there are differences, but
18 often those differences are not apparent.

19 Now, I would claim in your example that people
20 do detect differences between Coke and Pepsi and
21 knock-off colas, even if they're not there.

22 BY MR. LOVATO:

23 Q But you're not saying that brand has nothing
24 to do with the sales of the product?

25 A Oh, I thought I already said it has a lot to

6 (Pages 21 to 24)

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1 do with the sales of a product.

2 Q In drafting your report, did you undertake any
3 sort of analysis as to the effect of the brand, the
4 Miglin Method or simply the Miglin name would have on
5 the sales of the product if used to full effect?

6 MR. JACOBS: Objection; vague and ambiguous
7 and compound. Also assumes facts that haven't been
8 provided him, but let's just go with the compound. I'm
9 going to instruct him not to answer until you just
10 break that down. That's two completely different
11 questions in the same question with the "or" in
12 there.

13 MR. LOVATO: You're instructing him not to
14 answer based on a compound objection?

15 MR. JACOBS: I want it clear -- I'm -- yes,
16 yes. I'm telling you right now I want a clearer
17 question, counsel.

18 MR. LOVATO: That's compound. That's two
19 different issues. One, you don't instruct a witness
20 not to answer based on a compound objection, but with
21 that said, Mr. Jacobs, I'm certainly responsive to your
22 request to --

23 MR. JACOBS: Thank you.

24 MR. LOVATO: -- clarify the question.

25 MR. JACOBS: Thank you.

1 February of 2002?

2 MR. JACOBS: Objection; vague and ambiguous.
3 I assume you mean with respect to his Advanced Medical
4 Product stock?

5 MR. LOVATO: Yes.

6 THE WITNESS: I did not try to do a separate
7 analysis of the value of that stock, no.

8 BY MR. LOVATO:

9 Q Okay. If I understand correctly, the analysis
10 you essentially went through for your Expert Report was
11 whether 1 million units of the APN could be sold or
12 approximately how many units of the APN could be sold;
13 is that right?

14 A It's about -- my report is about the -- how
15 many units will be sold, and at what price, what the
16 market could be, and also what the likely nature of
17 that business would be, what -- what products
18 substitute for what products in this marketplace, and
19 that sort of thing.

20 Q And I take it you also went the next step and
21 looked at the effect that those sales would have on the
22 royalty that Landess would receive?

23 A I didn't take a next step, if you will, to
24 consider whether sales made would affect the royalty or
25 its rate.

1 BY MR. LOVATO:

2 Q Did you undertake any sort of analysis as to
3 the effect of the Miglin Method on sales of the
4 product?

5 MR. JACOBS: Objection; vague and ambiguous
6 with respect to the Miglin method, whatever that is.
7 You can answer, if you can.

8 THE WITNESS: I've thought about the so-called
9 Miglin Method or the Miglin marketing of the APN needle
10 in the context of this case, and I would consider that
11 an analysis to some degree.

12 BY MR. LOVATO:

13 Q Okay. But did you put that analysis in your
14 report?

15 A No, it's not something I articulated in the
16 report.

17 Q Okay. Now, also in your report, I take it
18 that you didn't look at a market approach of the value
19 of the Plaintiff's stock at the time of the Redemption
20 Agreement and the Consulting Agreement in February of
21 2002 in looking at what damages he may have?

22 A I'm not sure I understand what a market
23 approach is.

24 Q Okay. Did you look at an evaluation of what
25 Plaintiff Jason Landess's stock was worth on or about

1 Q What's your understanding as to the royalty
2 that Jason Landess would receive from the sale of a
3 particular APN needle?

4 A I believe that it's being asserted by
5 Plaintiffs that -- or at least by Plaintiff's expert
6 that \$3 per needle would be received by Mr. Landess for
7 each sale made.

8 Q So then you do see a correlation between the
9 sales made of the APN needle and the amount of royalty
10 that Jason Landess would receive?

11 A Well, you know, again, it depends, I think, on
12 how all these contracts settle out. It's a legal issue
13 as far as I'm concerned. If you interpret all the
14 contracts in a specific way, if there were an ongoing
15 business and sales were being made, my
16 lay-understanding would be he would receive \$3, but
17 that's -- it's being asserted that he would receive \$3
18 for each needle sold.

19 Q Do you have an opinion as to what the effect
20 of WMD -- well, first off, do you understand who WMD is
21 in this case?

22 A Western Medical Devices, I have an
23 understanding, I believe.

24 Q And what's your understanding as to the
25 relationship between western Medical Devices, which

1 I'll refer to as WMD to AMP, sales of the AMP device?
 2 MR. JACOBS: Objection; vague and ambiguous.
 3 What point in time because right now, I think it's
 4 probably none.
 5 BY MR. LOVATO:
 6 Q From February 2000 -- at approximately
 7 February 2002, what's your understanding as to the
 8 relationship between WMD and AMP?
 9 A I believe WMD was a separate company that was
 10 supposed to have the distribution arm of AMP, and it
 11 would essentially take the needle in some limited
 12 markets, California and the Kaiser market, and provide
 13 an exclusive sales method of the APN needle --
 14 Q Okay.
 15 A -- for AMP.
 16 Q In your report --
 17 A Or for themselves, I should say.
 18 Q -- you review, to some degree, WMD's
 19 geographical area for marketing the APN device; is that
 20 right?
 21 A That's correct.
 22 Q Okay. And then you have an opinion as to how
 23 that would affect the number of sales; is that
 24 right?
 25 A I did reach an opinion, if the market were

1 more limited, constrained by the WMD agreement, yes.
 2 Q And in your opinion, does that limited market
 3 area for WMD reduce the royalty that would go to Jason
 4 Landess?
 5 MR. JACOBS: Hold it. Objection; vague and
 6 ambiguous with respect to time. Are you talking,
 7 again, just in February of 2002 as opposed --
 8 MR. LOVATO: well, let's assume for this
 9 deposition that the time period I'm referring to is
 10 February 2002 unless I say otherwise.
 11 MR. JACOBS: And only that month, or not a set
 12 period of time at all.
 13 BY MR. LOVATO:
 14 Q On or about February of 2002, and, of course,
 15 this is going -- the time period's going to extend
 16 after that in determining the sales of the APN, but
 17 starting at February of 2002.
 18 So do you have an understanding as to -- or do
 19 you have an opinion as to how WMD's limited
 20 geographical area would affect the royalties received
 21 by Jason Landess?
 22 A Well, again, to the extent that this is not
 23 dragging me into any kind of -- any legal
 24 interpretation of the documents, I would have an
 25 opinion that WMD's ability to sell needles would be

1 circumscribed to some degree by that -- by their
 2 agreement. So the quantity sold by WMD might be
 3 limited, and that might, under some scenario, have some
 4 influence on the amount of actual royalty that
 5 Mr. Landess would receive in some period of time.
 6 Q Okay. So do you have an opinion as to whether
 7 Jason Landess would receive royalties based on sales of
 8 the APN by AMP that were not distributed through WMD?
 9 A I don't remember how that works, to be
 10 truthful. I'd have to read the agreements again. It's
 11 just a matter of looking, I guess, at the contracts.
 12 So I'd say I don't have an understanding as I sit here
 13 right now.
 14 Q Okay.
 15 A I recall it was \$2.00 per needle under some
 16 agreement, and I don't know if that is \$2.00 for
 17 needles that were sold by them or by WMD.
 18 Q So if Landess could receive a royalty under
 19 either the Consulting Agreement or the Redemption
 20 Agreement for sales directly by AMP, that wouldn't be
 21 effected by the limited market area of WMD, would it?
 22 A That -- in that hypothetical, I'd say no.
 23 Q Okay. But you just don't know under the
 24 contracts whether that's the case or not?
 25 A I don't think the -- I don't think the

1 contract, assuming the contract has some validity and
 2 all the legal issues, I don't think the contract would
 3 have any limitation on the geography that would affect
 4 Mr. Landess's royalties.
 5 Q Okay. What was your understanding as to the
 6 limitations on the geographical area that WMD operated
 7 in or could make sales in?
 8 A My understanding was under one agreement I
 9 saw, that they were given an exclusive license to sell
 10 in California. They could procure needles at their own
 11 cost and make sales in California. They could also
 12 make sales to the California -- to the Kaiser system,
 13 which is a national system. They can also make sales
 14 to, I believe it was Seneca, and then they also had a
 15 non-exclusive or first right of refusal to make, I
 16 believe, sales or to take on the job of making sales in
 17 other areas.
 18 Q And is it your opinion that WMD's market area
 19 or geographical area could not be expanded?
 20 A It would be -- no, it's not -- that's not my
 21 opinion.
 22 Q Okay. So, for example, if WMD were selling
 23 many needles, that AMP and WMD could enter into an
 24 agreement to extend the geographical area -- it's
 25 certainly conceivable that if WMD were having success

8 (Pages 29 to 32)

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1 in marketing the APN needle, that its geographical area
2 could be expanded?

3 A It's more than conceivable. I think they had
4 a -- they had a right of first refusal to actually
5 accept that business.

6 Q So you weren't aware of any limitation that
7 prevented expansion of WMD's geographical area for
8 sales of the APN needle?

9 A No.

10 Q Okay. Likewise, you don't have any
11 understanding that there was a limitation on whether
12 AMP could market the APN through another distributor
13 outside of WMD's geographical area?

14 A That's correct, or they -- or they could have
15 marketed it themselves, I suppose.

16 Q Okay. And then if the needle were marketed
17 and sold in such a matter without using WMD, what's
18 your opinion as to what Jason Landess could receive as
19 a royalty as a result of those sales?

20 A Well, without, again, looking at that
21 document, that agreement, I believe the -- my
22 recollection is \$2.00 per needle sold sales made by AMP
23 directly, but I'd have to look at the document to know,
24 to see exactly what the wording is.

25 Q Okay. Am I correct that in your Expert Report

1 the sales would be. I've said in this report that I
2 thought that the needle was a better substitute for
3 sclerotherapy, and that it had similar, but maybe not
4 proven better efficacy than sclerotherapy. And if
5 you're now giving me a hypothetical in which the needle
6 has much better efficacy than either laser or
7 sclerotherapy, meaning that it's some sort of an
8 instant cure-all type thing, that would take me into a
9 world that I hadn't contemplated.

10 BY MR. LOVATO:

11 Q Would it increase the sales?

12 MR. JACOBS: Objection; incomplete
13 hypothetical. Vague and ambiguous. Calls for
14 speculation.

15 BY MR. LOVATO:

16 Q well, let me rephrase the question.

17 If the APN needle were more effective than you
18 viewed when drafting your Expert Report, would that
19 likely increase the sales analysis that you have in
20 your report?

21 A Not necessarily.

22 Q So a needle that is more effective than you
23 viewed in your Expert Report wouldn't necessarily sell
24 more?

25 A It might sell more; it might sell more if it

1 though you're only analyzing the needles that WMD could
2 have sold in the market area that you referenced
3 earlier in this deposition?

4 A No, I mean that's one component of this
5 report, but I'm talking about the overall market for
6 APN needles and what my feelings are or my opinions are
7 about that market.

8 Q Now, in your report, and I saw numerous
9 references to efficacy of the needle.

10 A Do you mind if I look at my report.

11 Q Sure.

12 (Witness examines report.)

13 THE WITNESS: Okay. You go -- please go
14 ahead.

15 BY MR. LOVATO:

16 Q I take it, then, that your damage analysis in
17 your Expert Report is dependent, at least to some
18 degree, on your view that the needle is not effective?

19 A To some degree, yes.

20 Q Okay. So in that case if the needle did prove
21 to be more effective than you view in your report, what
22 would the effect be on the sales of the APN needle?

23 MR. JACOBS: well, objection; vague,
24 ambiguous. Calls for speculation. Go ahead.

25 THE WITNESS: Well, I'm not sure exactly what

1 were adopted at all, and it would depend at what price,
2 and who was adopting it and whether insurance would pay
3 for it in some cases. There's a whole lot of steps
4 that are out there besides just how effective the
5 needle is.

6 Q With everything else being equal, would
7 greater effectiveness of the needle likely increase the
8 sales of the APN needle?

9 A If a doctor, for instance, looked -- I'll
10 answer yes, and just to -- just to elaborate a little
11 bit, if a doctor were to try out the needle and found
12 it to be very effective, I would think that that doctor
13 might want to use it again.

14 Q Well, it seems, you know, what you are saying
15 in your Expert Report is that your view that the needle
16 was not effective or as effective as the other types of
17 therapy was a reason why you didn't see -- why --
18 excuse me -- let me rephrase.

19 It seemed that in your report it was your
20 opinion that the lack of effectiveness of the needle,
21 vis a vis other treatments, was a reason for why you
22 viewed that it wouldn't sell as well as Lehrer believed
23 it would sell?

24 A No, that's not correct.

25 Q So then what is the effect of the efficacy of

1 the needle on the sales that you reference in your
2 report?

3 A I didn't quantify it. I said that I thought
4 that because it had a poorer efficacy than existing
5 technologies, that any sales that were contemplated by
6 either Dr. Lehrer or by me, those sales would be even
7 more circumscribed than I'd already opined about.

8 In other words, if I say that I believe that a
9 one-percent adoption or a salvage therapy-type needle
10 technique would exist, I'm trying to say in addition to
11 that, a needle that's not effective or maybe even
12 defective, would not be helpful to that marketing.

13 Q But a needle that were more effective than,
14 you know, what you viewed in drafting your report would
15 have an effect where the sales were less
16 circumscribed?

17 A It might have a limited effect. It might
18 have. I didn't go that direction because no one's
19 given me any data hypothetically or otherwise about
20 this needle being more effective than existing
21 techniques.

22 It's been speculated that, I think, that this
23 needle could reduce the number of repeat procedures
24 that would actually make it more effective than
25 existing technologies.

1 Q And where did you get this information?

2 A I think that the -- that came from the
3 business plan, the WMD Business Plan. I think that
4 there was a statement in there somewhere that said it
5 takes three or four treatments per patient, typically
6 with sclerotherapy, maybe slightly fewer with laser,
7 I'm not sure they go there, but this has the
8 opportunity to reduce the number of treatments
9 necessary to cure a patient's or cure an area of a
10 patient's body down to maybe one or two. That was
11 something that the business plan speculated about.

12 Q And you reference the business plan.

13 There was something I was a little confused
14 about in your report is how the business plan has an
15 effect on the royalties received by Jason Landess as a
16 result of sales of the needle?

17 A well, I don't think a business plan would
18 affect anybody's royalties under any circumstance.

19 Q Okay.

20 A But it does have a large impact on the
21 quantity that Dr. Lehrer assumes is feasible in the
22 marketplace, because Dr. Lehrer has misunderstood the
23 business plan, and he's further misunderstood the size
24 of this market. And to the degree that quantity is
25 multiplied by royalty under some condition that legally

1 holds, it would circumscribe Mr. Landess's potential to
2 earn royalties.

3 Q But you're not trying to say that WMD's
4 business plan would somehow result in it choosing to
5 sell fewer needles, are you?

6 A No, absolutely not, but I thought I was clear.
7 I said that the business plan was relied on by
8 Dr. Lehrer in coming up with calculations of the size
9 of this market, and, therefore, it affects what he
10 thinks Mr. Landess could achieve. But in reality, a
11 business plan would not affect the sales of
12 anything.

13 Q Okay. You also made reference to a price
14 point.

15 what's your view and your expert opinion on
16 your Expert Report as to effect of the price point of
17 the APN needle on the sales of the product?

18 A I think it's -- my view is that it's a very
19 important aspect of this. I can elaborate if you like,
20 but it's, I think, a very important aspect of likely
21 future sales of any product.

22 Q Please elaborate.

23 A Okay. well, there's a couple of different
24 directions to go with that. The proposed dollar amount
25 per needle is \$70, assuming what Dr. Lehrer's assumes,

1 and that may be consistent more or less with what the
2 business plan had assumed, but assume that that's
3 correct. Dr. Lehrer then goes on to say that it will
4 take three needles for every procedure, so you're
5 talking about three times 70 or \$210 in addition to the
6 doctor's time versus a sclerotherapy procedure, which
7 involves the doctor's time and all that rolls into the
8 doctor's time, his office and equipment and so forth,
9 and negligible amounts of money for isotropic saline,
10 syringes and other things.

11 So if you take one scenario, which is that,
12 say, one needle were used per event, it seems to me
13 that the price of the procedure would rise from the
14 existing level in a competitive market to \$70 plus that
15 point. In other words, the price that the consumer
16 would see would go up by \$70.

17 According to Dr. Lehrer, at three needles per
18 procedure, the price might go up by \$210. This is a
19 very elastically demanded market by which I mean there
20 is lots of competition. There's lots of other doctors
21 out there that have lasers. There's lots of other
22 doctors that perform sclerotherapy. There's insurance
23 companies that are constantly on doctors to keep costs
24 down and will only pay for certain procedures.

25 In this world, I think that you're looking at

10 (Pages 37 to 40)

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1 a very elastically demanded product, meaning that a
2 small change in the price will have a large change in
3 the demand. A doctor that says to a patient, "Okay,
4 you're in for a procedure. It's going to cost you "X"
5 plus \$210," is likely to have very few sales as
6 compared to one who says the price is "x," where "x" is
7 the typical price for sclerotherapy or for laser.

8 And I've quantified, in fact, that the price
9 effect here using reasonable estimates of elasticity of
10 demand would diminish the assumed rate of Dr. Lehrer's
11 five percent to well below one percent. So that's my
12 elaboration.

13 Q So one effect of the price point -- let me
14 rephrase.

15 One effect of this price point or this
16 proposed price point on the sales would be if that the
17 sales weren't as high as WMD or AMP would have liked,
18 that there would be pressure to reduce the price of the
19 APN needle; isn't that right?

20 A In reality, yes, but that's not the
21 calculation that Mr. Lehrer did.

22 Q So a lower price would have an effect on
23 increasing sales?

24 A If the price of the needle were zero, for
25 instance, it might be competitive with or near zero,

1 might be competitive with sclerotherapy's cost.

2 Q Well, I appreciate your extreme example, but a
3 lower price would have an effect on demand?

4 MR. JACOBS: Objection; incomplete
5 hypothetical.

6 THE WITNESS: A price lower than some other
7 price, I would say would have an effect on demand
8 because I believe in downward slope and demand curves.

9 BY MR. LOVATO:

10 Q And what's your understanding as to the effect
11 of a lower price on the amount of a royalty that Jason
12 Landess would receive per unit of APN sold?

13 A Relative to what price, lower than -- lower
14 relative to what? I mean --

15 Q If the --

16 A -- relative --

17 Q -- APN sold for a lower price point than you
18 assume in your Expert Report, are you saying that Jason
19 Landess would receive a lower royalty per unit of APN
20 sold?

21 A The royalty per unit of APN sold, I believe,
22 is unchanged. His royalties are determined by units
23 sold, not by dollars.

24 Q Okay. So what it sounds like you're saying in
25 your Expert Report is that the high price point would

1 result in a lower price point, which would increase
2 sales?

3 A No, I didn't say that.

4 Q But do you disagree with that?

5 A What I've said is that Dr. Lehrer's number of
6 300,000 needles sold per year would not be sustainable
7 at a high price point. I don't know what is
8 contemplated in terms of whether these parties would
9 actually lower the price point in order to achieve
10 sales. I don't think it's very likely.

11 Q Well, based on what?

12 A Well, let me strike that. I don't know
13 whether it's likely or not what they would do. I'm not
14 in their heads.

15 Q In your report, you make reference to the APN
16 needle being a salvage therapy.

17 What do you mean by that?

18 A A salvage therapy is a therapy that's used
19 when other therapies typically fail.

20 Q And what led you to believe that the APN
21 needle would be sold solely as a salvage therapy?

22 A I'm not sure it would be sold solely as a
23 salvage therapy, but I had one conversation with
24 Dr. Gordon in which he, I believe, said that that was
25 the intended market. And I also read the report of

1 Dr. Woodson, who said that this would be a product that
2 might have some applicability where other techniques
3 had failed. And I'd have to see your report to find
4 the exact sentence that I'm talking about to give you
5 the exact wording, but that's my paraphrasing of it.

6 Q Do you have any analysis in your Expert Report
7 where you look at the APN needle as a direct type
8 therapy as opposed to salvage therapy?

9 A The entire Expert Report is assuming that it
10 would be used at -- I'm saying that -- that Dr.
11 Lehrer's numbers are much too high because I believe
12 the market would be targeted in fewer -- in a much
13 fewer number of cases.

14 Q Okay. But --

15 A I may have missed your question.

16 Q But nowhere in the Expert Report do you review
17 the sales of the APN as something other than a salvage
18 therapy, do you?

19 A I think I talk about it in terms of being a
20 salvage therapy, and that that would have a limiting
21 factor on the market. So I say it would be smaller
22 than Dr. Lehrer's assumed, and he doesn't assume it's a
23 salvage therapy. I'm saying, based on my
24 understanding, it would be used in more of a
25 salvage-type technique, and, therefore, the market

1 would be more limited.

2 Q Okay. But you didn't undergo an analysis in
3 your Expert Report where you were looking at the APN
4 needle in an aspect other than a salvage therapy?

5 A No, I think the entire report looks at it in a
6 non-salvage context because I'm talking about what
7 Dr. Lehrer assumed. And then I'm saying on top of
8 that, I believe that the actual sales would be reduced
9 from that.

10 Q So when you review on top of that, you're
11 simply looking at the salvage therapy limitations; are
12 you not? You're not giving a more expansive view as to
13 how the needle would be sold --

14 MR. JACOBS: Objection --

15 BY MR. LOVATO:

16 Q -- where you're doing that analysis in the
17 area where you're referencing a salvage therapy?

18 MR. JACOBS: Objection; vague and ambiguous.

19 THE WITNESS: I'm not sure I understand your
20 question --

21 BY MR. LOVATO:

22 Q Okay.

23 A -- but I did try to.

24 Q What's your understanding then as to how often
25 the needle would be used as a salvage therapy?

1 75 percent of the time, sclerotherapy will produce a
2 clearance, a desirable clearance in the spider vein
3 that's at issue. 25 percent of the time, it won't. So
4 25 percent of the cases that we see are back for their
5 second time around.

6 So if you look at the statistics in any given
7 year, 75 percent of the time, patients come in, they're
8 out, they don't return. 25 percent of the time,
9 they're going to be returning for, if they choose to
10 return, they're going to returning to try it again.

11 I would consider those salvage cases. Of
12 those 25 percent, some people that we see will be there
13 for their third time and their fourth time and so
14 forth.

15 Q Okay. Well, I don't think you're getting to
16 my question though.

17 What's your assumption as to whether an APN
18 needle is sold, how often it would be sold as a salvage
19 therapy?

20 A Well, I was trying to explain. So 25 percent
21 of the time if sclerotherapy is effective and if the
22 APN is used for salvage, then 25 percent of the
23 procedures that are out there would be procedures that
24 would possibly be appropriate for -- for the APN. So I
25 would say 25 percent of the existing procedures are

1 A I -- I don't really know. I know what I've
2 read from Dr. Woodson, and I know what Dr. Gordon told
3 me, and I believe that the five-percent adoption rate
4 that Dr. Lehrer picked is high if this needle is to be
5 used as a salvage therapy.

6 Q Well, what's your understanding or view as to
7 how often it would be used as a salvage therapy as
8 opposed to otherwise?

9 A I think I say. Do you mind if I look.

10 Q Sure.

11 A Okay.

12 (Witness examines document.)

13 THE WITNESS: I say damages are inflated by a
14 factor of four or possibly ten based on the salvage
15 limitation of the market.

16 BY MR. LOVATO:

17 Q Okay. I'm not an economist, and I bet the
18 jurors won't be economists. I'm trying to get away
19 from the factor terminology.

20 A Oh.

21 Q And if we put it into a simple percentage of
22 how often the needle would be used as a salvage therapy
23 as opposed to otherwise, what's your understanding?

24 A Well, let's try it like this: If the
25 sclerotherapy procedure is 75 percent effective, then

1 targets.

2 Q Would you say that 25 percent of the time the
3 APN needle is being used as a salvage therapy, in your
4 mind, or would be used as a salvage therapy in your
5 mind?

6 A That would be the -- hypothetically, if it's
7 sold at all at this price point and if it works, I
8 would think it would be limited to sales of, say, 25
9 percent of existing procedures.

10 Q Okay. In your view as to sales of the APN
11 needle --

12 A Yes.

13 Q -- for whatever purpose --

14 A Okay.

15 Q -- how often would those sales be for salvage
16 therapy purposes as opposed to otherwise?

17 A Oh, I think under that calculation, it would
18 probably be of maybe all of them. If I assumed the
19 needle is being used for salvage therapy, then it's
20 being used for salvage therapy. I was trying to
21 quantify the number of cases that such needles would be
22 applied for you.

23 Q So that's your only assumption in this report
24 is that the needle would be -- the APN needle would be
25 used for salvage therapy?

12 (Pages 45 to 48)

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1 A well, the assumption that I make about salvage
2 therapy, and I'm trying to say if the -- if this needle
3 were applied for salvage therapy, that's what it would
4 be applied to, a limited market.

5 Q I'm not asking you to first assume that the
6 needle is going to be used for salvage therapy and then
7 give me a number.

8 A Okay.

9 Q I'm asking you what your understanding is as
10 to this APN needle when it's sold, how often will it be
11 used for salvage therapy?

12 A What I'm saying is that if the needle -- and I
13 don't know, but if the needle was marketed for its
14 intended use, as I understood it, it would face a
15 limited market.

16 Q Okay.

17 A I don't know what it would actually be used
18 for.

19 Q Okay. What is your understanding, and can you
20 give me a number?

21 A A number for what?

22 Q For the -- I can't seem to get a number out of
23 you --

24 A For what?

25 Q -- but what's your understanding as to when an

1 asked and answered about three times.

2 MR. LOVATO: It hasn't been answered once.

3 THE WITNESS: Based on my understanding from
4 Dr. Gordon and Dr. Woodson, I believe that they think
5 it would be used a hundred percent of the time in
6 salvage instances, and I don't have a reason to
7 disagree. I don't know what the exact percentage would
8 be.

9 BY MR. LOVATO:

10 Q So that is your understanding, that of the
11 uses made of the APN needle, 100 percent of the time,
12 it would be used for salvage therapy purposes?

13 A It's my understanding, derived from what they
14 say, yes.

15 MR. LOVATO: Okay. Let me take a break.
16 (Recess taken.)

17 MR. LOVATO: Back on.

18 BY MR. LOVATO:

19 Q Is it your understanding that treatments for
20 spider veins are currently rising from year to year?

21 A "Currently rising," do you -- what do you mean
22 exactly by currently?

23 Q That the number of treatments is rising from
24 year to year?

25 A Has it risen from last year, or is it going to

1 APN needle is sold, what percentage of those sales
2 would be for salvage therapy purposes as opposed to
3 otherwise?

4 A I don't think it's known. I can't give you a
5 percentage, for instance.

6 Q Okay.

7 A When I said if all the needles were made -- if
8 all the needles were used for salvage purposes, that
9 would be 100 percent of the time.

10 Q So you have no understanding as to how often
11 the APN needle would be used for salvage --

12 A My understanding --

13 Q -- therapy purposes?

14 A Sorry I stepped on you. My understanding is
15 based on what I read from Dr. Woodson and what I heard
16 from Dr. Gordon about the -- about sales being used in
17 salvage streams, and they did not talk about the needle
18 being marketed in other cases. And she talks about the
19 needle being effective in salvage cases or likely to be
20 used in salvage cases. Again, I'd need to see her
21 sentence to know what she felt at the time.

22 Q Okay. So do you have an understanding as to
23 how often the needle would be used for salvage therapy
24 purposes as opposed to otherwise?

25 MR. JACOBS: I'm going to object; it's been

1 keep rising, or has it always risen from year to
2 year?

3 Q Well, what's your understanding as to the
4 general trend over the last five years or so?

5 A Okay. That's good.

6 The general trend in sclerotherapy procedures
7 has been rather interesting. Starting in the data I
8 looked at in about 1999, there was a peak, and there's
9 been a general decline in sclerotherapy and laser
10 treatments since about 2000, with neither of the trends
11 occurring in about 2001, 2002, and since then the
12 number of procedures have risen back, but have not
13 reached the level they were in the year 2000. So
14 they've increased relative to last year; they've
15 decreased relative to where they were five years ago.

16 Q And what's your view as to the effect of the
17 aging of the Baby Boomer will have on the size of the
18 market over the next ten years?

19 A I've done an extensive analysis of that, and
20 I'd say that the aging of the Baby Boomer will have a
21 very small, maybe negligible effect. It's not really
22 what moves and shakes this market.

23 Q It wasn't clear to me from your report, and
24 maybe you want to take a look at Exhibit B of your
25 report.

1 A Okay.

2 Q I think paragraphs -- or Paragraph 3 and
3 Paragraph 4.

4 A Okay.

5 Q What's your understanding as to which market
6 is larger as between the number of procedures performed
7 for sclerotherapy versus laser treatment?

8 A There are -- I'm not sure I understand the
9 question. The sclerotherapy -- they -- they both
10 probably apply to the same market, but the
11 sclerotherapy number of procedures is larger than the
12 number of laser procedures. I think that's your
13 question.

14 Q Yes. And so approximately how many are
15 performed each year? Just taking a look at Paragraph 4
16 and the figures that you have in that, or in Paragraph
17 3, where are you representing how many sclerotherapies
18 approximately are performed per year as opposed to
19 laser treatments?

20 A I have that data. I don't know if the -- if
21 these two paragraphs break out laser versus
22 sclerotherapy. I have those figures with me if you'd
23 like them. Is that your question?

24 Q Sure. If you can --

25 A Do you want to know -- do you want to know how

1 many lasers versus sclerotherapies there were?

2 Q Sure.

3 A Okay. Oh, let's see. Bear with me a minute.
4 Okay. A lot of numbers to read into the
5 record, but, for example, according to the American
6 Society of Esthetic Plastic Surgeons, there were 85,907
7 laser treatments for leg veins in the year 2000, and
8 525,237 sclerotherapy procedures in the year 2000.

9 Q Okay. Is that a one-page document that you're
10 looking at?

11 A The document I'm looking at is multiple pages,
12 but those numbers are on one page.

13 Q Okay. What's the document called? Actually
14 let me take a look at it.

15 MR. JACOBS: Do you want to make a copy?

16 MR. LOVATO: No, that's fine.

17 BY MR. LOVATO:

18 Q In Paragraph 9 of your Appendix B, you have
19 the first sentence That "Plaintiff's expert has
20 mistakenly assumed that three needles are used per
21 procedure instead of per patient in three separate
22 procedures."

23 First, what are you referencing when you say
24 "procedure"?

25 A I'm referencing a -- the definition that

1 dermatologists use of a visit by a patient to a
2 doctor's office for a treatment of spider veins and leg
3 veins.

4 Q So a procedure is a one-time visit of a
5 patient?

6 A That's correct.

7 Q To a doctor's office?

8 A That's correct.

9 Q Okay. And so your understanding is that the
10 use of the APN needle would be that one needle is used
11 per doctor visit of a patient?

12 A That's my understanding from Dr. Gordon,
13 yes.

14 Q Okay. Did that understanding come from
15 anywhere else?

16 A Not particularly, no.

17 Q Okay. With that understanding, I'm a little
18 confused by what you say in the next sentence, where
19 you say that "Plaintiff's expert has not appreciated
20 the potential of reusability of the APN needle."

21 A Okay.

22 Q What reusability would there be if only one
23 needle is being used per doctor visit?

24 A Well, the needle is a solid piece of metal
25 with sharp tines at the end. It could potentially be

1 autoclaved and used for someone else. It could be
2 stored and used for the same patient. It could be
3 used, according to Dr. Gordon, all day long for
4 patients.

5 I'd rather have a new needle myself, but
6 doctors autoclave instruments all the time, and
7 microphlebectomy hooks, very similar devices, are
8 autoclaved and reused repeatedly.

9 Q Okay. Have you seen the latest version of the
10 APN needle in this case?

11 MR. JACOBS: I don't know what that would be.

12 THE WITNESS: I don't think so.

13 BY MR. LOVATO:

14 Q Have you seen any APN needles in this case?

15 A I've only seen Patents and pictures of the APN
16 needle. So is that a "no"?

17 MR. LANDESS: Let me talk to you outside for a
18 second.

19 MR. LOVATO: Yeah, just a quick break.
20 (Recess taken.)

21 BY MR. LOVATO:

22 Q Also in your Appendix B, you make reference
23 to, "Plaintiff's Expert has not considered the validity
24 of the Patent."

25 Do you have any expert opinion as to the

1 validity of the Patent?

2 A Not to the extent that it gets me into any
3 matters that are legal, but I do have some opinion
4 about whether the Patent might be valid or invalid and
5 how that might affect their business, the AMP's
6 business going forward, AMP's business.

7 Q Have you seen the Patent?

8 A Yes.

9 Q What is it that caused you to raise concerns
10 about the validity of the Patent?

11 A As I read the Patent, the Patent refers to
12 prior art, and there is prior art, including the use of
13 microphlebectomy needles, and it wouldn't surprise me
14 if a challenge were raised for the validity of this
15 invention.

16 Q Based on what?

17 A Based on the possibility that it would be
18 invalid, that the Patent would not be valid.

19 Q Are you aware of any challenges to the Patent?

20 A No.

21 Q Are you aware of infringing uses on the
22 Patent?

23 A There have been some asserted, I think.

24 Q By whom?

25 A I believe Plaintiff alleges that there have

1 A I did. I read the Patent. I did the Patent
2 search. I read the Patents that were prior art. I
3 read the Patents that followed the Gordon Patents.

4 Q You do realize that Patent law is a
5 specialized area within the legal field?

6 A I don't claim to be a Patent lawyer.

7 Q Okay.

8 A I don't have any legal expertise.

9 Q Do you believe that the Patent in this case
10 valid?

11 A I don't have an opinion about that. I have
12 concern, as a matter of economics, that as do all
13 businesses, that Patent challenges may be brought for
14 products. Cutera Laser Company, in the documents I
15 produced, explained to their shareholders about what
16 can go wrong in their future sales and talks about
17 Patent challenges, and leaves money aside for
18 litigation purposes to protect against possible Patent
19 challenges. The areas -- the area of technological
20 products is complex.

21 Q Okay. But for it to be something more than
22 pure speculation, the idea that a Patent challenge
23 maybe brought, it would have to be based on some sort
24 of analysis that there's something wrong with the
25 Patent; that there are some challenging uses that,

1 been sales made by another company, and that would
2 probably be considered an infringing use of the Patent.

3 Q And what company or companies were these?

4 A I think there's a claim that Cosmetic Medical
5 Instruments, CMI, has made sales that would -- if this
6 Patent is valid, that I think would constitute an
7 infringing use of the Patent.

8 Q Are there any other entities that you were
9 looking at about possibly infringing uses?

10 A There's a -- I don't know about entities,
11 there's a Patent that came out that -- after the Gordon
12 Patent that references the Gordon Patent, and to the
13 extent that that device uses the Gordon Patent, there
14 may be something about potential infringement in this
15 market. I don't know whose infringement it might be.
16 It might be theirs.

17 Q Who gave you this information?

18 A Which information?

19 Q Any of the information that you've referenced
20 about the validity of the Patent or infringing uses?

21 A These are just my opinions based on my
22 research.

23 Q You just researched the Patent on your own?

24 A I wasn't allowed to? I mean --

25 Q I'm asking if you did?

1 your mind, effect the validity of the Patent?

2 A And I'm offering you no legal opinion. I'm
3 saying that it's possible, in my mind, that someone
4 could consider this invention obvious in the legal
5 sense.

6 Q But, again, you're not offering an opinion
7 to whether that's valid or not?

8 A My opinion? My opinion -- whether my
9 opinion's valid? It's -- I'm not a patent lawyer.
10 don't have -- I'm just telling you what I think are
11 possibilities.

12 Q I wasn't making reference to your opinion.
13 was making reference to what your opinion was as to
14 whether the Patent is valid in this case?

15 A What I'm trying to say there is no more than
16 it should be something that should be considered likely
17 any business would consider the validity of the product
18 they have.

19 Q Okay. Then how much of an effect does the
20 validity of the Patent or the alleged invalidity of the
21 Patent effect the sales of the APN in this case?

22 A I haven't quantified that. I -- I'm just
23 saying it's something that should be thought about.
24 It's possible that this Patent would receive
25 challenges, and this business would have to set aside

1 funds to protect themselves against such litigation.
 2 Q Okay.
 3 A Like Cutera does with respect to its laser
 4 technology. Those funds that are set aside for
 5 possible litigation draw funds away from the operation
 6 of the business.
 7 Q So there's no actual effect regarding the
 8 validity of the Patent that you're aware of on the
 9 sales of the APN from February 2002 onward?
 10 A Potential sales?
 11 Q Yes.
 12 A No, there's no challenges that I know of,
 13 nothing like that.
 14 Q So there's no actual effect that you're aware
 15 of?
 16 A well, I'm not sure how many sales were
 17 actually made, but I don't think that the sales that
 18 were made or returns that were made or any of that had
 19 any -- were impacted in any way by any kind of Patent
 20 challenge. That's just something I said should be
 21 considered.
 22 Q what's your understanding as to who would be
 23 using the APN needle? And what I'm referring to is:
 24 would it be actually used by a doctor, a nurse
 25 practitioner, or some other type of nurse?

1 A I haven't made any assumptions about that, per
 2 se. I would assume it would be used by a doctor --
 3 Q Okay.
 4 A -- unlike a laser, which can be used under the
 5 supervision of a doctor. But I think I differ with
 6 Dr. Lehrer on his opinion that this could be used by a
 7 nurse practitioner. It's an invasive procedure, and
 8 while it's possible, I don't think that's very likely.
 9 Q And what is your opinion based on?
 10 A Oh, I think -- I don't have a -- I guess the
 11 only answer there would be just introspection. I would
 12 rather not have a nurse or a nurse practitioner putting
 13 a needle in me, and I think most patients would think
 14 that way.
 15 Q In reviewing the potential number of sales of
 16 the APN needle after February of 2002, you didn't look
 17 at all to the actions of the defendants in this case?
 18 And when I'm referring to the Defendants, I mean Dennis
 19 Gordon, Duke Miglin or Marilyn Miglin.
 20 A No, I didn't.
 21 Q Do you know what the handle of the APN needle
 22 is made up of?
 23 A I believe there's two configurations for the
 24 APN needle; one is possibly with a handle and the other
 25 isn't.

1 Q But the one that has a handle, what do you
 2 know --
 3 A I can't recall --
 4 Q Do you know what the handle is made of, what
 5 it's composed of?
 6 A I know that was your question. I'd have to
 7 look at the Patent, but I've never seen it, and I don't
 8 know.
 9 Q Okay. Just so I'm clear: Do you know what
 10 the handle is composed of on the APN needle?
 11 A You mean what parts does it consist of, like
 12 does it have springs and moving parts, is that what you
 13 mean by composed or --
 14 Q Well, is it made up of metal, is it made up of
 15 carbon fiber; what is it made up of?
 16 A I can't -- I've never seen it, and I don't
 17 know. I don't know if the Patent chooses a preferred
 18 embodiment.
 19 Q Can you describe the autoclaving process to
 20 me?
 21 A Autoclaving is a pretty simple technique.
 22 It's like sterilizing something by boiling or steaming
 23 water. So autoclaving, it's a device that a medical
 24 instrument can go into that doctors use all the time
 25 that I think heat up water to -- you know, to the

1 boiling, steaming point, and lets the instrument sit
 2 there to attempt to kill off the bacteria.
 3 Q Now, something that were -- let me rephrase.
 4 MR. LOVATO: Rephrasing my question, I would
 5 turn it instead into a statement. I'm done asking
 6 questions, and thank you for coming.
 7 MR. JACOBS: Thank you very much.
 8 THE WITNESS: Okay. I don't know the protocol
 9 here in Nevada. How does payment get handled?
 10 MR. LOVATO: Off the record.
 11 MR. JACOBS: Oh, I'm sorry. Yes, off the
 12 record.
 13 (Discussion off the record.)
 14 THE REPORTER: Do you want him to read and
 15 sign? would you like a copy, e-transcript too?
 16 MR. JACOBS: I'm sorry, what?
 17 THE REPORTER: E-tran and all that good
 18 stuff.
 19 MR. JACOBS: Could I, please.
 20
 21 (Whereupon the deposition
 22 concluded at 10:57 a.m.)
 23 * * * * *
 24
 25

CERTIFICATE OF DEPONENT

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) ss:
 16 COUNTY OF CLARK)

17
 18 I, DR. JEFFREY DUBIN, deponent herein, do hereby
 certify and declare under penalty of perjury under the
 19 laws of the State of Nevada that the within and
 foregoing transcription, including any corrections
 20 reflected above is a true and correct transcription of
 my testimony contained therein.

21 EXPEDITED this day of 2006,
 22 at
 (City/State)

DR. JEFFREY DUBIN, Deponent

CERTIFICATE OF REPORTER

1		
2	STATE OF NEVADA)
3	COUNTY OF CLARK)
4		

5 I, Kimberly A. Perea, a duly commissioned Notary
 Public, Clark County, State of Nevada, do hereby
 6 certify: That I reported the deposition of DR. JEFFREY
 DUBIN, commencing on Wednesday, November 15, 2006, at
 7 9:15 a.m.

8 That prior to being deposed, the witness was duly
 sworn by me to testify to the truth. That I thereafter
 9 transcribed my said stenographic notes via
 computer-aided transcription into written form, and
 10 that the typewritten transcript is a complete, true and
 accurate transcription of my said stenographic notes.
 11 That review of the transcript was requested.

12 I further certify that I am not a relative,
 employee or independent contractor of counsel, of any
 13 of the parties, nor a relative, employee or independent
 contractor of the parties involved in said action, nor
 14 a person financially interested in the action, nor do I
 have any other relationship with any of the parties
 15 involved in the action that may reasonably cause my
 impartiality to be questioned.

16
 17 IN WITNESS WHEREOF, I have set my hand in my
 18 office in the County of Clark, State of Nevada, this
 19 26th day of November, 2006.

KIMBERLY A. PEREA, CSR, CCR #781



Certified Court Reporter

(702) 382-8778

2300 West Sahara Avenue
Suite 770, Box 17
Las Vegas, NV 89102
Fax: (702) 382-2050

November 29, 2006

Dr. Jeffrey Dubin
301 North Lake Avenue, Suite 330
Pasadena, CA 91101

Re: Deposition of **Dr. Jeffrey Dubin**
11/15/2006
Landess vs. Gordon Family Trust

Dear Dear Dr. Dubin::

Enclosed find the condensed original transcript of your deposition in the above entitled case for review and signature.

Any changes to your answers may be written in the space provided on the attached Certificate of Deponent. **Do not write on the condensed transcript!** The Certificate of Deponent must then be signed before a Notary Public.

Please return the signed and notarized Certificate of Deponent and the **condensed original transcript** to our office within 30-days from the date of this letter.

Please advise us if for any reason you cannot meet the 30-day time limit. Your prompt attention to this matter will be greatly appreciated.

Sincerely,

Jennifer Ayres

Jennifer Ayres
Associated Reporters

No. 604767
Enclosures

cc: All Counsel