

Job No: 7715

Advanced Aesthetic Concepts v. P2 L.L.C.

Mark Durante

April 7, 2010

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CAUSE NO. 342-242888-10

ADVANCED AESTHETIC) IN THE DISTRICT COURT
CONCEPTS, L.P.)

Plaintiff,)

v.) TARRANT COUNTY, TEXAS

P2, L.L.C. AND INTERNATIONAL)
BANK OF COMMERCE) 342nd JUDICIAL DISTRICT

Defendants.)

ORAL DEPOSITION OF MARK DURANTE
April 7, 2010

ORAL DEPOSITION OF MARK DURANTE, produced as a witness at the instance of the Defendants P2, L.L.C. and duly sworn, was taken in the above-styled and numbered cause on April 7, 2010, from 1:42 p.m. until 3:57 p.m., before Suzanne Kelly, CSR No. 1260, in and for the State of Texas, reported by stenographic method, at the LAW OFFICES OF GOODRICH POSTNIKOFF ALBERTSON & PETROCCHI, L.L.P., located at 777 Main Street, Suite 1360, Fort Worth, Texas, pursuant to Texas Rules of Civil Procedure and the provisions stated on the record, if any.

JOB NO.: 7715

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APPEARANCES

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EXHIBITS		
NO.	DESCRIPTION	MARKED/IDENTIFIED
5	A copy of a one-page letter to Mark Durante from Paige Peterson dated October 18, 2007	26
6	A copy of a two-page color brochure for Lipo-Ex	28-35
7	A copy of a four-page printout from Advanced Aesthetic Concepts	43-45, 47
8	A copy of a 26-page printout from the Web site of Advanced Aesthetic Concepts	48, 53-55
9	A copy of a seven-page color brochure for Advanced Aesthetic Concepts	62, 63

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NO.	DESCRIPTION	MARKED/IDENTIFIED
10	A copy of a one-page e-mail to Mark Durante from Webster Lodge III dated June 20, 2008	68, 69
11	A copy of a two-page printout from the Web site of the United States Patent and Trademark Office	71

1 PROCEEDINGS

2 THE COURT REPORTER: If you would raise
3 your right hand, I'll administer the witness' oath to
4 you.

5 (Oath administered.)

6 MARK DURANTE,
7 having sworn to testify the truth, the whole truth,
8 and nothing but the truth testifies upon his oath as
9 follows:

10 EXAMINATION

11 BY MR. AKIN:

12 Q. Mr. Durante, have you ever had your
13 deposition taken before?

14 A. No.

15 Q. Where are you from originally?

16 A. Baltimore, Maryland.

17 Q. How long did you live in Baltimore,
18 Maryland?

19 A. Actually, the town was Bel Air, Maryland. I
20 would probably say about 25 years.

21 Q. When did you make your way down to Texas?

22 A. 2003.

23 Q. Where were you at immediately before you
24 moved to Texas?

25 A. Kansas.

1 financial advisors.

2 Q. What did you do for American Express
3 financial advisors?

4 A. Financial planning.

5 Q. For how long?

6 A. About a year and a half to two years.

7 Q. What did you do next?

8 A. Then I was an independent contractor in the
9 business of working with microdermabrasion.

10 Q. When did you first start working as an
11 independent contractor working with --

12 A. April of 1998.

13 Q. I know you know where I was going with that,
14 but if you could let me try to get my question out?

15 A. Sure. Sure. Sure. Sure.

16 Q. Before you answer so she can get it all
17 down?

18 A. Sure.

19 Q. We don't want her to get upset at us.

20 Approximately what year was it when you
21 started working as independent contractor again?

22 A. 1998.

23 Q. 1998. Was that in Maryland at that time?

24 A. No. That was in Kansas.

25 Q. What exactly did you do as an independent

1 Q. What prompted your move?

2 A. Business.

3 Q. Did you get a new business? Did you expand
4 an old business?

5 A. No. The manufacturers that we were working
6 with in Kansas had an opening in Texas and thought we
7 might be able to utilize our skill set in Texas,
8 better in Texas than Kansas.

9 Q. Do you have an undergraduate degree?

10 A. Yes.

11 Q. What is that in?

12 A. In Accounting, a B.S. in Accounting.

13 Q. From what school?

14 A. University of Baltimore.

15 Q. After you graduated from the University of
16 Baltimore, did you seek any further education?

17 A. No.

18 Q. Would you please summarize or give us an
19 overview of when you graduated from the University of
20 Baltimore?

21 A. I went to an accounting firm for a couple of
22 months -- well, actually, let's see.

23 Probably when I graduated, I left the
24 accounting firm that I was working with in December of
25 that year. Then I went to work for American Express

1 contractor working with microdermabrasion?

2 A. I was a manufacturer's rep for cosmetic
3 equipment, cosmetic medical equipment.

4 Q. For what company or companies did you act as
5 a rep?

6 A. It was for a distributor called Bal-Tech
7 Medical.

8 Q. How did you become interested in
9 microdermabrasion?

10 A. Family friend.

11 Q. Tell me generally, how did the process work?
12 What did you do as a manufacturer's rep
13 for that product?

14 A. Basically went to meet with doctors to
15 interest them in the technology of that manufacturer
16 and ultimately to sell.

17 Q. Did you have any sort of agreement where you
18 would sell microdermabrasion products exclusively and
19 no other products?

20 A. No. No. There was -- no.

21 Q. Did you have any sort of written agreement
22 to sell microdermabrasion equipment with Bal-Tech?

23 A. I don't remember.

24 Q. How long did you work as an independent
25 contractor working with microdermabrasion products?

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1 A. I would probably say until about 2007.

2 Q. How many different microdermabrasion

3 products did you work with?

4 A. Four.

5 Q. And would you describe generally what the

6 differences were in those products?

7 A. Just changes in the technology that just

8 made them more salable over the previous technology.

9 New generations.

10 Q. Okay. So at any one time you would

11 generally be selling only one version?

12 A. Correct.

13 Q. Did any of those versions -- were any of

14 those versions approved by the FDA?

15 A. Yes.

16 Q. How many of them?

17 A. All.

18 Q. And how do you know that?

19 A. Stated by the manufacturers.

20 Q. Was that something that was important for

21 you to know before acting as a distributor to sell

22 those products?

23 A. It was important to the manufacturers, so it

24 was important to me.

25 I mean, I was an indirect relationship

Page 10

1 to that. I was never involved in the FDA process, so

2 it was a factor of their product that they received

3 that approval.

4 Q. When you were out trying to sell

5 microdermabrasion products, is that something that --

6 well, first of all, who were you selling to?

7 A. Physicians.

8 Q. Entirely physicians?

9 A. Ninety-eight percent. If there was anyone

10 else, it might be a spa, an upscale spa.

11 Q. When you were dealing with physicians

12 selling microdermabrasion products, would you

13 sometimes get asked by physicians whether the product

14 was FDA-approved?

15 A. Yes.

16 Q. How often would that happen?

17 A. Rarely.

18 Q. For the microdermabrasion products, would

19 you prepare your own marketing materials to give to

20 physicians?

21 A. I would say supporting documentation, not

22 the primary because I was working. Manufacturers

23 traditionally applied that information.

24 Q. So the manufacturer would give you certain

25 marketing materials that you could then pass on to

Page 11

1 physicians. Is that correct?

2 A. Correct.

3 Q. And in those marketing materials provided by

4 Bal-Tech for the various versions of it's

5 microdermabrasion product, did those marketing

6 materials say, specifically, that the product --

7 products were FDA approved?

8 A. I don't remember.

9 Q. Why did you stop working as a manufacturer's

10 rep for Bal-Tech?

11 A. Differences of opinion.

12 Q. What were those differences of opinion?

13 A. Their business model. I just felt like I

14 could do something different and do it better.

15 Q. What did you decide to do in 2007, when you

16 stopped working as a manufacturer's rep?

17 A. Well, we were still manufacturers reps to --

18 per se.

19 Q. Okay.

20 A. You just sought out different products.

21 Q. When you were working as a manufacturer's

22 rep between 1998 and 2007, did you do that through a

23 company that you formed or did you do it individually?

24 A. No. It was a company I formed.

25 Q. What company did you form?

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1 A. Advanced Aesthetic Concepts.

2 Well, there was multiples, but they are

3 all premised under Advanced Aesthetic Concepts just

4 based on states because I was in Kansas remember at

5 the time in 1998, so coming to Texas, the name I had

6 in Kansas, I could not claim here in Texas so I had to

7 rename the organization Advanced Aesthetic Concepts.

8 Q. What was the name you had used in Kansas?

9 A. Aesthetic Solutions.

10 Q. You moved to Texas in 2007?

11 A. Not in 2007. 2003.

12 Q. Okay.

13 A. Correct.

14 Q. When you moved to Texas in 2003, did you

15 form a new company at that time?

16 A. Yes, sir.

17 Q. What was the name of that company?

18 A. Advanced Aesthetic Concepts.

19 Q. Was that Advanced Aesthetic Concepts, L.P.,

20 the Plaintiff in this case?

21 A. No.

22 Q. What was the entity you formed in 2003?

23 A. Advanced Aesthetic Concepts, Inc.

24 Q. What kind of business did Advanced Aesthetic

25 Concepts, Inc., do?

1 A. Cosmetic medical equipment.
 2 Q. What kind of cosmetic medical equipment?
 3 A. Give me an example of specifically what you
 4 are looking for.
 5 Q. I don't know much about cosmetic medical
 6 equipment. So what kind of products were you selling
 7 that you would consider.
 8 A. Lasers.
 9 Q. Anything other than lasers?
 10 A. Light-based devices.
 11 Q. About how many different products?
 12 A. Well, there is probably 15 to 20 different
 13 combinations of those lasers.
 14 Q. What positions did you hold with Advanced
 15 Aesthetic Concepts, Inc.?
 16 A. Owner.
 17 Q. Did you have any other, any positions such
 18 as president, chairman?
 19 A. President and -- president and treasurer.
 20 Q. Were you the sole shareholder of Advanced
 21 Aesthetic Concepts, Inc.?
 22 A. No.
 23 Q. How many shareholders were there?
 24 A. Two.
 25 Q. Who was the other shareholder?

1 A. My wife.
 2 Q. Did you own the majority of those shares?
 3 A. No.
 4 Q. In 2003, you formed Advanced Aesthetic
 5 Concepts, Inc., was that the only company you were
 6 doing business through, or were there other companies
 7 you were doing business through?
 8 A. That was the primary one I was doing
 9 business through.
 10 Q. What were the other ones?
 11 A. I didn't do business through any other ones
 12 except for Advanced Aesthetic Concepts, Inc.
 13 Q. Did you stop doing business through the
 14 Kansas entity once you moved to Texas?
 15 A. Yes.
 16 Q. After you moved to Texas in 2003, did you
 17 form any other entities other than Advanced Aesthetic
 18 Concepts, Inc.?
 19 A. Yes.
 20 Q. How many?
 21 A. Three.
 22 Q. What's the first one you formed after formed
 23 Advanced Aesthetic Concepts, Inc.?
 24 A. J and E Developments.
 25 Q. Would you spell that?

1 A. J.
 2 Q. J?
 3 A. And E, Developments, Inc.
 4 Q. And what kind of business did J and E
 5 Developments do?
 6 A. Just a management company.
 7 Q. Were you the sole shareholder of that?
 8 A. No.
 9 Q. You and your wife again?
 10 A. Yes.
 11 Q. I take it J and E Development never had any
 12 business selling medical products?
 13 A. (Shakes head.)
 14 Q. Is that it?
 15 A. No. No.
 16 Q. After J and E Developments, what's the next
 17 entity you formed?
 18 A. Just trying to think of dates. Durante
 19 Holdings.
 20 Q. What kind of entity was that?
 21 A. That was for more a medical spa.
 22 Q. Was that a corporation, a limited
 23 partnership?
 24 A. No. It was a limited partnership.
 25 Q. You say that entity, the business of that

1 entity was to run a spa?
 2 A. Correct.
 3 Q. Was that a single spa located here in Fort
 4 Worth?
 5 A. Yes. Yes.
 6 Q. And is Durante Holdings still operating a
 7 spa in Fort Worth?
 8 A. No.
 9 Q. When did it stop doing so?
 10 A. 2008, the end of 2008.
 11 Q. What happened at the end of 2008 that caused
 12 Durante Holdings to stop operating that spa?
 13 A. My wife became ill.
 14 Q. You said there were three entities. I take
 15 it the third entity was --
 16 A. This L.P.
 17 Q. The Advanced Aesthetic Concepts, L.P.?
 18 A. Yes, sir.
 19 Q. If I refer, like your counsel did in the
 20 prior deposition to "Advanced," will you understand
 21 that "Advanced" means Advanced Aesthetic Concepts,
 22 L.P.?
 23 A. Yes. I will.
 24 Q. Who was the general partner of Advanced?
 25 A. It is -- it's an odd name. I would have to

1 actually find it out for you. It's like AA -- no.
 2 It's -- I think it's AAC Gen Park.
 3 Q. Okay. Is there anybody other than you and
 4 your wife that owns an interest in Advanced, an
 5 ownership interest?
 6 A. No. Besides ACC Gen Park. Correct.
 7 Q. Okay. But that would in turn be owned, if
 8 we took it another step, by you and your wife?
 9 A. Correct. Correct.
 10 Q. I appreciate your clarification, though.
 11 A. Yeah, sure.
 12 Q. Why did you form Advanced?
 13 A. On the advice of my accountant and counsel.
 14 Q. Did the business of Advanced change in any
 15 way when the name changed, the entity changed?
 16 A. No.
 17 Q. How many employees does Advanced have,
 18 currently?
 19 A. Three.
 20 Q. Who are those employees?
 21 A. Do you want their full names?
 22 Q. No. I don't need middle names.
 23 A. Jayne, Shannon and Cindy.
 24 Q. Cindy is Cindy Catfield?
 25 A. Kappel, K-a-p-p-e-l.

1 Q. Okay. Is Ms. Kappel still employed today by
 2 Advanced?
 3 A. Yes.
 4 Q. What's her position?
 5 A. She is our internal finance person. Deals
 6 with recordkeeping.
 7 THE COURT REPORTER: I'm sorry. Deals
 8 with?
 9 A. Recordkeeping. No problem.
 10 Q. (By Mr. Akin) Did you ever tell Ms. Kappel
 11 you were going to fire her over the wire transfers
 12 that are at issue in this lawsuit?
 13 A. No.
 14 Q. If Ms. Kappel said that she was going to get
 15 fired over those wire transfers, do you have any idea
 16 what she would have been talking about?
 17 A. She probably suspected based on the dollar
 18 amount transferred that she would be fired. Based on
 19 the enormity of the project.
 20 Q. But it wouldn't have been based on anything
 21 you told her?
 22 A. No.
 23 Q. Are you also the president of Advanced?
 24 A. No.
 25 Q. Is there a president?

1 A. No.
 2 Q. Are there any officers at all?
 3 A. No.
 4 Q. I guess -- are operations conducted
 5 exclusively through the general partner?
 6 A. Correct.
 7 Q. Who is the manager of the general partner?
 8 A. Myself and my wife.
 9 Q. Is that co-managers?
 10 A. Correct.
 11 Q. You mentioned earlier that at least at one
 12 point, your wife was ill in connection with the spa
 13 and I don't want to probe into the details, but is
 14 your wife actively involved at this time as a -- as a
 15 manager of the general partner?
 16 A. Not really.
 17 Q. Is it fair to say it's mainly you making the
 18 decisions?
 19 A. Correct. She is consulted, but she is not
 20 as active as I have.
 21 Q. Okay. Other than consulting with your wife
 22 to tell her that decisions are being made for
 23 Advanced, is there anybody else you have to talk with
 24 or consult with about decisions that are being made by
 25 the company?

1 A. No.
 2 Q. In consultation with your wife you are
 3 really the ultimate decision making authority for
 4 Advanced through being one of the managers and the
 5 general partner? Is that right?
 6 A. I make decisions on a daily basis but she is
 7 involved in all major decisions, you know, as well as
 8 anything I decide to bring her in to that I think is
 9 important at hand.
 10 Q. Okay.
 11 A. She's an owner. So there is a respect to
 12 that.
 13 Q. Sure. Appreciate that clarification.
 14 What does Shannon do at the office?
 15 A. He is basically customer service, inside
 16 consultant.
 17 Q. What about Jayne?
 18 A. Jayne, she is involved in putting together
 19 project management and any -- any work done with any
 20 of our marketing organizations.
 21 Q. In the regular course of Advanced business,
 22 does Advanced hire third party firms to help with
 23 marketing activities?
 24 A. Sometimes, yes.
 25 Q. Could you describe for me generally how that

1 process works, the process of creating marketing
 2 materials for Advanced?
 3 A. The -- give an example.
 4 Q. Sure. You mentioned that Jayne has
 5 responsibility for dealing with marketing
 6 organizations. And you know, first, I'm wondering:
 7 What input does Advanced have in the content that goes
 8 into those marketing materials.
 9 A. Uh-huh. We are in control of the content
 10 that goes into the materials.
 11 Q. So anything that ultimately gets sent out as
 12 a marketing material has been approved by Advanced
 13 before it goes out. Is that right?
 14 A. That's correct.
 15 Q. And it wouldn't -- it would not only be
 16 approved by Advanced, but it would be approved by you,
 17 personally? Right?
 18 A. Depending upon the size of the marketing
 19 project, then, yes.
 20 For day-to-day activities of informing
 21 clients of things that we're doing, some of those
 22 duties are handed to the people that work inside the
 23 organization.
 24 Q. Give -- what size would you become involved?
 25 A. Anything that's major that has a large

1 expenditure to it, I would say over \$500.
 2 Q. A mail-out to physicians?
 3 A. Correct.
 4 Q. A notice for a seminar?
 5 A. Correct.
 6 Q. Is there anybody at your office that -- the
 7 three employees you mentioned, Jayne, Shannon or Cindy
 8 who has experience with medical devices, prior to
 9 working with Advanced?
 10 A. No.
 11 Q. Do any employees of Advanced, Jayne, Shannon
 12 or Cindy have any experience in dealing with the FDA?
 13 A. No.
 14 Q. Have you ever had any criminal charges
 15 brought against you before?
 16 A. No.
 17 Q. In what year did you first hear of the name
 18 RevcoMed?
 19 ~~2007~~
 20 Q. What is the LipoTron 3000?
 21 A. Radio frequency device.
 22 Q. When did you first hear of the LipoTron
 23 3000?
 24 A. 2007. Did Advanced sell any LipoTron 3000
 25 devices in 2007?

1 MR. HERD: I think based on the
 2 representations by P2 as far as their contact with the
 3 FDA in the prior deposition, I am going to instruct
 4 you to invoke your Fifth Amendment rights.
 5 A. I cannot answer based on my Fifth Amendment
 6 rights.
 7 Q. (By Mr. Akin) Did Advanced sell any LipoTron
 8 3000 devices in 2008?
 9 A. I can't answer that based the upon my Fifth
 10 Amendment rights.
 11 Q. Did Advanced sell any LipoTron devices in
 12 2009?
 13 A. I can't answer that based upon my Fifth
 14 Amendment rights.
 15 Q. Has Advanced sold any LipoTron 3000 devices
 16 so far in 2010?
 17 A. I can't answer that based on my Fifth
 18 Amendment rights.
 19 Q. You are aware, aren't you, you, that P2 has
 20 taken the position in this litigation that the
 21 marketing of the LipoTron 3000 device is an illegal
 22 activity? You are aware of that allegation? Aren't
 23 you?
 24 MR. HERD: You can answer "yes" or "no"
 25 to that question.

1 A. Yes.
 2 Q. (By Mr. Akin) Are you willing to give any
 3 explanation -- do you believe that the marketing of
 4 LipoTron 3000 devices is legal, a legal activity?
 5 A. I can't answer that based on my Fifth
 6 Amendment rights.
 7 Q. You actually attended a prior hearing in
 8 this case. Didn't you?
 9 A. This one -- that we are talking about
 10 regarding the transfer of funds.
 11 Q. This case, the hearing in front of Judge
 12 Chapel?
 13 A. Yes.
 14 Q. You were there when one of your employees,
 15 Cindy Kappel got up on the stand and testified about
 16 the disputed wire transfers? Weren't you?
 17 A. Yes.
 18 Q. And you were -- Do you remember Ms. Kappel
 19 testifying that the wire transfers were money, but the
 20 money was being sent to RevcoTron.
 21 Do you recall that testimony?
 22 A. Yes.
 23 Q. Has Advanced ever purchased any products or
 24 medical devices from RevcoTron other than the
 25 versions of the LipoTron?

MR. HERD: Based upon the --

A. I can't answer that based on my Fifth Amendment rights.

Q. (By Mr. Akin) Do you remember hearing Ms. Kappel testify that the disputed wire transfers related to the sales of LipoTron devices?

A. No.

Q. You don't remember that?

A. No.

Q. We will get a transcript for that.

A. Yeah. Go ahead.

Q. Do you remember there being any discussion that hearing about the LipoTron device?

A. No. I do not.

Q. Is it your position that the wire transfers in this case were funds that were intended for RevecoMed?

A. Yes.

Q. That's where you say the money should have gone. Right?

A. Correct.

Q. (By Mr. Akin) Mr. Durante, you have been handed a document -- I might actually get that renumbered, if you don't mind.

What number --

MR. HERD: 4, so this would be "5."

(Deposition Exhibit Number 5 is marked.)

Q. (By Mr. Akin) Mr. Durante, you have been handed a document that is marked "Deposition Exhibit Number 5."

A. Uh-huh.

Q. Would you please identify that for us?

A. It looks like it's a letter from RevecoMed with Paige Peterson's name on it.

Q. Do you remember receiving a letter from Paige Peterson? Is it a true and correct copy of a letter dated October 18th, 2007, that you received from Paige Peterson?

A. No.

Q. Did you receive a signed copy of this letter?

A. No.

Q. Have you made any effort to look for it?

A. No. This is the first time I've seen it.

Q. You are confident?

A. I am confident.

Q. Did you ever ask Paige Peterson whether there had been FDA approval for the LipoTron 3000 device?

MR. HERD: I am going to instruct you that based on --

A. Fifth Amendment.

MR. HERD: -- statements made by P2 in the previous deposition that you invoke your Fifth Amendment right.

A. Yeah.

Q. (By Mr. Akin) Have you ever sold a medical device that did not have FDA approval?

A. No.

Q. Your testimony under oath is that -- has Advanced ever sold a medical advice that did not have FDA approval.

A. Fifth Amendment --

MR. HERD: I instruct you not to answer that based upon the previous testimony.

Q. (By Mr. Akin) Have you ever had any conversations with RevecoMed about whether the LipoTron 3000 had received FDA approval?

MR. HERD: I am going to instruct you not to answer based upon the previous deposition testimony, and your Fifth Amendment rights.

A. Fifth Amendment rights. I can't answer.

Q. (By Mr. Akin) Are you going to follow your lawyer's instruction on that?

A. Yes, I am.

Q. What is your general understanding about how the FDA approval process works? I understand you are not an expert in it.

But do you have an understanding of that?

A. I'm not an expert.

Q. Do you have any general understanding of how it works?

A. I am not going to answer that under my Fifth Amendment rights.

Q. Would it be accurate to say you do not have any evidence to offer in this case that the LipoTron 3000 has ever been approved by the FDA?

MR. HERD: I am going to instruct you not to answer that question based upon previous testimony. You can assert your Fifth Amendment rights.

A. I can't answer that due to my Fifth Amendment rights.

(Deposition Exhibit Number 6 is marked.)

Q. (By Mr. Akin) Mr. Durante, you have been handed a Deposition Exhibit that is marked "Deposition Exhibit Number 6."

1 Would you please identify that for us?
 2 A. It looks like a brochure.
 3 Q. And it's one of -- it's a brochure that was
 4 prepared by Advanced. Is that correct?
 5 A. Yes.
 6 Q. Approximately -- can you tell us what year
 7 Advanced had this Exhibit Number 6, the marketing
 8 brochure, prepared?
 9 A. I don't know.
 10 Q. It would have been sometime in 2007 or
 11 after. Is that right?
 12 A. It could be.
 13 Q. If you look at the bottom left corner it has
 14 the name, Advanced Aesthetic Concepts. Correct?
 15 A. Uh-huh. Correct.
 16 Q. Who was this sent to? Exhibit Number 6?
 17 A. I don't know.
 18 Q. What was the purpose of Advanced preparing
 19 Deposition Exhibit Number 6?
 20 A. It looks like it's a Lipo-Ex brochure that
 21 would be used on selling.
 22 Q. Something that Advanced would provide to
 23 physicians?
 24 MR. HERD: Would you repeat your
 25 question?

1 Q. (By Mr. Akin) Is Deposition Exhibit Number 6
 2 something that Advanced would provide to physicians?
 3 MR. HERD: I am going to object to that
 4 and instruct you not to answer based upon the previous
 5 testimony and based upon your Fifth Amendment rights.
 6 A. Based upon my Fifth Amendment rights, I
 7 can't answer.
 8 Q. (By Mr. Akin) Exhibit Number 6 is a
 9 marketing piece that you reviewed and approved. Is
 10 that correct?
 11 MR. HERD: I am going to instruct you
 12 not to answer --
 13 A. I can't answer based upon my Fifth Amendment
 14 rights.
 15 Q. (By Mr. Akin) Lipo-Ex, that actually refers
 16 to the LipoTron 3000 medical device. Doesn't it?
 17 MR. HERD: I am going to instruct you
 18 not to answer that question based upon the Fifth
 19 Amendment rights based on the testimony given in the
 20 previous deposition.
 21 A. I can't answer based upon my Fifth Amendment
 22 rights.
 23 Q. On Exhibit Number 6 right after the Lipo-Ex
 24 do you see the little letters, "TM"?
 25 A. Yes, sir.

1 Q. Do you understand that stands for trademark?
 2 Right?
 3 A. Yes, I do.
 4 Q. Advanced actually applied for a trademark
 5 for the name Lipo-Ex? Is that correct?
 6 MR. HERD: You can answer that
 7 question.
 8 A. Yes.
 9 Q. What is Lipo-Ex?
 10 MR. HERD: I am going to advise you to
 11 the extent that you can answer that question without
 12 violating your Fifth Amendment rights with respect to
 13 the testimony from the previous deposition that you
 14 can instruct -- you can answer that question in
 15 accordance with those instructions based upon your
 16 Fifth Amendment rights.
 17 A. It is a program designed to aid or help in
 18 the things listed in Exhibit 6.
 19 Q. Does part of that program include a
 20 medical device?
 21 A. I can't answer due to my Fifth Amendment
 22 rights.
 23 Q. There is not anything -- well, let me ask
 24 this: Is Lipo-Ex -- is any part or all of Lipo-Ex the
 25 program as you described it, been approved by the FDA?

1 A. I can't answer that due to my Fifth
 2 Amendment rights.
 3 Q. Just so we are clear, you understand when I
 4 say, "FDA," I am referring to the Food and Drug
 5 Administration.
 6 A. Correct.
 7 Q. How would Advanced go about trying to sell
 8 the Lipo-Ex to physicians?
 9 A. I can't answer that due to my Fifth
 10 Amendment rights.
 11 Q. There is not anything on Deposition Exhibit
 12 Number 6 saying that the Lipo-Ex is not FDA approved?
 13 Is there?
 14 MR. HERD: I am going to object to
 15 form.
 16 Q. (By Mr. Akin) You can go ahead and answer.
 17 A. No.
 18 Q. What is the basis for saying in Deposition
 19 Number -- Exhibit Number 6, on the first page there
 20 that with Lipo-Ex TM, you can melt up to three inches
 21 in body fat circumference in six weeks?
 22 MR. HERD: To the extent that you can
 23 answer that without --
 24 A. I can't answer that due to my Fifth
 25 Amendment rights.

1 MR. HERD: Anything that you can
2 answer, you are instructed to answer.
3 A. I can't.
4 Q. (By Mr. Akin) If you would look at the
5 second page, please, Exhibit 6.
6 A. (Witness complies.)
7 Q. If you look at the right-hand side, middle
8 of the page, top of Page 2 of Deposition Exhibit
9 Number 6, says "Lipo-Ex TM does all of this with no
10 pain, no inflammation and no downtime!"
11 Can I read that correctly?
12 MR. HERD: Time out. I would like to
13 see where we are reading. I'm sorry. Okay. Thank
14 you.
15 Q. (By Mr. Akin) Did I read that correctly?
16 A. Yes.
17 Q. What is the all of this refers to the bullet
18 points right above that. Correct?
19 A. I would assume so.
20 Q. So Deposition Exhibit Number 6 is saying
21 that the Lipo-Ex helps reduced large volumes of fat
22 without liposuction or surgery and does all of that
23 with no pain and no inflammation. Correct?
24 A. Correct.
25 Q. And Advanced was also representing that the

1 Lipo-Ex helps treat the unhealthy visceral --
2 visceral?
3 A. Correct.
4 Q. Visceral fat that not even liposuction can
5 treat and does that without any pain or inflammation.
6 Is that correct?
7 A. That's correct.
8 Q. Advanced was presenting that the Lipo-Ex
9 provides long term cellulite reduction with no pain
10 and no inflammation. Correct?
11 A. I would assume so.
12 Q. What was the basis for Advanced to represent
13 that the Lipo-Ex could do the items listed on Page 2
14 of Exhibit Number 6 with no pain and no inflammation?
15 A. I can't answer that due to my Fifth
16 Amendment rights.
17 MR. HERD: To the extent that you are
18 capable of answering that question without infringing
19 on your Fifth Amendment rights I would advise you to
20 answer that.
21 A. I can tell you, I've accomplished all of
22 that with diet. So that's where that is.
23 Q. (By Mr. Akin) Is there anything in Exhibit
24 Number 6 that says that Advanced is marketing a diet?
25 I am just asking you if you can point

1 me to anything in Exhibit Number 6.
2 A. Does Exhibit Number 6 say I am marketing a
3 technology?
4 MR. AKIN: Objection. Non-responsive.
5 A. If you can't answer that one, I am not
6 answering the other.
7 MR. HERD: May we go off the record for
8 a moment?
9 MR. AKIN: Sure.
10 (Conversation held off the record.)
11 A. I can't answer that due to my Fifth
12 Amendment rights.
13 Q. (By Mr. Akin) Mr. Durante, you have signed
14 an affidavit in connection with the Motion for Summary
15 Judgment that has been prepared by -- filed by
16 Advanced in this case. Is that correct?
17 A. That's correct.
18 Q. Do you remember you signed your name and
19 swearing to that affidavit before a notary public? Is
20 that right?
21 A. Yes.
22 Q. That affidavit is attached as an exhibit to
23 Advanced's Motion for Summary Judgment, is that
24 correct?
25 A. I would assume.

1 Q. Is every statement contained in your
2 affidavit true and correct?
3 A. I believe it is.
4 Q. Is it a true and correct statement that
5 since April, 2009, Advanced has made a total of 15
6 direct purchases from RevcoMed of LipoTron 3000 radio
7 frequency lipoplasty devices that Advanced had
8 previously purchased through P2?
9 MR. HERD: I am going to instruct you
10 not to answer that question.
11 As how I believe that you should answer
12 that question in terms of your Fifth Amendment rights
13 as to whether or not at the time that your affidavit
14 that you executed, whether the statements that you
15 made in that were true and correct, but with respect
16 for this deposition, going forward, that based on the
17 testimony of the previous deposition, you are going to
18 assert your Fifth Amendment rights to protect your
19 answers at this point.
20 A. That's correct. I am going to plead the
21 Fifth to protect my interest.
22 Q. (By Mr. Akin) Is it true that on or about
23 December 18, 2009, Advanced entered into a sales
24 agreement with Dr. J. Shaw at Ameri -- AmeriMed Spa
25 whereby Dr. Shaw purchased a LipoTron 3000 generator,

1 four bipolar hand pieces and two-year manufacturer's
2 extended warranty?

3 MR. HERD: I am going to advise you to
4 answer that question based on the truth, the veracity
5 of that statement at the time that, that affidavit was
6 executed, but with respect to this deposition going
7 forward that you assert your Fifth Amendment rights
8 based on the earlier deposition testimony.

9 A. I assert my Fifth Amendment rights.

10 Q. (By Mr. Akin) Advanced sent Dr. Shaw an
11 invoice in the amount of \$99,500. Is that correct?

12 A. I assert my Fifth Amendment rights.

13 Q. Is it true the first Dr. Shaw payment was
14 meant solely for the -- Let me back up.

15 It's true, isn't it, that Advanced
16 received the deposit wire from Dr. Shaw on
17 December 18, 2009, the so-called "first Dr. Shaw
18 payment"?

19 A. I assert my Fifth Amendment rights.

20 Q. The "first Dr. Shaw payment" as that term is
21 defined in your affidavit was meant solely for the
22 purchase of the LipoTron from Advanced. Is that
23 correct?

24 A. I assert my Fifth Amendment rights.

25 Q. Is it true that on or about December 18th,

1 A. I assert my Fifth Amendment rights.

2 Q. Is it true that on or about December 31,
3 2009, Advanced mistakenly submitted a wire transfer
4 pursuant to Purchase Order 13624 for \$20,750 to an
5 account owned by P2 rather than RevecoMed's bank
6 account?

7 MR. HERD: I am going to advise you to
8 answer that question to the extent that you can answer
9 that question without violating your Fifth Amendment
10 rights as to any of the representations made in the
11 earlier deposition.

12 A. I would assert my Fifth Amendment rights.

13 Q. (By Mr. Akin) Dr. Fagan is a customer of
14 Advanced. Correct?

15 A. I will assert my Fifth Amendment rights.

16 Q. Is it true that on or about December 28th,
17 2009, Advanced entered into a sales agreement with Dr.
18 Gary Fagan whereby Dr. Fagan purchased a LipoTron?

19 A. I assert my Fifth Amendment rights.

20 Q. Is there any reason why your affidavit uses
21 the term "LipoTron" instead of "Lipo-Ex"?

22 A. I assert my Fifth Amendment rights.

23 Q. Is it true that the purchase price for the
24 LipoTron purchased by Dr. Gary Fagan was \$97,641.50?

25 A. I assert my Fifth Amendment rights.

1 2009, Advanced issued Purchase Number -- Purchase
2 Order Number 13624 to RevecoMed on behalf of Dr. Shaw
3 for the LipoTron?

4 A. I assert my Fifth Amendment rights.

5 Q. Is it true that on or about December 18,
6 2009, Advanced submitted Purchase Order 13624 to
7 RevecoMed without the deposit because of a credit owed
8 them by RevecoMed?

9 A. I assert my Fifth Amendment rights.

10 Q. Is it true that RevecoMed shipped the
11 LipoTron to Dr. Shaw?

12 A. I assert my Fifth Amendment rights.

13 Q. On or about December 31, 2009, is it true
14 that Dr. Shaw wired the remaining balance to Advanced
15 which is called in your affidavit the "final Dr. Shaw
16 payment"?

17 A. I assert my Fifth Amendment rights.

18 Q. Is it true that the final Dr. Shaw payment
19 was meant solely for the purchase made pursuant to
20 "Purchase Order 13624, less the sales mark-up due to
21 Advanced"?

22 A. I assert my Fifth Amendment rights.

23 Q. Is it true that you attached a true and
24 correct copy of the e-mail confirming Dr. Shaw's
25 finer -- final payment by wire transfer?

1 Q. Is it true that you attached a true and
2 correct copy of the invoice to Dr. Fagan for
3 \$97,641.50?

4 A. I assert my Fifth Amendment rights.

5 Q. Is it true that Advanced received payment in
6 full from Dr. Fagan on or about December 31, 2009,
7 which you call in your affidavit, the "Dr. Fagan
8 payment"?

9 A. I assert my Fifth Amendment rights.

10 Q. Is it true that the Dr. Fagan payment was
11 meant solely for the purchase made pursuant to
12 purchase order 13632 less the sales mark-up due to
13 Advanced?

14 A. I assert my Fifth Amendment rights.

15 Q. Is it true that you attached a true and
16 correct copy of the wire transfer reflecting Dr.
17 Fagan's payment?

18 A. I assert my Fifth Amendment rights.

19 Q. Is it true that on or about December 31,
20 2009, Advanced issued Purchase Order Number 13632 to
21 RevecoMed on behalf of transfer Fagan for the
22 LipoTron?

23 A. I assert my Fifth Amendment right.

24 Q. Is it true that you attached a true and
25 correct copy of Purchase Order Number 13632 as Exhibit

<p style="text-align: right;">Page 41</p> <p>1 A to your affidavit?</p> <p>2 A. I assert my Fifth Amendment rights.</p> <p>3 Q. Is it true that on or about December 31,</p> <p>4 2009, Advanced mistakenly submitted payment in full of</p> <p>5 the purchase price of the LipoTron, \$41,500 to an</p> <p>6 account with P2 rather than RevecoMed's bank account?</p> <p>7 MR. HERD: I would advise you to answer</p> <p>8 that question to the extent you can truthfully, to the</p> <p>9 extent that it does not violate your Fifth Amendment</p> <p>10 rights.</p> <p>11 A. I assert my Fifth Amendment rights.</p> <p>12 Q. (By Mr. Akin) Cindy Kappel, she is the</p> <p>13 person at Advanced who is responsible for sending</p> <p>14 Advanced's payments to RevecoMed. Is that right?</p> <p>15 A. I assert my Fifth Amendment rights.</p> <p>16 MR. HERD: You can answer that</p> <p>17 question.</p> <p>18 A. I know but -- okay. I mean, what I will say</p> <p>19 is Cindy Kappel is responsible for sending monies to</p> <p>20 any persons.</p> <p>21 Q. (By Mr. Akin) One she sent money to on</p> <p>22 behalf of Advanced is RevecoMed? Right?</p> <p>23 A. I assert my Fifth Amendment rights.</p> <p>24 Q. You were actually the one who directed Cindy</p> <p>25 Kappel to send four wire transfers from Advanced --</p>	<p style="text-align: right;">Page 43</p> <p>1 answer that question with regard to your Fifth</p> <p>2 Amendment rights.</p> <p>3 A. I assert my Fifth Amendment rights.</p> <p>4 Q. Has Advanced been involved in any patient</p> <p>5 studies regarding the LipoTron 3000?</p> <p>6 MR. HERD: I would advise you not to</p> <p>7 answer that question based on your Fifth Amendment</p> <p>8 rights.</p> <p>9 A. I assert my Fifth Amendment rights.</p> <p>10 (Deposition Exhibit Number 7 is</p> <p>11 marked.)</p> <p>12 Q. (By Mr. Akin) Mr. Durante, you have been</p> <p>13 handed a document that is marked "Deposition Exhibit</p> <p>14 Number 7."</p> <p>15 Would you please identify that document</p> <p>16 for us?</p> <p>17 A. It appears to be a brochure.</p> <p>18 Q. It's another brochure that was prepared by</p> <p>19 Advanced. Correct?</p> <p>20 A. That is correct.</p> <p>21 Q. Prepared by Advanced with your approval.</p> <p>22 Correct?</p> <p>23 A. That's correct.</p> <p>24 Q. This was a brochure that Advanced provided</p> <p>25 to potential customers, physicians. Is that right?</p>
<p style="text-align: right;">Page 42</p> <p>1 the bank of Advanced, Compass Bank, to RevecoMed's</p> <p>2 bank account. Is that right?</p> <p>3 MR. HERD: I am going to advise you to</p> <p>4 the extent that you can answer that question without</p> <p>5 violating your Fifth Amendment rights that you answer</p> <p>6 that question based on the earlier deposition</p> <p>7 testimony.</p> <p>8 A. I assert my Fifth Amendment rights.</p> <p>9 Q. (By Mr. Akin) Is it true that the two wire</p> <p>10 transfers that were recalled were applied to Advanced</p> <p>11 account with RevecoMed?</p> <p>12 A. I assert my Fifth Amendment rights.</p> <p>13 Q. Is it true that the two wire transfers for</p> <p>14 which Advanced has been unable to recover from P2 in</p> <p>15 the amount of \$41,500 and \$20,750 were wire transfers</p> <p>16 from payments pursuant to purchase order 13632 for Dr.</p> <p>17 Fagan and Purchase Order 13624 for Dr. Shaw?</p> <p>18 A. I would assert my Fifth Amendment rights.</p> <p>19 MR. HERD: You need to let me make my</p> <p>20 statement.</p> <p>21 A. Oh, sorry.</p> <p>22 Q. (By Mr. Akin) Have you heard anything today</p> <p>23 that is going to persuade Advanced to stop selling,</p> <p>24 marketing the Lipo-Ex program?</p> <p>25 MR. HERD: I would advise you not to</p>	<p style="text-align: right;">Page 44</p> <p>1 A. I assert my Fifth Amendment rights.</p> <p>2 Q. Do you know what year Exhibit Number 7 was</p> <p>3 prepared in?</p> <p>4 A. No.</p> <p>5 Q. If you would look at Page 2.</p> <p>6 A. (Witness complies.)</p> <p>7 Q. Please. First paragraph, second sentence,</p> <p>8 says that, "The current study results showed an</p> <p>9 average reduction of subcutaneous and visceral fat of</p> <p>10 between 16 to 25 inches after only five sessions."</p> <p>11 Did I read that correctly?</p> <p>12 A. Yes. I did read it correctly.</p> <p>13 Q. What are the current study results that are</p> <p>14 being referred to on Page 2 of Deposition Exhibit</p> <p>15 Number 7?</p> <p>16 MR. HERD: You can answer that</p> <p>17 question.</p> <p>18 A. Those study results there?</p> <p>19 Q. (By Mr. Akin) Yes.</p> <p>20 A. Those study results were provided to me</p> <p>21 through Paige Peterson.</p> <p>22 Q. When did Paige Peterson provide you with the</p> <p>23 study results referenced there?</p> <p>24 A. It would have been after we met in 2007.</p> <p>25 Q. How long after?</p>

1 A. I don't know.
 2 Q. Do you still have a copy of those study
 3 results?
 4 A. I have a copy of the information she
 5 provided me that stated that information, yes.
 6 Q. And when you say you have a copy of the
 7 information provided that stated that information, are
 8 you talking about notes you took, or are you talking
 9 about physical documentation?
 10 A. No. Physical documentation that she
 11 provided me that I have on record.
 12 Q. Did you take any steps, yourself, to try to
 13 confirm whether the study results were true and
 14 accurate?
 15 A. From that position there, Paige only allowed
 16 herself to be the authority to give those results.
 17 MR. AKIN: Object as non-responsive.
 18 Q. (By Mr. Akin) My question is whether you,
 19 Mark Durante, took any steps on your own to try to
 20 confirm whether the study results that are referenced
 21 in Deposition Exhibit Number 7, Page 2, were true?
 22 A. By examining the information that she gave
 23 to me and by the statements that she made to me,
 24 that's where that came from.
 25 Q. You didn't do anything other than -- you

1 didn't do anything yourself? Did you?
 2 MR. HERD: Object to form.
 3 A. I reviewed the information she provided, the
 4 statements that she provided, as evidence that, that
 5 was correct.
 6 Q. (By Mr. Akin) Other than reviewing the
 7 statements, did you do anything else?
 8 A. There were numerous things that she handed
 9 me that had the same thing on there.
 10 Q. Other than reviewing however many documents
 11 Ms. Peterson gave you, did you do anything else beyond
 12 that to try to confirm that there were, in fact, study
 13 results that showed an average reduction of
 14 subcutaneous and visceral fat between 16 to 25 inches
 15 after only five sessions?
 16 A. No.
 17 Q. Did Ms. Peterson ever tell you that the
 18 LipoTron 3000, the application to the FDA had not been
 19 approved?
 20 MR. HERD: I would advise you not to
 21 answer that question.
 22 A. I would assert my Fifth Amendment rights.
 23 Q. (By Mr. Akin) You would agree that whatever
 24 documentation Ms. Peterson may have provided to you in
 25 2007, that was not the last time you talked to Ms.

Peterson about the FDA approval process? Was it?
 A. I assert my Fifth Amendment rights.
 MR. HERD: Objection.
 4 Q. (By Mr. Akin) Does Advanced have a return
 5 policy on devices that it sells to physicians?
 6 A. No.
 7 Q. All sales are final?
 8 A. Yes.
 9 Q. Has Advanced ever been sued by a physician
 10 or other provider for making alleged false statements?
 11 A. No.
 12 Q. Has Advanced been involved in any
 13 litigation?
 14 A. No.
 15 Q. Other than this one?
 16 A. No.
 17 Q. On Deposition Exhibit Number 7, Page 2,
 18 there is a quote on there from Dr. John Barnett,
 19 plastic surgeon. Do you see that?
 20 A. Uh-huh. Yes.
 21 Q. Do you know who got that quote from him?
 22 A. I will invoke my Fifth Amendment rights.
 23 Assert. Assert.
 24 Q. Look at the third page. There are some
 25 pictures on there looks like somebody's stomach.

1 Do you know where those pictures came
 2 from?
 3 A. I don't know exactly where it came from.
 4 Q. Did somebody at Advanced take those pictures
 5 or did they come from somewhere else?
 6 A. No. They came from somewhere else.
 7 Q. What's your understanding of how Lipo-Ex
 8 worked?
 9 MR. HERD: I would advise you to the
 10 extent you can answer that without violating your
 11 Fifth Amendment rights based on your earlier
 12 deposition testimony that you can answer that
 13 question.
 14 A. I assert my Fifth Amendment rights.
 15 MR. HERD: Can we take a break?
 16 MR. AKIN: Sure.
 17 (Recess taken.)
 18 (Deposition Exhibit Number 8 is
 19 marked.)
 20 MR. HERD: Back on the record. I think
 21 Mr. Durante is a little bit confused in terms of the
 22 affidavit that he executed and so I believe he wants
 23 to readdress some of the questions that you asked.
 24 If you want him to make a statement to
 25 that effect, how ever you want -- how ever you want

1 that done in other words, but he is confused and he
2 was a little bit concerned in terms of what it is the
3 affidavit in relation to how he is asserting his Fifth
4 Amendment rights so however you want to address that.

5 MR. AKIN: Sure.

6 Q. (By Mr. Akin) Is there a clarification you
7 would like to make regarding the series of questions
8 and answers relating to your affidavit that was filed
9 in connection with Advanced Motion for Summary
10 Judgment in this case?

11 A. I'm agreeing to the fact that there were
12 purchase orders that had a relationship of money
13 associated with them that are supposed to go to the
14 manufacturer, RevecoMed.

15 Q. And are you --

16 A. Those monies that were sent to Paige were in
17 error. They were not intended for her. There were no
18 bills associated with it. They were intended for
19 RevecoMed.

20 Q. And they were intended to go to RevecoMed
21 for the sales of LipoTron 3000 medical devices. Is
22 that right?

23 A. In relation to RevecoMed's product, the
24 LipoTron 3000.

25 Q. Okay. Is it true that since April 2009

1 3000 had received FDA approval?

2 MR. HERD: I advise you to assert your
3 Fifth Amendment right.

4 A. I assert my Fifth Amendment right.

5 Q. (By Mr. Akin) Did Advanced make any
6 representations to Dr. Shaw about the applications for
7 which the LipoTron 3000 could be used on patients?

8 A. I assert my Fifth Amendment right.

9 Q. Did Advanced make any representations to Dr.
10 Shaw about the efficacy of the LipoTron 3000?

11 MR. HERD: That's where I am going to
12 advise you to assert your Fifth Amendment rights.

13 A. I will assert my Fifth Amendment rights.
14 (Sotto voce discussion.)

15 MR. HERD: Excuse me one moment.

16 MR. AKIN: Sure.

17 (Sotto Voce discussion.)

18 Q. (By Mr. Akin) Is it true that on or about
19 December 28th, 2009, Advanced entered into a sales
20 agreement with Dr. Gary Fagan whereby Dr. Fagan
21 purchased a LipoTron 3000?

22 A. Not a sales agreement. He, again, agreed to
23 participate at a certain price for the LipoTron 3000.

24 Q. Was there a written contract of any sort
25 with Dr. Fagan?

1 Advanced has made a total of 15 direct purchases from
2 RevecoMed of LipoTron 3000 radio frequency assisted
3 lipoplasty devices that Advanced had previously
4 purchased through P2?

5 A. Yes.

6 Q. Is it true that on or about December 18th,
7 2009, Advanced entered into a sales agreement with Dr.
8 J. Shaw of AmeriMed Spa whereby Dr. Shaw purchased a
9 LipoTron 3000 generator, four bi-polar hand pieces and
10 a two-year manufacturer's extended warranty?

11 A. Not a sales agreement, no.

12 Q. Some other sort of agreement?

13 A. Just an agreement that he would pay X price
14 for that particular unit.

15 Q. And that unit included a LipoTron 3000. Is
16 that correct?

17 A. That's part of it, yes.

18 Q. Did you provide Dr. Shaw with any -- did
19 Advanced provide Dr. Shaw with any marketing materials
20 in connection with that sale of the LipoTron 3000?

21 MR. HERD: I am going to assert you to
22 advise your Fifth Amendment rights.

23 A. I assert my Fifth Amendment right.

24 Q. (By Mr. Akin) Did Advanced make any
25 representation to Dr. Shaw about whether the LipoTron

1 A. No written contract.

2 Q. Does Advanced make it a business practice to
3 try to not have written contracts for sales of
4 LipoTron?

5 A. No.

6 Q. Is it true that the purchase price to Dr.
7 Gary Fagan for the LipoTron 3000 was \$97,641.50?

8 A. That is something that Cindy would know but
9 it sounds close. I do not know the exact number.

10 Q. If it's in your affidavit, is it fair to say
11 that you confirmed that number before you --

12 A. That's correct.

13 Q. Let me finish.

14 If it's in your affidavit, is it fair
15 to say you confirm that purchase price before signing
16 off on your affidavit?

17 A. Yes.

18 Q. Was there any sort of signed quote with Dr.
19 Fagan?

20 A. I would have to check with Cindy, but I
21 would assume, yes.

22 Q. Was it the business practice of Advanced to
23 get signed quotes from physicians for purchases of
24 LipoTron 3000 devices?

25 A. We get signed quotations for all technology

1 to assure that the doctor is interested in the
 2 product.
 3 Q. So the answer is not only for LipoTron
 4 devices but for all products?
 5 A. For all products, correct.
 6 Q. Did Advanced represent to Dr. Gary Fagan
 7 that the LipoTron 3000 had received FDA approval?
 8 A. I invoke my Fifth Amendment rights.
 9 Q. Did Advanced provide any marketing materials
 10 to Dr. Fagan in connection with the sale of the
 11 LipoTron 3000?
 12 MR. HERD: I would advise you to invoke
 13 your Fifth Amendment rights.
 14 A. I invoke my Fifth Amendment rights.
 15 Q. (By Mr. Akin) Did Advanced make any
 16 representations to Dr. Fagan about the applications
 17 for which the LipoTron 3000 could be used?
 18 A. I invoke my Fifth Amendment rights.
 19 Q. Did Advanced make any representations to Dr.
 20 Fagan about the efficacy or effectiveness of the
 21 LipoTron 3000?
 22 MR. HERD: Invoke --
 23 A. Yeah. I invoke my Fifth Amendment rights.
 24 Q. (By Mr. Akin) If you want to look through
 25 Exhibit 8.

1 Mr. Durante, with the exception of the
 2 highlighting that's on there, would you please look
 3 through Exhibit Number 8 to this deposition and tell
 4 us whether Exhibit Number 8 contains true and correct
 5 copies of printouts or pages from the Web site of
 6 Advanced?
 7 A. This looks like our Web site. Or some form
 8 of it.
 9 Q. Have there been any changes to your Web
 10 site, recently? The Web Site of Advanced?
 11 A. No.
 12 Q. Do you know when the last time any changes
 13 were made?
 14 A. I don't.
 15 Q. Now, if you look at the first page of
 16 Exhibit Number 8 on the news column.
 17 A. Uh-huh.
 18 Q. How did these news items come to be
 19 existing -- into existence?
 20 What I mean by that is: Are these
 21 third party news articles that address products that
 22 Advanced sales or are these news pieces that were
 23 created by Advanced and sent out as press releases?
 24 A. These are not products. These are not
 25 things created by Advanced these are whatever a

1 physician decides to do if it's found the -- that's
 2 where those would come from, like a YouTube or
 3 something of that nature.
 4 Q. Did physicians give Advanced the opportunity
 5 to review and have him put -- before they put out
 6 those?
 7 A. No.
 8 Q. I know you know what I was going to ask.
 9 A. Yeah. Yeah. Sorry.
 10 MR. HERD: Let him ask it.
 11 Q. (By Mr. Akin) Do any of the physicians that
 12 Advanced deals with provide Advanced an opportunity to
 13 review and comment on marketing materials or media
 14 pieces before they go out?
 15 A. No.
 16 Q. If you would look at Page 2 of Exhibit
 17 Number 8. Page 2 provides -- shows some of the
 18 equipment that Advanced sales to physicians. Is that
 19 right?
 20 A. It provides equipment that we have available
 21 to us for relationship with manufacturers.
 22 Q. In other words, physicians can purchase all
 23 of those things shown through Advanced. Is that
 24 right?
 25 A. They could.

1 Q. And they, in fact, have at various points in
 2 time for each one of those items. Haven't they?
 3 A. Yes. Yes, they have.
 4 Q. It looks like there are eight items there?
 5 A. Yes, sir.
 6 Q. There are pictures for seven of those eight
 7 items. Is that correct?
 8 A. That's correct.
 9 Q. The only one that doesn't have a picture is
 10 the Lipo-Ex non-surgical fat reduction?
 11 A. That's correct.
 12 Q. Why is that?
 13 A. Because it's a multitude of things involved
 14 in the program.
 15 Q. What multitude of things is involved in the
 16 program?
 17 A. Well, it could be anything from diet,
 18 exercise, a variety of things. It could be a
 19 combination of some of these technologies that are
 20 provided here in order to obtain results.
 21 So being a program, we don't have a
 22 technology to show with it. The rest of these are
 23 specific technologies.
 24 Q. Does the Lipo-Ex non-surgical fat reduction
 25 that refers to -- it's all refers to equipment.

1 Doesn't it?

2 A. It does in terms of equipment, but that's

3 not -- the word "equipment" we could change that to

4 programs.

5 I mean, I could call this wrinkle

6 reduction "program."

7 I could call this, you know, acne

8 "program."

9 That's -- that word has no

10 relationship in terms of everything that's presented

11 here.

12 Q. Is the LipoTron 3000 medical device part of

13 the Lipo-Ex non-surgical fat reduction program?

14 MR. HERD: You can answer that question

15 "yes" or "no."

16 A. Yes.

17 Q. (By Mr. Akin) Advanced has conducted

18 seminars and workshops that have featured products

19 that it is capable of distributing. Is that right?

20 A. Repeat that.

21 Q. Sure. Has Advanced put on seminars where it

22 has discussed or displayed medical equipment that it

23 can distribute?

24 A. We put on educational presentations

25 discussing business applications to things as well as

1 equipment applications. They were not specific to

2 just equipment.

3 Q. But they can -- they do include equipment?

4 A. They could. Absolutely. Could. Not

5 always. They could.

6 Q. Did Advanced put on an educational

7 presentation in Houston in February of this year?

8 A. Yes, we did.

9 Q. Where was that held at?

10 A. The petroleum club.

11 Q. Did you attend that?

12 A. Yes. I did.

13 Q. How many people attended?

14 A. Thirty -- 30, 35, approximately.

15 Q. Of those 30 to 35, how many attendees worked

16 for Advanced?

17 A. Three.

18 Q. Which persons? You and who else?

19 A. Shannon, Jayne, myself and Webster.

20 Q. What was the last one?

21 A. Webster.

22 Q. Who is Webster?

23 A. He is an independent consultant to our

24 company.

25 Q. What are the last names for those people or

1 full names for those people?

2 A. Shannon Wilks.

3 Q. Webster? What's Webster's --

4 A. Lodge. Jayne Wilks.

5 Q. Were the other persons who attended the

6 educational presentation in Houston all physicians?

7 A. No.

8 Q. Other than physicians, who else was there?

9 A. It could be their staff. It could be

10 somebody that was associated with physician.

11 Sometimes physicians send their own

12 staff. We only work in the medical side. There has

13 to be medical association with anything that we work

14 with.

15 So anybody that was there was either

16 tied to a physician, was a physician, or was a staff

17 of a physician.

18 Q. How do you -- how does Advanced decide who

19 to invite to these events?

20 A. We pick certain practices, family practice,

21 OB/gyn and inform them that we are putting on

22 educational presentations.

23 Q. Who does the inviting? What persons?

24 A. Jayne, Shannon, myself, Webster.

25 Q. Do people get a physical invite? How does

1 that work?

2 A. Correct. It could be by e-mail. It could

3 be by mail.

4 Q. And when people show up at the event, what

5 do you do to confirm their identity and make sure that

6 only people who are invited attend?

7 A. They sign up. They give us a \$50 deposit so

8 that we can take account. Then when they come, if

9 they check their name off, we return the \$50 deposit.

10 So it's more of a confirmation process.

11 Q. Was the LipoTron 3000 discussed at the

12 educational presentation in Houston in February of

13 this year?

14 MR. HERD: You can answer that

15 question.

16 A. It was talked of as an emerging product.

17 Q. (By Mr. Akin) Were there any written

18 materials that were provided to attendees at the

19 February educational presentation in Houston?

20 A. No. I mean, if you are talking about

21 brochures, something of that nature, that would be the

22 extent of it.

23 Q. So there might --

24 A. It's not these brochures. We have a company

25 that looks kind of like this, talks about all of our

1 technology.

2 Q. In February of 2010 at the Houston
3 educational seminar, did Advanced make any
4 representations as to the applications for which the
5 LipoTron 3000 could be used?

6 MR. HERD: I am going to instruct you
7 not to answer that based on your --

8 THE COURT REPORTER: Please, if you
9 would let him finish.

10 MR. HERD: I said I am instructing my
11 client to invoke his Fifth Amendment right.

12 A. I invoke my Fifth Amendment right.

13 Q. (By Mr. Akin) At the educational
14 presentation in Houston, in February, did Advanced
15 make any representations as to the effectiveness of
16 the LipoTron 3000?

17 MR. HERD: I am going to instruct you
18 not to answer that question based upon your Fifth
19 Amendment rights.

20 A. I invoke my Fifth Amendment rights.

21 Q. (By Mr. Akin) At the educational
22 presentation in February of 2010 in Houston, did
23 Advanced make any representation to attendees about
24 whether the LipoTron 3000 had received FDA approval?

25 MR. HERD: I am going to instruct you

1 based on the earlier deposition not to answer that
2 based on your Fifth Amendment rights.

3 A. I cannot answer due to my Fifth Amendment
4 rights.

5 (Deposition Exhibit Number 9 is
6 marked.)

7 Q. (By Mr. Akin) Mr. Durante, you have been
8 handed Deposition Exhibit Number 9.

9 Would you please identify that for us?

10 A. It looks like different pages discussing RF
11 technology.

12 Q. Is this Exhibit Number 9, is that a
13 PowerPoint presentation that was prepared by Advanced?

14 A. This would have been prepared by Advanced.
15 Yes.

16 Q. Is it one where you were involved in the
17 preparation of Exhibit Number 9?

18 A. Yes. I was.

19 Q. In what year was this created?

20 A. I don't know. This is a very, very early-on
21 document. So I'm not quite sure. It would have been
22 in 2007.

23 Q. If you look at Page 2 of Exhibit Number 9,
24 please. It gives a little bit of the history.

25 A. Uh-huh.

1 Q. It says in 2006 the RF assisted lipoplasty
2 RFAL.

3 Is that at reference to the LipoTron
4 3000?

5 A. I would assume, yes.

6 Q. Is that a picture of the LipoTron 3000 on
7 the bottom right-hand side?

8 A. Yes.

9 Q. Who was this presentation given to?

10 A. I have no idea. This was information that
11 was provided by Paige Peterson.

12 MR. AKIN: Object as non-responsive.

13 Q. (By Mr. Akin) Did you give the PowerPoint
14 presentation in Exhibit Number 9 to this deposition to
15 any physicians?

16 A. No.

17 Q. If you would look at Page 4, please,
18 entitled "RF 2000 external heating."

19 A. Uh-huh.

20 Q. Do you see that?

21 A. Uh-huh.

22 Q. Is that a "yes"?

23 A. RFN endogenous endermal heating, yes.

24 Q. Thank you. It lists applications correct?

25 A. Correct.

1 Q. Those are applications that Advanced listed
2 as applications for the LipoTron 3000? Is that
3 correct?

4 A. No.

5 Q. What are they applications for?

6 A. Those are applications that were provided by
7 Paige Peterson in a PowerPoint presentation in which
8 the title of this was reformatted to that specific
9 yellow format, and I have a presentation to show this
10 exact thing. This is a copy and paste.

11 MR. AKIN: Object as non-responsive.

12 Q. (By Mr. Akin) What device or devices is
13 being referred -- or are being referred to in the
14 fourth page of this PowerPoint?

15 A. I would not know because it says "radio
16 frequency." It does not state a license specifically.

17 Q. So the answer is, you don't know?

18 A. No.

19 Q. Did Advanced provide any advice to
20 physicians as to whether they could charge patients
21 for treatment with the LipoTron 3000?

22 MR. HERD: You can answer that
23 question.

24 A. No.

25 Q. (By Mr. Akin) Advanced has never had any

1 discussions or conversations with any physicians about
 2 whether charges can be made for the LipoTron 3000?
 3 **A. The discussions that are made is a doctor's**
 4 **choice to charge, is based on their own professional**
 5 **opinion if they believe that this technology is in the**
 6 **best interest of their patient, that is the statement.**
 7 **Q. Is that the entirety of the statement that**
 8 **Advanced makes to physicians?**
 9 **A. I mean, to the best that I can tell you**
 10 **right now. That is correct.**
 11 **Q. Have you ever heard that it's illegal for a**
 12 **physician to charge for treatments for a non-FDA**
 13 **approved device unless the patient is advised that it**
 14 **is not FDA-approved in writing?**
 15 **A. No.**
 16 **Q. What is it your understanding that it means**
 17 **for a technology to be established by the FDA as an**
 18 **investigational device?**
 19 **A. That they have some form of relationship**
 20 **with the FDA to get the device approved.**
 21 **Q. What's your understanding of how long it**
 22 **generally takes for the FDA to approve or not approve**
 23 **a device?**
 24 **A. I don't know.**
 25 **Q. Have you ever made any effort to find that**

1 out?
 2 **A. No.**
 3 **Q. Do you know whether the LipoTron 3000 is**
 4 **currently considered an investigational device by the**
 5 **FDA?**
 6 **MR. HERD: You can answer that**
 7 **question. That's a "yes" or "no" question.**
 8 **A. Yes.**
 9 **Q. (By Mr. Akin) What do you know about that?**
 10 **A. What Paige has told me.**
 11 **Q. When was the last time you had a**
 12 **conversation with Paige about that issue?**
 13 **A. It would have been December of 2008.**
 14 **Q. What did Paige tell you?**
 15 **A. No. No. No. I'm sorry. January of 2009.**
 16 **Q. What did Paige tell you in January of 2009**
 17 **about the -- whether the LipoTron 3000 was an**
 18 **investigational device?**
 19 **A. She didn't.**
 20 **Q. What did you discuss with Paige in January**
 21 **of 2009?**
 22 **A. We discussed the fact that she was part of**
 23 **the study work.**
 24 **Q. Did Paige provide any additional information**
 25 **about the status of the FDA study to you?**

1 **A. No.**
 2 **Q. Did Paige Peterson ever tell you that the**
 3 **FDA had declined to approve the LipoTron 3000?**
 4 **A. No.**
 5 **Q. Did anybody with RevecoMed ever tell you**
 6 **that the FDA had declined to approve the LipoTron**
 7 **3000?**
 8 **A. No.**
 9 **Q. Did Advanced attend a trade show in San**
 10 **Antonio in February of 2008?**
 11 **A. Yes.**
 12 **Q. What trade show was that?**
 13 **A. The American Academy of Dermatology.**
 14 **Attended with a manufacturer.**
 15 **MR. HERD: You have answered his**
 16 **question.**
 17 **Q. (By Mr. Akin) Did that how did that work?**
 18 **Did Advanced have a booth?**
 19 **A. No.**
 20 **Q. At that trade show?**
 21 **A. No.**
 22 **Q. Has Advanced ever had any booths at trade**
 23 **shows?**
 24 **A. Yes.**
 25 **Q. What trade shows has Advanced had booths at?**

1 **A. American Academy of Family Practice, Texas**
 2 **Osteopathic, Texas Family Physicians, I don't know**
 3 **them all.**
 4 **(Deposition Exhibit Number 10 is**
 5 **marked.)**
 6 **Q. (By Mr. Akin) Mr. Durante, you have been**
 7 **handed Deposition Exhibit Number 10.**
 8 **Is that a true and correct copy of an**
 9 **e-mail from Webster Lodge, III --**
 10 **A. Yes.**
 11 **Q. -- to you?**
 12 **A. (No audible response.)**
 13 **Q. To you?**
 14 **A. Oh, no. No. I guess, yes, says, "To the**
 15 **Mark." Yes.**
 16 **Q. That's your e-mail at Advanced,**
 17 **mark@fromstarttoperfection.com.**
 18 **A. Yes. That's correct.**
 19 **Q. You mentioned Webster earlier. He is**
 20 **somebody who does what exactly?**
 21 **A. He is an independent contractor to our**
 22 **organization.**
 23 **Q. This e-mail shows him as having an office**
 24 **number and a mobile number.**
 25 **A. Correct.**

1 Q. Right underneath the name Advanced Aesthetic
 2 Concepts. Is that right?
 3 A. That is correct.
 4 Q. Is that one of your sales guys?
 5 A. Yes.
 6 Q. It looks like in June of 2008, Webster sent
 7 you a picture of somebody who used a LipoTron 3000 and
 8 ended up with some burns or welts on the neck.
 9 Would you agree with that?
 10 MR. HERD: Objection. That's assuming
 11 facts not in evidence.
 12 Q. (By Mr. Akin) Exhibit 10, a June 20, 2008,
 13 e-mail, Webster Lodge sent you two pictures of someone
 14 who claimed to have used the LipoTron 3000 device and
 15 has been hurt. Is that right?
 16 MR. HERD: Same objection.
 17 Q. (By Mr. Akin) I think you can answer.
 18 A. This doesn't state a LipoTron 3000 in this
 19 e-mail.
 20 Q. Do you have any understanding of what device
 21 was used by Dr. Karlin for treatment on the women
 22 whose picture is shown which Exhibit 10?
 23 A. I was not part of that treatment.
 24 Q. Has anybody ever told you what device was
 25 used?

1 A. Yes.
 2 Q. What were you told?
 3 MR. HERD: You can answer that
 4 question.
 5 A. The LipoTron.
 6 Q. (By Mr. Akin) LipoTron 3000?
 7 A. I don't know.
 8 Q. You were told it was a LipoTron?
 9 A. Yes.
 10 Q. Does Advanced have any files or records it
 11 has kept on complaints from patients who have been
 12 treated with the LipoTron 3000?
 13 A. No. I don't have any records of them.
 14 Q. Did Advanced sell a LipoTron 3000 to Dr.
 15 Karlin?
 16 A. I will invoke my Fifth Amendment rights.
 17 Q. Have you heard any other records about
 18 patients being burned after receiving treatment with
 19 the LipoTron 3000?
 20 A. No. Not that I'm aware of.
 21 Q. Have you made any effort -- have you ever
 22 asked RevecoMed whether RevecoMed has received
 23 complaints about patients being burned after being
 24 treated with the LipoTron 3000?
 25 A. I have not.

1 Q. You've never asked?
 2 A. I have never asked, no.
 3 (Deposition Exhibit Number 11 is
 4 marked.)
 5 Q. (By Mr. Akin) Mr. Durante you have been
 6 handed an Exhibit marked as "Exhibit Number 11" to
 7 your deposition. Is it true that Advanced -- let me
 8 check this for a second.
 9 Did Advanced ever hire -- Strike that.
 10 Did Durante Holdings, L.P., Durante
 11 Management, L.L.C., Mark Durante and Sommer Durante
 12 apply as the registrants for a trademark or word mark
 13 for the term "Lipo-Ex"?
 14 A. This is not in relationship to Advanced
 15 Aesthetic Concepts, L.P., so I'm not quite sure what
 16 the relationship is to the case at hand.
 17 Q. Tell me what Lipo-Ex means in this
 18 trademark.
 19 A. According to the "Goods and Services"
 20 section here, it says, "Health spa services, namely
 21 cosmetic body care services featuring radio frequency
 22 assisted lipoplasty."
 23 Q. Does radio frequency assisted lipoplasty
 24 refer to the LipoTron 3000?
 25 A. No.

1 Q. Does it refer to any LipoTron medical
 2 device?
 3 A. No.
 4 Q. Health spa services, is that a reference
 5 only to spa services for the spa you and your wife
 6 used to co-own here in Fort Worth?
 7 A. No.
 8 Q. What does it refer to?
 9 A. The health spa services as in when you look
 10 at the classifications, you have to pick one within a
 11 certain category and this IC 044, that's the category
 12 GNS health spa services, namely cosmetic body care
 13 services and that was the classification chosen.
 14 Q. Does Advanced use the trademark Lipo-Ex in
 15 any of its marketing materials?
 16 A. Yes.
 17 Q. Does the term Lipo-Ex in Advanced marketing
 18 materials have the same meaning as the trademark for
 19 which Lipo-Ex was registered?
 20 A. It could.
 21 Q. It could depending upon what?
 22 A. It could depending upon the program we
 23 developed for the physician.
 24 Q. Outside of the context of Advanced, what
 25 business or businesses have you been involved in that

1 have used the Lipo-Ex trademark?
 2 **A. Geostar, Durante Holdings.**
 3 Q. And how is Durante Holdings used, the
 4 trademark Lipo-Ex?
 5 **A. As a key word termed for the things that are**
 6 **in here, fat reduction program.**
 7 Q. How many times has Advanced sold a Lipo-Ex
 8 program that has not included a LipoTron medical
 9 device?
 10 **A. I will invoke my Fifth Amendment rights.**
 11 Q. What is a Lipo-Ex center?
 12 **A. I don't know.**
 13 Q. Are you aware that there are places out
 14 there that call themselves "Lipo-Ex centers"?
 15 **A. At this point, I am not.**
 16 Q. If there are places out there that call them
 17 "Lipo-Ex centers," do those places have any connection
 18 at all to Advanced? Or to you?
 19 **A. I have no idea because you would have to**
 20 **list who has Lipo-Ex center.**
 21 Q. Have you ever sold a LipoTron device to
 22 Michael P. Lyons, MD?
 23 **A. I will invoke my Fifth Amendment rights.**
 24 Q. Are you aware that the CT scan studies for
 25 the LipoTron 3000 have been international studies as

1 **A. I have not heard such a thing.**
 2 Q. Have you ever assisted any other
 3 manufacturers other than RevecoMed in assisting them
 4 in trying to get FDA approval for a medical device?
 5 **A. I have not.**
 6 Q. Did the Restore Medical Spa in Fort Worth
 7 use a LipoTron 3000 medical device?
 8 **A. I invoke my Fifth Amendment rights.**
 9 Q. Is it true that your Web site, the Web site
 10 of Advanced includes a picture of a woman who received
 11 treatment at the Restore Medical Spa with a LipoTron
 12 3000 device?
 13 **A. I invoke my Fifth Amendment rights.**
 14 Q. Do you see still have records anywhere for
 15 patients that were treated at the Restore Medical Spa?
 16 **A. I have patients that have been treated by**
 17 **Multiple Technologies, and I do keep those patient**
 18 **records, yes.**
 19 Q. Where are those kept?
 20 **A. At our clinic.**
 21 Q. I thought it was closed?
 22 **A. It is closed but we still have -- we still**
 23 **have the place, the physical facility.**
 24 Q. The physical facility?
 25 **A. Correct.**

1 opposed to studies performed in the United States?
 2 **A. Yes.**
 3 Q. How were you aware of that?
 4 **A. Paige Peterson.**
 5 Q. Any other source?
 6 **A. No.**
 7 Q. Do you understand there is a difference from
 8 the FDA's perspective in regard to a study performed
 9 overseas as to -- as opposed to a studies performed in
 10 the United States?
 11 **A. I am not involved in any FDA processes.**
 12 Q. And haven't made an effort to educate
 13 yourself either. Is that right?
 14 **A. I am not the responsibility. I'm not the**
 15 **manufacturer seeking FDA approval so I have no need to**
 16 **be involved in it.**
 17 Q. Do you believe it to be the case that you
 18 can sell LipoTron 3000 devices to physicians and it's
 19 only the manufacturer's responsibility and not the
 20 responsibility of Advanced to know whether there is
 21 FDA approval?
 22 **A. I invoke my Fifth Amendment rights.**
 23 Q. Have you ever been told that some of the
 24 studies on the LipoTron 3000 were performed on animals
 25 instead of humans?

1 Q. Okay. Have you ever met Michael Kim with
 2 RevecoMed?
 3 **A. Yes. I have.**
 4 Q. How many times have you met Mr. Kim?
 5 **A. Three times.**
 6 Q. When was the first time?
 7 **A. When Paige Peterson made an introduction.**
 8 Q. Was that an in-person introduction or some
 9 other type of introduction?
 10 **A. No. That was an in-person introduction.**
 11 Q. Where were you when that in-person
 12 introduction took place?
 13 **A. Las Vegas.**
 14 Q. When was that? Approximately?
 15 **A. October of 2008.**
 16 Q. How long did you talk to Mr. Kim the first
 17 time you met him?
 18 **A. We had dinner with him but I didn't get to**
 19 **talk that much to him.**
 20 Q. Did you not sit by him?
 21 **A. I sat. Yes, I did sit by him, but he had**
 22 **other guests.**
 23 Q. How many people were at the dinner, about?
 24 **A. I would probably say six or seven.**
 25 Q. Were there any discussions at that dinner