

Case No. _____

In the Supreme Court of Nevada

JACUZZI, INC. doing business as JACUZZI
LUXURY BATH,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the
State of Nevada, in and for the County of Clark;
and THE HONORABLE CRYSTAL ELLER, District
Judge,

Respondents,

and

ROBERT ANSARA, as special administrator of
the ESTATE OF SHERRY LYNN CUNNISON,
deceased; ROBERT ANSARA, as special
administrator of the ESTATE OF MICHAEL
SMITH, deceased heir to the ESTATE OF SHERRY
LYNN CUNNISON, deceased; and DEBORAH
TAMANTINI, individually and heir to the Estate
of SHERRY LYNN CUNNISON, deceased,

Real Parties in Interest.

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**PETITIONER'S APPENDIX
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67	Plaintiffs' Reply to: (1) Defendant Jacuzzi, Inc. dba Jacuzzi Luxury Bath's Brief Responding to Plaintiffs' Request for Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions; and (2) Defendant FirstStreet For Boomers & Beyond, Inc., AITHR Dealer, Inc., and Hale Benton's Objections to Plaintiffs' Demand for Certain Jury Instructions and Rulings on Motions in Limine Based on Court Striking Jacuzzi's	11/10/20	28	6906–6923

	Answer Re: Liability			
63	Plaintiffs' Response to Defendant Jacuzzi Inc. d/b/a Jacuzzi Luxury Bath's Objections to Plaintiff's [sic] Proposed "Order Striking Defendant Jacuzzi Inc., d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only" Submitted October 9, 2020	10/20/20	27	6713–6750
56	Plaintiffs' Response to Defendant Jacuzzi's Notice of Waiver of Phase 2 Hearing and Request to Have Phase 2 of Evidentiary Hearing Vacated	09/21/20	27	6562–6572
25	Plaintiffs' Supplement to Motion to Expand Scope of Evidentiary Hearing	08/20/19	9	2242–2244
30	Recorder's Transcript of Evidentiary Hearing – Day 1	09/16/19	17	4011–4193
58	Recorder's Transcript of Evidentiary Hearing – Day 1	09/22/20	27	6574–6635
31	Recorder's Transcript of Evidentiary Hearing – Day 2	09/17/19	17 18	4194–4250 4251–4436
32	Recorder's Transcript of Evidentiary Hearing – Day 3	09/18/19	18 19	4437–4500 4501–4584
36	Recorder's Transcript of Evidentiary Hearing – Day 4	10/01/19	19	4596–4736
21	Recorder's Transcript of Hearing Pursuant to Defendant Jacuzzi's Request Filed 6-13-19, Defendant Jaccuzi, Inc. d/b/a Jacuzzi Luxury Bath's Request for Status Check; Plaintiffs' Motion for Reconsideration Re: Plaintiffs' Renewed Motion to Strike Defendant Jacuzzi, Inc.'s Answer and Motion for Clarification Regarding the Scope of the Forensic Computer Search	07/01/19	8	1887–1973
52	Recorder's Transcript of Pending Motions	06/29/20	27	6509–6549

61	Recorder's Transcript of Pending Motions	10/05/20	27	6639–6671
94	Recorder's Transcript of Pending Motions	07/14/21	32 33	7893–8000 8001–8019
90	Reply in Support of “Countermotion to Clarify Issues that the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial”	06/30/21	32	7862–7888
50	Reply to Plaintiffs’ (1) response to Jacuzzi’s Objections to Proposed Order, and (2) Opposition to Jacuzzi’s Motion to Clarify the Parameters of Any Waiver of Attorney-Client Privilege	06/24/20	26 27	6495–6500 6501–6506
3	Second Amended Complaint	05/09/16	1	24–33
4	Third Amended Complaint	01/31/17	1	34–49
10	Transcript of All Pending Motions	02/04/19	5 6	1214–1250 1251–1315
20	Transcript of Proceedings – Defendant Jacuzzi, Inc.’s Request for Status Check; Plaintiffs’ Motion for Reconsideration Regarding Plaintiffs’ Renewed Motion to Strike Defendant Jacuzzi, Inc.’s Answer and Motion for Clarification Regarding the Scope of the Forensic Computer Search	07/01/19	8	1794–1886
74	Transcript of Proceedings: Jury Instructions	12/21/20	29	7119–7171
68	Transcript of Proceedings: Motion to Strike	11/19/20	28 29	6924–7000 7001–7010
71	Transcript of Proceedings: Motions in Limine: Jacuzzi’s Nos. 1, 4, 13, 16, and 21/First Street’s No. 4; Jury Instructions	12/07/20	29	7050–7115

CERTIFICATE OF SERVICE

I certify that on October 5, 2021, I submitted the foregoing
“Petitioner’s Appendix” for filing *via* the Court’s eFlex electronic filing
system. Electronic notification will be sent to the following:

Benjamin P. Cloward
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101

Attorneys for Real Parties in Interest

I further certify that I served a copy of this document by mailing a
true and correct copy thereof, postage prepaid, at Las Vegas, Nevada,
addressed as follows:

The Honorable Crystal Eller
DISTRICT COURT JUDGE – DEPT. 19
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

1 In addition to the written discovery, also in deposition testimony, Jacuzzi's NRCP
2 30(b)(6) witness steadfastly testified that there were no prior or subsequent incidents. Based on
3 the fact that Plaintiffs had independently discovered two subsequent incidents which Jacuzzi
4 failed to disclose via NRCP 16.1 disclosures, responses to discovery requests, or deposition
5 testimony, Plaintiffs filed a Motion to Strike Defendant Jacuzzi's Answer on June 22, 2018.¹⁶

6 In Plaintiffs' Motion to Strike Jacuzzi's Answer, Plaintiffs argued that the undisclosed
7 subsequent incidents were evidence of Jacuzzi's bad faith discovery conduct and requested that
8 the Court strike Jacuzzi's Answer. Jacuzzi defended against the Motion to Strike by arguing that
9 it had always been clear in its discovery responses, letters to counsel, and Objections to Notice of
10 Depositions that it was limiting its responses and searches to prior incidents only. Jacuzzi claimed
11 that its Rule 30(b)(6) witness was only prepared to testify regarding prior incidents. In other
12 words, the first excuse Jacuzzi gave to the Court was that it had only searched for prior incidents
13 and that there were none.

14 Jacuzzi firmly held onto this position for over a year and stated in multiple pleadings filed
15 with this Court that no prior incidents exist.¹⁷ Here are some examples of what Jacuzzi set forth
16 in its Opposition to Plaintiffs' Motion:

- 17 • "Demeritt was **prepared to discuss prior incidents**, not subsequent ones."¹⁸
- 18 • "In sum, **Jacuzzi has produced all relevant evidence related to other prior**
19 **incidents.**"¹⁹
- 20 • "Furthermore, Plaintiffs state: 'At this point, it has become clear that Jacuzzi is
21 aware of prior similar incidents but has willingly withheld such evidence.' This
22 too is false. **There are no other prior incidents**; Jacuzzi has withheld
nothing."²⁰

23 ¹⁶ See, Plaintiffs' Motion to Strike Defendant Jacuzzi, Inc. d/b/a Jacuzzi Bath's Answer, **Evidentiary Hearing**
24 **Exhibit 175.**

25 ¹⁷ See, e.g., Jacuzzi's Opp'n to Pls.' Mot. to Strike Jacuzzi's Answer, filed July 12, 2018, **Evidentiary Hearing**
26 **Exhibit 176.**

27 ¹⁸ Id. at 7:12-14 (emphasis added).

28 ¹⁹ Id. at 7:21 (emphasis added).

²⁰ Id. at 11:15-17 (emphasis added).



- “Jacuzzi’s attorneys, in-house and outside counsel, oversaw the search and analysis of documents as described in counsel’s correspondence to Plaintiffs. *See* April 23, 2018 letter from J. Cools to B. Cloward, attached as Exhibit F, and Cools Decl. at ¶ 10, attached as Exhibit E. **Fundamentally, there were no prior similar incidents to Jacuzzi’s knowledge.** Neither Jacuzzi nor its attorneys withheld any evidence.”²¹
- “**Jacuzzi has consistently produced all prior incidents**, which are the only documents relevant to Jacuzzi’s notice—Plaintiffs’ own articulated basis for production.”²²

In addition to the foregoing Opposition, Jacuzzi also set forth bold claims Jacuzzi’s Motion for Protective Order²³:

- “Importantly, **Jacuzzi has complied with this Court’s order and produced records showing all incidents from 2008 to the present** involving personal injury or claims of death, regardless of similarity to Plaintiffs’ claims.”²⁴
- “Also in early 2018, counsel for both parties conferred regarding the scope of other incident discovery. Jacuzzi agreed to search its records for prior incidents using search terms provide by Plaintiffs’ counsel. Upon review of the results from those searches, all of which were “false positives”- **they did not contain any prior incidents of personal injury even remotely related** to the claims Plaintiffs have asserted-Jacuzzi’s counsel sent Plaintiffs’ counsel a letter confirming that **there were no prior similar incidents** involving walk-in tubs. This was consistent with Jacuzzi’s discovery responses related to prior incidents.”²⁵
- “Jacuzzi complied with the Court’s directive to identify personal injury or death claims related to Jacuzzi’s walk-in tub products from 2008 to the present.”²⁶

²¹ *Id.* at 12:9-13 (emphasis added).

²² *Id.* at 13:3-4 (emphasis added).

²³ *See*, Jacuzzi’s Mot. for Protective Order, filed Sept. 11, 2018, attached hereto as **Exhibit 211**.

²⁴ *Id.* at 6:6-8. (emphasis added).

²⁵ *Id.* at 7:17-23 (emphasis added).

²⁶ *Id.* at 15:2-4.

- “As already represented to this Court, **Jacuzzi searched its records for personal injury claims involving walk-in tubs from 2008 to the present and has produced an incident report or complaint for each incident.** Notably, every single incident was after Cunnison's incident...”²⁷

Finally, Jacuzzi also claimed in its Opposition to Plaintiffs’ Renewed Motion to Strike Jacuzzi’s Answer, filed Jan. 24, 2019²⁸ the following:

- “Despite Plaintiffs’ angry rhetoric and finger-pointing, Jacuzzi did not, and has not, hid anything and has acted in good faith throughout discovery in this matter. **Importantly, Jacuzzi has produced all personal injury or death claims from 2008 to present** pursuant to the Discovery Commissioner’s rulings.”²⁹
- “To date, **Jacuzzi has identified all prior and subsequent claims for alleged bodily injury or death related to the Tub in question** (as well as all other models of walk-in tubs regardless of differences in design, as ordered by the Discovery Commissioner.”³⁰

The language asserted in the January 24, 2019 Opposition to Plaintiffs’ Renewed Motion to Strike is particularly egregious because, at that time, Jacuzzi had recently become made aware of a new claimant [Pullen matter] where Jacuzzi was notified by the claimant that the tub killed his mother – yet despite that recent discovery, Jacuzzi actually blamed Plaintiffs and accused Plaintiffs of “angry rhetoric and finger-pointing,” and attempted to persuade the Court that it had acted in good faith and “did not, and has not, hid anything . . .”³¹

This was not a one-time oversight either – instead – just 41 days after the Pullen discovery, Jacuzzi definitively stated in its Petition for Writ of Prohibition to the Nevada Supreme Court that “[t]o date, **Jacuzzi has identified and produced to Plaintiffs all of the evidence in Jacuzzi’s possession** of other prior and subsequent incidents of alleged bodily injury or death related to the

²⁷ Id. at 16:8-11.

²⁸ See, Jacuzzi’s Opposition to Plaintiffs’ Renewed Motion to Strike Jacuzzi’s Answer, filed Jan. 24, 2019, previously admitted as **Evidentiary Hearing Exhibit 188**.

²⁹ Id. at 2:16-19.

³⁰ Id. at 5:8-1.3

³¹ Id. at 16-19.

Jacuzzi® tub in question.”³² At the time that Jacuzzi made those representations to our Supreme Court, not only did Jacuzzi already possess the many, many prior and subsequent incidents that have only recently been identified, but Jacuzzi (and Ron Templer, personally) had also just learned about the Pullen death incident. Yet Jacuzzi chose not to identify or produce either the Pullen matter or any of the matters that would be discovered half a year later. Instead, Jacuzzi chose to continue to appear before Commissioner Bulla on multiple occasions and represent – both orally in open court and in writing via Memorandum³³ – that it had searched for prior incidents and that none existed.

For instance, Mr. Cools stated the following at the Aug. 29, 2018 hearing:

- MR. COOLS: And if I may say, Your Honor, you know, we’ve consistently said in this case that before when we were -- when we did our search and did our production, it was only based off of prior incidents, so we had already represented **there were no prior incidents.**³⁴
- MR. COOLS: So following the hearing, I went back to Jacuzzi, and we ran a search based off of the parameters you had provided, which was any personal injuries or death claims related to walk-in tubs before or after the incident, **and we identified nothing that had not been previously produced for prior to the incident.** There were subsequent claims that were produced. We produced the internal -- basically the customer database printout with some information redacted, such as the personal identifying information of the claimants and some other information that was all included on a privilege log, and there was I think two consumer CPSC complaints that were similarly disclosed.”³⁵
- MR. COOLS: So my point, Your Honor, is that **that’s what we did. We searched not only this tub but other walk-in tubs for anything prior to this incident using those search terms and there’s nothing related -- no personal injuries related to plaintiff’s claim.**³⁶

³² See, Jacuzzi’s Writ of Prohibition, filed December 10, 2018, at p. 16, previously admitted as **Evidentiary Hearing Exhibit 185** (emphasis added).

³³ See, Joshua Cools, Esq. Memorandum to Discovery Commissioner Bulla, Oct. 12, 2018, **Exhibit 212**.

³⁴ See, Rptr.’s Tr. of Hr’g, Aug. 29, 2018, previously admitted as **Evidentiary Hearing Exhibit 179** at 7:3-6 (emphasis added).

³⁵ *Id.* at 2:18-3:3 (emphasis added).

³⁶ *Id.*, at 7:7-10 (emphasis added).

- 1 • DISCOVERY COMMISSIONER: And so we don't know the answer to that right
2 now. A lot of what we have, as you indicate, the incidents were after the fall. So we
3 don't know with any certainty exactly what specific knowledge was known before
4 the fall. And I usually have this with me and I don't, when did this fall actually take
5 place? February 14th -- or February 19th of 2014. Okay. So we don't know from
6 like '08 to '14 –

7 MR. COOLS: Well, we've run that. **We have searched that and it's Jacuzzi's**
8 **position that there are none.**³⁷.

9 Jacuzzi also conclusively stated in amended and supplemental written discovery responses
10 that no prior incidents exist.³⁸ Over and over again, Jacuzzi convincingly and affirmatively

11 ³⁷ Id., at 10:8-10; See also, Joshua Cools, Esq. Memorandum to Discovery Commissioner Bulla, Oct. 12, 2018,
12 attached hereto as **Exhibit 212** (“**there were no pre-incident relevant claims.**”) (emphasis added).

13 ³⁸ See, Jacuzzi's Supplemental Responses to Plaintiff Tamantini's First Set of Interrogatories, served Dec. 28, 2018
14 (verified Jan. 4, 2019), **Evidentiary Hearing Exhibit 174**, at Response to Interrogatory No. 11:
15 “**Defendant is unaware of any persons claiming injury from his or her use of the Jacuzzi® 5229**
16 **Walk-In Tub, or any other Jacuzzi® Walk-In Tub, prior to the subject incident.**”; see also, Jacuzzi's
17 Amended Responses to Plaintiff Ansara's Second Set of Requests for Production of Documents, served
18 Jan. 9, 2019, **Evidentiary Hearing Exhibit 186** at Response to Request No. 43 which only referred
19 Plaintiffs to subsequent incidents already produced:

20 **AMENDED REQUEST FOR PRODUCTION NO. 43:**

21 ~~All documents relating to complaints made to you about your Walk In Tubs from January 1, 2012~~
22 ~~to the present.~~

23 **All documents relating to complaints involving bodily injury or death made to You (directly**
24 **or indirectly) about Your Walk-In Tubs. The scope of this Request is limited to incidents**
25 **which occurred (or were alleged to have occurred) from 2008 to present.**

26 **Pursuant to the Discovery Commissioner's Report and Recommendations (as approved by the**
27 **trial court), other than social security numbers, Your response to this request shall not redact**
28 **the names, addresses, telephone numbers, or other contact information of customers who have**
made complaints or claims to Jacuzzi.

RESPONSE:

Jacuzzi objects to this production request because it is overbroad and unduly burdensome,
because it requires production not limited in scope to the subject Walk-In Bathtub or Plaintiffs'
allegations. Jacuzzi objects to this request as vague, ambiguous and seeking information that is
irrelevant to the subject matter of this action and not likely to lead to the discovery of relevant or
admissible evidence. Jacuzzi further objects because the production seeks information protected
from disclosure by the right of privacy of third parties.

Jacuzzi refers Plaintiffs to the documents regarding other incidents of personal injury or
death in walk-in tubs from 2008 to present produced in compliance with Discovery-Commissioner's
direction at July 20, 2018 hearing produced to Plaintiffs on August 17, 2018, bates nos.
JACUZZI002912-002991. The production should not be regarded as a waiver to the documents and
information's relevance or admissibility.

Jacuzzi has provided redacted copies of the requested records, and has a writ pending
regarding the personal information of third parties.



1 proclaimed that it had conducted diligent, in-depth and exhaustive searches for prior incidents
2 and that there were none. It is now clear that Jacuzzi has been untruthful from day one.

3 With Plaintiffs hot on the trail and on the heels of Jacuzzi, literally knocking at the door,
4 on Friday July 26, 2019, the business day before the deposition of Jacuzzi's Director of Customer
5 Service, Kurt Bachmeyer, two Customer Service Employees, Eda Rojas and Deborah Nuanes,
6 and the assistant to Mr. Bachmeyer, Mayra Lopez, and three business days before the forensic
7 computer search of the Salesforce system, Jacuzzi served its Eighteenth Supplemental NRCP 16.1
8 Disclosure. Jacuzzi's Eighteenth Supplement contained evidence of up to³⁹ forty-seven (47) prior
9 and subsequent incidents⁴⁰ with **forty-three (43)** of those being **prior** to the Cunnison incident.
10 Then a couple weeks later on August 12, 2019, Jacuzzi served its Nineteenth Supplemental NRCP
11 16.1 Disclosure which contained three **prior** incidents and 31 subsequent incidents. Jacuzzi also
12 produced additional incidents on August 23, 2019, and August 29, 2019.

13 Jacuzzi's July 26, 2019, August 12, 2019, August 23, 2019 and August 29, 2019
14 disclosures were a document dump of e-mails, communications and previously undisclosed
15 Salesforce entries which reference not only **prior** customer complaints, but also reference **prior**
16 **incidents involving bodily injury**. Plaintiffs have created a table summary of each of Jacuzzi's
17 recent productions for the Court's review.⁴¹ The documents show that Jacuzzi knew of customers
18 who complained of the same risks that caused Sherry's death prior to Sherry's death despite
19
20
21

22 ³⁹ As the Court can see below the language used for some of the entries is in the **plural** which would indicate that
23 more than one customer existed per entry. Plaintiffs conservatively estimated the number of complaints to
24 be at least forty-seven (47) but based on recent disclosures made by *firstSTREET*, Plaintiffs are now able
to show the numbers to be much higher.

25 ⁴⁰ Throughout this litigation Jacuzzi has explained away its repeated non-disclosure by suggesting that Plaintiffs
26 failed to use the correct wording when requesting something. Therefore, when Plaintiffs refer to the
27 incidents, that term is synonymous with claims, occurrences, notices, episodes, warnings, notifications,
occasions, events, complaints or any other word that would cause Jacuzzi to know about a defect in the
walk-in Tub.

28 ⁴¹ See, Tables Summarizing Pertinent Documents of Jacuzzi's 15th, 18th, 19th, 22nd, 23rd NRCP 16.1 Supplements,
attached hereto as **Exhibit 205**.

1 previously boldly proclaiming that, prior searches “did not contain any prior incidents of personal
2 injury **even remotely related** to the claims Plaintiffs have asserted.”⁴²

3 For example, a December 27, 2013 e-mail (prior to the Cunnison DOL), from one of
4 Jacuzzi’s dealers/installers to Jacuzzi informed Jacuzzi about *frequent* customer complaints and
5 referenced injured customers. The e-mail specifically referenced four customers who had slipped
6 and two who had **seriously** injured themselves:

7 Also he says the bottom of the tub is extremely slippery, he has slipped, and
8 also a friend has slipped in using it. **We get this complaint a lot, we have**
9 **two customers right now that have injured themselves seriously and are**
10 **threatening law suits.** We have sent out bath mats to put in the tub to three
other customers because they slipped and were afraid to use the tub.⁴³

11 A July 9, 2012 e-mail chain (also prior to the Cunnison DOL), with the Subject “All
12 Firststreet unresolved incidents” contained a reference to a customer with broken hips
13 complaining about the slipperiness and lack of adequate grab bars.⁴⁴ An April 9, 2013 e-mail
14 chain (also prior to Cunnison) contained information about a customer named Donald Raidt who
15 called to complain that he slipped and fell and hurt his back. He informed Jacuzzi that he is willing
16 to get a lawyer if the tub is not taken out.⁴⁵ A December 2013 email (also prior) stated
17 “**we have a big issue** and . . . Due to the circumstances involved with time line and **slip injuries**
18 **this needs to be settled**....”⁴⁶ A June 2013 e-mail chain (prior to Cunnison) with the Subject
19 “Service issues on 5230/5229” from Regina Reyes to Kurt Bachmeyer referred to a customer I.
20 Stoldt, who became “stuck in tub.”⁴⁷ The same email mentions David Greenwell, who slipped
21 and became stuck in the footwell for two hours.⁴⁸ A second e-mail chain shows that Mr.

22 ⁴² See, Jacuzzi’s Mot. for Protective Order, filed Sept. 11, 2018, attached hereto as **Exhibit 211** at 7:17-23 (emphasis
23 added).

24 ⁴³ See, **Evidentiary Hearing Exhibit 11**, at JACUZZI005320 (emphasis added).

25 ⁴⁴ See, **Evidentiary Hearing Exhibit 2**, at JACUZZI005287.

26 ⁴⁵ See, **Evidentiary Hearing Exhibit 8**, at JACUZZI005367.

27 ⁴⁶ See, **Evidentiary Hearing Exhibit 41**, at JACUZZI005327 (emphasis added).

28 ⁴⁷ See, **Evidentiary Hearing Exhibit 10**, at JACUZZI005374.

⁴⁸ Id.

1 Greenwell had to call the fire department to get out.⁴⁹ Similarly, that same e-mail references a
 2 customer “C. Lashinsky” whose partner slipped in the tub such that the customer “had to remove
 3 the door to get her out.”⁵⁰

4 At the Evidentiary Hearing, Mr. Bachmeyer testified that he would normally send these
 5 types of emails to William Demeritt or Ron Templer.⁵¹ On cross-examination, Jacuzzi’s counsel,
 6 Lee Roberts, attempted to cast doubt by asking Mr. Bachmeyer if he specifically remembered
 7 ever seeing any of the documents he reviewed at the Evidentiary Hearing and if he specifically
 8 recalled sending any of the specific emails to Mr. Demeritt or Mr. Templer.⁵² Mr. Bachmeyer
 9 testified that he generally would send such documents to Mr. Demeritt or Mr. Templer but was
 10 unable to definitively state that he recalled sending any of the specific documents that were shown
 11 to him at the Evidentiary Hearing.⁵³

12 After the Evidentiary Hearing, Jacuzzi agreed to re-search emails between (1) William
 13 Demeritt and Kurt Bachmeyer, and (2) William Demeritt and Regina Reyes. On October 22,
 14 2019, Jacuzzi provided Plaintiffs with 42 pages of email documents. One of the documents is the
 15 continuation of the June 2013 email chain titled “Service issues on 5230/5229.”⁵⁴ Just as Mr.
 16 Bachmeyer testified, the email shows that he forwarded the email to William Demeritt and
 17 Anthony Lovallo, Jacuzzi’s General Counsel.⁵⁵

18 Several other e-mails discuss how customers frequently complained about the slipperiness
 19 of the tub (“Hello: I have so many people stating that the tub seat and floor are extremely
 20

21 ⁴⁹ See, Id., at Jacuzzi005623.

22 ⁵⁰ Id.

23 ⁵¹ See, generally, Recorder’s Tr. of Evidentiary Hr’g, Day 1 at 48-53, attached hereto as **Exhibit 201**.

24 ⁵² Id., at 159:5-160:17.

25 ⁵³ Id.

26 ⁵⁴ See, Email from Kurt Bachmeyer to William Demeritt and Anthony Lovallo RE: “Service issues on 5230/5229,”
 27 dated June 23, 2013, attached hereto as **Exhibit 213** at J001671.

28 ⁵⁵ Id.

1 slippery;”⁵⁶ “we are having a few customers slipping on the bottom of a Jacuzzi tub,”⁵⁷ “we have
 2 had customers call concerned that they slip off the seat,”⁵⁸ “Customer Harris...said the floor of
 3 the tub is very slippery. She said she slipped off the seat,”⁵⁹). Another customer complained:
 4 “seat slippery – you fall off onto the tub floor – door opens in so very hard to get up or be helped
 5 up.”⁶⁰ One dealer/installer informed Jacuzzi there were “a couple of tubs in the field that people
 6 want removed because the customers claim they are too slippery to use.”⁶¹

7 The list goes on and on. A quick review of the table summaries in Exhibit 205 shows that
 8 Jacuzzi has known about each of the issues involved in this case. Jacuzzi has known that an end
 9 user like Sherry could slide off the seat. Jacuzzi has known that a customer can become stuck in
 10 the foot well. Jacuzzi has known that a customer would need additional grab bars.

11 Initially, one may wonder why Jacuzzi would so deceitfully participate in the discovery –
 12 but when the hidden evidence is examined it becomes clear that the stakes were high – very high
 13 because the hidden information confirms that Jacuzzi knew of the risks of harm to Sherry **yet**
 14 **consciously disregarded those specific risks – thereby exposing Jacuzzi to punitive damages.**

15 Plain and simple, Jacuzzi made a calculated risk-reward decision and chose to lie about
 16 the non-existence of prior incidents to avoid exposure to punitive damages.

17 **B. JACUZZI WILLFULLY WITHHELD THE PULLEN MATTER**

18 It is now clear that Jacuzzi lied about prior and subsequent incidents. It is also clear that
 19 Jacuzzi knowingly violated Court orders by willfully withholding the Pullen matter from
 20 Plaintiffs. Jacuzzi’s decision to withhold the Pullen matter can only be willful because from July
 21 20, 2018 forward, it was absolutely clear to Jacuzzi that it had to produce all incidents involving
 22 personal injury or death related to any Jacuzzi walk-in tub from 2008 to present.

23 ⁵⁶ See, Evidentiary Hearing Exhibit 37, at Jacuzzi005566.

24 ⁵⁷ See, Evidentiary Hearing Exhibit 36, at Jacuzzi005646.

25 ⁵⁸ See, Evidentiary Hearing Exhibit 6, at Jacuzzi005414.

26 ⁵⁹ See, Evidentiary Hearing Exhibit 47, at Jacuzzi005722.

27 ⁶⁰ See, Evidentiary Hearing Exhibit 30, at Jacuzzi005334.

28 ⁶¹ See, Evidentiary Hearing Exhibit 43, at Jacuzzi005643.

1. Commissioner Bulla's July 20, 2018 Order

On July 20, 2018, Commissioner Bulla made her first ruling in this case regarding Jacuzzi's production obligations. Up until July 20, 2018, Jacuzzi took the position that only prior incidents needed to be produced.⁶² On July 20, 2018, Commissioner Bulla affirmatively and clearly ruled that both prior and subsequent incidents had to be produced:

DISCOVERY COMMISSIONER: Okay. So here's my suggestion -- I'm going to make them turn everything over to you first. I'm going to continue the motion to strike the answer, but I'm going to have the defendant not only turn over any similar incidents **before, but also after**.⁶³

Unequivocally, Commissioner Bulla expressly ordered Jacuzzi to produce all incidents involving injury or death. There was no limitation to "claims" or incidents where a customer was demanding remuneration or demanding that something be done like a refund or removal of the tub as Jacuzzi's prior counsel Mr. Crawford later tried to claim.

Additionally, there was no limitation to "serious" or "significant" injuries. Instead, Jacuzzi was ordered to produce information related to **any** type of injury – even a "pinched finger."⁶⁴

2. Commissioner Bulla's September 19, 2018 Orders

⁶² Yet, it chose not to produce any of the prior incidents that have just recently been disclosed.

⁶³ See, Rptr.'s Tr. of Hr'g, July 20, 2018, **Evidentiary Hearing Exhibit 177** at 9:21-24.

⁶⁴ See, Rptr.'s Tr. Of Hr'g, July 20, 2018, **Evidentiary Hearing Exhibit 177** at 17:9-20, which stated:

By August 17th of 2018 I want the alternative relief that I'm going to provide today with respect to this motion, i.e. **the information from 2008 to the present time, of any type of accidents or incidents involving the Jacuzzi tub leading to significant -- I know that's somewhat of objective term, but personal injury or death.**

MR. CLOWARD: Can we -- **could we just call it injury or death**; would that be okay?

DISCOVERY COMMISSIONER: **Yes**, but personal injury, not like injury to the tub.

MR. CLOWARD: Sure.

MR. COOLS: **How 'bout a pinched finger?**

DISCOVERY COMMISSIONER: **Yes**.

(emphasis added).

1 *a. Jacuzzi was Aware of the Scope of Production*

2 The parties appeared before Commissioner Bulla again on September 19, 2019. Jacuzzi
3 represented that it performed a search and that there were no other incidents. Nonetheless,
4 Commissioner Bulla ordered Jacuzzi to conduct another search:

5 DISCOVERY COMMISSIONER: Well, see what you have.

6 MR. COOLS: Okay.

7
8 DISCOVERY COMMISSIONER: And report it to Mr. Cloward so he has
9 a better understanding. For now I'm going to protect Request to Produce
10 No. 17, but with the idea that alternative relief will be provided in that the
11 defendant will work to isolate what computer or computers were used to
12 take complaints over the phone or document complaints as they came in to
13 the company. **And we need to do a search of all those complaints from
14 2008 to the present, to the extent that they exist, and that would include
15 both documents on computers as well as any hard copies that were
16 maintained separately of letters, letter complaints or whatever else you
17 have. I mean, what your client needs to understand, defense counsel, is
18 it's their knowledge that becomes relevant, what they knew about this
19 particular product prior to the fall.**

20 MR. COOLS: Right.

21 DISCOVERY COMMISSIONER: And so we don't know the answer to that
22 right now. A lot of what we have, as you indicate, the incidents were after
23 the fall. So we don't know with any certainty exactly what specific
24 knowledge was known before the fall. And I usually have this with me and
25 I don't, when did this fall actually take place? February 14th -- or February
26 19th of 2014. Okay. So we don't know from like '08 to '14 --

27 MR. COOLS: Well, we've run that. **We have searched that and it's
28 Jacuzzi's position that there are none.**

DISCOVERY COMMISSIONER: Oh, okay.

MR. COOLS: So, I mean, that is our representation in discovery responses
and to counsel. So I understand that you're saying that that may not be
enough, but --

DISCOVERY COMMISSIONER: **Well, I'm saying I don't know
because one of the things -- it may be correct, but I think what is
concerning to me is what occurs in the regular course of business.**
Where does a complaint get filed or made? To whom it gets made, have we



1 searched those computers, those call in or intake computers to make sure
2 that we've gotten all the information off that might be relevant. And that's
3 something that I am going to require the defendant to follow up on.⁶⁵

4 Similarly, Commissioner Bulla ordered Jacuzzi to "double check" its databases and "take
5 a look again with fresh eyes:"

6 And I also want to make sure you double check to see, if you had any written
7 complaints that came in, where those are because I think that's something
8 that you need to take a look at again with fresh eyes. You know, 2008 to
9 the present, was there a physical injury involved or a wrongful death.⁶⁶

10 Therefore, Commissioner Bulla ordered Jacuzzi to conduct another search for
11 information from 2008 to present. In reference to Jacuzzi's responses to Plaintiffs' Requests for
12 Production of Documents 24, 25, 41, 42, and 43, Commissioner Bulla expressly ordered Jacuzzi
13 to supplement its responses (implying she was requiring a new search and a supplement):

14 Requests 24 to 43, some of these requests do have time frames in them. I'll
15 leave those alone. But for the ones that don't, it's 2008 to the present and
16 it's where there is wrongful death or bodily injury. So with those parameters
17 in place, I do expect supplements to the extent there are any.⁶⁷

18 Commissioner Bulla clearly, consistently, and repeatedly ordered Jacuzzi to produce all
19 incidents involving injury or death from 2008 to present. Inexplicably, however, Jacuzzi chose
20 not to produce the Pullen Matter, an incident that involved a death occurring after a person
21 slipped and became stuck in a Jacuzzi walk-in tub. Jacuzzi also chose not to produce incidents
22 involving entrapment like Sherry.

23 **3. Jacuzzi's Corporate Counsel, Ron Templer, Esq., was Immediately**
24 **Made Aware of the Pullen Matter and, in Conjunction with Snell &**
25 **Wilmer, Chose to Withhold it from Plaintiffs**

26 ⁶⁵ See, Rptr.'s Tr. of Hr'g, Sept. 19, 2018, **Evidentiary Hearing Exhibit 180** at 6:6-18 (emphasis added).

27 ⁶⁶ Id., at 23:2-6.

28 ⁶⁷ Id., at 13:24-14:1 (as the transcript reveals, Jacuzzi had not yet answered those specific discovery responses, therefore the ultimate order was that they be answered – but the point being was that she expected another search with the information being produced).

1 On October 1, 2018, Robert Pullen called Jacuzzi and informed Jacuzzi of his mother's
 2 death. An October 1, 2018 Salesforce document stated that "CS feels their mom may not have
 3 died if they had not fallen in the tub."⁶⁸ Mr. Pullen called Jacuzzi again on October 30, 2019.
 4 The Salesforce document specifically states "Customer wants to take legal action because *he*
 5 *thinks the tub killed his mom.*"⁶⁹ Jacuzzi's Corporate Counsel, Ron Templer was immediately
 6 made aware of the Pullen Matter that same day.⁷⁰ Mr. Templer informed Joshua Cools (and
 7 potentially Vaughn Crawford) of Snell & Wilmer that same day.⁷¹ Despite Commissioner
 8 Bulla's clear order to produce all incidents involving injury or death, Jacuzzi and Snell & Wilmer
 9 chose not to disclose the Pullen Matter to Plaintiffs.⁷²

10 Instead, just 41 days later Jacuzzi filed its *Petition for Writ of Prohibition* and proclaimed
 11 to the Nevada Supreme Court that, "[t]o date, **Jacuzzi has identified and produced to Plaintiffs**
 12 **all of the evidence in Jacuzzi's possession** of other prior and subsequent incidents of alleged
 13 bodily injury or death related to the Jacuzzi® tub in question."⁷³

14 On February 4, 2019, Plaintiffs' Renewed Motion to Strike Defendant Jacuzzi, Inc.'s
 15 Answer came on for hearing before this Court. The proceedings lasted approximately two and

16 ⁶⁸ Evidentiary Hearing Exhibit 119, at JACUZZI0004696.

17 ⁶⁹ Evidentiary Hearing Exhibit 119, at JACUZZI0004710 (emphasis added).

18 ⁷⁰ Recorder's Tr. of Evidentiary Hr'g, Day 2, attached hereto as **Exhibit 202** at 32:1-7.

19 ⁷¹ Recorder's Tr. of Evidentiary Hr'g, Day 2, attached hereto as **Exhibit 202** at 33:25-34:11.

20 ⁷² Recorder's Tr. of Evidentiary Hr'g, Day 2, attached hereto as **Exhibit 202** 37:1-11:

21 Q My question was, whose decision was it to withhold this document until the judge
 22 specifically ruled that anything involving a death needed to be turned over?

23 A The decision around the time that I learned of it, Mr. Roberts' firm was not involved in
 24 the case at that point. So **that decision was a collective decision made by outside counsel**
and Jacuzzi.

25 Q So that was to confirm, because Mr. Roberts had not yet gotten involved in the case, that
 26 decision would have been made collectively with Jacuzzi and Snell & Wilmer?

27 A Yeah.

28 ⁷³ See, Jacuzzi's Writ of Prohibition, at 16, filed December 10, 2018, **Evidentiary Hearing Exhibit 185** at 16
 (emphasis added).

1 a half hours, and the Court took the matter under advisement. On March 4, 2019, the Court
 2 entered a *first* Minute Order setting an Evidentiary Hearing on the matter. The March 4, 2019
 3 Minute Order ordered the parties to identify “[t]he names of any relevant customers of
 4 Jacuzzi/First Street that have died . . .”⁷⁴ On March 7, 2019, Jacuzzi filed its “Brief Pursuant to
 5 the March 4, 2019 Minute Order,” which revealed for the first time that Jacuzzi had been aware
 6 since October 2018 of a third death involving a person “getting stuck” in a Jacuzzi walk-in tub.⁷⁵
 7 Upon learning of this new death, Plaintiffs’ filed a Motion for Reconsideration Regarding their
 8 Renewed Motion to Strike Jacuzzi’s Answer.

9 Jacuzzi’s refusal to participate in this litigation in good faith was on full display in
 10 Jacuzzi’s Opposition to Plaintiffs’ Motion for Reconsideration⁷⁶ and at the July 1, 2019 hearing
 11 on the motion.⁷⁷ With no valid explanation as to why it failed to disclose information regarding
 12 a death involving a customer getting stuck in a tub, Jacuzzi chose to argue that the Pullen Matter
 13 was not a “claim.” Further, Jacuzzi argued that Commissioner Bulla did not intend for Jacuzzi
 14 to disclose death incidents after September 19, 2018 because she stated that Jacuzzi must only
 15 produce incidents from 2008 to “present.”

16 At the July 1, 2019 hearing, Vaughn Crawford of Snell & Wilmer stood before this Court
 17 and argued (1) that Commissioner Bulla only ordered “claims” to be produced and (2) that the
 18 Pullen Matter was not a “claim.”⁷⁸ Mr. Crawford’s argument was not only absurd, it was

19 ⁷⁴ See, March 4, 2019 Minute Order, attached hereto as **Exhibit 214**.

20 ⁷⁵ In October 2018, Jacuzzi, in conjunction with Snell & Wilmer, chose not to disclose the Pullen matter. Jacuzzi
 21 chose not to do so after Mr. Templer had discussions with Snell & Wilmer and another outside attorney,
 22 Tim Mullin, Esq. This Court’s Minute Order requesting “[t]he names of any relevant customers of
 23 Jacuzzi/First Street that have died” did not change or expand any of Commissioner Bulla’s prior orders.
 24 And as seen in the Petition for Writ of Prohibition written by Snell & Wilmer and reviewed by Ron
 25 Templer, Jacuzzi understood that all incidents involving death and the use of a walk-in tub had to be
 26 produced. Therefore, whatever interpretation Jacuzzi had of prior orders that may have led it to withhold
 27 the Pullen Matter likely did not change as a result of a simple request for “the names of relevant
 28 customers...that have died.” The only thing that changed from October 2018 to Jacuzzi’s ultimate decision
 to disclose the Pullen Matter is that the law firm of Weinberg Wheeler Hudgins Gunn & Dial became
 involved.

⁷⁶ See generally, Jacuzzi’s Opp’n to Pls.’ Mot. for Recons., attached hereto as **Exhibit 206**.

⁷⁷ Rptr.’s Tr. of Hr’g., July 1, 2019, **Evidentiary Hearing Exhibit 190**.

⁷⁸ Id., at 46-57.

1 disingenuous. Commissioner Bulla’s rulings were clear, and Jacuzzi fully understood them. In
 2 fact, this Court need look no further than Jacuzzi’s *Petition for Writ of Prohibition* which sought
 3 relief from Commissioner Bulla’s recommendations and this Court’s order affirming the same.
 4 Jacuzzi’s description of the order shows that Jacuzzi knew and fully understood that it had to
 5 produce all incidents; there was no limitation to “claims” as Mr. Crawford defined the term.
 6 Jacuzzi’s Petition accurately described its disclosure obligations:

7 [T]he district court ordered Jacuzzi to disclose *all* incidents of *any* bodily
 8 injury, however slight, or however dissimilar, involving *any* model of
 9 Jacuzzi® walk-in tub, regardless of how the injury occurred (i.e., if a
 10 consumer pinched a finger closing the door of a walk-in-tub, it would be
 subject to the Court's order), including the private identifying information
 of Jacuzzi's customers.⁷⁹

11 [T]he district court's order ... requires Jacuzzi to find and disclose *any*
 12 incident involving *any* bodily injury at all, however slight, and involving
 13 any of Jacuzzi's walk-in tubs, whether containing the same alleged defect
 or not, and regardless of any similarity to plaintiffs' claims of defect.⁸⁰

14 Clearly, Jacuzzi did not truly believe in its “what is a claim?” argument. In light of
 15 Jacuzzi’s own description of its disclosure obligations pursuant to this Court’s order, Mr.
 16 Crawford’s “claim” argument was clearly pretext offered as a last resort to try to convince this
 17 Court that Jacuzzi withheld the Pullen Matter in good faith. The reality is that Jacuzzi’s
 18 Corporate Counsel, Mr. Templer, knew that Robert Pullen “wants to take legal action because
 19 he thinks the tub killed his mom.”⁸¹

20 Jacuzzi’s argument that it only had to disclose “claims” up until September 19, 2018 (the
 21 date they claim is Commissioner Bulla meant when she stated “present”) illustrates Jacuzzi’s
 22 “catch me if you can” approach to litigation. Jacuzzi was involved in each and every hearing
 23 before the Discovery Commissioner – where the discussions have always centered around other
 24 incidents and other customer complaints. In fact, **two days after Mr. Templer learned of the**
 25

26 ⁷⁹ See, Jacuzzi’s Writ of Prohibition, filed December 10, 2018, **Evidentiary Hearing Exhibit 185** at 3-4.

27 ⁸⁰ *Id.*, at 16.

28 ⁸¹ **Evidentiary Hearing Exhibit 119**, at JACUZZI0004710.

1 **Pullen Matter**, he personally attended the November 2, 2018 hearing before Commissioner
 2 Bulla where the parties discussed Jacuzzi's searches for other incident evidence. Jacuzzi knew
 3 that Commissioner Bulla never stated that Jacuzzi was only required to disclose incidents
 4 involving insurance claims or lawsuits.

5 Jacuzzi (and Ron Templer, personally) fully understood that Commissioner Bulla
 6 ordered that all matters involving injury or death needed to be turned over. Jacuzzi and Ron
 7 Templer also knew that Robert Pullen wanted to take legal action because he believed that his
 8 mother a Jacuzzi tub "killed his mom." Jacuzzi participated in discussions with Snell & Wilmer
 9 and decided to withhold the information from Plaintiffs **even though the Pullen matter**
 10 **involved a woman dying after becoming stuck in a tub**. Rather than allow Plaintiffs to
 11 conduct discovery on the matter, Jacuzzi chose to keep Plaintiffs in the dark. Jacuzzi's failure
 12 to voluntarily disclose the Pullen matter – and its pre-textual excuse for doing so – was willful
 13 and in bad faith.

14 **C. JACUZZI VIOLATED COMMISSIONER BULLA'S ORDER TO SEARCH ALL**
 15 **DOCUMENTS MADE IN THE ORDINARY COURSE OF BUSINESS**

16 **1. Commissioner Bulla Ordered Jacuzzi to Conduct a Search of All**
 17 **Documents Made in the Ordinary Course of Business in Response to**
 18 **Mr. Cools' Specific Questions About Emails**

19 Another important aspect of Commissioner Bulla's ruling is that she ordered Jacuzzi to
 20 search all documents prepared *in the ordinary course of business*. At the September 19, 2019
 21 hearing, Commissioner Bulla made it absolutely clear that she was requiring Jacuzzi to search
 22 all potential sources of information. At the hearing, it was upon Mr. Cools' request for
 23 clarification wherein he raised concerns about the potential burden for conducting a detailed
 24 search of emails when Commissioner Bulla made it abundantly clear that Jacuzzi was required
 25 to search all sources containing documents created in the ordinary course of business. The
 26 specific exchange is insightful:

27 MR. COOLS: Can I just clarify something in regards to something like 43? All
 28 documents relating to complaints made to you about your walk-in tubs from
 January 1, 2012 to the present.



...

MR. COOLS: My question is obviously, you know, that could also pertain to internal communications via email about that. Are you requiring us to also do an ESI search and privilege log for all privileged communications about those claims as well?

DISCOVERY COMMISSIONER: Ordinary course of business is what I'm talking about.

MR. COOLS: Okay.

DISCOVERY COMMISSIONER: Okay? To the extent that the complaint gets passed on to the lawyer and the lawyer is making opinions about it, I would say you need to do a privilege log.

MR. COOLS: That's just extremely costly and burdensome to have to go through and do –

DISCOVERY COMMISSIONER: Okay, but we're limiting it to the time frame, and this one is January 1st of 2012 and it deals with wrongful death or bodily injury. So it wouldn't involve any of the warranties, it wouldn't involve anything where there's no injury. How many claims could you possibly have?

MR. COOLS: I'm just saying even doing the search based off of the ten or eleven claims, subsequent claims that have been produced, having to go through and find all the custodians that may have touched that claim do a search, have counsel review for privilege, those are just very burdensome and costly endeavors. If that's part of your ruling, I understand.

DISCOVERY COMMISSIONER: Well, I don't want this to be overly burdensome and costly for the defendant, but you cannot hide behind a privilege not to produce documents that were in the ordinary course of business. And when you say something like that, it worries me.

MR. COOLS: I don't know that -- frankly, Your Honor, I don't know that any exist. I'm just saying I'm sure there's emails about it. So, you know, if a claim came in and it's escalated or whatever –

DISCOVERY COMMISSIONER: Well, then I think you just need to identify –

MR. COOLS: I mean, these aren't about our claim, so we're getting into a granular level on these other claims that –

DISCOVERY COMMISSIONER: All documents related to complaints made to you about your walk-in tubs from January 1st, 2012 to the present. The



1 complaints have to be about wrongful death or bodily injury. So any warranty
 2 claims, any non-injury claims are not part of this production. **Documents that are**
 3 **produced or prepared in the ordinary course of business have to be produced.**
 4 **If some point the claim goes to the legal department, you just need to identify**
 5 **the fact that any other documents are part of the legal -- it went to legal and**
 6 **are covered by work product privilege or whatever it is.** I mean, I don't know
 7 how many we're talking about. I don't expect you to do this for every warranty
 8 claim.⁸²

9 There was no ambiguity about what Commissioner Bulla ordered and now, in hindsight,
 10 the reason that Jacuzzi tried to evade the requirement of searching email was not because it was
 11 costly or burdensome – but rather because Jacuzzi knew darn well what those emails contained
 12 – all of the relevant, responsive and damaging information. It is no wonder why Jacuzzi filed a
 13 *Petition for Writ of Prohibition* under the false pretense of wanting to “protect its customers”
 14 private information. No – instead – Jacuzzi did not want Plaintiffs to discover the truth.

15 Despite Commissioner Bulla's order to search all documents made in the ordinary course
 16 of business, Jacuzzi **did not** search through its email systems.⁸³ At the Evidentiary Hearing
 17 Jacuzzi admitted for the first time that it had not, in fact, obeyed Commissioner Bulla's order
 18 when Mr. Templer testified that *some* emails were searched, but not all.⁸⁴ Additionally, it is

19 ⁸² See, Rptr.'s Tr. of Hr'g., Sept. 19, 2019, **Evidentiary Hearing Exhibit 180**, at 25:2-26:24 (emphasis added).

20 ⁸³ See, Recorder's Tr. of Evidentiary Hr'g, Day 2, attached hereto as **Exhibit 202** at 124:3-25.

21 Q Mr. Templer, has Jacuzzi, prior to the Judge's ruling, and I'm just talking about Judge
 22 Scotti's ruling, a couple of months ago, prior to that ruling had Jacuzzi ever at one time performed
 23 a search of these 20 terms, of all of the databases, and I'm not talking just the warranty, I'm not
 24 talking about, you know, just the RNT, I'm talking about all of the things that Mr. Cools represented
 25 in his declaration, did Jacuzzi ever do that?

26 A Of all databases?

27 Q Of the five databases that we talked about with Mr. Bachmeyer, that Jacuzzi uses to store
 28 information, so; 1) the RNT; 2) the KBM; 3) the sales force; 4) the email, and then I believe; 5) is
 also the legacy system, that you can use the click view. Had Jacuzzi ever done that?

A Those terms, **I don't know that ever run -- made a run against all email.** We have
 recently run some, and the results are so vast. For instance, my recollection is the word slip. When
 it was recently run against our database, our email system, it turned up nearly a million hits because
 the way that term is used throughout the company. So it -- not a million emails have not been
 searched through.

Q Okay.

A I believe the responses indicated that if we needed to get a forensic expert in or something
 we could do that, but at your expense, but that has not been done.

⁸⁴ See, Recorder's Tr. of Evidentiary Hr'g, Day 2, attached hereto as **Exhibit 202** at 149:19-24.

likely that Mr. Templer's testimony that "some" emails were searched is a reference to a very limited search performed in early 2018 when Jacuzzi searched employee emails for very specific terms related to the subject Cunnison incident only; it was not a search for other incidents.⁸⁵ Further, the timing of Jacuzzi's partial search of the email systems is most troubling. Despite being ordered to conduct that search in September of 2018, Mr. Templer admitted that the searches were not conducted until a little longer than 30 to 45 days before he was questioned at the evidentiary hearing.⁸⁶ It has now become clear that Jacuzzi did not search the emails systems of the employees most likely to have relevant emails and did not comply with Commissioner Bulla's Order. Yet despite that, Jacuzzi had no problem telling the Commissioner, this Honorable Court and the Nevada Supreme Court that it had searched all documents and had turned over all responsive documents "in its possession."

2. Jacuzzi Fully Understood that in Order to Find Relevant Documents, it Would Have to Search Emails

Just as Jacuzzi offered the "*what is a claim?*" argument as pretext to justify its decision not to disclose the Pullen Matter, Jacuzzi is now offering the unbelievable argument that it did not believe that it needed to search through emails for relevant documents even though Commissioner Bulla unambiguously ordered it to search for all documents made in the ordinary course of business. Specifically, Jacuzzi is now arguing that it acted in good faith because it searched in all the places where it expected relevant information to be found.

At the Evidentiary Hearing, Mr. Templer testified that in attempting to comply with Commissioner Bulla's order, "the company did a search in a place that it's reasonably expected

Q Remember I asked did Jacuzzi ever search these terms through email. Do you remember that?

A Yes.

Q And you said no.

A I said some email searches were done. **It has not been run against the entire email database.**

⁸⁵ See, April 3, 2018 Letter from Joshua Cools, Esq. to Benjamin Cloward, Esq. (In early 2018, the parties agreed that Jacuzzi would search for internal communications regarding the Cunnison incident which were created prior to the filing of Plaintiffs' Complaint. This search was limited to looking for pre-litigation internal communications, not other incidents), **Exhibit 215**.

⁸⁶ See, Recorder's Tr. of Evidentiary Hr'g, Day 3, attached hereto as **Exhibit 203** at 53:11-20.

1 that type of information to be maintained.”⁸⁷ He testified that at the time that Jacuzzi performed
2 its searches, it only expected to find relevant documents in the KBM and Salesforce databases:

3 Q Well, let me ask you. Do you think it would be reasonably expected
4 to find issues with regard to this tub, and that the customer service director
5 would have information that's reasonably expected?

6 A Mr. Bachmeyer wasn't the customer service director at that time, he
7 was warranty, and at the time, again, in speaking with people, the
8 understanding was that the information that was requested, incidents
9 involving serious personal injury or death, should be within the KBM sales
10 force customer service databases.⁸⁸

11 Mr. Templer then justified Jacuzzi's failure to search Kurt Bachmeyer's emails because
12 he did not expect relevant information to be found in employee emails:

13 Q And my question, Mr. Templer, is this very specific question. You
14 gave a limitation, you said, we did what we reasonably expected. We looked
15 into places that we reasonably expected. And my question was simply, do
16 you think, is it reasonably expected that the director of customer service
17 would have information responsive to what the Commissioner was
18 ordering?

19 A At the time I expected it to be in the customer service databases, not
20 in emails outside of those databases.⁸⁹

21 Essentially, Jacuzzi is arguing that the recent disclosures containing Kurt Bachmeyer and
22 Audrey Martinez emails were innocently missed. Just like Mr. Crawford's argument regarding
23 the Pullen Matter, Mr. Templer's testimony is both unbelievable and dishonest.

24 First, Commissioner Bulla specifically ordered Jacuzzi to search its emails when she
25 ordered Jacuzzi to review all documents made in the ordinary course of business. It cannot be
26 overlooked that the entire dialog and exchange between Commissioner Bulla and Jacuzzi was due
27 to Jacuzzi's request for clarification as to whether emails must also be searched! Second, a simple
28 review of "Email Recipients" column of Plaintiffs' demonstrative Exhibit 199 shows that Kurt

⁸⁷ See, Recorder's Tr. of Evidentiary Hr'g Day 2, attached hereto as **Exhibit 202** at 136:22-24.

⁸⁸ See, Recorder's Tr. of Evidentiary Hr'g Day 2, attached hereto as **Exhibit 202** at 137:7-14.

⁸⁹ See, Recorder's Tr. of Evidentiary Hr'g Day 2, attached hereto as **Exhibit 202** at 137:15-22.

1 Bachmeyer (the Director of Customer Service), Audrey Martinez (Marketing Manager), Regina
 2 Reyes (a Customer Service Manager), and other customer service department employees are
 3 consistently listed as email recipients. Yet those are the emails that ***were not searched!*** It is hard
 4 to believe that Jacuzzi did not reasonably expect to find other incidents information in any of
 5 these employees' emails. Third, Jacuzzi's recent disclosures confirm what *firstSTREET's* NRCP
 6 30(b)(6) witness testified to at his deposition: the dealers, as the face-to-face salesman and
 7 installers of the tubs, are the primary contact for the end-user customer.⁹⁰ Therefore, when
 8 customers have a complaint, they most likely contact the dealer first, who then contacts Jacuzzi.
 9 The dealers have direct relationships with Jacuzzi and often would contact Audrey Martinez or
 10 other Jacuzzi employees directly via email, thereby bypassing the customer service
 11 representatives who make entries onto the Salesforce system. Even Commissioner Bulla, having
 12 no experience with Jacuzzi's internal systems, recognized that customer complaints can come
 13 from directly from dealers. At the November 2, 2018 hearing, Commissioner Bulla stated:

14 Now I have defendant's motion for protective order, and I think I have a
 15 better understanding at least of the mechanism of the injury in this case. But
 16 I think really the question is what Jacuzzi knew or should have known for
 17 the negligence part of the claim, and then the strict liability is a different
 18 issue. But if I look at the negligence part of the claim, **it's what Jacuzzi**
 19 **knew about the tub, and if some of the complaints are coming through**
 20 **its retailers, for lack of a better term, then that concerns me, and**
 21 **presumably they were passed along to Jacuzzi, but I also need to know,**
 22 **you know, what you all knew about this particular walk-in tub.**⁹¹

23 Just as Commissioner Bulla suspected, complaints did in fact come through
 24 dealers/installers which were in fact passed along to Jacuzzi. Those complaints would go
 25 directly to employees like Regina Reyes and Audrey Martinez in emails. Those emails would
 26 be forwarded to employees like Kurt Bachmeyer and William Demeritt. Jacuzzi knew
 27 complaints from dealers would be in employee emails.

28 ⁹⁰ See, David Modena, Vol. 1, Dec. 11, 2018, at 102, attached hereto as **Exhibit 216**.

⁹¹ See, Rptr.'s Tr. of Hr'g., Nov. 2, 2018, **Evidentiary Hearing Exhibit 182**, at 5:13-22.

1 Additionally, Mr. Templer's testimony is significantly undermined by an email which
2 the Court ordered to be produced after its *in camera* inspection of the binders Jacuzzi submitted
3 to the Court. On July 25, 2018, just five days after the hearing on Plaintiffs' Motion to Strike
4 Jacuzzi's Answer, not surprisingly, Mr. Templer sent an email to Kurt Bachmeyer, Regina
5 Reyes, William Demeritt, and Jess Castillo (with Anthony Lovallo copied) which shows that
6 Jacuzzi fully understood that the only way to find all relevant documents was to search all
7 databases.⁹² **But more importantly – Jacuzzi knew the people who would know the answers!**
8 The email was not sent to random employees – instead it was sent directly to Mr. Bachmeyer,
9 Ms. Reyes, Mr. Demeritt and Mr. Castillo – the persons most likely to have relevant information
10 in their emails! Yet those folks' e-mails were unbelievably not searched.

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28 ⁹² Email from Ron Templer, Esq. to Various Jacuzzi Employees, July 25, 2018, (produced to Plaintiffs on Oct. 10, 2019) attached hereto as **Exhibit 217**.

Contrary to his Evidentiary Hearing testimony, Mr. Templer knew that a complete and diligent search required searching outside of the KBM and Salesforce databases:

From: Templer, Ron
Sent: Wednesday, July 25, 2018 6:15 PM
To: Bachmeyer, Kurt <Kurt.Bachmeyer@jacuzzi.com>; Reyes, Regina <Regina.Reyes@jacuzzi.com>; Demeritt, William <William.Demeritt@jacuzzi.com>; Dominguez, Mike <Mike.Dominguez@jacuzzi.com>; Castillo, Jess <Jess.Castillo@jacuzzi.com>
Cc: Lovallo, Anthony <Anthony.Lovallo@jacuzzi.com>
Subject: Cunnison v. Jacuzzi (CONFIDENTIAL ATTORNEY CLIENT/WORK PRODUCT COMMUNICATION)
Importance: High

Kurt, Regina & Jess:

Jacuzzi Inc./Jacuzzi Luxury Bath has been ordered by a court in a pending case to produce ALL customer complaints regarding personal injuries sustained in a walk-in tub. As such, **I need each of you to provide me with the following no later than August 3:**

- All letters, emails, customer service/warranty entries and all other communications and documents (written or electronic) that mention or refer to a personal injury sustained in a walk-in tub from 1/1/2008 to the present. This requires a search of **all** databases (both current and old), email and other potential locations where the information may be stored. When running a search of electronic files and records, the search can be limited to complaints and communications regarding walk in tubs that include one or more of the following terms:
 - Injury
 - Injure
 - Injured
 - Injuries
 - Death
 - Hurt
 - Pain

THIS SEARCH AND PRODUCTION WAS ORDERED BY A COURT, AND AS SUCH, NEEDS TO BE TIMELY AND COMPLETE. FAILURE TO PROPERLY AND THOROUGHLY CONDUCT THE SEARCH AND PRODUCE ALL REQUESTED INFORMATION WILL RESULT IN MAJOR ADVERSE CONSEQUENCES TO THE COMPANY.

Ron Templer
 Corporate Counsel

This email belies Mr. Templer's testimony because it shows that Jacuzzi understood that in order to find all necessary information, it had to search for "[a]ll letters, emails, customer service/warranty entries and all other communications and documents (written or electronic) that mention or refer to a personal injury sustained in a walk-in tub from 1/1/2008 to the present."⁹³ Additionally, it shows that Jacuzzi knew that a proper search "require[d] a search of **all** databases (both current and old), **email** and other potential locations where the information may be stored."⁹⁴

⁹³ Id.

⁹⁴ Id.

1 Finally, it reveals that Jacuzzi knew full well the importance of the search and the
 2 consequences of not obeying the Court order. In fact, Mr. Templer's email ends with a bold,
 3 ALL CAPS warning stating the importance of the search: **"THIS SEARCH AND**
 4 **PRODUCTION WAS ORDERED BY A COURT, AND AS SUCH, NEEDS TO BE**
 5 **TIMELY AND COMPLETE, FAILURE TO PROPERLY AND THOROUGHLY**
 6 **CONDUCT THE SEARCH AND PRODUCE ALL REQUESTED INFORMATION**
 7 **WILL RESULT IN MAJOR ADVERSE CONSEQUENCES TO THE COMPANY."**⁹⁵

8 Yet once again, Jacuzzi came before this Court at the Evidentiary Hearing with a new
 9 pre-textual excuse with Mr. Templer claiming that he (i.e., Jacuzzi) did not expect relevant
 10 information to be contained in emails. Just like Jacuzzi's Petition for *Writ of Prohibition* shows
 11 that Jacuzzi knew it had to produce the Pullen Matter, Mr. Templer's July 25, 2019 email shows
 12 that Jacuzzi knew it had to search all databases, including emails. It also shows that Jacuzzi
 13 knew which emails to search! The Court should reject Mr. Templer's testimony that Jacuzzi
 14 believed that the KBM and Salesforce databases would contain all relevant data – as his email
 15 proves otherwise. It is also worth noting that the email was not available at the time of Mr.
 16 Templer's evidentiary hearing cross-examination as the email was produced after the *in-camera*
 17 review, otherwise, Plaintiffs would have cross-examined Mr. Templer on this issue.⁹⁶

18 **D. JACUZZI VIOLATED COMMISSIONER BULLA'S ORDER WHEN IT LIED IN**
 19 **ITS RESPONSES TO PLAINTIFFS' RECENT WRITTEN DISCOVERY**
 20 **REQUESTS**

21 By January of 2019, Jacuzzi's disclosure requirements were clear. By this time, Plaintiffs
 22 had already sought case ending sanctions in their first Motion to Strike. The parties had been
 23 before Commissioner Bulla on four different occasions on discovery disputes relating to Jacuzzi's
 24 disclosures. Commissioner Bulla was concerned enough with Jacuzzi's discovery conduct that
 25 she ordered a forensic computer search – a rarely granted form of relief. Commissioner Bulla

26 _____
 27 ⁹⁵ Id.

28 ⁹⁶ See, Jacuzzi's 25th NRCP 16.1 Suppl. Disclosure (pleading only), served Oct. 10, 2019, attached hereto **Exhibit**
218 at 21 (showing disclosure of JACUZZI J001200, i.e., Mr. Templer's July 25, 2018 email).

1 had instructed Jacuzzi to supplement discovery and to conduct searches with “fresh eyes.” In
 2 other words, by January 2019, it was absolutely clear that Jacuzzi was required to complete a full,
 3 complete, diligent search through all databases in order to produce all documents created in the
 4 ordinary course of business.

5 By this time, Jacuzzi fully understood the scope of the court orders because Jacuzzi had
 6 already filed its Petition for *Writ of Prohibition*. Using Jacuzzi’s own description of
 7 Commissioner Bulla and this Court’s orders, Jacuzzi was required to: “find and disclose *any*
 8 incident involving *any* bodily injury at all, however slight, and involving any of Jacuzzi’s walk-
 9 in tubs, whether containing the same alleged defect or not, and regardless of any similarity to
 10 plaintiffs’ claims of defect.”⁹⁷

11 Clearly, Jacuzzi understood the Court’s orders, but chose to willfully violate them. After
 12 all of the foregoing – including the filing of the Petition for Writ – Jacuzzi chose to continue to
 13 definitively claim and affirmatively represent that the only other incidents (other than the Smith
 14 and Baize cases) were the ten subsequent incidents Jacuzzi disclosed on August 17, 2018 pursuant
 15 to Commissioner Bulla’s order after the July 20, 2018 hearing on Plaintiffs’ first Motion to Strike.
 16 Jacuzzi made these affirmative representations in violation of court orders in its Responses to
 17 Plaintiff Ansara’s Amended Second Set of Requests for Production of Documents.

18 **1. Plaintiff Ansara’s Request for Production of Documents No. 43**

19 Jacuzzi’s willful decision to ignore court orders is highlighted by the history of Plaintiff’s
 20 Request for Production of Documents Number 43 (“RFPD 43”). After the July 20, 2018 hearing
 21 on Plaintiffs’ (first) Motion to Strike, Plaintiff Ansara served his Second Set of Requests for
 22 Production of Documents, which contained the following request:

23 **REQUEST NO. 43.**

24 All documents relating to complaints made to you about your Walk-In Tubs
 25 from January 1, 2012 to the present.⁹⁸

26
 27 ⁹⁷ See, Jacuzzi’s *Writ of Prohibition*, filed December 10, 2018, **Evidentiary Hearing Exhibit 185**, at 16.

28 ⁹⁸ See, Plaintiff Ansara’s Second Set of Requests for Production of Documents, **Evidentiary Hearing Exhibit 178**.

Jacuzzi filed a Motion for Protective Order which came on for hearing on September 19, 2018.⁹⁹ At the September 19, 2019 hearing, Commissioner Bulla found that RFPD 43 sought relevant information, but was overbroad. Commissioner Bulla ordered Plaintiffs to serve supplemental Requests which were to be limited to incidents involving injury or death involving walk-in tubs from 2008 to present.¹⁰⁰ Prior to the relevant DCRR being affirmed, Jacuzzi served the following Response to RFPD 43 on October 1, 2018:

REQUEST FOR PRODUCTION NO. 43:

All documents relating to complaints made to you about your Walk-In Tubs from January 1, 2012 to the present.

RESPONSE:

Pursuant to the Court's Protective Order, this request is limited in scope to incidents involving personal injury or death in walk-in tubs.

Jacuzzi objects to this production request because it is overbroad and unduly burdensome, because it requires production not limited in scope to the subject Walk-In Bathtub or Plaintiffs' allegations. Jacuzzi objects to this request as vague, ambiguous and seeking information that is irrelevant to the subject matter of this action and not likely to lead to the discovery of relevant or admissible evidence. Jacuzzi further objects because the production seeks information protected from disclosure by the right of privacy of third parties.

Jacuzzi will supplement this response upon entry of a final order on Jacuzzi's Motion for Protective Order.¹⁰¹

Pursuant to Commissioner Bulla's order, Plaintiffs served an amended RFPD 43 on November 29, 2018. Plaintiff's amended RFPD 43 was specifically limited to the scope ordered by Commissioner Bulla:

REQUEST NO. 43.

~~All documents relating to complaints made to you about your Walk-In Tubs from January 1, 2012 to the present.~~

All documents relating to complaints involving bodily injury or death made to You (directly or indirectly) about Your Walk-In Tubs.

⁹⁹ See, Jacuzzi's Mot. for Protective Order, filed Sept. 11, 2018, attached hereto as **Exhibit 211**.

¹⁰⁰ See, Notice of Entry of Order Affirming Discovery Commissioner's Report and Recommendations, Sept. 19, 2018 Hearing, **Evidentiary Hearing Exhibit 183** at 3-5.

¹⁰¹ See, Jacuzzi's Response to Plaintiff Ansara's Second Set of Requests for Production, **Evidentiary Hearing Exhibit 181** at 16:1-14.

The scope of this Request is limited to incidents which occurred (or were alleged to have occurred) from 2008 to present.

Pursuant to the Discovery Commissioner's Report and Recommendations (as approved by the trial court), other than social security numbers, Your response to this request shall not redact the names, addresses, telephone numbers, or other contact information of customers who have made complaints or claims to Jacuzzi.¹⁰²

By this point, Mr. Templer had already sent his July 25, 2019 email to Mr. Bachmeyer, Ms. Reyes, Mr. Demeritt, and Mr. Castillo instructing them to search all databases, including email. By this point, Mr. Templer had already attended the November 2, 2018 hearing when Commissioner Bulla noted that complaints could come directly from dealers to Jacuzzi and that those types of complaints must be found and disclosed. By this point, Jacuzzi had already filed its Petition for Writ acknowledging the scope of the court orders. Nonetheless, on January 9, 2019, Jacuzzi served its Response to Plaintiff Ansara's Amended RFPD 43. Jacuzzi's Response simply referred to the previously disclosed ten subsequent incident documents which Jacuzzi had already produced (in redacted form):

AMENDED REQUEST FOR PRODUCTION NO. 43:

~~All documents relating to complaints made to you about your Walk-In Tubs from January 1, 2012 to the present.~~

All documents relating to complaints involving bodily injury or death made to You (directly or indirectly) about Your Walk-In Tubs. The scope of this Request is limited to incidents which occurred (or were alleged to have occurred) from 2008 to present.

Pursuant to the Discovery Commissioner's Report and Recommendations (as approved by the trial court), other than social security numbers, Your response to this request shall not redact the names, addresses, telephone numbers, or other contact information of customers who have made complaints or claims to Jacuzzi.

RESPONSE:

Jacuzzi objects to this production request because it is overbroad and unduly burdensome, because it requires production not limited in scope to the subject Walk-In Bathtub or Plaintiffs' allegations. Jacuzzi objects to this request as vague, ambiguous and seeking information that is irrelevant to the subject matter of this action and not likely to lead to the discovery of relevant or admissible evidence. Jacuzzi further objects because the production seeks information protected from disclosure by the right of privacy of third parties.

¹⁰² See, Plaintiff Ansara's Amended Second Set of Requests for Production to Jacuzzi, served Nov. 29, 2018, Evidentiary Hearing Exhibit 184, at 13.

Jacuzzi refers Plaintiffs to the documents regarding other incidents of personal injury or death in walk-in tubs from 2008 to present produced in compliance with Discovery-Commissioner's direction at July 20, 2018 hearing produced to Plaintiffs on August 17, 2018, bates nos. JACUZZI002912-002991. The production should not be regarded as a waiver to the documents and information's relevance or admissibility.

Jacuzzi has provided redacted copies of the requested records, and has a writ pending regarding the personal information of third parties.¹⁰³

Sadly, even though Commissioner Bulla had already ordered Jacuzzi to do more research, to look at its systems with "fresh eyes,"¹⁰⁴ and to supplement its responses to RFPD 43,¹⁰⁵ Jacuzzi still failed to identify and produce any of the recently produced documents. Instead, Jacuzzi affirmatively represented that the only documents regarding other incidents of personal injury or death in walk-in tubs from 2008 to present were already produced. Jacuzzi did not search relevant emails. Jacuzzi did not look with "fresh eyes." Jacuzzi did not produce documents made in the ordinary course of business. Most troublesome, Jacuzzi did not even produce the Pullen matter.¹⁰⁶

Rather than produce relevant evidence, Jacuzzi objected that the Request was overbroad and unduly burdensome. Commissioner Bulla had already considered these objections and ordered Plaintiffs to amend their Requests. Plaintiffs' Amended RFPD 43 is exactly within the scope allowed by Commissioner Bulla. Jacuzzi also objected that the Request required the production of private information of third parties. Again, Commissioner Bulla ruled that the productions would be subject to protective order and ruled that Jacuzzi could only redact social security numbers. Not only were Commissioner Bulla's orders effective at the time they were

¹⁰³ See, Jacuzzi's Response to Plaintiff Ansara's Amended Second Set of Requests for Production of Documents, served Jan. 9, 2019, **Evidentiary Hearing Exhibit 186** at 6-7, Response 43.

¹⁰⁴ See, Rptr.'s Tr. of Hr'g., Sept. 19, 2018, **Evidentiary Hearing Exhibit 180** at 23:2-6.

¹⁰⁵ See, Rptr.'s Tr. of Hr'g., Sept. 19, 2018, **Evidentiary Hearing Exhibit 180** at 13:24-14:1.

¹⁰⁶ Similarly, on December 28, 2018, Jacuzzi served Supplemental Responses to Plaintiff Tamantini's Interrogatory No. 11, affirmatively representing that it was unaware of any prior incidents and that all subsequent incidents had already been produced. Again, Jacuzzi did not reveal the Pullen matter in this Response. Jacuzzi's Amended Response to Interrogatory 11 was verified by William Demeritt. See, Jacuzzi's Supplemental Responses to Plaintiff Tamantini's First Set of Interrogatories, at Response to Interrogatory 11, at **Exhibit 219**.

1 made, but this Court affirmed Commissioner Bulla's Report and Recommendations on
2 November 5, 2018. Still, Jacuzzi refused to produce additional documents.¹⁰⁷

3 After over a year of EDCR 2.34 conferences, written discovery requests, five amended
4 deposition notices, six discovery motions, four discovery hearings, one conference call with
5 Commissioner Bulla, amended discovery requests, and a Petition to the Nevada Supreme Court,
6 Jacuzzi was fully aware of its disclosure obligations. Yet, on January 9, 2019, Jacuzzi
7 affirmatively represented in clear violation of a court order that the only incidents within the
8 scope set by Commissioner Bulla and this Court had already been produced.

9 Finally, Jacuzzi's Response to RFPD 43 notes that Jacuzzi "ha[d] a writ pending
10 regarding the personal information of third parties."¹⁰⁸ Jacuzzi's Petition for *Writ of Prohibition*
11 was denied on January 17, 2019. After the Nevada Supreme Court denied the Petition for Writ,
12 Jacuzzi still did not serve any supplements to its Response to RFPD 43. In fact, Jacuzzi to date
13 has not supplemented RFPD 43 in good faith.

14 **IV. LEGAL STANDARD**

15 In Nevada, there are two sources of authority to support the district court's judgment of
16 sanctions. First, N.R.C.P. 37(b)(2) authorizes as discovery sanctions dismissal of a complaint,
17 entry of default judgment, and awards of fees and costs. Generally, N.R.C.P. 37 authorizes
18 discovery sanctions only if there has been willful noncompliance with a discovery order of the
19 court. Fire Insurance Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 913
20 (1987). ... Second, courts have "inherent equitable powers to dismiss actions or enter default
21 judgments for ... abusive litigation practices." TeleVideo Systems, Inc. v. Heidenthal, 826 F.2d
22 915, 916 (9th Cir.1987) (citations omitted). "Litigants and attorneys alike should be aware that
23

24 ¹⁰⁷ See, Notice of Entry of Order Affirming Discovery Commissioner's Report and Recommendations, Sept. 19,
25 2018 Hearing, **Evidentiary Hearing Exhibit 183** at 14.

26 ¹⁰⁸ By the time Jacuzzi served this Response, this Court had already affirmed each and every pertinent DCRR.
27 Therefore, not only were Commissioner Bulla's orders effective on the day they were orally made, they
28 were already affirmed by this Court by the time Jacuzzi served its Response to RFPD 43. Nonetheless,
Jacuzzi claimed that it wanted to protect third party privacy rights. If that were true, Jacuzzi could have
easily produced the documents in redacted form just as it had done previously. In other words, Jacuzzi's
"third party privacy" argument was a delay tactic meant to keep Plaintiffs from obtaining important
information.

1 these powers may permit sanctions for discovery and other litigation abuses not specifically
2 proscribed by statute.” Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 92, 787 P.2d 777, 779
3 (1990).

4 **A. THIS COURT HAS DISCRETION TO ENTER DISCOVERY SANCTIONS THAT**
5 **IT DEEMS ARE NECESSARY**

6 Young, one of the seminal cases in Nevada regarding sanctions motions – particularly
7 motions to strike – states that discovery sanctions are within the power of the district court and
8 that the Nevada Supreme Court “will not reverse the particular sanctions imposed absent a
9 showing of abuse of discretion.” Id., 106 Nev. 88, 92–93, 787 P.2d 777, 779–80 (1990).
10 Therefore, this Court has discretion to impose any sanctions that it deems are appropriate. In fact,
11 in Young, the Nevada Supreme Court noted that “[e]ven if [the Nevada Supreme Court] would
12 not have imposed such sanctions in the first instance, we will not substitute our judgment for that
13 of the district court.” Id.

14 The only time that the Nevada Supreme Court would apply some heightened standard of
15 review is when the sanction is dismissal with prejudice. Id. “Sanctions are not considered case
16 ending when ... the district court strikes a party’s answer thereby establishing liability but allows
17 the party to defend on the amount of damages.” Bahena v. Goodyear Tire & Rubber Co., 126
18 Nev. 243, 249, 235 P.3d 592, 596 (2010); see also, Valley Health Sys., LLC v. Estate of Doe by
19 & through Peterson, 134 Nev. Adv. Op. 76, 427 P.3d 1021, 1027 (2018), as corrected (Oct. 1,
20 2018). Notably, even when a district court does enter case ending sanctions, Nevada case law
21 only requires two things. First, case ending sanctions “should be imposed only after thoughtful
22 consideration of all the factors involved in a particular case.” Id. The only other requirement is
23 that the “discovery sanction be supported by an express, careful and preferably written
24 explanation of the court’s analysis of the pertinent factors.” Id.

25 Importantly, in Nevada, dismissal need not be preceded by other less severe sanctions.
26 The Supreme Court further stated that “while dismissal need not be preceded by other less severe
27 sanctions, it should be imposed only after thoughtful consideration of all the factors involved in
28 a particular case.” Young, at 92, 787 P.2d at 780.



1 In discussing the legal basis for dismissal, the Supreme Court held:

2 that every order of dismissal with prejudice as a discovery sanction be
3 supported by an express, careful and preferably written explanation of the
4 court's analysis of the pertinent factors. The factors a court may properly
5 consider include, but are not limited to, the degree of willfulness of the
6 offending party, the extent to which the non-offending party would be
7 prejudiced by a lesser sanction, the severity of the sanction of dismissal
8 relative to the severity of the discovery abuse, whether any evidence has
9 been irreparably lost, the feasibility and fairness of alternative, less severe
sanctions, such as an order deeming facts relating to improperly withheld
or destroyed evidence to be admitted by the offending party, the policy
favoring the adjudication on the merits, whether sanctions unfairly operate
to penalize a party for the misconduct of his or her attorney, and the need to
deter both the parties and future litigants from similar abuses.

10 Id. at 93, 787 P.2d at 780.

11 Thus, under Nevada law, the Court need only consider the Young factors (immediately
12 above) and give “thoughtful consideration of all the factors involved.” After giving thoughtful
13 consideration, the Court need only give an express, careful and preferably written explanation of
14 the court's analysis of the pertinent factors. Id.

15 **B. A COURT’S FINDINGS IN SUPPORT OF STRIKING AN ANSWER MUST BE**
16 **SUPPORTED BY SUBSTANTIAL EVIDENCE**

17 In coming to its decision, this Court must make factual findings that are supported by
18 substantial evidence. In reviewing the district court’s order in Young, the Nevada Supreme Court
19 only analyzed whether the district court’s finding was supported by substantial evidence. Id., 106
20 Nev. 88, 91, 787 P.2d 777, 779 (1990)(“The court's finding of willful fabrication is supported by
21 substantial evidence.”) Non-case concluding sanctions will be upheld if the district court’s
22 sanction order is supported by substantial evidence. Bahena at 254, 235 P.3d at 599.

23 A district court’s “findings of fact shall not be set aside unless they are clearly erroneous
24 and not supported by substantial evidence.” Valley, 427 P.3d at 1027. “[W]here the trial court,
25 sitting without a jury, makes a determination predicated upon conflicting evidence, that
26 determination will not be disturbed on appeal where supported by substantial evidence.” Trident
27 Constr. Corp. v. W. Elec. Inc., 105 Nev. 423, 427, 776 P.2d 1239, 1242 (1989) (internal quotation
28 marks omitted). “Substantial evidence is that which a reasonable mind [can] accept as [sufficient]

1 to support a conclusion.” Dynamic Transit Co. v. Trans Pac. Ventures Inc., 128 Nev. 755, 761,
 2 291 P.3d 114, 118 (2012); see also Howard v. Hughes, 134 Nev. Adv. Op. 80, 427 P.3d 1045,
 3 1047–48 (2018); International Fid. Ins. v. State of Nevada, 122 Nev. 39, 42, 126 P.3d 1133, 1134–
 4 35 (2006) (The district court's factual findings, however, are given deference and will be upheld if
 5 not clearly erroneous and if supported by substantial evidence); Nelson v. Peckham Plaza
 6 Partnerships, 110 Nev. 23, 25, 866 P.2d 1138, 1139 (1994)(if the district court's findings are
 7 supported by substantial evidence, they will be upheld).

8 Therefore, the Court must only give thoughtful consideration of all factors involved and
 9 give an express, careful and preferably written explanation of the court's analysis of the pertinent
 10 factors. The Court must make its factual determinations that are supported by substantial
 11 evidence. There is **no** Nevada case that requires the Court to apply a clear and convincing
 12 standard. However, even if this Court imposes a clear & convincing standard, Plaintiffs have met
 13 that because the evidence presented overwhelmingly shows that Jacuzzi has acted in bad faith.

14 **C. THE COURT SHOULD ONLY CONSIDER NEVADA CASE LAW ON SANCTION**
 15 **MOTIONS**

16 On September 16, 2019, at the very beginning of this proceeding, Jacuzzi Counsel
 17 acknowledged that there is no Nevada case law instructing the district courts of the state to apply
 18 a certain burden of proof in determining sanctions motions. However, Jacuzzi’s counsel also
 19 made a comment to the Court that the Court should look to other states to find that the Court
 20 should apply the clear and convincing standard. Plaintiffs anticipate that Jacuzzi will attempt to
 21 find caselaw outside of Nevada to support the position that the Court should apply the clear and
 22 convincing standard. The Nevada Supreme Court has already specifically indicated that there is
 23 ample case law in Nevada on sanctions and has refused to look to other jurisdictions.

24 In one of the other seminal case on discovery sanctions, Bahena v. Goodyear Tire &
 25 Rubber Co., 126 Nev. 243, 249, 235 P.3d 592, 596 (2010), the dissenting opinion looked to
 26 outside, federal authorities. The Bahena court specifically rejected the adoption of outside
 27 authorities and specifically noted that Nevada has “ample” case authority regarding discovery
 28 sanctions. The Bahena majority stated in a footnote in response to the dissent:

Our dissenting colleague suggests we adopt a standard of review for discovery sanctions based upon a parallel line of federal authority. We disagree because there is ample Nevada case authority regarding discovery sanctions. Also, we have expressly rejected the adoption of federal authority that employs mechanical application of factors regarding qualifications of expert witnesses and that conflicts with our state law. *Higgs v. State*, 126 Nev. —, —, 222 P.3d 648, 657–58 (2010).

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 243, 249, 235 P.3d 592, 596 (2010).

As the Nevada Supreme Court clearly stated in *Bahena*, this Court should reject any argument that the Court should look to any non-Nevada authority on this issue. “There is ample Nevada case authority regarding discovery sanctions.” *Id.*

Based on the foregoing, the Court has discretion in deciding this motion but must give thoughtful consideration to all factors involved, as stated in *Young* and its progeny. Should the Court enter sanctions, the Court must enter an order with express, careful and written explanation of the court's analysis of the pertinent factors. The Court’s decision must be supported by substantial evidence. While there is no Nevada case governing on the burden of proof for sanction motions, this Court should, at most, apply the preponderance of the evidence standard in light of the fact that Nevada Supreme Court has upheld orders striking answers that were supported by substantial evidence, i.e., evidence that a “reasonable mind [can] accept as [sufficient] to support a conclusion,” this Court should, at most, apply a preponderance of the evidence standard.¹⁰⁹ Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 243, 249, 235 P.3d 592, 596 (2010); Valley, 427 P.3d at 1027; Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

¹⁰⁹ As in Constitutional law cases utilizing the somewhat heightened rational basis standard, rational basis “plus,” here, too, if the Court enters case ending sanctions, it need only utilize a similar preponderance of the evidence “plus” because Nevada case law indicated only a somewhat heightened standard of review for such sanctions. As the Nevada Supreme Court notes, even with the somewhat heightened standard of review for case ending sanctions, the district court is still granted discretion.

1 However, even if this Court determines that a higher burden of proof should be used, there
2 can be no question that Plaintiffs have met even a clear and convincing standard because the
3 evidence of misconduct is so overwhelming.

4 **D. THE DISCOVERY COMMISSIONER’S RULINGS ARE BINDING AND**
5 **EFFECTIVE ORDERS FOR PURPOSES OF DISCOVERY AND NRCP 37**
6 **SANCTIONS**

7 In Bahena I, the Nevada Supreme Court held that a Discovery Commissioner’s rulings are
8 effective and must be complied with once it is made, orally or written, unless the party seeks a stay
9 of the ruling pending review by the district court:

10 **A ruling by the discovery commissioner is effective and must be**
11 **complied with for discovery purposes once it is made, orally or written,**
12 **unless the party seeks a stay of the ruling pending review by the district**
13 **court.** Id. ; EDCR 2.34(e). Goodyear failed to seek a stay of the ruling or
14 an expedited review by the district court prior to the time to comply with
15 the ruling, and was therefore required to comply with the discovery
16 commissioner's directive. **The failure to do so was tantamount to a**
17 **violation of a discovery order as it relates to NRCP 37(b)(2).** *Young*, 106
18 Nev. at 92, 787 P.2d at 779 (holding that a court's oral ruling was sufficient
19 to “constitute an order to provide or permit discovery under NRCP
20 37(b)(2)”).

21 Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592, 597, 126 Nev. 243, 250–51 (Nev. 2010)

22 Here, no stay was ever sought or granted after any hearing before Commissioner Bulla.
23 Therefore, Commissioner Bulla’s orders were effective on the day they were made.

24 **V. LEGAL ARGUMENT**

25 **A. THE YOUNG FACTORS**

26 **1. Factor One: Degree of Willfulness of the Offending Party**

27 Jacuzzi knew, understood, and appreciated Commissioner Bulla’s Orders. Yet, oddly,
28 Mr. Templer testified that on numerous occasions that he only understood that Jacuzzi was
supposed to produce “serious” injury incidents.¹¹⁰ Mr. Templer consistently testified that he did

¹¹⁰ See, Recorder’s Tr. of Evidentiary Hr’g Day 2, attached hereto as **Exhibit 202** at 104:25-105:5; 106:10-13;
107:4-8; 105:2-3 (discussing Jacuzzi’s understanding of Commissioner Bulla’s alternative relief granted
at hearing on Plaintiffs’ (First) Motion to Strike: “My understanding was Jacuzzi was to provide incidents
involving serious personal injury or death, involving walk-in tubs.”); Id., at 105:19:21 (“Again, I didn’t

1 not specifically recall his understanding at specific times throughout this litigation. However,
 2 when this Court asked him to clarify his understanding of Commissioner Bulla's order, Mr.
 3 Templer testified that he understood that Commissioner Bulla ordered Jacuzzi to produce "all
 4 incidents involving a walk-in tub" even incidents with "a finger being jammed in the door."¹¹¹

5 THE COURT: Mr. Templer, help me to understand something. You said a
 6 couple of different times that it was your understanding of what the
 7 discovery commissioner wanted is documentation of all incidents relating
 8 to, or resulting in serious personal injury or death, before or after the
 9 incident --

10 THE WITNESS: Uh-huh.

11 THE COURT: -- in this case. And so I'm wondering, so that's what your
 12 understanding is of what the discovery commissioner wanted Jacuzzi to
 13 produce. Did you further narrow the parameters of what the discovery
 14 commissioner asked for, based on your understanding the Plaintiff's claims
 15 in this case?

16 THE WITNESS: No. Not at that time.

17 THE COURT: Okay. So --

18 THE WITNESS: That was just looking for --

19 THE COURT: So was it irrelevant then what your understanding of the
 20 Plaintiff's claims were in complying with the discovery commissioner's
 21 order?

22 THE WITNESS: In complying with that order I think it was irrelevant what
 23 the Plaintiff's defect claims were. My -- **our understanding, the
 24 company's understanding was she requested all incidents involving a
 25 walk-in tub, and I think it even mentioned a finger being jammed in a
 26 door --**

27 THE COURT: Right. I saw that.

28 read this transcript. I understood that Jacuzzi was turn over incidents involving serious personal injury or
 death involving a walk-in tub."); Id., at 106:6; Id. at 106:10-13 ("Q So you agree that after this hearing
 Jacuzzi understood that it was to turn over claims, incidents, accidents, issues, if it involved serious
 personal injury or death, true? A Yes."); Id., at 106:6 ("she wanted information...or
 documents...[r]egarding serious personal injury or death."); Id. at 107:16-17 (I'm aware that the company
 was to turn over for serious personal injury or death.").

¹¹¹ The reference to a finger being jammed in a door is a reference to the July 20, 2018 hearing, the first hearing on
 Plaintiffs' Motion to Strike Jacuzzi's Answer

THE WITNESS: -- which clearly wasn't relevant to the Plaintiff's claims, **but our understanding was that that would have to be produced as well.**¹¹²

Not only did Mr. Templer understand the scope of Commissioner Bulla's orders, he knew that a reasonable search necessarily included a search of Jacuzzi's email systems. As noted in his July 25, 2018 email, *supra*, Mr. Templer and Jacuzzi knew full well that in order to comply with Commissioner Bulla's order, it was required to search for "[a]ll letters, emails, customer service/warranty entries and all other communications and documents (written **or electronic**) that mention or refer to a personal injury sustained in a walk-in tub from 1/1/2008 to the present."¹¹³ Additionally, it shows that Jacuzzi knew and expected relevant information to be contained in "**all** databases (both current and old), **email** and other potential locations where the information may be stored."¹¹⁴

a. Ron Templer Was Directly Involved in Jacuzzi's Discovery Abuses

Jacuzzi was directly involved in the discovery abuses in this case. Mr. Templer has been intimately involved in this litigation. Mr. Templer attended the depositions of Jacuzzi's Rule 30(b)(6) witnesses, William Demeritt, Michael Dominguez, and Mark Allen. Mr. Templer was involved in preparing Mr. Demeritt for his deposition.¹¹⁵ Mr. Templer attended the November 2, 2019 hearing before Commissioner Bulla specifically to address any questions Commissioner Bulla might have had regarding Jacuzzi's searches.

Additionally, as seen in the binders submitted for in camera inspection. Mr. Templer was involved in "quarterbacking" Jacuzzi's discovery responses. As he testified at the

¹¹² See, Recorder's Tr. of Evidentiary Hr'g Day 2, attached hereto as **Exhibit 202** at 113:20-115:7.

¹¹³ See, Email from Ron Templer, Esq. to Various Jacuzzi Employees, July 25, 2018, **Exhibit 217**.

¹¹⁴ See, Email from Ron Templer, Esq. to Various Jacuzzi Employees, July 25, 2018, **Exhibit 217**.

¹¹⁵ See, Recorder's Tr. of Evidentiary Hr'g Day 2, attached hereto as **Exhibit 204** at 97:1-8.

Q Who prepared you for your deposition?

A Counsel.

Q What counsel?

A **Our in-house counsel** and our outside counsel. I think his name was Cools.

1 Evidentiary Hearing, he is the one person at Jacuzzi that worked with outside counsel in
 2 responding to discovery.¹¹⁶ Mr. Templer also testified that all productions were done in
 3 conjunction with outside counsel and that all discovery decisions were jointly made, **including**
 4 **the decision to withhold the Pullen matter.**¹¹⁷ Thus, Mr. Templer and Jacuzzi were directly
 5 involved in Jacuzzi's discovery conduct in this case.

6 ¹¹⁶ See, Recorder's Tr. of Evidentiary Hr'g Day 2, attached hereto as **Exhibit 202** at 144:17-155:7.

7 Q Well, I'm trying to get answers to questions about what Jacuzzi knew or didn't know. So
 8 the particular question is if you, Mr. Templer, don't know, then who at Jacuzzi would
 9 know?

10 A In regard to responding to a discovery request?

11 Q Yes.

12 A Nobody, it should be me.

13 Q So you're the only guy?

14 A I was the one that dealt with outside counsel in responding to discovery, if that's
 15 what you're asking.

16 ¹¹⁷ See, Recorder's Tr. of Evidentiary Hr'g Day 2, attached hereto as **Exhibit 203** at 45:2-46:9.

17 Q Ultimately, without getting into the -- I guess the substance of any communication, who
 18 had the decision as to what documents to turnover or not to turnover? Was that Jacuzzi's
 19 decision or was that Snell Wilmer and outside counsel's decision?

20 A All productions and discovery in the case has been in conjunction with outside counsel,
 21 both Snell Wilmer and Weinberg Wheeler, depending on the timing.

22 Q Okay. So as I understand your response, the decision regarding the production of
 23 documents was a jointly made decision between Jacuzzi and its retained counsel, true?

24 MR. ROBERTS: Objection. Overbroad.

25 THE COURT: Well, overruled. If -- answer it to the best you can.

26 THE WITNESS: Yeah.

27 THE COURT: And if you can't, let the counsel know that you need clarification.

28 THE WITNESS: Sure.

THE COURT: All right?

THE WITNESS: I can't answer any more than I said it a minute ago, is that all discovery
 responses were done in conjunction with outside counsel.

BY MR. CLOWARD:



1 *b. Jacuzzi Knowingly Misled Plaintiffs and the Court*

2 *i. Misrepresentations to Plaintiffs*

3 Since May 2017, Jacuzzi represented to Plaintiffs on numerous occasions that there were
4 no prior incidents. First, Jacuzzi represented that there were no prior incidents in its Responses
5 to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents. It made the
6 same representations in its Amended Interrogatory Responses. On April 23, 2018, Jacuzzi's
7 Counsel, Joshua Cools, advised Plaintiffs that Jacuzzi performed a search for prior incidents and
8 that "no responsive documents were found." Then, Jacuzzi's Rule 30(b)(6) deponent – who was
9 prepared by Mr. Templer and outside counsel – represented that there were no prior incidents.

10 Then, even after the long string hearings before Commissioner Bulla which culminated
11 in Jacuzzi filing a Petition for Writ of Prohibition which showed that Jacuzzi fully understood
12 the scope of the court orders, Jacuzzi's still chose to misrepresent to Plaintiffs in its Response to
13 RFPD 43 that no other incidents and complaints existed. Jacuzzi also had no problem making
14 similar misrepresentations to the judiciary.

15 *ii. Misrepresentations to the Court*

16 Beginning July 12, 2018, Jacuzzi began making misrepresentations to the Court. On July
17 12, 2018, Jacuzzi filed an Opposition to Plaintiff's (first) Motion to Strike Jacuzzi's Answer.
18 Now, over a year later, after Jacuzzi's recent disclosures and the Evidentiary Hearing, a current
19 reading Jacuzzi's Opposition highlights Jacuzzi's bad faith discovery in this case. Plaintiffs'
20 first Motion to Strike was based on Jacuzzi's failure to produce subsequent incidents. In its

21
22
23 Q Okay. Was there ever, to your knowledge, a discovery response or -- and that could be
24 interrogatories, that could be -- that could be requests for production, that could be requests
25 for admissions, so any of the discovery responses, **was there ever a time that you recall**
26 **where it was not a collective decision?**

27 A **No.** I mean, I didn't -- or, I mean, the company, exclusively, did not serve any discovery
28 responses. All of them were served through counsel.

Q Okay.

A And to my knowledge and recollection, **all discovery responses were discussed with**
the company before being served

1 Opposition, Jacuzzi ardently and fervently argued that it had not been acting in bad faith because
2 it had always been clear that it was only searching for and disclosing **prior** incidents.

3 First, Jacuzzi's Opposition argued "Jacuzzi stated in its responses to Plaintiffs' written
4 discovery *explicitly* that it limited its response to prior incidents." "Second, after several meet
5 and confer conferences, Jacuzzi's counsel agreed to search for other prior incidents using
6 Plaintiffs' proposed search terms." Third, Jacuzzi stated that it served an Objection to Plaintiffs'
7 Fifth Amended Notice of Deposition which stated it would only produce a witness to testify
8 about incidents prior to the subject incident.

9 The Affidavit of Joshua Cools in support of Jacuzzi's Opposition affirmatively states to
10 the Court that Jacuzzi searched for prior incidents and that no information was found. Notably,
11 Mr. Cools' Affidavit states that Jacuzzi "search[ed] its records, **including documents**
12 **electronically retained by our customer service and warranty departments.**" Yet, it is now
13 clear that Jacuzzi did not search Regina Reyes (customer service manager) or Kurt Bachmeyer's
14 (Director of Warranty) emails and did not conduct a thorough search of the Salesforce database
15 as several Salesforce records have since been provided.¹¹⁸ Mr. Cools' Affidavit states that the
16 search results were reviewed by Jacuzzi's in house counsel. He claimed that no similar incidents
17 were found.

18 In addition to Mr. Cools' Affidavit, Jacuzzi's Opposition made it clear that it had
19 searched for prior incidents and that it had not found any:

20 "In sum, **Jacuzzi has produced all relevant evidence related to other**
21 **prior incidents.**"¹¹⁹

22 "Furthermore, Plaintiffs state: 'At this point, it has become clear that Jacuzzi
23 is aware of prior similar incidents but has willingly withheld such evidence.'
24

25 ¹¹⁸ See, e.g., Salesforce Records re: Donald Raidt, **Evidentiary Hearing Exhibit 8** at JACUZZI005715; Salesforce
26 records re: David Greenwell, at **Evidentiary Hearing Exhibit 10** at JACUZZI005717-18; Salesforce Records re:
27 Ron Flashberger, at **Evidentiary Hearing Exhibit 13** at JACUZZI005707; Salesforce Records re: Cathryn
28 Reynolds, at **Evidentiary Hearing Exhibit 32** at JACUZZI005689; Salesforce Records re: Unknown Customer, at
Evidentiary Hearing Exhibit 45 at JACUZZI006858;

¹¹⁹ See, Jacuzzi's Opp'n to Pls.' Mot. to Strike, **Evidentiary Hearing Exhibit 176** at 7:21.

1 This too is false. **There are no other prior incidents**; Jacuzzi has withheld
2 nothing.”¹²⁰

3 “Jacuzzi’s attorneys, in-house and outside counsel, oversaw the search and
4 analysis of documents as described in counsel’s correspondence to
5 Plaintiffs. *See* April 23, 2018 letter from J. Cools to B. Cloward, attached
6 as Exhibit F, and Cools Decl. at ¶ 10, attached as Exhibit E.
7 **Fundamentally, there were no prior similar incidents to Jacuzzi’s**
8 **knowledge.** Neither Jacuzzi nor its attorneys withheld any evidence.”¹²¹

9 “**Jacuzzi has consistently produced all prior incidents**, which are the
10 only documents relevant to Jacuzzi’s notice—Plaintiffs’ own articulated
11 basis for production.”¹²²

12 Then, on September 13, 2018, Jacuzzi filed its Motion for Protective Order regarding
13 Plaintiffs’ Requests for Production of Documents. Just like Jacuzzi’s Opposition to Plaintiffs’
14 first Motion to Strike, Jacuzzi’s Motion for Protective Order now highlights the fact that Jacuzzi
15 has acted in bad faith throughout discovery in this case. The following quotes illustrate:

16 “Importantly, **Jacuzzi has complied with this Court’s order and**
17 **produced records showing all incidents from 2008 to the present**
18 **involving personal injury or claims of death, regardless of similarity to**
19 **Plaintiffs’ claims.”** Jacuzzi’s Motion for Protective Order, Sept. 11, 2018,
20 at 6:6-8.

21 “As already represented to this Court, **Jacuzzi searched its records for**
22 **personal injury claims involving walk-in tubs from 2008 to the present**
23 **and has produced an incident report or complaint for each incident.**
24 Notably, every single incident was after Cunnison’s incident...” Jacuzzi’s
25 Motion for Protective Order, Sept. 11, 2018, at 16:8-11.

26 **iii. Misrepresentations in Open Court**

27 Similarly, Jacuzzi represented to Commissioner Bulla that it had conducted full searches
28 and that there were no results. At the August 29, 2018 continued hearing on Plaintiffs’ Motion
to Strike, Jacuzzi represented to the Court that there were no prior incidents involving personal
injury or death.

¹²⁰ See, Jacuzzi’s Opp’n to Pls.’ Mot. to Strike, **Evidentiary Hearing Exhibit 176** at 11:15-17.

¹²¹ See, Jacuzzi’s Opp’n to Pls.’ Mot. to Strike, **Evidentiary Hearing Exhibit 176** at 12:9-13.

¹²² See, Jacuzzi’s Opp’n to Pls.’ Mot. to Strike, **Evidentiary Hearing Exhibit 176** at 13:3-4.

1 MR. COOLS: And if I may say, Your Honor, you know, we've consistently
2 said in this case that before when we were -- when we did our search and
3 did our production, it was only based off of prior incidents, so we had
4 already represented **there were no prior incidents**. Rptr.'s Tr. of Hr'g,
5 Aug. 29, 2018, at 7:3-6.

6 MR. COOLS: So following the hearing, I went back to Jacuzzi, and **we ran**
7 **a search based off of the parameters you had provided**, which was any
8 personal injuries or death claims related to walk-in tubs before or after the
9 incident, **and we identified nothing that had not been previously**
10 **produced for prior to the incident**. There were subsequent claims that
11 were produced. We produced the internal -- basically the customer database
12 printout with some information redacted, such as the personal identifying
13 information of the claimants and some other information that was all
14 included on a privilege log, and there was I think two consumer CPSC
15 complaints that were similarly disclosed."¹²³

16 On September 19, 2018, Jacuzzi once again represented to the Court that it had produced
17 all information pertaining to prior and subsequent incidents involving any sort of injury or death:

18 MR. COOLS: So my point, Your Honor, is that **that's what we did. We**
19 **searched not only this tub but other walk-in tubs for anything prior to**
20 **this incident using those search terms and there's nothing related -- no**
21 **personal injuries related to plaintiff's claim.**

22 ***

23 DISCOVERY COMMISSIONER: And so we don't know the answer to that
24 right now. A lot of what we have, as you indicate, the incidents were after
25 the fall. So we don't know with any certainty exactly what specific
26 knowledge was known before the fall. And I usually have this with me and
27 I don't, when did this fall actually take place? February 14th -- or February
28 19th of 2014. Okay. So we don't know from like '08 to '14 --

MR. COOLS: Well, we've run that. **We have searched that and it's**
Jacuzzi's position that there are none.¹²⁴

At the November 2, 2018 hearing on Jacuzzi's Motion for Protective Order, Jacuzzi stated
in open court, "we have already provided to the Court and most of which -- in terms of relevant -

¹²³ See, Rptr.'s Tr. of Hr'g., Aug. 29, 2018, **Evidentiary Hearing Exhibit 179** at 2:18-3:3.

¹²⁴ See, Rptr.'s Tr. of Hr'g, Sept. 19, 2018, **Evidentiary Hearing Exhibit 180** at 7:7-10:15 (emphasis added).

1 - any claims of personal injury or wrongful death for the subsequent injuries, we've already
2 provided those to plaintiff.”¹²⁵ Similarly, Jacuzzi stated:

3
4 MR. COOLS: If I can just say one additional thing, Your Honor. I think that
5 this has all been predicated on this idea that Jacuzzi's withholding things,
6 and I think that, from your own in camera review, that would be clear that
7 we've disclosed --

8 DISCOVERY COMMISSIONER: I --

9 MR. COOLS: -- everything that --¹²⁶

10 Importantly, Jacuzzi's Corporate Counsel, Ron Templer was present in the Courtroom.¹²⁷
11 Additionally, at this point, Jacuzzi (i.e., Ron Templer, personally) had already been made aware
12 of the Pullen matter and neither Mr. Templer nor Mr. Cools mentioned anything about the
13 recently-discovered death that was alleged to have occurred due to a person “getting stuck” in a
14 Jacuzzi brand walk-in tub.¹²⁸

15 *a. Jacuzzi Had the Ability to Quickly and Easily Search its
16 Databases*

17 Jacuzzi also misrepresented its efforts to find relevant documents. Plaintiff anticipates
18 that Jacuzzi will argue that it spent considerable time searching its KBM and Salesforce
19 databases, searching long and hard for information. In reality, these searches were quick and
20 simple. Regina Reyes testified that she has been an employee of Jacuzzi for 21 years. She
21 supports and manages the call center for both the spa and bath divisions. She has been in this
22 position since at least 2012. Ms. Reyes testified that she was able to easily search and compile
23 data from Jacuzzi's Salesforce database.

24 Q Okay. So let's pretend for a moment that Bob Rowen, or who's the
25 president of Jacuzzi right now?

26 A Chuck Hubler.

27 ¹²⁵ See, Rptr.'s Tr. of Hr'g., Nov. 2, 2018, **Evidentiary Hearing Exhibit 182** at 6:21-24.

28 ¹²⁶ Id., at 9:20-25.

¹²⁷ Id. at 2:11-20.

¹²⁸ See generally, Id.



1 Q Okay. Let's say Mr. Hubler comes into your office and says, hey, I need
2 this data as soon you can get it to me. How long would that take you? It's
3 your number one task. You don't have to do anything else but that report.

4 A That may depend on how successful I am in with the report, in
5 configuring the report and collecting data.

6 Q Okay. Can you explain a little bit more about that?

7 A Well, it may be if I'm running the data through sales force searching for
8 information, it could take me five minutes, but in some instances it could
9 take me a little bit longer, depending if there's interruptions, but it --

10 Q Okay. Well, no interruptions. You're in a conference room alone, Mr.
11 Hubler comes in. You don't have to do anything else. No phones, no other
12 emails, this is the only thing you have to do. How long would that usually
13 take?

14 A It may take me about 15 to 20 minutes.¹²⁹

15 There can be no question whatsoever that Jacuzzi has intentionally tried to over-
16 complicate the search process in a woe is me tactic to create the impression that it is very difficult
17 to conduct these searches. Further, Ms. Reyes testified that as she became more familiar with the
18 Salesforce system, her search speed increased.

19 iv. Misrepresentations to the Nevada Supreme Court

20 On December 7, 2018, Jacuzzi filed its Writ of Prohibition filed with the Nevada
21 Supreme Court. In the Petition, Jacuzzi stated that it had "already produced the universe of
22 possibly relevant other incidents involving the tub in question."¹³⁰

23 2. **Factor Two: Extent to which Non-Offending Party Would be 24 Prejudiced by a Lesser Sanction**

25 Now, over three years after Jacuzzi served its Initial NRCP 16.1 Disclosure on September
26 26, 2016 and over two years after Plaintiffs' first set of written discovery on May 1, 2017,

27 ¹²⁹ See, Recorder's Tr. of Evidentiary Hr'g, Day 2, **Exhibit 202** at 217:13-218:6 (emphasis added).

28 ¹³⁰ See, Jacuzzi's Writ of Prohibition, filed December 10, 2018, **Evidentiary Hearing Exhibit 185** at 8, 13, 15,
(emphasis added).

1 Plaintiffs' find themselves with their firm trial date continued by another year to October 12,
2 2020.

3 Should the Court enter any less sanction, Plaintiffs will literally have to re-do almost all
4 depositions. First, Plaintiffs will have to conduct follow up discovery to request additional
5 information pertaining to the newly disclosed incidents. Then, Plaintiffs will have to re-depose
6 both Jacuzzi and *firstSTREET/AITHR's* Rule 30(b)(6) witnesses regarding their knowledge of
7 each prior and subsequent incident. Plaintiffs were not given a fair opportunity to question the
8 witnesses about their knowledge of the tubs potentially dangerous design. Jacuzzi designated
9 two Rule 30(b)(6) witnesses: Michael Dominguez, Director of Engineering, and William
10 Demeritt, Director of Risk Management. Plaintiffs were unable to question Mr. Dominguez
11 about whether or not Jacuzzi's design considered the prior incidents or whether Jacuzzi
12 considered the numerous slipperiness complaints. Plaintiffs were unable to question Mr.
13 Demeritt about the facts and circumstances of each prior or subsequent incident. Jacuzzi did not
14 produce one single prior or subsequent incident prior to Mr. Demeritt's deposition so Plaintiffs
15 were not given an opportunity to question Jacuzzi's witnesses on perhaps the most critical issue
16 in the case: Jacuzzi's prior knowledge.

17 All experts will now have to review the new materials and supplement their reports.
18 Plaintiffs will have to pay expensive expert fees to re-depose Jacuzzi's experts so that Plaintiffs
19 can question the experts as to how the new evidence affects their opinions. Plaintiffs will have
20 to re-prepare, re-travel (out of state), and re-take multiple expert depositions.

21 Regarding Plaintiffs' experts, much time was spent analyzing the tub with regard to
22 Expert Robert Swint, he conducted many experiments and focus groups with the tub and a
23 competitor tub. All of this was done without having the benefit of the prior or subsequent
24 incidents. Essentially his opinions were given in a vacuum. He and Plaintiffs other experts
25 should be able to start from scratch having all data available so their opinions encompass all
26 issues.

27 It would be an unfair burden to force Plaintiffs to, effectively, start discovery again from
28 the very beginning but unfortunately that is what is necessary to level the playing field. Allowing

1 Plaintiffs the opportunity to re-conduct discovery with the recent disclosures in-hand places the
 2 burden on Plaintiffs to re-strategize, re-prepare, and re-discover evidence. Monetary sanctions
 3 or evidentiary sanctions will only be sufficient to overcome the amount of time and resources
 4 that Plaintiffs have lost and will have to continue to spend to fully prepare this case for trial if
 5 the sanction is significant and takes into consideration not only the time but the costs associated
 6 with the litigation. For this reason, Plaintiffs request \$557,631.72 in costs and an amount to be
 7 submitted after the reply for attorneys' fees. These amounts are requested pursuant to N.R.C.P.
 8 37(b)(2). Plaintiffs will prepare and submit a memorandum of costs and attorneys' fees at the
 9 conclusion of the evidentiary hearing. The passage of time has undermined, frustrated, and
 10 eliminated Plaintiffs' ability to gather relevant information in this litigation. This is an important
 11 aspect to this litigation as "memories . . . fade[] over time . . ." Valley, 427 P.3d at 1029. .

12 Further, "[n]o party should be allowed to conceal evidence, and then suffer merely a
 13 monetary sanction, while being allowed to reap the benefits of the loss of that evidence. Litigants
 14 should be entitled to have their cases adjudicated on the merits." Valley, 427 P.3d at 1029.

15 **3. Factor Three: Severity of the Sanction Relative to the Severity of the** 16 **Discovery Abuse**

17 This is a case where Plaintiffs' Decedent, Sherry Cunnison, was trapped in a Jacuzzi tub
 18 for multiple days. When first responders finally found Sherry in her tub, she was conscious and
 19 able to communicate. She consciously suffered in her tub for days before ultimately passing
 20 away. Therefore, Jacuzzi's failure to produce other incident evidence – even after multiple
 21 court orders – is an extremely severe discovery abuse. The need for good faith discovery is
 22 exponentially greater in product liability cases where the most important evidence is in the hands
 23 of the defendant.

24 Here, Jacuzzi failed to disclose crucial evidence, the evidence that goes directly towards
 25 Jacuzzi's knowledge about the product at issue. Even worse, Jacuzzi consistently came before
 26 the Court and represented that it had searched all databases, including electronically stored
 27 information. Jacuzzi submitted pages of Excel sheets and spoke about "thousands of hits,"
 28 continuously signifying to Commissioner Bulla, this Court, and the Nevada Supreme Court that

1 it had been performing exhaustive searches. It turns out, Jacuzzi was not searching in the one
2 place where we now know contains information about prior injury incidents.

3 **4. Factor Four: Whether any Evidence has Been Irreparably Lost**

4 In a case where similar incident witnesses are likely elderly persons, each day that passes
5 results in witness memories fading. For example, it is now almost six years after the December
6 27, 2013 e-mail from one of Jacuzzi's dealers/installers to Jacuzzi referencing two customers who
7 have seriously injured themselves after slipping in a tub who were threatening lawsuits. It is over
8 six years after end-user Donald Raidt informed Jacuzzi that he slipped and fell and hurt his back
9 in a Jacuzzi tub. It is over six years after Kurt Bachmeyer and Regina Reyes were informed of
10 three customers who had gotten stuck in their walk-in tubs, two of whom either needed to call the
11 fire department or have family members remove the door so that they could get out. Additionally,
12 there are the dozens of end-users who are known to have slipped and fallen in their walk-in tubs.
13 Plaintiffs have been unable to investigate these incidents to determine the details of the falls and
14 to determine if there were any injuries. It is likely that there were injuries. The end-users are
15 usually elderly people – it is reasonable to conclude that an end-user would only call to complaint
16 about slipping and falling in a tub if that person suffered an injury. Unfortunately, Plaintiffs were
17 deprived of the ability to discover if any of those slip and falls did in fact result in injury. Due to
18 Jacuzzi's discovery tactics, these elderly witnesses' memories have been allowed to fade for
19 years.

20 Additionally, as the Court will recall, one of the major issues in Plaintiffs' prior Motions
21 was the issue of Jacuzzi's failure to disclose the identity of all dealers/installers. In this case,
22 Jacuzzi manufactured the Subject Tub, *firstSTREET* marketed the tub, and AITHR DEALER
23 sold the Tub. AITHR, as the dealer, is the party that had direct contact with Sherry. As the seller
24 with direct contact with the customer, the dealer is likely the first party a customer contacts when
25 an incident occurs. *firstSTREET* and AITHR's corporate witness, David Modena, testified that
26 *firstSTREET*'s marketing efforts generated leads which were then routed to a network of
27 approximately twelve to fourteen dealers. The dealers would then use the leads to go and make
28 house calls to sell and install the tubs to the elderly. Importantly, Mr. Modena also testified that



1 **the primary contact for the end-user customer is usually the dealer.**¹³¹ This means that
 2 dealers would be the best sources for finding information relating to the crucial issues of prior
 3 notice and dangerousness of the tub.

4 Plaintiffs did not learn of the identity of additional dealers until after this Court's decision
 5 on Plaintiffs' Renewed Motion to Strike. After Mr. Modena's deposition, Plaintiffs believed that
 6 there were approximately 12 to 14 dealers. **Plaintiffs have since learned there were over 250**
 7 **independent dealers.** Jacuzzi, of course, did not disclose this information until the July 15, 2019
 8 continued deposition of Jacuzzi's Rule 30(b)(6), Mike Dominguez.¹³² Plaintiffs have attempted
 9 to subpoena the few known dealers, but have learned that several dealers are now out of business.
 10 Plaintiffs have spent considerable resources locating and attempting to serve subpoenas on
 11 various dealers. Plaintiffs have not received a single response. Had Plaintiffs disclosed the dealer
 12 identities in May of 2017, Plaintiffs likely would have been able to locate dealers with relevant
 13 information.

14 **5. Factor Five: Feasibility and Fairness of Alternative, Less Severe** 15 **Sanctions**

16 Less severe sanctions are not feasible because Jacuzzi has already displayed its
 17 willingness to withhold critical evidence. An order to compel production is dependent on
 18 Jacuzzi's willingness to participate in good faith. Jacuzzi has already demonstrated that an order
 19 compelling the production of documents pertaining to prior similar incidents would be futile.
 20 Therefore, the only feasible sanction is striking Jacuzzi's Answer and entering default.

21 While trial has now been continued, Plaintiffs should not be forced to continue in another
 22 year of this cat and mouse game with Jacuzzi. Plaintiffs should not have to expend valuable
 23 resources fighting Jacuzzi at every turn. Plaintiffs have a fundamental right to have their case
 24 heard expeditiously. The only fair result is to strike Jacuzzi's Answer and enter default, because
 25 it would be unfair to continue discovery, forcing to continue this never-ending "cat and mouse"
 26 game with Jacuzzi.

27
 28 ¹³¹ See, David Modena Dep., **Exhibit 216** at 102.

¹³² See, Exhibit 1 to July 15, 2019 Deposition of Mike Dominguez, List of Dealers, **Exhibit 220**.

1 **6. Factor Six: Whether Sanctions Unfairly Operate to Penalize a Party**
2 **for Misconduct of His Attorney**

3 Jacuzzi's own in-house legal department participated directly in withholding evidence.
4 This is not a case where an attorney has undertaken abusive discovery tactics on behalf of his
5 client. This is not a case where the party was unaware of his attorney's discovery abuse. Rather,
6 this case involves the actual party defendant – through its own in-house counsel – taking part in
7 withholding evidence. Striking Jacuzzi's Answer would not unfairly penalize Jacuzzi for the acts
8 of defense counsel.

9 **7. Factor Seven: The Need to Deter Both Parties and Future Litigants**
10 **from Similar Abuse**

11 A trial is the search for the truth. The purpose of discovery is to enable parties to access
12 all relevant evidence so that they can evaluate and resolve their dispute. In a product liability
13 case, a plaintiff is at the mercy of the defendant's good faith in discovery. Here, Jacuzzi has only
14 disclosed evidence which it has unilaterally determined is relevant. It has hand-picked the
15 evidence in this case. It has consistently and continuously withheld evidence until the last
16 possible minute in an attempt to frustrate Plaintiffs' discovery efforts. This conduct should not
17 be permitted.

18 Dealers and witnesses with relevant information become harder and harder to find as time
19 goes on. No party should be allowed to frustrate legitimate discovery by failing to search for
20 important evidence in places that the Discovery Commissioner had specifically ordered to be
21 searched. No party should be able to frustrate legitimate discovery by misrepresenting that good
22 faith, thorough discovery efforts were being undertaken when they were not. Jacuzzi has impaired
23 the adversarial system and must suffer the consequences – not Plaintiffs.

24 **VI. CONCLUSION**

25 Nevada law, the rules of ethics, and specific court orders required Jacuzzi to produce all
26 evidence created in the ordinary course of business that would relate to this case. Jacuzzi, in
27 conjunction with Snell & Wilmer, willfully chose to withhold documents in violation of court
28 orders.

VII. RELIEF REQUESTED

A. THE COURT SHOULD STRIKE JACUZZI'S ANSWER

Plaintiffs request that the Court strike Jacuzzi's Answer and enter default against Jacuzzi and allow Plaintiffs to proceed to a default prove-up hearing pursuant to NRCP 55(b)(2). Alternatively, at a minimum, Plaintiffs request that the Court strike Jacuzzi's Answer as to liability only.

B. THE COURT SHOULD GRANT MONETARY SANCTIONS AGAINST JACUZZI AND SNELL & WILMER FOR COSTS AND ATTORNEY'S FEES

In addition to the sanction of striking the Answer, Plaintiffs also request that the Court enter a monetary sanction against both Jacuzzi and Snell & Wilmer in the amount of \$557,631.72 for costs and an attorney fee amount to be submitted after the Reply is completed pursuant to NRCP 37(b)(2). From the moment Jacuzzi learned that Sherry was stuck in their Jacuzzi 5229 Walk In Tub for three days because she slipped off the seat and became entrapped, unable to open the door outward, Jacuzzi knew that they would be exposed to a multi-million dollar verdict. Jacuzzi was instantly aware of its high exposure because Jacuzzi has known that end-users were slipping off their seats for years. Jacuzzi has also known that end-users were getting stuck in their tubs for years. Because of Jacuzzi's knowledge, punitive damages were inevitably to follow.

As a calculated risk, Jacuzzi decided to take a "catch me if you can" approach to discovery. Jacuzzi decided to take advantage of the fact that it controls the evidence that most strongly affects liability and punitive damages (i.e., evidence regarding its prior knowledge). Therefore, from day one, Jacuzzi acted as the self-appointed gatekeeper of evidence in this case. First, Jacuzzi withheld subsequent incidents even though it is well-established that subsequent incidents are relevant in strict liability products cases. Next, Jacuzzi withheld information about dealers, disclosing only one dealer: Defendant AITHR. Jacuzzi then conclusively stated that other dealers were irrelevant to this case. Plaintiffs now know that there were over 250 dealers nationwide, i.e., 250 sources of evidence regarding notice and punitive damages. Then, Jacuzzi decided to withhold evidence regarding marketing and advertising only to ultimately produce thousands of pages of documents on the issue. The list goes on and on. Jacuzzi has consistently withheld information and then justified doing so by taking absurd positions. Most recently, Jacuzzi made the decision to withhold the Pullen matter because the matter did not fit Jacuzzi's own definition of a "claim." Now, Jacuzzi



1 asserts that it did not believe that customer complaints would be found in a customer service
2 manager's email. Each new motion has resulted in piecemeal productions cleverly crafted to avoid
3 good faith disclosure.

4 Throughout this case, both this Court and Commissioner Bulla have noted Jacuzzi's
5 underhanded discovery tactics. Commissioner Bulla stated that she was concerned with Jacuzzi's
6 reluctance to produce documents because of third party privacy concerns. ("[Y]ou cannot hide
7 behind a privilege not to produce documents that were in the ordinary course of business. And
8 when you say something like that, it worries me.") This Court also noted the pretextual nature of
9 Jacuzzi's "what is a claim?" argument regarding the Pullen matter. ("THE COURT: That position
10 that it wasn't a claim, I'm just having a little bit of trouble with that... is this a pretext after the
11 fact...?"). And now, looking back at the history of this case and Jacuzzi's endless
12 misrepresentations, it is clear that Jacuzzi has been engaged in swift dealing and has offered
13 justifications as pretext.

14 Jacuzzi and Snell & Wilmer chose to litigate this way. As Mr. Templer testified, he was
15 involved in all disclosures and had numerous conversations with outside counsel regarding the
16 various hearings and motions in this case. Had Plaintiffs simply accepted Jacuzzi's various
17 statements that all prior and subsequent incidents have been produced, Plaintiffs' case would be
18 drastically different than it is now. And had Jacuzzi simply produced its recent disclosures in its
19 initial NRCP 16.1 disclosure, Plaintiffs would have been able to spend the last two years
20 conducting discovery regarding the end-users who were "injured seriously and threatening lawsuits"
21 or who "slipped and fell causing [them] to hurt [their] back." Plaintiffs could have spent their
22 resources discovering if any of the dozens of customers who slipped and fell in their tubs
23 experienced substantially similar incidents as Sherry. Plaintiffs could have discovered the
24 circumstances behind end-users like I. Stoldt and David Greenwell who became stuck in their tubs
25 needing emergency assistance. Plaintiffs could have conducted discovery on some of the newly
26 discovered 250 dealers who contact Jacuzzi directly when they receive customer complaints.

27 Instead, Plaintiffs have spent \$557,631.72 in costs litigating a case with incomplete
28 information. The costs have been increased because of Plaintiffs' necessity to have the experts



1 continue to assess new information because the experts never had complete information. Plaintiffs
 2 have spent significant money traveling to countless expert depositions and corporate representative
 3 depositions which will all have to be done again because Plaintiffs did not have the relevant
 4 information the first time around. Plaintiffs have spent significant sums on a forensic data expert
 5 to help find documents that should have been disclosed voluntarily. Plaintiffs have spent over two
 6 years fighting tooth and nail to find other incidents evidence and are still unsure if it has all been
 7 disclosed because to date, the forensic search has yet to be completed due to Jacuzzi's continued
 8 gamesmanship. Now, if the Court does not strike Jacuzzi's Answer, Plaintiffs will now re-conduct
 9 discovery and incur the same amount of costs because Plaintiffs literally will be required to start
 10 anew to cure the impact of Jacuzzi's willful nondisclosure. Otherwise, the result would be that
 11 Jacuzzi would "reap the tactical benefit of [concealing the evidence." Valley, 427 P.3d at 1029.

12 Jacuzzi and Snell & Wilmer placed Plaintiffs in this position and should be ordered to put
 13 Plaintiffs in the position they would have been had Jacuzzi and Snell & Wilmer litigated in good
 14 faith. Whether or not the Court strikes Jacuzzi's Answer, Jacuzzi and Snell & Wilmer should be
 15 ordered to pay Plaintiffs past attorney's fees [submitted after the Reply] and costs in the amount
 16 of \$557,631.72. If the Court does not strike Jacuzzi's Answer, Jacuzzi should still nevertheless be
 17 ordered to pay the same amount for Plaintiffs' future attorney's fees and costs in re-conducting
 18 discovery. Additionally, Jacuzzi and Snell & Wilmer should be ordered to pay a separate sanction
 19 determined by this Court to punish them for their bad faith conduct.

20 Regardless of whether the Court strikes Jacuzzi's Answer and enters default, certain
 21 evidentiary findings should be entered against Jacuzzi.

22 C. EVIDENTIARY FINDINGS AND/OR JURY INSTRUCTIONS

23 Plaintiffs request the following evidentiary findings:

24 1. Jacuzzi should be ordered to pay the cost of having a third party perform a
 25 document review of the hundreds of thousands of pages of "hits" referenced in Jacuzzi's
 26 Responses to Plaintiff Ansara's Seventh Set of Requests for Production of Documents.

27 2. All documents contained in Evidentiary Hearing Exhibits 1 to 168 should be
 28 admitted at trial.

1 3. A court reporter should be present at each additional session of the forensic
2 computer search.

3 4. Jacuzzi must produce a copy of the Salesforce database so that Plaintiffs can
4 conduct its own search of the data without the need for a Jacuzzi agent to perform the search.

5 5. The jury should be instructed that the Court has found that during this litigation,
6 Jacuzzi willfully withheld evidence related to other end-users being injured in substantially similar
7 incidents because it knew the evidence was harmful to its defenses in this case

8 6. The jury should be instructed that the Court has found that during this litigation,
9 Jacuzzi willfully withheld evidence which would tend to show that Jacuzzi had reason to anticipate
10 that Sherry may slip off the seat into the footwell because it knew the evidence was harmful to its
11 defenses in this case.

12 7. The jury should be instructed that the Court has found that during this litigation,
13 Jacuzzi willfully withheld evidence which would tend to show that Jacuzzi had reason to anticipate
14 that if Sherry were to slip off the seat into the footwell, she would be unable to open the inward
15 opening door because it knew the evidence was harmful to its defenses in this case.

16 8. The jury should be instructed that Jacuzzi knew, prior to the subject tub being sold
17 to Sherry, that other customers had slipped off the seat and into the footwell of substantially similar
18 Jacuzzi walk in tubs.

19 9. The jury should be instructed that Jacuzzi knew, prior to the subject tub being sold
20 to Sherry, that other customers who had slipped into the footwell were unable to exit because of
21 the inward opening door.

22 10. The jury should be instructed that Jacuzzi knew of other incidents where customers
23 had to call 911 or other emergency responders for help exiting the tub because they were unable
24 to exit due to the inward opening door and weakened physical conditions being elderly or advanced
25 in age.

26 11. The jury should be instructed that in response to customer complaints about the
27 slipperiness of the tub surface that it began offering various products to customers free of charge
28 which were meant to increase slip resistance.

1 12. The jury should be instructed that at the time that Sherry's tub was manufactured,
2 other walk-in tub manufacturers were manufacturing similar walk-in tubs with similar features as
3 Sherry's tub that had outward opening doors.

4 13. The jury should be instructed that it was commercially feasible for Jacuzzi to
5 produce a tub with the same dimensions as Sherry's tub, but with an outward opening door instead
6 of an inward opening door.

7 14. The jury should be instructed that Jacuzzi had a duty to warn Sherry of the risk of
8 slipping off the seat.

9 15. The jury should be instructed that Jacuzzi had a duty to warn Sherry of the risk of
10 entrapment due to the inward opening door.

11 16. The jury should be instructed that a reasonable consumer would not expect that the
12 seat of a walk-in tub would be slippery enough to cause the consumer to slip off the seat during
13 normal use.

14 17. The jury should be instructed that a reasonable consumer would not expect that the
15 he/she would become entrapped in a walk-in tub due to the inability to open the tub door.

16 18. The jury should be instructed that any evidence in this case relating to an end-user
17 slipping in a walk-in tub was not the result of customer misuse of the tub.

18 19. The jury should be instructed that any evidence in this case relating to an end-user
19 becoming entrapped in a walk-in tub was not the result of customer misuse of the tub.

20 20. The jury should be instructed that prior incidents documented in any of the admitted
21 Evidentiary Hearing Exhibits are substantially similar to the subject incident such that Jacuzzi was
22 on notice of the product's dangerous attributes prior to the time it sold the tub to Sherry.

23 21. The jury should be instructed that subsequent incidents documented in any of the
24 admitted Evidentiary Hearing Exhibits are substantially similar to the subject incident such that
25 Jacuzzi consciously disregarded foreseeable and probable harm.

26 22. Denial of Jacuzzi's Motion in Limine No. 1 (motion that seeks to exclude
27 "improper" lay witness opinions about tub's dangerous features).
28



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LAW FIRM

23. Denial of Jacuzzi's Motion in Limine No. 13 (motion that seeks to exclude other complaints, incidents, lawsuits that address the tub's dangerous features).

24. Denial of *firstSTREET*'s Motion in Limine No. 4 (that Jacuzzi joined) (that seeks to exclude Plaintiff from characterizing tub as "death trap").

25. Denial of Jacuzzi's Motion in Limine No. 21 (motion that seeks to exclude testimony re: how Cunnison became stuck in tub).

26. Denial of Jacuzzi's Motion in Limine No. 4 (motion that seeks to exclude evidence re: duration of time Cunnison stuck in tub).

27. Denial of Jacuzzi's Motion in Limine No. 16 (motion that seeks to exclude Plaintiffs' experts from offering "undisclosed" or "untimely" opinions. Plaintiffs' experts should be permitted to supplement their opinions based upon the document dump that Jacuzzi performed after they'd previously testified).

DATED THIS 4th day of November, 2019.

RICHARD HARRIS LAW FIRM

/s/ Benjamin P. Cloward

BENJAMIN P. CLOWARD, ESQ.

Nevada Bar No. 11087

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Attorney for Plaintiffs



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004804

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the amendment to EDCR 7.26, and Administrative Order 14-2, I hereby certify that on this 4th day of November, 2019, I caused to be served a true copy of the foregoing **PLAINTIFFS' EVIDENTIARY HEARING CLOSING BRIEF** as follows:

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below; and/or

☒ Electronic Service — in accordance with Administrative Order 14-2 and Rule 9 of the Nevada Electronic Filing and Conversion Rules (N.E.F.C.R.).

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39

39

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11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 ROBERT ANSARA, as Special Administrator of
14 the Estate of SHERRY LYNN CUNNISON,
15 Deceased; ROBERT ANSARA, as Special
16 Administrator of the Estate of MICHAEL
17 SMITH, Deceased heir to the Estate of SHERRY
18 LYNN CUNNISON, Deceased; and DEBORAH
19 TAMANTINI individually, and heir to the Estate
20 of SHERRY LYNN CUNNISON, Deceased,

21 Plaintiffs,

22 vs.

23 FIRST STREET FOR BOOMERS & BEYOND,
24 INC.; AITHR DEALER, INC.; HALE BENTON,
25 Individually, HOMECCLICK, LLC; JACUZZI
26 INC., doing business as JACUZZI LUXURY
27 BATH; BESTWAY BUILDING &
28 REMODELING, INC.; WILLIAM BUDD,
Individually and as BUDDS PLUMBING; DOES
1 through 20; ROE CORPORATIONS 1 through
20; DOE EMPLOYEES 1 through 20; DOE
MANUFACTURERS 1 through 20; DOE 20
INSTALLERS 1 through 20; DOE
CONTRACTORS 1 through 20; and DOE 21
SUBCONTRACTORS 1 through 20, inclusive,

Defendants.

CASE NO.: A-16-731244-C
DEPT NO.: II

PLAINTIFFS' APPENDIX TO
PLAINTIFFS' EVIDENTIARY
HEARING CLOSING BRIEF



004806

COME NOW, the Plaintiffs, by and through their attorney, BENJAMIN P. CLOWARD, ESQ., of RICHARD HARRIS LAW FIRM, pursuant to EDCR 2.27, and hereby submit, **PLAINTIFFS' APPENDIX TO PLAINTIFFS' EVIDENTIARY HEARING CLOSING BRIEF** filed on November 4, 2019.

Ex. No.	Brief Description of Exhibit	# of Pages	Appendix Pg. Range
201.	Recorder's Tr. of Evidentiary Hr'g – Day 1	183	0001-0183
202.	Recorder's Tr. of Evidentiary Hr'g – Day 2	243	0184-0426
203.	Recorder's Tr. of Evidentiary Hr'g – Day 3	148	0427-0574
204.	Recorder's Tr. of Evidentiary Hr'g – Day 4	141	0575-0715
205.	Table Summaries – Jacuzzi 15 th , 18 th , 19 th , 22 nd , and 23 rd NRCP 16.1 Supplements	32	0716-0747
206.	Jacuzzi's Opp'n to Pls.' Mot. for Recons. Re: Pls.' Renewed Mot. to Strike [filed May 28, 2019]	20	0748-0767
207.	Plaintiff Tamantini's 1 st Set of Interrogatories to Defendant Jacuzzi [served May 1, 2017]	13	0768-0780
208.	Plaintiff Tamantini's 1 st Set of Request for Production of Documents to Defendant Jacuzzi [served May 1, 2017]	12	0781-0792
209.	E-mail correspondence between Joshua Cools, Esq. and Benjamin Cloward, Esq. [dated February 12, 14, & 15, 2018]	2	0793-0794
210.	Letter from Jacuzzi to Plaintiffs [dated April 23, 2018]	1	0795
211.	Jacuzzi's Mot. for Protective Order [filed Sept. 11, 2018]	122	0796-0917
212.	[PROTECTED DOCUMENT] Joshua Cools, Esq. Mem. To Discovery Commissioner Bulls [dated Oct. 12, 2018]	4	0918-0921
213.	[PROTECTED DOCUMENT] E-mail from Kurt Bachmeyer to William Demeritt and Anthony Lovallo re: "Service Issues on 5230/5299" [dated June 23, 2013]	3	0922-0924
214.	March 4, 2019 Minute Order	3	0925-0927
215.	Letter from Joshua Cools, Esq. to Benjamin Cloward, Esq. [dated April 3, 2018]	12	0928-0939
216.	David Modena Dep., Vol. 1, Dec. 11, 2018	30	0940-0969

Ex. No.	Brief Description of Exhibit	# of Pages	Appendix Pg. Range
217.	[PROTECTED DOCUMENT] E-mail from Ron Templer to various Jacuzzi Employees [dated July 25, 2018]	1	0970
218.	Defendant Jacuzzi's 25 th NRCP 16.1 Suppl. Disclosure (pleading only)[served Oct. 10, 2019]	25	0971-0995
219.	Jacuzzi's Supplemental Responses to Plaintiff Tamantini's First Set of Interrogatories	14	0996-1009
220.	Mike Dominguez Dep., July 15, 2019 – Exhibit 1 – List of Dealers	8	1010-1017

DATED THIS 4th day of November, 2019.

RICHARD HARRIS LAW FIRM

/s/ Benjamin P. Cloward

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Nevada Bar No. 11087

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Las Vegas, Nevada 89101

Attorneys for Plaintiffs



CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the amendment to EDCR 7.26, and Administrative Order 14-2, I hereby certify that on this 4th day of November, 2019, I served a copy of the foregoing **PLAINTIFFS' APPENDIX TO PLAINTIFFS' EVIDENTIARY HEARING CLOSING BRIEF** as follows:

■ Electronic Service — in accordance with Administrative Order 14-2 and Rule 9 of the Nevada Electronic Filing and Conversion Rules (N.E.F.C.R.).

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/s/ Nicole M. Griffin

An employee of RICHARD HARRIS LAW FIRM



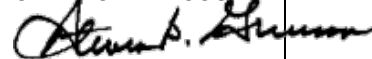
EXHIBIT 201

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EXHIBIT 201

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Steven D. Grierson
CLERK OF THE COURT



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5 DISTRICT COURT

6 CLARK COUNTY, NEVADA

7 ROBERT ANSARA, ET AL.,

CASE#: A-16-731244-C

8 Plaintiffs,

DEPT. II

9 vs.

10 FIRST STREET FOR BOOMERS &
11 BEYOND INC., ET AL.,

12 Defendants.

13 BEFORE THE HONORABLE RICHARD F. SCOTTI
14 DISTRICT COURT JUDGE
15 MONDAY, SEPTEMBER 16, 2019

16 **RECORDER'S TRANSCRIPT OF EVIDENTIARY HEARING - DAY 1**

17 APPEARANCES:

18 For the Plaintiffs:

BENJAMIN P. CLOWARD, ESQ.
CHARLES H. ALLEN, ESQ.
IAN C. ESTRADA, ESQ.

20 For Defendant First Street
21 for Boomers & Beyond Inc:

DAN POLSENBERG, ESQ.
MEGHAN M. GOODWIN, ESQ.
PHILIP GOODHART, ESQ.

22 For Defendants:

23 D. LEE ROBERTS, JR., ESQ.
BRITTANY M. LLEWELLYN, ESQ.
24 JOEL HENRIOD, ESQ.

25 RECORDED BY: DALYNE EASLEY, COURT RECORDER

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<u>FOR THE DEFENDANT</u>	<u>MARKED</u>	<u>RECEIVED</u>
None		

1 Las Vegas, Nevada, Monday, September 16, 2019

2

3 [Case called at 10:53 a.m.]

4 THE MARSHAL: Remain seat. Department 2 now in session.
5 The Honorable Judge Richard Scotti presiding.

6 THE COURT: Ansara v. First Street, A-731244. Let's have
7 everybody's appearances.

8 MR. CLOWARD: Good morning, Your Honor. Ben Cloward
9 on behalf of the Plaintiffs.

10 MR. ALLEN: Charles Allen on behalf of the Plaintiffs.

11 MR. ESTRADA: Ian Estrada on behalf of the Plaintiffs.

12 MR. ROBERTS: Good morning, Your Honor. Lee Roberts on
13 behalf of Jacuzzi.

14 MS. LLEWELLYN: Good morning, Brittany Llewellyn on
15 behalf of Jacuzzi.

16 THE COURT: All right.

17 MR. GOODHART: Good morning, Your Honor. Philip
18 Goodhart on behalf of First Street, AITHR, and Hale Benton.

19 THE COURT: Very good.

20 MS. GOODWIN: Good morning, Your Honor. Meghan
21 Goodwin, also on behalf of First Street, AITHR, and Hale Benton.

22 THE COURT: Very good.

23 MR. HENRIOD: Joel Henriod on behalf of Jacuzzi.

24 THE COURT: Very good.

25 MR. POLSENBERG: And Dan Polsenberg too, Your Honor,

1 good morning, on behalf of Jacuzzi.

2 THE COURT: Very good. All right.

3 MR. ROBERTS: And Your Honor, I did want to point out
4 though, Mr. Ron Templer is here.

5 THE COURT: Very good.

6 MR. TEMPLER: Good morning, Your Honor.

7 MR. ROBERTS: He's in-house counsel for Jacuzzi --

8 THE COURT: Very good.

9 MR. ROBERTS: -- but he's also serving as the company
10 representative at this hearing.

11 THE COURT: Very good. Thank you.

12 All right. So just a few procedural comments, and I'll let you
13 know procedurally I think what we're going to do today and then my
14 initial reasoning behind setting this today, but before we get into that,
15 has anything be settled, or have the parties agreed to continue this
16 hearing, or have the parties agreed to continue trial, anything of that
17 nature that I would need to know at this point?

18 MR. CLOWARD: No, Your Honor.

19 MR. ROBERTS: No, Your Honor.

20 THE COURT: All right.

21 MR. ROBERTS: We did have the court-ordered mediation in
22 front of Jackie Glass, and that was unsuccessful.

23 THE COURT: Well, that's unfortunate. So thank you.

24 So this is an evidentiary hearing on Plaintiff's renewed
25 motion to strike Jacuzzi's answer. Plaintiff has the burden of proof. The

1 Court had believed that there was substantial merit to conduct this
2 evidentiary hearing because and for these reasons:

3 number one, there has been extensive and continued
4 discovery disputes among the parties that threatened, once again, the
5 trial date; number two, Jacuzzi has continued to supplement its
6 discovery responses; number three, Plaintiff contends that Jacuzzi's
7 supplemental discovery responses were untimely and made in bad faith;
8 and number four, Plaintiff has strongly insisted on an evidentiary hearing
9 to preserve its record on the discovery conduct in this case.

10 In prior hearings, Plaintiff has complained of that:

11 number one, Jacuzzi delayed production of the so-called
12 Chopper documents; number two, Jacuzzi delayed production of the so-
13 called Pullen documents. Plaintiff has also complained and contended
14 that, number three, Jacuzzi delayed in producing documents on
15 incidents where people were injured from supposedly slipping and
16 falling in the Jacuzzi walk-in tubs with inward opening doors; and
17 number four, Plaintiff in prior hearings has complained and alleged that
18 Jacuzzi has delayed in producing documents involving incidents where
19 customers slipped in one of its walk-in tubs with inward opening doors;
20 number five then, without regard to personal injuries, Plaintiff has
21 contended that Jacuzzi has obstructed forensic review of its electronic
22 data systems.

23 In these prior hearings, and in its briefs, Jacuzzi has
24 defended itself by asserting:

25 number one, initial discovery orders were limited to

1 discovery claims of personal injury or death and Jacuzzi has taken a
2 limited interpretation of the term claim to mean those instances where
3 there was a demand for compensation.

4 Next, Jacuzzi has defended itself by contending that
5 discovery initially narrow, but later broadened to include, not just claims,
6 but incidents where a customer was injured, and Jacuzzi contends that it
7 undertook good-faith efforts to respond to that broadened scope of
8 discovery.

9 Jacuzzi has also contended that early in this case, Plaintiff did
10 not argue that this case was about a slippery tub, so documents about
11 customers slipping were not relevant. Jacuzzi has contended that given
12 the large number of communications with customers, and the vast
13 amount of documentation, the numerous individuals that might have
14 custody of such communications, and the difficulty in reviewing the
15 communications for relevance, Jacuzzi contends for all those reasons,
16 their conduct shows they acted in good faith in producing everything.

17 The parties here must recognize that there is a distinction
18 between, on the one hand, violating a specific court order, if that
19 occurred, and on the other hand, violating a discovery obligation under
20 NRCP 16.1, or a document request under NRCP 34. A violation of a court
21 order may trigger this Court's discretion to award various sanctions
22 under NRCP 37, including the relief sought by the Plaintiff here; however,
23 for a mere discovery violation, the sanction that the Court may impose is
24 generally limited to an award of attorney's fee, plus such a fees should
25 not be awarded, if a non-disclosure of documents was substantially

1 justified.

2 Here, Plaintiff is seeking the harsh sanction of striking
3 Jacuzzi's answer. As stated, such relief cannot be imposed absent
4 violation of a court order. Thus, the primary purpose of this evidentiary
5 hearing is to determine whether Jacuzzi violated a court order; if so, how
6 such order was violated; when such violation occurred; the extent of
7 such violation; who, within Jacuzzi caused such violation; whether
8 Jacuzzi acted in good faith or bad faith; and the extent of any prejudice
9 suffered by Plaintiff.

10 The Court will permit both sides to introduce evidence of
11 Jacuzzi's overall discovery conduct, to the extent it bears on the issue
12 whether Jacuzzi violated any court order in bad faith or good faith.

13 Further, as we proceed in this evidentiary hearing, the parties
14 will be reminded that the Court has not made any ruling on the
15 applicability or the waiver of any attorney-client privilege so that will
16 come up on a case-by-case basis.

17 Having said my introductory remarks, would the parties like a
18 short recess to consider how to proceed with opening statements, or are
19 you ready to proceed now?

20 MR. CLOWARD: The Plaintiffs are ready.

21 THE COURT: Or if you have a question, you may ask that as
22 well. I will now accept any comments, or questions, or motions.

23 MR. ROBERTS: Thank you, Your Honor. I believe Jacuzzi
24 would like just a ten-minute recess --

25 THE COURT: Yes, you may.

1 MR. ROBERTS: -- in light of what the Court has just outlined,
2 but before we do that, I did want to bring one thing to the Court's
3 attention and seek guidance.

4 THE COURT: Very well.

5 MR. ROBERTS: In the minute order the Court ordered that
6 Jacuzzi must produce the designated witnesses that were set forth in the
7 motion to expand the evidentiary hearing. Those witnesses were Josh
8 Cools, Von Crawford [phonetic], Ron Templer, William Demeritt, Jessica
9 Stillo [phonetic], Regina Reyes, and Kurt Bachmeyer. All of those
10 witnesses will be made available in person during these evidentiary
11 hearings, and we've coordinated the schedule with counsel for Plaintiffs,
12 so we should be good, and I believe the Court received that schedule and
13 has approved it.

14 THE COURT: I did. Thank you.

15 MR. ROBERTS: Very good.

16 We do want to say that the minute order also say, "Plaintiff is
17 not entitled to examine at this hearing any outside counsel of Jacuzzi,
18 either present or past, unless such outside counsel, either takes the stand
19 in opposing the motion for sanctions, or otherwise requests this Court to
20 accept any sworn statement of outside counsel in opposition to the
21 motion to dismiss."

22 So in accordance with the Court's order, Mr. Von Crawford,
23 and Mr. Josh Cools are both here. We had produced them, but we did
24 want to let the Court know that Jacuzzi does not intend to waive the
25 attorney-client privilege --

1 THE COURT: Understood.

2 MR. ROBERTS: -- or rely on an advice of counsel defense,
3 and due to the nature of the hearing, where their conduct is in question,
4 Jacuzzi has elected to have Weinberg, Wheeler, Hudgins, Gunn & Dial
5 attorneys act as counsel in this hearing, so they will not be actively
6 participating in the hearing as counsel.

7 So in light of that, they just wanted to get guidance on
8 whether the Court requires their presence throughout these hearings, or
9 if they might be excused, or if the Court wanted them here for any other
10 purpose?

11 THE COURT: So let me respond to that. One of the *Ribeiro*
12 factors that the Court is required to consider is the extent to which any
13 discovery malfeasance is the responsibility of counsel, or if counsel
14 wants to accept responsibility, rather than having any responsibility be
15 shifted entirely to its client.

16 If Defense counsel -- or Jacuzzi's counsel wanted to take that
17 position, that is entirely their decision making, then I thought there might
18 be the need to either obtain affidavit testimony, or sworn testimony from
19 counsel, as to that fact -- as to that position. I don't know if that's the
20 position you're going to take in this case.

21 Now, I certainly wouldn't require you to divulge any
22 attorney-client communications. So I think you have a decision to make,
23 Mr. Roberts, on whether you want to take the defense that the non-
24 production of Jacuzzi documents was wholly the decision of its counsel,
25 or if it was one of the other reasons that I've articulated that you've

1 expressed as defenses in this case. I hope that answers your question.
2 Looks like you might still have some concern about that.

3 And let me say one more thing. I understand that Jacuzzi
4 has asserted many defenses to the contentions that Plaintiff has raised
5 here. All right. If, after a long evidentiary hearing the Court were to find
6 upon the relevant burden of proof, which we're going to discuss in a
7 second too, in favor of the Plaintiff, that none of the Jacuzzi's defenses
8 applied, then we would need to get to the next, and perhaps last phase,
9 which is why did these discovery violations occur.

10 So what I would be willing to do is to allow that issue of
11 involvement of outside counsel in the decision making to be postponed
12 until the end of the evidentiary hearing.

13 MR. ROBERTS: Your Honor, that was exactly why the Court
14 noted the concern on my face, is because this is Plaintiffs' burden, and
15 until we go through their presentation and assess whether or not they
16 may have met their burden on one or more issues, that we need to rebut,
17 it might have been premature for me to make a final call on that.

18 Even though it is not Jacuzzi's intent to waive privilege, and
19 we do not want to use attorney-client communications as a sword,
20 because that might result in overall waiver in the case, therefore, if the
21 Court will allow it, I'd ask that they be excused this week, and then I
22 believe we have a day next week, the 25th, set aside for William
23 Demeritt. And then after Mr. Demeritt's testimony, we would then notify
24 the Court of a final decision on whether we would seek to put in a sworn
25 affidavit or sworn testimony from Mr. Cools or Mr. Crawford.

1 THE COURT: Mr. Cloward, I think you understand my though
2 process here, is that the factor -- the *Ribeiro* factor that goes to
3 involvement of outside counsel, is the last factor we can consider, if the
4 other Jacuzzi defenses have been proven to lack merit by application of
5 the appropriate burden of proof that you would have?

6 MR. CLOWARD: Sure. I understand that, Your Honor. I think
7 the only concern that we have is that we don't want a defense that's a
8 moving target. You know, if we meet our burden of proof. Now, at the
9 end of the week they come in and prior counsel falls on the sword and
10 says, you know what, it was solely my decision, because of the evidence
11 that we produced this week, I don't think that's fair to us that that issue is
12 a moving target.

13 I mean, Mr. Roberts just announced that they don't plan on
14 making the advice-of-counsel defense, you know, that should be the
15 position, rather than allowing, you know, that defense to kind of fluctuate
16 and move depending on what happens this week. That's my only
17 concern, but I respectfully defer to the Court.

18 THE COURT: Yeah. I appreciate that concern, but out of
19 respect for the doctrine of protection of attorney-client privilege and
20 communications, I wanted to postpone the need to consider revealing or
21 forcing the revelation of any attorney-client communications until --

22 MR. CLOWARD: Certainly.

23 THE COURT: -- the end, but I appreciate -- I think this is the
24 best way to balance the concerns of the parties.

25 MR. CLOWARD: I think that's fair, Your Honor.

1 THE COURT: All right. So let me ask this then -- the next
2 question. I think I was eluding to is, what is the applicable burden of
3 proof that the Plaintiff has? Is it one of preponderance of the evidence,
4 or clear and convincing evidence? What would be your position on that.
5 And I can tell you I'm going to resolve that issue right not, but I wanted
6 both parties to have their position on record.

7 MR. CLOWARD: Yeah. Quite honestly, we believe that it's
8 preponderance of the evidence, but we're happy to brief that: provide a
9 brief to the Court on that issue on the burden of proof, but we think at
10 the end of this, the burden that we will prove is clear and convincing.
11 There's no question in my mind we will prove that this week.

12 THE COURT: All right. Mr. Roberts.

13 MR. ROBERTS: Your Honor, I believe it has to be clear and
14 convincing evidence that we violated a court order before the Court
15 should impose such a harsh sanction. I know that in *Young v. Ribeiro*
16 they applied a heightened standard of review, and that certainly implies
17 a heightened burden of proof, but I don't have a case on that. And I was
18 reserving that issue for our closing briefs, which the Court indicated they
19 would allow in writing, but if it would helpful to have early briefing on
20 that, we can also provide it.

21 THE COURT: Thank you. The earlier the better, so the Court
22 knows the prism through which to view the evidence that I'm going to be
23 taking notes on.

24 MR. CLOWARD: Certainly, Judge. We can try and provide
25 that by Wednesday.

1 THE COURT: That would be very well. Thank you.

2 MR. CLOWARD: Okay.

3 THE COURT: Now, let's talk logistics. Do you both want a
4 brief opening statement or to jump right into presentation of the
5 evidence?

6 MR. CLOWARD: We would prefer to jump right into the
7 presentation of evidence, Your Honor.

8 MR. ROBERTS: Your Honor, the Court's indulgence.

9 THE COURT: Sure. I don't mind listening to you again. I've
10 read all the stuff, so --

11 MR. ROBERTS: What we would like to do, Your Honor, is as
12 Defendant, we can reserve our opening statement to the beginning of
13 our case-in-chief, and decide --

14 THE COURT: You may.

15 MR. ROBERTS: -- whether to do that at that time. And
16 because the ten-minute recess was to confer with my client on whether
17 or not he wanted me to give an opening, we can go ahead and proceed
18 with the evidence, I believe.

19 THE COURT: Next, scheduling: What's your anticipation,
20 Counsel?

21 MR. CLOWARD: Your Honor, our hope is that after today, if
22 we are able to get through Mr. Bachmeyer and Mr. Templer, that may
23 actually alleviate the need for the -- many of the Wednesday witnesses.
24 We still would like to call obviously Audrey Martinez. We think she's
25 important. Regina Reyes, some of the other folks, possibly will not be

1 necessary -- Jessica Steele, and some of the other customer service
2 representatives. We're hopeful that some of those issues can be
3 addressed through Mr. Bachmeyer, as the director of customer service.
4 So our hope, Your Honor, is that we can make a lot of headway today,
5 and maybe that might alleviate the need for some of the Wednesday
6 witnesses.

7 THE COURT: Perfect. Mr. Roberts.

8 MR. ROBERTS: Ours is somewhat dependent on what comes
9 out during Mr. Cloward's testimony. At this time we do not feel the need
10 to put on any witnesses, other than the ones that Mr. Cloward has
11 designated. We will attempt to accomplish what we need to accomplish
12 through redirect, so that we don't need any additional hearing days.

13 THE COURT: Or cross?

14 MR. ROBERTS: Well --

15 THE COURT: Well, if they put them on, then --

16 MR. ROBERTS: If they put them on, then we're going to start
17 with cross, I believe.

18 THE COURT: All right.

19 MR. ROBERTS: Unless you -- I'm okay limiting him to no
20 leading questions, if he's okay, since they're --

21 MR. CLOWARD: Well, they're adverse witnesses, so no,
22 we're not okay with that.

23 MR. ROBERTS: So I believe we'll start with cross, and then --

24 THE COURT: Well, just see if you could --

25 MR. ROBERTS: -- technically --

1 THE COURT: -- at least not be redundant in covering on
2 cross the same thing you're going to cover on direct if you call them so
3 of course.

4 What else?

5 MR. ROBERTS: Well, and I need to clarify. There's one thing
6 I misspoke on. I said Jessica Steel would be here in person. He's
7 actually one of the ones we've agreed to produce by phone. We
8 had -- the original order before the Court expanded the scope, indicated
9 that out-of-state witnesses could appear by telephone, because they're
10 beyond the subpoena power of the Court. That language was not in the
11 new order. It was our contention that they could appear by telephone if
12 they were out of the subpoena power of the Court, but we did reach a
13 compromise with --

14 THE COURT: Okay.

15 MR. ROBERTS: -- Plaintiff's counsel where we would agree
16 to bring most of them here and the Wednesday witnesses, and Mr.
17 Castillo, he would allow to appear by phone.

18 MR. CLOWARD: That's correct, Your Honor.

19 MR. ROBERTS: So there is one more. The Court's minute
20 order said, any additional witnesses must be subpoenaed. It's our
21 understanding that Audrey Martinez received a subpoena in California.

22 MR. CLOWARD: Correct.

23 MR. ROBERTS: As the Court knows, that's a valid subpoena,
24 because it was served out of the jurisdiction. She had previously agreed
25 that our firm could represent her, even though was an ex-employee of

1 Jacuzzi. Ms. Llewellyn has spoken to Ms. Martinez about receiving the
2 subpoena, and we believe that despite unenforceability of the subpoena,
3 she will be able to make it in tomorrow, and we'll try to confirm that with
4 the Court by the end of the day.

5 MR. CLOWARD: Thank you, sir.

6 THE COURT: If I wasn't clear in my minute order, I didn't
7 intend to convey that witnesses could not appear by phone if there was a
8 good cause to do that. When I said that to be brought forth by subpoena
9 I meant that they needed to appear in one way or another. If they were
10 not one of the designated witnesses, they needed to be subpoenaed, and
11 then they could appear by phone. If they were one of the designated
12 witnesses, then they had to be made available.

13 I didn't intend to rule out appearing by phone, if either of the
14 of the parties can stipulate, or if there was some other good cause. So
15 I'll be mindful of that if some emergency comes up during the
16 proceedings.

17 MR. ROBERTS: Thank you, Your Honor. I believe we've got
18 an agreement so that there's no need to bring that in front of the Court.

19 THE COURT: Exclusionary rule. Anybody plan to invoke that
20 during this proceeding?

21 MR. ROBERTS: Jacuzzi does not plan to invoke it.

22 MR. CLOWARD: One moment, Your Honor.

23 MR. CLOWARD: Your Honor, we would like to invoke that,
24 specifically, we'd like Mr. Templer -- I understand he's a corporate
25 designee, so that might be a little be tricky, but --

1 THE COURT: Yeah, I'm going to allow Jacuzzi to have a
2 corporate designee here, so in addition to all of its attorneys, including
3 the attorneys, which at this point, don't intend to take the position that
4 there was some discovery violation, based upon advice of counsel.

5 MR. CLOWARD: Okay.

6 THE COURT: But if there are other witnesses, then I would
7 invoke the exclusionary rule is properly invoked as to those, so I think
8 we're clear on that.

9 MR. ROBERTS: We anticipated that Plaintiffs might invoke
10 the rule, so when we met with our witnesses, we have already instructed
11 them not to have any communications with any other witness after they
12 are sworn and not to have any communications with anyone who
13 testifies before them after they are sworn.

14 THE COURT: Very good.

15 MR. ROBERTS: So we should be okay on that.

16 THE COURT: Very good. Thank you, Counsel.

17 Let's commence the evidentiary hearing then. Mr. Cloward --

18 MR. CLOWARD: Thank you.

19 THE COURT: -- you may present first.

20 MR. CLOWARD: Your Honor, we would like to call Mr. Kurt
21 Bachmeyer to the stand.

22 THE COURT: Please come forward.

23 MR. ROBERTS: He's in the hallway, Your Honor.

24 THE COURT: Oh, right. Thank you.

25 MR. CLOWARD: And, Your Honor, just for scheduling time

1 wise --

2 THE COURT: Yes.

3 MR. CLOWARD: -- what time would the Court like to break?

4 THE COURT: Let's go until 12:30 today. Does that work for
5 everybody?

6 MR. CLOWARD: You got it.

7 THE COURT: All right. 12:30. How you doing, sir?

8 MR. BACHMEYER: Good.

9 THE COURT: Very good. Can you take the stand over here?
10 Remain standing. The court clerk has an oath for you.

11 THE CLERK: Raise your right hand.

12 KURT BACHMEYER, PLAINTIFF'S WITNESS, SWORN

13 THE CLERK: Okay. You may be seated. And then can you
14 please -- oh, you can remain seated.

15 THE COURT: You can be seated.

16 THE WITNESS: Okay.

17 THE CLERK: Can you please state and spell your first and
18 last name for the record?

19 THE WITNESS: Kurt William Bachmeyer, K-U-R-T W-I-L-L-I-
20 A-M, Bachmeyer, B-A-C-H-M-E-Y-E-R.

21 THE CLERK: Thank you.

22 THE WITNESS: Uh-huh.

23 THE COURT: Mr. Cloward, you may proceed.

24 MR. CLOWARD: Thank you, Your Honor.

25 DIRECT EXAMINATION

1 BY MR. CLOWARD:

2 Q Good afternoon -- or good morning -- mid-morning, Mr.
3 Bachmeyer. How are you?

4 A Good. Thank you.

5 Q Good. So just a couple of questions. I guess the first thing I
6 wanted to do was help the judge understand the relationship between
7 the parties specifically with regard to the walk-in-tub. It's my
8 understanding that Jacuzzi manufactures the tubs. First Street is the
9 exclusive marketing partner, and then Aging in the Home is the installer
10 of those tubs, correct?

11 A That's how I understand it.

12 Q Okay. Now, I want to shift the focus a little bit on how
13 Jacuzzi stored information. You agree with me that Jacuzzi used
14 systems and had systems in place to input and track customer and
15 product issues, correct?

16 A Correct.

17 Q And one of the systems that Jacuzzi has is a system called a
18 KBM system, which has been used since 2000, true?

19 A True.

20 Q And Jacuzzi had a system called RNT that was used between
21 2010 and '14, correct.?

22 A Correct.

23 Q And that Jacuzzi used and continues to use a system called
24 Salesforce from 2004 -- or excuse me '14 to the present, true?

25 A True.

1 Q Jacuzzi also has used email as a system to track customer
2 and product issues, correct?

3 A Correct.

4 Q Now, in your deposition we talked about hey, well, what
5 happens when a letter comes in -- an actual hard letter from a consumer.
6 You indicated that those would be scanned and then emailed to an
7 individual like yourself, true?

8 A True.

9 Q And then you kind of determine who those letters need to be
10 disseminated to via email, correct?

11 A That's correct.

12 Q Okay. So the next thing I want to focus on are the types of
13 issues that Jacuzzi, in fact, tracks. Remember that part of your
14 deposition where I asked you -- and I'm going to quote, "What if
15 someone called saying the tub is leaking; someone calling saying the tub
16 is scratched; someone calling saying hey, I fell, I broke my neck, and now
17 I'm paralyzed; someone calling saying I fell down, I wasn't hurt, but I'm
18 worried about the tub, tub being slippery; and those were all examples
19 of things that Jacuzzi tracks, correct?"

20 A Correct.

21 Q And you agree that Jacuzzi has a process to escalate issues
22 to additional decision makers -- folks up the ladder, so to speak, correct?

23 A Correct.

24 Q And things that trigger a review of additional decision
25 makers, or folks up the ladder, are things that fall outside of your

1 expertise, like an injury, product redesign, questions about the product
2 that need to be sent to R&D, marketing, sales, things of that nature, true?

3 A True.

4 Q And you agree that things dealing with customer safety
5 would also trigger a review of additional decision makers or folks up the
6 ladder, correct?

7 A True.

8 Q Now, the different groups of the ladder, I guess, that you
9 would escalate issues to -- during your deposition we talked about four
10 different groups, correct?

11 A Correct.

12 Q First, was the sales and marketing, true?

13 A True.

14 Q Second, was the R&D, also known as research and
15 development or engineering, correct?

16 A Correct.

17 Q Next, was the risk management and the risk management
18 that's Bill Demeritt, who is the vice president of risk management,
19 correct?

20 A Correct.

21 Q And finally, the fourth, was folks in legal, and folks in legal
22 are Ron Demeritt -- or excuse me -- Ron Templer, Nicole Simetz, and
23 Anthony Lovallo, correct?

24 A Correct.

25 Q So let's talk now about generic types of issues that would be

1 sent to Ron Templer and Bill Demeritt. You agree, obviously, injuries
2 would trigger for their review, true?

3 A True.

4 Q And issues touching on customer or consumer safety, true?

5 A True.

6 Q And at the deposition we reviewed some of those
7 depositions -- or excuse me -- some of those examples specifically on
8 page 25. I asked,

9 "For instance, if a claim comes in and because there's maybe some
10 confusion of what the word claim means, I'm just going to say email
11 comes in, you know, whether they're demanding remuneration, or
12 demanding replacement of the tub or not. So if an email communication
13 comes in and it says -- and it states it's either directly from the customer,
14 or directly from the dealer, or directly from a customer service agent, or
15 directly from a marketing partner, like First Street, any email, any
16 correspondence from anybody comes in, and the person says, hey,
17 somebody slipped and fell in the walk-in-tub, what happens to that
18 email?"

19 And you said,

20 "I would get as much information as I could from whoever the
21 email originated from, and then provide that information to our sales
22 and marketing folks, or engineering folks, and then to Bill, or Ron and
23 Bill." True?

24 A True.

25 Q Now, some very specific examples that are sent to legal or

1 risk management --

2 MR. CLOWARD: Brandon, will you please pull up the
3 spreadsheet OSI master spreadsheet.

4 BY MR. CLOWARD:

5 Q I'm going to first, Mr. Bachmeyer, I'm going to focus on
6 incidents that took place before Ms. Cunnison's incident. Okay. And I'm
7 going to take one moment --

8 MR. CLOWARD: Your Honor, Court's indulgence. I would
9 just like to, for the Court's benefit, I would like to go through the columns
10 to just help everyone understand what the columns are.

11 THE COURT: Sure.

12 MR. CLOWARD: Okay. Thank you, Brandon.

13 So the first is just the tab. The Court has two binders with
14 tabs 1 through 157. So the tab number corresponds with the specific
15 document in the tab.

16 The second is the earliest date that this would have been
17 disclosed by Jacuzzi in a redacted form.

18 The second -- or the third column is the earliest date that this
19 was disclosed by Jacuzzi in unredacted form, so with the names.

20 The fourth column is the customer name -- fifth column -- if
21 none.

22 Fifth column, is the Bates range.

23 Sixth column is the summary of complaints that was
24 compiled by my office.

25 And then the date or month, year, is the date of the incident

1 itself, Your Honor.

2 And then finally, the next column -- or not finally, but then
3 we have email recipient, so that was who at Jacuzzi may have received
4 that that we know of.

5 Others involved, means is this a non-party, like a dealer
6 that's involved.

7 And then was Aging in the Home remodelers on notice, was
8 First Street on notice.

9 And then finally, search terms trigger.

10 THE COURT: So this is an attorney-generated document?

11 MR. CLOWARD: Correct.

12 THE COURT: And I can view this then as not as evidence, but
13 as what Plaintiffs' counsel contends the evidence will show?

14 MR. CLOWARD: Correct, Your Honor.

15 THE COURT: All right.

16 MR. CLOWARD: Thank you.

17 MR. ROBERTS: And Your Honor, you previewed -- we would,
18 of course, object to this document.

19 THE COURT: Okay.

20 MR. ROBERTS: To the extent it's a summary of evidence,
21 that evidence has not yet been admitted, and I believe it also contains
22 attorney summaries of attorney argument. This may be an appropriate
23 demonstrative aide for closing or to be submitted in closing briefs, but
24 we would object to its admission in evidence at this point before these
25 matters have been established.

1 THE COURT: Thank you.

2 MR. GOODHART: Your Honor --

3 THE COURT: Yes.

4 MR. GOODHART: -- on behalf of First Street, AITHR, and Mr.
5 Benton, I would join in Mr. Roberts' objections as well. This document
6 does appear to have some indications of AITHR and First Street's
7 involvement; it was my understanding is not a part of this hearing, as
8 well.

9 THE COURT: Very well. Well, I'll overrule the objection, but
10 with this qualification, again, the Court does not view this as evidence.
11 The Court views this as attorney argument, and statements of what
12 counsel would contend that it would prove during the course of trial, if
13 he had ten hours to make an opening statement. All right.

14 MR. CLOWARD: Thank you.

15 THE COURT: You may proceed.

16 BY MR. CLOWARD:

17 Q Okay. So first, Mr. Bachmeyer, I'm trying to focus on the
18 ones that you would have personal knowledge on. So let's turn to tab 2,
19 if you would.

20 MR. CLOWARD: And, Brandon, if you'll pull that up, please,
21 specifically, page 5286 first.

22 THE WITNESS: I'm sorry. Should I be looking at this as
23 well?

24 MR. CLOWARD: Yes, please.

25 THE COURT: It'll be easier for you to use the hard copy, than

1 when you put stuff on --

2 THE WITNESS: Yeah, I appreciate that. It's a little blurry.

3 THE COURT: Right.

4 BY MR. CLOWARD:

5 Q Okay. So, sir, at the bottom of the page it's Bate labeled and
6 it says, Jacuzzi 0052 aide 6. When you're there, just let me know.

7 A Which --

8 Q It's tab 2.

9 A Grab the right book. Okay.

10 Q Okay. So the first page is Jacuzzi 0052 aide 6, do you see
11 that?

12 A Yes, I do.

13 Q Okay. So this an email from somebody at First Street
14 forwarding this from Venus Gaspar to Regina Reyes and copying you,
15 true?

16 A No. Venus Gaspar did not work for First Street.

17 Q I'm sorry. What I meant to say were, these were
18 incidents -- First Street incidents -- if you look at the subject it says, "All
19 First Street unresolved incidents" --

20 A Okay.

21 Q -- correct?

22 A Correct.

23 Q And there's an Excel spreadsheet called First Street incident
24 report.xls; do you see that?

25 A True.

1 Q So what is being forwarded, I guess, are First Street incident
2 report, true?

3 A True.

4 Q Okay. And that's forwarded from Venus Gaspar to Regina
5 Reyes and yourself, correct?

6 A Correct.

7 Q Okay. So now let's turn to the third page in Exhibit 2, which
8 is Jacuzzi 5287, and if you recall, Mr. Bachmeyer, this was the one that
9 was a little bit difficult to read?

10 A Yeah, I will definitely not be able to read that from here.

11 Q We're going to blow it right here.

12 A Okay.

13 MR. CLOWARD: Can you get that any larger, Brandon?

14 BY MR. CLOWARD:

15 Q Okay. Mr. Bachmeyer, do you remember going over this in
16 your deposition, where the issue was that it was a broken hip and the
17 person says, "This unit is too slippery, feels that we should have more
18 grab bars on both sides," true?

19 A True.

20 Q Okay. Now, if you will turn to -- and you agreed with me, in
21 your deposition, that that is an example of something that would have
22 been forwarded to the risk management and legal department,
23 specifically, Bill Demeritt and Mr. Templer, true?

24 A I believe that would.

25 Q Now, if you'll turn to tab 3.

1 MR. ROBERTS: Excuse me Ben, could I interrupt?

2 Your Honor, if this were a trial in front of the jury, we would
3 be objecting on the grounds that this incident is not substantially similar,
4 or at least there's no evidence it's substantially similar to the Cunnison
5 incident, and we would objecting to the admission of this.

6 How would the Court like me to handle that? Since this is
7 not in front of the jury, will the Court make a decision later, as to whether
8 or not this is substantially similar or would the Court like me to object
9 any incident where I believe it's not substantially similar?

10 THE COURT: Are you really saying that it's not relevant? Is
11 this objection not relevant?

12 MR. ROBERTS: I'm saying that it would not be --

13 THE COURT: I've never heard of --

14 MR. ROBERTS: -- admissible at trial. That is my objection.

15 THE COURT: Because?

16 MR. ROBERTS: Because in order to be admissible, the
17 incident has to be substantially similar; that the injury had to be caused
18 by a substantially similar event, in a substantially similar product, or it's
19 simply not admissible. The only thing we know is that the woman
20 slipped and hurt her hip -- fell and hurt her hip, and wants another grab
21 bar, so she doesn't fall.

22 In this case, Ms. Cunnison, it is now alleged, I think, was
23 sitting in the seat and slipped off into the foot well. It's no longer alleged
24 that she fell, even though that was alleged in the complaint, and
25 therefore, the issue with the grab bar in Cunnison was apparently her

1 ability to use the grab bar to get out of the foot well, not the grab bar to
2 keep herself from falling. So this is not a substantially similar event --

3 THE COURT: I think that's --

4 MR. ROBERTS: -- that would be admissible at trial.

5 THE COURT: -- I think that's one of the purposes of this
6 hearing, is to determine if documents Plaintiff contends were
7 withheld -- or information that Plaintiff contends were withheld is that
8 type of information substantially similar events, or otherwise that should
9 have been disclosed.

10 So you can have a standing objection, as far as I'm
11 concerned, to lack of relevance on the basis that incidents that we will
12 discuss during this proceedings are not substantially similar.

13 MR. ROBERTS: Thank you.

14 THE COURT: Or you can stand up and object at each
15 instance, which will underlie and prolong this, but I do grant you a
16 standing objection on that basis.

17 MR. ROBERTS: Thank you.

18 MR. CLOWARD: And Your Honor, we would stipulate to that
19 standing objection.

20 MR. ROBERTS: Thank you, Your Honor.

21 THE COURT: All right. Very well.

22 MR. ROBERTS: Very good.

23 BY MR. CLOWARD:

24 Q One matter that I wanted to clarify --

25 THE COURT: Mr. Roberts, if you believe, though, that for

1 some important reason, you need to stand up and make the objection
2 more vigorously so the Court -- so you can underscore the point to the
3 Court, feel free to do that.

4 MR. ROBERTS: Thank you, Your Honor.

5 THE COURT: All right.

6 MR. CLOWARD: Thank you.

7 One thing that I wanted to address, the comment that was
8 made by Mr. Roberts that we have taken this position that she now did
9 not fall, that she slipped off of the seat. We've never -- there's somewhat
10 conflicting information regarding the first responders.

11 One first responder indicates that he thought that she fell.
12 The other first responder thought that she slipped off of the seat, so
13 we're not --

14 THE COURT: Well, I read the excerpts of the first responder
15 deposition testimony that the parties provided to me, and I know there's
16 some point of contention between the parties, as to the actual theory of
17 Plaintiff's --

18 MR. CLOWARD: Correct.

19 THE COURT: -- case. So why don't we proceed though.

20 MR. CLOWARD: Okay. I just wanted to make sure that by
21 not voicing -- that we didn't -- we haven't that -- taken that position that
22 I'm somehow waiving that down the road that he's going to say well,
23 when we said this to the Court, he didn't jump up and clarify this. I am
24 clarifying. There is a disputed issue on that. That will be something that
25 the fact finder --

1 THE COURT: Right.

2 MR. CLOWARD: -- will determine.

3 THE COURT: Understood. No admission by omission during
4 this proceeding.

5 MR. CLOWARD: Thank you, Your Honor.

6 THE COURT: Okay.

7 MR. GOODHART: Your Honor, Phil Goodhart for First Street,
8 AITHR, and Mr. Benton. Again, this doesn't have anything to do with
9 First Street, as far as I'm aware of; however --

10 THE COURT: Not at this point.

11 MR. GOODHART: -- just to preserve any objections that First
12 Street or my other clients could have, if I could have a standing joinder
13 to Mr. Roberts's objection? I don't know what's going to play out three,
14 four, five months down the road. I just want to make sure that I'm
15 protected here by making sure that I'm not waiving anything that Mr.
16 Cloward may later on say that I should have done during this evidentiary
17 hearing.

18 THE COURT: Wise point. In the interest of time, the Court
19 will order that any objection --

20 MR. GOODHART: Thank you.

21 THE COURT: -- made Mr. Roberts and any standing
22 objection, to which this Court has agreed to, those are all hereby
23 adopted by you, and can be used by you in any future proceedings if
24 necessary.

25 MR. GOODHART: I appreciate that, Your Honor.

1 THE COURT: Yes. Okay.

2 MR. CLOWARD: Thank you, Your Honor.

3 BY MR. CLOWARD:

4 Q Mr. Bachmeyer, if you'll now turn to tab 3.

5 MR. CLOWARD: Brandon, if you could pull up tab 3,
6 specifically, we're going to turn to page 5623, so Jacuzzi 005623.

7 THE COURT: Which tab?

8 MR. CLOWARD: Tab 3, Your Honor.

9 THE COURT: Thank you.

10 MR. CLOWARD: And it's Bates stamped --

11 THE COURT: Got it.

12 MR. CLOWARD: Thank you.

13 BY MR. CLOWARD:

14 Q Are you there, Mr. Bachmeyer?

15 A Yes, I am.

16 Q Okay. You agree this was an email that was sent by Regina
17 Reyes to yourself, true?

18 A True.

19 Q The subject were, service issues on a 5230 and 5229, correct?

20 A That is correct.

21 Q Now, the 5230 and 5229 those are Jacuzzi walk-in-tub
22 models, correct?

23 A Correct.

24 Q Okay. Now, the individual that I want to focus on is the first
25 individual by the name of I. Stoldt. You agree that this customer

1 reported that, the unit would not drain. She got stuck in the bathtub and
2 had to crawl out of the door. True?

3 A That's what's written here, correct.

4 Q And the second person, Mr. Greenwell, mentioned that he,
5 slipped in the tub, got stuck in the foot well. Had to call the fire
6 department. True?

7 A True.

8 Q The third person, Ms. Lashinsky called to report that she
9 wanted her door replaced because, her partner slipped in the tub. They
10 had to remove the door to get her out. True?

11 A True.

12 Q Okay. You agree that all three of these incidents took place
13 before Ms. Cunnison's incident in February of 2014, true?

14 A True.

15 Q And in fact, on page 5622 --

16 MR. CLOWARD: Brandon, if you can go to 5622, please.

17 BY MR. CLOWARD:

18 Q Mr. Bill Demeritt said he asked you a very specific
19 task -- gave you a specific task. This is on 5622 and Mr. Demeritt said,
20 and I quote -- or excuse me -- the email is from you to Ray Torres and
21 Audrey Martinez, correct?

22 A Correct.

23 Q And so the Court understands who Ray Torres and Audrey
24 Martinez are, would you take just a moment and explain who those folks
25 are?

1 A Ray Torres was the -- either the director or VP of engineering
2 at the time. And Audrey Martinez was the sales and marketing manager.

3 Q She was -- this was kind of her baby: the walk-in-tub with
4 First Street and AITHR, true?

5 A Correct. True.

6 Q Okay. And so you send them an email and you say, I've been
7 tasked by Bill D. to get this group together and discuss steps to resolve,
8 so we don't see these issues continually coming up, correct?

9 A Correct.

10 MR. ROBERTS: Objection. Foundation. Hearsay.

11 BY MR. CLOWARD:

12 Q You sent that email true?

13 THE COURT: Well, hold on. Response?

14 MR. CLOWARD: Okay. It's a business document that was
15 prepared in the ordinary course of business.

16 THE COURT: One second. Well, I'll overrule the objection, as
17 to hearsay, and relevance.

18 What was the other objection?

19 MR. ROBERTS: Foundation.

20 THE COURT: Foundation?

21 MR. ROBERTS: So he's confirmed, Your Honor, that he -- the
22 authenticity of the email, but he hasn't been asked if he remembers any
23 of this.

24 THE COURT: Well, overruled. It's not relevant whether he
25 remembers it. He laid a proper foundation for questions to be asked

1 about it, so overruled. Go ahead.

2 MR. CLOWARD: Thank you.

3 BY MR. CLOWARD:

4 Q So, Mr. Bachmeyer, you agree that Bill Demeritt gave you
5 specific tasks on this date, true?

6 A From what I see here, correct?

7 Q And that was as early as 2013 that issues with regard to folks
8 getting stuck in their tubs was, continually coming up, true?

9 A These incidents here, correct.

10 Q Okay. Now, sir, if you'll turn to tab 4. Can you tell the Court,
11 I guess, what this document is?

12 A This is a claim form.

13 Q Just a claim form?

14 A This would -- this would come from our third-party
15 contractor in the field.

16 Q Okay. And what was the service that was performed, I guess,
17 the issue that this customer was having?

18 A It's reported it won't operate properly, and the service
19 performed, or the failure that they saw was that the airline off switch on
20 the motor switch was off the jets. Some on and some off. Jets too
21 strong that were in seat area bruising skin.

22 Q Okay. If you want to turn to tab 6, this is actually

23 MR. CLOWARD: I'm sorry -- if we turn to tab 5. Tab 5 was
24 actually the Lashinsky incident. So if the Court has additional
25 information if it wants on Lashinsky, it can look to tab 5.

1 BY MR. CLOWARD:

2 Q Now, Mr. Bachmeyer, if you'll turn to tab 6. Mr. Bachmeyer,
3 this was an email from Regina to yourself, true?

4 A I was copied on it.

5 Q Okay. And you were forwarded information, correct?

6 A Correct.

7 Q And the email that was forwarded was from Nick Fawkes to
8 Regina Reyes, true?

9 A True.

10 Q And so what was the complaint that Nick Fawkes, or the
11 suggestion that Nick Fawkes had on this day to Jacuzzi?

12 A It looked like he was discussing that the -- some future plans
13 to make the surface more abrasive.

14 MR. ROBERTS: Your Honor, I would object, as to relevance
15 for this hearing. There's no injury alleged. There's no claim alleged.
16 There's no indication that the person actually slipped and fell, therefore,
17 it's beyond the scope of any requested discovery, or any discovery order
18 in this matter.

19 THE COURT: Well, it might go to the issue of notice or
20 knowledge on the part of Jacuzzi on whether its Jacuzzis were too
21 slippery and could lead to falls, but, of course, that begs the question
22 whether, even if that were so, if there was any responsibility to produce
23 it.

24 MR. CLOWARD: Yeah. And do you want to -- oh, I'm sorry.

25 THE COURT: I think he's standing again. Let him finish his

1 objection.

2 MR. ROBERTS: And we can brief this, Your Honor, but the
3 case law on the admissibility of prior and subsequent incidents in a
4 products case indicates that what's admissible are accidents, which
5 result in injury.

6 THE COURT: No, I understand.

7 MR. ROBERTS: That's because in order to be noticed, the
8 company has to be on notice that something is dangerous enough to
9 cause injury. So if it hasn't caused injury, there's no notice.

10 THE COURT: Right. I tend to agree with that. We're not in
11 front of the jury now, and anything that's being used or discussed today
12 is not -- you know, it's not in front of a jury.

13 MR. ROBERTS: Okay.

14 THE COURT: I'm wondering -- kind of leads us to the next
15 issue, whether anything that is said in these proceedings can be used for
16 impeachment or cross-examination in the underlying trial.

17 MR. CLOWARD: The majority of the questions -- a lot of the
18 questions were answered during Mr. Bachmeyer's deposition. I guess a
19 couple of things I want to address, if I may. First and foremost, there's
20 this continual objection, in an attempt to kind of divert the Court's
21 attention to say hey, none of this is relevant. We didn't have to turn it
22 over. This is not an incident. Those are all arguments that will be made
23 at the closing.

24 THE COURT: Right.

25 MR. CLOWARD: We believe that what the evidence will

1 show when we go through the specific transcripts of what Commissioner
2 Bulla ordered, that she did contemplate things of this --

3 THE COURT: Well, we'll get to that. No, I understand --

4 MR. CLOWARD: Sure.

5 THE COURT: -- too. A lot of what Mr. Roberts is saying is
6 argument, but I think what he's trying to do is just to preserve his
7 objection and not to let something go said here, whereby he doesn't
8 object means it comes in at trial.

9 And so to further streamline this, Mr. Roberts, Mr. Cloward,
10 perhaps we could have a stipulation that just because Mr. Roberts might
11 not object doesn't mean that this evidence is coming in at trial and
12 doesn't mean he's waived any objection at time of trial. Will you agree
13 to that, Mr. Cloward?

14 MR. CLOWARD: Absolutely, 100 percent.

15 THE COURT: Does that satisfy a lot of your concerns, Mr.
16 Roberts?

17 MR. ROBERTS: It will, Your Honor. And the only reason I
18 stood up, despite the Court's granting a standing objection is before I
19 had an injury alleged, at least in the log, but my objection was that's not
20 caused by something substantially similar circumstances to this case.

21 This, doesn't even involve an injury, so I thought that was a
22 little different, so I'm only --

23 THE COURT: It is different.

24 MR. ROBERTS: -- going to stand up if I think it's totally
25 something new, but I'll try to limit my objections so we can get through

1 this.

2 THE COURT: It is different, but there is an allegation by the
3 Plaintiff that at some point in time Defendant Jacuzzi was required to
4 produce documents that related to slipperiness of a tub, notwithstanding
5 lack of injury.

6 MR. ROBERTS: I agree, Your Honor, which is why we
7 produced this.

8 THE COURT: So which is why we're here.

9 MR. ROBERTS: It's got a Jacuzzi stamp on it.

10 THE COURT: Which is why you produced it --

11 MR. ROBERTS: Yeah.

12 THE COURT: -- and why we're here, and so fine.

13 MR. ROBERTS: Okay.

14 THE COURT: Think we're on the --

15 MR. ROBERTS: Thank you, Your Honor.

16 THE COURT: -- same page here, Mr. Roberts.

17 MR. GOODHART: And again, if I could have the ongoing
18 joinder to the objection --

19 MR. CLOWARD: Happy --

20 MR. GOODHART: -- as we did before?

21 THE COURT: I think we covered that already, but yes.

22 MR. GOODHART: Okay. Thank you.

23 THE COURT: All right. Let's continue.

24 MR. CLOWARD: Thank you, Your Honor.

25 BY MR. CLOWARD:

1 Q You agree here that Nick Fawkes is letting Regina know that
2 the complaint of folks slipping is something that is seen more and more
3 often, true?

4 A That's what he says here.

5 MR. ROBERTS: Objection. Foundation.

6 BY MR. CLOWARD:

7 Q Okay.

8 THE COURT: Overruled.

9 BY MR. CLOWARD:

10 Q And he indicated he would, highly recommend that we
11 consider putting something a little bit more abrasive, not only on the
12 floor, but also on the seats, as we have had customers call concerned
13 that they slip off the seat, true?

14 A That's what it says, yes.

15 Q Okay. Now, Nick Fawkes is not somebody just off the street,
16 right?

17 A I don't know his capacity quite frankly. I know that he was
18 part of First Street, but I can't recall back eight years what he -- what his
19 actual title was.

20 Q Do you see his email? Does this refresh your recollection,
21 Nick.Fawkes@AIHRremodelers.com?

22 A Correct, but I don't understand what relationship he had with
23 the remodelers.

24 Q Okay. But he's certainly somebody that worked for one of
25 the Defendants --

1 A Correct.

2 Q -- true? So it's not as though it's unsolicited advice off the
3 street, true?

4 A Correct.

5 Q Okay. This is an individual that appears to have some direct
6 contact with customers, true?

7 A I -- I would assume, yes.

8 Q Okay.

9 MR. CLOWARD: Now, Brandon, if you'd pull up 58, 59.

10 THE WITNESS: Which tab?

11 MR. CLOWARD: This is still in tab 6. This is the sales force
12 document that was produced relative to Mr. Arnouville.

13 THE COURT: It would be 59? 59?

14 MR. CLOWARD: It is -- for the record, there's some confusion
15 with the bate stamping. I think what happened is Jacuzzi bate stamped
16 over a range and then they had to revise that, so some documents have
17 two bates numbers. This document is bate stamped Jacuzzi 005858, also
18 REV Jacuzzi 005958.

19 THE COURT: Got it. I'll be able to find everything.

20 MR. CLOWARD: Thank you, Your Honor.

21 BY MR. CLOWARD:

22 Q And so, Mr. Bachmeyer, what in the right-hand column does
23 it say there; what is the complaint here of Mr. Arnouville?

24 A It appears that he's saying that his wife slipped on the seat
25 and the floor.

1 Q Okay. Now, the tub was installed when?

2 A 12/13, December 13.

3 Q And what was the date of his call?

4 MR. CLOWARD: Can you go back out and do the whole
5 thing, Brandon?

6 BY MR. CLOWARD:

7 Q Do you see the from date there, Monday, December 17?

8 A Correct.

9 Q So this was installed just four days prior to this individual?

10 A Uh-huh.

11 Q Okay. Now, one thing I want to point out, and I would just
12 ask the Court to take kind of a mental snapshot, if it will, but Mr.
13 Bachmeyer, you agree that the comments here that are contained on this
14 page are basically -- it's the exact thing that's contained on the email on
15 5416.

16 MR. CLOWARD: Can you take it side-by-side?

17 MR. ROBERTS: Objection. Form.

18 THE COURT: Well, is 5416 something that has been
19 identified yet? Which one was that? 5416, where can I find that one?

20 MR. CLOWARD: It's in tab 6, Your Honor. It's the third page
21 in tab 6.

22 THE COURT: So, I mean, what is 5416? He hasn't identified
23 it, right?

24 BY MR. CLOWARD:

25 Q 5416 is part of the email that was forwarded to you, Mr.

1 Bachmeyer, true?

2 THE COURT: All right. Okay. Can you just ask him if the
3 doors are the same or it's the same thing? Well, overruled. I'll allow
4 that.

5 MR. CLOWARD: I want to show something that's going to be
6 super important later on.

7 THE COURT: Okay. All right.

8 BY MR. CLOWARD:

9 Q Mr. Bachmeyer, you agree that this email, this information in
10 this email, where it says customer's tub --

11 MR. CLOWARD: We're working on it.

12 BY MR. CLOWARD:

13 Q -- customer's tub was installed on 12/13 and they say his wife
14 slips on the seat and floor, is the same information on the sales force
15 document, true, word-for-word?

16 A It's similar.

17 Q Can you --

18 A I'm not sure if it's word-for-word.

19 Q Well --

20 A I may not be looking at the right documents. It's a little
21 confusing here.

22 Q It's important. So I'm going to have you look at 5414 and I'm
23 going to read the information contained in the sales force document.
24 You can just follow along and just confirm if it's -- if it is in fact the exact
25 language, okay? So tell me when you're ready.

1 [Witness reviews document]

2 A Okay, I've got 5414.

3 Q Okay. Customer's tub was installed on 12/13, and they say
4 the wife slips on the seat and the floor. Nick would like to know if there
5 is anything you can do to help the customer out? They are not using the
6 tub because they are afraid she will fall.

7 Did I read that correctly?

8 A I see that, correct.

9 Q So the text of these is identical, right?

10 A Where's the document that you want me to look at? I'm
11 sorry. I see this one right here in front of me, but what is the other one
12 that you'd like me to --

13 Q I actually read from the one I wanted you to look at so that
14 you wouldn't have to compare them. All I asked you to do was -- I'm
15 going to read this. I'm going to read this one word-for-word and have
16 you confirm on this one, okay? That's what we did.

17 MR. ROBERTS: Your Honor, Jacuzzi is stipulating that they
18 match, the portion read by Mr. Cloward.

19 THE COURT: Thank you.

20 MR. CLOWARD: That's 5858 and 5859?

21 MR. ROBERTS: Correct.

22 MR. CLOWARD: Okay.

23 BY MR. CLOWARD:

24 Q So you agree that these -- that the language contained in the
25 emails is also housed in sales force, true?

1 A I agree that these are correct now, now that I look at them.
2 I'm sorry about that.

3 Q Okay. It's okay. So the question was, you agree that the
4 information contained in the emails is the same information that's
5 housed in the sales force document, true?

6 A It would appear that one is.

7 Q Okay. And you agree that by searching the sales force
8 database it would also pull up emails that were contained in that specific
9 customer file, true?

10 A It may.

11 Q Okay. Mr. Bachmeyer, how often do you have to search the
12 sales force database?

13 A Not often.

14 Q How often?

15 A Not regularly at all.

16 Q Do folks do that at your direction?

17 A Not at my direction, no.

18 Q Okay. Now, if you'll turn to binder -- or to tab number 7, you
19 agree at the top left-hand corner this is somebody that's complaining
20 that the bottom of their tub is slippery, true?

21 A True.

22 Q Now if you turn to Jacuzzi 005465, this customer has called
23 and is very upset because he says he's almost fallen three times since
24 having his new tub installed. He says that the floor of the tub is too
25 slippery. He says there is no grid or no slip feeling to the tub. He said he

1 is no longer able to use the tub until the problem is fixed, true?

2 A True.

3 Q And Monique, in the next page, 5466, Monique Trujillo, again
4 of Aging in the Home Remodelers, she says this is a very serious safety
5 concern and I really need someone to contact him asap to get a
6 technician out to his home before he falls, true?

7 A True.

8 Q And we talked in your deposition about serious safety
9 concerns; you agreed that you would forward those to Mr. Demeritt and
10 Mr. Templer for guidance, correct?

11 A True. Correct, excuse me.

12 Q Now, if you'll turn to tab 8 --

13 MR. CLOWARD: Specifically, Brandon, Jacuzzi 005369.

14 BY MR. CLOWARD:

15 Q -- Mr. Bachmeyer, you agree that this individual is notifying
16 the service provider that he no longer wanted service because he doesn't
17 want the tub, true?

18 A Correct.

19 Q And the reason he didn't want the tub is because he slipped
20 and fell and hurt his back, true?

21 A That's what this says, yes.

22 Q He was actually threatening to get a lawyer, true?

23 A Correct.

24 Q In particular he said he's willing to get a lawyer if the tub is
25 not taken out and he is refunded, correct?

1 A That's what it says, yes.

2 Q So you agree that he's demanding that Jacuzzi do
3 something, correct?

4 A That's what this says, yes.

5 Q And you would have forwarded this to both Mr. Demeritt and
6 Mr. Templar for guidance, correct?

7 A On something of this nature, correct.

8 Q Okay. Now let's go to 9. This is an individual, if you look on
9 page 5337, by the name of Edward Kleiches?

10 MR. CLOWARD: Just one moment. Brandon's pulling it up.
11 Just one moment.

12 BY MR. CLOWARD:

13 Q Okay. You agree, Mr. Bachmeyer, this was a letter sent to
14 Jacuzzi Luxury Bath on May 15, 2013, by someone named Edward
15 Kleiches, true?

16 A True.

17 Q And is this an example of a letter that would have been
18 scanned and emailed to you for further dissemination?

19 A If it came to my office, yes.

20 Q Okay. This individual is complaining about the ability to let
21 water out, true?

22 A I haven't read the entire document.

23 Q Go ahead, take your time. It's 5336.

24 [Witness reviews document]

25 Q It's the third bullet point if that helps.

1 A Okay. I've read it.

2 Q You agree that this individual's complaining about the
3 difficulty in letting the water out, true?

4 MR. ROBERTS: Objection to form.

5 THE COURT: Elaborate.

6 MR. ROBERTS: Pardon?

7 THE COURT: Elaborate, please.

8 MR. ROBERTS: Well, he said complaint. I don't see that
9 anywhere in the document.

10 MR. CLOWARD: I'll restate.

11 THE COURT: Thank you.

12 BY MR. CLOWARD:

13 Q Mr. Bachmeyer, you agree this individual is voicing
14 communication that it is difficult to let the water out, true?

15 A I don't specifically see that. Can you show me where you see
16 that, I'm sorry, looking at?

17 Q The third bullet point, the highlighted portion.

18 A Yeah, I'm reading that.

19 Q It says when your hands are wet, it is difficult to let the water
20 out; do you agree that's what he's communicating?

21 A Okay. Yes.

22 Q Okay. Now, sir, if you'll turn to exhibit 10, tab 10.

23 MR. CLOWARD: Brandon, 5374.

24 BY MR. CLOWARD:

25 Q And this is additional information regarding one of the folks

1 that we talked about in tab 3, this is the information specific to him, Mr.
2 Greenville. What is the complaint that Mr. Rojas is sending to Ray
3 Parnell, copying Regina Reyes; what is the issue here, what happened?

4 A This particular gentleman slipped in the tub and was trapped
5 for two hours trying to get out because he slipped on the floor. Said the
6 unit needs more grip.

7 Q Okay. And then if you turn to Jacuzzi 5717 in that same tab,
8 in the lower right-hand corner you agree a little more detail is given in
9 that he actually had to have the fire department to get him out, true?

10 A That's what this says, yes.

11 Q And certainly that is something that you would have
12 forwarded to the four teams, including Mr. Templar and Mr. Demeritt,
13 true?

14 A If it was provided to me, yes.

15 Q And, in fact, if you look at Jacuzzi 5372, so it's the first page
16 of exhibit 10, you were in fact provided this information, correct?

17 A It appears to be correct, yes.

18 Q Okay. Now, sir, if you'll turn to exhibit tab 11.

19 MR. CLOWARD: Brandon, if you'll go to 5320.

20 BY MR. CLOWARD:

21 Q Who is Andrea Dorman?

22 A I don't recall.

23 Q Okay. Do you recall a company by the name of Home Safety
24 Baths?

25 A I do.

1 Q That was one of the distributors of this product, true?

2 A True.

3 Q Okay. So in this email you agreed at your deposition when
4 we talked about it, that there were seven folks identified as having an
5 issue with the slipperiness of this tub, true?

6 A That's the number we agreed on them, yes.

7 Q Okay. You agree first she says look, we get this complaint a
8 lot. You need to follow along here. It's right here. We get this complaint
9 a lot. We have two customers right now that have injured themselves
10 seriously and they -- or, excuse me, and are threatening lawsuits, true?

11 MR. ROBERTS: Objection. Hearsay.

12 BY MR. CLOWARD:

13 Q True?

14 THE COURT: Well, hold on.

15 MR. ROBERTS: Only if it's offered for the truth of the matter
16 asserted.

17 THE COURT: Right. So it's -- I'm assuming you're not -- this
18 isn't being offered for the truth, it's being offered for potential notice that
19 there are two customers that have threatened lawsuits?

20 MR. CLOWARD: That and --

21 THE COURT: Because I can't -- without more, I can't accept it
22 as fact that there were indeed two customers threatening lawsuits, right?

23 MR. CLOWARD: Certainly. The point that it's being -- in
24 addition to that it is that the scope of the hearing is what did they know,
25 what did they not know.

1 THE COURT: Well, I understand. All right. So it's sustained
2 in part and overruled in part. Let's go.

3 MR. CLOWARD: Okay.

4 BY MR. CLOWARD:

5 Q And, further, Mr. -- and it says Mr. -- I believe the individual
6 that they're referring to, Mr. Flashberger, because these emails are with
7 regard to his tub repair, take a moment and refresh yourself on that.

8 [Witness reviews document]

9 THE COURT: What's the question? I think he's waiting.

10 BY MR. CLOWARD:

11 Q Oh, I didn't know that you were ready.

12 A Sorry.

13 Q You agree that this email was part of an email that was
14 forwarded to you on December 30, 2013, true?

15 A Correct.

16 Q Okay. And the email from Megan Davis to you on December
17 30th, 2013, which is page 5317 --

18 A Right.

19 Q -- of tab 11, indicates that this is in regard to an individual by
20 the name of Flashberger, correct?

21 A That's what this subject line says, yes, correct.

22 Q Okay. And the email that Andrea, on 5319, Andrea at Home
23 Safety Baths dot com., sent to Deborah Nuanes, Regina Reyes, Audrey
24 Martinez, and Simona Robertson of First Street, was given status on Mr.
25 Flashberger's issue, true?

1 A That's what it appears, yes.

2 Q And in addition to Mr. Flashberger's issue, she also pointed
3 out, we have -- she pointed out that Mr. Flashberger has slipped, and his
4 friend has slipped using the tub, true? I'm pointing to it right here.

5 A Yes, true.

6 Q And then she points out that she has two serious claims of
7 injury where folks are threatening lawsuits, correct?

8 A That's correct.

9 Q And then she points out that she had three other customers
10 that we had to send bathmats to because they slipped and were afraid to
11 use the tub, true?

12 A True.

13 Q And you agreed at your deposition that this is something that
14 you would have forwarded to Mr. Templar and Mr. Demeritt for
15 guidance, correct?

16 A Yes.

17 Q Now, if you'll turn to tab 12. Actually, tab 12 is just --

18 MR. CLOWARD: Your Honor, the way that we did the tabs,
19 just so the Court understands, because that email contained potentially
20 seven folks, we lumped it into two folks threatening lawsuit, three folks
21 with the bathmat, Mr. Flashberger, and then Mr. Flashberger's friend. So
22 we don't need to go over tab 12. We can go to tab -- same thing, we
23 don't need to go over tab 13.

24 BY MR. CLOWARD:

25 Q Tab 15. Okay. Do you remember talking about this email

1 from Ray Parnell about how his workers were getting hammered on the
2 guild surveys and it was affecting their bonuses?

3 A I don't recall the specifics.

4 Q Do you remember talking about that in your deposition?

5 A Yes.

6 Q Okay. And what is a guild survey?

7 A I don't know. It's not something that's from Jacuzzi.

8 Q Are you aware of what the guild survey is that's recently
9 been produced in this case? It's about a 3500 entry document.

10 A I'm sorry, it doesn't ring a bell to me. I'm sorry. Maybe if I
11 was presented with something, I could refresh my memory, but it
12 doesn't ring a bell with me.

13 MR. CLOWARD: Brandon, can you go to guild survey? It is
14 first -- can I have it later if you can't find it in that folder?

15 Your Honor, may I have one moment?

16 THE COURT: Uh-huh.

17 [Pause]

18 BY MR. CLOWARD:

19 Q We'll come back to that so that we can keep moving along.
20 Now, if you'd turn to page 5303. You agree this individual, Ms. Howard,
21 called today and said she said the tub is just not what she expected it to
22 be. She called it dangerous because she slips on the seat and she is not
23 happy about the jets, true?

24 A True.

25 MR. ROBERTS: Objection. Ambiguous.

1 THE COURT: Well, save that for argument.

2 MR. ROBERTS: Just it says our system, and I think he should
3 clarify what -- whether that's Jacuzzi or First Street.

4 THE COURT: A valid objection. Why don't you see if he can
5 clarify?

6 MR. ROBERTS: Is the reference to our system, Jacuzzi
7 system, or First Street system?

8 THE COURT: I'm looking for the terms our system. I know
9 that counsel said it, but I don't see it in the document.

10 MR. ROBERTS: It's on there. I have 303, the second page,
11 Your Honor --

12 MR. CLOWARD: Yeah, I don't think I asked him.

13 MR. ROBERTS: -- and it appears to be under the first three
14 email --

15 THE COURT: The first three.

16 MR. ROBERTS: -- therefore the reference would be to the
17 First Street system and not Jacuzzi's from context, but.

18 MR. CLOWARD: I didn't raise that issue.

19 THE COURT: Well, all right. So sustained as to any
20 discussion of our system, but let's move on if we didn't need to elicit any
21 more information on that.

22 MR. CLOWARD: Thank you.

23 BY MR. CLOWARD:

24 Q Now, Mr. Bachmeyer, if you'll go to exhibit 16. This is a
25 letter from an individual by the name of Patricia Brandon, correct?

1 A Correct.

2 Q And if you turn to exhibit 5309 --

3 A Okay.

4 Q -- that's a customer survey that Jacuzzi and First Street gave
5 to the customers using their tubs, which were then sent to First Street
6 and then sent back to Jacuzzi, correct?

7 A I'm not sure Jacuzzi participated in the questionnaire. I know
8 that this is absolutely a First Street document. I don't know.

9 Q These documents were forwarded to Jacuzzi, correct?

10 A Correct.

11 Q Okay.

12 A From First Street.

13 Q Yes. So essentially First Street would have the customer fill
14 these out, then they would gather the data, then the data would forward
15 it to Jacuzzi, correct?

16 A Correct.

17 MR. ROBERTS: Object to form. Foundation.

18 THE COURT: Overruled.

19 BY MR. CLOWARD:

20 Q Okay. And she's voicing her concerns. This is a --

21 THE COURT: Well, actually, I would -- do want to hear
22 clarification on it. I know he agreed with you, but let's find out how he
23 knows that, if he does.

24 MR. CLOWARD: How he knows?

25 THE COURT: That these documents would have been

1 compiled and forwarded to Jacuzzi.

2 MR. CLOWARD: Okay. I can ask a real quick question.

3 THE COURT: Let's find out how he would know.

4 BY MR. CLOWARD:

5 Q Mr. Bachmeyer, at your deposition we covered several of
6 these consumer complaints, correct?

7 A Correct.

8 Q And they were actually compiled into an Excel spreadsheet
9 that was sent from First Street to Jacuzzi on a monthly basis, correct?

10 A Correct.

11 Q And we covered that during your deposition, correct?

12 A Correct.

13 Q So these documents, while they may have been generated or
14 compiled by First Street, were in fact shared with Jacuzzi, correct?

15 A Correct.

16 Q Okay. Now, in this situation you agree this individual on the
17 one, two, three, four, fifth paragraph down, indicates that she's 83 years
18 old.

19 [Witness reviews document]

20 A Correct.

21 Q And she indicates that she has some limitations with the tub
22 getting in and out and indicates that she has to be extremely cautious,
23 true?

24 A True.

25 Q Now, if you go to exhibit 17. And this helps clarify. Take a

1 look at the first page there at 5333.

2 MR. CLOWARD: And, Brandon, if you'd pull up the From and
3 To.

4 BY MR. CLOWARD:

5 Q Okay. First you agree that on June 11, 2013, Simona Roberts
6 sent an email to Audrey Martinez and Norm Murdock with some
7 comments, correct?

8 A Correct.

9 Q And then Audrey sent that email to Bob Rowan; who's Bob
10 Rowan again?

11 A The former president at the Jacuzzi.

12 Q And who's Joseph Davis?

13 A The current president of Jacuzzi Bath.

14 Q And then yourself, correct?

15 A Excuse me?

16 Q I'm sorry. And then yourself, correct?

17 A Correct.

18 Q Okay. And the subject is what?

19 A There are a few more comments, customer letter, PDF's,
20 customer surveys.

21 Q Okay. So you agree there are some attachments to that
22 email that attached certain things, correct?

23 A That's what it would appear, yes.

24 Q And in this case this -- one of the attachments was an Excel
25 spreadsheet that were First Street customer surveys the month of June

1 2013, correct?

2 A That's what it looks like, yes.

3 Q Okay.

4 THE COURT: Mr. Cloward, a couple quick questions. When
5 was the 5300 series of Jacuzzi documents or the 5000 series of Jacuzzi
6 documents produced?

7 MR. CLOWARD: Your Honor, if you actually look --

8 Can you pull up the --

9 THE COURT: I just wanted a rough answer.

10 MR. CLOWARD: You can tell --

11 THE COURT: Like 53 through 59 and so on.

12 MR. CLOWARD: 53 through -- I think it was around July 26,
13 which I'll get to.

14 THE COURT: All right. And when was Mr. Bachmeyer
15 deposed? Another question I had.

16 MR. CLOWARD: Exactly one business day before these were
17 produced.

18 THE COURT: Okay.

19 MR. CLOWARD: So basically they were produced Friday
20 evening around 4:30. His deposition was scheduled for Monday
21 morning and I think 9 A.M.


22 And, importantly, an important note, is the next day's
23 deposition was the ESI individual. And then the next day was the actual
24 forensic search where we were going to go to Mr. Roberts. That still has
25 not been completed.

1 THE COURT: We'll get to that later.

2 MR. CLOWARD: We're midway into that process.

3 THE COURT: Okay.

4 MR. ROBERTS: And I'd like to clarify, Your Honor, that the
5 forensic search scheduled that week was only of sales force, not the
6 database that would have contained these documents.

7 THE COURT: Now, it would have been -- this is the earlier
8 database, the KBM, or no, with the RMT system. 

9 MR. ROBERTS: Email.

10 THE COURT: Email.

11 MR. ROBERTS: Yes.

12 THE COURT: Okay. All right.

13 BY MR. CLOWARD:

14 Q Okay. Now, in this email, or excuse me, in this -- in tab 17
15 you agree that this individual named Ruth Young --

16 MR. CLOWARD: And, Brandon, that's page Jacuzzi 5335 if
17 you could pull that one up.

18 BY MR. CLOWARD:

19 Q She voices five -- she only numbers four, but there in the P.S.
20 she voices a fifth comment, true?

21 A True. True.

22 Q We go to the second one, it says after sitting down, the
23 faucets and showerhead cannot be reached, correct?

24 A That's what she says, correct.

25 Q Okay. Number three, the door should open out as there is

1 barely room to squeeze by to get in it, correct?

2 A Correct.

3 Q Number four, it is difficult to exit as there is nothing on the
4 right-hand side to hang onto, plus to step out there's about six to seven
5 inches high. Would be okay, probably, for someone not as lame and stiff
6 as I am, true?

7 A True.

8 Q And there's a P.S., oh, one thing more, I do use a rubber
9 bathmat, because I find the bottom of the tub slippery, correct?

10 A Correct.

11 Q And you agree that we've already covered these documents
12 went to First Street, then they went to Jacuzzi, correct?

13 A Correct. This particular document, yes.

14 Q Now, if you go to tab 18 --

15 MR. CLOWARD: And, Your Honor, I notice it's 12:25. This
16 next entry is the Jerre Chopper, so I would imagine it will take a little bit
17 of time to work through some of the questions I have on that. I'm happy
18 to do that , but I want to be cognitive --

19 THE COURT: No, it's a good time for lunch. All right. A one
20 hour break or a one hour lunch time; does that work for everybody to be
21 back here at 1:30?

22 MR. CLOWARD: Yes, Your Honor.

23 MR. ROBERTS: Yes, Your Honor.

24 THE COURT: All right. Recess.

25 [Recess at 12:25 p.m., recommencing at 1:34 p.m.]

004871

004871

1 THE COURT: -- consider these things. I wonder on the one
2 hand if I were to deny your motion, Mr. Cloward, would you then be
3 requesting more time for discovery, and on the other hand if I were to
4 grant the motion, would Jacuzzi be seeking, you know, a stay pending
5 petition for a -- you know, some kind of review by the Supreme Court so
6 that you don't have to just try liability, you wouldn't -- I mean damages, I
7 mean you have to do liability later.

8 So what are both of your thoughts on that? I mean maybe
9 it's too hypothetical now, but we are five weeks away. You know, we're
10 five weeks away and for planning purposes it's really difficult to change
11 my schedule at the last minute. And I don't want other litigants to be
12 unfairly impacted. Shall we just wait until the end of this week before we
13 revisit that issue again?

14 MR. CLOWARD: Whatever the Court's preference. I mean in
15 candor to the Court I think regardless of the outcome of Your Honor's
16 ruling, we would not be prepared in October.

17 THE COURT: Regardless of the outcome?

18 MR. CLOWARD: Regardless of the outcome because even if
19 the Court grants the motion and let's say there's a punitive base to the
20 case, it's my understanding that that would have to be due --
21 constitutional due process rights, that that punitive damage portion
22 would have to have a jury impaneled.

23 And so clearly we can't present the entirety of these
24 arguments if we are just receiving them within the last 60 days and some
25 of them two or three weeks ago. We don't know the -- we still don't

1 know the entirety. We haven't completed the ESI search.

2 THE COURT: Well, let's -- I didn't want to get into the merits,
3 I just want to know your initial thoughts, you know, on -- one way or
4 another. I mean if both of you are saying regardless of how I rule, we're
5 going to need to continue, I just need to know that sooner than later.

6 Mr. Roberts?

7 MR. ROBERTS: I think we would agree, Your Honor. We
8 would agree to vacate the trial date. I think that in fairness, regardless of
9 your ruling, there is additional discovery that Mr. Cloward's now entitled
10 to do. We might take exception to 85 depositions that he's indicated
11 he'd like to take, but --

12 THE COURT: Yeah. I --

13 MR. CLOWARD: I don't know if I said that.

14 MR. ROBERTS: -- that's not going to happen.

15 MR. CLOWARD: I don't know if I said that; did I?

16 MR. ROBERTS: Yes.

17 MR. CLOWARD: Eighty-five?

18 MR. ROBERTS: Yeah. It may have been Ian. I think you can
19 blame him, but I think 85 is --

20 THE COURT: All right. Anyway, that's not going to happen.

21 MR. ESTRADA: I thought it was more like 100.

22 MR. ROBERTS: But we -- I agree that the Court could vacate
23 the trial date if Plaintiff is okay with that.

24 THE COURT: How old is this case and do we have to worry
25 about a five year rule here?

1 MR. ROBERTS: I don't believe so, Your Honor. I think
2 we're --

3 MR. CLOWARD: A 2016 case, Your Honor.

4 MR. ROBERTS: -- 2016.

5 THE COURT: Can I have -- can we be more precise when in
6 2016?

7 MR. ROBERTS: Yes, Your Honor.

8 MR. CLOWARD: One moment, Your Honor.

9 UNIDENTIFIED SPEAKER: 2-3-2016.

10 MR. ROBERTS: 2-3-2016, Your Honor. So we'd be looking at
11 February '21, five year rule.

12 THE COURT: So but -- so this coming February from -- next
13 February it'll be four years, right?

14 MR. ROBERTS: Correct.

15 MR. CLOWARD: Correct.

16 THE COURT: Because right now I am booked solid through,
17 you know, about March, April next year.

18 All right. Let's just think about this and discuss it a little bit
19 more at the end of the day.

20 MR. CLOWARD: You've got it, Judge.

21 THE COURT: All right. Thank you, counsel.

22 MR. ROBERTS: Thank you, Your Honor.

23 THE COURT: All right. Let's proceed.

24 DIRECT EXAMINATION CONTINUED

25 BY MR. CLOWARD:

1 Q Okay. Mr. Bachmeyer, if we can just continue off on --
2 continue with exhibit 18. Do you remember receiving letters from an
3 individual by the name of Jerre Chopper?

4 A I do.

5 Q Okay. And, in fact, you agree on page Jacuzzi 005191, this
6 letter was actually written and got your attention, correct?

7 A Correct.

8 Q And, Mr. Bachmeyer, how often would you receive a letter
9 directly from a customer?

10 A Not often.

11 Q Do you agree, though, that if a customer actually takes time
12 to go and find out that you're the Director of Customer Service and
13 actually writes you a letter, that they should be taken seriously?

14 A Absolutely.

15 Q And do you believe that a customer in this situation should
16 be treated with respect?

17 A Yes.

18 Q Do you believe that Jacuzzi should at least thoughtfully
19 consider the concerns of its customers like Ms. Chopper?

20 MR. ROBERTS: Objection. Relevance.

21 THE COURT: It's sustained.

22 BY MR. CLOWARD:

23 Q Okay. In this letter you agree that Ms. Chopper is indicating
24 that she says, and I quote, in the third paragraph, last sentence, or
25 second sentence, she says, furthermore, this tub is a death trap for any

1 senior experiencing a medical emergency while bathing. It should be
2 recalled. Correct?

3 A That's her statement, yes.

4 Q Was there any discussion about her concerns, were they
5 taken seriously or not?

6 A I recall that it was.

7 Q Okay. What was discussed?

8 A I don't recall the exact wording to it, but I know that I asked
9 for some advice from Bob Rowan on this.

10 Q Okay. Did you also make Mr. Templar and Mr. Demeritt
11 aware of this situation?

12 A I don't recall.

13 Q Okay. But certainly a customer that's writing several letters
14 indicating that they're going to go to the U.S. Consumer Product Safety
15 Commission, that's something that in the ordinary course of business
16 you would defer to Mr. Demeritt and Mr. Templar, true?

17 A True.

18 Q Okay. Now, the next one is Jacuzzi 5236 in that same binder.
19 5235 and 5236. Just let me know when you're there.

20 [Witness reviews document]

21 A I'm sorry, I'm here. I'm there.

22 Q Okay. Now, you agree that this is a letter that's written to
23 Stacey Hackney of First Street, but you're copied as a recipient if you
24 look on page 52, Jacuzzi 005236, correct?

25 A Correct.

1 Q So you received a copy of this letter, true?

2 A I don't recall, but it would appear that it came to my
3 attention.

4 Q Okay. And in the second paragraph of the second page,
5 she's indicating that the tub is neither comfortable, convenient, or safe
6 for anyone suffering a medical emergency and she says I have a balance
7 problem and periodic blackouts, there was no way to get out. The door
8 opens inward and the pressure of the door would negate its opening. Do
9 you see where she writes that? Did I read that correctly?

10 A Yes.

11 Q Okay. So do you recall the discussions regarding this
12 particular matter that Jacuzzi had?

13 A I don't.

14 Q Okay. In a situation like this where a customer calls in, they
15 report something or they write a letter, they report something by letter,
16 and it's serious enough that you feel like you should forward it to Mr.
17 Demeritt and to Mr. Templar. As the issue continues to progress, are
18 you updating them with letters that continue to come in or is it just a
19 onetime conversation of here's this issue and then you never follow up
20 with them again?

21 MR. ROBERTS: Objection, Your Honor. This calls for
22 speculation. I think we've now gone from routine to trying to establish
23 that that original letter was actually sent and now it's whether they're in
24 follow-ups.

25 THE COURT: Well, it's not speculation because we're asking

1 -- he's asking, and I'm listening to whether -- what he knows, what's his
2 business practice, right, so it wouldn't be speculative there. But the
3 question was a little bit convoluted, but if you understand what he's
4 asking, I'll go ahead and let you answer that.

5 THE WITNESS: Would you please ask it again.

6 THE COURT: It is compound. It's hard for me to follow.

7 MR. CLOWARD: Yeah, it was. It was a bad question. I'll try
8 again.

9 BY MR. CLOWARD:

10 Q Okay. So if you look at the previous page, 5214, this was the
11 letter that was addressed directly to you. So it's Jacuzzi 005214.

12 [Witness reviews document]

13 A Correct. Yes.

14 Q Do you see the date in the top right-hand corner, it's dated
15 September 12, 2012, correct?

16 A Yes.

17 Q So as we progress in that calendar year, later on in the year,
18 on December 4, 2012, Ms. Chopper sends a letter now to First Street and
19 she copies you on the letter, so it's, you know, three months, about three
20 months later, and she's still voicing some concerns; do you see that?

21 A Yes.

22 Q So my question would be, in a situation like that, when you
23 receive one complaint from a customer and then a couple months later
24 you receive another complaint, are you then updating again Bill
25 Demeritt, and Ron Templar, and Bob Rowan saying, hey, here's this

1 issue again, or are you just not following up with those folks?

2 A Typically we would update them.

3 Q Okay. That's what you would do in your custom business
4 practice?

5 A Yes.

6 Q Okay. Now --

7 THE COURT: Is that for all types of customer or does it
8 depend on the seriousness?

9 THE WITNESS: Thank you. I'd like to expand on that if I
10 could because some things would absolutely -- excuse me -- would go to
11 engineering, R&D, sales and marketing if it pertained more to something
12 that was in their part of the business, so to speak, if it was anything with
13 design.

14 BY MR. CLOWARD:

15 Q Okay. And I think in your deposition you testified that unless
16 it was a very basic question, like hey, can I get the tub in a different color
17 or something along those lines, you're going to forward to the
18 appropriate teams, correct?

19 A I don't believe that's correct, no.

20 Q Okay. Well, I'm going to find that deposition testimony and
21 we'll come back to it.

22 A Okay.

23 MR. CLOWARD: Ian, can you try and track that for me?

24 BY MR. CLOWARD:

25 Q Okay. Now, in tabs 19 through 32, this is going to go kind of

1 quick because 19 through 32 these are a lot of the same -- these are a lot
2 of the same complaints from a customer survey. First, we turn to tab 19.

3 MR. CLOWARD: And, Brandon, if you can pull up tab 19,
4 we're going to look at Jacuzzi 005298.

5 BY MR. CLOWARD:

6 Q All right. Now, again, this is an email you agree from Audrey
7 to Mr. Rowan, Mr. Davis, and yourself on June 4, 2013, including some
8 customer surveys from First Street, correct?

9 A Correct.

10 Q All right. Now, what I want to do is talk about the actual
11 survey itself.

12 MR. CLOWARD: So, Brandon, if you'll go to Jacuzzi 005301.

13 BY MR. CLOWARD:

14 Q Okay. For instance, in tab 19, you agree that the survey has
15 been entered into this Excel spreadsheet and kind of summarized by
16 someone at First Street, correct?

17 MR. ROBERTS: Object to form. Foundation.

18 THE COURT: Sustained. Lay some foundation for that.

19 MR. CLOWARD: Sure.

20 BY MR. CLOWARD:

21 Q Mr. Bachmeyer, what is your understanding of the source of
22 the information contained in the Excel spreadsheets that were forwarded
23 by First Street?

24 A That it was information that they had received on their
25 surveys and then provided to us in a spreadsheet.

1 Q Okay. And, in fact, if you look at Jacuzzi 005300, it's just a
2 page right before that --

3 A Yep.

4 Q -- you can see some handwritten notes where customers
5 wrote certain things, correct?

6 A Correct.

7 Q So let's just focus one moment on this last one where it says,
8 one thing I would change about the Jacuzzi walk-in tub is the spout. I
9 would like it to swivel. So keep that in mind.

10 MR. CLOWARD: Now, Brandon, if we go to the spreadsheet.

11 BY MR. CLOWARD:

12 Q Now, you see this comment by this last individual at page --
13 line 30 where it says I would like the spout to swivel?

14 A Yes.

15 Q Okay. So does that help you, I guess, understand where the
16 source of the information contained in this spreadsheet came from?

17 A Yes.

18 Q And where would that be?

19 A It came from First Street.

20 Q Okay. Customer surveys, true?

21 A True.

22 Q Okay. So what I want to do is now there are various tabs that
23 correspond with these specific complaints. So rather than go through at
24 the tab, we'll just kind of point something out and folks can follow along.
25 In particular you see an individual talking about on line 18 saying the

1 surface is too slippery, the tub is -- the seat in the tub is very slippery; do
2 you see that?

3 A Yes.

4 Q And so your understanding would be that would be a
5 customer complaint or customer concern or suggestion?

6 A A comment, yes.

7 Q A comment. And then on line 14, the surface is too slippery.
8 Again, you agree that would be a customer --

9 A Comment.

10 Q -- comment?

11 A Yes.

12 Q Let's see. At 15, customer indicating that the door was not
13 wide enough. That's a customer comment, right?

14 A Yes.

15 Q Customer 21 making a suggestion of having both left and
16 right extra hand grabbers on the front of the tub to help hold and let
17 down. Do you agree that's a customer comment?

18 A Yes, I do.

19 Q Okay. And an individual on 26 indicating that it takes too
20 much water to fill, so the fill time -- but then the surface is too slippery.
21 And then the comment is, the drain very hard to work with wet hands,
22 floor very slippery, takes way too long to fill, correct?

23 A Correct.

24 Q Now, in this one in particular, 26, I want to focus on that for a
25 moment. If you'll turn to tab 26 -- let me see. Oh, no, I'm sorry. Hold on

1 one moment. It's line 26, but it's tab 32. I'm sorry.

2 MR. CLOWARD: The Court's indulgence, one moment. I'm
3 sorry, Your Honor.

4 THE COURT: That's all right.

5 [Pause]

6 BY MR. CLOWARD:

7 Q Oh, yeah. Okay.

8 MR. CLOWARD: So, Brandon, if you'll go to 32, the very first
9 date.

10 BY MR. CLOWARD:

11 Q Okay. Now, Mr. Bachmeyer, this is an email from Norm
12 Murdock to yourself and Audrey Martinez, correct?

13 A To Regina, and myself, and Audrey, correct.

14 Q And now, this one is a little bit different because this is open
15 incident report for AITHR, correct?

16 A Correct.

17 Q So the name of this document indicates that these are not
18 First Street incidents from the incident report, but these are open
19 incidents with regard to AITHR, true?

20 A As I understand it.

21 Q Okay. And, again, this has an Excel spreadsheet attached,
22 true?

23 A True.

24 Q Okay. So let's work our way through that. Specifically, if
25 you'll turn to Jacuzzi, it's just the next page, so it's Jacuzzi 005285, and

1 this was the spreadsheet that was attached to that email, correct?

2 A It's going to have to be brought up a little bigger here. Okay.

3 Q You agree with that, right?

4 A Yes.

5 Q And this was -- these were incidents -- okay, this is what
6 we're missing. Now, if you look here, this woman by the name of
7 Catherine Reynolds, the subject is, quote, customer feels tub is too
8 slippery. Is suggesting that we offer a mat that fits the tub. What she
9 has bought doesn't fit. Will you try to find a mat for her? Did I read that
10 correctly?

11 A Yes.

12 Q Okay. Now, do you see anything in this entry that she fell?

13 A No.

14 Q Or that she slipped?

15 A No.

16 Q You just see that she says that she thinks the tub is too small,
17 then, right?

18 A Correct.

19 Q Okay. So now let's turn to page Jacuzzi 005295. Do you see
20 where she indicates that she has actually slipped twice in the tub?

21 A Correct.

22 Q You'd agree with me that that letter of detail was not in that
23 Excel spreadsheet, true?

24 A True.

25 Q And then if you also turn to page Jacuzzi 005689 --

004884

004884

1 A Okay.

2 MR. CLOWARD: Pull it up just a little bit more, Brandon,
3 please. Thank you.

4 BY MR. CLOWARD:

5 Q The subject is my tub is very slippery on the bottom, true?

6 A True.

7 Q And she indicates that the bottom of her tub is slick as glass,
8 correct?

9 A Correct.

10 Q And she indicated that she cannot use the tub because the
11 bottom is very slippery, true?

12 A True.

13 Q So she's requesting information by way of a mat taken, can I
14 get a mat, can I get something to put on the bottom of this tub, true?

15 A True.

16 Q You agree that she's demanding that something be done.
17 She's not just calling up to tell you about the tub, she's actually
18 requesting something, correct?

19 A True.

20 Q Okay.

21 MR. CLOWARD: Now, Brandon, if you could pull up the
22 brochure and scroll through I think it's page maybe 6. So then let's do 7.
23 Sorry, 8. It's the one with the statistics on the side there. Okay, thank
24 you.

25 BY MR. CLOWARD:

1 Q Okay. You're aware that this is a leave behind packet that is
2 provided to customers, right?

3 MR. ROBERTS: Objection. Foundation.

4 THE COURT: What -- it's sustained. Also, what exhibit
5 number is this?

6 MR. CLOWARD: This is going to be -- it's my office is
7 delivering --

8 THE COURT: What tab number?

9 MR. CLOWARD: It's not in the tabs.

10 THE COURT: Okay. All right.

11 MR. CLOWARD: This is an additional document.

12 THE COURT: All right. Let's find out if he knows what this is.

13 MR. CLOWARD: Okay.

14 BY MR. CLOWARD:

15 Q Mr. Bachmeyer, do you remember during your deposition
16 when we talked about statistics and methods of sales that were used at
17 the dealer conferences?

18 A Yes.

19 Q Okay. Remember how we talked about how statistics
20 regarding falls were used with the customer?

21 A Yes.

22 Q Okay. And you'll agree that Jacuzzi tells folks that in the next
23 17 seconds an older adult will be treated in the emergency department
24 for injuries related to a fall and then in the next 30 minutes an older adult
25 will die from injuries sustained in a fall. And that most falls occur in the

1 bathroom getting in and out of the tub, correct?

2 MR. ROBERTS: Objection. Foundation.

3 THE COURT: Yeah. So are you asking -- you've got to be a
4 little more clear in your question here. I don't know if you're asking him
5 if that's what the document says or if he knows this was -- you know, if
6 he knows that this is in the literature of Jacuzzi or what. You know find
7 out. Let's lay some foundation.

8 MR. CLOWARD: Sure, absolutely.

9 BY MR. CLOWARD:

10 Q Mr. Bachmeyer, at your deposition you agreed that falls and
11 slipping in the bathroom was a very serious safety concern, true?

12 A Yes.

13 Q And, in fact, you use that as a method to induce folks to buy
14 the tubs, correct?

15 MR. ROBERTS: Objection. Objection. Foundation.
16 Mischaracterizes a generated document.

17 THE COURT: Well, overruled. You can deal with that on
18 cross, all right? Go ahead.

19 THE WITNESS: I certainly don't.

20 BY MR. CLOWARD:

21 Q Okay. Remember when you talked about the 2012 top selling
22 tips at the dealer conference? We received a recap of that conference
23 during your deposition?

24 A I did, and I let you know that I did not attend any of the dealer
25 conferences, as well.

1 Q Okay. And the question that I asked you was, do you agree
2 that you were provided with a document that was in summary of the
3 dealer conference that had taken place in 2012, right?

4 A I believe I said I did.

5 Q Okay. So the document was a summary of what was said at
6 the conference, right?

7 MR. ROBERTS: Objection. Foundation.

8 THE WITNESS: I wasn't there.

9 BY MR. CLOWARD:

10 Q Okay.

11 THE COURT: All right. He's already answered. Let's go
12 ahead.

13 MR. CLOWARD: Okay.

14 BY MR. CLOWARD:

15 Q Do you remember in that document one of the top selling
16 tactics was to instill fear among the elderly?

17 MR. ROBERTS: Objection. Foundation.

18 THE COURT: Well --

19 MR. ROBERTS: And ambiguous as to who used that tactic.

20 THE COURT: He's just asking him if he knows that that
21 statement was in the document, so overruled. I'll allow him to --

22 THE WITNESS: It's on the statement, yes. I saw that.

23 BY MR. CLOWARD:

24 Q Okay. Now,

25 THE COURT: Whether it's true or not, I don't know, but his

1 statement was in there. All right.

2 MR. CLOWARD: Okay.

3 BY MR. CLOWARD:

4 Q What I'm trying to do is lay a foundation that at your
5 deposition when I asked you about the Catherine Reynolds situation,
6 where she said that she slipped twice, and I asked you if that's
7 something you would have said to risk management, you said yes, I
8 would have, looking for their guidance; you agree with that, right?

9 A Yes.

10 Q And the reason that you send those types of things to risk
11 management is because of the potential of injury that Jacuzzi even
12 educates the consumer of slipping and falling in the bathtub, right?

13 MR. ROBERTS: Objection. Foundation.

14 THE COURT: Overruled. He can tell us his own state of
15 mind. Go ahead.

16 THE WITNESS: Say the question one more time, please.

17 THE COURT: What's the reason why you do it, send the
18 information to risk management? That's the question.

19 THE WITNESS: Oh, okay. Because I need guidance on how
20 to respond.

21 BY MR. CLOWARD:

22 Q Okay. And in addition to the information we've already
23 covered, if you want to go to 5293 in that same binder.

24 MR. CLOWARD: Actually, we'll move past that one, Your
25 Honor.

1 THE COURT: All right.

2 BY MR. CLOWARD:

3 Q I guess just a general question. Do you agree that in that
4 chain of emails, both First Street and the dealer, Beldon, were asking for
5 Jacuzzi's input on how to respond to Ms. Reynolds' complaints that the
6 tub was too slippery?

7 A Without reviewing the entire string and seeing the very last
8 portion, I believe that's correct.

9 Q Okay. And, in fact, on page Jacuzzi 5288 --

10 A Which tab?

11 Q It's the same tab, 32.

12 THE COURT: You said 5288, right?

13 MR. CLOWARD: Correct, Your Honor.

14 THE COURT: All right. I'm there.

15 BY MR. CLOWARD:

16 Q You agree that Ms. Reyes, Regina, sent an email to yourself,
17 Audrey, and someone named Debbie Morabito, and said hey, there's a
18 proposed response, we don't have training on this topic, but, you know,
19 here's a response, what do you think, correct?

20 A Correct.

21 Q And you agree that you would have sent that email before
22 just disseminating that standard statement, that you would have sent
23 that to Mr. Templar and Bill Demeritt to get their guidance on that
24 response, true?

25 A Prior to that I would have sent that to engineering.

1 Q Okay.

2 MR. CLOWARD: Can you turn up --

3 THE WITNESS: Just to understand, I have no compliance.

4 BY MR. CLOWARD:

5 Q Okay. But you agree, so you would have sent it to both,
6 engineering and to risk management and legal, true?

7 A Eventually, yes.

8 Q Okay. And you actually agreed with that in your deposition?
9 You would have sent that to have legal and risk management review the
10 proposed response before disseminating that, true?

11 A True.

12 Q Okay. Now, if we could go to tab 34.

13 MR. CLOWARD: And, Your Honor, before I forget, I would
14 like to move into evidence volume 1 and 2 of the master OSIs, and --

15 THE COURT: Remind me what OSI stands for?

16 MR. CLOWARD: Other similar incident.

17 THE COURT: Oh, okay.

18 MR. CLOWARD: So it's the two -- basically, the binders that
19 we're going through, so I'd just ask that those be moved and admitted
20 into evidence for purpose of this evidentiary hearing.

21 MR. ROBERTS: We --

22 THE COURT: Not coming in for purposes of the truth of the
23 matters asserted therein, but only for the purpose of, as relevant to the
24 issue of whether Jacuzzi had the information that's in these documents?

25 MR. CLOWARD: Yeah.

1 MR. ROBERTS: So we would agree, subject to a motion to
2 strike, if he doesn't actually get them all into evidence.

3 THE COURT: I think that's what he's --

4 MR. ROBERTS: Right. But I think he's asking to have them
5 all put into evidence without any testimony. I mean, we've only laid the
6 foundation for the first 34 and we got --

7 THE COURT: Right.

8 MR. ROBERTS: -- I think 156 altogether.

9 MR. CLOWARD: Well, I have --

10 THE COURT: Well, but they're Jacuzzi documents, right?
11 You produced them, and so -- I mean, the question is would Jacuzzi have
12 notice of all of the information that's in the documents, and I think it's --

13 MR. ROBERTS: Yeah.

14 THE COURT: -- necessarily so if they're in our business
15 records and were produced in this case.

16 MR. ROBERTS: Correct. I have -- we just got the exhibits --

17 THE COURT: I mean, is there something --

18 MR. ROBERTS: -- this morning, Your Honor.

19 THE COURT: Okay.

20 MR. ROBERTS: I hadn't even looked at volume 3 yet.

21 THE COURT: So let's accept --

22 MR. ROBERTS: To the extent they were produced by Jacuzzi,
23 we'll, of course, agree to their authenticity, and subject to objections,
24 which we have standing to relevance, prejudice outweighs probative,
25 and other reasons why we would object, and have objected, we -- you

1 understand why it's sort of a trick question?

2 THE COURT: I'm admitting them, subject to any motion to
3 strike, based upon any of the objections you've raised so far, or any
4 standing objections that I've given you.

5 MR. ROBERTS: Thank you, Your Honor.

6 THE COURT: All right.

7 MR. ROBERTS: With that understanding, I'm okay with it.

8 MR. CLOWARD: Thank you.

9 THE COURT: So they're conditionally admitted. Admitted
10 subject to any later motion to strike. And that's which numbers again?
11 It's volumes -- all of volumes 1 and 2 --

12 THE CLERK: Okay.

13 THE COURT: -- which are tabs what? Volume 1 is tab 1
14 through 75 and volume 2 tab 76 through 156.

15 THE CLERK: And they're all objected to?

16 THE COURT: Yes. There are objections to those, and I'm
17 admitting to conditionally, subject to a motion to strike, based upon the
18 objections that he's asserting now. We'll discuss how to write that up
19 later. Okay.

20 THE COURT: Let's go ahead.

21 MR. CLOWARD: We would also like because, you know, and
22 to the extent that this becomes an appellate issue, we would like to move
23 in the spreadsheet that was prepared by my office pursuant to the charts
24 and summaries evidentiary statute that allows us to summarize, and so
25 we would like to also admit that, so --

1 THE COURT: Well, I'm not going to admit it as an exhibit.

2 What I'll do is admit it as a --

3 MR. CLOWARD: Left-sided filing?

4 THE COURT: Well, a court -- well, either left-side filing
5 or -- well, I'm going to mark it as a Court exhibit.

6 MR. CLOWARD: Okay. Perfect.

7 THE COURT: Okay. So it's a Court exhibit, not admitted into
8 evidence.

9 THE CLERK: Can I get a copy, Mr. Cloward?

10 MR. CLOWARD: Yes.

11 THE CLERK: Is it in the binder?

12 THE COURT: I got one. You can take mine. She's got it.
13 Let's keep going.

14 MR. CLOWARD: Okay. You got it, Judge.

15 BY MR. CLOWARD:

16 Q Okay. Now, next up tab 34. Mr. Bachmeyer, you agree here
17 that this customer Mr. Branic [phonetic] is calling indicating that the floor
18 is very slippery. He's upset and he wants a free bathmat or something to
19 make it slip resistant, true?

20 A True.

21 Q Now, Exhibit 25, specifically, page 53 -- Jacuzzi 005314.

22 A Okay.

23 Q You agree that this individual called, and she had slipped on
24 her tub and hit her arm on the grab bar, and she was requesting that
25 Jacuzzi send her a mat, or at that point she was requesting that Aging

1 and Home request her a mat to put in the bottom of the tub, so it's not so
2 slippery, true?

3 A Hang on one second.

4 Q You got it?

5 A Correct.

6 Q And Mr. Murdock forwards the request to yourself -- or
7 excuse me -- to Audrey Martinez and to Ray Torres, and then Audrey
8 forwards the email to yourself and Regina, correct?

9 A Correct.

10 Q You agree that she's specifically requesting that action be
11 taken, true?

12 A True.

13 Q She's making a claim or demand that something be done,
14 true?

15 A True.

16 Q And in particular she demanded that Jacuzzi send her a mat
17 to put in the bottom of her tub, true?

18 A True.

19 Q Now, on Jacuzzi 5314, that's the first page. You agree that
20 when Norm sent this email to Audrey, Norm said, and I quote, "We
21 continue to have these issues and complaints with poor slip resistance.
22 We need a better alternative. Thoughts?"

23 A Yes.

24 Q True? And all of these that we've gone through, all of these
25 took place before Ms. Cunnison's February 2014 incident, correct?

1 A Correct.

2 Q Now, on page Jacuzzi 5435, there's some discussion about
3 this claim between Regina, yourself, and Audrey, and Ms. Reyes says,
4 and I quote, "If she uses strips, they peel back after a while, and this is
5 not the same customer. Not the same customer in line 2 that says he
6 has sent her a gift card. Her complaint is that she cannot find a mat
7 small enough to fit the area."

8 So you agree that there are actually two people, at that time, that
9 were complaining and requesting that they have a bathmat?

10 A That's what it appears.

11 Q Now, if you want to take a moment and thumb through
12 Jacuzzi 005638 -- and I'm sorry, this is tab 36, Mr. Bachmeyer. I
13 apologize. So it's Jacuzzi 005638 through Jacuzzi 00546. And if you'll
14 just thumb through those. We discussed this during your deposition, but
15 it's a little bit of a confusing email chain.

16 [Witness reviews document]

17 Q Have you had a chance to familiarize yourself with those
18 emails?

19 A I'm good. Yeah.

20 Q Okay. You notice in the subject line of 5645 the subject line
21 in the original email is October 15, 2013, so again, before Ms. Cunnison.
22 The subject is, "Slippery floors walk-in-tubs," from
23 SteveBuckley@AtlasHomeImprovement.com, correct?

24 A Correct.

25 Q And Atlas Home Improvement that was a dealer that

1 distributed tubs for Jacuzzi, correct?

2 A Correct.

3 MR. CLOWARD: So now, Brandon, if you could go to the
4 next page 5645.

5 BY MR. CLOWARD:

6 Q So the first email that is sent is from Steve Buckley of Atlas.
7 And his email says, "We're having a few customers slipping on the
8 bottom of the Jacuzzi tub. I am wondering if you have any
9 recommendations on product or bathmat suitable for this issue. Looking
10 for something easy for the elderly." He also talks about and asks, "Also,
11 are we able to purchase and install the top-mounted grab bar on existing
12 installs. This may help as well."

13 Did I read that correctly?

14 A Correct.

15 Q And you received a copy of this email at some point and it
16 was forwarded to you, correct?

17 A It appears, yes.

18 Q And there was some discussion internally about what would
19 be potential solutions, correct?

20 A Correct.

21 Q All right. And if a dealer sent you an email, or you received
22 an email from a dealer saying hey, we have several customers that are
23 slipping on this. We need some guidance. You agree that's a safety
24 concern that would be forwarded to the additional folks in the case, or in
25 the matter: Mr. Demeritt --

1 A In the company.

2 Q -- and Mr. Templer, correct?

3 A It should

4 MR. ROBERTS: Objection. Form.

5 THE WITNESS: Excuse me.

6 THE COURT: Overruled. Go ahead.

7 BY MR. CLOWARD:

8 Q Correct?

9 A It should.

10 Q Now, if you go to tab 37, same thing here.

11 MR. CLOWARD: Brandon, if you'll pull up 5666, it's Jacuzzi
12 005666.

13 BY MR. CLOWARD:

14 Q Here, there's a dealer, Melanie Borja, of Air Tight, that says, "I
15 have so many people stating the tub seat and floor are extremely
16 slippery, literally unsafe. Is there any type of mat, or something that we
17 can do to help with this issue? I tried to find online anything to help, but
18 nothing the size we need," true?

19 A True.

20 Q And you were made aware of that email, right?

21 A Yes.

22 Q Because you were copied on page 5666, correct?

23 A Correct.

24 Q And if a dealer like Melanie Borja from Air Tight were to send
25 in an email saying, "Hey, I have so many people stating that the tub seat

1 and floor are extremely slippery, literally unsafe," that's the type of thing
2 that you would forward to Mr. Demeritt and Mr. Templer, true?

3 A After I get information from engineering, correct.

4 Q Okay. Now, let's go to tab 39.

5 MR. CLOWARD: And Brandon, if you'll pull up Jacuzzi
6 005867.

7 Actually, Your Honor, I'm sorry, but I need to go back to 38. I
8 hate to re-plow -- or 37.

9 5666, Brandon.

10 BY MR. CLOWARD:

11 Q You agree that internally, in response to Mr. Borja's email,
12 Regina's response to yourself, Audrey, and Deborah is that, "We
13 continue to receive this feedback," true?

14 A True.

15 MR. CLOWARD: Now, we can go to 39.

16 BY MR. CLOWARD:

17 Q On Jacuzzi 005867, you agree this individual named Ms.
18 Perilou [phonetic] from Kenner, Louisiana, "Slipped on tub floor and seat
19 once she only used tub three times," true?

20 A That's what this says, yes?

21 Q And on page Jacuzzi 005856, alternate site REV Jacuzzi
22 005967, the last page of that Exhibit 39 on the right hand she indicated
23 that she was afraid to use the tub, true?

24 A Yes.

25 Q You agree that if you review pages 5865 through 5867 in the

1 case comments, it appears as though there are emails sent from various
2 individuals, like we went over in the example number 6, correct?

3 A Yes.

4 Q Okay. And you wouldn't know whether things have been
5 produced in discovery or not, would you?

6 A No.

7 Q Now, tab 41 --

8 MR. ROBERTS: Ben, could I object here?

9 Your Honor, I was thinking about the proposal to move these
10 into evidence, and --

11 THE COURT: Okay.

12 MR. ROBERTS: -- I may have reflexively been overbroad in
13 my objection.

14 THE COURT: Okay.

15 MR. ROBERTS: I think that there's a big difference now,
16 upon reflection, between admitting that these would be admissible at
17 trial, or admitting that these should have been produced versus having
18 them in front of the Court for the Court's consideration of those issues,
19 and therefore --

20 THE COURT: But they're not admitted for trial.

21 MR. ROBERTS: Right. Therefore, if it would help, and
22 reserving any objection that they're admissible at trial, for the purposes
23 of this hearing, we would stipulate that Exhibits 1 through 140 -- excuse
24 me -- 1 through 139 are admitted for the purposes of this hearing, and
25 that that they are authentic, and that they went to the Jacuzzi individuals

1 who are indicated as receiving them as to, from, and CC on the email.
2 And if that would assist in expediting the hearing, then we would agree
3 to that, and that if there are any further questions about who they were
4 provided to and when, it's not reflected in the documents, so that could
5 certainly be inquired into the witnesses.

6 The only reason that I accepted 140 through 156 is that it
7 appears those documents were produced by First Street and not Jacuzzi,
8 and therefore, I do feel it'd be appropriate evidential foundation, as to
9 whether Jacuzzi knew about those, and when they were provided to
10 Jacuzzi.

11 THE COURT: Anything you want to add on that, Mr.
12 Cloward?

13 MR. CLOWARD: Let me confer with counsel one moment --

14 THE COURT: Uh-huh.

15 MR. CLOWARD: -- but our --

16 MR. ALLEN: One second here.

17 [Plaintiff's counsel confer]

18 MR. CLOWARD: I guess to the extent -- I have several
19 concerns. Number one, if the standard is clear and convincing, if that's
20 the standard that the Court is -- the lens that the Court is going to view
21 this through, then I wouldn't want to belabor the process, but, you know,
22 it would be important for me to create the evidentiary record on these
23 issues.

24 If counsel agrees that they are able to be stipulated and
25 moved into evidence, I think that in argument I can make some of those

1 arguments. My plan was only to go -- we're still in the priors. We've
2 only touched on the priors. We haven't even gotten to the subsequent. I
3 think there are two or three more priors, and then I was going to shift
4 gears and go into another line of inquiry, but I guess I want to know
5 specifically what the very specific stipulation that counsel is proposing
6 so that I understand what he's proposing, whether they come in just for
7 this hearing, whether --

8 THE COURT: I think he's proposing that 1 through 139 are
9 admissible for purposes of this hearing only, and for purposes of
10 showing that these documents were part of Jacuzzi's business records
11 that they were produced at some point in time in discovery; that the
12 documents are authentic; to the extent the documents show to and from;
13 that that information is not disputed. And I don't know if his stipulation
14 was broader than that. Did I -

15 MR. ROBERTS: Also, the people receiving CCs --

16 THE COURT: -- capture --

17 MR. ROBERTS: -- received the CCs.

18 THE COURT: Right. So these are documents that were in the
19 records. They have knowledge of these documents; notice of the
20 information in the documents. They were sent from the people that they
21 purport to be sent from. They were received by the people that
22 purportedly received them, including the CCs. And the documents are
23 authentic and genuine. I think that's the scope of your stipulation,
24 correct?

25 MR. ROBERTS: Yes, Your Honor.

1 THE COURT: And they can be used --

2 MR. ALLEN: And as well, with --

3 THE COURT: -- they can be used in this proceeding for those
4 purposes and for my review, as to the issues relating to notice, and
5 timeliness of production, and scope of production?

6 MR. ROBERTS: Correct.

7 THE COURT: Is that correct?

8 MR. ROBERTS: Correct, Your Honor.

9 THE COURT: Okay. 140 --

10 MR. CLOWARD: I guess --

11 THE COURT: -- through 156, sounds like you are
12 withdrawing, for the moment, your stipulation to admit those and we
13 can deal with that when we get to those. Does that work?

14 MR. CLOWARD: No.

15 THE COURT: Okay.

16 MR. CLOWARD: I'm sorry. I'm confused.

17 THE COURT: All right.

18 MR. CLOWARD: I'm sorry, Your Honor. I don't know how we
19 went from having a stipulation that they're admitted to now --

20 MR. ROBERTS: Well, actually, they were conditionally
21 admitted, subject to my objections, and subject to a motion to strike.
22 And after thinking about what the judge said the fact that they should
23 come into evidence regardless of whether or not they were discoverable,
24 regardless of not whether they complied with the court order and should
25 have been produced, due to a court order. It's the judge who has to

1 make that decision, based on the document, so therefore, their properly
2 admitted in this proceeding, even if we object to their relevance at trial,
3 and so right --

4 THE COURT: Yeah. So let me just summarize this as easily
5 as I can. And the parties -- Mr. Roberts stipulates to admissibility of
6 these documents for the limited purpose of the issues in this evidentiary
7 hearing, and not for purposes of trial. He reserves all objections at trial
8 that he may believe are appropriate and this stipulation applies to
9 Exhibits 1 through 139.

10 As to 140 through 156, we'll deal with those, if and when we
11 get to those in this proceeding.

12 MR. CLOWARD: Okay.

13 THE COURT: Correct, Mr. Roberts?

14 MR. ROBERTS: Correct.

15 MR. CLOWARD: The other thing that I would ask --

16 THE COURT: All right. So for my court clerk, they're
17 admitted without objection for this proceeding, but all objections are
18 reserved for trial.

19 THE CLERK: Okay.

20 THE COURT: Very good. And that's 1 through 139.

21 THE CLERK: Okay.

22 [Plaintiff's Exhibits 1 through 139 admitted into evidence]

23 THE COURT: All right. What else?

24 MR. CLOWARD: The other --

25 THE COURT: We got to get going on this, Counsel.

1 MR. CLOWARD: I understand. The other issue that I had
2 was, as long as there's an agreement regarding the dates of the
3 complaints, so I'm trying to go through --

4 THE COURT: Yeah, he stipulated as to date, and to and from,
5 and CCs.

6 MR. CLOWARD: Okay. So for instance, just for the record
7 tab 1 through 42 are priors. And then tab 43 through -- we'll use his
8 number of 139, are subsequent, but in addition to 139 being subsequent,
9 additionally, 140 through 156 are also subsequent potentially.

10 THE COURT: You've made your record, so let's continue.

11 MR. CLOWARD: Okay.

12 BY MR. CLOWARD:

13 Q So, Mr. Bachmeyer, if you'll turn to tab 41. This is just an
14 additional email regarding the Flashberger incident. You agree that you
15 received this email December 30, 2013, true?

16 A True.

17 Q And in this email it actually indicates there is another email
18 trail going around that Megan is going to be adding you to the
19 distribution list. "We have a big issue and we are only pointing finger,
20 per se, but due to circumstances involved with the timeline and slip
21 injuries," plural, "this needs to be settled so I'm keeping you in the loop,"
22 true?

23 A That's what it says, yes.

24 Q So that's a whole another incident, in addition to Flashberger
25 where, at least, potentially two slip injuries have taken place that Ms.

1 Regina Reyes says, "Is a big issue," correct?

2 A That's what it says, correct.

3 Q You received this email, right.

4 A Yes.

5 Q Do you remember what the additional email said by Megan
6 Davis was?

7 A I do not.

8 Q And certainly, this would have been something if there are
9 slip injuries that you're going to get Mr. Demeritt and Mr. Templer
10 involved, true?

11 A Yes.

12 Q Now, the next is tab 42. This is the Salesforce document.
13 This is January 22nd, 2014. You see again how in the case comments
14 there appear to be emails from outside Jacuzzi system to internally,
15 specifically, on the bottom left hand Ashley Davidson at AIHR
16 Remodelers internally to Deborah Nuances at Jacuzzi.com and Regina
17 Reyes, true?



18 A Yes.

19 Q And do you know whether those emails have ever been
20 produced in this litigation?

21 A I do not.

22 Q Okay. You agree in this case, this individual is unhappy with
23 the product because she slips off the seat and has to hold onto the
24 handle to take a bath, and she said the floor is also slippery when there's
25 soap on the floor, true?

1 A Yes.

2 Q She also indicates on the next page 005869 that the door is
3 too narrow, and she has to move around then she is in the unit -- after
4 she is in the unit to be able to close the door, correct?

5 A Correct.

6 Q So she's having an issue with the door getting in and out,
7 you agree, true?

8 A Yes.

9 Q Now, the next page is her handwritten survey. You agree
10 this is a handwritten customer service satisfaction survey, true?

11 A Yes.

12 Q So do those surveys get input into the Salesforce database?

13 A I don't know.

14 Q You do, in fact, receive handwritten customer satisfaction
15 surveys, though, true?

16 A Some, yes.

17 Q Okay. In particular, I guess, what are the types of surveys
18 that Jacuzzi would receive?

19 A I was just copied on certain portions of the survey.

20 Q Okay. Did First Street send through, either Norm Murdock or
21 Simona Robertson, send emails to Jacuzzi with serious surveys, like,
22 hey, this customer has a safety consideration here?

23 A I don't know.

24 Q So for instance, if you turn to exhibit -- it's the second
25 binder -- we're going to tab 140.

1 A Okay.

2 Q For instance, this individual indicates that he -- that the floor
3 is slippery and the seat, and he's afraid of it. Is that something that
4 generally First Street would pass on to Jacuzzi?

5 A I would think.

6 Q Okay. And Exhibit 40 -- 141, an individual indicating that the
7 floor of the tub was slippery when wet, and that it requires a bathmat for
8 safety. He did not feel that the tub met his expectations as advertised as
9 nonslip. Would you agree that would be something that would be
10 passed along to Jacuzzi?

11 A Yes.

12 Q And 142, an individual that says that the first time they got in
13 the tub, they fell flat to the floor. Would you agree that that's something
14 that First Street would share with Jacuzzi?

15 A Yes.

16 Q And 143, an individual that says I was very surprised the tub
17 came with nonskid on floor and seat of tub. Called Aging in the Home
18 Remodelers and Jacuzzi -- or, no, it doesn't say -- called Aging in the
19 Home Remodelers. They sent someone to install nonskid pillow or seat.
20 Where was the planning in production? Even one advertised has that.
21 See enclosed. This is safe, question, question, question. Was this an old
22 tub? Was this a reject? Is that something that would have been
23 forwarded from First Street to Jacuzzi?

24 A I believe so.

25 Q 144, this individual says, quote, I find the floor of the tub very

1 slippery. Again, safety consideration that would be forwarded from First
2 Street to Jacuzzi?

3 A Yes.

4 Q 145, the door should open out, not in. It's too confining to
5 get into the tub. It takes too long to fill with water. Bottom of tub, plus
6 seat, are slippery. That's also something that would be forwarded from
7 First Street to Jacuzzi?

8 A I would typically think yes.

9 Q And 146, very poor follow-up after installation. Were told
10 that a follow-up or would have someone come out to apply something
11 on the floor of the tub to handle the slippery surface. Still did not hear.
12 Would that be something that First Street would pass along to Jacuzzi?

13 A Potential --

14 MR. ROBERTS: Objection. Foundation.

15 THE COURT: Overrule. I think he pretty much has opened
16 the door on this by saying repeatedly, in the prior questions, that certain
17 things would have been expected to be passed on to Jacuzzi from First
18 Street. And so I'm going to go ahead and allow him to finish answering
19 this question. If you want to put someone from First Street on Mr.
20 Roberts -- if you want to put someone on from First Street to state that
21 they didn't pass these surveys on to Jacuzzi, I think you can do that.

22 MR. ROBERTS: Thank you, Your Honor.

23 THE COURT: All right? All right.

24 BY MR. CLOWARD:

25 Q And, sir, you agree that this is, again, something that First

1 Street would pass along, the type of thing that First Street would pass
2 along to Jacuzzi, correct?

3 A I would think so.

4 Q Okay. And in fairness, we're going to get to the surveys
5 where there's a compilation, and the statistics, and all the things that are
6 recorded.

7 A Okay.

8 Q And we talked about that here in your deposition. So we'll
9 get to that in a minute. But let's just finish this. 147, again, this
10 individual, Dorothy Costo [phonetic], is indicating the floor is slippery.
11 This set too low, maybe seat too low. Do you agree an individual
12 conveying a safety consideration that a floor is slippery would be
13 something that First Street would pass along to Jacuzzi, true?

14 A I believe so, true.

15 Q 149, an individual that says I almost slid off seat first time,
16 and almost didn't get out. Without the pillow, I would not be able to use
17 it at all. Certainly an individual that almost slid off the seat and almost
18 didn't get out of the tub would be something that would be passed from
19 First Street to Jacuzzi, true?

20 A I believe so.

21 MR. CLOWARD: Oh, I'm sorry, Your Honor, I misspoke.
22 That's 148, not 149, just so the record is clear.

23 THE COURT: Okay. Thank you --

24 MR. CLOWARD: Thank you.

25 THE COURT: -- for clarifying.

1 BY MR. CLOWARD:

2 Q Now, one 149, this individual says I have fallen off the seat
3 and ended up in tub. Had to call for help to get me out. Do you see that?

4 A I believe so. I think I know what you're getting to, yes.

5 Q I have fallen off the seat and ended up something tub --

6 A In the tub.

7 Q -- in the tub. Had to call for help to get out. You agree that
8 someone that has to call for help to get out of the tub would be
9 something that First Street would pass along to Jacuzzi, true?

10 A I would suspect that, yes.

11 Q And in a situation like that, when that would be received,
12 certainly an individual that says, hey, I fell in the tub and I couldn't get
13 out, that's something that you're forwarding to risk management and
14 legal, right?

15 A If I'm copied on these, yes.

16 Q Okay. Now, you say if you're copied on these, you don't -- if
17 you're not copied on these, are the folks trained that when they read --

18 THE COURT: Wait, when copied on CDs, copied on -- you
19 talking about the surveys?

20 MR. CLOWARD: Yes.

21 THE COURT: All right. What were --

22 MR. CLOWARD: So --

23 THE COURT: Can you explain what you're saying there?

24 When you say copied on these, what did you mean?

25 THE WITNESS: I wasn't always copied on every one for the

004911

004911

1 surveys. If they had -- if marketing sales had a meeting with
2 engineering or someone like that, something might have been snipped
3 out of it to offer my opinion or something like that.

4 THE COURT: What was the mechanism by which you
5 received some of the First Street surveys?

6 THE WITNESS: Through email.

7 THE COURT: So you would receive them through emails?

8 THE WITNESS: Yes.

9 THE COURT: From who?

10 THE WITNESS: Usually, as I recall, it was Audrey Martinez.

11 THE COURT: All right. All right. Thank you. So I was going
12 to ask him, Mr. Roberts, maybe I'll leave it up to you to ask this, but I
13 wanted to know the basis for his conclusions that certain surveys would
14 be passed on to him, and certain surveys would not be passed on, and
15 how he would know which ones were passed on and which ones were
16 not passed on.

17 MR. ROBERTS: Uh-huh.

18 THE COURT: I'll leave that up to you to --

19 MR. ROBERTS: Okay.

20 THE COURT: -- ask him if you want to.

21 MR. CLOWARD: Yeah.

22 MR. ROBERTS: Thank you, Your Honor.

23 THE COURT: Okay. Go ahead. Or could you follow up with
24 that Mr. Cloward. Whatever you choose.

25 MR. CLOWARD: Sure.

1 THE COURT: Just something on the Court's mind.

2 BY MR. CLOWARD:

3 Q Certainly, Mr. Bachmeyer, issues that dealt with safety, those
4 would be -- in the regular course of your business, would be something
5 communicated from First Street to Jacuzzi, correct?

6 A Yes.

7 Q And in the deposition and the documents that we haven't
8 gotten to yet, there were weekly meetings, where every Monday where
9 there were a group of both Jacuzzi and First Street folks that would have
10 a conference call, true?

11 A True.

12 Q And that was to go over issues that would come up in the
13 previous week, true?

14 A And other things, yes.

15 Q Yeah. That was among the things that were discussed,
16 correct?

17 A Correct.

18 Q Okay. And, certainly, if First Street is receiving issues with
19 regard to safety, that's something that would be raised with Jacuzzi,
20 right?

21 A Yes.

22 Q Okay.

23 THE COURT: All right. Thank you, Mr. Cloward.

24 MR. CLOWARD: You got it.

25 BY MR. CLOWARD:

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1 Q 150 indicates that this individual communicated that they
2 wanted better nonslip floor. And then on the other side, we don't have
3 the other side of the document, so we don't know. But, again, is this the
4 type of thing that Jacuzzi is made aware of from First Street?

5 A Should be.

6 Q 151, this individual says I find the sat and bottom a little
7 slippery. I had to put a mat down. Is this the type of thing that First
8 Street would make Jacuzzi aware of?

9 A Yes.

10 Q 152, individual says tub bottom/seat slippery. Is that
11 something that First Street would make Jacuzzi aware of?

12 MR. CLOWARD: Did I say 153 again? Did I do that again?

13 UNIDENTIFIED SPEAKER: I missed it.

14 MR. CLOWARD: That was 152.

15 BY MR. CLOWARD:

16 Q Next, 153, this person says except for the slipperiness of the
17 floor, and an additional comment, I would tell them about the slippery
18 floor and that it takes a long time to fill up, true? Did I read that
19 correctly?

20 A You read that correctly.

21 Q And that's the type of thing that First Street would
22 communicate to Jacuzzi, correct?

23 A Through these surveys, yes.

24 Q 154, this individual is saying that the shower grip is slippery,
25 hard to hold. Number 2, the tub seat is slippery, slide off. Other than

1 that, she loves it. But, again, is that something that would be
2 communicated from First Street to Jacuzzi?

3 A Yes.

4 Q All right. And 155, the individual says that it's a poorly
5 designed tub surrounds. Not enough room to get in tub to close door. I
6 have difficulty turning drain knob. Tub seat and tub floor very slippery.
7 Do you agree that's the type of thing that would communicated from
8 First Street to Jacuzzi, true?

9 A True.

10 Q And, finally, with 156, this individual is saying, quote, I had a
11 problem with a slippage on the bottom of the tub. I had to install six
12 strips on the bottom of the jacuzzi so that I could get out. Is that the type
13 of thing that First Street would communicate to Jacuzzi?

14 A Sure. Yes.

15 Q All right. And this individual, for the record, was 86 years
16 old, correct?

17 A Correct.

18 Q Okay.

19 MR. CLOWARD: Your Honor, I'm going to take Jacuzzi's
20 stipulation on the remainder of the documents as to not waste the
21 Court's time, but I am going to focus on just a few more subsequent -- or
22 a few subsequent incidents, okay?

23 THE COURT: I don't know if there was a stipulation to the
24 so-called remainder of the documents. Mr. Roberts?

25 MR. ROBERTS: There was no stipulation on Exhibit -- on

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1 tabs 140 to 156. I believe --

2 THE COURT: So I need to hear a motion or request with
3 respect to those.

4 MR. CLOWARD: Okay. I would -- I believe I've laid a
5 foundation that Jacuzzi would have received these in the ordinary
6 course, and so I would move to admit tabs 140 through 156. And, again,
7 this is just for an evidentiary hearing, not purposes --

8 THE COURT: Yeah, I got it. Mr. Roberts?

9 MR. ROBERTS: Permission to voir dire the witness, Your
10 Honor?

11 THE COURT: I'll give you a minute.

12 MR. ROBERTS: Thank you. I'll be short.

13 VOIR DIRE

14 BY MR. ROBERTS:

15 Q You were shown a number of documents, and you testified
16 that you believed that Jacuzzi would routinely be notified by First Street
17 of complaints regarding safety, right?

18 A Yes.

19 Q Let's just stick to that topic. What foundation do you have?
20 In other words, what knowledge do you have that all complaints that
21 First Street got about safety were given to Jacuzzi?

22 A I don't.

23 Q Do you have any personal knowledge of the entire universe
24 of safety complaints First Street may have received?

25 A I don't.

1 Q Do you know if First Street invariably, in other words, always
2 sent safety concerns to Jacuzzi?

3 A I don't.

4 Q You saw the tabs 140 through 156. Mr. Cloward went
5 through them with you just now?

6 A Yes.

7 Q Did you have any personal recollection of actually receiving
8 and reviewing those entries on those exhibits before today?

9 A I don't.

10 Q Okay. Thank you.

11 MR. ROBERTS: Thank you, Your Honor.

12 THE COURT: All right. Want to state your objection, if any?

13 MR. ROBERTS: Yes, Your Honor. Under *Thomas v.*

14 *Hardwick*, 231 P.3d 1111, evidence habit or routine is relevant and
15 admissible to prove an act in conformity. However, the court found that
16 the foundation requires that specific recurring stimuli have produced the
17 same specific response often and invariably enough to qualify as habit or
18 routine.

19 So in other words, it's not just that you would normally, or
20 he often receives something. And, certainly, we know from tabs 1
21 through 39, that he did often receive those things in tabs 1 through 39.
22 He received those things. They got Jacuzzi stamps on them. We know
23 First Street passed that information along. But the things with First
24 Street stamps that we're objecting to, just because he usually got
25 something or he often got something doesn't mean that he invariably

1 got it, and that whatever is in those First Street records should be
2 deemed to have been known by Jacuzzi with no evidence of transmittal
3 of that information to Jacuzzi.

4 MR. CLOWARD: You know, in response, Your Honor, the
5 difficulty --

6 THE COURT: Keep it brief.

7 MR. CLOWARD: Yeah. The difficulty is, first off, First Street
8 produces these in April, so just, you know, a couple months ago. We
9 don't have the opportunity to go and depose the folks and lay the
10 foundation and do these things. And that's our whole argument for this
11 -- this evidentiary hearing is, is that we're sandbagged. Things were
12 provided the day before deposition --

13 THE COURT: I've heard enough. I'm going to admit them
14 for the limited purposes that Exhibits 140 through 156 are the issues
15 raised in those documents are the type of issues that Jacuzzi believes
16 were customarily provided by First Street. All right? So --

17 MR. CLOWARD: Fair enough.

18 THE COURT: So they're admitted over objection, and -- but
19 for the limited purpose of this evidentiary hearing.

20 [Plaintiff's Exhibits 140 to 156 admitted into evidence]

21 MR. CLOWARD: Thank you, Your Honor.

22 THE COURT: All right. What else is there?

23 MR. CLOWARD: So I just want to make sure that 1 through
24 157 have been admitted for the limited purpose of your consideration --

25 THE COURT: I thought we said 156.

1 MR. CLOWARD: Or 156. I'm sorry, Judge 156.

2 THE COURT: Well, I'm going to let the record stand on what I
3 said they are admitted for rather than having to repeat myself again --

4 MR. CLOWARD: Certainly.

5 THE COURT: -- and risk inconsistency there.

6 MR. CLOWARD: Okay. Fair enough.

7 THE COURT: All right?

8 MR. CLOWARD: So --

9 THE COURT: But I will clarify one thing. They're -- just
10 because -- you know, I'm going to look at these, and weigh the
11 testimony, and form my own conclusion at the end of this whole hearing
12 whether Jacuzzi actually received them. Right? And just because 140
13 through 156 might have been received doesn't mean that all of them
14 were received.

15 MR. CLOWARD: I understand.

16 THE COURT: Okay. Let's keep going.

17 DIRECT EXAMINATION CONTINUED

18 BY MR. CLOWARD:

19 Q Okay. So, Mr. Bachmeyer, if you'll turn to exhibit binder 2,
20 specifically tab 49A. We're now transitioning into the subsequent
21 incidents.

22 THE COURT: You said 49A?

23 MR. CLOWARD: Correct.

24 THE COURT: That's in binder 1.

25 THE WITNESS: Okay.

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1 THE COURT: Yeah.

2 THE WITNESS: All right.

3 MR. CLOWARD: Oh, I'm sorry. I --

4 THE COURT: I thought you said binder 2, but --

5 THE WITNESS: Yeah.

6 THE COURT: -- that's okay.

7 MR. CLOWARD: I did. I'm sorry.

8 THE WITNESS: That's what I was --

9 THE COURT: We're with you.

10 THE WITNESS: -- looking for, too. Okay. I'm there.

11 BY MR. CLOWARD:

12 Q Okay. And the first page, do you agree that this is a
13 customer that fell in the tub, true?

14 A True.

15 Q And on page 5879 --

16 A Okay.

17 Q -- you agree that this customer is complaining that even with
18 that on there, and that's the factory molded, nonskid, the surface
19 becomes hazardously very slippery when he stands up to take a shower,
20 true?

21 A And uses soap --

22 Q Yeah.

23 A -- correct.

24 Q And he is requesting that a sanded, nonskid be applied to the
25 situation, correct?

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1 A Correct.

2 Q So he's requesting -- he's making a demand of Jacuzzi to do
3 something, right?

4 A Correct.

5 Q Now, if you want to next turn to Exhibit B --

6 MR. CLOWARD: -- or strike that. Your Honor, one moment,
7 please.

8 THE COURT: Sure. Take your time.

9 BY MR. CLOWARD:

10 Q Yes, this is Exhibit 49B.

11 A Okay.

12 Q In particular, if you would turn to 5345.

13 A I'm there.

14 Q And if you'd just start at 5345 and kind of work your way to
15 the front just to give you some context of the document, but -- and I'll lay
16 foundation that you were, in fact, copied on that. But you agree that the
17 first voice message is from a woman named Shannon, and she said that
18 this is the man who has been injured in his tub, true?

19 A That's what they're saying here, yes.

20 Q Okay. So we've got an injury in a tub, and the information is
21 forwarded along, you agree, correct?

22 A Correct.

23 Q And the email that was forwarded to you from Simona --
24 actually, the email was forwarded to you from Norm Murdock, but it
25 contained an email from Simona Robertson on page 5342, true?

1 A It would appear, yes.

2 Q Okay. So we've already established that he's injured, and
3 that the floor, seats, and walls of the tub are too slippery. Mr. Kinser
4 slips off the seat when in the tub, and slips on the floor when getting out,
5 correct?

6 A Yes.

7 Q And the grab bar is slippery. His hands slip when grabbing
8 the bar, true?

9 A Yes.

10 Q And now on page 5344, at the top there, at this point,
11 Mr. Kinser wants to have the tub removed, true?

12 A That's what it says, yes.

13 Q Okay. So he's saying, look, I fell in the tub, and I injured
14 myself, and I'm demanding something; I want the thing removed, true?

15 A That's what it says, yes.

16 Q And, certainly, that would be something that would be made
17 known to Bill Demerit and Ron Templer, correct?

18 A I would say normally it would. And the reason why I say
19 normally is because I'm just cc'd on this, and sometimes I don't, you
20 know, read everything that's in a -- an email.

21 Q Okay. Now, if we want to turn -- now we're going to go into
22 exhibit binder 2. Or, excuse me, binder 2, tab 119. Are you familiar with
23 the Pullen incident?

24 A Right off the bat, no.

25 Q Okay. An individual that called saying that the tub killed his

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1 mom; does that refresh your recollection?

2 A Now I'm really not aware of it, no.

3 Q Okay. Let's move through the document, then. So we're
4 going to go to Exhibit 4696 of tab 119.

5 A Okay.

6 Q First, what is the date of this call?

7 A It looks like it's 10/1/2018.

8 Q And the subject?

9 A Nonslip surface is slippery.

10 Q And you agree that in the description CS -- that's customer,
11 correct? CS is complaining that floor of tub is slippery?

12 MR. ROBERTS: Objection. Foundation.

13 THE COURT: As to what part? What CS means?

14 MR. ROBERTS: Well, he's stated he didn't remember the
15 Pullen incident, and he hasn't established that he's familiar with this
16 document or any of the information or --

17 THE COURT: Well, let's -- understood. Overruled, though.
18 Let's explore it, both you guys. Let's see if he can refresh his memory.
19 And I can't imagine there are that many alleged deaths resulting from
20 the use of the jacuzzi, so let's explore whether he has familiarity with this
21 based upon trying to refresh his recollection.

22 MR. ROBERTS: And I didn't object until he got to an
23 abbreviation. If he didn't type the abbreviation, I don't know if he would
24 know if that's consumer or customer. That's my objection.

25 THE COURT: That's a valid point, too.

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1 BY MR. CLOWARD:

2 Q Mr. Bachmeyer --

3 THE COURT: All right. So I'll sustain it as to that point.

4 MR. ROBERTS: Thank you, Your Honor.

5 THE COURT: Go ahead.

6 BY MR. CLOWARD:

7 Q Mr. Bachmeyer, remind us again what your position is.

8 A I'm the director of warranty and technical services for spa.

9 And with regards bath, it is warranty claims and third-party contractors
10 and our regional service managers that maintain them.

11 Q Okay. And how long have you had that position?

12 A Oh, boy. Since 2014.

13 Q Okay. And at some point, you were -- you were the director
14 of customer service?

15 A Correct.

16 Q Okay. So as a director of customer service, fair to say you
17 had an opportunity to go in and review customer complaints that were
18 logged into the Salesforce system?

19 A I could do that.

20 Q Okay. So based on your experience, generally speaking,
21 what is your understanding of what CS means?

22 A It's either customer or customer service, but, yeah, it seems
23 logical that what you're saying is consumer.

24 Q Okay.

25 A It's consumer.

1 Q We'll just call it consumer, fair?

2 A Fair.

3 Q You agree that this individual is complaining that the floor of
4 the tub is slippery, true?

5 A True.

6 Q Cannot stick slip-proof mat to the tub due to nonskid surface,
7 correct?

8 A Correct.

9 Q She says -- or says she has slipped multiple times, correct?

10 A Correct.

11 Q Consumer's mother fell in tub, true?

12 A True.

13 Q And this next line, who does he feel is -- or, I guess, what
14 does he say about the design, that it's irresponsible?

15 A True.

16 Q And that his mother got stuck in tub, and shortly after got
17 blood clots and died, correct?

18 A Correct.

19 Q And he says customer feels their mother may not have died
20 if they had not fallen in tub?

21 MR. ROBERTS: Objection; form. The --

22 THE COURT: We're just --

23 MR. ROBERTS: He went from customer to consumer, and
24 that is relevant, Your Honor.

25 THE COURT: It is? Okay. I guess I didn't appreciate the

1 distinction. Maybe it will come up, so -- all right. So I think you were
2 using the term CS to mean consumer; is that what --

3 THE WITNESS: Correct.

4 THE COURT: And not customer; is that --

5 THE WITNESS: It's --

6 THE COURT: The other way around?

7 THE WITNESS: No, a consumer, for me, is the end
8 consumer.

9 THE COURT: Okay. Well, in any event, it says what it says.
10 CS feels her mother may not have died if they had not fallen in tub. All
11 right. We'll find out from Jacuzzi if there's some distinction between -- in
12 their mind between customer and consumer. All right?

13 MR. CLOWARD: Okay.

14 THE COURT: All right. Mr. Cloward, where does that leave
15 us, sir?

16 MR. CLOWARD: I'll just continue.

17 THE COURT: You may.

18 MR. CLOWARD: Okay.

19 THE COURT: Let -- you know what? This is a good time for
20 us to take a break. We've been going about an hour, an --

21 MR. CLOWARD: You got it, Judge.

22 THE COURT: -- hour and a half.

23 MR. CLOWARD: You got it.

24 THE COURT: So I appreciate that. So one thing that was on
25 my mind, counsel, you know, you've been discussing customer -- or

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1 consumer complaints regarding slipperiness of the tub. Most of them
2 appear to be noninjury, and there's a couple where there's a reference to
3 injury. At an appropriate time, maybe today or maybe early tomorrow,
4 can you let me know, what's the first order of the court where Jacuzzi
5 was directed to produce the noninjury customer complaints of
6 slipperiness?

7 MR. CLOWARD: I believe that I have that line of questioning
8 in my outline for Mr. Templer.

9 THE COURT: Okay.

10 MR. CLOWARD: So I can try and --

11 THE COURT: I think it's important for the Court to know. Not
12 to cut to the chase here --

13 MR. CLOWARD: Certainly.

14 THE COURT: -- but what's the -- you know, there's a lot of,
15 you know, noninjury customer complaints of slipperiness in here.
16 What's the order that required them to produce it, and what was the date
17 of that order. That's --

18 MR. CLOWARD: Okay.

19 THE COURT: -- pretty important for me in my mind.

20 MR. CLOWARD: I can look into that.

21 THE COURT: Okay. Very good. Let's --

22 MR. CLOWARD: Thanks.

23 THE COURT: -- 15-minute recess.

24 MR. ROBERTS: Thank you, Your Honor.

25 [Recess at 3:09 p.m., recommencing at 3:30 p.m.]

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1 THE MARSHAL: Remain seated. Department II come to
2 order. Back on the record.

3 MR. CLOWARD: Hi, Judge.

4 THE COURT: We're ready if you're ready, Mr. Cloward.

5 BY MR. CLOWARD:

6 Q Okay. Mr. Bachmeyer, let's continue with the Mr. Pullen
7 incident. And before we go, I noticed the at the break that you were with
8 Mr. Cools at some point. Did you have discussions about this matter
9 with Mr. Cools?

10 A We were trying to find water.

11 Q Okay. I just wanted to make sure I --

12 A The downstairs machine doesn't work, and this doesn't have
13 any water over here, so --

14 THE COURT: We'll be glad to get you some.

15 Marshal?

16 THE WITNESS: No, no. I've got some.

17 THE MARSHAL: You have some?

18 THE WITNESS: Yep.

19 THE COURT: Okay.

20 THE WITNESS: Thank you. I appreciate it.

21 THE COURT: No problem.

22 MR. CLOWARD: Brandon, if you'll pull up 4696?

23 BY MR. CLOWARD:

24 Q Okay. Mr. Bachmeyer, as we reviewed this a moment ago,
25 prior to the break, you agreed that this -- Mr. Pullen is indicating that his

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1 mother was stuck in the tub, then shortly after got blood clots and died,
2 and that the customer feels -- or consumer feels that his mother may not
3 have died if he had not -- if she had not fallen in the tub, correct?

4 A That's what it says, yes. Correct.

5 Q So you agree that Mr. Pullen is communicating his belief that
6 it was due to her use of the tub that she died, correct?

7 A Correct.

8 Q Okay. Now, he also was communicating that he thinks that --
9 that this is a -- that the floor design is irresponsible, true?

10 A True.

11 Q So he's pointing out the specific with the tub that he feels is I
12 guess kind of responsible for his mother's situation, true?

13 A True.

14 MR. ROBERTS: Objection. Calls for speculation.

15 THE COURT: Sustained.

16 MR. CLOWARD: Okay.

17 BY MR. CLOWARD:

18 Q Now, on page 4710 --

19 MR. CLOWARD: You're -- just one. You got it, Brandon?
20 That's good.

21 BY MR. CLOWARD:

22 Q You see here where Megan indicates to Regina, wanted to
23 run this one by you. Customer wants to take legal action because he
24 thinks the tub killed his mom. Do you see that?

25 A I see that.

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1 Q So you agree at that point the customer is conveying that he
2 thinks that the tub killed his mom?

3 A That's what he's saying, uh-huh.

4 Q And he's also communicating that he wants to take legal
5 action, true?

6 A Yes.

7 Q Okay. Now, if a customer called and said that the Jacuzzi
8 product killed their loved one, you agree that that's something that
9 Jacuzzi would take extremely seriously, right?

10 A Yes.

11 Q And can you think of a situation -- actually, any situation that
12 Jacuzzi would take more seriously than a customer calling saying, hey,
13 your product killed my loved one?

14 MR. ROBERTS: Objection. Calls for speculation.

15 THE COURT: Overruled.

16 THE WITNESS: I can't think of any.

17 BY MR. CLOWARD:

18 Q Okay. And you agree that in the Pullen situation, when
19 Mr. Pullen called and said the tub killed his mom, the customer service
20 agents would have immediately escalated that call, true?

21 A I would agree to that.

22 Q And who in particular are the customer service agents
23 trained to contact if someone calls claiming that a death resulted from a
24 Jacuzzi product?

25 A I would imagine their supervisor.

1 Q Okay. And who is it that the supervisor is trained to get
2 involved in the situation?

3 A To their manager.

4 Q And ultimately you agree that that ends up with risk
5 management and Mr. Templer, true?

6 A I don't know on this particular case. I'm no longer in charge
7 of customer service at this time.

8 Q Okay. Back when you were in customer service, okay --

9 A Uh-huh.

10 Q -- you agree that if a customer called and said, "Look, your
11 product killed my mom," that's something that would be immediately
12 escalated to Ron Templer and Bill Demeritt, true?

13 A True.

14 Q And, again, you can't think of a situation more serious than
15 this that would be escalated to those folks, correct?

16 A Not offhand.

17 Q And fair to say you don't have I guess specific knowledge of
18 this incident because you no longer have the position that would have
19 overseen these customer service agents; is that fair?

20 A True.

21 Q Okay.

22 A That's fair. Excuse me.

23 Q Okay. Now, as you review the documents, in particular, if
24 you just thumb through the documents, there was a call on October 1, a
25 call on October 11, and a call a October 30, and the references for your

1 benefit, Mr. Bachmeyer, the October 1 call is case number 00749823 --

2 THE COURT: I'm sorry. I didn't hear that.

3 BY MR. CLOWARD:

4 Q It's case number 00749823.

5 MR. CLOWARD: And, Your Honor, that is Jacuzzi 004696.

6 THE COURT: Thank you.

7 THE WITNESS: Yes.

8 BY MR. CLOWARD:

9 Q Mr. Bachmeyer, you agree that on this call on October 1,
10 Mr. Pullen is complaining about the slippery issue, true?

11 A Let me get there.

12 Q It's the first page of the --

13 A Yeah. I'm sorry. Say your question again.

14 Q Yes. It's okay. You agree that on this call, on October 1,
15 Mr. Pullen is complaining about the slipperiness issue, true?

16 A True.

17 Q And he relayed that he felt that the Jacuzzi product was -- is I
18 guess responsible for his mother's death, correct?

19 A Correct.

20 Q And the thing that Jacuzzi offered him was a bathmat? I
21 believe on Jacuzzi 004701 -- this is the next call, and this is October 11,
22 2008. He's calling again. And there's a one-time courtesy of a Cajun
23 Grip bathmat. Do you see that?

24 A Yes, I do.

25 Q Are you aware of a product called a Cajun Grip, or was that

1 meant to be the Kahuna Grip, to your knowledge?

2 A I think it's more of a Kahuna Grip --

3 Q Okay.

4 A -- to my knowledge. I don't really recall Cajun.

5 Q Okay. Now, if you'll go one more to Jacuzzi -- and I guess
6 what is the date of that call, just so we have it for the record?

7 A 10/11.

8 Q Okay. So it's October 11, 2008, true?

9 A True.

10 Q Now, the next case -- or the next call is Jacuzzi 4706. And on
11 that first page, do you agree that it's saying, look, the tub is dangerous.
12 Mother slipped various times, and passed away? At this point, the
13 customer service agent's entry says, doesn't know whether it was the tub
14 or something else. Do you see that?

15 A Yes.

16 Q So who would it be that's entering this data into that
17 description?

18 A The -- probably the case owner, my assumption would be.

19 Q And who is the case owner?

20 A It says Regina Reyes.

21 Q She's like one of the bosses, right?

22 A She's a manager.

23 Q Okay. And I'm just confused -- maybe you can help me
24 clarify it -- why she would say, doesn't know whether it was the tub or
25 something else, and then compare that to the note on 4 -- on Jacuzzi

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1 004710, where Megan says to Regina, this customer wants to take legal
2 action because he thinks the tub killed his mom.

3 Do you know if there would be a discrepancy there, why Megan
4 would tell Regina, hey, Regina I've got this client, he thinks that the tub
5 killed his mom, and then Regina goes in there and changes the
6 description and says, yeah, I don't -- I don't -- I don't -- he doesn't know
7 whether it was the tub or something else?

8 A I don't.

9 Q You can't speculate as to why that would happen?

10 A No.

11 Q Do you have any training that -- that, you know, would assist
12 us in -- in making that determination?

13 MR. ROBERTS: Objection. Calls for speculation.

14 THE COURT: Yeah.

15 MR. ROBERTS: Expressly.

16 THE COURT: It's -- he already answered this.

17 MR. CLOWARD: Okay.

18 THE COURT: Okay. You can argue what it means later.

19 MR. CLOWARD: You got it, Judge.

20 THE COURT: I mean, I see there's -- I see there's a difference.

21 MR. CLOWARD: You got it. I'll move on. Thank you.

22 BY MR. CLOWARD:

23 Q Okay. Now, can you explain to us who Monique Gonzales
24 [phonetic] is, to your knowledge? If you know these questions, then --
25 it's okay if you don't. Do you know Monique Gonzales?

1 A Personally, no.

2 Q Do you know of her through -- in the -- in the corporation?

3 A Potentially.

4 Q Okay. I'm trying to alleviate the potential need for some folks
5 being called on Wednesday. So if you don't have the answers, it's okay.

6 It really is.



7 Do you know who Abdele Hernandez [phonetic] is?

8 A Yes.

9 Q And who is Abdele Hernandez?

10 A Currently he is a spa technician.

11 Q Okay.

12 A An internal spa technician. Excuse me.

13 Q And do you know why someone like Abdele would be
14 involved in a case like this? Why his name would pop up on some of
15 these forms?

16 A He was in our bath division at one time, and he was
17 promoted up into the ranks to spa technician --

18 Q Okay.

19 A -- just recently.

20 Q And how about Megan Davis?

21 A I know her, yes.

22 Q And tell me -- tell the Court I guess, tell us, who Megan Davis
23 is?

24 A She's a supervisor for the bath division, consumer service
25 supervisor for the bath division.

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1 Q Now, is she the same position that Regina Reyes is?
2 A No. Regina Reyes is the manager of consumer services.
3 Q So can you help us understand the hierarchy, I guess? Who
4 would be over who?
5 A Regina Reyes would be over Megan Davis.
6 Q Okay.
7 A And Abdele Hernandez would be under Megan Davis.
8 Q Okay.
9 THE COURT: Hold. Let me catch up with you. Hold. So
10 who -- Regina Davis [sic] --
11 THE WITNESS: No.
12 THE COURT: When you say over Megan Davis -- Regina,
13 what's her last name?
14 THE WITNESS: Reyes.
15 THE COURT: Right, right. When you said Regina Reyes was
16 over Megan Davis, does that mean that she was --
17 THE WITNESS: She's the manager.
18 THE COURT: -- her boss?
19 THE WITNESS: Megan Davis' boss would be Regina Reyes,
20 correct.
21 THE COURT: All right. And then under Megan Davis was
22 what person's name?
23 THE WITNESS: Abdele Hernandez.
24 THE COURT: Abdele Hernandez. And can I gather, from
25 your testimony, that Megan Davis had some supervisory role over

1 Abdele Hernandez?

2 THE WITNESS: Correct.

3 THE COURT: Okay. Thank you.

4 THE WITNESS: Yeah.

5 MR. CLOWARD: Thank you, Judge.

6 BY MR. CLOWARD:

7 Q And, Mr. Bachmeyer, where would Monique Gonzales fit into
8 that diagram, if you know?

9 A I really don't.

10 Q That's --

11 A I'm sorry.

12 Q That's fair. No. That's fair. We appreciate your assistance
13 so far.

14 A Yeah.

15 Q Thank you. And now, I guess let's go back to when you were
16 the director of customer service.

17 A Okay.

18 Q Where did you fit into that hierarchy?

19 A So Regina would have reported up to me. Same type of
20 structure. Megan reported to Regina, Regina would have reported to
21 me.

22 Q Okay.

23 A Megan to Regina.

24 Q And who is the current person that would be in your
25 position? Or I guess who would have been in October? Who would that

1 be?

2 A Connie Dentz.

3 Q Connie Dentz?

4 A Yes.

5 Q D-E-N-T-Z?

6 A D-E-N-T-Z, correct.

7 Q Thank you.

8 THE COURT: So -- one second. So you said in October.

9 You meant October of like 2018? Last year?

10 MR. CLOWARD: Yes, Your Honor.

11 THE COURT: Okay. Thank you. I'm with you.

12 MR. CLOWARD: Thank you for the clarification.

13 BY MR. CLOWARD:

14 Q Okay. Now, Mr. Bachmeyer, do you remember earlier in the
15 day when I said I want everyone to kind of have a mental bookmark
16 because I'm going to come back to some testimony? Do you remember
17 that?

18 A Yes.

19 Q Okay. So that was with regard to the email correspondence
20 that is contained in some of this previous salesforce documentation.

21 A Okay.

22 Q Do you recall that?

23 A Yes.

24 Q Do you know why there are no email documents in these
25 documents from October 1st, October 10th, and October 30th?

1 A I don't.

2 Q Okay. And if you will turn to Jacuzzi 4707 -- actually, I'm
3 sorry -- 4697.

4 MR. CLOWARD: And, Brandon, if you can pull that up.

5 BY MR. CLOWARD:

6 Q Now, I see -- I guess, first off, are you aware that this
7 Honorable Court made an order on March -- on March 7th -- or, let's see.
8 Excuse me. The Court's ruling was March 4th for death cases. Were you
9 aware of that?

10 A I don't believe I am.

11 Q Okay. That's fair. What I wanted to point out was that three
12 days after the Court's order, it says, formatted today, March 7, 2019. Do
13 you know why that would take place? Like what happened there, if
14 somebody went in and deleted things or --

15 A I don't.

16 THE COURT: Where's that -- where's that language?

17 MR. ROBERTS: Your Honor, that's on Jacuzzi 004697. And,
18 Your Honor, if you would like to write these down, there are -- there are
19 two more references.

20 THE COURT: Hold on. I'm still looking -- I'm on that page. I
21 -- I don't see that language anywhere, formatted today.

22 MR. CLOWARD: Will you take it down, Brandon? Just the --
23 this --

24 THE COURT: Here, let me just -- I don't -- here's my page.
25 Where -- oh.

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1 MR. CLOWARD: Right here. Under contact information.

2 THE COURT: Okay. I see it. Thank you. Got it.

3 BY MR. CLOWARD:

4 Q Now, if you'll turn to Jacuzzi 4702, this is for the October 11
5 call. And, again, we see this formatted date just three days after the
6 Court ordered. Do you know why that would be entered into the record
7 like that?

8 A I do not, no.

9 Q Okay. And, finally, on Jacuzzi 4707, this is the October 30,
10 2018 record where Mr. Pullen indicated that the Jacuzzi tub killed his
11 mom. And, again, it indicates that's its formatted three days after the
12 judge's ruling. You don't know why that's there?

13 A I don't, no.

14 Q Now, I have reviewed the rest of the calls. There were some
15 other calls by Mr. Pullen about various things. And I don't see that
16 formatted date on any of those other calls. Do you know anything about
17 what it means -- what that means?

18 A I don't.

19 Q Okay.

20 THE COURT: Let me ask for a clarification.

21 MR. CLOWARD: Sure.

22 THE COURT: When you say you don't know what it means,
23 are you saying you don't know why there was a reference to formatting
24 on that date or you're not -- you don't know what the term formatting in
25 these forms means?

1 THE WITNESS: Your first question, and then the second --

2 THE COURT: Okay.

3 THE WITNESS: -- portion of it as well, because I'm not
4 exactly sure why --

5 THE COURT: Okay.

6 THE WITNESS: -- why that's even in there.

7 THE COURT: You're familiar in general with the salesforce --

8 THE WITNESS: Correct.

9 THE COURT: -- documents.

10 THE WITNESS: Correct.

11 THE COURT: All right. But you -- you're not -- you don't use
12 it to such extent that you would know what it means when it says,
13 formatted today?

14 THE WITNESS: That is correct.

15 THE COURT: Okay. Thank you.

16 THE WITNESS: Yeah.

17 MR. CLOWARD: Okay. Your Honor, my staff just brought
18 some additional exhibits. May I obtain --

19 THE COURT: Sure.

20 MR. CLOWARD: -- those and provide those --

21 THE COURT: You can take -- sure. Take your time to --

22 MR. CLOWARD: Thank you.

23 THE COURT: -- do whatever you wants to do with them.

24 [Court and Clerk confer]

25 THE COURT: My court clerk just handed me a note. Just for

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1 purposes of keeping a good record, my court clerk noted that certain
2 exhibits -- under certain exhibit tabs, there's no documents. And that
3 would be 33, 38, 40, 99, and 134. I just wanted the record to be clear that
4 the Court was not provided those. So in the future -- we didn't lose any?
5 Okay.

6 UNIDENTIFIED SPEAKER: I believe there are slip sheets
7 saying there is exhibit deleted or something to that effect, Your Honor.

8 THE COURT: Oh. Very good. Thank you.

9 UNIDENTIFIED SPEAKER: At least in my copy.

10 THE COURT: Very good. Thank you.

11 MR. CLOWARD: It says, intentionally left blank.

12 THE COURT: All right.

13 MR. CLOWARD: We had to move some things around, and
14 that was the easiest way to do that. I'm sorry if we confused --

15 THE COURT: Nope. It's fine.

16 What do you got there for us now, Mr. Cloward?

17 MR. CLOWARD: May I approach the witness with two
18 binders?

19 THE COURT: Yes.

20 MR. CLOWARD: I have two --

21 THE COURT: Are those -- Mr. Roberts, do you want to see
22 those first to --

23 MR. ROBERTS: Yes.

24 THE COURT: -- see what they are?

25 MR. CLOWARD: He can have this copy.

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1 MR. ROBERTS: Thank you.

2 MR. CLOWARD: These are just some additional exhibits that
3 I intend to use with Mr. Bachmeyer.

4 THE COURT: All right. Can he put the other binders away or
5 do you still need --

6 MR. CLOWARD: Yes, Your Honor.

7 THE COURT: -- them? All right. If you want to close --

8 THE WITNESS: Yes.

9 THE COURT: -- those so they don't risk falling. And you can
10 set them down somewhere out of your way, if you'd like.

11 THE WITNESS: Yes.

12 THE COURT: Thank you.

13 THE WITNESS: Yes.

14 THE COURT: Thank you. I appreciate it.

15 MR. CLOWARD: Lee, can I have that set to give to the judge?

16 THE COURT: Well, I'll take the clerk's set.

17 MR. CLOWARD: I'm sorry, Your Honor.

18 THE COURT: I'll have the -- I'll have the originals. Thank
19 you. Let's keep going.

20 MR. CLOWARD: Okay. Oh, wait. I have a set. I have an
21 extra set.

22 THE CLERK: Okay.

23 MR. CLOWARD: Do you need it?

24 MR. ROBERTS: You gave him my set.

25 THE CLERK: That's your set?

1 MR. ROBERTS: Yeah. I think -- it's okay.

2 MR. CLOWARD: Sorry. I'm giving away his set. I'm sorry,
3 Judge.

4 THE COURT: That's okay.

5 MR. ROBERTS: I apologize, Your Honor. Thank you.

6 MR. CLOWARD: It's getting late in the day. My brain juices
7 are not --

8 THE COURT: I've been taking notes directly on the exhibits
9 as you've been discussing them, since I have the Court's copy. What I'm
10 going to do is -- if you can just go a little bit slower, so I'll just keep my
11 notes and my notepad here.

12 MR. CLOWARD: You got it.

13 THE COURT: All right. Thank you.

14 MR. CLOWARD: Okay.

15 [Counsel confer]

16 MR. CLOWARD: So we're going to go to 1 -- Exhibit 160.
17 Brandon, that's 4.

18 THE COURT: Okay.

19 THE WITNESS: Just so you know, I don't have them.

20 MR. CLOWARD: Oh, we didn't get -- I'm sorry.

21 THE COURT: Well, let's do this: I'm going to give him the
22 Court's --

23 MR. CLOWARD: I'm sorry, Judge.

24 THE COURT: -- official copy. Don't write on this copy.

25 THE WITNESS: I won't.

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1 THE COURT: All right. So this is one volume, and here's the
2 other volume. These are -- is that okay, Madam Clerk?

3 THE CLERK: Sure.

4 THE COURT: Okay. These are the originals. Don't mark
5 them.

6 THE WITNESS: I won't touch them.

7 THE COURT: All right. Let's proceed.

8 MR. CLOWARD: I'm sorry, Your Honor.

9 BY MR. CLOWARD:

10 Q Okay. Now, again, Mr. Bachmeyer, I just wanted to kind of
11 go through the process. We've covered this in large part, but you agree
12 that there are customer surveys that were gathered by First Street and
13 sent to Jacuzzi, true?

14 A True.

15 Q And we've already kind of covered the specific things that
16 were tracked in the survey itself. Do you remember when we went
17 through the Excel spreadsheet?

18 A Yes.

19 Q Okay. Now, at your deposition, if you'd look on Exhibit 157 --

20 MR. CLOWARD: Brandon, this is 1.

21 BY MR. CLOWARD:

22 Q -- I asked you some questions, if you recall, about a
23 document called, First Street Service Hot Issues Sheet.

24 A Yes.

25 Q Do you remember that?

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1 A Yes, I do.

2 Q Okay. And in that document, you agree that Jacuzzi and
3 First Street tracked things basically from the dealers, and in addition to
4 the information by who installed it, additionally things such as the serial
5 number, the core, even the manufacturing date were entered into these
6 types of databases?

7 A We received that information, yes.

8 Q Okay.

9 MR. CLOWARD: 158, I think it's 2, Exhibit 2, our 2.

10 BY MR. CLOWARD:

11 Q Now the next thing I want you to focus on, this is First
12 003937, and we asked -- we spoke about this during the deposition. This
13 is Exhibit -- Court's Exhibit 158.

14 Earlier we talked about, I want to just lay the foundation so it's
15 crystal clear. There were weekly calls, and in addition to the weekly
16 calls, there was actually a warranty slide that was circulated so everyone
17 could be on the same page as to what the issues were. True?

18 A True, but I'm not on there.

19 Q Is that one of the few that you were omitted from?

20 A Pardon me?

21 Q Was that one of the few that you were omitted from? You
22 remember receiving these, right?

23 A Yes.

24 Q Okay.

25 A Yes.

1 Q And, in particular, during the deposition, we talked about the
2 things that were on this and the things that First Street, and if you could
3 retract.

4 MR. CLOWARD: So, Brandon, if you will go to 3939.

5 BY MR. CLOWARD:

6 Q Now this is one of those exhibits, or those PowerPoints that
7 was attached to the email. You agree that Jacuzzi and First Street
8 tracked things down to the number of units shipped, 1277, true?

9 A True.

10 Q And even the issues, or there were no issue in 1058 of them,
11 where there were 18 of them that had some other kind of an issue, and
12 then 200 of one them had an issue that was a Jacuzzi issue. True?

13 A True.

14 Q And you agree that on these weekly meetings, there were
15 phone calls and action items where Jacuzzi was given certain things to
16 follow up on, and First Street was given certain things to follow up on.
17 True?

18 A True.

19 Q For instance, your name is here, Kurt -- or K. Bachmeyer,
20 7/30/2012, analyzed dealer claims for B-O-B W-O-W comparisons, true?

21 A True.

22 Q What does that mean?

23 A Bob Wow is best of the best, worst of the worst.

24 Q Okay. So you're looking for issue that folks are having, right?

25 A Correct.

1 Q Worst of the worst issues to the best of the best issues?

2 A From my standpoint, it was more of our field technicians
3 making the repairs in the field.

4 Q Okay.

5 A Where they have to repeatedly go out there or not.

6 Q Okay. And in this situation, Audrey Martinez was asked to
7 research claim for Arthur and Gwendolyn Darr. True?

8 A True.

9 Q And that would have been a customer, consumer?

10 A True, I guess.

11 THE COURT: Well, I heard him say true and then I guess
12 softly.

13 MR. CLOWARD: Yeah.

14 THE COURT: I -- so I want to make sure the record is clear on
15 that.

16 Did you want to -- were you done with your answer there?

17 THE WITNESS: I -- it would be speculation on my part, so I
18 don't -- the assumption is yes, that would be a consumer.

19 BY MR. CLOWARD:

20 Q Okay. I guess let me ask a better question.

21 A Okay.

22 Q Had you, in your experience, have you had a situation where
23 an action item was to follow up on a specific customer, consumer's
24 issue?

25 A Me, yes.

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004948

1 Q Okay.

2 MR. CLOWARD: Now Brendon, if you will go to First 3940,
3 First 003940.

4 BY MR. CLOWARD:

5 Q And in this, we talked about in your deposition how Jacuzzi
6 and First Street actually tracked down to the very granular detail, the
7 very specific issues with each aspect of the tub, correct?

8 A Correct.

9 Q Like, for instance, you knew that there were 21 tubs that had
10 lights inoperative. True?

11 A True.

12 Q You had 20 tubs with a door leak. Correct?

13 A True, correct.

14 Q You had 17 with a door leak for the door. True?

15 A True.

16 Q And the corresponding entries, as we move to the right of
17 the screen there. Correct?

18 A Correct.

19 MR. CLOWARD: Brandon, please go to First 003944. Just
20 blow up any old section.

21 BY MR. CLOWARD:

22 Q And, Mr. Bachmeyer, you agree that with these corrective
23 actions that were tracked on a weekly basis, the detail that was
24 maintained by Jacuzzi and First Street included the customer name,
25 serial number, core number, manufacturing date, the phone number of

1 the individual, and other issues, correct?

2 A Correct.

3 MR. CLOWARD: Brandon, First 003948.

4 BY MR. CLOWARD:

5 Q And Jacuzzi even tracked, the First Street even tracked the
6 issues that each particular dealer had. So, for instance, we knew that
7 this dealer, Beldon Leafguard of Central Texas, installed three baths, and
8 two of those had issues, so they had an issue percentage of 66.7 percent,
9 correct?

10 A Correct.

11 Q And Mr. Bachmeyer, if you will turn, and we've touched on
12 this a few times, but if you will turn to Exhibit 163.

13 THE COURT: Stop for a second. You were saying dealer and
14 that says installer, were all the installers dealers that you use on the
15 term?

16 THE WITNESS: I hesitate to even --

17 THE COURT: Is one in the same?

18 THE WITNESS: I hesitate to even broach that.

19 THE COURT: Okay. Well, then I -- let's just keep going, all
20 right?

21 THE WITNESS: Yeah, that's a --

22 THE COURT: You guys can deal with that in closing
23 argument. I just wanted the record to note that the word on there was
24 installer, and you said dealer. So let's continue.

25 MR. CLOWARD: There's been significant confusion on that

1 issue, and we have not --

2 THE COURT: All right. Let's not address that now.

3 MR. CLOWARD: Okay.

4 THE COURT: We're in a good flow right now.

5 MR. CLOWARD: You got it.

6 BY MR. CLOWARD:

7 Q Okay. So I wanted to just, again, on Jacuzzi 00533, Mr.

8 Bachmeyer, you agree that in addition to the weekly summaries, Jacuzzi
9 also had these monthly surveys, June 2013, correct?

10 A Correct.

11 Q Now -- and if you will turn to Exhibit 167.

12 MR. CLOWARD: Brendon, that's 11.

13 BY MR. CLOWARD:

14 Q Earlier, we talked about, in some of those customer surveys,
15 how, for instance, there would be complaints of -- various complaints,
16 for instance, hey, the buttons are sticking, or hey, it's too slippery, or
17 whatever the concern is as they came in, do you remember that
18 discussion?

19 A Yes.

20 Q Okay. And then this group of emails, you agree that starting
21 on Page 5392 and moving forward to 5391, and then 5390, and then
22 5389, if you would just review those. This is an email that originated
23 from a dealer, or an installer, specifically Ray Parnell, who sends an
24 email on Jacuzzi 005390, and he sends the email to First Street Support
25 at jacuzzi.com, and copies Allen Ross, correct?

1 A Correct.

2 Q Now in this, he lists -- he says, hey, here's a summary of
3 some things that we're having issues with. On Jack, he says buttons
4 sticking.

5 MR. CLOWARD: Brandon, if you can go to the next one,
6 5391?

7 MR. CLOWARD: Another individual, Fanchier [phonetic], is
8 the last name, buttons sticking. This one was sent possibly to you, Kurt
9 B. Fay Hope says, aroma therapy not working. Doesn't have to do with
10 the buttons, but --

11 MR. CLOWARD: Next one, Brandon, on 5392.

12 BY MR. CLOWARD:

13 Q Harry Kyle, a customer who says his buttons don't work half
14 the time.

15 A Uh-huh.

16 Q So you agree that Mr. Parnell sends an email to First Street,
17 who then forwards it to Jacuzzi, and says hey, we have three or four
18 customers, they've got a button issue, right?

19 A Yes.

20 Q And on 5388, or excuse me, 5392. I'm sorry. I covered that
21 one. So the time of this email from Ray Parnell was November 8, 2012 at
22 8:05. Do you see that, November 8, 2012, 8:05 a.m., true?

23 A I do.

24 Q Okay. Now that email goes, and in 5388, it goes to Audrey,
25 and this is at 8:52, and we're looking at 5388. So November 8, 2012,

004952

004952

1 8:52, Norm says to Audrey, this reiterates my request during the middle
2 of the week. We need to improve the button operation. Are you able to
3 pull a history of service calls to see how many of them are button
4 related.

5 See where that request is made?

6 A Yes.

7 Q And then Audrey, about an hour-and-a-half later, at 10:34
8 a.m. on 5387 and 5388, sends an email to you.

9 A Uh-huh.

10 Q Do you see at 10:34 a.m., the same date, true?

11 A Yeah, true.

12 Q And she says, first, to Ray, and that's Ray in Engineering,
13 right?

14 A Correct.

15 Q Any input on how we can make the buttons easier to push?
16 True?

17 A True.

18 MR. CLOWARD: And then the next page, Brandon.

19 BY MR. CLOWARD:

20 Q She says, Kurt, can you please get a recap of button related
21 issues together? True?

22 A True.

23 Q So, she's asking you, hey, can we look at this button issue,
24 right?

25 A Uh-huh. True.

1 Q True? And that's basically less than two-and-a-half hours
2 after the original email from Ray Parnell, true? His email was at 8:05, her
3 email to you is at 10:34, correct?

4 A Okay. Yes.

5 Q So next, you send an email about 15 minutes later, 5386,
6 5387, to Regina Reyes, and again, this is the same day, November 8,
7 2012, it's your email down here --

8 A Uh-huh.

9 Q -- is 10:43, and we'll have to go to the next page for the text,
10 but to establish it was at 10:43. You ask her, can you provide me with
11 this data, please? Correct?

12 A Correct.

13 Q And let's take a look at her response that same day at 4:19.

14 MR. CLOWARD: So that's perfect, Brandon. Thank you.

15 BY MR. CLOWARD:

16 Q You see there's an attachment there, it's an XLS spreadsheet.
17 It says, cannot push button to start?

18 A Yes.

19 Q And she says, here you go.

20 A Yep.

21 Q So Regina sends you an email November 8th at 4:19 p.m.,
22 correct?

23 A Correct.

24 Q All right. So, she went -- whatever she did, she gathered that
25 information, and now let's take a look at the spreadsheet.

1 MR. CLOWARD: Okay. Can you pull that up, Brandon, the
2 spreadsheet?

3 Your Honor, I apologize. I don't have an easel.

4 THE COURT: That's okay. That will work for me.

5 MR. ALLEN: Your Honor, may I approach to take a look?

6 THE COURT: Go ahead. Sure. I have an easel, but we'll
7 worry about using it tomorrow.

8 MR. CLOWARD: That's okay.

9 THE COURT: All right.

10 MR. CLOWARD: It's just basically this --

11 MR. ALLEN: Okay.

12 MR. CLOWARD: -- same thing.

13 THE COURT: I won't be able to read that from here, but let's
14 just do what we can.

15 MR. CLOWARD: You got it, Judge.

16 MR. GOODHART: Ben, is there a Bates Number?

17 MR. CLOWARD: Yes. It is Jacuzzi 5394, Phil, and Jacuzzi
18 5393.

19 MR. GOODHART: Thank you.

20 BY MR. CLOWARD:

21 Q And so, Mr. Bachmeyer, you review these entries, and
22 essentially the subject for these entries is an analysis of any complaint
23 where a button was mentioned, true?

24 THE WITNESS: Can I ask to see those? I can't --

25 THE COURT: Yeah. Why don't you bring it closer so he

1 can --

2 MR. ALLEN: All right. I'll be a wall, a human easel.

3 MR. CLOWARD: Thank you. I appreciate that.

4 THE COURT: Do you have a hard copy in there of 5394?

5 MR. CLOWARD: But it's --

6 MR. ROBERTS: We did, Your Honor, but it's very difficult to
7 read.

8 THE COURT: All right. So approach the witness a little more
9 of you could.

10 THE WITNESS: Okay. I'm sorry, your question?

11 BY MR. CLOWARD:

12 Q The question was just simply you agree that the Excel
13 spreadsheet that was sent from Regina to you contained issues with
14 regard to buttons?

15 A Correct.

16 Q Okay. So Jacuzzi had the ability, like we talked about in your
17 deposition, to compile data, compile information in a very quick fashion
18 and forward that along as requested, correct?

19 A Certain information, correct.

20 Q Okay.

21 THE COURT: Counsel, you had certain lines highlighted
22 where the -- were those button issues that were highlighted or is
23 everything on their button issues? I couldn't see.

24 MR. CLOWARD: I can -- I can go ahead and establish that
25 through the witness, if you would like or --

1 THE COURT: Why don't you do that.

2 MR. CLOWARD: -- or I could show the Court --

3 THE COURT: Right. And rather than you testifying, let's
4 have the witness.

5 MR. CLOWARD: Okay.

6 BY MR. CLOWARD:

7 Q So, Mr. Bachmeyer, let's take a look at some of these entries.

8 A Sure.

9 Q For instance, you agree the first entry is, tub won't turn on.
10 Left message for tub doctor per customer, hold off on service until she
11 has time to test unit. Follow-up 8/3 if I don't hear from her. Correct?

12 A Correct.

13 Q And then the next one, stated unit blows too hard. It's
14 popping the breaker. Also stated he cannot adjust pressure or controls
15 are hard to operate Jacuzzi. Excuse me, customer has jets open all the
16 way and did not know how to use tub or jets. Okay?

17 A Correct.

18 Q And some of the controls are button controls, true?

19 A Yes, true.

20 Q Then the next one, button is too hard to push. Do not have
21 customer serial number. Left message for agent to make sure his has
22 info. Correct?

23 A Correct.

24 Q And the highlighted ones, the next one is highlighted. It
25 says, issue. Push button too hard to push. The next entry, issue. Air

1 controls hard to push and handle hard to close. Correct?

2 A Correct.

3 Q The next issue is highlighted. Issue. Push button which
4 starts the jets is very hard to push. Correct?

5 A Correct.

6 Q The next highlighted, push button is very hard to engage.

7 A Correct.

8 Q The next one that's highlighted, issue. Control buttons hard
9 to push. Correct?

10 A Correct.

11 Q Okay. So rather than continuing to go through it, you would
12 agree that it appears as though the ones that are highlighted in yellow
13 are specific complaints where the customer said the buttons are hard to
14 push?

15 A Correct.

16 Q And there are other, some other entries, such as this one, to
17 be specific. It's 120914-000049. It says, issue. Air button not working.
18 So it mentions button, but it's not a push button issue, fair?

19 A Fair.

20 Q Okay.

21 MR. CLOWARD: Thanks, Charles.

22 Judge, does that satisfy the Court?

23 THE COURT: I understand your demonstrative exhibit now,
24 thanks.

25 BY MR. CLOWARD:

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1 Q Okay. Now the point of that, I guess, line of questioning was
2 simply -- and this is demonstrative -- was simply to --

3 MR. CLOWARD: You want to just hold it here, back there is
4 good.

5 BY MR. CLOWARD:

6 Q -- simply to show that, Mr. Bachmeyer, you agree in this
7 line -- or in this set of emails, that an issue arose that needed to be
8 investigated, correct?

9 A Correct. Excuse me.

10 Q A request was made, you compiled the data, correct?

11 A Correct.

12 Q Within hours, the data was compiled?

13 A Correct.

14 Q And emails were circulated with that data?

15 A Correct.

16 Q All in about eight hours?

17 A Correct.

18 Q Thank you.

19 MR. CLOWARD: Thank you.

20 BY MR. CLOWARD:

21 Q And at the deposition, you agreed -- you testified that Jacuzzi
22 had the ability to narrow down on the database to look at very specific
23 issues, correct?

24 A Correct.

25 Q And, you know, it's page 179, line 16 through 23, and 180 of

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1 your deposition. In particular, you indicated that Jacuzzi could narrow it
2 down in the database to look at issues like the grab bar, true?

3 A True.

4 Q Issues like the door opening in or out, true?

5 A True, but I'm hesitant on that. The only reason I say that is
6 because I'm not sure that that particular complaint would be stored. The
7 first one that you gave me, the grab bars, we absolutely have that in -- in
8 our claims data.

9 Q Okay. Do you remember in your deposition telling me that
10 you could narrow it down things, issues, like the door opening in or out?

11 A If I said that, it's probably the way of doing it.

12 Q Okay.

13 MR. CLOWARD: Brendon, can you go to --

14 BY MR. CLOWARD:

15 Q Well, I'll just ask you. If I --

16 MR. CLOWARD: May I approach, rather -- we can show a
17 video-clip if you would like, Your Honor, or I could do the hard, whatever
18 the Court --

19 THE COURT: Do you have his depo transcript there?

20 MR. CLOWARD: I have a depo transcript, I also have the
21 video transcript ready.

22 THE COURT: Are you using it to impeach or refresh
23 recollection, or some other purpose?

24 MR. CLOWARD: Some of both, just kept asking.

25 THE COURT: All right.

1 Any dispute as to whether that's an authentic copy of the
2 deposition transcript there, Mr. Roberts?

3 MR. ROBERTS: No dispute, Your Honor.

4 THE COURT: All right. Then we don't need to officially
5 publish. Go ahead.

6 MR. ROBERTS: I'm going to object if he's going to impeach
7 him, because I don't think that he's said anything that is impeachable.

8 THE COURT: Well, if you say I don't recall, and he did recall
9 at that deposition --

10 MR. ROBERTS: Then he's --

11 THE COURT: the case law allows that, but -- yeah,
12 what -- so before showing the deposition, why don't you clarify as to the
13 matter upon which you seek to refresh recollection.

14 MR. CLOWARD: Just let me -- I don't want to overcomplicate
15 this. I think when we get where we need to get --

16 THE COURT: No, I don't either, but he makes a valid
17 objection, so we'll follow proper protocol.

18 MR. CLOWARD: Absolutely, Your Honor. And what I'll do is
19 I'll just reask some questions --

20 THE COURT: Very well.

21 MR. CLOWARD: -- and then if we need to, then we can go to
22 the depo.

23 THE COURT: Very well.

24 MR. CLOWARD: Okay.

25 BY MR. CLOWARD:

1 Q Mr. Bachmeyer, you remember going through this process
2 with me, that we just went through with the Court, during your
3 deposition, correct?

4 A Correct.

5 Q And then at the conclusion of that line of questioning, I asked
6 you whether Jacuzzi had the capability to gather data for specific issues.

7 A Correct.

8 Q Okay. And do you have any recollection as to whether or not
9 you testified that issues like the grab bar, issues like the door opening in
10 or out, issues like the tub being too slippery or the floor being slippery,
11 issues like the seat being too slippery could be tracked?

12 A They could be tracked, yes, sir.

13 Q Okay. So you agree with that?

14 A Yes.

15 Q Okay. And you agree that Jacuzzi has the ability to narrow
16 its searches to just the walk-in tubs, true?

17 A True.

18 Q I mean that's not a hard thing for Jacuzzi to do, correct?

19 A Back in that timeframe, I would say it would be.

20 Q Well, now, if you remember, when I talked to you about that,
21 we talked about how Audrey Martinez had previously testified, I think a
22 week or two before that, that there were documents that were contained,
23 simply within the walk-in division?

24 A True.

25 Q True?

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1 A True.

2 Q So the data that was collected that was input, would have
3 only been input for the Walk-In Tub Division, true?

4 A True.

5 Q So the data is not contained data that is outside of the Walk-
6 In Tub Division, like you're not going to put Sundance spa information in
7 the Walk-In Tub Division, true?

8 A True.

9 Q You're not going to put in one of the other spa companies
10 information in the Walk-In Tub Division, true?

11 A True.

12 Q So you start with -- the information that you start with is for
13 the Walk-In Tub Division, true?

14 A True.

15 MR. ROBERTS: Object, ambiguous.

16 THE COURT: Overruled.

17 MR. CLOWARD: I got it.

18 BY MR. CLOWARD:

19 Q During your deposition, there was some question that I asked
20 whether Mr. Templar had sent you text messages or communications
21 during the deposition. Did that, indeed, happen?

22 A You asked me that, correct.

23 Q Did he send you text messages?

24 A No, he did not.

25 Q Did he send you emails?

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1 A He didn't send me anything during that deposition.

2 Q Okay.

3 A I told you it was the text from my sister, and I handed you my
4 phone.

5 Q Okay. You agree that initially you testified that he had, and
6 then folks went --

7 A I misunderstood -- I misunderstood your question.

8 Q Okay. I just want to confirm.

9 A Uh-huh.

10 MR. CLOWARD: Your Honor, one moment to confer?

11 Actually, Your Honor, may we have a five minute recess to review. I
12 believe I'm finished with my questioning with this witness. I just want to
13 review.

14 THE COURT: Yeah. Let's -- give me one moment. I thought I
15 had a question.

16 MR. CLOWARD: Yes, Judge.

17 THE COURT: So, I think I -- when we were looking at that one
18 spreadsheet, the demonstrative --

19 THE WITNESS: Yes.

20 THE COURT: -- on the button issue. I think we heard you say
21 that you had asked Regina Reyes to obtain the information for you, and
22 then she provided this XLS spreadsheet?

23 THE WITNESS: Data dump, yes.

24 THE COURT: Okay. Do you -- do you -- not -- I don't want
25 you to speculate, all right, do you know the process by which she would

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1 have prepared that XLS spreadsheet?

2 THE WITNESS: I don't.

3 THE COURT: Okay. Thank you. Is Regina going to testify?

4 MR. CLOWARD: I think she's set for tomorrow, Your Honor.

5 THE COURT: Okay. Very good. Let's take a five minute

6 recess.

7 MR. CLOWARD: You got it, Judge.

8 [Recess at 4:23 p.m., recommencing at 4:35 p.m.]

9 THE MARSHAL: Department 2, come to order. Back on the
10 record.

11 THE COURT: Mr. Cloward, you have the floor.

12 MR. CLOWARD: Your Honor, we pass at this point.

13 THE COURT: All right. So you're passing the witness.

14 Mr. Roberts, it's your turn.

15 MR. ROBERTS: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. ROBERTS:

18 Q Mr. Bachmeyer, I'm going to start with the -- what you just
19 testified to. Do you still have the binder in front of you, with Court's
20 Exhibit Number 167?

21 A Okay.

22 Q And this deals with the whole surge of the button issue that
23 you reviewed with Mr. Cloward, okay?

24 A Correct.

25 Q I would like you to turn to Jacuzzi 5388 for me.

1 A Yes.

2 Q Bottom of the page, the email from Norm Murdock to Dave
3 Modena and Audrey Martinez, are you with me?

4 A I'm with you.

5 Q Okay. What is it that Norm is asking to be pulled?

6 A He's looking for data on the -- on the button to make it easier
7 to push.

8 Q Next line, I think that will help.

9 A I gave the pull history on the service calls to see how many
10 of them are button related.

11 Q So tell me where data on service calls is stored at Jacuzzi at
12 this time in 2012.

13 A In KBM.

14 Q Okay. Tell -- explain to the Court what KBM is.

15 A It's just a knowledge-based management system that -- it's
16 used for manufacturing. It provides all the information on all of our
17 products that are being built. It has records of when they were
18 manufactured, what time, who -- if they're registered, who it's registered
19 to, who the products are registered to, etcetera.

20 Q Explain to the Court what a warranty claim is as you use that
21 term.

22 A A warranty claim comes in from a third party contractor from
23 the field, who's actually worked on one of our products, and once
24 they've worked on the product, they will send in a claim, and when that
25 gets to us, then we pay the claim and ultimately pay them.

1 Q So as you use that term, does a warranty claim come from a
2 consumer, the end user of the product, or does it come from someone
3 else?

4 A No, it comes from someone else.

5 Q The person who actually does the repair?

6 A Correct.

7 Q There has been some discussion about Sales Force records.
8 Is the Sale Force System different than the KBM system?

9 A Correct.

10 Q And when a consumer, an end user, calls in with an issue or
11 complaint or comment, does that go into KBM?

12 A At that time, prior to 2012? Yes.

13 Q What about November 8th, 2012?

14 A I don't know.

15 Q Okay. Based on your review of the spreadsheet on the
16 boards that Mr. Cloward showed you --

17 A Yes.

18 Q -- could you tell if that was a spreadsheet of service calls that
19 included the word button?

20 A To me, that was more of consumer complaints, that's why I
21 had Regina run the data.

22 Q Okay. Do you know where Regina searched for the data?

23 A I don't.

24 Q Was at least one of the entries you reviewed has the word
25 button but wasn't related to cannot push the button?

1 A Correct.

2 Q Let's talk about customers and consumers. From your point
3 of view and the way Jacuzzi uses those terms, could you explain to the
4 Court what the difference is between a consumer and a customer?

5 A So in my world, a consumer is the end consumer, the person
6 that actually has the product in their home. A customer is who we
7 actually sell the product to.

8 Q To your knowledge, does Jacuzzi sell any product directly to
9 end users or consumers?

10 A Not to my knowledge.

11 Q You were shown a brochure that was left behind during sales
12 presentations. Did Jacuzzi do any sales presentations of -- for people,
13 end users considering whether to buy a tub?

14 A I wasn't a part of it.

15 Q Have you heard of that happening?

16 A Not Jacuzzi.

17 Q There's been a reference to First Street customers, who are
18 First Street customers, based on your understanding of the way that
19 terms is stated?

20 A It would be the end user, that's how I would see it.

21 Q So First Street customers are your consumers, is that a fair
22 summary?

23 A I would say so, yes.

24 Q Okay. I'm going to go to Volume I from this morning.

25 A Okay.

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1 Q When I got up and voir dire'd you prior to the admission of
2 some exhibits, I was talking about the things that First Street would
3 normally forward to Jacuzzi, right?

4 A Yes.

5 Q Now let's talk about a similar issue, but different. You spoke
6 a lot this morning about the things that would routinely get forwarded to
7 William Demeritt or Bill Demeritt, the Risk Manager.

8 A Yes.

9 Q And the things that would routinely get forwarded to Ron
10 Templer, correct?

11 A Correct.

12 Q Did anything routinely get forwarded to Ron Templer before
13 he was employed at Jacuzzi, as in-house counsel?

14 A No.

15 Q Do you recall the date on which Mr. Templer was employed
16 as in-house counsel?

17 A I don't recall the specific date, no.

18 Q But is it fair to say that if a document is dated before he was
19 employed at Jacuzzi, it probably would not have been forwarded to him?

20 A Correct.

21 Q Other than --

22 MR. ROBERTS: -- strike that.

23 BY MR. ROBERTS:

24 Q With regard to the practice of the types of documents that
25 were routinely forwarded to Legal or to Risk Management, okay?

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1 A Yes.

2 Q Were there any written guidelines about what needed to be
3 forwarded to either Mr. Templer or Mr. Demeritt?

4 A Not that I'm aware of.

5 Q And were things invariably forwarded to Mr. Demeritt and
6 Mr. Templer when everything dealt with a safety concern?

7 A I would say yes.

8 Q With regard to the documents that you looked at today, all of
9 those exhibits --

10 A Yes.

11 Q -- were there any that you had a current recollection of
12 actually forwarding to either Mr. Templer or Mr. Demeritt?

13 A I can't say specifically on these without any kind of an email
14 from me that showed that.

15 Q When you forwarded things to Mr. Templer or Mr. Demeritt,
16 was it typically by email?

17 A Yes.

18 Q So if you forwarded an issue, did either one of those
19 gentlemen, you could search the system and it should show up if you, in
20 fact, forwarded to them, correct?

21 A I would think so.

22 Q If I could get you to turn to tab 3 in Volume I, sir?

23 A Okay.

24 Q Okay. If you would look at the bottom left corner of the page,
25 I believe you agree that these issues were continually coming up,

1 correct?

2 A Yes.

3 THE COURT: Are we talking about slipperiness issues? You
4 say these issues that we're on now?

5 MR. ROBERTS: Yes.

6 THE COURT: Okay.

7 MR. ROBERTS: That's what I was getting to.

8 THE COURT: Okay.

9 BY MR. ROBERTS:

10 Q And the specific issues were the ones that are outlined, or
11 summarized in, let's see --

12 MR. ROBERTS: The Court's indulgence. I think it's in the
13 back.

14 THE COURT: Sure. No, take your time, that's all right. I see
15 the terms these issues continually coming up, that's on 5622.

16 MR. ROBERTS: Right.

17 THE COURT: Okay.

18 BY MR. ROBERTS:

19 Q And if you look at Tab 55623.

20 A Yes.

21 Q The issues there are the unit would not drain, she got stuck
22 in the tub, customer got stuck in the foot well, had to call Fire
23 Department, and three, partner slipped in tub, they had to remove the
24 door to get her out.

25 When you agreed that issues, these issues were continually

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1 coming up, which of those specific issues were you talking about or were
2 you talking about all of them?

3 A I would say all of them.

4 Q Other than these three customers, can you recall a single
5 other incident where a customer claimed they got stuck in the tub and
6 couldn't get out?

7 A Prior to these?

8 Q Prior to or after that. Let's start with prior to so it's not
9 compound.

10 A Prior to, no. No.

11 Q And this question is going to be directed to all of the exhibits
12 that you reviewed today, and these were back in 2012, 2013, 2014, 2015.
13 Prior to being shown these documents at your deposition, or in
14 preparation for your deposition, did you have a recollection of any of
15 these events?

16 A Yes, I did.

17 Q Which ones in particular?

18 A I can't think of their names right offhand, but when I saw the
19 names, it rang a bell.

20 Q It refreshed your recollection?

21 A Yes.

22 Q With regard to the Pullen incident, that was the customer
23 who said that the Jacuzzi tub killed his mother --

24 A Yes.

25 Q -- she developed blood clots? Do you have an independent

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1 recollection, or do you have any knowledge that that incident, or
2 information about that incident was actually provided to William
3 Demeritt at any time?

4 A I do not.

5 Q Let's skip over a few of these for a minute. Do you have the
6 capability to search Sales Force yourself without assistance?

7 A No.

8 Q Are you familiar with the details of how you would run a
9 search if you wanted to define certain complaints or issues, or data?

10 A No.

11 Q Would you typically delegate requests to you to provide
12 incidents or claims data?

13 A Yes.

14 Q In this case, were you aware of searches being run for terms
15 so that Jacuzzi could respond to discovery?

16 A Yes.

17 Q And were you either sent emails or copied on emails
18 requesting all documents containing certain search terms?

19 A Yes.

20 Q Were you copied on documents responsive to those
21 requests?

22 A Yes.

23 Q Of the documents that you've seen today, were any of those
24 in the records that you found and forwarded to counsel? And if you
25 don't know, you can say that, sir.

1 A I don't know.

2 Q Was there anyone that rang a bell, and you can testify I know
3 I saw that and forwarded it to counsel?

4 A Yeah. If there -- if there were details of an email and the back
5 and forth, then I can get an idea of what I would have done with that, but
6 looking back on some of these things that are seven, eight years old, it's
7 hard for me to recall exactly what I did, but typically, that's what I would
8 do.

9 Q Okay.

10 MR. ROBERTS: The Court's indulgence just for a second.
11 That's all.

12 THE COURT: So, hold on for a second. All right. He was
13 aware of searches being done by Jacuzzi to respond to discovery he
14 said. All right.

15 MR. ROBERTS: Yes.

16 THE COURT: He received emails on the search terms being
17 used to do that, and then he was copied and received emails on the
18 actual documents that were found. All right. A ton of the documents in
19 these binders deal with alleged slipperiness of the tub in question here.
20 And he -- I think he just said that he doesn't recall -- he doesn't know,
21 specifically, if any of these documents that are in these binders were
22 turned over from Jacuzzi to counsel.

23 So, I'm having trouble digesting that because it seems to me
24 that that slipperiness was one of the search terms that would have
25 been -- this would have been a large amount of documents that would

1 have been discovered using that search term. So if he got copied on all
2 of the documents, wouldn't he know about all of those slipperiness
3 documents?

4 I'm having trouble understanding why he wouldn't know
5 about all those documents, unless he got them by email and didn't pay
6 attention. Help me understand that, please.

7 MR. ROBERTS: Yes, let me try to clarify that.

8 THE COURT: Thank you.

9 BY MR. ROBERTS:

10 Q Did you run the actual searches?

11 A Only one.

12 Q Very good. And which search did you personally run?

13 A For claims.

14 Q Okay. And when you say claims, do you mean personal
15 injury claims or warranty claims?

16 A Warranty, third-party warranty claims.

17 Q Okay. And did you -- were you personally aware of what
18 warranty claims you found when you personally ran your searches?

19 A Yes.

20 Q Okay. And were any of these documents that we reviewed
21 today, ones that you found searching for warranty claims?

22 A No.

23 Q Now with regard to searches that were run in other
24 databases, such as Sales Force, did you personally perform those
25 searches?

1 A I did not.

2 Q And although you were copied, though, on the results,
3 correct?

4 A Correct.

5 Q When you are were copied on the results did you open the
6 attachments and review all of the hits that were found?

7 A I did.

8 Q And as you sit here today, do you remember anything that
9 you reviewed being one of those hits, or do you just not have a
10 recollection?

11 A No, I remember. Specifically to the terms that -- the specific
12 terms with that would come across that would be a better explanation,
13 and so that's what was asked of me is to provide that.

14 Q To provide a --

15 A A better explanation.

16 Q -- explanation?

17 A Correct. Some of the search words that we were provided
18 with had like the first few letters of something. One of the search words
19 was pain, well, anything that hit paint or talked about painted or painter
20 or any of that kind of thing, was also brought through to that search, as
21 well. So they asked me to go through each one of those and distinguish
22 what was actually pain and what we would distinguish was not pain.

23 Q So -- just so we're not confusing the issues, the customer
24 complaints that we reviewed today, do you specifically recall seeing any
25 of those before your deposition, before 2019?

1 A My name's on them. I have a problem not saying no to that.

2 Q Okay. You remember seeing them on the searches?

3 A Yes.

4 Q All of them or some of them?

5 A Some.

6 Q Very good.

7 MR. ROBERTS: And so, Your Honor, I may be able to help
8 explain. I don't know if --

9 THE COURT: That helped a little bit, but --

10 MR. ROBERTS: -- if the Court wants me to offer further
11 explanation outside the presence of the witness, but there are some of
12 these that are on the in-camera list that went to Commissioner Bulla,
13 who ruled that they did not have to be produced.

14 THE COURT: All right.

15 MR. ROBERTS: And there are some that are not on the list
16 and that would not have been hit, but the search terms were the subject
17 of the --

18 THE COURT: I saw the list of searched terms.

19 MR. ROBERTS: Right. And at -- and the Court asked this, as
20 of September 19th, Commissioner Bulla had only ordered that things be
21 produced that involved serious bodily injury or death, and that's
22 September 19th, 2018. And then this Court, on March 4th, said that the
23 Court didn't care if there was an injury or not. And I don't believe there
24 was any order --

25 THE COURT: Well, I --

1 MR. ROBERTS: -- between those two --

2 THE COURT: I wouldn't say that I didn't care.

3 MR. ROBERTS: Well, I'm sorry. I didn't mean to paraphrase.

4 THE COURT: But I expanded the scope.

5 MR. ROBERTS: Right. The scope shall be all incidents
6 involving a Jacuzzi walk-in tub, inward opening doors, for the time
7 period of two-thousand -- January 1st, 2008 to the date they filed a
8 complaint where a person slipped and fell, whether or not there was an
9 injury, whether or not there was a warranty claim, and whether or not
10 there was a lawsuit, but for the purposes of a Court order, ordering us to
11 supplement discovery, ordering us to produce something outside the
12 forensic search, I'm -- I couldn't find one in my initial review. I hate to
13 represent there wasn't one, because I wasn't involved at the time, but I
14 haven't seen one on the record.

15 THE COURT: Well, we'll --

16 UNIDENTIFIED SPEAKER: May we excuse the witness?

17 THE COURT: We'll save that legal argument for later, I
18 guess, but no, I understand your position. I'm not -- we'll discuss that
19 further later.

20 MR. ROBERTS: Okay.

21 THE COURT: All right. Thank you.

22 MR. ROBERTS: Thank you, Your Honor.

23 THE COURT: But is there any --

24 MR. CLOWARD: Just a little.

25 THE COURT: -- redirect?

1 MR. CLOWARD: Just a little.

2 THE COURT: All right. Thank you.

3 MR. CLOWARD: Brandon, I'm going to have you pull up the
4 deposition. In particular, I'm going to with Page 179. Either one, it's
5 okay.

6 REDIRECT EXAMINATION

7 BY MR. CLOWARD:

8 Q While we're on this, the search issue, we have this
9 demonstrative exhibit with the search terms. Are these the search terms
10 that you used?

11 A Not all of them.

12 Q Okay. So of these -- well, first off, let's just go through them.
13 Did you use fall?

14 A No.

15 Q And are you referring to something up there that you have?

16 A Yes, I am.

17 Q Can you tell me what it is that you're --

18 A Sure, it's just my notes.

19 Q May we see those?

20 MR. ROBERTS: No objection, Your Honor.

21 THE COURT: I can take a quick look. Thank you.

22 THE WITNESS: It just had the terms that you're talking
23 about.

24 BY MR. CLOWARD:

25 Q Are these the, I guess the notes that you prepared today or

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1 the notes that you prepared as a result of a request from Legal and IT on
2 the searches?

3 A This was just information that I wanted to recollect and have
4 notes with me in case I was asked about this.

5 Q Okay. So, can you just, for the record, very plainly state what
6 search terms you wrote down --

7 A Sure.

8 Q -- that you actually used.

9 A So at two different times. The height of the tub walls, the
10 doorway width, inward versus outward opening door, and grab handles.
11 And the second one was injury, injure, injured, injuries, death, hurt and
12 pain.

13 Q And what are the dates of those searches? So, I guess -- and
14 I'm sorry, I didn't want to cut you off, but I want to make sure that the
15 record's very clear on this issue. You did -- you performed two separate
16 searches on two different dates; is that fair?

17 A It's fair that those searches were made.

18 Q On two separate dates?

19 A Correct.

20 Q So the first day, what was the date of the first search?

21 A It looks like it was around May of 2017.

22 Q Okay. Now May of 2017, what search terms did you use in
23 that search?

24 A That would have been the ones that started out with height
25 of the tub walls, doorway width, inward versus outward opening door,

1 and the grab handles.

2 Q An no other terms, fair?

3 A Fair.

4 Q Okay. Now what is the second search that you performed?

5 A It looks like it was around July of 2018.

6 Q Okay. And what search terms did you use in that search?

7 A Injury, injure, injured, injuries, death, hurt, and pain.

8 Q And that's it?

9 A Yes.

10 Q So it's fair that you did not search for a single term on this
11 agreed upon search term list, true?

12 A It could be up for speculation on Number 7, on the door, the
13 inward/outward door opening.

14 THE COURT: He said he was only involved --

15 THE WITNESS: -- and also the grab rails. I'm sorry.

16 THE COURT: He said he was only in searches for warranty
17 claims, so it must have been someone else who did the searches on the
18 other terms, I suppose.

19 MR. CLOWARD: Maybe.

20 THE COURT: We'll find out.

21 MR. CLOWARD: Yeah.

22 THE COURT: Okay.

23 THE WITNESS: These are not typical warranty claim terms
24 used. Usually, the people in the field are replacing a pump, a jet, or
25 making repairs to a control panel, or stuff like that.

1 BY MR. CLOWARD:

2 Q Okay. So was it your understanding in performing the
3 searches that you performed that you were looking for warranty issues?

4 A That's what I do.

5 Q Okay. So it wasn't even your understanding when you were
6 looking necessarily for injuries; is that fair?

7 A I was looking for anything that contained those words, you
8 know, our warranty claims documents that we have.

9 Q Okay. Now what did you do to perform that search?

10 A I went through out Click View App, which is basically just an
11 application that pulls data from KBM on all the claims --

12 Q And tell --

13 A -- all the claims.

14 Q -- tell me about that process. When you say all claims, what
15 do you mean all claims.

16 A Someone had to go through all claims, I didn't want to miss
17 anything. And then to your point earlier, you can start narrowing it
18 down just by walk-in tubs, and things of that nature, just to make sure
19 that I didn't miss anything.

20 THE COURT: What's the database called where all the
21 warranty claims is maintained, if there is one database for that or a
22 group of --

23 THE WITNESS: So it's called Legacy.

24 THE COURT: Legacy?

25 THE WITNESS: Yeah.

1 THE COURT: Okay. Is that the database that you use for
2 those search terms you identified?

3 THE WITNESS: So Legacy stores all the claims that we input.

4 THE COURT: Warranty claims?

5 THE WITNESS: Correct. Warranty claims, and from that we
6 have an application that's called Click View and that pulls out all of those
7 claims, and we can run, you know, different reports on it and different
8 things of that nature.

9 THE COURT: Okay. Thank you.

10 BY MR. CLOWARD:

11 Q Okay. Now you were the former Customer Service Manager
12 for, I guess, the Jacuzzi Walk-In Tub Division, right?

13 A For the Bath and Spa Division.

14 Q Okay. And that's continued within, I guess, the Bath and Spa
15 is the Walk-In Tub Division, right?

16 A Correct.

17 Q So you -- how long did you have that position again?

18 A Oh, boy. I think for -- I want to say five years.

19 Q Okay. Now other than the warranty database, what other
20 databases are there that maintain like personal injury claim or claim of
21 injury like we've covered today in the binders?

22 A So I would say Outlook, which is our email, KBM, RNT, and
23 then Sales Force.

24 Q Okay. And were you asked to look at any of those databases
25 when you were looking for warranty claims?

1 A For me, personally, I was supposed to look through letters,
2 emails that I had attained, had obtained, excuse me, that were directed
3 to me, and -- but the other things, I was not asked to look at.

4 Q Okay.

5 A As I understood, someone else was.

6 Q And do you know who that was?

7 A I don't right off the bat, no.

8 Q Okay. Do you know if your successor in that position was
9 asked to participate in those searches?

10 A That would be my assumption.

11 Q Do you know that?

12 A I don't know that.

13 Q Who is it, that you're aware of, that actually performed the
14 searches?

15 A I would have to say Regina Reyes, because she's one of our
16 people that understands Sales Force really well.

17 Q Who else, that you're aware of?

18 A Yes. Miguel Rojas.

19 Q So Miguel Rojas, Regina Reyes, anyone else that you're
20 aware of, in particular, that participated in these searches?

21 A Yes, Jessica Steele.

22 Q Okay. Anyone else?

23 A I would like to retract that. I'm thinking back now, and I can
24 see the email, Connie Den^{se} was asked on that.

25 Q Okay. So Connie participated?

1 A Correct. Connie, Jess, myself, Regina, and then I delegated
2 something, some parts of this to Miguel Rojas.

3 Q Okay. And what did you delegate to Miguel Rojas?

4 A Certain incidents that he could shed more light on with
5 regard to the details. He's our Regional Service Manager.

6 Q And when you say incidents, what are you talking about?

7 A I believe at the time that we were looking at those, they were
8 actual claims.

9 Q Claims for warranty or claims for --

10 A Correct.

11 Q -- injury?

12 A Claims for warranty.

13 Q Okay. Is it fair to say that you had no involvement with the
14 injury aspect of this?

15 A At these dates, correct.

16 Q So you were -- you were just looking for warranty issues?

17 A Warranty claims and anything that was directed specifically
18 to me.

19 Q Okay. Now if you were asked to search your email for these
20 search terms over here, these 20 agreed upon search terms, you know,
21 fall, slip, elderly, overweight, and so forth down the list, you would have
22 done that, right?

23 A Yeah, I don't see why not.

24 Q And the emails that we went over, you could have searched
25 those in your own email box, right?

1 A Yes.

2 Q And fair to say nobody asked you to look for those things,
3 true?

4 A The only things I was looking for were the ones that I
5 provided to you.

6 Q Okay. Now -- yeah, and if you would have been asked, you
7 would have done it, right?

8 A Or found somebody that could help me.

9 Q Okay. Now you were asked some questions, follow-up
10 questions, about the Excel spreadsheet, the survey contained on the
11 boards that we talked about, remember --

12 A Yes.

13 Q -- the questions by Mr. Roberts?

14 A Yes.

15 Q Do you remember when I first showed you that document in
16 your deposition? You actually thought that that document came from
17 Sales Force?

18 A I did.

19 Q Okay. Because Sales Force has the ability to search for
20 things like this, true?

21 A I believe it does.

22 Q And you could pull Excel spreadsheets just like the Excel
23 spreadsheet that we went over with you, true?

24 A I believe so.

25 Q Okay. Now you were asked questions about Mr. Templer.

1 Obviously, Mr. Templer joined Jacuzzi, I think in 2014, prior to then he
2 was in private practice as a partner in a law firm, correct?

3 A If you're telling me that, then I take that as correct, because I
4 don't know a specific date --

5 Q Okay.

6 A -- that he came to work.

7 Q Understood. You agree that in addition to Mr. Templer,
8 though, there's also Anthony Lovallo [phonetic] and Nicole Simmons,
9 who work in the Jacuzzi Legal Department, true?

10 A True.

11 Q And those folks have been there for a long time, right?

12 A I can say one has, for sure.

13 Q That would be Anthony, true?

14 A True.

15 Q And, in fact, there was an email in one of the things we
16 covered that -- where there was a comment about how Anthony had
17 lawyers for lawyers, remember that?

18 A I do.

19 Q Okay. So when I was asking you the questions about was
20 this forwarded to Ron Templer or Risk Management, the initial
21 conversation was that you had sent it to four categories of individuals
22 that were up the chain, true?

23 A I believe I said that.

24 Q One was Marketing, one was Research and Development or
25 Engineering, true?

1 A True.

2 Q And then the third one was the Legal Department, true?

3 A I don't know if I specifically -- well, prior to Ron Templer, then
4 I must have sent it to the Legal Department. I don't recall.

5 Q And you didn't -- you didn't just start sending safety issues
6 that came up to Ron Templer, because he joined Jacuzzi --

7 A No.

8 Q -- right? You would have sent those prior to Ron joining to
9 either Anthony or to Nicole, right?

10 MR. ROBERTS: Objection. Asked and answered.

11 THE COURT: Sustained. I have this in my notes, so --

12 MR. CLOWARD: Okay.

13 THE COURT: -- four different departments that he sent --

14 MR. CLOWARD: Understood. Thank you, Your Honor.

15 THE COURT: -- information to.

16 MR. CLOWARD: Understood. I guess I just wanted to make
17 sure that there's testimony that prior to Mr. Templer, he would have sent
18 it to somebody in Legal.

19 THE COURT: I understand.

20 MR. CLOWARD: Okay.

21 BY MR. CLOWARD:

22 Q Now you reviewed the hits that were found, right?

23 A Yes.

24 Q So when you say the hits that were found, were those the
25 hits that were found using these 20 search terms?

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1 A Some of them, no, but the majority of them, yes.

2 Q Do you recall seeing issues with people slipping and falling?

3 A Yes.

4 Q And people getting injured?

5 A Yes.

6 Q Okay. And you don't know what happened to those?

7 A I don't.

8 Q But you do know that that email was sent to you and you

9 reviewed it, and you're confident about that?

10 A Yes.

11 Q And then you don't know what happened to that, whether

12 that was turned over in this case, or whether that stayed with Mr.

13 Templer, you don't know?

14 A I don't.

15 Q Okay, fair enough.

16 MR. CLOWARD: Your Honor, one moment to confer with

17 counsel.

18 [Counsel confer]

19 BY MR. CLOWARD:

20 Q I just want to make sure that this -- the terms that you did not

21 search were basically 1 through 6, and then 8 through 20. You may have

22 searched Number 7, because you were looking for the inward opening

23 door, true?

24 A 5, 6 and 7, now that I look at it, could all be the -- classified as

25 the same type of thing, the inward and outward.

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1 Q Okay. But other than 5, 6, and 7, you agree you did not
2 search for 1, 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, which were
3 the 20 agreed upon search terms, true?

4 A Twelve?

5 THE COURT: I thought he said he did do a search for at least
6 the word grab, grab handles.

7 THE WITNESS: That's what I was going to --

8 THE COURT: -- and grab's under there under 14 and 15, so.

9 THE WITNESS: Yeah. I was actually going to say 12, excuse
10 me. I'm sorry. I'm sorry.

11 THE COURT: Go ahead.

12 THE WITNESS: I was actually going to say 12 through 16,
13 anything that had grab, grab rails, grab handles, any of that kind of stuff.

14 BY MR. CLOWARD:

15 Q Okay.

16 A Yeah.

17 Q So, I want to just make sure that we're cleared on the record
18 on this issue. So you may have searched 5, 6 and 7, and then you may
19 have searched 13, 14, 15, and 16. Is that fair?

20 A That's fair, in the warranty documents, yes, sir.

21 Q And again, that was limited to the warranty documents. You
22 were not looking in Sales Force, you were not looking in other databases
23 that may contain information about whether somebody was injured?

24 A I was not, correct.

25 Q Okay. Thank you.

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1 THE COURT: All right. Thank you for clarifying some of that.

2 Is there anything else on re-cross, Mr. Roberts?

3 MR. ROBERTS: Just one question, Your Honor.

4 RECROSS-EXAMINATION

5 BY MR. ROBERTS:

6 Q Mr. Cloward showed you 20 agreed upon search terms?

7 A Yes.

8 Q Do you know the date upon which those search terms were
9 agreed upon?

10 A I do not.

11 Q Do you know if they were agreed upon before you performed
12 your searches that you testified to about today?

13 A I do not.

14 Q Thank you.

15 MR. ROBERTS: No further questions, Your Honor.

16 THE COURT: All right. Thank you.

17 All right. Mr. Bachmeyer, you may step down. Thank you
18 for your time today, sir. Appreciate it.

19 THE WITNESS: Thank you.

20 THE COURT: You can leave the binders up there. Make sure
21 you grab all your stuff. You can take your notes with you, sir.

22 THE WITNESS: Okay.

23 THE COURT: All right. Have a good day.

24 THE WITNESS: Thank you.

25 THE COURT: So tomorrow, we start at 8:30, right? Who's

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1 the next witness?

2 MR. CLOWARD: Mr. Templer.

3 THE COURT: Mr. Templer, okay. Mr. Templer, we'll see you
4 at 8:30. And how long do you anticipate for your direct, Mr. Cloward?

5 MR. CLOWARD: On paper, the direct is shorter, but --

6 THE COURT: Okay.

7 MR. CLOWARD: -- I don't know.

8 THE COURT: And then what other witnesses did we hope to
9 get through tomorrow?

10 MR. CLOWARD: I think Ms. Martinez, Audrey Martinez, and
11 Ms. Regina, was she coming today -- tomorrow or Wednesday?

12 MR. ROBERTS: Regina was today; wasn't she?

13 MR. CLOWARD: I'm going to double-check. I believe that
14 Regina Reyes is also on the schedule for tomorrow, Your Honor, for -- at
15 1:00.

16 THE COURT: All right. We'll try to do what we can. I think
17 Wednesday we're starting at 10:00.

18 MR. CLOWARD: And she is -- she is in town and available to
19 testify in person tomorrow.

20 THE COURT: Perfect. All right. In terms of trial date, my
21 secretary did check on some available dates, and actually given the age
22 of this case, you might have a little bit higher priority than some of the
23 other cases that I had set. I don't have a lot of options, but here's what I
24 have.

25 If we were to vacate the current trial date, I can give you guys

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1 four weeks on -- beginning March 23rd, or four weeks beginning March
2 30th, and then I have a lot of time opening up after about the third week
3 of June.

4 So, look at that, check your schedules, talk to each other, and
5 then maybe later on this week we can decide what to do. All right?

6 MR. CLOWARD: Thank you, Your Honor.

7 MR. ROBERTS: Thank you, Your Honor.

8 THE COURT: Very good. All right. Have a nice evening
9 everybody. I'll see you back here tomorrow at 8:30.

10 UNIDENTIFIED SPEAKER: Since we have 8:30, can we leave
11 the binders on the table, Your Honor?

12 THE COURT: You can. Nobody else is going to be here.
13 Marshal, you will need --

14 [Proceedings concluded at 4:35 p.m.]

15
16 ATTEST: I do hereby certify that I have truly and correctly transcribed the
17 audio-visual recording of the proceeding in the above entitled case to the
18 best of my ability.

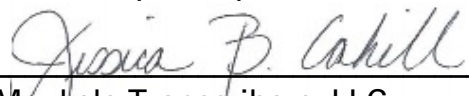
19 
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Jessica B. Cahill, Transcriber, CER/CET-708

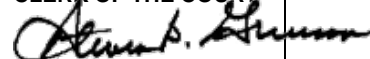
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5 DISTRICT COURT

6 CLARK COUNTY, NEVADA

7 ROBERT ANSARA, ET AL.,

CASE#: A-16-731244-C

8 Plaintiffs,

DEPT. II

9 vs.

10 FIRST STREET FOR BOOMERS &
11 BEYOND INC., ET AL.,

12 Defendants.

13 BEFORE THE HONORABLE RICHARD F. SCOTTI
14 DISTRICT COURT JUDGE
15 TUESDAY, SEPTEMBER 17, 2019

16 **RECORDER'S TRANSCRIPT OF EVIDENTIARY HEARING - DAY 2**

17 APPEARANCES:

18 For the Plaintiffs:

BENJAMIN P. CLOWARD, ESQ.
CHARLES H. ALLEN, ESQ.
IAN C. ESTRADA, ESQ.

20 For Defendant First Street
21 for Boomers & Beyond Inc:

DAN POLSENBERG, ESQ.
MEGHAN M. GOODWIN, ESQ.
PHILIP GOODHART, ESQ.

22 For Defendants:

23 D. LEE ROBERTS, JR., ESQ.
BRITTANY M. LLEWELLYN, ESQ.
24 JOEL HENRIOD, ESQ.

25 RECORDED BY: DALYNE EASLEY, COURT RECORDER

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FOR THE DEFENDANT

MARKED

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None

1 Las Vegas, Nevada, Tuesday, September 17, 2019

2
3 [Case called at 8:39 a.m.]

4 THE MARSHAL: Remain seated. Department 2. The
5 Honorable Judge Richard Scotti presiding.

6 MR. CLOWARD: Good morning, Your Honor.

7 THE COURT: Good morning.

8 I'm just looking at the binders I have up here now. It looks
9 like I have 1 through 192.

10 MR. CLOWARD: Correct.

11 THE COURT: All right. Ansara v. First Street; A-731244.

12 Mr. Cloward, are you ready to proceed with your next
13 witness?

14 MR. CLOWARD: Your Honor, yes I am.

15 THE COURT: All right. Any procedural issues before we get
16 started?

17 MR. CLOWARD: No, Your Honor.

18 THE COURT: All right. Let's begin.

19 MR. ROBERTS: Your Honor, if I could raise just one thing?

20 THE COURT: Yes, you may.

21 MR. ROBERTS: The witness coming up is in-house counsel
22 for --

23 THE COURT: Mr. Templer?

24 MR. ROBERTS: -- Jacuzzi. Yes.

25 THE COURT: Right.

1 MR. ROBERTS: And, as I stated at the beginning, it is not our
2 intention to waive attorney-client privilege or attorney work product
3 privilege.

4 THE COURT: Of course.

5 MR. ROBERTS: And we've look at some case law, and I know
6 that there are cases saying that you can inquire into facts, and that's not
7 privileged, and it doesn't waive the privilege. And my concern is I don't
8 want to -- we want to allow the witness to be as open and forthcoming in
9 response to any questions the Court and counsel may have, but it is not
10 our intention to waive the privilege by encouraging the witness to be
11 forthcoming.

12 So I wanted to at least say that anything mentioned by the
13 client of something that might arguably be privileged is inadvertent. It's
14 not our intention to waive privilege more broadly by --

15 THE COURT: Absolutely. Also, there are cases that, in some
16 instances, draw a distinction between in-house counsel conducting
17 business in a business capacity as opposed to a legal representation
18 capacity.

19 MR. ROBERTS: I --

20 THE COURT: And that's often a hard line to draw.

21 MR. ROBERTS: I agree, Your Honor. But I don't think those
22 cases would apply because the scope of his testimony is what was done
23 to respond to discovery in a court proceeding.

24 THE COURT: Right.

25 MR. ROBERT: So I don't think that could be --

1 THE COURT: Right.

2 MR. ROBERTS: -- argued to be a business function.

3 THE COURT: You're probably correct there. I think, at a
4 minimum, we should make sure that communications between outside
5 counsel and Mr. Templer are not inquired into. I think that would
6 probably be a given, right, Mr. Cloward?

7 MR. CLOWARD: Yes. Your Honor, as I understand it, we're
8 not to inquire as to the contents of communications, but we were
9 allowed, pursuant to the minute order, as my reading, as to whether
10 something was said. So that brings us --

11 THE COURT: Subject matter, yes, but I'll also grant
12 Mr. Roberts a reserved objection to the extent, in any future proceedings,
13 the examination as to subject matter would be viewed as opening the
14 door.

15 MR. ROBERTS: Okay.

16 THE COURT: All right?

17 MR. CLOWARD: Thank you, Your Honor.

18 THE COURT: Okay.

19 MR. ROBERTS: And I've explained the -- to the witness the
20 *Coyote Springs* case -- the exception set forth in *Coyote Springs*. That is,
21 if the witness is unsure as to whether responding would waive the
22 privilege or would be privileged, he can request a recess, and then we
23 would come back in and announce whether or not we intend to invoke
24 the privilege. We'll try to minimize the use of that so as not to disrupt
25 the proceedings, but --