

IN THE SUPREME COURT OF THE STATE OF NEVADA

Nos. 83598, 84971, and 85358

IN RE PARAMETRIC SOUND CORPORATION
SHAREHOLDERS' LITIGATION.

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Elizabeth A. Brown
Clerk of Supreme Court

PAMTP, LLC,

Appellant,

v.

KENNETH F. POTASHNER; VTB HOLDINGS, INC.;
STRIPE GROUP, LLC; SG VTB HOLDINGS, LLC;
JUERGEN STARK; and KENNETH FOX,

Respondents.

Consolidated Appeals from Final Judgment and Fees and Costs Awards
Eighth Judicial District Court Case No. A-13-686890-B

APPELLANT'S APPENDIX – VOLUME 3 OF 24

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INDEX TO JOINT APPENDIX

(Chronological)

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
3/7/18	Amended Class Action and Derivative Complaint	1	AA 0001- AA 0078
3/27/18	Order Denying Defendants' Motions to Dismiss the Amended Class Action and Derivative Complaint	1	AA 0079- AA 0090
11/15/19	Stipulation of Settlement	1	AA 0091- AA 0174
5/19/20	Final Judgment and Order of Dismissal With Prejudice	1	AA 0175- AA 0203
5/20/20	PAMTP LLC's Complaint	2	AA 0204- AA 0270
8/20/20	Order Denying Defendants' Motions to Dismiss Plaintiff's Complaint	2	AA 0271- AA 0280
9/3/20	Director Defendants' Answer to Complaint	2	AA 0281- AA 0317
9/3/20	Answer to Plaintiff PAMTP LLC's Complaint	2	AA 0318- AA 0360
5/18/21	Order Granting Plaintiff's Motion Against Defendants Kenneth Potashner, Juergen Stark, and VTB Holdings, inc. Setting Evidentiary Hearing Re Spoliation Sanctions	2	AA 0361- AA 0368
6/23/21	Transcript of Evidentiary Hearing re: Spoliation Sanctions (6/18/21)	3-4	AA 0369- AA 0696
7/15/21	Findings of Fact, Conclusions of Law and Order Imposing Spoliation Sanctions	5	AA 0697- AA 0707
8/3/21	Order Denying Motion for Summary Judgment of Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings. LLC Juergen Stark, Kenneth Fox	5	AA 0708- AA 0725

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
8/3/21	Order Denying Defendants' Motion in Limine to Exclude Plaintiff's Damages	5	AA 0726- AA 0742
8/3/21	Order Denying the Director Defendants' Motion for Summary Judgment	5	AA 0743- AA 0760
8/3/21	Order Denying Defendants' Motion in Limine to Exclude All Reference, Evidence, and Testimony Regarding Post Merger Conduct	5	AA 0761- AA 0778
8/3/21	Order Denying Defendants' Motion in Limine to Exclude the Opinions, Testimony, and Reports of J.T. Atkins	5	AA 0779- AA 0795
8/3/21	Order Denying Defendants' Motion in Limine to Exclude Evidence Related to Alleged Fraud by the Non- Director Defendants	5	AA 0796- AA 0813
8/3/21	Order Denying Motion for Summary Judgment of Defendant VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC SG VTB Holdings, LLC Juergen Stark, and Kenneth Fox	5	AA 0814- AA 0831
8/3/21	Order Granting in Part Defendants' Motion in Limine to Exclude Evidence and Testimony Related to Irrelevant or Undisclosed Measures of Damages	5	AA 0832- AA 0838
8/23/21	Order Granting Certain Director Defendants' Motion for Determination of Good Faith Settlement	5	AA 0839- AA 0844
8/24/21	Plaintiff PAMTP LLC's Memorandum of Law Regarding NRS 78.200 and NRS 78.211	5	AA 0845- AA 0850
8/24/21	Defendants' Motion for Judgment on Partial Findings Pursuant to NRCP 52(c) Regarding Lack of Control or Expropriation	5	AA 0851- AA 0865
8/24/21	Defendants' Motion for Judgment on Standing Pursuant to NRCP 52(c)	5	AA 0866- AA 0876

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
8/24/21	Defendants' Motion for Judgment for Lack of Evidence on <i>Gentile</i> Damages Pursuant to NRCP 52(c)	5	AA 0877- AA 0886
8/24/21	Specially Appearing Defendants Juergen Stark's and Kenneth Fox's Motion for Judgment Under the Statute of Limitations Pursuant to NRCP 52(c)	5	AA 0887- AA 0896
8/25/21	Non-Director Defendants' Trial Brief Re: Section 14(A)	5	AA 0897- AA 0904
8/25/21	Opposition to Plaintiff PAMTP LLC's Memorandum of Law Regarding NRS 78.200 and NRS 78.211	5	AA 0905- AA 0914
8/26/21	Transcript of Proceedings Bench Trial – Day 1 (8/16/21)	6-7	AA 0915- AA 1231
	Trial Exhibit 244	7-8	AA 1232- AA 1573
	Trial Exhibit 376	9	AA 1574- AA 1575
8/26/21	Transcript of Proceedings (8/17/21) Bench Trial – Day 2, Vol. 1	9	AA 1576- AA 1719
8/26/21	Transcript of Proceedings (8/17/21) Bench Trial – Day 2, Vol. 2	10	AA 1720- AA 1888
8/26/21	Transcript of Proceedings (8/18/21) Bench Trial – Day 3, Vol. 1	11	AA 1889- AA 2018
	Trial Exhibit 5	11	AA 2019- AA 2022
	Trial Exhibit 6	11	AA 2023- AA 2029
	Trial Exhibit 26	11	AA 2030
	Trial Exhibit 38	11	AA 2031
	Trial Exhibit 95	11	AA 2032

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
	Trial Exhibit 106	11	AA 2033
	Trial Exhibit 108	11	AA 2034- AA 2037
	Trial Exhibit 109	11	AA 2038- AA 2041
	Trial Exhibit 111	11	AA 2042- AA 2043
	Trial Exhibit 137	11	AA 2044- AA 2047
	Trial Exhibit 142	11	AA 2048
	Trial Exhibit 152	11	AA 2049- AA 2050
	Trial Exhibit 194	11	AA 2051- AA 2092
	Trial Exhibit 277	11	AA 2093- AA 2095
	Trial Exhibit 296	11	AA 2096- AA 2097
8/26/21	Transcript of Proceedings (8/18/21) Bench Trial – Day 3, Vol. 2	12	AA 2098- AA 2238
	Trial Exhibit 78	12	AA 2239- AA 2240
	Trial Exhibit 82	12	AA 2241- AA 2243
	Trial Exhibit 83	12	AA 2244
	Trial Exhibit 87	12	AA 2245- AA 2246
	Trial Exhibit 88	12	AA 2247- AA 2248
	Trial Exhibit 89	12	AA 2249
	Trial Exhibit 90	12	AA 2250-

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
			AA 2251
	Trial Exhibit 94	12	AA 2252
	Trial Exhibit 98	12	AA 2253- AA 2254
	Trial Exhibit 99	12	AA 2255- AA 2256
	Trial Exhibit 113	12	AA 2257- AA 2260
	Trial Exhibit 132	12	AA 2261
	Trial Exhibit 171	12	AA 2262
	Trial Exhibit 293	12	AA 2263- AA 2264
	Trial Exhibit 346	12	AA 2265- AA 2267
8/26/21	Transcript of Proceedings (8/19/21) Bench Trial – Day 4, Vol. 1	13	AA 2268- AA 2387
	Trial Exhibit 775	13	AA 2388
	Trial Exhibit 776	13	AA 2389- AA 2390
	Trial Exhibit 781	13	AA 2391- AA 2394
	Trial Exhibit 785	13	AA 2395- AA 2411
	Trial Exhibit 789	13	AA 2412- AA 2413
	Trial Exhibit 821	13	AA 2414
	Trial Exhibit 837	13	AA 2415- AA 2416

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
8/26/21	Transcript of Proceedings (8/19/21) Bench Trial – Day 4, Vol. 2	14	AA 2417- AA 2597
	Trial Exhibit 265	14	AA 2598- AA 2599
	Trial Exhibit 345	14	AA 2600- AA 2602
8/26/21	Transcript of Proceedings (8/20/21) Bench Trial – Day 5	15	AA 2603- AA 2800
	Trial Exhibit 17	15	AA 2801- AA 2803
	Trial Exhibit 58	15	AA 2804- AA 2805
	Trial Exhibit 60	15	AA 2806- AA 2807
	Trial Exhibit 116	15	AA 2808
	Trial Exhibit 120	15	AA 2809- AA 2816
	Trial Exhibit 305	15	AA 2817
	Trial Exhibit 1052	16	AA 2818- AA 2862
8/26/21	Transcript of Proceedings (8/23/21) Bench Trial – Day 6, Vol. 1	16	AA 2863- AA 2984
	Trial Exhibit 84	16	AA 2985- AA 3045
	Trial Exhibit 110	17	AA 3046
	Trial Exhibit 143	17	AA 3047- AA 3048
	Trial Exhibit 160	17	AA 3049
	Trial Exhibit 166	17	AA 3050- AA 3058

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
	Trial Exhibit 170	17	AA 3059- AA 3060
	Trial Exhibit 172	17	AA 3061- AA 3064
	Trial Exhibit 267	17	AA 3065- AA 3069
	Trial Exhibit 271	17	AA 3070
	Trial Exhibit 330	17	AA 3071- AA 3073
	Trial Exhibit 338	17	AA 3074- AA 3076
	Trial Exhibit 339	17	AA 3077- AA 3084
	Trial Exhibit 364	17	AA 3085- AA 3087
	Trial Exhibit 425	17	AA 3088- AA 3106
8/26/21	Transcript of Proceedings (8/23/21) Bench Trial – Day 6, Vol. 2	17	AA 3107- AA 3282
8/26/21	Transcript of Proceedings (8/24/21) Bench Trial – Day 7, Vol. 1	18	AA 3283- AA 3410
	Trial Exhibit 428	18	AA 3411- AA 3415
	Trial Exhibit 464	18	AA 3416- AA 3422
	Trial Exhibit 909	18	AA 3423- AA 3433
8/26/21	Transcript of Proceedings (8/24/21) Bench Trial – Day 7, Vol. 2	19	AA 3434- AA 3579
	Trial Exhibit 413	19	AA 3580- AA 3600

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
8/26/21	Transcript of Proceedings (8/25/21) Bench Trial – Day 8	20	AA 3601- AA 3703
9/2/21	Notice of Submission of Proposed Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3704- AA 3735
9/3/21	Notice of Submission of Plaintiff's Objections to Defendants' Proposed Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3736- AA 3771
9/3/21	Order Granting Motion for Judgment Pursuant to NRCP 52(c)	20	AA 3772- AA 3795
9/8/21	Notice of Entry of Order Granting Defendants Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3796- AA 3822
9/22/21	Non-Director Defendants' Memorandum of Costs	20	AA 3823- AA 3831
9/22/21	Defendant Kenneth Potashner's Verified Memorandum of Costs	21	AA 3832- AA 3872
9/29/21	Defendants' Motion for Attorneys' Fees	21	AA 3873- AA 3901
9/30/21	Plaintiff PAMTP LLC's Notice of Appeal	21	AA 3902- AA 3929
10/7/21	Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	21	AA 3930- AA 3945
10/7/21	Motion to Retax Non-Director Defendants' Memorandum of Costs	21	AA 3946- AA 3964
10/13/21	Plaintiff PAMTP LLC's Opposition to Motion for Attorneys' Fees	21	AA 3965- AA 4046

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
10/21/21	Non-Director Defendants' Opposition to Plaintiff's Motion to Retax Costs	21	AA 4047-AA 4069
10/21/21	Opposition to Plaintiff's Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	22	AA 4070-AA 4131
10/28/21	Reply in Support of Defendants' Motion for Attorneys' Fees	22	AA 4132-AA 4159
11/9/21	PAMTP, LLC's Reply in Support of Motion to Retax Non-Director Defendants' Memorandum of Costs	22	AA 4160-AA 4170
11/9/21	PAMTP, LLC's Reply in Support of Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	22	AA 4171-AA 4178
12/16/21	Plaintiff PAMTP LLC's Supplemental Brief in Opposition to Motion for Attorneys' Fees	22	AA 4179-AA 4189
12/16/21	Supplemental Brief in Support of Defendants' Motion for Attorneys' Fees	22	AA 4190-AA 4204
12/22/21	Transcript of Hearing re: Defendants' Motion for Attorneys' Fees (12/2/21)	23	AA 4205-AA 4311
1/13/22	Transcript of Hearing re: Plaintiff's Motions to Retax (11/16/21)	23	AA 4312-AA 4369
6/7/22	Order Denying Defendants' Motion for Attorneys' Fees	23	AA 4370-AA 4386
6/15/22	Notice of Entry of Order Denying Defendants' Motion for Attorneys' Fees	23	AA 4387-AA 4407
6/30/22	Notice of Appeal	23	AA 4408-AA 4414
8/29/22	Order re: PAMTP LLC'S Motions to Re-Tax Costs	23	AA 4415-AA 4439
9/2/22	Notice of Entry of Order re: PAMTP, LLC's Motions to Re-Tax Costs	24	AA 4440-AA 4466
9/14/22	Plaintiff PAMTP LLC's Case Appeal Statement	24	AA 4467-AA 4526

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
9/16/22	Amended Judgment	24	AA 4527- AA 4536
10/19/22	Order Granting Plaintiff's Motion to Stay Execution of Amended Judgment on Order Shortening Time	24	AA 4537- AA 4547
12/12/22	Order Granting Defendants' Motion to Amend Judgment	24	AA 4548- AA 4562
12/18/22	Second Amended Judgment	24	AA 4563- AA 4571

INDEX TO JOINT APPENDIX

(Alphabetical)

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
3/7/18	Amended Class Action and Derivative Complaint	1	AA 0001- AA 0078
9/16/22	Amended Judgment	24	AA 4527- AA 4536
9/3/20	Answer to Plaintiff PAMTP LLC's Complaint	2	AA 0318- AA 0360
9/22/21	Defendant Kenneth Potashner's Verified Memorandum of Costs	21	AA 3832- AA 3872
9/29/21	Defendants' Motion for Attorneys' Fees	21	AA 3873- AA 3901
8/24/21	Defendants' Motion for Judgment for Lack of Evidence on <i>Gentile</i> Damages Pursuant to NRCP 52(c)	5	AA 0877- AA 0886
8/24/21	Defendants' Motion for Judgment on Partial Findings Pursuant to NRCP 52(c) Regarding Lack of Control or Expropriation	5	AA 0851- AA 0865
8/24/21	Defendants' Motion for Judgment on Standing Pursuant to NRCP 52(c)	5	AA 0866- AA 0876
9/3/20	Director Defendants' Answer to Complaint	2	AA 0281- AA 0317
5/19/20	Final Judgment and Order of Dismissal With Prejudice	1	AA 0175- AA 0203
7/15/21	Findings of Fact, Conclusions of Law and Order Imposing Spoliation Sanctions	5	AA 0697- AA 0707
10/7/21	Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	21	AA 3930- AA 3945
10/7/21	Motion to Retax Non-Director Defendants' Memorandum of Costs	21	AA 3946- AA 3964

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
9/22/21	Non-Director Defendants' Memorandum of Costs	20	AA 3823-AA 3831
10/21/21	Non-Director Defendants' Opposition to Plaintiff's Motion to Retax Costs	21	AA 4047-AA 4069
8/25/21	Non-Director Defendants' Trial Brief Re: Section 14(A)	5	AA 0897-AA 0904
6/30/22	Notice of Appeal	23	AA 4408-AA 4414
6/15/22	Notice of Entry of Order Denying Defendants' Motion for Attorneys' Fees	23	AA 4387-AA 4407
9/8/21	Notice of Entry of Order Granting Defendants Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3796-AA 3822
9/2/22	Notice of Entry of Order re: PAMTP, LLC's Motions to Re-Tax Costs	24	AA 4440-AA 4466
9/3/21	Notice of Submission of Plaintiff's Objections to Defendants' Proposed Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3736-AA 3771
9/2/21	Notice of Submission of Proposed Order Granting Defendants' Motion for Judgment Pursuant to NRCP 52(c), Findings of Fact and Conclusions of Law, and Judgment Thereon	20	AA 3704-AA 3735
8/25/21	Opposition to Plaintiff PAMTP LLC's Memorandum of Law Regarding NRS 78.200 and NRS 78.211	5	AA 0905-AA 0914
10/21/21	Opposition to Plaintiff's Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	22	AA 4070-AA 4131
6/7/22	Order Denying Defendants' Motion for Attorneys' Fees	23	AA 4370-AA 4386

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
8/20/20	Order Denying Defendants' Motions to Dismiss Plaintiff's Complaint	2	AA 0271- AA 0280
3/27/18	Order Denying Defendants' Motions to Dismiss the Amended Class Action and Derivative Complaint	1	AA 0079- AA 0090
8/3/21	Order Denying Defendants' Motion in Limine to Exclude All Reference, Evidence, and Testimony Regarding Post Merger Conduct	5	AA 0761- AA 0778
8/3/21	Order Denying Defendants' Motion in Limine to Exclude Evidence Related to Alleged Fraud by the Non- Director Defendants	5	AA 0796- AA 0813
8/3/21	Order Denying Defendants' Motion in Limine to Exclude Plaintiff's Damages	5	AA 0726- AA 0742
8/3/21	Order Denying Defendants' Motion in Limine to Exclude the Opinions, Testimony, and Reports of J.T. Atkins	5	AA 0779- AA 0795
8/3/21	Order Denying Motion for Summary Judgment of Defendant VTB Holdings, Inc. and Specially Appearing Defendants Stripes Group, LLC SG VTB Holdings, LLC Juergen Stark, and Kenneth Fox	5	AA 0814- AA 0831
8/3/21	Order Denying Motion for Summary Judgment of Specially Appearing Defendants Stripes Group, LLC, SG VTB Holdings. LLC Juergen Stark, Kenneth Fox	5	AA 0708- AA 0725
8/3/21	Order Denying the Director Defendants' Motion for Summary Judgment	5	AA 0743- AA 0760
8/23/21	Order Granting Certain Director Defendants' Motion for Determination of Good Faith Settlement	5	AA 0839- AA 0844

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
12/12/22	Order Granting Defendants' Motion to Amend Judgment	24	AA 4548- AA 4562
8/3/21	Order Granting in Part Defendants' Motion in Limine to Exclude Evidence and Testimony Related to Irrelevant or Undisclosed Measures of Damages	5	AA 0832- AA 0838
9/3/21	Order Granting Motion for Judgment Pursuant to NRCP 52(c)	20	AA 3772- AA 3795
5/18/21	Order Granting Plaintiff's Motion Against Defendants Kenneth Potashner, Juergen Stark, and VTB Holdings, inc. Setting Evidentiary Hearing Re Spoilation Sanctions	2	AA 0361- AA 0368
10/19/22	Order Granting Plaintiff's Motion to Stay Execution of Amended Judgment on Order Shortening Time	24	AA 4537- AA 4547
8/29/22	Order re: PAMTP LLC'S Motions to Re-Tax Costs	23	AA 4415- AA 4439
5/20/20	PAMTP LLC's Complaint	2	AA 0204- AA 0270
11/9/21	PAMTP, LLC's Reply in Support of Motion to Retax Defendant Kenneth Potashner's Verified Memorandum of Costs	22	AA 4171- AA 4178
11/9/21	PAMTP, LLC's Reply in Support of Motion to Retax Non-Director Defendants' Memorandum of Costs	22	AA 4160- AA 4170
9/14/22	Plaintiff PAMTP LLC's Case Appeal Statement	24	AA 4467- AA 4526
8/24/21	Plaintiff PAMTP LLC's Memorandum of Law Regarding NRS 78.200 and NRS 78.211	5	AA 0845- AA 0850
9/30/21	Plaintiff PAMTP LLC's Notice of Appeal	21	AA 3902- AA 3929
10/13/21	Plaintiff PAMTP LLC's Opposition to Motion for Attorneys' Fees	21	AA 3965- AA 4046

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
12/16/21	Plaintiff PAMTP LLC's Supplemental Brief in Opposition to Motion for Attorneys' Fees	22	AA 4179- AA 4189
10/28/21	Reply in Support of Defendants' Motion for Attorneys' Fees	22	AA 4132- AA 4159
12/18/22	Second Amended Judgment	24	AA 4563- AA 4571
8/24/21	Specially Appearing Defendants Juergen Stark's and Kenneth Fox's Motion for Judgment Under the Statute of Limitations Pursuant to NRCF 52(c)	5	AA 0887- AA 0896
11/15/19	Stipulation of Settlement	1	AA 0091- AA 0174
12/16/21	Supplemental Brief in Support of Defendants' Motion for Attorneys' Fees	22	AA 4190- AA 4204
6/23/21	Transcript of Evidentiary Hearing re: Spoliation Sanctions (6/18/21)	3-4	AA 0369- AA 0696
12/22/21	Transcript of Hearing re: Defendants' Motion for Attorneys' Fees (12/2/21)	23	AA 4205- AA 4311
1/13/22	Transcript of Hearing re: Plaintiff's Motions to Retax (11/16/21)	23	AA 4312- AA 4369
8/26/21	Transcript of Proceedings Bench Trial – Day 1 (8/16/21)	6-7	AA 0915- AA 1231
8/26/21	Transcript of Proceedings (8/17/21) Bench Trial – Day 2, Vol. 1	9	AA 1576- AA 1719
8/26/21	Transcript of Proceedings (8/17/21) Bench Trial – Day 2, Vol. 2	10	AA 1720- AA 1888
8/26/21	Transcript of Proceedings (8/18/21) Bench Trial – Day 3, Vol. 1	11	AA 1889- AA 2018
8/26/21	Transcript of Proceedings (8/18/21) Bench Trial – Day 3, Vol. 2	12	AA 2098- AA 2238

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
8/26/21	Transcript of Proceedings (8/19/21) Bench Trial – Day 4, Vol. 1	13	AA 2268- AA 2387
8/26/21	Transcript of Proceedings (8/19/21) Bench Trial – Day 4, Vol. 2	14	AA 2417- AA 2597
8/26/21	Transcript of Proceedings (8/20/21) Bench Trial – Day 5	15	AA 2603- AA 2800
8/26/21	Transcript of Proceedings (8/23/21) Bench Trial – Day 6, Vol. 1	16	AA 2863- AA 2984
8/26/21	Transcript of Proceedings (8/23/21) Bench Trial – Day 6, Vol. 2	17	AA 3107- AA 3282
8/26/21	Transcript of Proceedings (8/24/21) Bench Trial – Day 7, Vol. 1	18	AA 3283- AA 3410
8/26/21	Transcript of Proceedings (8/24/21) Bench Trial – Day 7, Vol. 2	19	AA 3434- AA 3579
8/26/21	Transcript of Proceedings (8/25/21) Bench Trial – Day 8	20	AA 3601- AA 3703
	Trial Exhibit 5	11	AA 2019- AA 2022
	Trial Exhibit 6	11	AA 2023- AA 2029
	Trial Exhibit 17	15	AA 2801- AA 2803
	Trial Exhibit 26	11	AA 2030
	Trial Exhibit 38	11	AA 2031
	Trial Exhibit 58	15	AA 2804- AA 2805
	Trial Exhibit 60	15	AA 2806- AA 2807
	Trial Exhibit 78	12	AA 2239- AA 2240

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
	Trial Exhibit 82	12	AA 2241- AA 2243
	Trial Exhibit 83	12	AA 2244
	Trial Exhibit 84	16	AA 2985- AA 3045
	Trial Exhibit 87	12	AA 2245- AA 2246
	Trial Exhibit 88	12	AA 2247- AA 2248
	Trial Exhibit 89	12	AA 2249
	Trial Exhibit 90	12	AA 2250- AA 2251
	Trial Exhibit 94	12	AA 2252
	Trial Exhibit 95	11	AA 2032
	Trial Exhibit 98	12	AA 2253- AA 2254
	Trial Exhibit 99	12	AA 2255- AA 2256
	Trial Exhibit 106	11	AA 2033
	Trial Exhibit 108	11	AA 2034- AA 2037
	Trial Exhibit 109	11	AA 2038- AA 2041
	Trial Exhibit 110	17	AA 3046
	Trial Exhibit 111	11	AA 2042- AA 2043
	Trial Exhibit 113	12	AA 2257- AA 2260
	Trial Exhibit 116	15	AA 2808

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
	Trial Exhibit 120	15	AA 2809- AA 2816
	Trial Exhibit 132	12	AA 2261
	Trial Exhibit 137	11	AA 2044- AA 2047
	Trial Exhibit 142	11	AA 2048
	Trial Exhibit 143	17	AA 3047- AA 3048
	Trial Exhibit 152	11	AA 2049- AA 2050
	Trial Exhibit 160	17	AA 3049
	Trial Exhibit 166	17	AA 3050- AA 3058
	Trial Exhibit 170	17	AA 3059- AA 3060
	Trial Exhibit 171	12	AA 2262
	Trial Exhibit 172	17	AA 3061- AA 3064
	Trial Exhibit 194	11	AA 2051- AA 2092
	Trial Exhibit 244	7-8	AA 1232- AA 1573
	Trial Exhibit 265	14	AA 2598- AA 2599
	Trial Exhibit 267	17	AA 3065- AA 3069
	Trial Exhibit 271	17	AA 3070
	Trial Exhibit 277	11	AA 2093- AA 2095
	Trial Exhibit 293	12	AA 2263- AA 2264

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
	Trial Exhibit 296	11	AA 2096- AA 2097
	Trial Exhibit 305	15	AA 2817
	Trial Exhibit 330	17	AA 3071- AA 3073
	Trial Exhibit 338	17	AA 3074- AA 3076
	Trial Exhibit 339	17	AA 3077- AA 3084
	Trial Exhibit 345	14	AA 2600- AA 2602
	Trial Exhibit 346	12	AA 2265- AA 2267
	Trial Exhibit 364	17	AA 3085- AA 3087
	Trial Exhibit 376	9	AA 1574- AA 1575
	Trial Exhibit 413	19	AA 3580- AA 3600
	Trial Exhibit 425	17	AA 3088- AA 3106
	Trial Exhibit 428	18	AA 3411- AA 3415
	Trial Exhibit 464	18	AA 3416- AA 3422
	Trial Exhibit 775	13	AA 2388
	Trial Exhibit 776	13	AA 2389- AA 2390
	Trial Exhibit 781	13	AA 2391- AA 2394
	Trial Exhibit 785	13	AA 2395- AA 2411

<u>Date</u>	<u>Document Description</u>	<u>Vol.</u>	<u>Pages</u>
	Trial Exhibit 789	13	AA 2412- AA 2413
	Trial Exhibit 821	13	AA 2414
	Trial Exhibit 837	13	AA 2415- AA 2416
	Trial Exhibit 909	18	AA 3423- AA 3433
	Trial Exhibit 1052	16	AA 2818- AA 2862

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully submitted this 12th day of January, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on January 12, 2023, a true and correct copy of the foregoing was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

/s/ CaraMia Gerard
An Employee of McDonald Carano LLP



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

IN RE PARAMETRIC SOUND)
CORPORATION SHAREHOLDERS')
LITIGATION)

CASE NO. A-13-686890-B
DEPT NO. XI

This Document Relates to:)
ALL ACTIONS)
_____)

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

FRIDAY, JUNE 18, 2021

EVIDENTIARY HEARING - DAY 1

APPEARANCES:

FOR KENNETH POTASHNER,
ANDREW WOLFE, SETH
PUTTERMAN, ROBERT KAPLAN,
ELWOOD NORRIS, PARIS
ACQUISITION, VTB HOLDINGS,
PARAMETRIC SOUND, TURTLE
BEACH CORP.:

JOSEPH S. PEEK, ESQ.
ROBERT J. CASSITY, ESQ.
RICHARD C. GORDON, ESQ.
JOSHUA HESS, ESQ.
ALEJANDRO E. MORENO, ESQ.
JOHN P. STIGI, III, ESQ.

FOR THE OBJECTOR:

GEORGE F. OGILVIE, III, ESQ.
ADAM M. APTON, ESQ.

RECORDED BY: JILL HAWKINS, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

I N D E X

Opening statement for the Plaintiffs by Mr. Ogilvie	5
Opening statement for the Defense by Mr. Peek	10

W I T N E S S E S

WITNESSES FOR THE PLAINTIFF:

DAVID MADIGAN

Direct Examination by Mr. Ogilvie	17
Cross-Examination by Mr. Peek	26
Redirect Examination by Mr. Ogilvie	32
Recross-Examination by Mr. Peek	34

KIERAN GRENNAN

Direct Examination by Mr. Ogilvie	36
Cross-Examination by Mr. Peek	45
Redirect Examination by Mr. Ogilvie	83
Recross-Examination by Mr. Peek	87
Further Redirect Examination by Mr. Ogilvie	94
Further Recross-Examination by Mr. Peek	97

JUERGEN STARK

Direct Examination by Mr. Apton	100
Cross-Examination by Mr. Hess	116
Redirect Examination by Mr. Apton	134
Recross-Examination by Mr. Hess	164
Further Redirect Examination by Mr. Apton	167

KENNETH FOX

Direct Examination by Mr. Apton	170
---------------------------------	-----

Cross-Examination by Mr. Hess	188
Redirect Examination by Mr. Apton	192
KENNETH POTASHNER	
Examination read by Mr. Apton	197
ANDREW WOLFE	
Examination read by Mr. Apton	203
WITNESSES FOR THE DEFENSE:	
ERIK JOHN HOUSER	
Direct Examination by Mr. Moreno	208
Cross-Examination by Mr. Apton	217
KEN POTASHNER	
Direct Examination by Mr. Potashner	221
Cross-Examination by Mr. Apton	247
Redirect Examination by Mr. Stigi	274
ANDREW WOLFE	
Direct Examination by Mr. Stigi	278
Cross-Examination by Mr. Apton	284
Redirect Examination by Mr. Stigi	286

E X H I B I T S

EXHIBITS ADMITTED:

1	249
3	205
6	102
7	110

8	178
9	174
10	174
11	162
12	184
13	152
14-16	181
28	270
30	268
31	270
319	275
342	233
421-566	72
454	72
483	61
515	59
532	61
559	63
562	68
564	70
570	127
571	129

1 **LAS VEGAS, CLARK COUNTY, NEVADA, JUNE 18, 2021, 9:00 A.M.**

2 * * * * *

3 MR. PEEK: We're ready to go.

4 THE COURT: Would anyone like to make an opening
5 statement? It's a yes or no.

6 MR. PEEK: I would reserve mine, Your Honor, for now.
7 I'm just waiting to hear from the other side. The clock is on
8 him.

9 THE COURT: Mr. Ogilvie, would you like to make an
10 opening statement --

11 MR. OGILVIE: Yes, please.

12 THE COURT: -- since you're not in arbitration?

13 MR. OGILVIE: Thank you, Your Honor. And thanks to
14 Judge Wall.

15 **OPENING STATEMENT FOR THE PLAINTIFF**

16 MR. OGILVIE: Your Honor, we're here today because
17 the Court previously determined that the loss of text messages,
18 e-mails and other ESI after the litigation hold letters were
19 issued to the individual defendants is of serious concern and
20 an evidentiary hearing should be scheduled to evaluate the
21 *Ribeiro* factors and to determine which evidentiary sanction or
22 sanctions would be appropriate.

23 Plaintiff submits that substantial destruction of
24 relevant ESI occurred in this litigation, which warrants
25 serious and substantial evidentiary sanctions, as set forth in

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1 plaintiff's pre-hearing brief, which we submitted last night.
2 At the conclusion of the hearing plaintiff will request the
3 following sanctions.

4 There's three evidentiary sanctions and one
5 exclusionary sanction: One, an adverse factual inference that
6 defendant, Kenneth Potashner, had control over Parametric at
7 the time of the merger and used that control for his personal
8 benefit when approving the merger;

9 Two, an adverse inference finding that Potashner and
10 Juergen Stark knew that the fairness opinion in the proxy
11 statement was materially misleading;

12 Three, an adverse factual inference finding that
13 Potashner was promised material consideration in exchange for
14 approving a merger and consequently acted in his own
15 self-interest, to the detriment of Parametric's stockholders;
16 and

17 The fourth sanction is an exclusionary sanction, Your
18 Honor, which would exclude any and all testimony by or on
19 behalf of the defendants that would seek to disprove any of the
20 foregoing three evidentiary inferences.

21 So the evidence that we will submit today supports
22 these sanctions.

23 We designated deposition transcripts and will
24 introduce through interrogatory responses evidence that
25 demonstrates that Mr. Potashner, despite numerous litigation

1 holds, beginning in August 2013 and continuing through 2013,
2 2014, 2015 and beyond, knew or had the obligation to preserve
3 ESI. But despite those, Mr. Potashner destroyed text messages,
4 and then lied about it in deposition.

5 The evidence will show that in his August 8th, 2019,
6 deposition, Mr. Potashner repeatedly testified that he did not
7 communicate by text and did not use texts in a work
8 environment. That is demonstrably false. Mr. Potashner also
9 destroyed e-mails sent to and from his personal Gmail account.

10 We have two -- well, we have one expert and one
11 foundational witness who will lay the foundation for Dr.
12 Madigan's testimony that 35 percent, roughly 35 percent of the
13 e-mails between Mr. Potashner and John Todd were destroyed --
14 were not produced, presumably destroyed, deleted. But whether
15 they were destroyed, deleted or simply not produced doesn't
16 matter, Your Honor. It amounts to the same spoliation and
17 results in the same appropriate sanctions.

18 Dr. Madigan will provide the Court with his analysis
19 which, again, that roughly 35 percent of the 1,328 e-mails
20 between Mr. Potashner and Mr. Todd were not produced. That has
21 a margin of error of approximately 8 percent, so somewhere
22 between 27 and 43 percent of those individuals' e-mails were
23 not produced.

24 Regarding Mr. Juergen Stark and VTB Holdings, the
25 interrogatory responses show that VTB Holdings issued the

1 litigation holds to Mr. Stark and Ken Fox and the litigation
2 holds covered all ESI and all aspects of the shareholder
3 litigation regarding the preservation of that ESI. Mr. Stark,
4 as a long-time executive in various companies, understood and
5 admitted in his deposition to being familiar with the legal
6 hold process. But despite that litigation hold and his
7 experience with that process, he -- Mr. Stark did not preserve
8 text messages on his cell phone before clearing them in 2014.
9 A small portion of text messages were produced by non-party Ron
10 Doornink. Those text messages show communication about business
11 issues via text with Mr. Stark.

12 And the spoliation is not limited just to Mr. Stark.
13 Mr. Fox did not preserve text messages before replacing his
14 phone on or after February 15th -- or February, 2015. Mr. Fox
15 also didn't preserve his Gmail account e-mails. Several of his
16 Gmail e-mails made their way into discovery through other
17 means, but he produced zero himself. The destruction of text
18 messages and e-mails suggest that other ESI was also spoliated.

19 And at the conclusion, again, Your Honor, of today's
20 hearing we will be seeking the sanctions that were mentioned at
21 the outset regarding Mr. Potashner's control over Parametric,
22 the fairness opinion in the proxy statement, and the modus for
23 approving the merger.

24 Obviously, as the Court has reminded us again and
25 again, we need to move quickly. We will attempt to do so. We

1 will attempt to -- we will produce or adduce much of the
2 evidence through deposition designations that we have
3 submitted.

4 THE COURT: I'm not reading them. So if you're not
5 reading them in this hearing, they're not coming in,
6 Mr. Ogilvie. Mr. Peek made me do that one time. I stayed up
7 until 1:30 in the morning. I'm never doing it again.

8 So anything else?

9 MR. OGILVIE: Understood, Your Honor.

10 THE COURT: Okay.

11 MR. OGILVIE: I have to tell you that wasn't our
12 plan, but I understand what the Court is saying.

13 THE COURT: Yeah. I learned my first year as a judge
14 never to let a lawyer make me do that again. And it's all due
15 to Mr. Peek on this particular issue.

16 MR. PEEK: And I knew better.

17 MR. OGILVIE: Okay. That's all I have for the
18 opening, Your Honor.

19 THE COURT: Thank you, Mr. Ogilvie.

20 Mr. Peek.

21 MR. PEEK: Your Honor, I think the first thing I want
22 to say --

23 THE COURT: Mr. Ogilvie, you have to wipe down. We
24 have to follow COVID protocols. And I can't start the clock
25 until you wipe down. So I've got to go back to it on Ogilvie

1 time. There we go. Okay. It's going to be interesting.

2 **OPENING STATEMENT FOR THE DEFENDANTS**

3 MR. PEEK: Your Honor, the first thing that I want to
4 say is that the focus has been by the plaintiffs on
5 Mr. Potashner, not on all of the other director defendants. So
6 I want the Court to keep that in mind that it is not the other
7 director defendants against whom they seek any evidentiary
8 sanctions or any adverse inferences that they would ask you to
9 draw.

10 The other thing, Your Honor, that I do want to say is
11 that I'm reminded that this should be an opening statement, not
12 an opening argument, and it appears to be more an opening
13 argument than it is an opening statement. And it's
14 Mr. Ogilvie's belief that he will be able to adduce all that
15 evidence. But I want the Court to keep in mind a couple of
16 things.

17 When we hear from Madigan and Grennan, as I
18 appreciate the report and I know the Court has at least had an
19 opportunity to review it, is that we're not talking about a
20 percentile of all of the Todd e-mails or all of the Potashner
21 e-mails. We're only talking about a percentile based upon
22 1,328 e-mails.

23 THE COURT: We're talking about all their personal
24 e-mails --

25 MR. PEEK: No, Your Honor. I --

1 THE COURT: -- and all their personal text messages.

2 MR. PEEK: We'll wait and hear from them, but that is
3 exactly my point is I have not heard Grennan to say that, nor
4 have I read Grennan to say that. I know that is the way they
5 are going to try to get Mr. Grennan to go. Because what
6 they're saying is of the 17,000 personal e-mails that
7 Mr. Potashner produced, what percentage of what number is it
8 that have not been produced, or at least by that party?

9 The other thing that is important to remember, Your
10 Honor, is when we are looking at the concept of spoliation,
11 maybe somebody didn't produce it for whatever reason. They
12 want you to believe that there was an intent on Mr. Potashner's
13 part to delete and intent to destroy, but what we do know, Your
14 Honor, with respect to the e-mails, because you only know that
15 because of the other e-mails, is that the e-mails are available
16 to them from an evidentiary standpoint from which they would
17 draw inferences.

18 So what I'm learning as I pass through my career,
19 Your Honor, and it's been a long one, is that now lawyers,
20 instead of trying cases on the evidence look for a discovery
21 tort. They look for that. They set you up. It now becomes a
22 game of gotcha anymore. It is no longer do I have the evidence
23 upon which to prove my case, but can I find some discovery tort
24 to be able to persuade the Court, oh, this person is bad, that
25 person is bad.

1 So when you hear the evidence from the transcripts of
2 Mr. Potashner, you won't get the same conclusion that Mr.
3 Ogilvie wants you to draw: that he lied when he said he didn't
4 text. We will hear and you will know what his testimony was,
5 and it is not the way that Mr. Ogilvie characterizes it.

6 Similarly, when you hear from our expert -- not
7 expert, really the ESI guy who helped gather, along with
8 Mr. Moreno, the evidence from Mr. Potashner's laptop, the same
9 evidence that we know because Todd has it.

10 And what you will also learn, Your Honor, as we go
11 through this, when you look at the compilation and the random
12 sampling, because we did it ourselves, and I will say that the
13 evidence will show, Your Honor, that of those 50 e-mails, one,
14 we only found 45 because we don't really know what the 50 are
15 because nobody has told us what the 50 are, but when we tried
16 to duplicate that effort, what we found is only 45. That's
17 what our evidence will show.

18 Secondly, what we also found, and I tried to show you
19 that yesterday, Your Honor, there are e-mails talking about,
20 oh, my son is going to go to college in Wake Forest. Oh, thank
21 you for dinner the other night. Oh, it was nice meeting you
22 and your wife. That, Your Honor, would not be a responsive
23 e-mail. So that so called subset, that so called percentage
24 that they want you to believe is based upon a false premise,
25 the false premise is that the documents that constitute this 50

1 of the 145 were in fact, one, responsive; or, two, something
2 that we would have found as we were trying to produce the
3 documents.

4 THE COURT: And if they hadn't been destroyed, you
5 wouldn't be asking anyone to trust you on that.

6 MR. PEEK: No, Your Honor. You are saying destroyed.
7 They want you to believe destroyed. And it seems that you may
8 have already reached that conclusion, and that troubles me.

9 THE COURT: I've been doing this briefing since
10 March, Mr. Peek. This is the evidentiary hearing on the nature
11 of the sanction --

12 MR. PEEK: I understand.

13 THE COURT: -- not whether there has been a discovery
14 abuse. I've already found the discovery abuse. We are at the
15 stage of what's the appropriate sanction, given the evidence
16 that has been lost.

17 Now, I understand your position is much of the
18 evidence has not been lost, but I have already made the
19 decision.

20 MR. PEEK: What you have made a decision, as I
21 appreciate, Your Honor, the *Young v. Ribeiro*, is that this
22 is --

23 THE COURT: No, Mr. Peek, I have not evaluated *Young*
24 *v. Ribeiro* yet.

25 MR. PEEK: You have said there is a prima facie case

1 to believe that the sanctions may be awarded and I am going to
2 determine what they are based upon the standards of prejudice,
3 intent, willfulness --

4 THE COURT: Yep.

5 MR. PEEK: -- and whether real evidence has been
6 lost.

7 THE COURT: That is part of my analysis.

8 MR. PEEK: Right. That is part of your analysis. So
9 let's at least keep the eye on that ball, Your Honor, that we
10 need to focus on willfulness, intent, spoliation and whether
11 the evidence has been lost.

12 And I would also say, Your Honor, I don't recall
13 seeing a finding that there was a deletion, because if you look
14 at the sampling that I looked at of Mr. Todd's e-mails that
15 Mr. Grennan will be testifying to, those documents would not
16 have been produced by others because they relate to a dinner
17 date. They are not responsive.

18 So while you may have already reached a conclusion
19 that there have been some documents lost, it is not that vast
20 number that they want you to believe. So I want you to keep
21 that open mind, Your Honor --

22 THE COURT: I will.

23 MR. PEEK: -- even though you have, as you said,
24 reached a conclusion that there has been some.

25 THE COURT: We wouldn't have had this hearing if

1 there hadn't been significant evidence.

2 MR. PEEK: I understand, Your Honor. I'm very clear.
3 But let's also keep in mind that facts should be elicited from
4 that witness stand, not through some discovery tort.

5 THE COURT: We'll see. Okay.

6 MR. PEEK: Oh, I've got to wipe down for George.

7 THE COURT: Yep. First witness.

8 MR. HESS: Actually, sorry --

9 THE COURT: You guys are going to get involved in
10 this?

11 MR. PEEK: Remember, we only have --

12 THE COURT: If you're going to start, you're going to
13 take the time away from Mr. Peek --

14 MR. HESS: Fair enough, Your Honor.

15 THE COURT: -- and then you run out and then it's not
16 my problem anymore. I'd just ask you to sit down and shut up.

17 MR. HESS: I'll give him the lane.

18 MR. OGILVIE: Your Honor --

19 THE COURT: First witness?

20 MR. OGILVIE: Kieran Grennan.

21 THE COURT: Thank you.

22 MR. OGILVIE: I'm sorry. I'm sorry.

23 MR. PEEK: You told me Madigan.

24 MR. OGILVIE: Yes. I apologize.

25 THE COURT: Madigan is the one Dan told me you were

1 calling first.

2 MR. OGILVIE: Dr. Madigan. Yes, please. Your Honor,
3 could I publish -- in an attempt to save some time, could I
4 publish the depositions that were delivered to the court clerk
5 yesterday?

6 THE COURT: For what purpose?

7 MR. OGILVIE: Well, they're all party depositions and
8 a party opponent deposition can be used for any purpose.

9 THE COURT: It can, but you have to actually want to
10 use it. You can't just publish it.

11 MR. OGILVIE: Well, I'm not going to use it with
12 these witnesses, but I'm going to read into evidence --

13 THE COURT: So when you get ready to use the portion,
14 let me know and we will publish them as you use them. I do not
15 want to publish depositions that will not be used --

16 MR. OGILVIE: Okay.

17 THE COURT: -- because then we have to keep them
18 instead of returning them to you.

19 MR. OGILVIE: Okay. Well, I'll make it --

20 THE COURT: So, go. Where's our witness?

21 THE CLERK: I'm pulling him up, Judge.

22 THE COURT: Thank you. Good morning, sir. It's my
23 understanding that you have agreed to be sworn over our video
24 line. Is that correct?

25 MR. MADIGAN: Yes, it is.

1 THE COURT: All right. Please raise your right hand.

2 MR. PEEK: Your Honor, may I move someplace where I
3 can see the witness? My line of sight is --

4 THE COURT: You can, Mr. Peek, as long as you stay
5 socially distant.

6 THE MARSHAL: Right in front of you, Mr. Peek.

7 MR. PEEK: Oh, I'm sorry, he's right here in front of
8 me. Sorry.

9 THE COURT: Raise your right hand, sir, so we can
10 swear you in.

11 **DAVID MADIGAN**

12 (having been recalled as a witness and being first
13 duly sworn, testified via video as follows:)

14 THE CLERK: Please state and spell your first and
15 last name for the record.

16 THE WITNESS: David Madigan. D-a-v-i-d, M-a-d-i-
17 g-a-n.

18 THE COURT: Thank you, sir.

19 Mr. Ogilvie, you're up.

20 MR. OGILVIE: Thank you, Your Honor.

21 **DIRECT EXAMINATION**

22 **BY MR. OGILVIE:**

23 Q Dr. Madigan, good morning. I'm going to just ask you
24 to keep your voice up because the transmission is not as good
25 as it could be.

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1 A Okay.

2 Q Dr. Madigan, how are you employed?

3 A I'm a professor at Northeastern University in Boston.

4 Q And what is your official title at Northeastern?

5 A I'm a professor of statistics. I'm also the provost
6 and the chief academic officer.

7 Q Can you provide the Court with a summary of your
8 educational background?

9 A Sure. So I grew up in Ireland and went to college at
10 Trinity College Dublin. I have a Bachelor's Degree in
11 Mathematics from Trinity and a Ph.D. in Statistics.

12 Q So at Trinity College in Dublin, Ireland?

13 A Yes.

14 Q Could you provide the Court with a summary of your
15 work history?

16 A I've been employed at various universities and a
17 number of companies. I have been a consultant for KPMG. I
18 worked for AT&T for a period. And I've been a professor at
19 four different universities, at the University of Washington in
20 Seattle, at Rutgers University in New Jersey. And most
21 recently until about a year ago I was a professor at Columbia
22 University in New York City, where I was also the Dean of the
23 Faculty of Arts and Sciences.

24 Q Okay. I just want to make sure the record is clear.
25 You said until recently it was at Columbia University in New

1 York City?

2 A That's right, until a year ago.

3 Q Okay. And in what areas were you a professor, what
4 discipline?

5 A Statistics. I've been a professor of Statistics for
6 30 years.

7 Q Do you still teach Statistics?

8 A I do.

9 Q Do you also provide expert witness services?

10 A I've done so in a number of matters over the last 20
11 years or so.

12 Q Okay. Over the past 20 years, approximately how many
13 times have you been engaged as an expert witness?

14 A I don't know the exact number, but I think it was
15 something like maybe 25 different, you know, matters.

16 Q Okay. In what area or discipline?

17 A Much of the work that I've testified about relates to
18 drugs, pharmaceutical products and medical devices.

19 Q Okay. But was it in Statistics?

20 A Oh, yeah. Sorry. In that work I would perform
21 statistical analysis and prepared reports describing that
22 analysis.

23 Q Is it true that all of your expert witness
24 engagements have related to statistical analysis?

25 A Yes.

1 Q Have you been retained to provide expert witness
2 testimony in this matter?

3 A Yes.

4 Q Approximately when were you retained?

5 A It was a few weeks ago, two or three weeks ago.

6 Q Generally, what was the scope of the engagement?

7 A In this particular matter what I was asked to focus
8 on was a collection of e-mails, specifically 1,328 e-mails that
9 were sent by or between Kenneth Potashner and John Todd. What
10 was of interest, as I understood it or understand it is of
11 those 1,328 e-mails, what proportion of them have not been
12 produced by anyone other than Mr. Todd.

13 Q Do you consider yourself qualified to perform the
14 analysis for which you were engaged in this litigation?

15 A I do.

16 Q Why is that?

17 A The matter here that I assisted with is -- has to do
18 with statistical inference and statistical sampling. It's
19 right at the core of the discipline of statistics, so this is a
20 very straightforward application of core statistical ideas --
21 (inaudible).

22 COURT RECORDER: Judge, I need their phones off.

23 THE COURT: Everybody turn your cell phones off. Can
24 they turn them on airplane mode?

25 COURT RECORDER: They can.

1 THE COURT: So they can be on airplane mode, but
2 you're throwing off the witness. I've got about 30 people in
3 the courtroom and they all have their cell phones on, sir, and
4 unfortunately we think it's screwing up the transmission we're
5 getting from you. So we're going to see if we can limit our
6 digital footprint here.

7 THE WITNESS: Thank you, Your Honor.

8 THE COURT: All right, let's try again, Mr. Ogilvie.

9 MR. OGILVIE: Did you miss anything, Jill?

10 COURT RECORDER: No.

11 BY MR. OGILVIE:

12 Q Dr. Madigan, what did you -- how did you go about
13 performing the analysis that you were engaged to perform here?

14 A Well, as I mentioned, what was of interest here were
15 1,300 -- in round numbers, 1,300 e-mail messages, and the
16 question is what proportion of those had not been produced by
17 anyone other than Mr. Todd. So the approach here was to take a
18 sample, a statistical sample of the 1,300 e-mails and use that
19 sample to make -- to estimate the proportion of the 1,300
20 e-mails that had not been produced by anyone other than Mr.
21 Todd.

22 Q Okay. And how was that performed?

23 A So in terms of statistical sampling, the most
24 straightforward and full-proof, if you will, method of sampling
25 is so-called simple random sampling. But that's not a

1 colloquial term, that's a term of art. It means something very
2 precise. And so in this particular case I asked for a random
3 sample to be taken of the 1,328 e-mails. In this case it was a
4 random sample of 145 e-mails.

5 Q When you say it's a term of art, what -- can you
6 define it as a term of art?

7 A Sure. So to generate a random sample from a
8 population, in this case the population is the 1,328 e-mail
9 messages, and to generate a random sample from a population you
10 basically have to -- you use a table of -- you actually use a
11 computer, but you use a table of random numbers and you use
12 those random numbers to take a sample in such a way that the
13 sample you take is just as likely as any other sample you might
14 have taken. And by using random numbers that property is
15 guaranteed because it produces an unbiased estimate.

16 Q Did you request a random sample for your evaluation
17 in this matter?

18 A I did.

19 Q And do you know how -- did you -- you received a
20 random sample; is that correct?

21 A I did.

22 Q And what was the volume of e-mails in that random
23 sample?

24 A In this case it was 145 e-mails in the sample, and
25 the way that came about is when the sample was taken they

1 actually took three samples, random samples of size 50 and then
2 there were some duplicates in there which they removed to yield
3 a random sample of 145.

4 Q Do you know how the randomness of this sample was
5 achieved?

6 A It's my understanding that an e-discovery system was
7 used to draw the random samples. And the particular
8 eDdiscovery system software is called Relativity and it's the
9 most widely used system for e-discovery, as far as I know. So
10 they used the capability of that software to draw the random
11 sample.

12 Q Were you provided with the subset of 145 e-mails?

13 A Not the e-mails themselves. What I was provided with
14 was the -- let me back up. So all 145 e-mails, an assessment
15 was made from each one of those whether they had been produced
16 by someone other than Mr. Todd or not. I was told that or
17 informed that 50 of the e-mails in the random sample, 50 of the
18 145 had not been produced by anyone other than Mr. Todd.

19 Q Okay. And what did you do with those figures?

20 A So we have 50 out of 145, so that enables you to
21 estimate the proportion in the entire population that were not
22 produced by anyone other than Mr. Todd. So maybe I should -- I
23 can elaborate a little bit. So then recall, we're trying to
24 estimate the proportion in the population of 1,328 e-mails, the
25 proportion number that were not produced by anyone other than

1 Mr. Todd. Let's give that proportion a name. Let's call that
2 "P." It's some number between zero and one hundred percent.
3 So we have a sample of 145. Out of those 145, 50, which is 35
4 percent, 35 percent had not been produced by anyone other than
5 Mr. Todd. But because it's a random sample, that enables you
6 to state that the estimate, the percent, our "P," the
7 percentage of the entire population, the statistical, unbiased
8 estimate is 35 percent. And now we did a sample, it's not the
9 whole population, so there is something called a margin of
10 error associated with that estimate, and in this case it's a
11 standard calculation, a statistical calculation. The margin of
12 error in this case is 8 percent. I calculated it to be 8
13 percent. And the way one interprets that is our estimate is 35
14 percent but we are very confident -- we're 95 percent sure that
15 "P," the true percentage in the population is somewhere within
16 8 percent of that, so somewhere between 27 percent and 43
17 percent.

18 Q And how did you determine that margin of error?

19 A That's -- it's a standard formula in textbooks that I
20 utilized in this case. I can tell you what it is, but it's a
21 very standard, elementary calculation.

22 Q So what was your final determination relative to the
23 1,328 e-mails that was the universe of e-mails?

24 A So based on the random sample, the best estimate of
25 the fraction of the 1,328 that were not produced by anyone

1 other than Mr. Todd, the best estimate of that fraction is 35
2 percent and with 95 percent confidence the number is somewhere
3 between actually 27.1 percent and 42.5 percent.

4 Q So is it your opinion, then, that of the 1,328
5 e-mails that were produced by Mr. Todd that were between Mr.
6 Todd and Mr. Potashner, between 27.1 percent and 42.5 percent
7 were not produced by Mr. Potashner?

8 A Were not produced by anyone other than Mr. Todd.

9 Q Were not produced by anyone, not just Mr. Potashner
10 but anybody in this litigation other than Mr. Todd; is that
11 correct?

12 A That's correct.

13 Q And that range of 27.1 percent and 42.5 percent is
14 with 95 percent confidence; is that correct?

15 A That's correct.

16 MR. OGILVIE: Your Honor, I'll pass the witness.

17 THE COURT: Thank you. Mr. Peek. Mr. Ogilvie, wipe
18 down, please. Sir, we're still following COVID protocols here
19 in the courtroom, so the lawyers have to wipe down and
20 disinfect the lectern as they switch places, so give us a
21 minute while I get the next one up. I have turned the timer
22 off while we are cleaning.

23 MR. PEEK: Your Honor, and I understand. I was
24 handed a note and I don't know if this came from the Clark
25 County person, but the audio guy says that we should have

1 Madigan pull the mike closer to him and that might help. I
2 don't know if he can or not, Your Honor, but that was at least
3 a note that I had.

4 THE COURT: Okay. Well, your time is running, Mr.
5 Peek.

6 CROSS-EXAMINATION

7 BY MR. PEEK:

8 Q Dr. Madigan, as I appreciate what you did is, first
9 of all, somebody pulled 1,328 e-mails. Do you know how that
10 was determined?

11 A I do not.

12 Q Do you know whether or not it is the entire universe
13 of all of the documents that had been produced in this matter?

14 A I believe it's the entirety of the e-mails between
15 two particular people. That's what I understand.

16 Q Okay. So nobody has told you that there were
17 actually many more documents besides these 1,328 between these
18 two parties?

19 A I don't know anything about that.

20 Q Okay. So your analysis, then, only is applied to the
21 1,328; is that correct?

22 A That's basically correct. I'm using a sample to make
23 a statistical inference out of the 1,328.

24 Q Well, I don't want to be basically correct, I want to
25 be completely correct. Is your analysis only predicated upon

1 1,328 e-mails, sir?

2 A It's the predicate that I stumbled over. So my
3 analysis pertains -- the statistical inference pertains only to
4 those 1,328.

5 Q Thank you. That's all I wanted to hear. So the next
6 question I have is, do you know how it was that the decision
7 was made to only pull from that 1,328, 145 as the random
8 sampling? Did you give that direction, for example, as a
9 statistician?

10 A So I explained that the sample size, the bigger the
11 sample size, the smaller margin of error. And so I understand
12 that 145 yielded a margin of error that was deemed reasonable.

13 Q So you didn't direct the person to pull only 145 as
14 the random sample; is that correct?

15 A I don't believe so. I believe I just explained the
16 principle.

17 Q So you don't know -- well, first of all, are you
18 familiar with Relativity?

19 A Yes, somewhat. Somewhat. Yes.

20 Q I don't mean somewhat. What is your familiarity, if
21 any, with Relativity as a hosting platform to do searches?
22 What is your familiarity with it, if any?

23 A It's only vicarious. I've used it in context like
24 you and I are talking about here today before.

25 Q Well, do you know whether or not the sampling that

1 was achieved from the 1,328, how it was achieved? I mean, you
2 say it was random, but you don't know for certain; do you?

3 A All I know is that Relativity has the capability to
4 draw random samples and that that capability was used. That's
5 all I know.

6 Q And how do you know that it has the capability to
7 provide random sampling?

8 A Because I have encountered those in other legal work
9 that I've done.

10 Q Okay. So, but Relativity has the ability to produce
11 a larger random sampling than 145 of 1,328; correct?

12 A Oh, absolutely, yes. It can produce a random sample
13 of a target size, whatever you want.

14 Q And as you said, the larger the sampling, the less
15 the margin of error; correct?

16 A All things being equal, yes.

17 Q So how did you -- with respect to the margin of
18 error, then was it -- it was predicated, I guess, upon the size
19 of the sampling of 145 of 1,328; is that correct?

20 A Yes.

21 Q Okay. So you also said that you understood that
22 there were three samples taken of the 1,328?

23 A Yes.

24 Q Have you seen those three samples?

25 A I have not.

1 Q Do you know what those three samples achieve in terms
2 of the amount of responsive e-mail produced by others? Do you
3 know what any one of those other two do?

4 A I do not.

5 Q So it could be that --

6 A Sorry. To answer your question correctly, do you
7 mind repeating it because I kind of lost the train.

8 THE COURT: Can you repeat your question for him?
9 BY MR. PEEK:

10 Q Okay. My question was, first of all, starting with
11 you know what the other three samples were?

12 A So there were three samples of size 50, but they were
13 combined together, pooled into one sample for my analysis.

14 Q Three samples of the 50 or three samples of the
15 1,328, which yielded 145? That's where I'm confused.

16 A I see. Sorry. Three samples of size 50 were drawn
17 from the 1,328.

18 Q I'm still confused. You start with 1,328. You take
19 a random sample to achieve 145; correct? That's step one;
20 correct?

21 A No. No. The step one, two and three here was take a
22 random sample of size 50, take a second random sample of size
23 50, take a third random sample of size 50 and then put them
24 together. There were 145 unique e-mails in the combined random
25 sample.

1 THE COURT: So there were some that overlapped
2 between the random sample and you de-duplicated them?

3 THE WITNESS: That's right.

4 THE COURT: Thank you.

5 MR. PEEK: I think I understand, but I'm not --
6 BY MR. PEEK:

7 Q So if I appreciate, then, what your analysis is and
8 what you're here to tell us is that of the 1,328 e-mails there
9 were 34 percent, with a margin of error of 8 percent that were
10 not produced by others; is that correct?

11 A Yes. It's actually 35 percent. But, yes, that's
12 correct.

13 Q Yeah, it's actually 35 percent. My apologies. With
14 the margin of error of 8 percent. So if I'm doing the math,
15 then I would take that percentage and multiply it times 1,328
16 to determine how many documents, based on this sampling, were
17 not produced by others?

18 A Yes.

19 Q So if I were to -- so, do you have a calculator there
20 you can take -- let's just use 35 percent times 1,328. What
21 does it come up with?

22 A Well, it was actually 34.5 percent, is the exact
23 number --

24 Q Let's use that number if that's the correct one.

25 A So you get 458.

1 Q Okay. So there are 458 e-mails that were purportedly
2 not produced by others based upon this random sampling of
3 1,328. Is that your testimony?

4 A That's the estimate. Yes.

5 Q With of course a margin of error of that 8 percent.
6 So if I want to do the math, I can multiply it times 27.1 or
7 42.5 if I wanted to. I'd come up with a different number;
8 correct?

9 A That's exactly right.

10 Q So just so that I am clear, if there were, for
11 example, let's say 150,000 total e-mails and documents
12 produced, you're not here to testify that 34.5 percent of those
13 were lost; are you?

14 A No, I'm not. My testimony is limited to the 1,328
15 e-mails.

16 Q And you don't have any opinion at all as to what the
17 entire -- of the entire universe of documents produced by my
18 clients here may have not been produced? You have no opinion
19 there?

20 A I do not.

21 Q It's only about the Todd e-mails, solely?

22 A Understanding that's the 1,328, yes.

23 Q I guess the other thing that I would ask you is you
24 didn't look at any of the 50 e-mails to determine whether or
25 not those 50 e-mails should have been produced by others; is

1 that correct?

2 A That's correct.

3 Q You have no opinion there; correct?

4 A I do not.

5 MR. PEEK: Thank you.

6 THE COURT: Mr. Ogilvie. Mr. Peek, please wipe down.

7 Mr. Ogilvie, do you need redirect?

8 (Pause in the proceedings.)

9 THE COURT: Mr. Ogilvie, you're up.

10 MR. OGILVIE: Thank you, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. OGILVIE:

13 Q Dr. Madigan, very briefly. So in following up on Mr.
14 Peek's questions about the actual numbers, if my calculations
15 are right, at 34.5 percent of 1,328 e-mails there would be 458
16 e-mails that through your statistic analysis would not have
17 been produced; is that correct?

18 A By anyone other than Mr. Todd, yes.

19 Q By anyone other than Mr. Todd. Yes. And at 27.1,
20 that would amount to 360 e-mails. Does that sound approximately
21 correct?

22 A That's correct.

23 Q And at 42.5 percent, the upper end of the margin of
24 error, it would be 564 e-mails that were not produced by anyone
25 other than Mr. Todd; is that correct?

JD Reporting, Inc.

1 A That is correct.

2 Q So, Mr. Peek asked you about the sample size. A
3 larger sample would have done what? Produced a narrower margin
4 of error?

5 A That's right.

6 Q Okay. Are you comfortable in your experience as a
7 statistician that the 145 sample size of the 1,328 e-mails was
8 statistically accurate or statistically competent?

9 A Yeah. I mean, it gives a margin of error of 8
10 percent. So it's -- the uncertainty that remains is quantified
11 by the margin of error. So, you know, it is what it is.

12 Q Okay. But you're confident in the margin of error.
13 You said it's 95 percent certain; correct?

14 A That's right.

15 Q Okay. Did you need to review the content of the
16 e-mails in the random sample to perform your analysis?

17 A No.

18 Q Do you ever do that in your work in performing
19 statistical analysis?

20 A Generally not. I mean, much of my work is in
21 healthcare and I'm not a clinician so I don't -- I don't look
22 at clinical notes. That's outside my area of expertise. So
23 generally, no, I do not.

24 Q All right. Sir, are you aware of the personal
25 relationship between Mr. Potashner and Mr. Todd?

1 A I am not.

2 MR. OGILVIE: Nothing further, Your Honor.

3 THE COURT: Anything further, Mr. Peek? Mr. Ogilvie,
4 wipe down, please.

5 MR. PEEK: Yes.

6 RE CROSS-EXAMINATION

7 BY MR. PEEK:

8 Q Dr. Madigan, I have a follow-up question. Your
9 opinion relies upon, does it not, Mr. Grennan, who gave you
10 the -- who used the 1,328 e-mails and then took the random
11 sampling and then determined what was or was not produced by
12 others; is that correct?

13 A I'll confess the name you mentioned is not familiar
14 to me, but as I understand it somebody performed that exercise.

15 Q So who gave you the information with respect to the
16 1,328 e-mails?

17 A Mr. Apton.

18 Q Who?

19 A Mr. Apton.

20 Q Mr. Apton. So you've never spoken to a Mr. Grennan,
21 who is supposedly a discovery person?

22 A I have not.

23 Q So tell me again, when was the first time that you
24 spoke to Mr. Apton? And I want it to be on a specific date, as
25 opposed to two to three weeks ago. I want to get a specific

1 date. Two weeks ago is June 4th.

2 A Give me one second. I'm going to look at my
3 calendar.

4 Q I will.

5 A Yeah, I'm also just not good. It was in the month of
6 June, I'm almost certain.

7 Q I'm sorry, say again? It was when? It was during
8 the month of June?

9 A Yes.

10 Q So it could have been anywhere between, say, June 1st
11 and let's say June 7th; correct?

12 A That's -- yeah, I believe that's correct.

13 Q And it was certainly not before June 2nd?

14 A I don't know that. I can't be certain. June 1st I
15 think was a --

16 Q June 4th would have been a Friday because today is
17 the 18th. Fourteen days from today makes it a Friday.

18 A Yeah. I'm not certain. I'm pretty sure it was the
19 month of June. That's all I can -- that's as good as I can
20 give you.

21 MR. PEEK: Thank you. That's all I have, Your Honor.

22 THE COURT: Thank you, Mr. Peek. Any additional
23 questions for Dr. Madigan? Dr. Madigan, thank you very much.
24 Have a nice afternoon.

25 THE WITNESS: Thank you, Your Honor. Bye-bye.

1 THE COURT: Next witness.

2 MR. OGILVIE: Kieran Grennan, Your Honor.

3 THE COURT: Good morning. It's my understanding,
4 sir, that you have agreed to be sworn over our video line. Is
5 that true?

6 MR. GRENNAN: That is true.

7 THE COURT: If you'd raise your right hand, please.

8 **KIERAN GRENNAN**

9 [having been called as a witness and being first duly sworn,
10 testified via video as follows:]

11 THE CLERK: Please state your name for the record.

12 THE WITNESS: Kieran Grennan.

13 THE COURT: Thank you, sir. Mr. Ogilvie, you may
14 proceed.

15 MR. OGILVIE: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. OGILVIE:

18 Q Mr. Grennan, the transmission is not so great, so if
19 you could speak very clearly, loudly, and maybe get closer to
20 the microphone that will be beneficial, okay. Mr. Grennan,
21 have you ever testified in court before?

22 A I have.

23 Q Have you ever testified in court in the field of
24 e-discovery?

25 A No, I have not.

1 Q Could you please describe for the Court or provide
2 the Court with your educational background?

3 A I graduated from the University of Scranton in 1992
4 with a double major of Criminal Justice and Philosophy. And I
5 graduated law school from the University of Richmond in 1995.

6 Q I'm sorry, what was the law school?

7 A University of Richmond, in Virginia.

8 Q Okay. How are you currently employed?

9 A I'm a project manager with a company called
10 vDiscovery.

11 Q And that is v, small vdiscovery, one word; correct.

12 A Correct.

13 Q And how long have you been employed with vdiscovery?

14 A A little over six years. I started in March of 2015.

15 Q How long have you worked in the e-discovery field?

16 A Fifteen years.

17 Q What is vdiscovery?

18 A It's basically taking electronic data, typically
19 e-mail but sometimes files, and putting them in a database so
20 they're indexed, searchable and productions can be made.

21 Q The mask probably prevented you from hearing what I
22 asked. I meant vdiscovery, vdiscovery, the company you work
23 for. What does vdiscovery do?

24 A I'm sorry. We're a company in midtown Manhattan that
25 does primarily e-discovery. It started as a paper discovery

1 company and then it has evolved.

2 Q And you indicated it was based in midtown Manhattan?

3 A Yes.

4 Q And you also indicated that you are a project manager
5 at vdiscovery. What do you generally do on a day-to-day basis
6 for vdiscovery as a project manager?

7 A As a project manager my primary roles are A, to
8 supervise the data technicians to make sure that their work is
9 accurate, and to help clients figure out what their needs are
10 and how best to achieve them. I spend most of my day either
11 talking to clients or checking on the work of the data
12 technicians.

13 Q Are you familiar with the work that the data
14 technicians perform?

15 A Yes. I used to do that job myself at another company
16 and I still do it occasionally if there's a particularly
17 complicated matter, but day to day I don't do much of the
18 technical work anymore.

19 Q Are you familiar with an e-discovery platform known
20 as Relativity?

21 A Relativity is the platform that we host at
22 vdiscovery. It's probably the largest and most commonly used
23 document review platform in the legal business in the U.S. at
24 the moment.

25 Q Was your company, vdiscovery, retained for

1 e-discovery, electronic discovery services in this litigation?

2 A Yes. We were retained in September, I believe, of
3 2020.

4 Q And what services was your company generally asked to
5 provide at that time?

6 A To process some of the client's data so that they can
7 review it and make a production and to host any productions
8 they received so that they could review them.

9 Q Kind of the run-of-the-mill work that electronic
10 discovery vendors perform; is that right?

11 A Yes. That is what we do every day.

12 Q And was there a more recent request to vdiscovery for
13 work relative to this litigation?

14 A Yes. In, I believe, late May we were asked to do a
15 more targeted search on a specific subset of documents, a
16 production received from Mr. Todd.

17 Q Okay. Can you describe that more targeted search?

18 A Initially we were asked to -- any searches for
19 e-mails for -- on the To, From or cc line with Ken Potashner at
20 a particular Gmail address.

21 Q Okay. And what did you do with that information?

22 A That got us 1,328 documents and then the next part of
23 the task was to see if those same documents were also produced
24 by any other party.

25 Q Were you involved in this work?

1 A Yes, I was.

2 Q Can you describe your participation in this function?

3 A Well, the first thing we did, Relativity has a
4 built-in random sampling feature, so we took a random sample of
5 50 documents from that 1,328 and then began searching for
6 those. And we did three iterations of that process, three sets
7 of 50 that we then searched for among other productions.

8 Q So tell me about this random sample function in
9 Relativity.

10 A It has a built-in tool where you point it at a
11 particular search, in this case the 1,328 documents, and you
12 instruct it either to give you a percentage or a number of
13 documents, whichever you prefer. So in this instance we went
14 with numbers of documents.

15 Q And I think you said three iterations, sets of 50?

16 A That is correct. Since they're random samples, there
17 was some overlap, so it ended up being 145 unique e-mails.

18 Q Okay. So 3 times 50 would be 150, but you found five
19 duplicative e-mails, so the sample that you provided was 145?

20 A That is correct.

21 Q Okay. And then what -- after arriving at that 145,
22 what did you do next?

23 A Well, the first thing we tried to do was search using
24 what's known as metadata, things like e-mail from, e-mail to,
25 the subject, the date sent and a search across other

1 productions for those documents. We determined that that was
2 not a particularly reliable method in this case because not all
3 parties provided all metadata, so then we switched to doing
4 text searches.

5 Q Okay. So let me take a step back. I want to make
6 sure the Court understands. You took e-mails between Mr. Todd
7 and Mr. Potashner, and then did you -- I'm sorry. Did you
8 describe the To/From between the two of them?

9 A To, From or cc in the e-mails involving Mr. Potashner
10 at his Gmail address.

11 Q Okay. Is there a term that you use regarding the
12 To/From or cc?

13 A Well, From or cc are generally just called
14 recipients. And the -- sorry, To or cc are generally just
15 called recipients and From would be called the sender.

16 Q Are you familiar with the term top level?

17 A Yes. Top level means the originating -- top level
18 would be the final e-mail in the chain. Like, when you're
19 scrolling through an e-mail and you open a new one, you can
20 scroll down and there might be ten messages in the chain, but
21 the most recent one that you just opened is the top level
22 e-mail. And so these were all top level e-mails that we were
23 searching for.

24 Q So -- and your initial search for top level e-mails
25 between Mr. Potashner and Mr. Todd resulted in how many

1 e-mails?

2 A One thousand three hundred and twenty-eight.

3 Q And then you described the random sampling that you
4 performed, three sets of 50, which resulted in a 145, a subset
5 of 145. What did you do -- you then said that you searched
6 metadata?

7 A For those documents to see if they were produced by
8 any other party in the case.

9 Q And you say any other party in the case. What was
10 the universe of documents that you compared that 145 e-mail
11 subset or random sample to?

12 A Well, the full universe of documents is 121,000
13 documents.

14 Q Did you search that 121,000 documents for a
15 cross-over between these 145?

16 A Correct. Actually, it's --

17 Q And what -- I'm sorry?

18 A It's 120,735. I'm just calling it 121,000 as an
19 approximation.

20 Q Good. Okay. And what was the results of that
21 comparison?

22 A Of the 145 there were 50 that did not exist anywhere
23 else in the universe of documents.

24 Q So there were the 50 e-mails that the top level
25 e-mail --

1 A They're only in Todd's production, but not in any
2 other production.

3 Q Fifty e-mails in Mr. Todd's production that were not
4 in any other production; is that correct?

5 A That is correct.

6 Q When using the randomization feature on Relativity,
7 what control do you have over the sample that it generates?

8 A The only control we have is what the initial universe
9 it will be, which in this instance was the 1,328 documents, and
10 whether it gives us a percentage or a number of documents.

11 Q And you --

12 A Other than that, it's completely random. We don't
13 have control over which documents get pulled out.

14 Q Okay. And rather than percentage, in this instance
15 you used 50 as a specific number; is that correct?

16 A Yes. Correct.

17 Q So you described the process of using metadata to do
18 the comparison of the 145 e-mails against the other 121,000
19 documents. Did that -- was that -- did that provide you with a
20 satisfactory result?

21 A It did not. And at first we were concerned about
22 why, so we looked at the other productions more carefully, and
23 not everyone provided full metadata in their productions.

24 Q What does that mean?

25 A If somebody, for example, just gives you PDFs of

1 their e-mails, that won't have any way to index and search the
2 To, From, the subject, the date sent, and some of the
3 productions we received were received as PDFs.

4 Q So was there anything that you did as a result of
5 that unsatisfactory result of searching metadata?

6 A We switched to doing text searches.

7 Q And describe that for the Court.

8 A You take, for example, the first sentence of an
9 e-mail and you put that into the search window in Relativity to
10 see how many results you get. And as long as you get at least
11 the document from which you copied it, you know that it is
12 searching correctly. And then if you get any others, you take
13 a look at them to see if it's the same e-mail.

14 Q Okay. And what was the result of doing the text
15 search?

16 A That's where we're basing the idea that there were 50
17 that did not exist anywhere else. Of the 95 that did, three of
18 them were not there as top level, they were lower down, like
19 nested in a chain.

20 Q Okay. So the random sample after the de-duplication
21 was 145 e-mails. Of that 145 e-mails, there were 50 e-mails
22 that were produced by Mr. Todd that were not produced by any
23 other party; is that correct?

24 A That is correct.

25 Q And then of the remaining 95 e-mails, there were

1 three e-mails in which the information in Mr. Todd's e-mails
2 were nested or lower down in an e-mail chain; is that correct?

3 A That is correct.

4 Q And what did you do with the results of these
5 searches and comparisons?

6 A We informed our client. Well, first we went through
7 the process a couple more times to do sort of quality control
8 and then we informed the client of those results.

9 MR. OGILVIE: Thank you, Mr. Grennan. Your Honor,
10 I'll pass the witness.

11 THE COURT: Thank you. If you'd wipe down, please.
12 Mr. Peek, cross-examination.

13 MR. PEEK: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. PEEK:

16 Q Mr. Grennan, you have a law degree?

17 A Yes.

18 Q Have you ever practiced as a lawyer?

19 A I did. I practiced for about four years in Richmond,
20 Virginia.

21 Q And did you ever -- well, does your company
22 participate and review for responsiveness any of the e-mails
23 that you collect?

24 A We don't do any of the actual reviews, no.

25 Q So with respect to the documents that you were

1 hosting or that you reviewed, you were not looking for whether
2 or not any of the documents were or were not properly
3 responsive to any request; correct?

4 A Correct. My only concern was whether or not they are
5 there in the database.

6 Q And as I understand, you made the determination to
7 point at 50 of the 145, is that correct, or 50 of the 1,328?

8 A Of the 1,328.

9 Q Okay. So your first iteration was to create three
10 sample sets, each only of 50 documents; correct?

11 A That is correct.

12 Q And why did you choose the 50 as opposed to some
13 other number?

14 A Fifty just seemed like a manageable amount.

15 Q Did it seem like a random sampling of 1,328 in your
16 -- or do you have any opinion one way or the other?

17 A Well, the random sampling tool is built in to
18 Relativity.

19 Q I understand that, sir. But you chose a number of 50
20 for this random sampling; correct?

21 A Correct.

22 Q You made no statistical determination as to what that
23 yield of just 50 documents is in terms of a proper statistical
24 analysis of 1,328 only choosing 50?

25 THE COURT: Are you asking him if he found the 50 was

1 statistically significant?

2 MR. PEEK: Not yet, Your Honor. I'm going to --

3 THE COURT: Okay.

4 MR. PEEK: I'm going to ask him that in a minute, but
5 I'm starting just with, Your Honor, the random sampling.

6 THE COURT: Okay. All right, Mr. Peek.

7 MR. PEEK: I'm trying to --

8 THE COURT: I'm going to make you do it again because
9 it didn't make sense.

10 MR. PEEK: I'll try, Your Honor.

11 BY MR. PEEK:

12 Q The 50, do you have some appreciation as a
13 statistician --

14 A I'm not a statistician.

15 Q -- as to whether 50 is a proper random sampling?

16 THE COURT: He said he's not a statistician.

17 THE WITNESS: I'm not a statistician, sir.

18 BY MR. PEEK:

19 Q Okay. And it was you who made the decision to choose
20 50 and pointed that number to yield that random sampling;
21 correct?

22 A That is correct.

23 Q And you did that without any statistical background
24 as to whether or not that is a proper statistical sampling of
25 1,328; correct?

1 A I did that just as a reasonable number to search for.

2 Q I'm going to ask my question again. Did you do so
3 with an understanding that that was a proper statistical
4 analysis of the 1,328 or just something that you wanted to use?

5 A It was just a number I wanted to use. I had to just
6 trust Relativity's sampling tool. Whether or not 50 is a
7 significant amount, I have no idea, but that's why we did it
8 three times.

9 Q That random sampling tool, though, gives you the
10 opportunity to choose 50 or 100 or 150; correct?

11 A That is correct.

12 Q And you chose the lower of those numbers; correct?

13 A That is correct.

14 Q And I think we both appreciate that the total Todd
15 production is close to, what, 5,000 documents? Or do you know?

16 A You mean before even searching for the e-mails for
17 this particular --

18 Q Well, Mr. Todd produced a number of e-mails, did he
19 not?

20 A He did.

21 Q And you didn't then take a random sampling from all
22 of Mr. Todd's e-mails; did you?

23 A He produced -- his full production was 5,402
24 documents. The first thing we were asked to do was search for
25 top level e-mails where Mr. Potashner was on the To, From or

1 cc. That goes to 1,328. We did the random sampling from
2 within that subset.

3 Q So it's only where Mr. Potashner and Mr. Todd are on
4 the top level that was your search; correct?

5 A That is correct.

6 Q So if Mr. Todd and Mr. Potashner were on a lower
7 level of the nested e-mail, you wouldn't have picked up that
8 e-mail; correct?

9 A That is correct.

10 Q So you have no opinion as to whether or not there are
11 nested e-mails between Mr. Todd and Mr. Potashner in nested
12 e-mails?

13 A Well, they would have been found in the text searches
14 because the text searches went across the entire universe of
15 documents.

16 Q We're going to get to that.

17 A So even if there were nested e-mails within Mr.
18 Todd's production, those would have been found, also.

19 Q We're going to get to that in a minute. So did Todd
20 produce with -- in native format with metadata attached?

21 A Yes, he did provide with metadata.

22 Q Okay. And I think you told us that others did not;
23 correct?

24 A That is correct.

25 Q And it's your testimony that when you did text

1 searches, because some of the other documents did not have
2 metadata so you couldn't use them, you had to do text searches;
3 correct?

4 A That is correct.

5 Q That's of the other 127,000?

6 A That's of the full 120,000, including the 5,400 from
7 Mr. Todd.

8 Q Understood. So when you did these text searches, I
9 think you said you used the first line of the --

10 A I used that as an example. It depends entirely on
11 what the first line was.

12 Q Well, are you telling this Court --

13 A If the first sentence --

14 THE COURT: Wait. You've got to let him finish.
15 Sir, can you finish your answer, please?

16 THE WITNESS: If the first sentence didn't have any
17 distinctive words, I would find a sentence that did.

18 BY MR. PEEK:

19 Q Are you telling this Court --

20 A We didn't always use the first sentence.

21 Q Let me know if you're done.

22 A I am done.

23 Q Thank you. Are you telling this Court that of the
24 1,328 or the 145 or the 50 that you did text searches in all of
25 the nested e-mails?

1 A I did text searches for the 145 documents across the
2 entire universe of 120,000 documents, which includes nested
3 e-mails.

4 Q I understand, sir. There are, as I appreciate it, a
5 lot of nested e-mails below the top line in this case. Did you
6 find that to be true?

7 A Yes.

8 Q And did you do text searches in each and every one of
9 those below nested e-mails in your analysis?

10 A The way that you do a text search is not by going
11 into an individual document. You search across the entire
12 universe, which includes the nested e-mails.

13 Q You're not listening to my question or perhaps I'm
14 not clear. Nested e-mails may be five, six, ten below the top
15 line; correct?

16 A That is correct.

17 Q And each one of those nested e-mails has by itself
18 text; correct?

19 A That is correct.

20 Q Did you then --

21 A It's included in the text from the top of the e-mail,
22 which counts as one document, as the text for everything within
23 that chain that is in that document.

24 Q So you tested not just the first sentence of each of
25 the nested, or did you -- excuse me. Did you test for each of

1 the first sentences and each of the nested e-mails below the
2 top level?

3 MR. OGILVIE: Your Honor, I object. He
4 mischaracterizes the witness's testimony.

5 THE COURT: Overruled. The question is confusing,
6 Mr. Peek. Can you rephrase it?

7 MR. PEEK: Let me try it again. Sorry that everybody
8 finds it confusing.

9 BY MR. PEEK:

10 Q We both agree that below the top level there are many
11 nested e-mails; correct?

12 A Correct.

13 Q What I'm trying to understand is when you were doing
14 this text search on the other universe of documents, did you do
15 a text search which included text from each of the nested
16 e-mails in the 145?

17 A No, sir, because I was searching for the 145 top
18 level e-mails.

19 Q So you're not telling us that the nested information
20 below the top level may have been produced; correct? Or was
21 not produced?

22 A In those 145 they may very well be. I have no way of
23 knowing that.

24 Q You're only here to testify that the top level are
25 the ones that are not produced; correct?

1 A That is correct.

2 Q So if I have just an e-mail that's being forwarded to
3 somebody, did you look for that text below that top level of
4 the forward to determine whether or not the e-mails below had
5 been produced?

6 A No, sir, I did not. I was only searching for the top
7 level e-mails.

8 Q And you know, do you not, that of the documents that
9 you say that were not found in others, many of them are just
10 forwarded, correct? Many of these 50 are just forwarded. You
11 know that, don't you?

12 A I did see some that were forwarded, yes. I do not
13 recall whether they all were, but I can check if you want to
14 give me a few minutes.

15 Q Well, I don't have --

16 THE COURT: You didn't mean -- Mr. Peek, you didn't
17 mean 50, you meant the 145?

18 MR. PEEK: Both, Your Honor.

19 THE COURT: Okay.

20 BY MR. PEEK:

21 Q So, you're doing a search of the 145 and of the 145
22 many of them are just forwarding; correct?

23 A Correct.

24 Q And you didn't find those ones that were just
25 forwarding partially in those 50? That's part of that universe

1 of 50; correct?

2 A The universe of 50, which are the ones that were not
3 produced by anyone else at the top level, some of those were
4 just forwards.

5 Q Okay.

6 A If that's what you're asking.

7 Q That is what I'm asking. So you're not telling this
8 Court that the actual nested information that is significant
9 was not produced; correct?

10 A I am not saying that.

11 Q So, and you also were not making any kind of an
12 opinion, were you, as to whether or not the Todd e-mails were
13 responsive in this matter; correct?

14 A I was not making any decision on that at all.

15 Q So, for example, when you did not find an e-mail that
16 says, "Are you and Margaret available for dinner at my house on
17 December 6th," you were not making a determination as to
18 whether or not that should have been produced by others?

19 MR. OGILVIE: Objection. Lacks foundation.

20 THE COURT: Overruled.

21 THE WITNESS: I was not making any decision on
22 whether it should be, I was merely checking whether or not it
23 was.

24 BY MR. PEEK:

25 Q Now, do you have an understanding of the subject

1 matter of this litigation?

2 A I do not.

3 Q So when you were searching the text --

4 MR. PEEK: I'm sorry, let me see that again. What
5 number was that?

6 MR. MORENO: 532.

7 MR. PEEK: What is it?

8 MR. MORENO: 532.

9 BY MR. PEEK:

10 Q So when you're searching textually --

11 MR. PEEK: 532?

12 MR. MORENO: Uh-huh.

13 BY MR. PEEK:

14 Q -- were you putting into your search this text, "Are
15 you and Margaret available for a dinner at my house December
16 6th?"

17 A I don't recall whether that was the exact phrase we
18 used in any of the searches for the 145. If you want to give
19 me a few minutes to check for that now, I'm happy to do so.

20 Q Well, what I'm trying to understand, though, and I
21 don't want to take a lot of time here, is you told us that you
22 put in text information when there wasn't metadata, so one of
23 the text information you would have put in would be, "Are you
24 and Margaret available for dinner at my house on December 6th."
25 Correct?

1 A It may very well be. Off the top of my head, I do
2 not recall the 145 specific sentences that we used a few times.

3 Q Did you have an understanding that a dinner
4 engagement was in any way relevant or responsive to any of the
5 requests for production in this matter?

6 A No. I had no opinion or information about whether it
7 was not responsive.

8 Q I'm going to give you another example. By the way,
9 do you have a list of the 50?

10 A Fifty that were not produced by anyone else? Yes, I
11 do.

12 Q And did you provide that to Mr. Apton?

13 A Yes.

14 Q And would you be willing to produce it to us?

15 A I'm sorry, sir?

16 Q Would you be willing to have it produced to us so
17 that we can sample your analysis?

18 A Absolutely.

19 Q So here's another one. This is my Exhibit 483.

20 THE COURT: Does the witness have the exhibits?

21 MR. PEEK: He does not, Your Honor --

22 THE COURT: That's a problem.

23 MR. PEEK: -- but I'm going to just ask him questions
24 from 483 because it's one of the 145.

25 THE COURT: Okay. Good luck.

1 MR. PEEK: Well, Your Honor --

2 MR. MORENO: Steve, give him the Bates number because
3 he can pull it on Relativity.

4 MR. PEEK: Yeah. So, yeah, there we go.

5 BY MR. PEEK:

6 Q Can you pull up TODD6961 on your Relativity database?

7 A 961. Yes, I have it up.

8 Q And can you also compare it to whether or not it's
9 part of the 50?

10 A It is part of the 50.

11 Q Okay. And so would you read to the Court what the
12 subject matter is, the subject line?

13 A The subject line. It's a folder that says "Resume."

14 Q Okay. And then can you look down to the bottom of it
15 and tell us what the subject matter of the e-mail is?

16 THE COURT: Mr. Peek, put -- Thank you. I know.
17 Sir, could you tell us the subject matter of that?

18 BY MR. PEEK:

19 Q Go ahead and read some of the text and tell us what
20 the scope of the e-mails are.

21 A Let's see. The top line is, "We will look forward."
22 The next one down says, "I'm happy to help. Have him call me
23 and I can walk through the various avenues that he may have an
24 interest in." The next one down is, "John is a great guy who
25 has had several great wins and a great network. I need to get

1 the two of you together. I'm not sure how active the MS intern
2 program is, but his son would be a good candidate." The next
3 one down says, "As we discussed, attached is my son's resume.
4 He will graduate this spring from Wake Forest University with a
5 degree in Finance. He did his summer internship at Wells Fargo
6 in Charlotte. Any thoughts would be appreciated. Thanks.
7 J.T."

8 Q So this is one of those e-mails that you found --
9 that you did not find in the other universe; correct?

10 A That is correct.

11 Q And do you have an appreciation that this case is
12 about this gentleman's son attending Wake Forest?

13 A If you say so.

14 Q No, I'm asking you. Do you have an appreciation that
15 this case is about -- the subject matter of this case has to do
16 with anything about this gentleman's son attending Wake Forest?

17 A I know nothing about the subject matter of the case.
18 I just know about the documents and whether or not they exist.

19 (Pause in the proceedings.)

20 THE COURT: Give him a second, sir. They're looking
21 up other documents that they hope you can pull from Relativity
22 to help them answer questions.

23 THE WITNESS: Sure. No problem.

24 THE COURT: Mr. Cassity has now come up from the
25 audience to try and help.

1 BY MR. PEEK:

2 Q Okay. I'm going to now ask you to look at TODD10009.

3 A Okay.

4 Q It's Exhibit 515. Is it one of your missing --

5 THE COURT: Is there an objection to 515?

6 MR. OGILVIE: No, Your Honor.

7 THE COURT: It will be admitted.

8 (Exhibit Number(s) 515 admitted.)

9 THE WITNESS: Yes, that is one of the 50 that I did
10 not find anywhere else.

11 BY MR. PEEK:

12 Q Okay. And what is the subject matter of the e-mail?

13 A Let me go into it. The subject line on that one
14 says, "International Communications Corp."

15 Q And the top line says, "I will put on calendar,
16 thanks." Correct?

17 A That is correct.

18 Q And then the actual subject matter deals with -- it
19 says, "The best company I saw at this year's tech review, which
20 is where I first saw PAMT, was ICC." Do you see that?

21 A I do see that.

22 Q And it says, "I talked with their principal guy and
23 they would like to collaborate." Do you see that?

24 A Yes.

25 Q And this is an e-mail between Mr. Todd and Mr.

1 Potashner about a company other than Turtle Beach; correct?

2 A It appears to be. Correct.

3 Q And of course this is one of those e-mails that was
4 not produced by others?

5 A The top level e-mail that says, "I will put on
6 calendar" is the one that I can tell you was not produced by
7 anybody else.

8 Q And does that calendaring item to you appear to be --
9 have any relevance here at all? Or do you know?

10 A I have no opinion on the relevance, sir.

11 Q Okay.

12 (Pause in the proceedings.)

13 THE COURT: So for those of you who are helping, does
14 anybody know what exhibit TODD6961 was? So I can ask Mr.
15 Ogilvie if he stipulates.

16 MR. PEEK: I'm sorry, Your Honor. What?

17 THE COURT: I'm asking your team.

18 MR. PEEK: What's the Bates number?

19 THE COURT: 6961.

20 MR. CASSITY: Exhibit 483, Your Honor.

21 THE COURT: 483?

22 MR. CASSITY: Yes.

23 THE COURT: Mr. Ogilvie, any objection to 483, since
24 it was already read from?

25 MR. OGILVIE: No objection, Your Honor.

1 THE COURT: It will be admitted. Thank you.

2 (Exhibit Number(s) 483 admitted.)

3 MR. PEEK: And I think the other one, Your Honor, was
4 432, which is the dinner one, which is --

5 THE COURT: I haven't had the 432 read from.

6 MR. PEEK: Pardon?

7 THE COURT: The witness has not read from it.

8 MR. PEEK: I'll get him to read from that one again.

9 BY MR. PEEK:

10 Q So let me have you now, Mr. Grennan, go to TODD8169,
11 which is our Exhibit 532, which I'm offering, Your Honor.

12 THE COURT: 532 or 432?

13 MR. PEEK: 532, Your Honor.

14 THE COURT: Any objection to 532?

15 MR. OGILVIE: No objection.

16 THE COURT: It will be admitted.

17 (Exhibit Number(s) 532 admitted.)

18 THE COURT: Sir, let us know when you've gotten to
19 TODD8169.

20 THE WITNESS: I have that document open.

21 THE COURT: All right, Mr. Peek, he's got the
22 document on Relativity.

23 BY MR. PEEK:

24 Q And is that also one that was not produced by others?

25 A That is another one that I did not find produced by

1 anyone else.

2 Q And would you read to us the subject matter?

3 A The subject line just says, "December 6th." And then
4 the body of the e-mail says, "Are you and Margaret available
5 for dinner at my house on December 6th?"

6 Q Thank you. And did you have some appreciation that a
7 dinner engagement was in any way responsive or relevant from
8 the other 127,000 documents upon which you did a search?

9 A No. I have no opinion about the responsiveness or
10 relevance of any document. I just know we were asked to check
11 whether or not these documents existed.

12 Q Were you also advised whether or not there was a
13 scope of -- a temporal scope in this matter between class
14 plaintiffs and the defendants here?

15 A I was told that there was a time base.

16 Q And what was the scope, time scope that you
17 understood?

18 A Off the top of my head I do not recall, but I can go
19 back through e-mails and check for that if you want me to.

20 Q Well, do you understand that it was from, I
21 believe --

22 MR. MORENO: January 1st, 2013.

23 BY MR. PEEK:

24 Q -- January 1st, 2013 to January 15th --

25 MR. MORENO: 17th.

1 BY MR. PEEK:

2 Q -- January 17th, 2014?

3 A I'm sorry, can you repeat those dates?

4 Q January 1st, 2013 to January 17th of 2014 was the
5 negotiated temporal scope between class plaintiffs and the
6 defendants.

7 A Of the 145 documents in the sample, 137 fall within
8 that range and then the remainder are about a week later.

9 Q That's not my question. My question is that the
10 temporal scope of responsive documents were between a date
11 range of January 1st, 2013 and January 17th, 2014. Did you
12 understand that to be the case?

13 A I can check whether that's the exact date range we
14 searched. Off the top of my head, I do not remember.

15 Q So you would have found documents beyond that date
16 range; correct?

17 A As I said, I did find some that are beyond that. I
18 see some going up into January 28, 2014 and one from February
19 of 2014.

20 Q Well, let's look at the one that is 9030, which is
21 our Exhibit 559, which I'm offering.

22 MR. OGILVIE: No objection.

23 THE COURT: It will be admitted.

24 (Exhibit Number(s) 559 admitted.)

25 THE WITNESS: I'm sorry. Can you please repeat the

1 Bates number for me?

2 MR. PEEK: The Bates number is 9030.

3 THE WITNESS: Okay.

4 BY MR. PEEK:

5 Q And is that one of the so-called missing documents?

6 A That is.

7 Q Okay. And what is the subject matter?

8 A Give me a minute to go into it. The subject line
9 says, "Thin Film Physics."

10 Q And what is the date of the top level e-mail?

11 A January 24th, 2014.

12 Q And what are the dates in the other nested e-mails?

13 A The next one down it says -- is January 23rd. The
14 next one down is January 23rd.

15 Q That's all of it, isn't it?

16 A Yes.

17 Q And would you look at the first nested e-mail which
18 says, "Dear Ken." Read that to the Court, if you would.

19 A (Reading) "Sorry for the lack of response on this."
20 The next nested e-mail down says, "Can we please make an intro
21 at Photonics West."

22 Q I'm talking about the bottom e-mail, sir.

23 A Gotcha.

24 THE COURT: He wants you to go to the very bottom of
25 the e-mails, the first one.

1 BY MR. PEEK:

2 Q Where it says, "Dear Ken."

3 A (Reading) "Dear Ken, Hope you started well into 2014.
4 Thin Film Physics will visit Photonics West and I would kindly
5 ask you to make contact for our sales guy to talk about
6 possible and concrete cooperation possibilities. Thank you in
7 advance for your support."

8 Q And again, sir, do you have an appreciation of
9 whether or not this -- well, first of all, this e-mail is
10 outside the date range that I just described; correct?

11 A Yes, because this is from January 23rd and I believe
12 you said the date was ending at January 17th.

13 Q Correct. And does there -- is there anything that
14 appears in this e-mail to reference Parametric or Turtle Beach?

15 A I do not see either of those terms in this e-mail.
16 The search terms we were asked to --

17 Q Now, let me have you look at 562, which is --

18 THE COURT: Wait. Hold on. Sir, you had an answer
19 to give us?

20 MR. PEEK: He said he did not see it.

21 THE WITNESS: We were asked to search for certain
22 search terms and this did hit on search terms, but it
23 doesn't -- Turtle Beach was not one of the terms that this
24 document hit on.

25 THE COURT: Thank you, sir.

1 BY MR. PEEK:

2 Q Okay. Then you don't have -- you don't know what the
3 search terms were, then, that were used between the class
4 plaintiffs and the defendants; correct?

5 A I had been given various search terms and we searched
6 for them, and this document hit on three of the terms we were
7 given.

8 Q Well, one of them would be Todd; right?

9 A So it would have been -- Todd is one of them. HL is
10 one of them and CH is one of them.

11 Q Okay. So it would have hit on somebody's search
12 terms, but it's beyond the scope, the temporal scope; correct?

13 A I have no idea whether these terms that hit were
14 limited to the temporal scope or the document was outside of
15 the temporal scope.

16 Q So I think you said the search terms were Todd,
17 Potashner and what else? CH and what else?

18 A And HL.

19 Q HL. So I'm looking -- where do I see HL?

20 A Give me a moment to go into the document. In the
21 middle of the word EarthLink in an e-mail address.

22 Q In the middle of what?

23 A In the middle of EarthLink in an e-mail address on
24 the To line.

25 THE COURT: HL is EarthLink. It's in the middle.

1 MR. PEEK: Ahh. So it's somebody's e-mail address.
2 Okay.

3 THE COURT: So it wasn't -- it wasn't a very
4 effective search term.

5 MR. PEEK: Oh, yeah, really effective, Your Honor.
6 BY MR. PEEK:

7 Q And where do you find the search term CH?

8 MR. OGILVIE: Steve, what exhibit is this?

9 MR. PEEK: Again, 559.

10 MR. OGILVIE: Thank you.

11 THE WITNESS: (Indiscernible), going down, right
12 below there where it says From, it says -- there's an e-mail
13 from Ken Potashner to Jose Cortes, and CH looks to be part of
14 his address, also.

15 BY MR. PEEK:

16 Q So, Mr. Grennan, although you may not have been a
17 review person, do you appreciate that once documents have hits
18 on search terms that somebody then does another review of those
19 documents to determine whether they're responsive?

20 A Yes. I am aware of that process.

21 Q And so do you think that the term HL or the term CH
22 upon which this hit would make it responsive because it doesn't
23 have anything to do with Parametric or Turtle Beach?

24 A Again, sir, I have no opinion on whether or not a
25 document is responsive.

1 Q Okay.

2 A If I was the one reviewing this and if I was just
3 reviewing for those two entities, I would not consider this
4 e-mail to have to do with those two entities. But again, sir,
5 I have no idea of the responsiveness or relevance of any
6 document.

7 Q So let me now move you to Exhibit 562, which is Bates
8 number 9098.

9 THE COURT: Any objection, Mr. Ogilvie?

10 MR. OGILVIE: No objection.

11 THE COURT: It will be admitted.

12 (Exhibit Number(s) 562 admitted.)

13 THE WITNESS: Okay. I'm in it.

14 BY MR. PEEK:

15 Q And is this one of the 50 documents that you say was
16 not produced by others?

17 A Yes, it is.

18 Q Okay. And so would you first of all agree with me
19 that it's beyond the temporal scope range?

20 A Yes. This document is from January 28th.

21 Q And would you also agree with me that it does not
22 appear to have anything to do with Parametric or Turtle Beach?

23 A I don't know, sir, because it just says, "Just to
24 move forward, please sign this and return it today." So
25 without knowing what the "this" he wants signed is, there's no

1 way I can answer that.

2 Q So we have -- the subject matter is Simplified
3 Contract; correct?

4 A That is correct.

5 Q And the attachment refers to EA Health revised;
6 correct?

7 A That is the name of the attachment. Correct.

8 Q And it's an e-mail addressed to an Art Gruen;
9 correct?

10 A Correct.

11 Q And he is the CEO of EA Health; correct?

12 A Based on his e-mail address, correct.

13 Q And the subject matter just says, "So we can move
14 forward, please sign this and return it today." Correct?

15 A That is what it says.

16 Q So when you were searching for text, did you put in
17 the text, "Just so we can move forward, please sign this and
18 return today"?

19 A More than likely that is the sentence that we tried
20 first. Again, I don't remember specifically all 145, but if
21 you'd like I can search for that exact text now.

22 Q So you would agree with me, though, that there's
23 nothing in this e-mail that would suggest it has anything to do
24 with either Parametric or Turtle Beach; correct?

25 A There is nothing in the body of the e-mail that

1 mentions either of those.

2 Q Okay. So now let me have you look at Exhibit 564,
3 which I would offer, Your Honor.

4 MR. OGILVIE: No objection.

5 THE COURT: Any objection? It will be admitted.

6 (Exhibit Number(s) 564 admitted.)

7 BY MR. PEEK:

8 Q So it is text -- excuse me -- Bates number 9305.

9 A 9305. Okay. And, yes, that is one of the 50.

10 Q Thank you very much for that. And it's also --
11 what's the date of the e-mail?

12 A The date of that e-mail is August 25th, 2017.

13 Q So that is now, let's see, three years and six months
14 beyond the temporal scope; correct?

15 A Correct.

16 Q Actually, I guess, seven months, three years and
17 seven months. And what is the subject matter?

18 A The subject line says, "Weisbord-Home Bay Invoice
19 #10.

20 Q And there's an attachment that refers to an invoice;
21 correct?

22 A Correct.

23 Q And this is an e-mail that appears to be from David
24 Demoress (phonetic) at Home Bay Company and also to John Todd
25 and it's from Josh Weisbord, the son of one of the plaintiffs

1 here.

2 A If that is the son of the plaintiff, I take your word
3 for it. But, yes, it is from that person.

4 Q And what does this -- what does the text say?

5 A (Reading) "David, please process and issue check same
6 way as the last few times after either John or Ken approves."

7 Q Anywhere at all is there a reference to either
8 Parametric or Turtle Beach or any of the other director
9 defendants?

10 A Not within that e-mail, no.

11 Q Okay. Now I'm going to have you turn to Exhibit 454.

12 MR. PEEK: And that, Your Honor, is Exhibit -- that's
13 454, which I would offer.

14 BY MR. PEEK:

15 Q And for you, Mr. Grennan, it is 10704.

16 A Okay. I've got it.

17 Q Was it also one of the 50?

18 A Yes, it was.

19 Q Okay. And there's no subject matter here, is there?

20 A There is no subject line, no.

21 Q And read the text to us, if you would, please.

22 THE COURT: Any objection to 454?

23 MR. OGILVIE: No objection.

24 THE COURT: It will be admitted.

25 (Exhibit Number(s) 454 admitted.)

1 THE WITNESS: "Thanks for dinner last night, we had a
2 great time. It was fun to celebrate deal and get to know your
3 wife. I still can't believe how you guys got married."

4 MR. PEEK: Hang on a moment, Your Honor.

5 (Pause in the proceedings.)

6 MR. PEEK: Your Honor, I'm going to go through some
7 more, but before I do that I'm offering the full 145 e-mails
8 that he reviewed as exhibits and they are 421 through 555.

9 UNIDENTIFIED SPEAKER: 566.

10 MR. PEEK: 556.

11 UNIDENTIFIED SPEAKER: 566.

12 MR. PEEK: 566. My math is not very good, Your
13 Honor.

14 THE COURT: Several of which we've gone through and
15 admitted already. Any objection, Mr. Ogilvie?

16 MR. OGILVIE: No objection.

17 THE COURT: They will be admitted, if they haven't
18 already been admitted.

19 (Exhibit Number(s) 421-566 admitted.)

20 BY MR. PEEK:

21 Q Let me have you look at another one. This is
22 Exhibit 549. It is your Bates number 10133.

23 A Okay. I've got it.

24 Q And is it one of the universe of 50?

25 A Yes, it is.

1 Q And what is the subject matter in the subject line?

2 A The subject line on that says, "Morgan Stanley
3 Expansion Capital."

4 Q And who are the authors and recipients in the nested
5 e-mail?

6 A The nested e-mail -- the bottom e-mail, you mean?

7 Q Well, when I say the nested e-mail, I'm talking about
8 the begin forwarded message part.

9 A Let's see.

10 Q The one below that where it starts out from Robert
11 Bassman.

12 A From Robert Bassman to Kien Saneii and then copying
13 Ken Potashner, Omar Maasarani, Jesse Bromberg, Melissa Daniels.
14 That appears to be all of them.

15 Q And, first of all, what text search did you do, if
16 any, for this e-mail? Would it just be the top line where you
17 say, "We should assume that it is not going to work out and
18 discuss on 30th setting up meeting"?

19 A I can search for that sentence right now if you want
20 me to, sir, to see if that (indiscernible).

21 Q I'm just asking you if that's the one you would have
22 used, sir.

23 THE COURT: And, sir, if you don't remember, that's
24 okay.

25 THE WITNESS: I do not recall specifically which

1 sentence I would have used from any e-mail.

2 BY MR. PEEK:

3 Q Okay. Do you find anywhere in this e-mail the name
4 Parametric or the name Turtle Beach?

5 A I do not.

6 Q Let me have you look at TODD8285, which is
7 Exhibit 535.

8 A 8285?

9 Q Yes, sir.

10 A Okay.

11 Q Is it one of the 50?

12 A It is.

13 Q And what is the subject matter?

14 A It does not have any -- sorry. The subject is "Staff
15 Cancelled."

16 Q And what is the text in the e-mail?

17 A "Due to holiday."

18 Q So other than -- well, would you consider this to be
19 responsive to any request for production, a cancellation of a
20 staff meeting, or do you have an opinion one way or the other?

21 A I have no opinion on the responsiveness of any of
22 these documents.

23 Q So when we look at your 50, we've already gone
24 through a number of them that do not appear to have been
25 required to be produced. Would you agree with that?

1 A I have no opinion on the responsiveness or
2 appropriateness of producing any of these documents.

3 Q Okay. So your only opinion is that of the 145, which
4 is a compilation of three 50 samples of 1,328, is that 50 were
5 not produced by others.

6 A That is correct.

7 Q You have no opinion as to whether those should or
8 should not have been produced; correct?

9 A I have no opinion on whether it should or should not
10 have. I can merely say they were not.

11 Q And so let me understand, why is it you only used top
12 line as opposed to all of the other 9,000 or 5,000 other --
13 4,000 other documents that were produced by Mr. Todd?

14 A Because what we were looking for were e-mails where
15 Ken Potashner was on either the To, From or cc, and it's only
16 top level e-mails that have that metadata.

17 Q I'm going to have you look at another one. This is
18 556, the exhibit, and it is your Bates number 8979.

19 A 979. Okay. Or 8979.

20 Q 8979.

21 A All right.

22 Q Is it one of the 50?

23 A It is.

24 Q Is it one of the 50, sir?

25 A Yes, it is.

1 Q Thank you. And the subject line is?

2 A "MXWL Update."

3 Q And it is dated when?

4 A January 17th, 2014.

5 Q Okay. And read the text.

6 A "Rossi not responding, may be due to my screw-up of
7 making him aware I am central behind McGough. Bob decided they
8 do want a banker; selecting one next week. I am reaching out
9 to a large disgruntled shareholder who reached out to me last
10 month, Gotham."

11 Q Do you see anywhere in the subject matter either
12 Turtle Beach or Parametric?

13 A I do not see either of those two words in there, no.

14 Q So the search terms again here, the hit would have
15 been Todd and Potashner as two of the search terms; correct?

16 A And HL.

17 Q And HL. And somewhere in this e-mail there must be
18 an H and an L connected together; right?

19 A In the middle of the word EarthLink.

20 Q So when you -- all right. And CH someplace else?

21 A John Todd, Potashner and HL are the only terms that
22 hit on this one.

23 THE COURT: Mr. Peek, how much longer do you have on
24 cross?

25 MR. PEEK: I don't think much, Your Honor. Give me a

1 moment here because I want to -- if you want me to break, I
2 want to know what my time is.

3 THE COURT: I need to take a break because it's
4 almost 10:45.

5 MR. PEEK: Yeah, I know. If you can tell me how much
6 time I've used, that will dictate as to whether I want to
7 continue.

8 THE COURT: So far with this witness you have used 46
9 minutes and you had used 19 minutes before, which takes me to
10 --

11 MR. PEEK: 105.

12 THE COURT: Well, an hour and five.

13 MR. PEEK: Okay. Thank you, Your Honor.

14 THE COURT: So do you want to take a break now?

15 MR. PEEK: I do, Your Honor.

16 THE COURT: All right. So we're going to take our
17 break now at 10:49 for ten minutes. Sir, you can get up and
18 walk around. We'll be back in 10 minutes, okay?

19 THE WITNESS: Thank you very much.

20 THE COURT: Counsel, my plan is to go to noon and
21 then to break until 1:15. I'm supposed to be at a seminar from
22 12:00 to 1:15, so I'll be in my office on that seminar and then
23 we'll come back and go until you finish or run out of time,
24 whichever comes first.

25 MR. PEEK: Thank you, Your Honor.

1 (Proceedings recessed at 10:49 a.m. until 10:59 a.m.)

2 THE COURT: Sir, are you ready to resume?

3 THE WITNESS: Yes.

4 THE COURT: All right. Mr. Peek is ready to resume
5 too.

6 All right. Mr. Peek, you're back up.

7 And I was really good. We only did a 10-minute
8 break. So I'm trying to keep us on track.

9 MR. PEEK: Thank you, Your Honor.

10 BY MR. PEEK:

11 Q Mr. Grennan, are you ready?

12 A I am ready, sir.

13 Q Thank you. During your time as a project manager and
14 your experience in e-discovery, which we both know doesn't go
15 back for your entire career, do you appreciate that there's an
16 error rate in production?

17 A I am familiar with that -- with the idea of the error
18 rate, yes.

19 Q Have you dealt with that before? I mean, are you --
20 did you -- so you have -- you know that there is always an
21 error rate in production of documents?

22 A It depends on what, exactly, you're calling the error
23 rate.

24 Q Well, I've seen it, for example, when you do
25 technology-assisted review, there's an error rate that's

1 acceptable. I've also seen it in -- error rates with respect
2 to hard copy review by subject matter experts, there's error
3 rate in that. Are you familiar with those concepts?

4 A Yes, I am.

5 Q Okay. And have you found that there is at least --
6 there's always some error rate in ESI discovery, whether it's
7 by predictive coding or by subject matter experts who are doing
8 hard copy review?

9 A I would say that there's a certain amount of error to
10 be expected in every aspect of life, sir.

11 Q That's not what I asked, sir. We all -- we've been
12 arguing, that's being a little, you know -- focus on the
13 question, if you would, sir. And (indiscernible). Do you
14 appreciate, as I said, that whether it be predictive coding or
15 whether it be subject matter experts doing hard copy review,
16 that there is always an error rate in e-discovery?

17 A Yes, sir, there is.

18 Q And what do you appreciate that number -- that
19 percentage to be?

20 A I have absolutely no idea, sir. It varies.

21 Q It varies. Yeah. Okay. So it varies, I think I've
22 seen it anywhere from 5 percent to 10 percent to 15 percent;
23 have you seen that as well?

24 A Sir, since I usually have no knowledge of the
25 contents of any documents, I have no basis to determine how

1 many are produced or not produced in error.

2 Q But you're just -- but you are familiar with the fact
3 that there is an error rate in productions of ESI; correct?

4 A Yes.

5 Q Because there's a, as you say, human error?

6 A Correct.

7 Q And even in technology-assisted review, there is
8 error; correct?

9 A Correct.

10 Q Have you done technology-assisted review yourself?

11 A I have. Well, I have done the initial REMS of
12 review, not the final review, to confirm the responsiveness of
13 documents. But I have run the process and then presented data
14 sets to clients for them to make the final determination.

15 Q And there are -- and as you understand and appreciate
16 in a technology-assisted review, there is typically an
17 acceptable error rate in technology-assisted review; correct?

18 A I apologize, sir. Your screen froze for a minute, so
19 I did not hear the full question.

20 MR. PEEK: What did I do?

21 THE COURT: You froze.

22 MR. OGILVIE: The screen froze.

23 THE COURT: You had a technical problem.

24 BY MR. PEEK:

25 Q So, again, I'm talking about in technology-assisted

1 review with which you have experience, is there, as you
2 appreciate it, an error rate that the parties accept in
3 technology-assisted review?

4 A Yes.

5 Q And do you have familiarity with what that typical
6 error rate is?

7 A I am not.

8 Q Are you familiar with the literature that argues that
9 technology-assisted review provides a better production than
10 does human review?

11 A I am familiar with that argument. Yes, sir.

12 Q And have you yourself tested that?

13 A I have not.

14 Q And do you appreciate that the argument is that
15 technology-assisted review or predictive coding is always
16 better than human review?

17 A I don't know that I've ever heard anyone say it's
18 always better. I have heard pros and cons for each.

19 Q Okay. Let me now, just so that I can be clear, I'm
20 going to go through some of the documents here, because I don't
21 have your list of 50, so I want you --

22 MR. PEEK: Your Honor, what I would ask is, rather
23 than have me do this, if I could just get that list from
24 counsel as I asked?

25 THE COURT: You're welcome to ask for the list, Mr.

1 Peek. I'm not going to make it as part of this hearing.

2 MR. PEEK: I understand.

3 THE COURT: Okay. So let's control --

4 MR. PEEK: Because, otherwise, I have to use my time
5 to go through each and every one of the 50.

6 THE COURT: I understand --

7 MR. PEEK: And I think that's an inappropriate use of
8 my time, when all they have to do is just provide us the
9 document.

10 THE COURT: Mr. Peek, I understand strategic
11 decisions need to be made on the way to use time. I made the
12 offer that you could have additional time. You rejected that
13 offer because of witness scheduling issues. I understand that.
14 When we originally talked about moving this up a couple of
15 days, you told me you --

16 MR. PEEK: Well, you know, that was --

17 THE COURT: -- had witnesses --

18 MR. PEEK: -- scheduling error. Don't make a -- make
19 it look like --

20 THE COURT: Mr. Peek, I made efforts to provide
21 additional time.

22 MR. PEEK: All right. I'm not going to go there.
23 Your Honor, I would -- may I ask counsel if I could have
24 that --

25 THE COURT: You can turn and ask Mr. Ogilvie.

1 MR. PEEK: I know, but I want your permission before
2 I do that.

3 THE COURT: Sure. Talk to George.

4 MR. PEEK: May I have the list of 50?

5 MR. OGILVIE: Yes, we'll provide it.

6 MR. PEEK: Thank you. Anything else that -- That's
7 all I have. Thank you, Mr. Grennan.

8 THE WITNESS: Thank you.

9 THE COURT: Thank you, sir. Mr. Ogilvie, do you have
10 any redirect?

11 MR. PEEK: I need to wipe down first, Your Honor.

12 THE COURT: You do. Mr. Ogilvie, any redirect?

13 MR. OGILVIE: I do, Your Honor.

14 THE COURT: Okay.

15 MR. PEEK: Does the wipe-down count against my time?

16 THE COURT: I turned your time off already.

17 MR. PEEK: Thank you.

18 THE COURT: You've used 71 minutes so far. I think.
19 Austin's keeping track too. So we're going to compare notes if
20 there's a dispute.

21 MR. PEEK: Thank you, Your Honor.

22 THE COURT: Mr. Ogilvie, you're up.

23 REDIRECT EXAMINATION

24 BY MR. OGILVIE:

25 Q Mr. Grennan, did Mr. Apton provide you with a list of

1 search terms that he received from the defendants in this
2 matter to run against the 145 e-mails of the random sample?

3 MR. PEEK: Objection, Your Honor. Best evidence
4 would be those searches themselves.

5 THE COURT: Overruled. You can answer.

6 THE WITNESS: Yes, I was provided a list of terms.

7 BY MR. OGILVIE:

8 Q All right. And did you run those search terms
9 against the 145 e-mails -- or the e-mails that form the random
10 sample?

11 A Yes, sir, I did.

12 Q And did you come to a determination as to how many of
13 the 145 e-mails in the random sample had hits for those search
14 terms?

15 A Yes, sir. If you'll give me just a moment, I'll take
16 a look for you. 141.

17 Q 141 of the 145 random sample had hits from search
18 terms provided by the defendants; is that correct?

19 A That is correct.

20 Q Mr. Grennan, if I could have you turn to same set of
21 Todd documents.

22 MR. OGILVIE: This is 6265, Your Honor. This is
23 Exhibit 1246, which has already been admitted.

24 THE COURT: So it's one of the admitted documents?
25 Thank you, Mr. Ogilvie.

1 THE WITNESS: Okay.

2 BY MR. OGILVIE:

3 Q Who is the to/from on that e-mail?

4 A It's from Grant Keary to Ken Potashner, copying John
5 Todd.

6 Q Okay. What's the subject line?

7 A The subject line is John Todd Letter on Consulting
8 Agreement.

9 Q And could you read that e-mail for us?

10 A Sure.

11 "Mr. Potashner, pursuant to John Todd's
12 request, attached to this e-mail is a copy of
13 a letter amending the agreement to provide
14 consulting services between Parametric Sound
15 Corporation and Todd Consulting LLC,
16 confirming that Parametric will not terminate
17 the consulting agreement without cause prior
18 to the consummation of the pending merger
19 transaction regarding HyperSound Health, Inc.
20 If the document is acceptable, please place it
21 on Parametric letterhead, sign on behalf of
22 Parametric, and forward a copy to me. Please
23 let me know if you have any questions."

24 Q Is this e-mail one of the 50 that was not produced by
25 any other party?

JD Reporting, Inc.

1 A It is.

2 Q Let me turn -- direct your attention to TODD6332.

3 MR. OGILVIE: That's Exhibit 444, Your Honor.

4 THE COURT: Thank you.

5 THE WITNESS: Okay.

6 BY MR. OGILVIE:

7 Q All right. Is this document one of the 50 that was
8 produced by no other party other than Mr. Todd?

9 A Yes, it is.

10 Q Let me direct your attention to TODD6232.

11 MR. PEEK: What's the exhibit number?

12 MR. OGILVIE: Exhibit 437.

13 THE WITNESS: Okay.

14 BY MR. OGILVIE:

15 Q Is this exhibit -- is this document one of the 50?

16 A Yes, it is.

17 Q Let me direct your attention to TODD6205, that's
18 Exhibit 432.

19 A Okay.

20 Q Is this exhibit -- or is this document one of the 50?

21 A Yes, it is.

22 Q Let me turn your attention to TODD6187, that's
23 Exhibit 429.

24 A I'm sorry, can you please repeat the Bates number?

25 Q TODD6187.

1 A Okay.

2 Q Again, that's Exhibit 429. Mr. Grennan, is this
3 document one of the 50?

4 A Yes, it is.

5 Q Thank you.

6 MR. OGILVIE: Nothing further, Your Honor.

7 THE COURT: Mr. Peek, anything further?

8 Mr. Ogilvie, you have to wipe down.

9 MR. OGILVIE: Yep.

10 THE COURT: Unless he's going to say no.

11 MR. OGILVIE: He's going to say no.

12 (Pause in proceedings.)

13 THE COURT: Mr. Peek, you had some additional
14 questions you wanted to ask?

15 MR. PEEK: I do, Your Honor.

16 THE COURT: Isn't that nice?

17 MR. PEEK: Thank you.

18 RECROSS-EXAMINATION

19 BY MR. PEEK:

20 Q Were the search terms that Mr. Apton sent you the
21 same search terms that were negotiated between the class
22 plaintiffs and the defendants?

23 A I have no knowledge of that, sir.

24 Q Wouldn't you think that would be the appropriate use,
25 is what were the search terms that the parties negotiated

1 before Mr. Apton became involved to you as opposed to something
2 Mr. Apton came up with?

3 A I have no opinion on that either, sir.

4 Q Well, you're opining that there are missing documents
5 based upon search terms that Mr. Apton gave you; correct?

6 A I didn't really say that there were 50 documents that
7 are top-level e-mails --

8 Q Sir --

9 A -- that were produced by --

10 Q Sir --

11 A -- Mr. Todd that were not produced by anyone else.

12 THE COURT: You've got to let him finish.

13 BY MR. PEEK:

14 Q Listen to the question.

15 THE COURT: Thank you, sir.

16 BY MR. PEEK:

17 Q You only used the search terms that Mr. Apton gave
18 you as opposed to use the search terms that were used by the
19 parties before Mr. Apton became involved; correct?

20 A I have no idea whether they're the same terms or not,
21 sir.

22 Q Wouldn't you think it would be appropriate to only
23 use the search terms that the parties use to produce all the
24 documents as opposed to new ones that Mr. Apton created?

25 A Are you asking me my personal opinion of which --

1 Q I'm asking --

2 A -- set of terms is --

3 Q Yeah, that seems to be --

4 A -- appropriate?

5 Q Seems to be a fair question for your opinion, yeah.

6 A (Indiscernible.)

7 MR. OGILVIE: Your Honor, it lacks foundation.

8 Objection. It lacks foundation.

9 THE COURT: Overruled.

10 Sir, you can provide us with your answer based upon
11 your experience in the e-discovery realm. Mr. Ogilvie, put
12 your mask back on.

13 THE WITNESS: I think that both terms should be used.

14 BY MR. PEEK:

15 Q I'm sorry?

16 A I think that both terms should be used, because,
17 occasionally, a client's lawyer is interested in additional
18 aspects.

19 Q Okay.

20 A (Indiscernible) scope of agreed terms.

21 Q So both should have been used; correct?

22 A It's entirely possible that the list that was given
23 did include both.

24 Q I don't know whether they are or not, because it
25 wasn't produced to me. So let me have you look at Exhibit 440

1 -- by the way, do you have the Turtle Beach documents on your
2 collection?

3 A Sir, which documents are you referring to as Turtle
4 Beach documents?

5 Q Well, we're going to have you look at Exhibit 444,
6 which is 6322 -- 6332.

7 THE COURT: Is that TODD6322?

8 MR. PEEK: Yes.

9 BY MR. PEEK:

10 Q TODD6332?

11 A Okay.

12 Q Do you have that?

13 A I have that.

14 Q Okay. Now, can you also look at Turtle Beach 73780
15 and compare it to this 6332 from Todd.

16 A We're on the second?

17 MR. HESS: TB. It should be TB.

18 BY MR. PEEK:

19 Q TB. TB373780.

20 A One moment. And, I'm sorry, can you repeat that
21 non-TODD Bates number please.

22 Q TB00073780.

23 MR. OGILVIE: What's the Exhibit, Steve?

24 MR. PEEK: And the exhibit is 444.

25 THE COURT: Thank you.

1 THE WITNESS: Okay. I've got it open.

2 BY MR. PEEK:

3 Q Okay. So you have both of them open? Can you put
4 them side by side for me, the TODD and the Turtle Beach
5 document.

6 A I'm going to download it instead, because it was a
7 PDF. I apologize. The PDF function is taking a lot longer
8 than it usually does.

9 Q Hopefully, the Court won't --

10 THE COURT: Your timer's running, Mr. Peek.

11 BY MR. PEEK:

12 Q Do you have, at least, the Turtle Beach 73780 open on
13 your screen? Just that one, just pull it --

14 A Yes, I do, sir.

15 Q Just open that one.

16 A Okay. I've got that one open.

17 Q Okay. Does it contain the following information from
18 James Barnes to -- I don't know to whom. But it says, "This is
19 Todd and Bolton."

20 Do you see that? Is that in that e-mail?

21 A Yes.

22 Q And is also in that e-mail, and I'm reading from 444:
23 "I don't know what the latest version is or where the
24 negotiation stands."

25 Is that in there?

1 A Yes, it is.

2 Q And is also in there, "Seem to be ongoing forever."

3 A Yes, it is.

4 Q And then there's another e-mail that says, "Please
5 send me the sound bar development contract."

6 Is that one in there?

7 A Yes, sir, there is.

8 Q So is there any forwarding information in that e-mail
9 of Turtle Beach 73780?

10 A That was from Ken Potashner to John Todd. The
11 subject line says both.

12 Q And you find that in the Turtle Beach document or in
13 the TODD document?

14 A In the Turtle Beach version, it starts with, "This is
15 Todd and Bolton."

16 In the TODD version, it starts with, "Please send me
17 the latest contract."

18 Q And it contains all the other information below from
19 the Turtle Beach; correct?

20 A Correct.

21 Q Okay. So this is one of the 50; this 6332 is one of
22 the 50?

23 A I -- one moment. Let me get back to the list. That
24 is one of the 50, yes.

25 Q Thank you. And now would you turn to 446 again,

1 which is TODD6265?

2 A Okay.

3 Q That's a communication from a lawyer to certain
4 individuals; correct?

5 A From somebody named Grant Keary.

6 Q Who purports to be a lawyer?

7 A His e-mail domain is DLKRAW.com.

8 Q So this could be an attorney-client communication;
9 correct? Would not have been produced.

10 A I have no opinion on whether or not (indiscernible;
11 multiple speakers).

12 Q Well, but it's a communication from a lawyer to
13 individuals; correct?

14 A It's from somebody with a law firm in their e-mail
15 domain to someone else.

16 MR. PEEK: That's all I have, Your Honor.

17 THE COURT: Thank you. Mr. Peek, if you would wipe
18 down.

19 Mr. Ogilvie, do you have any additional questions for
20 this witness?

21 MR. OGILVIE: Briefly.

22 THE COURT: Hold on a second. I've got to switch and
23 COVID wipe down and get Mr. Ogilvie back up to the lectern
24 again.

25 MR. PEEK: It's kind of sopping wet now, Your Honor.

1 THE COURT: I don't know a better way.

2 MR. PEEK: I know you don't, Your Honor. I'm just --
3 it's just a comment.

4 THE COURT: I get the Costco wipes, because the other
5 ones the County gives us are too strong and I don't want you
6 guys all having bleach spots on your suits.

7 MR. PEEK: Thank you for that.

8 THE COURT: His time is running. Mr. Ogilvie, if you
9 want to use time, get up. Your timer's running.

10 MR. OGILVIE: I need to present the witness with an
11 exhibit.

12 THE COURT: Well, how are you going to do that? Is
13 it on relativity?

14 MR. OGILVIE: No. No.

15 THE COURT: Is he able to access it in some way?
16 Remember, part of the protocol for witnesses is they have to
17 have all the exhibits if they're going to be testifying
18 remotely.

19 MR. PEEK: I think we all failed in that, Your Honor.

20 I don't have any objection to it, George if you can
21 lay a foundation --

22 If they lay a foundation with him.

23 FURTHER REDIRECT EXAMINATION

24 BY MR. OGILVIE:

25 Q So Mr. Grennan, do you have the list of search terms

1 that Mr. Apton provided to you?

2 A A moment here. I have more than one list of search
3 terms.

4 Q Do you have a list of search terms that are in a --
5 the table format identified as Exhibit A at the top?

6 A (Indiscernible) sent that. Just a second to see
7 where I saved it.

8 I apologize for the delay. Yes, I have that. Sorry.

9 Q Okay.

10 MR. OGILVIE: Your Honor, do we have the ability to
11 share a screen?

12 THE COURT: Nope.

13 BY MR. OGILVIE:

14 Q So what -- tell me what the document you are
15 referring to looks like.

16 A It's a PDF, it says Exhibit A, then it says, All
17 dates are 1/1/2013 through 1/17/2014, unless stated otherwise.
18 And then it appears to be -- it's a PDF that appears to have
19 been, if I'm were to guess, made from an Excel.

20 Q Okay. And it --

21 A Because it's got two columns, one with terms and one
22 with date range.

23 Q How many pages is it?

24 A 12.

25 THE COURT: 12?

1 THE WITNESS: 12.

2 BY MR. OGILVIE:

3 Q Well, okay. Could you read me the search term --
4 first search term on the top of each of the 12 pages.

5 THE COURT: I think Mr. Peek is satisfied already
6 with those.

7 MR. PEEK: Yeah, I'm satisfied. If you represent
8 that Mr. Apton sent that to him, I'll accept that
9 representation.

10 BY MR. OGILVIE:

11 Q Is this the --

12 MR. OGILVIE: So, Your Honor, it's Exhibit 420.

13 THE COURT: Thank you. So get --

14 BY MR. OGILVIE:

15 Q This is the exhibit -- or the search terms that
16 Mr. Apton had you search the 145 e-mails?

17 A Yes, it is.

18 Q Thank you.

19 MR. OGILVIE: Nothing further.

20 THE COURT: So any objection to 420, given that
21 foundation, Mr. Peek?

22 MR. PEEK: No, Your Honor --

23 THE COURT: Hold on. Mr. Ogilvie, you got to wipe
24 down.

25 MR. OGILVIE: Sorry.

1 MR. PEEK: Your Honor, you are a good mom.

2 THE COURT: Been a long week, guys. You're going to
3 re-use the wipe? All right, guys. Sir, Mr. Peek has a few
4 more questions.

5 MR. PEEK: Yeah.

6 FURTHER RECROSS-EXAMINATION

7 BY MR. PEEK:

8 Q If the search terms include the temporal scope, why
9 did you compare documents beyond the temporal scope in your 50
10 missing e-mails, that you knew the temporal scope, based on
11 this document?

12 A Because I ran the search terms after finding the 50.

13 Q Well, but they're not in the temporal scope. Why did
14 you include them if they're not in the temporal scope, Mr.
15 Grennan?

16 A They're two completely different processes. First, I
17 established the list of 50. Then, separately, I ran search
18 terms across the entire universe of documents, and then I would
19 create a search based on a temporal scope after I had already
20 run the terms against the full universe.

21 Q Let me ask that question again: Why did you include
22 documents beyond the temporal scope as missing, when you knew,
23 in fact, that they were not getting on the temporal scope?

24 A I did not -- I put them as missing within temporal
25 scope, sir.

1 Q You included it as missing --

2 A (Indiscernible; multiple speakers) 50 documents
3 (indiscernible) production that are not anywhere else.

4 Q Sir, you included them as missing from the 145 when
5 they were beyond the temporal scope; correct?

6 A The only temporal scope of this search term unit,
7 yes.

8 Q And you used that and provided it or it was provided
9 to a statistician to come up with some number of missing
10 documents; correct?

11 A I have no idea what any statistician was given or was
12 doing.

13 MR. PEEK: Thank you, Your Honor.

14 THE COURT: Can you wipe that -- oh, you did wipe
15 that.

16 MR. PEEK: I did wipe down, Your Honor. I did --

17 THE COURT: Did you wipe down while he was asking
18 questions.

19 Mr. Ogilvie, any more questions for this witness?

20 MR. OGILVIE: No, Your Honor.

21 THE COURT: Thank you, sir. We appreciate your time.
22 Have a very nice afternoon.

23 THE WITNESS: Thank you. You also.

24 THE COURT: Next witness.

25 MR. PEEK: I'm going to switch with my colleague,

1 Your Honor.

2 THE COURT: You guys can switch all you want.

3 Mr. Peek, there's plenty of room in the audience or
4 in the jury box.

5 MR. PEEK: I may do that, Your Honor.

6 MR. APTON: Your Honor, we'd like to call another
7 VTBH Holdings corporate representative.

8 THE COURT: I don't call people by corporate
9 representatives; I call them by names.

10 MR. APTON: Mr. Juergen Stark, Your Honor.

11 THE COURT: So Mr. Stark. Mr. Stark, if you'd come
12 forward to the witness stand, you are the first one there
13 today, so we have not re-cleaned it since yesterday when the
14 cleaning people did it. So hopefully it looks good.

15 **JUERGEN STARK**

16 [having been called as a witness and being first duly sworn,
17 testified as follows:]

18 THE CLERK: Please state your name for the record.

19 THE WITNESS: Juergen Stark.

20 THE COURT: And, Mr. Stark, as you can tell, all of
21 us are wearing masks, which makes it really hard to understand.

22 THE WITNESS: Yes.

23 THE COURT: If the lawyers ask you a question and you
24 can't hear it or it doesn't make sense, either, because it's
25 garbled or because it's just a bad question, let them know and

1 they will rephrase it. Don't be offended if they ask you to
2 repeat or rephrase, because sometimes we get garbled. And if
3 you need a break at any time, you let us know. Okay?

4 THE WITNESS: Thank you.

5 THE COURT: All right. Counsel, you're up.

6 MR. APTON: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MR. APTON:

9 Q Mr. Stark, where are you currently employed?

10 A Turtle Beach.

11 Q And what's your title there?

12 A Chairman and CEO.

13 Q How long have you been CEO of Turtle Beach?

14 A Since September 2012.

15 Q And are you familiar with a company named VTB
16 Holdings, Inc.?

17 A Yes.

18 Q Okay. What is that?

19 A A holding company under the corporate structure.

20 Q And was the -- well, can you explain it a little bit
21 further?

22 A I'm not certain, actually. So we have some legal
23 subsidiaries under the overall corporate umbrella that contain
24 the parts of the Turtle Beach business.

25 Q Was Turtle Beach in some capacity previously known as

1 VTB Holdings, Inc.?

2 A I believe so, yes.

3 Q And when was that?

4 A I believe we changed to Turtle Beach Corporation
5 sometime after the Parametric acquisition, but I'm not certain.

6 Q And that merger occurred in January of 2014; correct?

7 A Correct.

8 Q For the purpose of today's hearing, are you here to
9 give testimony on behalf of Turtle Beach?

10 A Yes.

11 Q And that would include VTB Holdings; correct?

12 A Yes.

13 Q And, of course, yourself too, yes?

14 A Yes.

15 Q Okay. And today's testimony, that relates to
16 preservation of electronic discovery in this action, yes?

17 A Yes.

18 MR. APTON: Your Honor, I'd like to introduce Exhibit
19 6.

20 THE COURT: Any objection to 6?

21 MR. HESS: What's Number 6?

22 MR. APTON: VTB Holdings.

23 MR. HESS: Okay. No objection.

24 THE COURT: 6 will be admitted.

25 (Exhibit Number(s) 6 admitted.)

1 BY MR. APTON:

2 Q Mr. Stark, can you see this TV screen or --

3 A No.

4 MR. APTON: May I adjust it, Your Honor?

5 THE CLERK: Yeah, he knows it.

6 THE WITNESS: I have one here.

7 MR. APTON: Oh, you have --

8 THE COURT: So, sir, they can make it bigger. Just
9 tell them --

10 THE WITNESS: Okay.

11 THE COURT: -- and they will make it larger. Brian's
12 really good at responding to what you ask him to do.

13 BY MR. APTON:

14 Q Mr. Stark, you could see that document okay in front
15 of you?

16 A Yes.

17 Q Okay. And what is that document?

18 A It is -- can you make it a little bit bigger? It's a
19 little bit -- VTB Holdings, Inc., response to Plaintiff's first
20 set of interrogatories.

21 MR. APTON: I -- if Your Honor's okay with it, I --
22 perhaps Mr. Stark would like to use this TV instead?

23 THE COURT: No. Don't move that.

24 MR. APTON: Okay. Hold on.

25 THE COURT: Ramsey's the only one allowed to touch

1 it.

2 MR. APTON: All right. Hold on.

3 THE COURT: And you can't go up there, because I run
4 into social distancing problems.

5 MR. APTON: Okay.

6 THE COURT: So I need you to stay where you are.

7 MR. APTON: Apologies, Your Honor.

8 MR. PEEK: Then I can't see.

9 THE COURT: I can't help everybody.

10 MR. PEEK: So I need to go back --

11 THE WITNESS: No, that --

12 MR. APTON: Which one are you looking at, that one?

13 THE WITNESS: I'm looking at this one. It's just the
14 screen is not super clear. But I'm okay. We'll try to do it
15 with this here. Keep going.

16 BY MR. APTON:

17 Q Okay. Mr. Stark --

18 MR. OGILVIE: And can you put it back so I can see
19 it?

20 BY MR. APTON:

21 Q -- if you need to change screens at any point, just
22 let me know. Okay?

23 A Yeah, I will. Thank you.

24 Q Mr. Stark, are you familiar with this document?

25 A Yes.

1 Q Okay. It generally asks about VTB Holdings' efforts
2 to preserve and collect and produce electronic discovery;
3 correct?

4 A Yes.

5 Q Can you turn to page 15, please?

6 THE COURT: And if you could blow up the request and
7 response we're going for. Which one, counsel?

8 BY MR. APTON:

9 Q So, Mr. Stark, I want to direct your attention to
10 lines 3 to 8.

11 A You're going to have to make it bigger. Yeah.

12 Q It's the first full paragraph on page 15; do you see
13 that?

14 THE COURT: Hold on. We're going to have to move it.

15 THE WITNESS: Yeah. So I see lines 3 to 8, yes.

16 BY MR. APTON:

17 Q Just to be clear, that's page 15 of the actual
18 document as opposed to page 15 of the PDF.

19 Mr. Stark, do you see the document?

20 A You're going to have to make it bigger. When it's on
21 full document mode, it's impossible to read it on here. There
22 you go.

23 THE COURT: Are you asking him to examine Request
24 Number 20 and the response to Request Number 20, counsel?

25 MR. APTON: Yes, that's -- yes, Your Honor.

1 THE COURT: Okay.

2 MR. APTON: Thank you, Your Honor.

3 THE COURT: So if we could go to the prior page and
4 blow up the request and the beginning of the response, and then
5 go to the second. Is it 20 you're looking for?

6 MR. APTON: 20, Your Honor, yes.

7 THE COURT: Okay. So if we could blow 20 up so he
8 can see it and read it to himself. Not to me.

9 Oh, I said nice things about you and now here we go.
10 Look at this.

11 MR. APTON: I know. I'm sorry.

12 THE COURT: And, sir, after you've read this portion
13 --

14 THE WITNESS: Okay. I've read it.

15 THE COURT: -- let us know and he'll move to the next
16 page, to the top of 15, to let you read that portion of the
17 response.

18 THE WITNESS: I'm ready.

19 THE COURT: Can you see it or you need us to blow it
20 up?

21 THE WITNESS: When you're on full document, I will
22 not be able to read it.

23 THE COURT: So we need to read the top of 15.

24 THE WITNESS: It's really not clear.

25 THE COURT: Who's on --

1 THE WITNESS: Okay.

2 THE COURT: Karen, is it you? Okay. Thanks, Karen.
3 Sorry, I was saying nice things about Brian and it's you I
4 should say nice things about.

5 MR. PEEK: So she needs a thumbs up.

6 THE COURT: Good job.

7 THE WITNESS: Okay.

8 BY MR. APTON:

9 Q Okay. Mr. Stark, this response here, does it
10 accurately describe the steps VTBH, VTB Holdings, and its
11 attorneys took to collect potentially relevant ESI?

12 A Yes.

13 Q And that would include VTBH's or VTB Holdings' legal
14 counsel issuing a litigation hold to VTBH's officers and
15 directors on August 14, 2013; correct?

16 A Yes.

17 Q Who is VTB Holdings' counsel at this point in time?

18 A I believe it was Dechert, Tony Chan.

19 Q And who were VTB Holdings' officers and directors in
20 August of 2013?

21 A That would have been the board of directors. So Ron
22 Doornink, Ken Fox, myself, maybe Carmine and -- at this point
23 in time, Carmine and Fred from Turtle Beach before we got sold.

24 Q Okay. And Mr. Ken Fox, who you just mentioned, he
25 was, in fact, the president and CEO of VTB Holdings at this

1 time; correct?

2 A I'm actually not certain about that.

3 Q Did he sign the merger agreement with Parametric?

4 A I'm not certain, either, actually. I apologize. He
5 may have signed it, but maybe on behalf of Stripes Group. I
6 don't recall him having an official capacity with VTBH, but
7 it's possible. And, I'm sorry, but I'm not sure if VTBH
8 Holdings might be -- is that Ken's legal entity for his stake
9 in Turtle Beach?

10 Q You're here to testify on behalf of VTBH Holdings
11 today, yes?

12 A I need some help. I want to make sure I'm not making
13 a mistake here, that VTBH Holdings, is it part of Turtle Beach
14 or is it part of Stripes?

15 Q I can't answer your question --

16 A I don't know.

17 Q -- for you today, Mr. Stark. You are here today to
18 provide testimony on behalf of Turtle Beach?

19 A Yes.

20 Q And VTB Holdings, Inc.; correct?

21 A Yes.

22 Q And so you're able to tell me what efforts to
23 preserve ESI on behalf of those entities remain; correct?

24 A Yes.

25 Q Okay. So back to page 15, lines 3 through 8; it is

1 correct that VTBH's -- VTB Holdings' officers and directors
2 received a litigation hold, yes?

3 A Yes.

4 Q What's your understanding of a litigation hold?

5 A It's a notice to preserve all information relevant to
6 a case.

7 Q Do you have any professional experience that would
8 inform that understanding?

9 MR. HESS: Can I just object to the extent he's
10 testifying as a corporate representative and that's --

11 THE COURT: Overruled. He's testifying as an
12 individual. We don't have 30(b)(6)s in hearings.

13 MR. HESS: Thank you.

14 THE COURT: Only in depositions.

15 THE WITNESS: I was familiar with the process. It
16 didn't happen a lot, but I was at Motorola before Turtle Beach,
17 and there were a few legal holds that had been issued in my
18 days at Motorola.

19 BY MR. APTON:

20 Q What was your title at Motorola?

21 A It varied over time, but, ultimately, I was chief
22 operating officer of Motorola's mobile business.

23 Q And when you received a litigation order at Motorola,
24 what was it that you normally did?

25 A Preserved all documents related to whatever the hold

1 was on.

2 Q Documents as in written documents?

3 A Any relevant material.

4 Q Could that include electronic documents?

5 A Yeah, of course.

6 Q How many litigations holds do you remember receiving
7 with Motorola?

8 A I couldn't tell you. It wasn't a lot, but it was at
9 least enough for me to know how the process works.

10 Q Uh-huh. And when that process ensues, lawyers are
11 involved; correct?

12 A Uh-huh.

13 Q And --

14 THE COURT: Is that yes?

15 THE WITNESS: Yes. Sorry.

16 THE COURT: Okay.

17 BY MR. APTON:

18 Q Who else is involved in that process?

19 MR. HESS: Object to form.

20 THE WITNESS: Individuals subject to the hold,
21 obviously.

22 THE COURT: Overruled.

23 THE WITNESS: And lawyers.

24 BY MR. APTON:

25 Q Uh-huh. My point is, it's a formal process, yes?

1 A Yes.

2 Q With respect to the litigation hold that you and the
3 other officers and directors of VTBH Holdings received in
4 August of 2013, what do you recall that litigation hold saying?

5 A I don't have a specific recollection of this, since
6 it was eight years ago, but I'm assuming it would have been
7 preserve all materials related to the case.

8 Q Written and electronic; correct?

9 A Yes.

10 MR. APTON: Your Honor, I'd like to introduce Exhibit
11 Number 7.

12 THE COURT: Any objection to 7?

13 MR. HESS: Is it the Turtle Beach one?

14 MR. APTON: Litigation hold.

15 MR. HESS: Oh. No objection.

16 THE COURT: Be admitted.

17 (Exhibit Number(s) 7 admitted.)

18 BY MR. APTON:

19 Q So, Mr. Stark, please take a minute to review what's
20 Exhibit 7 in evidence. Let me know when you're -- well, first
21 of all, let me know if you can read it. Can you read that?

22 A I can't read it.

23 THE COURT: You just need Karen to blow it up for
24 you?

25 THE WITNESS: Yes.

1 THE COURT: The top, bottom, middle?

2 MR. APTON: Well, I --

3 THE WITNESS: Full screen is not readable here, guys.

4 MR. APTON: Sure. Let's focus --

5 THE WITNESS: It's blurry and --

6 MR. APTON: Sorry, Mr. Stark.

7 BY MR. APTON:

8 Q Let's focus on the header information. So the
9 recipient, the sender, the dates, subject. And this indicates
10 that it's from Bruce Murphy, yes?

11 A Okay. Yep.

12 Q And he was your CFO at the time; correct?

13 A Yes.

14 Q And your name's on that address; right?

15 A Yes.

16 Q Who's Bob -- how do you pronounce the last name,
17 Pinko?

18 A Picunko. Would have been the head of marketing at
19 the time.

20 Q Okay. Dominick Pagnozzi?

21 A Head of sales.

22 Q Jim Adams?

23 A No, sorry. Dominick would have been -- Jim at the
24 time would have been head of international sales.

25 Q Jim Adams?

1 A Yes.

2 Q I'm sorry, did you tell me his role?

3 A International sales.

4 Q Thank you. Richard Kulavik?

5 A Would have been the CTO and running IT.

6 Q Greg Boelsen?

7 A Supply chain.

8 Q And Jeff Goldstein?

9 A Product management.

10 Q What about Rhonda Robinson?

11 A Finance team.

12 Q And Kezban Terralavoro?

13 A HR.

14 Q Is Mr. Ken Fox a recipient of this letter?

15 A Doesn't appear to be.

16 Q And if I can direct your attention to now paragraph 2
17 of the letter. Mr. Stark, can you read paragraph 2 for us into
18 the record?

19 A Want me to read it out loud?

20 Q Yes, please.

21 A Cases like this have, unfortunately, become common in
22 connection with transactions involving a public company.

23 Q I'm sorry, Mr. Stark, can you keep your voice up?
24 It's hard to hear you with the mask on.

25 A Yeah, sorry. It's hard with the mask.

1 Cases like this have, unfortunately, become common in
2 connection with transactions involving a public company. While
3 we do not believe there is any merit to the claims and
4 certainly believe that the claims against the company are
5 baseless, courts allow for very broad inspection of documents
6 and can punish a party for failing to keep and produce relevant
7 evidence, even when a claim is without merit.

8 It is therefore important that VTB employees preserve
9 and not discard any records, documents, or communications,
10 whether electronic or paper, that may be relevant to the
11 litigation. In particular, we should preserve any electronic
12 or paper records that concern, in any way, the merger with
13 PAMT.

14 Analysis concerning the potential merger and
15 negotiation and the merger agreements, communication concerning
16 the merger and other similar documents, out of an abundance of
17 caution, please regard the period relevant to the lawsuit is
18 beginning on April 1, 2013, and continuing through the present.

19 Q Thank you. Now, you received this e-mail; correct?

20 A Yes.

21 Q Do you recall reading it?

22 A I don't recall, but I'm certain I read it.

23 Q Okay. Why do you say you're certain you read it?

24 A Well, somebody sends me an e-mail on a legal hold,
25 I'm going to read it.

1 Q It's not just someone, it's your CFO; correct?

2 A Yes.

3 Q And the subject line is, "Important. Litigation Hold
4 Memo. Please Read."

5 Correct?

6 A Of course.

7 Q Yeah. Okay. So now, there came a point in time when
8 you were asked by VTB Holdings to provide text messages from
9 your phone; correct?

10 A I don't recall if text messages were asked for
11 specifically.

12 Q Okay.

13 MR. APTON: If we can go back to Exhibit 6, please?

14 Q Now, Mr. Stark, I'm going to direct your attention to
15 page 9, lines 13 through 19.

16 MR. PEEK: I don't think he can read it. She needs
17 to blow it up.

18 MR. APTON: I think we're working on it.

19 BY MR. APTON:

20 Q Sir, page 9, lines 13 through 19. Mr. Stark, if you
21 could read that portion and just let me know if that refreshes
22 your recollection as to whether you were asked to provide text
23 messages.

24 A Okay. Good. Yes, looks like I was.

25 Q Okay. But you didn't have the text message, though,

1 at that time, did you?

2 A I didn't have a text message at that time?

3 Q Did you have the phone you used during the merger
4 negotiations at the time VTBH Holdings asked you to provide
5 text messages?

6 A Not in 2014, when the collections started.

7 Q Okay. And why did you no longer have that phone?

8 A Because I switched phones very frequently at that
9 time, at least once a year. And so I didn't -- no longer had
10 the phone that could -- had the text messages from 2013.

11 Q Did you make any effort to preserve those text
12 messages?

13 A No.

14 Q You cleared them, did you not?

15 A I factory reset the phone.

16 Q Uh-huh. And you saved your contacts at the same
17 time; correct?

18 A No. Everything on my phone that's relevant to the
19 case was also on my computer. So the phone, I didn't view the
20 phone, including text messages, as having anything that was not
21 fully overlapping with what would be on my computer relevant to
22 the case.

23 THE COURT: So let me ask you a question, sir. Were
24 your text messages downloaded and transferred to your work
25 computer?

1 THE WITNESS: No, not at that time.

2 THE COURT: Okay.

3 MR. APTON: Thank you, Your Honor. Your Honor, no
4 more questions for Mr. Stark right now.

5 THE COURT: Okay. Cross-examine -- can you wipe
6 down, please?

7 MR. APTON: Yes.

8 THE COURT: Cross-examination. Unless you want to
9 revert to your case in chief.

10 MR. HESS: I'll do that, Your Honor.

11 THE COURT: Okay. All right.

12 MR. HESS: Thank you.

13 CROSS-EXAMINATION

14 BY MR. HESS:

15 Q Good morning, Mr. Stark. You testified earlier that
16 you had previously been the CEO of Motorola Mobility; correct?

17 A Yes. COO of Motorola Mobility.

18 Q And what business is Motorola Mobility in?

19 A Mobile phones.

20 Q So a maker of mobile phones?

21 A Yes.

22 Q Okay. And in your capacity as COO of Motorola
23 Mobility, did you come to obtain, you know, strong industry
24 information about mobile phones and their functionality?

25 A Of course.

1 Q Yeah. And during the relevant time period of this
2 case, were you using a Motorola phone?

3 A Yes.

4 Q Okay. Can you describe the types of electronic
5 devices that VTBH provided to you in 2013?

6 A Laptop.

7 Q Laptop. So not a -- not your cell phone?

8 A Correct.

9 Q Did they reimburse you for your cell phone?

10 A No.

11 Q Did they reimburse you for your cellular plan?

12 A No.

13 Q Do they do that for any employee?

14 A I believe no.

15 Q Are cell phones considered corporate devices?

16 A I'm not sure -- I'm not certain. I --

17 Q Are text messages on employees' cell phones
18 considered business records of VTBH?

19 THE COURT: That might be a legal conclusion,
20 counsel.

21 BY MR. HESS:

22 Q Does VTBH consider them their business records?

23 THE COURT: That's a good way to ask it. Thank you.

24 MR. HESS: Thank you, Your Honor, for helping me out.

25 / / /

1 BY MR. HESS:

2 Q So let me ask it, Mr. Stark, does VTBH consider text
3 messages on employee cell phones business -- its -- their
4 business records?

5 A No, but that doesn't mean that I wouldn't have
6 voluntarily given my text messages if I felt that they had
7 anything responsive to litigation hold.

8 Q So it's your --

9 A That wouldn't have stopped me from providing my
10 phone, providing my text messages.

11 Q So you -- in your personal practice, if there was a
12 text message that you thought was responsive to a litigation
13 hold, let's say, you would have preserved that and turned it
14 over to the company; correct?

15 A Absolutely.

16 Q Okay.

17 A Whether it was the company's property or not. In
18 fact, if I had even the smallest inkling that there might be
19 something unique and relevant on my phone, including with text
20 messages that wasn't on my computer, I would have asked
21 counsel, okay, there might be something, there might not be
22 something. Do you want me to check to make sure? But at the
23 time, I had a, you know, still today, you have a very diligent
24 systematic way of processing my work. And I don't want
25 business content in my text messages for a lot of good reasons.

1 And so I, you know, I would have -- had I thought
2 differently, I would have offered up the phone, including the
3 text messages. But I'm highly certain at that time that it had
4 no material that was not fully duplicated in the documents in
5 the computer I provided.

6 In fact, sorry for the long answer, but if legal
7 counsel would have said, Okay, there's nothing on your phone,
8 but keep your phone just in case, I also would have flagged
9 that and made sure that I didn't go through my normal process
10 of occasionally replacing my phone, which always involves,
11 obviously, resetting it to clear all the information off and
12 providing it to, at the time, what was frequent that I would --
13 my kids would get the hand-me-down phones.

14 Q And, Mr. Stark, if you could just keep your voice up
15 a little bit so the court reporter can make sure you get what
16 you're saying.

17 And as the COO of Motorola Mobility, I mean, how
18 frequently did you update your cell phone?

19 A It could be every few months. I would get new
20 prototype phones, tests, that's one of the reasons why I didn't
21 want business content on my phone, because at that period of
22 time, I don't think there was a way to back up your text
23 messages. In fact, I think even on Motorola Android phones,
24 text messages disappeared. Like, the phone would only keep 90
25 days of text messages. And so that, among many other reasons I

1 can get into, that's why I didn't want and didn't allow
2 substantive business content to be in text messages, because
3 then every time I have to replace a phone, I got to then figure
4 out how to get that information off. I can't search it, I
5 can't easily move it, I can't back it up. It's not a
6 productive place to hold business content. Particularly, when
7 you're replacing phones on a frequent basis.

8 Q Right. And your habit of replacing your cell phones
9 for the newest generation of phone, did that continue to today?

10 A Yes.

11 Q Okay.

12 MR. HESS: Would you pull up TX356?

13 Q Mr. Stark, did you submit a declaration in opposition
14 to the --

15 THE COURT: What's the exhibit number, counsel?

16 MR. HESS: It's 356.

17 THE COURT: Any objection to 356? Mr. Apton, 356?

18 MR. APTON: Your Honor, it's a declaration. For
19 sure, Your Honor, our practice is not to allow that sort of
20 stuff as evidence.

21 THE COURT: The objection is sustained.

22 MR. HESS: Your Honor, if -- in his declaration,
23 there are exhibits that I want to --

24 THE COURT: Counsel, you can go through the exhibits
25 to it, but the declaration --

1 MR. HESS: Very good.

2 THE COURT: -- and a hearsay statement, he's here to
3 testify. I'm happy to listen to him tell me whatever it is you
4 want me to have him tell me.

5 MR. HESS: All right. Okay. There is an Exhibit A
6 to Exhibit 356.

7 THE COURT: I can't admit a partial portion of an
8 exhibit.

9 MR. HESS: Okay.

10 BY MR. HESS:

11 Q Mr. Stark, did there come a time in 2014 that you
12 reduced into writing your policies about the use of electronic
13 communications for employees of Turtle Beach?

14 A Yes, multiples times.

15 Q Multiple times. And tell us a little bit about this
16 policy that you formulated and distributed to all Turtle Beach
17 employees in the beginning of 2014.

18 A So I have this stuff going back probably 10 years
19 earlier, even, than this. I have a very systematic way of
20 processing work. I've been in a position where I have a very
21 high amount of workload, including in e-mail. And I want
22 e-mail and communications with me to be efficient. And I also
23 want that, you know, Turtle Beach and my prior organizations
24 that I managed to be efficient in communicating with each other
25 and using the proper mediums to do so.

1 So the -- kind of my best practices involve things
2 like not sending e-mails without subject lines, using your
3 inbox as your -- essentially, your complete list of what you
4 need to accomplish. So you read an e-mail, I archive. If I --
5 if I'm done with whatever needs to be done, but I leave it in
6 my inbox if I'm either -- haven't read it, I'm not finished
7 processing with it or I need to follow up on it. And I keep
8 that inbox, used to have a rule that it had to be 150 by Sunday
9 night. So that's 150 total things that I either haven't read,
10 haven't responded to, or need to follow up on.

11 And then many times this made me more efficient than
12 people that worked for me in terms of keeping them on track for
13 things that they owed me.

14 So -- but it's not just about -- it's not about my
15 work efficiency; it's about helping the entire organization be
16 more efficient in communicating to people. Don't add a bunch
17 of extra people to the cc list. Don't change subject material
18 in the middle of an e-mail.

19 It also outlined something I felt very strongly
20 about, which is how to use e-mail, how to use voicemail, how to
21 use text messaging. And, you know, content that needed
22 multiple people that had -- should be on e-mail. Text messages
23 should be only for short, non-substantive, easy, instant
24 reply-type of things. I don't want to get it -- even today, by
25 the way, it's something I feel very strongly about. I don't

1 want to get a text message that either requires me to do a
2 bunch of work, that I can't answer immediately, that I can't
3 later go back to search what did we discuss, what did we do,
4 whatever; that's not appropriate content for a text message.

5 Particularly, back in 2013, it's not like today,
6 where now you have apps on your computer where you can respond
7 to things and type a long text. Back in those days, everything
8 was thumb typing, it was 120 characters. It's a completely
9 inefficient way to process any substantive work, and it didn't
10 fit into my process. I wanted everything located on my
11 computer in documents or e-mail so I could follow up on it, I
12 could search it, I could, you know, back it up when I change
13 computers, things like that. So that was the gist of the
14 communication.

15 Q And, Mr. Stark, as part of this policy that you
16 distributed to Turtle Beach, what was the policy in terms of
17 deleting e-mail?

18 A I don't delete e-mails.

19 Q What do you do with your e-mails?

20 A I -- it's either in my inbox or it is archived. So I
21 have a button in my e-mail or on my Outlook that even I have a
22 custom written macro before you could do this is in Outlook, so
23 that I could look at an e-mail, either it stays in the inbox or
24 I'm done with it, in which case it gets archived. So I have
25 enormous archive folder that has every e-mail that's ever been

1 sent or received by me.

2 And this -- tell me if I'm being too long-winded --
3 this is -- has nothing to do with a legal hold, by the way. It
4 has to do with the fact that I want the ability to go back and
5 check on things. I want the ability to be able to say, okay,
6 when did I ask somebody to do something. Right? And if I
7 don't have this structure, then it -- what happens, which a lot
8 of people do, which drives me nuts, is the inbox just starts
9 filling up. And that's the surest way to drop balls on things
10 and not follow up, because you don't have a clear line between
11 something you've finished and something that is still left to
12 do.

13 And then I don't go back to my archive folder and
14 delete, because that would take a bunch of time, and why do it?
15 Storage is cheap and, yeah, that's how I process my work. It's
16 literally focused on saving milliseconds per e-mail, because if
17 there -- the amount of e-mail that I get and got, if I could
18 shave a second or two off of every e-mail, that's a
19 productivity improvement. I'm an efficiency nut, so this is,
20 like, my system that I wanted other people to use my system,
21 because I knew it was a good -- good and productive and
22 efficient system.

23 Q So as a consequence of that, in 2014, is it fair that
24 you repeatedly instructed all Turtle Beach employees not to use
25 text messages for business purposes?

1 A Yes.

2 Q Okay.

3 A And if someone texted me something that violated the
4 policy, I would -- even today, by the way, I still do this.
5 The kids will text me something. I'll be, Send this to me by
6 e-mail. This is not text content. I can't -- you're
7 interrupting whatever I'm doing. I'm not going to go back and
8 check my text messages, see if I handled everything that's in
9 there, and it violates protocol on how to use text messages.

10 Q And, Mr. Stark, the merger between VTBH and
11 Parametric, what was -- at the time, did you consider that an
12 important transaction?

13 A Of course.

14 Q And --

15 THE COURT: So, counsel, we're going to break for
16 lunch now. See you guys at 1:15.

17 MR. HESS: Thank you, Your Honor.

18 MR. PEEK: Thank you, Your Honor.

19 THE COURT: And if you want to admit that attachment
20 to 356, you can make it into a new exhibit and resubmit it
21 electronically.

22 MR. HESS: Thank you, Your Honor.

23 (Proceedings recessed at 12:00 p.m., until

24 (Proceedings recessed at 12:00 p.m., until 1:16 p.m.)

25 THE COURT: You may continue your examination.

1 I'd like to remind you you're still under oath, sir.

2 MR. HESS: Welcome back, Mr. Stark.

3 Can I have Exhibit 570 pulled up, please.

4 (Pause in the proceedings.)

5 MR. HESS: Any objection?

6 MR. APTON: Hold on a second.

7 MR. HESS: Sure.

8 THE COURT: Isn't 570 part of the ones that were
9 already admitted?

10 UNIDENTIFIED SPEAKER: No, this is a new one.

11 THE COURT: Oh.

12 MR. HESS: You asked for a new one. So we're going
13 to --

14 THE COURT: So 570 was the exhibit to 356, which I
15 said I couldn't admit the way it was?

16 UNIDENTIFIED SPEAKER: Correct.

17 UNIDENTIFIED SPEAKER: Correct.

18 THE COURT: Any objection to 570? Which is probably
19 a memo about how we're going to use our electronic information?

20 MR. HESS: You are not incorrect, Your Honor.

21 THE COURT: I'm just guessing. I'm not looking at it
22 because I'm looking at the great seal on the wall.

23 (Pause in the proceedings.)

24 MR. APTON: Was this produced in discovery or
25 attached to the declaration?

1 MR. HESS: This was attached to the declaration.

2 MR. APTON: Okay. Then no objection.

3 MR. HESS: Okay. Great. Thank you.

4 THE COURT: Be admitted. Thank you.

5 (Exhibit Number(s) 570 admitted.)

6 BY MR. HESS:

7 Q So, Mr. Stark, do you recognize the e-mail that's
8 been admitted as 570?

9 A Yes.

10 Q Okay. And why did you send this e-mail?

11 A This was another push by me to use communications
12 properly in the company.

13 Q Okay. And it's sent to All VTB U.S. Can you explain
14 who the recipients of all VTB U.S. is or are?

15 A Yes. That would be all of the U.S. employees of the
16 company.

17 Q Okay. And there's an attachment to this exhibit --
18 Mr. Stark, we'll pull up the exhibit, the attachment for you --
19 entitled "Using Gmail effectively." Can you kind of take a
20 look at this whole document.

21 First of all, do you recognize this attachment?

22 A Yes.

23 Q Is this --

24 A At that time we used Gmail instead of Outlook today,
25 but, yes.

1 Q And is this a document that you personally prepared?

2 A Yes.

3 Q And this document reflects what we were discussing
4 earlier before lunch; correct?

5 A Yes.

6 Q And this document, does it actively reflect your own
7 practices with respect to using electronic communications for
8 business purposes?

9 A Yes. Some form of this document probably going back
10 even 10 years before this.

11 Q While you were at Motorola Mobility?

12 A While I was at Motorola, wherever I was trying to get
13 people to communicate productively.

14 Q Okay. And if you go to the second page, there's a
15 second to last section. It says "E-mail versus text messages
16 versus chat."

17 Do you see that?

18 A Yes.

19 Q Can you read those bullet points for me, sir.

20 A "Do not use text messages for anything other than
21 easy immediate quick feedback, e.g., are you joining the
22 meeting? Anything that takes more typing or the recipient may
23 need to hold the reply or do some work to reply, use e-mail,
24 not text messages."

25 "The same rule applies to Google chat messages. They

1 should be for quick immediate replies. Anything more involved
2 should go via e-mail."

3 Q And, Mr. Stark, did this reflect your personal habits
4 as of 2013, 2014?

5 A As of 2013, 2014 and as of today.

6 Q And did you expect all Turtle Beach employees to
7 abide by this?

8 A That was my hope.

9 MR. HESS: Let me get Exhibit 571.

10 THE COURT: 571, that's also a proposed exhibit?

11 MR. HESS: Yes, it is.

12 THE COURT: Any objection to 571?

13 (Pause in the proceedings.)

14 MR. APTON: No objection.

15 MR. HESS: Thank you.

16 THE COURT: No objection?

17 MR. HESS: No objection.

18 THE COURT: Be admitted.

19 (Exhibit Number(s) 571 admitted.)

20 THE COURT: Thank you.

21 BY MR. HESS:

22 Q Mr. Stark, do you recognize this document?

23 A Yes.

24 Q And this is an e-mail that you sent to Richard
25 Kulavic on March 18, 2014; correct?

1 A Yes.

2 Q And why are you sending this e-mail?

3 A At that time he was, in addition to being the CTO, he
4 was also responsible for IT, which would've included things
5 like e-mail.

6 Q Great. And this is dated March 18, 2014; correct?

7 A Right.

8 Q And the closing date of the merger between Parametric
9 and Turtle Beach was January 15, 2014; correct?

10 A Correct.

11 Q Okay. And if you look at the bottom or the lower
12 e-mail where you're replying to Kezban Terralavoro; do you see
13 that?

14 A Yes.

15 Q Who is Mr. Terralavoro?

16 A She.

17 Kezban was the head of HR at that time.

18 Q Okay. And your response to her, what are you trying
19 to communicate to her?

20 A Let me read it.

21 So I'm asking her to set up some mandatory Gmail
22 training so that everyone knows how to use and get the most out
23 of Gmail.

24 If we have new people who joined, they could also
25 join this session.

1 Q Okay. And if you look at there's an attachment to
2 this e-mail, Mr. Stark.

3 A So it looks like this has something to do with
4 Parametric integration, post the deal closed.

5 Q Right. Okay. So this is --

6 A Can you go up a little further?

7 Q She's asking you for additional training for
8 onboarding Parametric employees?

9 A It looks like that, yes.

10 Q Okay. And your response is the Gmail training
11 that --

12 A Yes, apparently.

13 Q Okay. If you can go to the attachment, please.

14 THE COURT: Is that part of this same exhibit?

15 MR. HESS: Yes.

16 THE COURT: Thank you.

17 BY MR. HESS:

18 Q And, Mr. Stark, this is just the same document we
19 just looked at from the Exhibit 570, the using Gmail
20 effectively?

21 A Yeah, it looks like it.

22 Q It's identical, an identical document, right, to that
23 exhibit?

24 A Yes.

25 Q Okay. Finally, Mr. Stark, during the course of this

1 litigation, do you know who the custodians in the class action
2 litigation were on behalf of VTBH?

3 A I believe it was myself and Bruce Murphy originally,
4 and then I think we added John after he joined because he
5 joined as Bruce's replacement.

6 Q And have there ever been any other custodians for
7 VTBH in this action?

8 A I'm not certain. I don't think so.

9 Q And are you aware of whether Ken Fox was ever a
10 custodian for VTBH in this action?

11 A I don't think so.

12 MR. HESS: Thank you, Mr. Stark.

13 THE COURT: Any redirect?

14 MR. APTON: Yes, Your Honor.

15 THE COURT: Did you wipe down?

16 MR. HESS: I did, Your Honor.

17 THE COURT: Okay. Thank you. I was trying to keep
18 track of the time, and I missed it.

19 MR. HESS: Actually, Your Honor, how much time do
20 defendants still have left?

21 THE COURT: I don't know. I haven't added them all
22 up yet.

23 MR. HESS: Oh, I'm sorry. Okay.

24 THE COURT: Not much.

25 MR. HESS: I understand --

1 THE COURT: You're fast running out.

2 MR. HESS: -- that's why I asked, Your Honor.

3 MR. APTON: Your Honor, if I could at this time, I'd
4 like to publish one of the transcripts, Juergen Stark's
5 transcript.

6 THE COURT: Okay. Which version -- volume?

7 MR. APTON: Well, it was only one transcript.

8 THE COURT: Date?

9 MR. APTON: August 15, 2019.

10 THE COURT: Okay. Hold on a minute. Let's see if
11 Val can find it.

12 Sir, depositions still in Nevada come in
13 old-fashioned sealed envelopes with original stamps on them
14 from the old days when there weren't copying machines, and they
15 made fancy versions of these originals. You can tell I'm
16 stalling while (indiscernible).

17 THE WITNESS: It seems to go along with the screen
18 date here.

19 THE COURT: Yeah. You know, my screen works a little
20 bit better than yours, but not much.

21 So in a minute I'm going to hand you your original
22 deposition. It's one of the paper things I'm going to hand
23 you.

24 THE WITNESS: Okay.

25 THE COURT: You can ask to -- or you can move

1 yourself forward or back in pages to give yourself context when
2 counsel directs you to a section.

3 THE WITNESS: Okay.

4 THE COURT: And here is your deposition. It appears
5 to have exhibits attached to it. So good luck.

6 REDIRECT EXAMINATION

7 BY MR. APTON:

8 Q Mr. Stark, actually, before we get to the transcript,
9 let me just ask a quick question relating to the testimony you
10 just gave to Mr. Hess. He asked if Mr. Fox was a custodian in
11 this case. Do you recall that?

12 A Do I recall his question?

13 Q Uh-huh.

14 A Yes.

15 Q Okay. And to your knowledge, what is a custodian?

16 A Someone who's responsible for retaining the
17 information.

18 Q And when VTBH or VTB Holdings attempted to collect
19 ESI for this case, did they ask Mr. Fox for his ESI?

20 A I don't know. That would have been -- at that time
21 we had outside counsel that would have been conducting all of
22 the work behind the document collection.

23 Q But you're here to provide information as to what VTB
24 Holdings did to collect ESI; correct?

25 A Correct.

1 Q Okay. So can you tell me whether VTB Holdings asked
2 Mr. Fox for his ESI in August of 2013?

3 A I'm not certain.

4 Q If not you, who would be the best person?

5 THE COURT: Everybody in the audience needs to make
6 sure your masks are on correctly, please. Thank you.

7 BY MR. APTON:

8 Q So, Mr. Stark, how could you find out whether or not
9 VTB Holdings asked Mr. Fox for his ESI in August of '13?

10 A I would have to ask counsel.

11 Q Is that counsel here in the courtroom today?

12 A Yeah, they would most likely know.

13 Q Okay.

14 A I wasn't the one doing the discovery or the ESI
15 collection. I was CEO of the company. So I'm not going to
16 know every detail of the process.

17 Q Okay. Which of your counsel is here that you could
18 ask?

19 A Mr. Hess would likely know.

20 MR. APTON: Judge, can the witness speak to --

21 THE COURT: No. The witness is not going to go
22 consult with his attorney to answer a question for you and
23 invade the privilege.

24 Sir, why do you think appointing a custodian has
25 anything to do with your discovery allegations in this case?

1 THE WITNESS: Appoints? Why do I think appointing a
2 custodian?

3 THE COURT: Uh-huh.

4 THE WITNESS: I assume custodian means that people
5 who are responsible for the delivery of the documents.

6 THE COURT: Why do you assume that, sir?

7 THE WITNESS: Well, that's what -- that's what the
8 materials I read would suggest.

9 THE COURT: Okay.

10 THE WITNESS: But I'm not an expert on either the
11 definition of custodian or exactly how all of this works.

12 THE COURT: So do you think having someone appointed
13 as a custodian relieves the company of its obligations to
14 provide the information in discovery?

15 THE WITNESS: No.

16 THE COURT: Okay. Just wanted to make sure because I
17 sort of got that impression from --

18 THE WITNESS: Oh, no. Not at all. I apologize --

19 MR. OGILVIE: I didn't -- I didn't hear the last
20 answer.

21 THE COURT: It doesn't matter, Mr. Ogilvie. I heard
22 it.

23 MR. OGILVIE: Okay.

24 THE COURT: You've been in here before, George.

25 MR. OGILVIE: Yep.

1 THE WITNESS: I apologize by the way. I'm not trying
2 to be evasive.

3 THE COURT: It's all right.

4 THE WITNESS: I'm just not an expert on how this
5 works.

6 THE COURT: I know, sir. Most people who are in
7 business aren't, which is why you don't want to be in
8 litigation.

9 BY MR. APTON:

10 Q Mr. Stark, the only reason I ask you these questions
11 would be because you, yourself, testified, and we'll get to
12 your testimony in a second -- that you were familiar with this
13 process.

14 A If by process --

15 Q But you are here, and with ESI's preservation and
16 production.

17 A Yeah --

18 Q And you are here to give --

19 THE COURT: You got to let him finish.

20 MR. APTON: Sorry, Your Honor.

21 THE COURT: Sir, make sure you finish your answer.
22 I'm going to stop counsel if he interrupts you. Okay?

23 THE WITNESS: Okay.

24 Please.

25 / / /

1 BY MR. APTON:

2 Q And you are here to explain what VTB Holdings did to
3 obtain information, ESI, from its directors and officers, yes?

4 A I'll do the best I can.

5 Q But as you sit here, you have no knowledge one way or
6 the other whether VTB Holdings attempted to obtain Mr. Fox's
7 ESI; is that right?

8 A That's correct.

9 Q Do you have Exhibit 6?

10 MR. APTON: Can we pull up Exhibit 6, please.

11 THE COURT: Are you going to have him look at his
12 depo or not?

13 MR. APTON: I am.

14 THE COURT: Okay. So we're going back to the answers
15 to interrogatories?

16 MR. APTON: Yes, Your Honor.

17 THE COURT: Okay.

18 BY MR. APTON:

19 Q Page 15, line 6 through 8.

20 A Fifteen. So I'm on tab 6?

21 Q No.

22 UNIDENTIFIED SPEAKER: No. It's an exhibit that's
23 electronic --

24 THE COURT: It's on the screen.

25 UNIDENTIFIED SPEAKER: He's not referring to your

1 deposition.

2 THE COURT: Remember how we have to look on the
3 screen?

4 THE WITNESS: Oh, that's right. All right. Sorry.

5 THE COURT: And they have to blow it up so we can
6 both read it.

7 THE WITNESS: All right. Go ahead and --

8 THE COURT: So are we going to 20 again?

9 MR. APTON: I'm sorry. It's 6, Exhibit 6.

10 THE COURT: We're on Exhibit 6.

11 MR. APTON: Page 15, line 6 and 7.

12 THE COURT: And if we could please blow it up, Karen,
13 so all of us can read it.

14 Can you see it, sir?

15 THE WITNESS: Yes, I can.

16 THE COURT: Okay.

17 BY MR. APTON:

18 Q Does this give you any more insight as to whether VTB
19 Holdings asked Mr. Fox to produce his ESI?

20 A So it looks like, which I am familiar with, that all
21 the directors and officers received the legal hold.

22 What's throwing me off is I'm not sure how the
23 custodian part fits in. Because I think we had less custodians
24 than people who actually got the legal hold request.

25 Q This says here, line 6, "VTBH did not rely on the

1 custodians or any other employees to determine what information
2 and/or ESI was potentially relevant."

3 Right?

4 A Okay.

5 Q Is that correct?

6 A Yes.

7 Q Okay. Okay. Mr. Stark, let's go to your transcript
8 now.

9 MR. APTON: Now, Your Honor, we designated a portion
10 of this.

11 THE COURT: You can use it with the witness. He's
12 here.

13 MR. APTON: Okay.

14 THE COURT: You can either you read it and he reads
15 part or you can use it in some other way, but you got to get it
16 in as part of the record if I'm going to consider it.

17 BY MR. APTON:

18 Q So, Mr. Stark, if I could turn your attention to
19 page 115.

20 A Okay.

21 Q And pages -- line 21 on page 115.

22 THE COURT: And, sir, remember, you can read before
23 and after to give yourself context before you respond to any
24 questions he asks you.

25 THE WITNESS: Yeah.

1 BY MR. APTON:

2 Q Your answer on page 20 what -- I'm sorry, 115,
3 line 21 to 24, you say --

4 THE COURT: Counsel, you've got to read the question.
5 You can't just read an answer.

6 THE WITNESS: I see the answer. That's okay.

7 BY MR. APTON:

8 Q Well, so, Mr. Stark, what are you explaining here in
9 your answer?

10 A I'm stating that I'm familiar with the legal hold
11 process.

12 Q Yes. And that legal hold process would encompass all
13 materials related to whatever the topic was?

14 A Correct.

15 Q Including your phone at the time, yes?

16 A Yes.

17 Q And --

18 A If my phone had relevant information on it.

19 Q And the examination goes on, and you're asked,
20 including text messages?

21 A Correct. If my text messages had some substantive
22 for the legal hold.

23 Q Okay.

24 A I am in no point am I debating that the scope covers
25 everything. But then the next question is where is the

1 information that's relevant to the case? The phone has e-mail,
2 for example, but all of the e-mail is on the computer. So you
3 don't have to do both of them, and I felt strongly then and
4 continue to feel strongly that my text messages did not contain
5 substantive additional information for the case.

6 Q So that's what I want to ask you about. What's your
7 basis for that conclusion?

8 A My basis is knowing that I wouldn't start a major
9 conversation; I wouldn't have any meaningful new information go
10 back and forth on a 160 character typed text message. That is
11 not a medium to negotiate a deal or anything substantive.

12 Q But you're not a lawyer; correct?

13 A I'm not a lawyer, no.

14 Q Right. And just earlier you were confused by what
15 custodians were and how the ESI process works in this case;
16 correct?

17 MR. HESS: Objection. Misstates the testimony.

18 THE COURT: Overruled.

19 THE WITNESS: I'm not a lawyer. I don't know exactly
20 what it means.

21 BY MR. APTON:

22 Q So how are you able to make a determination as to
23 what, quote, unquote, relevance was for your text messages?

24 A I believe I would have talked to the counsel, talked
25 to our attorney and said, okay. What have you got? Here's

1 what I've got. I've got files. I've got paper files. I've
2 got things on my computer, files and documents. And he
3 would've said, okay, what about your phone? And I would've
4 said text messages, maybe I would have even checked, like let
5 me just double check and make sure there's nothing in here.

6 It might not be perfect, but I knew very well at the
7 time how I did my work.

8 And again, I wouldn't have had something substantive
9 go in a text message. It's just not a productive medium.

10 Q Uh-huh. And so you ultimately discarded those text
11 messages; correct?

12 A No, I didn't discard them. I changed my phone, like
13 I did on a regular basis, and I would guess at that time, the
14 legal hold didn't even come into my thinking for a second
15 because if I had been told, hey, even though your phone doesn't
16 contain anything, we'd like you to keep it, I would've kept it.

17 Q Who told you that your phone -- strike that.

18 A I don't -- I don't remember the conversations.

19 THE COURT: You can't ask him legal privileged
20 questions.

21 THE WITNESS: No. But I --

22 MR. APTON: I strike it.

23 BY MR. APTON:

24 Q Were you ever told that your phone did not contain
25 relevant information?

1 THE COURT: The objection is sustained.

2 Mr. Peek, it's not your witness.

3 MR. PEEK: I understand, Your Honor.

4 THE COURT: You've got to move faster.

5 MR. HESS: Your Honor, I know.

6 THE WITNESS: So I want to be very clear on this.

7 THE COURT: Don't tell him anything --

8 MR. HESS: No. No.

9 THE COURT: -- your lawyers told you. I don't want
10 to know.

11 THE WITNESS: No. No. No. No.

12 And it was eight years ago. I don't remember the
13 conversations that we had, but I know that if I'm subject to a
14 legal hold it's my responsibility to provide all of the
15 information that could be relevant to the case. And if I have
16 any doubt, my reaction would be to provide it. I have nothing
17 to hide. I want the evidence to be out there. That's why I
18 keep all of my e-mails. I process work the way I do so that I
19 have it available, and I am highly confident that the decision
20 that was made about the text message and the phone were because
21 there was nothing substantive or new in that medium.

22 BY MR. APTON:

23 Q And who made that decision?

24 A My guess is it would have -- I'm not going to guess.
25 I don't remember back then.

1 The way that this has happened in the past and
2 happened recently is there's a discussion: What do you have?
3 Where is it? This filing cabinet has got stuff you need. This
4 one doesn't. I've got nothing in here that has anything to do
5 with the case. So take this filing cabinet, but you don't need
6 this one.

7 People don't come back later and say, well, you
8 didn't give us that filing cabinet because it didn't have
9 anything in it that's relevant to the case. The purpose is not
10 to provide all information in your repository. It's to provide
11 the information that's relevant to the legal hold in the case,
12 which is exactly what I would have done and exactly what I
13 would do every single day for the rest of my life.

14 Q My problem is is that that's not what you testified
15 to in your deposition.

16 A How am I not testifying to that?

17 Q If you can look at page 116.

18 A Uh-huh. I see it.

19 Q Starting on line 20, you're asked, "In that period of
20 time, did you typically backup your phone when you got a new
21 one?"

22 A No.

23 Q You responded, "No. And I didn't -- I don't even
24 know, uh, how I would back text -- back up text messages."?

25 A Correct. Which is why text messages are not a good

1 medium for substantive business conversations.

2 Q Well, you proceed to testify that you did in fact
3 save your contacts; correct?

4 A Contacts are in the cloud. You don't have to save
5 them off the phone. In fact, I've never kept contacts on my
6 phone that are only on my phone even today. I don't want that.
7 My phone could get lost at any time, and suddenly I would lose
8 information that I don't have someplace else. That's not the
9 way I work.

10 But losing text messages, if somebody steals my phone
11 or it drops and cracks, which has happened to all of us once or
12 twice, I need to be sure that everything on my phone is
13 transitory and can easily be put back on a new phone. That's
14 exactly how we did it.

15 Q On page 117 -- or sorry, strike that.

16 Page 118, line 3, you say, "I would -- my old phone
17 would be cleared because it would go to one of my kids, for
18 example, to use."?

19 A Yes.

20 Q And counsel asks "So when you say, quote, 'cleared,'
21 close quote, what does that mean, deleted?

22 And you say, "Factory reset and phone given to, you
23 know, typically at that time one of my kids."

24 And you're asked, "Okay. Who would -- who would do
25 the clearing?"

1 And you say, "I would do it."

2 A Uh-huh.

3 Q Is that what happened?

4 A So, first of all, I don't recall exactly what
5 happened to the phone eight years ago. Most likely -- it
6 could've broken. It could have needed to be reset for some
7 other reason. It could have still been a prototype phone from
8 Motorola.

9 But that's exactly the practice that I followed back
10 then and that I would follow today. If you're done with the
11 phone, you don't go in and delete text messages or do anything
12 like that. You factory reset the phone. There's a menu
13 option. It clears everything from the phone which you want
14 because you don't want someone being able to get to your e-mail
15 or anything else, and then the phone --

16 At that period of time I don't know exactly if this
17 is what I did with the phone, but typically my kids would get
18 the hand-me-downs because I would usually have the latest
19 greatest phone and would update when a new phone came out. And
20 so when you're done with it, there's nothing on there that you
21 need that you can't easily put on the next phone. Because,
22 again, remember, at Motorola, I would be testing phones and
23 doing this on, like, an every couple month basis. So you
24 factory reset it, and often at that point in time I will give
25 it to one of my kids.

1 Q And in this case you would've done that with or
2 without consulting counsel first?

3 A I don't recall, but probably the conversation about
4 my phone would have been when the legal hold came out and I was
5 asked where stuff was.

6 Q And that would --

7 A I would have to make a decision, like what have I got
8 where? I've got to make sure I save it.

9 And, again, if somebody would have said at that point
10 in time, okay, you're saying there's nothing in your text
11 messages, but there could be, and we want you to save your
12 phone, I would've saved the phone.

13 Q And that litigation hold came out in August of 2013;
14 right?

15 A Correct.

16 THE COURT: So, sir, can I interrupt for a few
17 minutes and try and drive down a little path.

18 For text messages, do you use that like to schedule
19 lunch or things like that when you're trying to arrange things?

20 THE WITNESS: Yeah. It's --

21 THE COURT: That's about the limit of what you use it
22 for, or where are you, and why aren't you on the phone, and
23 we're waiting for you in the office?

24 THE WITNESS: Yeah, certainly back then.

25 Today it's a little more complicated because I can

1 type text messages on my computer instead of thumb typing them.
2 And I have some people, like the contractor on my house, that
3 doesn't do e-mail. So I end up having to type in long text
4 messages.

5 But my preference, and certainly back then when text
6 messages were limited to 160 characters and I had to thumb type
7 them in, my work protocol was it's got to be something you can
8 immediately answer, and it's got to be quick and simple. I
9 might -- it might -- it's possible that I might confirm
10 something. Like if I had a conversation with something earlier
11 in the day and someone said, hey, give me an update on this.
12 It might be, okay this got cleared or this happened or
13 whatever, but that's not like substantive new content. That is
14 simple short e-mail where the primary -- or text message where
15 the primary content is someplace else. Most of the e-mails I
16 would guess would be simple things like you're saying, like are
17 you late to the meeting --

18 THE COURT: Okay. You mean text messages?

19 THE WITNESS: Text messages. Sorry.

20 THE COURT: Okay.

21 THE WITNESS: -- are you coming; where are you;
22 you're late; do you want to grab lunch tomorrow; something that
23 the recipient or I could answer right away.

24 THE COURT: Okay. Let me switch gears for a minute.

25 So I know that as a supervisor of many employees, you

1 try and get your employees to follow your protocols --

2 THE WITNESS: Yes.

3 THE COURT: -- but in my experience --

4 THE WITNESS: I try to get the whole world to do it.

5 THE COURT: -- sometimes they don't follow the
6 protocols, no matter how clear the protocols are.

7 THE WITNESS: Yes.

8 THE COURT: So when you would receive text messages
9 from employees that say, hey, can I send out that letter we
10 talked about two hours ago, would you respond to that? Or
11 would you say, hey, don't send me a text message; send me an
12 e-mail?

13 THE WITNESS: If it's like an instant response, like
14 we just talked about it, and the content is in the e-mail, I am
15 familiar with the letter, they're not sending me the letter to
16 review by text message --

17 THE COURT: Right.

18 THE WITNESS: -- I could easily have said, yeah, go
19 ahead and send it out.

20 THE COURT: Okay. So there may be substantive things
21 that you discussed by text messages, but they would be things
22 that in your mind were very quick and easy for you to respond
23 to because they were just something that took a couple of
24 seconds --

25 THE WITNESS: Correct.

1 THE COURT: -- for you to process on the small typing
2 source that you had.

3 THE WITNESS: Yeah. And again, the primary content
4 would have been either discussed or on e-mail or in some of
5 document.

6 THE COURT: Right.

7 THE WITNESS: If somebody were to text me something
8 that I have to review, like a document for the first time that
9 I hadn't seen someplace else, I would definitely, even today,
10 say send it by e-mail.

11 THE COURT: Okay. Thank you, sir. Sorry for the
12 interruption.

13 THE WITNESS: No.

14 THE COURT: I was just trying to understand a little
15 better.

16 BY MR. APTON:

17 Q So, Mr. Stark, contrary to what you just said, you do
18 have some text messages that suggest you do use texting for
19 substantive reasons.

20 I'd like to introduce Exhibit Number 13.

21 THE COURT: Any objection to 13?

22 MR. PEEK: It's not in your -- it will be on the
23 screen.

24 THE WITNESS: Yeah, I figured.

25 THE COURT: Any objection to 13?

1 (Pause in the proceedings.)

2 MR. HESS: No objection.

3 THE COURT: Be admitted.

4 (Exhibit Number(s) 13 admitted.)

5 THE COURT: And, sir, again, if you need it made
6 bigger please let us know.

7 THE WITNESS: I do. (video interference).

8 BY MR. APTON:

9 Q So let me first direct you right to that very first
10 paragraph.

11 A You've got to get (indiscernible). Okay.

12 Q It says -- (indiscernible) Mr. Stark, have you seen
13 this document before? Are you familiar with it?

14 A I don't think so.

15 Q You see your name at the top there, Juergen Stark,
16 yes?

17 A Yes.

18 Q And that's your phone number underneath?

19 A Yeah.

20 Q Okay.

21 A Who is this to?

22 Q So these are text messages sent by you to Mr. Ronald
23 Doornink.

24 A Okay.

25 Q This was produced in discovery. Okay.

1 I want to direct you to some of your text messages.
2 On the second page, time stamp is 2014, July 18th, about
3 halfway down, do you see that text message that starts, "FYI, I
4 reviewed proposal with Rodney"?

5 A Can you make it a little bit bigger.

6 Q I'm sorry. You said can you make it --

7 A Can you make it a little bit bigger. Sorry.

8 (Pause in the proceedings.)

9 THE COURT: Is that better, sir?

10 THE WITNESS: Yes. Thank you.

11 BY MR. APTON:

12 Q Now, remember, these are messages received from you
13 by Mr. Doornink.

14 A Okay.

15 Q So this text message,

16 "FYI, I reviewed proposal with Rodney. I
17 think he thought options would be much higher
18 based on public filings. John is public at
19 250 or 290 depending on subsequent
20 (indiscernible)."

21 What -- what are you saying in this text message?

22 A So let me see the date here. July 2014.

23 So Rodney was the person we hired to run --

24 Q Can you speak up, please.

25 A Yeah. Sorry.

1 Rodney was the person we hired to run the HyperSound
2 business, so the Parametric business after we bought it. And
3 it looks like --

4 "I think he thought options would be much higher
5 based on public filings" --

6 Q I'm sorry. Mr. Stark, can you --

7 A Oh, I see. Yeah.

8 Sorry. I'm reading it to myself.

9 So I'm guessing this is --

10 THE COURT: We don't want you to guess. We want your
11 best recollection.

12 THE WITNESS: I'm pretty sure the proposal is
13 probably is an employment proposal for Rodney, and I'm telling
14 Ron, who would've been involved in the decision with how many
15 options he would get, it sounds like we discussed it that day
16 or at some point earlier. So Ron was familiar with the
17 context, and I'm saying he thought options would be much higher
18 based on public filings.

19 So, "John is public at 250 or 290," is probably the
20 number of options he had in the thousands, and I am telling him
21 that -- basically this is a text message saying we have to
22 increase the number of options for Rodney based on, I don't
23 know for sure, but this looks like it's some follow-up to some
24 conversation I had with Ron.

25 / / /

1 BY MR. APTON:

2 Q My point is this is a lot of information for a text
3 message. Would you agree?

4 A Pretty unusual, but, yes.

5 Q Let's go further down, second from the bottom, July
6 29th, 2014. It says, "FINRA inquiry, normal course of
7 business, no disclosure."

8 What FINRA inquiry were you referring to?

9 A I don't know.

10 Q Turtle Beach had an offer in April of 2014; correct?

11 A Yes.

12 Q Okay. Did FINRA send Turtle Beach a letter asking
13 why certain shares were sold into the market before the offer?

14 MR. HESS: I'm going to object as to how this bears
15 on Mr. Stark's texts.

16 THE COURT: Overruled. This has to do with how he
17 does texting.

18 Keep going.

19 THE WITNESS: I vaguely recall something, but I don't
20 remember the specifics here.

21 BY MR. APTON:

22 Q FINRA inquiry, substantive issue, no?

23 A Seven years ago?

24 Q At the time.

25 A Yeah, at the time.

1 Q Let's go to the fourth page, please, second text
2 message from the top.

3 Again, this is received. So it's you sending it to
4 Mr. Doornink.

5 A Okay.

6 Q "So we announced first real HS deployment this
7 morning. Stock trades 3,800 units only so far and dropped.
8 Slightly crazy."

9 There's a response from Mr. Doornink afterwards
10 discussing election results.

11 But, again, this is a conversation that's more than
12 just call me, yes?

13 A I don't really consider this to be a substantive
14 topic.

15 Q Well, what does HS stand for?

16 A HyperSound deployment.

17 Q Okay.

18 A Sort of like a text about the stock trading only
19 3800 units is like who cares.

20 Q Okay. But you thought it was important enough to
21 text Mr. Doornink; right?

22 A Well, it's a pretty short quick topic if he's looking
23 at the trading of the stock and wondering what happened. I
24 don't know if I talked to him 10 minutes earlier and we
25 discussed it and I'm following up on that.

1 Again, it's a little bit unusual, but I wouldn't call
2 this a substantive text.

3 Q Okay. Let's go third from the bottom. Now, this is
4 marked sent. So Mr. Doornink is now texting you?

5 A Okay.

6 Q Right?

7 This is a long one. So I'm not going to read the
8 whole thing, but it looks like you're discussing a compensation
9 package for someone; is that correct?

10 And please read the response that you send right
11 afterwards.

12 A Okay.

13 Q Another substantive conversation?

14 A Again, it depends on the context. I would be
15 absolutely -- well, I would have very high confidence that all
16 of this content was in a set of e-mails. This sounds like it's
17 some proposal to someone again that he would have seen in an
18 e-mail, and we're interacting on the proposal.

19 Q But, as you sit here today, you don't know if it
20 actually was in an e-mail?

21 A I don't know. I don't know.

22 Q Okay. And let's look at one more. Next page, I
23 guess the first from the bottom.

24 THE COURT: You've just hit 90 minutes is what that
25 means.

1 MR. APTON: Thank you, Your Honor.

2 THE COURT: You hit 90 minutes before lunch.

3 BY MR. APTON:

4 Q It reads January 11, 2015?

5 A Okay.

6 Q "A key point of context on the e-mail I just sent"?

7 A Yep.

8 Q "Revenues are tracking to 186.3, so more cushion
9 above 185 and almost no chance of adjustments going below."

10 Are you referring to your year-end revenues for 2014?

11 A I don't recall this. That sounds like it.

12 Q You described this as a, quote, "a key point of
13 context," close quote?

14 A On the e-mail I just sent. The content is in the
15 e-mail.

16 Q My question is how come this "key point of context"
17 wasn't actually in the e-mail you sent?

18 A Context on the e-mail, I don't know. Maybe I just
19 sent him an e-mail, and I didn't mention this point.

20 Q Mr. Stark, let me shift gears here.

21 THE WITNESS: Can I make a point here, Your Honor?

22 THE COURT: Sure, sir.

23 THE WITNESS: The examples that you're bringing up
24 are not the negotiation of a strategic combination of two
25 companies.

1 BY MR. APTON:

2 Q No, but my point is that they reflect your practices
3 and procedures at that point in time; correct?

4 A Yes. Yes. So the interesting question would be out
5 of how many text messages are there two or three that you could
6 maybe argue had some substance, even though we don't know
7 whether it might have been a follow-up to a call, whether the
8 other person might have said, you know what, I'm at the
9 baseball game. I'm not going to have my laptop. Can you send
10 me a quick text on this once you find out. I don't know any of
11 the context here.

12 Q We don't know the extent of the text messages because
13 you did not provide your phone when the litigation hold came
14 out; correct?

15 A Yes. Because I believe there's nothing substantive
16 in the text messages.

17 Q And you made that decision by yourself; correct?

18 A No, I never said that.

19 Q What did you say?

20 A Well, I said that I don't remember how the decision
21 was made, if it was me. Most likely I would have talked to
22 counsel and said here's what I have. Here's what I think is in
23 each of the places, and I would've said I believe I've got
24 nothing substantive in my text messages related to this deal or
25 legal hold. And then essentially the phone would've been off

1 the hook.

2 Q Mr. Stark, I'm going to direct you to the
3 Exhibit 7 that we introduced earlier, the litigation hold.

4 A Okay.

5 Q It was dated August 15, 2013. Yeah. If you could
6 take a minute and just look --

7 THE COURT: Which paragraph are you going to blow up?

8 MR. APTON: I don't --

9 THE COURT: Because neither he nor I can read the
10 whole thing.

11 MR. APTON: Well, I guess let's focus on the first
12 paragraph first.

13 THE COURT: Okay.

14 BY MR. APTON:

15 Q And my question, Mr. Stark, and then you can guide
16 the screen if you think it would be helpful, I want to know if
17 there is an exception for personal cell phone devices in this
18 litigation hold.

19 A If we made an exception for personal cell phone
20 devices?

21 Q Yes. Earlier your counsel was talking about your
22 personal cell phone device and whether the company paid for it.

23 My question is, is there anything about this
24 litigation hold that excused you from applying it to your
25 personal devices?

1 A Well, it wouldn't matter because I would've provided
2 it if it had something. Whether it was the company's property
3 or not is irrelevant. If I thought it had information that was
4 relevant, I would have provided it. Even if there was an
5 exception, I would've provided it.

6 So I have no idea if there was an exception or not.

7 Q For the record --

8 A I wouldn't think there would be.

9 Q Right. And then this litigation hold does not
10 reflect such an exception; correct?

11 A I don't believe so.

12 Q And one more point, Mr. Stark.

13 You made a -- strike that.

14 You've testified to policies and practices that you
15 have implemented in your company at Turtle Beach; correct?

16 A The Gmail, the e-mail use, yes.

17 Q Okay. And are you familiar with a Turtle Beach
18 employee handbook?

19 A Yes.

20 MR. APTON: Okay. Can I introduce Exhibit 11?

21 THE COURT: The whole thing?

22 MR. HESS: No objection.

23 THE COURT: Any objection?

24 MR. HESS: No objection.

25 THE COURT: 11 is admitted.

1 (Exhibit Number(s) 11 admitted.)

2 BY MR. APTON:

3 Q Mr. Stark, you discuss some policies at your company.
4 You said earlier that it's important everyone follows them;
5 correct?

6 A So you're talking about the e-mail?

7 Q Yes.

8 A I don't know if I would've called that a policy. I
9 would call that me sharing how I would like people to
10 communicate with me and amongst themselves. I don't know that
11 that document ever said this is a company policy you must
12 follow.

13 Q Did you, as CEO of Turtle Beach, follow the rules and
14 policies in this handbook?

15 A To the best of my knowledge.

16 Q Can I turn your attention to page 68 of the policy.
17 The Bates stamp ends in 284.

18 A What's the date of the handbook by the way?

19 THE COURT: If we can go back to page 1.

20 Hold on a minute, sir. Let's see if we can figure it
21 out.

22 THE WITNESS: Just so I know because --

23 BY MR. APTON:

24 Q On the cover it states, "Turtle Beach Corporation
25 employee handbook, December 2014."

1 A December 2014. Okay.

2 THE COURT: Thank you, Karen.

3 BY MR. APTON:

4 Q Now if we could go to page 68. And the first
5 paragraph at the very top of page 68, Mr. Stark, this paragraph
6 says that if employees use their personal devices they still
7 need to make them available to the company for various reasons,
8 including legal process, discovery requests or investigations.
9 Correct?

10 A That makes perfect sense.

11 Q Did you follow that policy?

12 A Had my phone been asked for, I would have gladly
13 given it over.

14 Q So your phone was never asked for?

15 A If it was determined to be needed and therefore
16 requested in the legal hold, I would've turned it over.

17 MR. APTON: No more questions (indiscernible).

18 THE COURT: Thank you.

19 Any recross?

20 MR. HESS: Yeah, just briefly. I'll let him wipe it
21 down.

22 THE COURT: If we could wipe down, please, as you
23 walk away. Thank you very much.

24 MR. HESS: What was that last exhibit that was up?

25 THE COURT: That was 11.

1 MR. HESS: 11.

2 THE COURT: The employee handbook?

3 MR. HESS: Yeah, the employee handbook, 11.

4 Can we go to page 67, just the paragraph right before
5 where we were at.

6 UNIDENTIFIED SPEAKER: The actual page or the --

7 MR. HESS: The page of the manual 67. So it's Bates
8 (indiscernible), and the bottom, electronic (indiscernible).

9 RECROSS-EXAMINATION

10 BY MR. HESS:

11 Q So first of all, Mr. Stark, the handbook was dated
12 December of 2014. And again, the merger closed on January 15,
13 2014; correct?

14 A Correct.

15 Q Okay. And then on this paragraph here, you -- it
16 says, starting in the middle,

17 "The company expects the employees will
18 use Turtle Beach's technology systems,
19 equipment for all work-related communications.
20 Thus employees should not use their own
21 devices for this purpose, provided that
22 employees may choose to use their own personal
23 devices to access or send e-mail
24 communications not involving confidential
25 information."