

APPENDIX 2-4

Whitney A PLAYED on 5_4 and 5_5 20151002 PA DA PC DC PCC on 5-2-17

Whitney A PLAYED on 5_4 and 5_5 20151002 PA DA PC DC PCC on 5-2-17

| Scene | Designation | Source | Tx Duration | Elapsed | Remains | Media File | Barcode |
|-------|---------------------|---|-------------|----------|----------|-------------------|---------|
| 1 | 8:8 -8:10 | Whitney, Adam 2015-10-02 | 00:00:11 | 00:00:00 | 01:03:34 | Whitney_A-100215- | M5.1 |
| | | 8:8 Q. Please state and spell your name for the record. | | | | | |
| | | 8:9 A. Adam Hopkins Whitney, A-D-A-M, space, H-O-P-K-I-N-S, | | | | | |
| | | 8:10 space, W-H-I-T-N-E-Y. | | | | | |
| 2 | 9:18 -9:19 | Whitney, Adam 2015-10-02 | 00:00:03 | 00:00:11 | 01:03:23 | Whitney_A-100215- | M5.2 |
| | | 9:18 Q. What's the name of your current company? | | | | | |
| | | 9:19 A. Meijer. | | | | | |
| 3 | 11:10 -11:15 | Whitney, Adam 2015-10-02 | 00:00:12 | 00:00:14 | 01:03:20 | Whitney_A-100215- | M5.3 |
| | | 11:10 Q. Do you have an undergraduate degree? | | | | | |
| | | 11:11 A. I do. | | | | | |
| | | 11:12 Q. What school did you earn that degree from? | | | | | |
| | | 11:13 A. University of Michigan. | | | | | |
| | | 11:14 Q. What year? | | | | | |
| | | 11:15 A. 1998. | | | | | |
| 4 | 16:17 -16:24 | Whitney, Adam 2015-10-02 | 00:00:26 | 00:00:26 | 01:03:08 | Whitney_A-100215- | M5.4 |
| | | 16:17 Q. What was your title when you started at Sears? | | | | | |
| | | 16:18 A. I don't remember. Sears changed titles several times | | | | | |
| | | 16:19 when I was there. I believe when I started I was | | | | | |
| | | 16:20 inventory manager. It may have been senior | | | | | |
| | | 16:21 merchandise planner, but that was really the same role | | | | | |
| | | 16:22 fundamentally. | | | | | |
| | | 16:23 Q. That, you said, was around 2004? | | | | | |
| | | 16:24 A. As I recall, yes. | | | | | |
| 5 | 19:17 -20:5 | Whitney, Adam 2015-10-02 | 00:01:12 | 00:00:52 | 01:02:42 | Whitney_A-100215- | M5.5 |
| | | 19:17 Q. What was your next role? | | | | | |
| | | 19:18 A. DMM of Sears hand tools and power tools. | | | | | |
| | | 19:19 Q. Was that approximately 2011? | | | | | |
| | | 19:20 A. To the best of my recollection, yes, approximately. | | | | | |
| | | 19:21 Q. What were your responsibilities in that role? | | | | | |
| | | 19:22 A. Really the same responsibilities as a divisional | | | | | |
| | | 19:23 merchandise manager, having several buyers report to | | | | | |
| | | 19:24 me, overall manage the financials -- financial | | | | | |
| | | 19:25 objectives of those categories and ultimately create | | | | | |
| | | 20:1 strategies to satisfy our customers. | | | | | |
| | | 20:2 Q. About how many buyers reported to you in that role? | | | | | |
| | | 20:3 A. I need to think. I don't remember. I believe four or | | | | | |
| | | 20:4 five. There could be some that I'm forgetting. It's | | | | | |
| | | 20:5 been a while. | | | | | |
| 6 | 21:15 -22:5 | Whitney, Adam 2015-10-02 | 00:00:52 | 00:02:04 | 01:01:30 | Whitney_A-100215- | M5.6 |
| | | 21:15 Q. What was your role when you began at Meijer? | | | | | |

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21:16 A. DMM of toys.
21:17 Q. Is that your current role as well?
21:18 A. No.
21:19 Q. What is your current role?
21:20 A. Vice president of merchandise presentation and
21:21 pricing.
21:22 Q. When did you become the vice president of merchandise
21:23 presentation and pricing?
21:24 A. In late August of last year.
21:25 Q. 2014?
22:1 A. Yes, so it's been a little over a year.
22:2 Q. Did you have any titles in between GMM and VP?
22:3 A. No, but my categories of responsibility expanded from
22:4 tools -- from toys, to school, home office, and then
22:5 toys and electronics.

| | | | | | | | |
|---|---------------------|--|----------|----------|----------|-------------------|------|
| 7 | 29:23 -30:6 | Whitney, Adam 2015-10-02 | 00:00:22 | 00:02:56 | 01:00:38 | Whitney_A-100215- | M5.7 |
| | 29:23 | Q. Do you understand that you are testifying here today | | | | | |
| | 29:24 | based on a subpoena for a deposition? | | | | | |
| | 29:25 | A. Yes. | | | | | |
| | 30:1 | Q. Do you understand that you need to testify about your | | | | | |
| | 30:2 | personal knowledge and involvement regarding | | | | | |
| | 30:3 | Loggerhead's litigation against Sears and Apex? | | | | | |
| | 30:4 | A. Yes. | | | | | |
| | 30:5 | Q. And you understand you are under oath? | | | | | |
| | 30:6 | A. I do. | | | | | |
| 8 | 30:23 -31:10 | Whitney, Adam 2015-10-02 | 00:00:46 | 00:03:18 | 01:00:16 | Whitney_A-100215- | M5.8 |
| | 30:23 | Q. When was the first time you started working with the | | | | | |
| | 30:24 | Bionic Wrench product that you can recall? | | | | | |
| | 30:25 | A. I guess what I clearly recall is my buyer approaching | | | | | |
| | 31:1 | me. I didn't work directly with items, so to speak. | | | | | |
| | 31:2 | I had a team of buyers that reported to me. I | | | | | |
| | 31:3 | remember my buyer reaching out to me for help with a | | | | | |
| | 31:4 | vendor and that was the LoggerHead vendor and the | | | | | |
| | 31:5 | Bionic Wrench was one of their items. | | | | | |
| | 31:6 | Q. Who was that buyer? | | | | | |
| | 31:7 | A. Stephanie Kaleta. | | | | | |
| | 31:8 | Q. Approximately when did she first approach you about | | | | | |
| | 31:9 | the vendor? | | | | | |
| | 31:10 | A. In February of 2012, I believe. | | | | | |
| 9 | 32:25 -33:9 | Whitney, Adam 2015-10-02 | 00:00:44 | 00:04:04 | 00:59:30 | Whitney_A-100215- | M5.9 |
| | 32:25 | Q. Prior to the time where your buyer approached you | | | | | |
| | 33:1 | about the Bionic Wrench, did you have any contact with | | | | | |
| | 33:2 | LoggerHead? | | | | | |
| | 33:3 | A. No, not that I recall. | | | | | |

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33:4 Q. Was it typical for you to not have any contact with
33:5 the vendor unless an issue arose?
33:6 A. Yes, I dealt with hundreds of vendors. So it was very
33:7 common to have many vendors that I would never have a
33:8 chance to meet with, but my buyers did business with
33:9 and that we bought and sold their items.

10 **35:15 -36:16** Whitney, Adam 2015-10-02 00:02:03 00:04:48 00:58:46 Whitney_A-100215- M5.10

35:15 Q. When was your first phone call with Dan Brown, Jr.?
35:16 A. I believe it was February 17. It was a Friday.
35:17 Q. What do you recall about that phone conversation?
35:18 A. I very distinctly remember that phone conversation. I
35:19 remember calling to help sort out whatever issues the
35:20 LoggerHead team had so that we could come to an
35:21 agreement. I remember Dan Brown, Jr. being shockingly
35:22 abrasive and accusatory of me. This was my first
35:23 meeting, introduction with them. I remember being
35:24 really, really caught off guard with the level of
35:25 emotional aggression from him. I remember asking to
36:1 speak to his father to try and work with them and sort
36:2 out their concerns and hear their concerns. I
36:3 remember him distinctly saying that his father was not
36:4 involved and was not going to be involved and I could
36:5 not talk to him. He owned this relationship, Dan
36:6 Brown, Jr. owned this relationship moving forward.
36:7 Q. When you say shockingly abrasive, what specifically
36:8 are you referring to?
36:9 A. I'm referring to my ethical nature and integrity being
36:10 called into question by somebody that I've just met
36:11 over the phone. That's, in my definition, shocking
36:12 and abrasive and unprofessional.
36:13 Q. What kinds of things did he say that made you feel
36:14 that way?
36:15 A. Well, telling me that I'm unethical without having met
36:16 me is, in my mind, inappropriate and not called for.

11 **37:9 -37:17** Whitney, Adam 2015-10-02 00:00:31 00:06:51 00:56:43 Whitney_A-100215- M5.11

37:9 Q. At that point in time did you initiate the call or did
37:10 LoggerHead initiate it?
37:11 A. I did.
37:12 Q. Do you remember why you initiated it?
37:13 A. I remember Stephanie, my buyer, approaching me and
37:14 asking for help, that she was fairly new to the desk
37:15 and she had a vendor that she was really trying to
37:16 make progress with and come to an agreement with and
37:17 was not able to do that and wanted my help.

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|----|------------------------------------|---|----------|----------|----------|-------------------|-------|
| 12 | 37:25 -38:9 | Whitney, Adam 2015-10-02 | 00:00:45 | 00:07:22 | 00:56:12 | Whitney_A-100215- | M5.12 |
| | | 37:25 Q. Did this phone conversation resolve those issues? | | | | | |
| | | 38:1 A. No. | | | | | |
| | | 38:2 Q. Do you recall any other phone conversations after this | | | | | |
| | | 38:3 particular one? | | | | | |
| | | 38:4 A. I remember the phone conversation on, I believe it was | | | | | |
| | | 38:5 May 25, with Dan Brown, Jr. I believe Dan Brown | | | | | |
| | | 38:6 joined the call at some point during the call. | | | | | |
| | | 38:7 Q. What do you recall about what was discussed? | | | | | |
| | | 38:8 A. We were calling to communicate that we were no longer | | | | | |
| | | 38:9 able to put the product on DRTV for Q4. | | | | | |
| 13 | 38:10 -38:14 | Whitney, Adam 2015-10-02 | 00:00:15 | 00:08:07 | 00:55:27 | Whitney_A-100215- | M5.13 |
| | | 38:10 Q. Do you recall anything else about that phone | | | | | |
| | | 38:11 conversation? | | | | | |
| | | 38:12 A. Yes. I recall Dan Brown, Sr. telling me that if that | | | | | |
| | | 38:13 was the case then we're effectively ending our | | | | | |
| | | 38:14 relationship. | | | | | |
| 14 | 38:23 -38:24 | Whitney, Adam 2015-10-02 | 00:00:05 | 00:08:22 | 00:55:12 | Whitney_A-100215- | M5.14 |
| | | 38:23 Q. Was Ms. Kaleta a part of that phone conversation? | | | | | |
| | | 38:24 A. She was. | | | | | |
| 15 | 60:10 -60:17 | Whitney, Adam 2015-10-02 | 00:00:37 | 00:08:27 | 00:55:07 | Whitney_A-100215- | M5.15 |
| | Link > P462.1 | 60:10 Q. Exhibit 5 is a document bearing the Bates number Sears | | | | | |
| | | 60:11 5346 through Sears 5347. I would like you to turn to | | | | | |
| | Link > P462.2 | 60:12 the second page and take a look at that e-mail from | | | | | |
| | | 60:13 Bill Kiss. | | | | | |
| | | 60:14 A. Mm-hmm. | | | | | |
| | | 60:15 Q. Who is Bill Kiss? | | | | | |
| | | 60:16 A. He was the marketing vice president. I don't remember | | | | | |
| | | 60:17 his specific title. | | | | | |
| 16 | 60:21 -61:7 | Whitney, Adam 2015-10-02 | 00:00:39 | 00:09:04 | 00:54:30 | Whitney_A-100215- | M5.16 |
| | Link > P462.2.2 | 60:21 Q. He asked, "Last holiday what did we move most/sell out | | | | | |
| | | 60:22 of?" | | | | | |
| | | 60:23 A. "What we did move most and sell out of?" And I | | | | | |
| | | 60:24 answered, "Bionic." | | | | | |
| | Link > P462.1.3 | 60:25 Q. You answered "Bionic" in the next e-mail, right? | | | | | |
| | | 61:1 A. In that e-mail I answered "Bionic" and then Tom Arvia | | | | | |
| | | 61:2 replies, "Yep, no question." | | | | | |
| | | 61:3 Q. And the date of your e-mail is May 9, 2012, right? | | | | | |
| | | 61:4 A. Yes. | | | | | |
| | | 61:5 Q. So the last holiday would have been the holiday season | | | | | |
| | | 61:6 of December of 2011? | | | | | |
| | | 61:7 A. Correct. | | | | | |
| 17 | 86:14 -86:25 | Whitney, Adam 2015-10-02 | 00:00:54 | 00:09:43 | 00:53:51 | Whitney_A-100215- | M5.17 |

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Link > P459.1 86:14 Q. If you would click on Exhibit 8, that is a document
 86:15 with the Bates stamp Sears 5246 through 5247?
 86:16 A. Okay.

Link > P459.1.1 86:17 Q. We are going to look at the second e-mail which is
 86:18 from you dated January 6, 2012. Do you see that?
 86:19 A. Yes, I do.
 86:20 Q. This e-mail is directed to Dennis Carrie, right?
 86:21 A. Yes.
 86:22 Q. Who was Dennis Carrie?
 86:23 A. He was our finance guy. I forget his title. I think
 86:24 he was ultimately our CFO. Again, I don't remember
 86:25 time frames. He was the finance guy.

| | | | | | | | |
|----|--------------------|--------------------------|----------|----------|----------|--------------------|-------|
| 18 | 87:8 -87:14 | Whitney, Adam 2015-10-02 | 00:00:22 | 00:10:37 | 00:52:57 | Whitney_A-100215-; | M5.18 |
|----|--------------------|--------------------------|----------|----------|----------|--------------------|-------|

87:8 Q. Did he have a role in approving contracts for your
 87:9 department?
 87:10 A. Approving contracts. What was the last word in your
 87:11 question?
 87:12 Q. In your department or for your department.
 87:13 A. No. Technically he didn't have a role in approving
 87:14 contracts. I would say no.

| | | | | | | | |
|----|---------------------|--------------------------|----------|----------|----------|--------------------|-------|
| 19 | 88:16 -89:24 | Whitney, Adam 2015-10-02 | 00:02:27 | 00:10:59 | 00:52:35 | Whitney_A-100215-; | M5.19 |
|----|---------------------|--------------------------|----------|----------|----------|--------------------|-------|

Link > P459.2.1 88:16 Q. If you would swipe at the top. Item 1 refers to an
 88:17 overall halo/lift/attachment to the hand tools
 88:18 category overall. Do you see that?
 88:19 A. Yes.
 88:20 Q. What does halo refer to?
 88:21 A. Give me one quick second to read this.
 88:22 Q. Sure.
 88:23 A. "Overall halo/lift/attachment to the hand tools
 88:24 category overall, not just this one item." You asked
 88:25 me halo?
 89:1 Q. Yes.
 89:2 A. I would say that's the overall attachment to the
 89:3 categories overall. I feel like I have basically
 89:4 defined it right here. The halo is I'm expecting the
 89:5 item to help the entire department, the entire
 89:6 category, have lift, have sales lift. That's what I
 89:7 would refer to as halo.
 89:8 Q. Why would one item help the entire department?
 89:9 A. Because if you can drive customers into the store with
 89:10 that item, then there is a higher proclivity for those
 89:11 customers to buy other things. Generally in retail
 89:12 there is different terminology used, but generally
 89:13 some things are used to drive traffic, people into the
 89:14 stores. We measure attachment which is affinity which

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89:15 is looking at the basket of sales in total and
89:16 understanding relationships between different items.
89:17 So it's reasonable to expect and to analyze and that
89:18 is what I'm asking for here, to understand the
89:19 benefits that this item could bring above and beyond
89:20 just looking at it individually.
89:21 Q. So the idea is a particular item would bring customers
89:22 to the store and the customers would purchase more
89:23 than just that item; is that right?
89:24 A. That's right.

20 **90:12-91:6** Whitney, Adam 2015-10-02 00:01:51 00:13:26 00:50:08 Whitney_A-100215-; M5.20

90:12 Q. Is the term halo the same thing as attachment?
90:13 A. I think it's a more general term. That's why I put
90:14 overall halo/lift/attachment. In this case, I'm
90:15 asking for as much help as I can get to show that we
90:16 should do this item. I'm looking for as many
90:17 different angles and avenues that I can have to say
90:18 let's analyze this, not just based on a very narrow
90:19 perspective, but based on an overall perspective which
90:20 is why I use the term halo.
90:21 Q. I'm asking, though, is there a difference between what
90:22 halo means and what attachment means? My next
90:23 question will be what lift means.
90:24 A. So yes. Lift specifically is sales increase. That's
90:25 how I'm using that term lift. Attachment would be do
91:1 we notice any other items in this basket that see a
91:2 sales lift related to this item in this promotion.
91:3 Halo is the overall benefit that we receive based on
91:4 that relationship.
91:5 Q. You use the term basket. What does that refer to?
91:6 A. The overall customer's transaction total.

21 **92:25-93:21** Whitney, Adam 2015-10-02 00:01:24 00:15:17 00:48:17 Whitney_A-100215-; M5.21

[Link > P459.1.2](#)

92:25 Q. And towards the bottom of his -- the first paragraph
93:1 of his e-mail he says, "My primary interest is driving
93:2 traffic into the department as that is where the
93:3 success will lie." Do you see that?
93:4 A. Just bear with me. No.
93:5 Q. I'm looking at the first paragraph of Dennis's e-mail.
93:6 A. Okay.
93:7 Q. Starting where he says --
93:8 A. "As my primary interest is driving traffic into the
93:9 department, that is where the success will lie, not
93:10 necessary" -- maybe he meant not necessarily -- "in
93:11 the success of a specific item.
93:12 Q. Yes. So is he saying that driving traffic would

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93:13 create that halo effect that we were talking about?
 93:14 A. I think he is agreeing with me. I think he is saying
 93:15 I am going to support you here, Adam. As long you can
 93:16 assure that you will get subsidy, I agree that driving
 93:17 traffic is where the success will lie. I think he is
 93:18 trying to agree and partner with me on my initial
 93:19 e-mail to him which is, let's look at this from a
 93:20 different perspective than just the nuts and bolts of
 93:21 this doesn't work.

22 **93:23 -94:2** Whitney, Adam 2015-10-02 00:00:16 00:16:41 00:46:53 Whitney_A-100215-: M5.22

93:23 In these e-mails you and Dennis are both
 93:24 basically saying that the halo profits that Sears is
 93:25 deriving from the Bionic Wrench are even more
 94:1 important than the profits from the sale of the wrench
 94:2 itself?

23 **94:4 -94:18** Whitney, Adam 2015-10-02 00:00:51 00:16:57 00:46:37 Whitney_A-100215-: M5.23

94:4 A. I don't know that that is exactly what I'm saying,
 94:5 even more important, no. What I am saying is in a lot
 94:6 of cases in retail, especially in this case where I'm
 94:7 being challenged by finance and they're saying this
 94:8 doesn't make us money, I'm trying build an argument
 94:9 that says we need to look at this from a broader
 94:10 perspective. It may be that we lose money here, but
 94:11 it might create success over here. When you talk
 94:12 halo, you talk about correlation and correlative
 94:13 effect. It's hard in retail to prove that one thing
 94:14 drove another. It is commonplace to say, let's look
 94:15 at what this particular item did for this category or
 94:16 for our store and make decisions based on that. It
 94:17 doesn't mean that one thing in this e-mail or in the
 94:18 context was more important.

24 **94:20 -94:25** Whitney, Adam 2015-10-02 00:00:17 00:17:48 00:45:46 Whitney_A-100215-: M5.24

94:20 Q. In this context, though, the profits derived from the
 94:21 halo of the Bionic Wrench were significant enough that
 94:22 you thought it would be a plus factor supporting DRTV,
 94:23 right?
 94:24 A. I thought it would be a supportive case for running
 94:25 DRTV, yes, I did.

25 **103:7 -103:9** Whitney, Adam 2015-10-02 00:00:18 00:18:05 00:45:29 Whitney_A-100215-: M5.25

103:7 Q. Let's look at the next exhibit. This is going to be
 103:8 Exhibit 10 with the Bates number Sears 553 through
 103:9 555.

[Link > P365.1](#)

26 **104:1 -105:8** Whitney, Adam 2015-10-02 00:01:44 00:18:23 00:45:11 Whitney_A-100215-: M5.26

104:1 Q. It says "From Whitney, Adam"?

[Link > P365.1.1](#)

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Link > P365.2.1

104:2 A. I see. Okay.

104:3 Q. Going on to the next page, that is the rest of that

104:4 e-mail.

104:5 A. Yes.

104:6 Q. And it's dated January 5, 2012, right?

104:7 A. Yes.

104:8 Q. In this e-mail you are addressing Dennis?

104:9 A. Yes.

104:10 Q. Asking for help?

104:11 A. Yes.

104:12 Q. The topic appears to be "Bionic Wrench DRTV on

104:13 Father's Day for 2012," right?

104:14 A. Yes, in jeopardy.

104:15 Q. Under situation you say, "Vendor is in dire need of a

104:16 commitment in order to secure production for Father's

104:17 Day," right?

104:18 A. Yes.

104:19 Q. What did you mean by that statement?

104:20 A. I meant that I needed approval to -- I meant the

104:21 vendor is in dire need of a commitment in order to

104:22 secure production for Father's Day. I needed Dennis's

104:23 alignment on moving forward. I was calling out

104:24 literally, "Dennis, need your help, scope, Bionic

104:25 Wrench, DRTV in 2012 Father's Day." I put dash "In

105:1 jeopardy." I'm saying the vendor needs our

105:2 commitment. I'm -- they need our orders in order to

105:3 secure production for Father's Day. Ran did the

105:4 analysis attached which indicates a negative ROI,

105:5 however, Amanda and I wanted to talk this through as

105:6 we feel it is too big of an opportunity to forego.

105:7 This is me pushing the finance team to align and say

105:8 yes so that we can send the vendor our orders.

27 **107:17 -107:22** Whitney, Adam 2015-10-02 00:00:18 00:20:07 00:43:27 Whitney_A-100215-; M5.27

Link > Hide

107:17 Q. Why was it a big opportunity?

107:18 A. Because it carried with it sales and margin that were

107:19 important for our department.

107:20 Q. Including the halo that we talked about earlier?

107:21 A. Possibly, but in and of itself a big opportunity as

107:22 well.

28 **126:7 -126:16** Whitney, Adam 2015-10-02 00:00:54 00:20:25 00:43:09 Whitney_A-100215-; M5.28

Link > P399.1

126:7 Q. This is going to be Exhibit 17 with the Bates number

126:8 Sears 1169 through 1170. I'm not sure why this one

126:9 was produced with this orientation. You are

126:10 definitely -- feel free to zoom in to see better.

126:11 A. I have got it open here. Exhibit 17 from me to

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|-----------------|-----------------------|---------------|---|----------|----------|----------|--------------------|-------|
| | | 126:12 | Stephanie on February 18. | | | | | |
| Link > P399.1.1 | | 126:13 | Q. Looking at the e-mail at the bottom of the page from | | | | | |
| | | 126:14 | you to Ms. Miller, you talk about an hour plus | | | | | |
| | | 126:15 | conversation with Dan, Jr.? | | | | | |
| | | 126:16 | A. Yes. | | | | | |
| 29 | 126:17 -126:23 | Whitney, Adam | 2015-10-02 | 00:00:21 | 00:21:19 | 00:42:15 | Whitney_A-100215-; | M5.29 |
| | | 126:17 | Q. Is that the conversation you were referring to | | | | | |
| | | 126:18 | earlier? | | | | | |
| | | 126:19 | A. Yes. "Karen, I just had an hour plus conversation | | | | | |
| | | 126:20 | with Dan, Jr. from LoggerHead. It did not go well. | | | | | |
| | | 126:21 | His father is not willing to speak to me about it. | | | | | |
| | | 126:22 | Dan said that Sears is unethical among many other | | | | | |
| | | 126:23 | things." | | | | | |
| 30 | 127:1 -127:12 | Whitney, Adam | 2015-10-02 | 00:01:11 | 00:21:40 | 00:41:54 | Whitney_A-100215-; | M5.30 |
| | | 127:1 | Looking at the next e-mail in time, that's from | | | | | |
| | | 127:2 | Ms. Kaleta and she is responding to your e-mail | | | | | |
| | | 127:3 | summary, right? | | | | | |
| | | 127:4 | A. Yes. | | | | | |
| | | 127:5 | Q. In that e-mail she says -- and I'm looking at the | | | | | |
| | | 127:6 | second paragraph. In that she says in the third | | | | | |
| Link > P399.1.2 | | 127:7 | sentence after the comma, "But assuming worse case | | | | | |
| | | 127:8 | scenario, no subsidy, no VIR, 13.99 cost and DRTV. We | | | | | |
| | | 127:9 | could still generate slightly better than the | | | | | |
| | | 127:10 | 2.7 million in margin we did LY for the year." Do you | | | | | |
| | | 127:11 | see that? | | | | | |
| | | 127:12 | A. Yes, I see that. | | | | | |
| 31 | 127:14 -128:16 | Whitney, Adam | 2015-10-02 | 00:01:59 | 00:22:51 | 00:40:43 | Whitney_A-100215-; | M5.31 |
| | | 127:14 | Does that mean that if Sears, at this point | | | | | |
| | | 127:15 | in time, accepted all of these particular terms that | | | | | |
| | | 127:16 | Ms. Kaleta refers to, Sears would still make | | | | | |
| | | 127:17 | 2.7 million, at least 2.7 million in margin? | | | | | |
| | | 127:18 | A. It appears to me as though she is saying, worse case | | | | | |
| | | 127:19 | we could generate 2.7 million in margin, but she also | | | | | |
| | | 127:20 | goes on to say that the margin rate with subsidy would | | | | | |
| | | 127:21 | of course be down dramatically, 37.6 percent compared | | | | | |
| | | 127:22 | 52.2 percent. So how she is coming with up the | | | | | |
| | | 127:23 | dollars is assuming that we would sell a significant | | | | | |
| | | 127:24 | increase in overall unit volume, but our margin rate | | | | | |
| | | 127:25 | would go down precipitously, a huge amount from 52.2 | | | | | |
| | | 128:1 | percent to 37.6 percent. | | | | | |
| | | 128:2 | Q. Could you explain to me how that would happen? | | | | | |
| | | 128:3 | A. How the margin rate could go down so drastically? | | | | | |
| | | 128:4 | Q. Yes. | | | | | |
| | | 128:5 | A. If a cost goes up drastically. | | | | | |

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128:6 Q. What's the cost that would go up here?
 128:7 A. I'm looking at her note. Whatever the cost was 13.99,
 128:8 I forget what it was, \$9 or \$11 or whatever the cost
 128:9 was, it's going up to 13.99. That's a significant
 128:10 cost increase and it significantly reduces our margin
 128:11 rate.
 128:12 Q. What exactly is a margin rate?
 128:13 A. Gross margin rate and it's the percentage of margin to
 128:14 your total sales.
 128:15 Q. Is it basically a percent profit?
 128:16 A. Yes, basically.

32 **128:17 -129:6** Whitney, Adam 2015-10-02 00:00:52 00:24:50 00:38:44 Whitney_A-100215-: M5.32

128:17 Q. So when she says 2.7 million in margin, is that
 128:18 2.7 million of profit?
 128:19 A. 2.7 million of profit, right, based on -- she says
 128:20 based on the higher volume and retail. She's assuming
 128:21 that we're going to sell this thing for a much higher
 128:22 retail which on the product life cycle, all
 128:23 indications would be that we would sell a lot less at
 128:24 even the same retail, especially not at a higher
 128:25 retail.

[Link > P399.1.3](#)

129:1 My response to this is, "The real question
 129:2 I have is can we make that volume or any item at
 129:3 better than 37 percent margin. That's not a high
 129:4 margin rate for hand tools, I'm thinking, but let's
 129:5 discuss Monday so that we know what our backup plan
 129:6 would be."

33 **129:19 -129:21** Whitney, Adam 2015-10-02 00:00:12 00:25:42 00:37:52 Whitney_A-100215-: M5.33

[Link > Hide](#)

129:19 Q. Is it fair to say that even with all of these terms
 129:20 that Ms. Kaleta refers to, Sears would still have a
 129:21 37 percent margin?

34 **129:22 -130:9** Whitney, Adam 2015-10-02 00:00:42 00:25:54 00:37:40 Whitney_A-100215-: M5.34

129:22 A. Well, when you say still have a 37 percent margin, our
 129:23 sales plans are based off of generally what we do a
 129:24 year historically. Without knowing what my sales plan
 129:25 would have been still have 2.8 million or 2.7 million,
 130:1 doesn't matter if my sales plan is to continue to have
 130:2 the same margin rates that I had the year before.
 130:3 That's assuming a much higher volume with a much
 130:4 higher retail which I don't think is a good
 130:5 assumption.
 130:6 Q. Okay. I don't think that answers my question. My
 130:7 question is: Is it fair to say that even accepting
 130:8 all these terms that Ms. Kaleta refers to, Sears would

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130:9 have a 37 percent margin with this product?

| | | | | | | | |
|----|---------------|---|----------|----------|----------|--------------------|-------|
| 35 | 130:12-130:13 | Whitney, Adam 2015-10-02 | 00:00:09 | 00:26:36 | 00:36:58 | Whitney_A-100215-; | M5.35 |
| | 130:12 | A. Assuming worse case scenario, Stephanie is indicating | | | | | |
| | 130:13 | that we would generate \$2.7 million in margin. | | | | | |
| 36 | 130:15-130:17 | Whitney, Adam 2015-10-02 | 00:00:09 | 00:26:45 | 00:36:49 | Whitney_A-100215-; | M5.36 |
| | 130:15 | Q. Which would be 37 percent, right? | | | | | |
| | 130:16 | A. Which would be 37.6 percent compared to 52.2 percent | | | | | |
| | 130:17 | last year according to her note. | | | | | |
| 37 | 131:6-131:12 | Whitney, Adam 2015-10-02 | 00:00:16 | 00:26:54 | 00:36:40 | Whitney_A-100215-; | M5.37 |
| | 131:6 | Q. You thought there was a need for the backup plan, | | | | | |
| | 131:7 | though, right? | | | | | |
| | 131:8 | A. Absolutely, based on the significant change of all the | | | | | |
| | 131:9 | terms. | | | | | |
| | 131:10 | Q. What kind of backup plan were you contemplating at | | | | | |
| | 131:11 | this point? | | | | | |
| | 131:12 | A. A plan for us to make our sales and margin targets. | | | | | |
| 38 | 131:19-132:1 | Whitney, Adam 2015-10-02 | 00:00:22 | 00:27:10 | 00:36:24 | Whitney_A-100215-; | M5.38 |
| | 131:19 | Q. What were the specific options that you conceived of | | | | | |
| | 131:20 | at that time? | | | | | |
| | 131:21 | A. I don't remember. | | | | | |
| | 131:22 | Q. You don't remember any of the backup plans you | | | | | |
| | 131:23 | considered? | | | | | |
| | 131:24 | A. Again, on February 18, if you are asking me to say | | | | | |
| | 131:25 | what would you have considered a backup plan at that | | | | | |
| | 132:1 | time, I don't remember. | | | | | |
| 39 | 132:2-132:21 | Whitney, Adam 2015-10-02 | 00:01:09 | 00:27:32 | 00:36:02 | Whitney_A-100215-; | M5.39 |
| | 132:2 | Q. Okay. In the general time period of February of 2012, | | | | | |
| | 132:3 | what were the backup options you were considering? | | | | | |
| | 132:4 | A. Again, I don't remember the specific options at that | | | | | |
| | 132:5 | time in February. You know, you have shown me | | | | | |
| | 132:6 | documents that make me think that, you know, we were | | | | | |
| | 132:7 | talking about multiple different backup plans, but I | | | | | |
| | 132:8 | don't remember. I don't remember what specifics we | | | | | |
| | 132:9 | would have talked about then. | | | | | |
| | 132:10 | Q. What were the multiple different backup plans that you | | | | | |
| | 132:11 | saw in the documents we have seen? | | | | | |
| | 132:12 | A. I think the "Let's discuss Monday so that we know what | | | | | |
| | 132:13 | our backup plan would be" is a general statement that | | | | | |
| | 132:14 | says we need to talk about a backup plan. You are | | | | | |
| | 132:15 | asking me what were those backup plans and I'm saying | | | | | |
| | 132:16 | I don't remember. I don't remember specifically what | | | | | |
| | 132:17 | we talked about as a backup plan. We would have | | | | | |
| | 132:18 | talked about if these guys aren't going to sell us, | | | | | |
| | 132:19 | what else are we going to do to put on TV or to sell | | | | | |

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132:20 to make up the significant sales and margin that we
 132:21 need to generate to make our sales plan.

| | | | | | | | |
|----|------------------------------------|--------------------------|---|----------|----------|--------------------|-------|
| 40 | 133:7 -133:21 | Whitney, Adam 2015-10-02 | 00:00:58 | 00:28:41 | 00:34:53 | Whitney_A-100215-: | M5.40 |
| | | 133:7 | Q. What other products did you consider? | | | | |
| | | 133:8 | A. I remember a conversation about lighted pliers. I | | | | |
| | | 133:9 | don't remember the details about lighted pliers. I | | | | |
| | | 133:10 | remember a conversation about, you know, would that be | | | | |
| | | 133:11 | an item that we could substitute if these guys do as | | | | |
| | | 133:12 | they're threatening which is to stop production and | | | | |
| | | 133:13 | not send us any product. | | | | |
| | | 133:14 | Q. Any other products that you discussed? | | | | |
| | | 133:15 | A. At some point in time we talked about the Craftsman | | | | |
| | | 133:16 | Max Axxess. I don't recall exactly when that entered | | | | |
| | | 133:17 | into the conversation. To be clear, I don't recall | | | | |
| | | 133:18 | when that entered into the conversation as it relates | | | | |
| | | 133:19 | to an item that we would develop versus an item that | | | | |
| | | 133:20 | would replace the volume of the Bionic Wrench. I | | | | |
| | | 133:21 | think that's an important distinction. | | | | |
| 41 | 134:3 -134:13 | Whitney, Adam 2015-10-02 | 00:00:39 | 00:29:39 | 00:33:55 | Whitney_A-100215-: | M5.41 |
| | | 134:3 | Q. When she says "explore another item," is that what you | | | | |
| | | 134:4 | were referring to in terms of considering the lighted | | | | |
| | | 134:5 | pliers or the Max Axxess? | | | | |
| | | 134:6 | A. Yes, any other item. She says to explore another | | | | |
| | | 134:7 | item. From my point of view here on February 18, | | | | |
| | | 134:8 | we're discussing this is not good, we need to discuss | | | | |
| | | 134:9 | a backup plan. | | | | |
| | | 134:10 | Q. So at this point based on this e-mail, one of those | | | | |
| | | 134:11 | backup plans might be exploring another item for | | | | |
| | | 134:12 | holiday DRTV; is that right? | | | | |
| | | 134:13 | A. Yes. | | | | |
| 42 | 156:5 -156:6 | Whitney, Adam 2015-10-02 | 00:00:11 | 00:30:18 | 00:33:16 | Whitney_A-100215-: | M5.42 |
| | | 156:5 | Q. Okay. Let's look at the next document. It's | | | | |
| | Link > P408.1 | 156:6 | Exhibit 24. The Bates number is Sears 1418. | | | | |
| 43 | 157:6 -157:8 | Whitney, Adam 2015-10-02 | 00:00:15 | 00:30:29 | 00:33:05 | Whitney_A-100215-: | M5.43 |
| | Link > P408.1.1 | 157:6 | Q. That is an e-mail from Elliot Lourie to two | | | | |
| | | 157:7 | individuals at LoggerHead Tools. Do you see that? | | | | |
| | | 157:8 | A. Yes, I do. | | | | |
| 44 | 157:25 -158:8 | Whitney, Adam 2015-10-02 | 00:00:30 | 00:30:44 | 00:32:50 | Whitney_A-100215-: | M5.44 |
| | Link > P408.1.2 | 157:25 | Q. And the last sentence says that, "This forecast is | | | | |
| | | 158:1 | subject to change pending Father's Day performance and | | | | |
| | | 158:2 | finalization of Q4 marketing assets," right? | | | | |
| | | 158:3 | A. That's correct. | | | | |
| | | 158:4 | Q. So to the extent that there would be any changes to | | | | |
| | | 158:5 | the forecast, these would be the two factors that | | | | |

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158:6 would lead to that change, right?
 158:7 A. Those would be the biggest single influences and
 158:8 impacts to the change of the forecast, yes.

45 **158:11 -158:14** Whitney, Adam 2015-10-02 00:00:06 00:31:14 00:32:20 Whitney_A-100215-: M5.45

158:11 There is nothing else mentioned in this
 158:12 e-mail that could have an impact on the forecast,
 158:13 right?
[Link > Hide](#) 158:14 A. Correct.

46 **169:13 -170:10** Whitney, Adam 2015-10-02 00:01:22 00:31:20 00:32:14 Whitney_A-100215-: M5.46

169:13 Q. Between May 15, 2012 and the date of this new forecast
 169:14 June 20, 2012, Sears reduced its forecast by
 169:15 approximately 210,000 units; is that fair?
 169:16 A. No. I think we reduced our projections within a
 169:17 matter of days after setting the initial forecast.
 169:18 That was after our conversation with Dan Brown, Jr.,
 169:19 the conversation that I mentioned Dan Brown, Sr.
 169:20 joined at some point.
 169:21 Q. When did that conversation --
 169:22 A. That was on May 25th.
 169:23 Q. Who attended that conversation?
 169:24 A. Myself and Stephanie and Dan Brown, Jr. and, as I
 169:25 remember, Dan Brown, Sr. was also on the call, but I
 170:1 think he joined -- if I remember correctly, after the
 170:2 call began.
 170:3 Q. During that call, did you tell LoggerHead that you
 170:4 were reducing the forecast by about 210,000 units?
 170:5 A. I don't remember if we gave him a specific number. We
 170:6 told him that we were no longer pursuing DRTV and it
 170:7 was going to drastically reduce the forecast. We very
 170:8 well may told him what the unit was. I don't know if
 170:9 we knew what the new forecast was at the time. I
 170:10 don't remember.

47 **172:9 -172:16** Whitney, Adam 2015-10-02 00:00:24 00:32:42 00:30:52 Whitney_A-100215-: M5.47

172:9 Q. Well, when you said to them we are going to
 172:10 drastically reduce the forecast, did you give them any
 172:11 kind of number of how much you are planning or
 172:12 reducing?
 172:13 A. Again, I don't recall the specifics, so I'm not saying
 172:14 we didn't, but I don't remember giving them a specific
 172:15 number. I remember Dan Brown emphatically saying this
 172:16 effectively ends our relationship with Sears.

48 **190:10 -191:11** Whitney, Adam 2015-10-02 00:01:37 00:33:06 00:30:28 Whitney_A-100215-: M5.48

190:10 Q. Just to understand, the reason for the revised
 190:11 forecast you gave to them was because you didn't have

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190:12 the funding for DRTV; is that right?
190:13 A. We were not moving forward with DRTV.
190:14 Q. What are the reasons that you weren't moving forward?
190:15 A. I don't remember all the specific reasons. I know
190:16 that funding for DRTV was a major issue and concern.
190:17 At that point I think our lack of trust in the
190:18 LoggerHead team and what they were saying had a direct
190:19 bearing in that decision. I'm sure of it.
190:20 Q. When you say "lack of trust," what happened to create
190:21 that lack of trust between the May 15th forecast and
190:22 when you decided to drop the forecast?
190:23 A. Yeah. I think the lack of trust started back in
190:24 February and before. I think it culminated in having
190:25 to make final decisions. The final decisions all had
191:1 to happen around that middle of May time frame. I
191:2 think when we sent that forecast, we believed in that
191:3 forecast. We also said very clear in writing and
191:4 verbally this forecast will change based on DRTV and,
191:5 I believe, Father's Day performance.
191:6 Q. You said it's subject to change?
191:7 A. Subject to change. It's a forecast and it's subject
191:8 to change. That's standard language in our industry.
191:9 It means exactly that, that's it subject to change.
191:10 That's why we were working so hard to get a more
191:11 formalized agreement.

49 **193:14 -194:8** Whitney, Adam 2015-10-02 00:01:11 00:34:43 00:28:51 Whitney_A-100215- M5.49

193:14 Q. When did you first learn about the Max Axess locking
193:15 wrench?
193:16 A. I don't recall.
193:17 Q. Was it during the time period you were thinking of
193:18 backup plans to selling the Bionic Wrench?
193:19 A. I don't recall.
193:20 Q. What do you recall about your involvement with the
193:21 locking wrench?
193:22 A. I remember a conversation about the handle and the
193:23 size of the grip on it, that was -- we felt --
193:24 multiple people felt that was too large and that we
193:25 wanted to make sure that it was smaller and could fit
194:1 in your hand more easily.
194:2 Q. Why were you involved in those conversations?
194:3 A. Because it was a product that was being considered for
194:4 development. I would give input on those sorts of
194:5 things for many different products.
194:6 Q. What was your understanding as to what kind of product
194:7 it was?

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194:8 A. It's a locking wrench.

50 194:10 -194:17 Whitney, Adam 2015-10-02 00:00:28 00:35:54 00:27:40 Whitney_A-100215-4 M5.50

194:10 What products would compete with the
194:11 locking wrench?
194:12 A. I think all of our gimmick-type items would compete.
194:13 Items that we market -- a broad range of items would
194:14 compete with that item.
194:15 Q. Including the Bionic Wrench?
194:16 A. I think certainly the Bionic Wrench would compete with
194:17 that item, yes.

51 195:12 -196:16 Whitney, Adam 2015-10-02 00:01:39 00:36:22 00:27:12 Whitney_A-100215-4 M5.51

195:12 Q. My question was: Would you say that the Max Axess was
195:13 a substitute for the Bionic Wrench in the marketplace?
195:14 A. No.
195:15 Q. Why not?
195:16 A. Because it's a different item. It's got different
195:17 features.
195:18 Q. What are the different features?
195:19 A. The single biggest feature I recall is the locking
195:20 mechanism. I don't remember specifics, but I believe
195:21 there are different specifications and standards for
195:22 it. I think it's more capable as far as having higher
195:23 standards and specifications. But I'm not an engineer
195:24 and I don't remember those specifics.
195:25 Q. Other than the locking mechanism, is there any other
196:1 feature you can remember?
196:2 A. The specs, the standards. It is applicable to
196:3 mechanics and folks that need a higher spec tool.
196:4 Q. What do you mean by specs?
196:5 A. Again, I don't remember the specifics, but specs would
196:6 be kind of gripping force or the amount of poundage or
196:7 torque that it could handle. Again, I'm not an
196:8 engineering. I'm just vaguely recalling that the
196:9 locking wrench had those features and the Bionic
196:10 Wrench did not. You asked me about if it's a
196:11 replacement, right?
196:12 Q. Yes.
196:13 A. No. As a matter of fact, we planned on having, and I
196:14 believe did have both items out for sale at the same
196:15 time. There was never an intention to be a
196:16 replacement of those.

52 197:9 -197:11 Whitney, Adam 2015-10-02 00:00:13 00:38:01 00:25:33 Whitney_A-100215-4 M5.52

197:9 Q. All right. Let's look at the next exhibit which is
[Link > P461.1](#) 197:10 going to be Exhibit 29 with a Bates number Sears 5337

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197:11 through 5338.

| | | | | | | | |
|----|------------------------------------|--|----------|----------|----------|-------------------|-------|
| 53 | 197:16-198:19 | Whitney, Adam 2015-10-02 | 00:01:34 | 00:38:14 | 00:25:20 | Whitney_A-100215- | M5.53 |
| | Link > P461.1.1 | 197:16 Q. Looking at the earliest e-mail time which starts at | | | | | |
| | | 197:17 the bottom of that page from Barry Pope. Do you see | | | | | |
| | | 197:18 that? | | | | | |
| | | 197:19 A. I do. | | | | | |
| | | 197:20 Q. And the subject line of that e-mail is BIO II. Do you | | | | | |
| | | 197:21 see that? | | | | | |
| | | 197:22 A. I do. | | | | | |
| | | 197:23 Q. Mr. Pope writes, "We have a rough prototype to show | | | | | |
| | | 197:24 you." Do you see that? | | | | | |
| | | 197:25 A. I do. | | | | | |
| | Link > P461.1.3 | 198:1 Q. If you look early -- rather later in the chain to the | | | | | |
| | | 198:2 latest e-mail that's from Ms. Kaleta to you, do you | | | | | |
| | | 198:3 see that? | | | | | |
| | | 198:4 A. Yes. | | | | | |
| | | 198:5 Q. That's dated April 17, 2012? | | | | | |
| | | 198:6 A. Yes. | | | | | |
| | | 198:7 Q. And she says, "FYI, I have the protocol of the | | | | | |
| | | 198:8 Craftsman Bionic Wrench to show you." Do you see | | | | | |
| | | 198:9 that? | | | | | |
| | | 198:10 A. Yes. | | | | | |
| | | 198:11 Q. When she says Craftsman Bionic Wrench, do you | | | | | |
| | | 198:12 understand that mean the Max Axess? | | | | | |
| | | 198:13 A. Yes, I do. | | | | | |
| | | 198:14 Q. Why was it referred to as the Craftsman Bionic Wrench? | | | | | |
| | | 198:15 A. Because we didn't have a name for it and I think that | | | | | |
| | | 198:16 was the closest item that we knew to compare it to. | | | | | |
| | | 198:17 Q. As of this date, April 17, Ms. Kaleta has the | | | | | |
| | | 198:18 prototype of the Max Axess? | | | | | |
| | | 198:19 A. Yes. | | | | | |
| 54 | 200:15-200:25 | Whitney, Adam 2015-10-02 | 00:00:36 | 00:39:48 | 00:23:46 | Whitney_A-100215- | M5.54 |
| | | 200:15 Q. Did you understand it to be modelled after the | | | | | |
| | | 200:16 LoggerHead Bionic Wrench? | | | | | |
| | | 200:17 A. No. I definitely understood it to have similarities | | | | | |
| | | 200:18 with the LoggerHead Bionic Wrench, but modelled after, | | | | | |
| | | 200:19 no. | | | | | |
| | | 200:20 Q. But it was similar enough that when Ms. Kaleta says, | | | | | |
| | | 200:21 "Craftsman Bionic Wrench," you knew what she meant? | | | | | |
| | | 200:22 A. Absolutely. It definitely had shared characteristics. | | | | | |
| | | 200:23 If you look at the two items, you would say these are | | | | | |
| | | 200:24 similar looking objects. The functionality of them, | | | | | |
| | | 200:25 in our opinion, was significantly different. | | | | | |
| 55 | 203:4-203:6 | Whitney, Adam 2015-10-02 | 00:00:17 | 00:40:24 | 00:23:10 | Whitney_A-100215- | M5.55 |

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| | | | | | | | | |
|----|------------------------------------|---------------|--|----------|----------|----------|-------------------|-------|
| | | 203:4 | Q. Let's look at the next document this is going to be | | | | | |
| | Link > P463.1 | 203:5 | Exhibit 31 with the Bates stamp Sears 5348 through | | | | | |
| | | 203:6 | 5350. | | | | | |
| 56 | 203:11 -203:23 | Whitney, Adam | 2015-10-02 | 00:00:42 | 00:40:41 | 00:22:53 | Whitney_A-100215- | M5.56 |
| | Link > P463.2.1 | 203:11 | Q. I would like you to look first at the e-mail that | | | | | |
| | | 203:12 | begins on very bottom of the first page from you to | | | | | |
| | | 203:13 | Ms. Kaleta. It goes to the next page and you are | | | | | |
| | | 203:14 | requesting the Q4 unit estimate on the Teeny Turner, | | | | | |
| | | 203:15 | also Bionic Wrench same info from last holiday. Do | | | | | |
| | | 203:16 | you see that? | | | | | |
| | | 203:17 | A. Yes. | | | | | |
| | | 203:18 | Q. So you are asking Ms. Kaleta for certain information | | | | | |
| | | 203:19 | about the Bionic Wrench, right? | | | | | |
| | | 203:20 | A. Yes. | | | | | |
| | | 203:21 | Q. Then you say, "This for a Sam president meeting at | | | | | |
| | | 203:22 | 2:00 p.m. today"? | | | | | |
| | | 203:23 | A. Yes. | | | | | |
| 57 | 204:10 -204:19 | Whitney, Adam | 2015-10-02 | 00:00:32 | 00:41:23 | 00:22:11 | Whitney_A-100215- | M5.57 |
| | Link > P463.1.1 | 204:10 | Q. When you say "Q4 estimate," that's a forecast? | | | | | |
| | | 204:11 | A. Unit estimate would be a unit forecast, that's right. | | | | | |
| | | 204:12 | Q. Looking back on page 1, Ms. Kaleta gives you a little | | | | | |
| | | 204:13 | chart for Bionic, right? | | | | | |
| | | 204:14 | A. Okay. Yes. | | | | | |
| | | 204:15 | Q. And the sales unit estimated there are presented for | | | | | |
| | | 204:16 | 2011 and 2012, right? | | | | | |
| | | 204:17 | A. Correct. | | | | | |
| | | 204:18 | Q. So at this point in time it was 374,000? | | | | | |
| | | 204:19 | A. Correct. | | | | | |
| 58 | 205:6 -205:7 | Whitney, Adam | 2015-10-02 | 00:00:05 | 00:41:55 | 00:21:39 | Whitney_A-100215- | M5.58 |
| | Link > P464.1 | 205:6 | Q. No. I'm sorry. I sent out a new exhibit. This is | | | | | |
| | | 205:7 | Exhibit 32. | | | | | |
| 59 | 205:12 -206:1 | Whitney, Adam | 2015-10-02 | 00:01:02 | 00:42:00 | 00:21:34 | Whitney_A-100215- | M5.59 |
| | Link > P464.1.1 | 205:12 | Q. The Bates stamped Sears 5351. Your e-mail on this | | | | | |
| | | 205:13 | page, the second e-mail, is dated May 10, 2012? | | | | | |
| | | 205:14 | A. Right, okay. | | | | | |
| | | 205:15 | Q. I set that you talked to Sam at length about | | | | | |
| | | 205:16 | Bionic/Apex version. | | | | | |
| | | 205:17 | A. Okay. | | | | | |
| | | 205:18 | Q. When you say "Apex version," you mean Apex's version | | | | | |
| | | 205:19 | of the Bionic Wrench, right? | | | | | |
| | | 205:20 | A. Let me read this. I needed to refamiliarize myself | | | | | |
| | | 205:21 | with it. So I say one Bionic. Sam is uncomfortable | | | | | |
| | | 205:22 | with no exclusivity and the fact that they're | | | | | |
| | | 205:23 | unwilling to work with us and recognizing we're over a | | | | | |

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205:24 barrel. This reenforces that we're paying for their
 205:25 marketing unit. Yes, I am referring to the Apex
 206:1 Max Axess.

| | | | | | | | |
|----|------------------------------------|--|---|----------|----------|-------------------|-------|
| 60 | 206:2 -206:3 | Whitney, Adam 2015-10-02 | 00:00:05 | 00:43:02 | 00:20:32 | Whitney_A-100215- | M5.60 |
| | 206:2 | Q. And you're calling it the Apex version of the Bionic, | | | | | |
| | 206:3 | right? | | | | | |
| 61 | 206:5 -206:6 | Whitney, Adam 2015-10-02 | 00:00:09 | 00:43:07 | 00:20:27 | Whitney_A-100215- | M5.61 |
| | 206:5 | A. I'm calling it the Apex version. Again, it's, in my | | | | | |
| | 206:6 | opinion, a different tool and has a locking mechanism. | | | | | |
| 62 | 206:8 -206:10 | Whitney, Adam 2015-10-02 | 00:00:06 | 00:43:16 | 00:20:18 | Whitney_A-100215- | M5.62 |
| | 206:8 | Q. But you are referring to it here as the Apex version | | | | | |
| | 206:9 | of the Bionic, right? | | | | | |
| | 206:10 | A. Yes. | | | | | |
| 63 | 207:9 -207:15 | Whitney, Adam 2015-10-02 | 00:00:24 | 00:43:22 | 00:20:12 | Whitney_A-100215- | M5.63 |
| | Link > P425.1 | 207:9 | Q. Exhibit 33 has Bates number Sears 2075. Looking at | | | | |
| | Link > P425.1.2 | 207:10 | the e-mail at the very top, that's from Ms. Kaleta to | | | | |
| | | 207:11 | you, right? | | | | |
| | | 207:12 | A. Mm-hmm. | | | | |
| | | 207:13 | Q. And it's dated May 17, 2012? | | | | |
| | | 207:14 | A. Yes, 5/17/2012. | | | | |
| | | 207:15 | Q. And it says Bionic versus Max Axess, right? | | | | |
| 64 | 207:18 -208:23 | Whitney, Adam 2015-10-02 | 00:02:01 | 00:43:46 | 00:19:48 | Whitney_A-100215- | M5.64 |
| | | 207:18 | A. Yes, it does. | | | | |
| | | 207:19 | Q. It presents a comparison of Bionic and Max Axess for | | | | |
| | | 207:20 | Q4, right? | | | | |
| | | 207:21 | A. Yes, it did. | | | | |
| | Link > P425.1.3 | 207:22 | Q. If you read the comparison, she says, "The receipts | | | | |
| | | 207:23 | units seem much higher for Apex, but really only seem | | | | |
| | | 207:24 | higher because we enter Q4 of 40K units of Bionic | | | | |
| | | 207:25 | already on hand, and because we downtrended the Bionic | | | | |
| | | 208:1 | forecast by about 30K units to account for | | | | |
| | | 208:2 | cannibalization on the new Max Axess." Do you see | | | | |
| | | 208:3 | that? | | | | |
| | | 208:4 | A. I do. | | | | |
| | | 208:5 | Q. What did you understand her to mean by | | | | |
| | | 208:6 | cannibalization? | | | | |
| | | 208:7 | A. I understand that to mean we will sell 30,000 less | | | | |
| | | 208:8 | units of the Bionic Wrench due to their being more -- | | | | |
| | | 208:9 | different options for the customer and in particular | | | | |
| | | 208:10 | the Max Axess. | | | | |
| | | 208:11 | Q. What does the term cannibalization mean in the | | | | |
| | | 208:12 | industry? | | | | |
| | | 208:13 | A. In the industry cannibalization would be one item | | | | |
| | | 208:14 | impacting another item is the simplest way to put it. | | | | |

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208:15 Q. Impacting in what way?
 208:16 A. Impacting sales.
 208:17 Q. So replacing sales?
 208:18 A. I don't know that I would use the word replacing.
 208:19 Reducing sales.
 208:20 Q. So in this context the introduction of the Max Axess
 208:21 would reduce the sales of the Bionic Wrench; is that
 208:22 right?
 208:23 A. Yes.

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| | | | | | | | |
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| 65 | 213:15 -213:17 | Whitney, Adam 2015-10-02 | 00:00:11 | 00:45:47 | 00:17:47 | Whitney_A-100215- | M5.65 |
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213:15 Q. Are you aware of any other versions of the Bionic
 213:16 Wrench other than the Max Axess?
 213:17 A. No.

| | | | | | | | |
|----|---------------------|--------------------------|----------|----------|----------|-------------------|-------|
| 66 | 222:7 -222:8 | Whitney, Adam 2015-10-02 | 00:00:07 | 00:45:58 | 00:17:36 | Whitney_A-100215- | M5.66 |
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222:7 Q. I'm going to ask to mark another exhibit. This is
 222:8 going to Exhibit 36.

[Link > P428.1](#)

| | | | | | | | |
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| 67 | 224:17 -224:25 | Whitney, Adam 2015-10-02 | 00:00:32 | 00:46:05 | 00:17:29 | Whitney_A-100215- | M5.67 |
|----|-----------------------|--------------------------|----------|----------|----------|-------------------|-------|

224:17 Q. You don't recall taking any steps to address that
 224:18 particular issue?
 224:19 A. I don't recall. I don't remember. I don't
 224:20 remember -- again, it's been so long ago, I don't
 224:21 remember. I'm sure it looks like we met with Loren.
 224:22 I don't remember meeting with Loren. I don't
 224:23 remember.
 224:24 Q. Who is Loren?
 224:25 A. Loren one of the attorneys that works with the Sears.

[Link > Hide](#)

| | | | | | | | |
|----|---------------------|--------------------------|----------|----------|----------|-------------------|-------|
| 68 | 225:3 -225:5 | Whitney, Adam 2015-10-02 | 00:00:09 | 00:46:37 | 00:16:57 | Whitney_A-100215- | M5.68 |
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225:3 Q. I want to go back for a minute to something we were
 225:4 talking about early which was the halo sales?
 225:5 A. Yes.

| | | | | | | | |
|----|-----------------------|--------------------------|----------|----------|----------|-------------------|-------|
| 69 | 225:13 -225:21 | Whitney, Adam 2015-10-02 | 00:00:34 | 00:46:46 | 00:16:48 | Whitney_A-100215- | M5.69 |
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225:13 Q. So how would you go about trying to figure out what a
 225:14 particular product's halo is?
 225:15 A. Looking at that item's basket or transactional
 225:16 information to say what else was in the basket and
 225:17 compare it over time to say, hey, do we find that this
 225:18 item tends to help the sales of another item or not.
 225:19 Do we see baskets go up and customers stay in the
 225:20 department longer. There are many different kinds of
 225:21 variables that we would look at to determine that.

| | | | | | | | |
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| 70 | 244:3 -244:21 | Whitney, Adam 2015-10-02 | 00:01:07 | 00:47:20 | 00:16:14 | Whitney_A-100215- | M5.70 |
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244:3 Q. In the beginning of your deposition today you were
 244:4 recalling a conversation that you had with Dan Brown,

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244:5 Jr. on the 17th of February. Do you recall that
 244:6 general discussion?
 244:7 A. I do. I very distinctly remember the discussion.
 244:8 Q. How is it that you very distinctly remember that
 244:9 discussion?
 244:10 A. It was Friday evening and I was calling to understand
 244:11 what these guys' concerns were and why Stephanie
 244:12 having difficulty with them and what was going on. I
 244:13 just remember Dan Brown, Jr. being so abrasives and
 244:14 nasty. He called me unethical and he called Sears
 244:15 unethical. I had not met Dan Brown in person and he
 244:16 was attacking me. I think I will always remember that
 244:17 conversation it was so unbelievable to me. It was
 244:18 very upsetting. It was disruptive. I just very
 244:19 distinctly, whoa, what was that all about.
 244:20 Q. Over the course of your business career, can you
 244:21 recall having a similar discussion with a vendor?

| | | | | | | | |
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| 71 | 244:23 -244:23 | Whitney, Adam 2015-10-02 | 00:00:02 | 00:48:27 | 00:15:07 | Whitney_A-100215- | M5.71 |
| | | 244:23 A. No, I cannot. | | | | | |
| 72 | 246:11 -246:19 | Whitney, Adam 2015-10-02 | 00:00:25 | 00:48:29 | 00:15:05 | Whitney_A-100215- | M5.72 |
| | Link > D282.1 | 246:11 Q. Mr. Whitney, you now have in front of you what has 246:12 been marked as Exhibit 40 to your deposition. Is that 246:13 correct? 246:14 A. Yes, it is. 246:15 Q. Can you just identify this document for the record? Link > D282.1.1 246:16 A. This is an e-mail communication I sent to my boss, 246:17 Karen Miller, it looks like after the conversation -- 246:18 just of a the conversation I had with Dan Brown, Jr. 246:19 from LoggerHead. | | | | | |
| 73 | 248:10 -249:3 | Whitney, Adam 2015-10-02 | 00:00:59 | 00:48:54 | 00:14:40 | Whitney_A-100215- | M5.73 |
| | Link > D282.1.2 | 248:10 Q. I'd like to direct your attention to the third 248:11 paragraph of your e-mail. 248:12 A. Okay. 248:13 Q. It says, "To clarify, that is 55 percent higher than 248:14 last year's cost, if you include the subsidy and 248:15 24 percent higher cost than last year's full invoice." 248:16 Do you see that? 248:17 A. Yes. 248:18 Q. What were you referring to in that discussion there? 248:19 A. I was referring the fact that they had said they 248:20 had -- they had -- they said they cannot move forward 248:21 which is part of also in this letter and that they 248:22 can't move forward unless we, Sears, agree to this new 248:23 cost every day of 13.99, which is 55 percent higher | | | | | |

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248:24 than last year's costs including subsidy, 24 percent
248:25 higher than the full invoice cost.
249:1 Q. In your business experience, had you encountered
249:2 circumstances where a vendor proposed a 55 percent
249:3 cost increase on you?

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| | | | | | | | |
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| 74 | 249:4 -249:4 | Whitney, Adam 2015-10-02 | 00:00:01 | 00:49:53 | 00:13:41 | Whitney_A-100215- | M5.74 |
| | | 249:4 A. Never. | | | | | |
| 75 | 249:7 -249:9 | Whitney, Adam 2015-10-02 | 00:00:08 | 00:49:54 | 00:13:40 | Whitney_A-100215- | M5.75 |
| | | 249:7 Q. Was this the only time? | | | | | |
| | | 249:8 A. That I recall. | | | | | |
| | | 249:9 Q. How did you react to the price increase? | | | | | |
| 76 | 249:11 -249:22 | Whitney, Adam 2015-10-02 | 00:00:40 | 00:50:02 | 00:13:32 | Whitney_A-100215- | M5.76 |
| | | 249:11 A. I asked for an explanation of it. I asked how could | | | | | |
| | | 249:12 it be that much of an increase. We deal with cost | | | | | |
| | | 249:13 pressures and commodities ever day. We deal with | | | | | |
| | | 249:14 hundreds of requests to increase costs. We negotiate | | | | | |
| | | 249:15 and we talk about it and a lot of times it's related | | | | | |
| | | 249:16 to issues the supplier has and they're legitimate and | | | | | |
| | | 249:17 we want to work through those issues. Sometimes we | | | | | |
| | | 249:18 accept those increases. Sometimes we push back and | | | | | |
| | | 249:19 say we can't afford to do that. Never are we told | | | | | |
| | | 249:20 we're not moving forward unless and it's just a black | | | | | |
| | | 249:21 and white and it's a full or 55 percent or 24 percent | | | | | |
| | | 249:22 with no explanation. | | | | | |
| 77 | 250:4 -250:19 | Whitney, Adam 2015-10-02 | 00:00:53 | 00:50:42 | 00:12:52 | Whitney_A-100215- | M5.77 |
| | | 250:4 Q. At this point in time, did you want to have a | | | | | |
| | | 250:5 relationship with LoggerHead and sell their wrench? | | | | | |
| | | 250:6 A. I would say absolutely I did. I wanted to sell their | | | | | |
| | | 250:7 wrench. And I feel as though it's obviously based on | | | | | |
| | | 250:8 my conversations with Dennis internally and Dan | | | | | |
| | | 250:9 Connow. I was constantly negotiating to do work with | | | | | |
| | | 250:10 LoggerHead. I also feel as if we compromised in many | | | | | |
| | | 250:11 different ways and accepted their new demands on | | | | | |
| | | 250:12 multiple different occasions to try and work with | | | | | |
| | | 250:13 them. I feel as though we did a good job of | | | | | |
| | | 250:14 documenting that and trying to partner with these | | | | | |
| | | 250:15 guys. | | | | | |
| | | 250:16 Q. You talked earlier in your testimony with DRTV. How | | | | | |
| | | 250:17 important was DRTV for this particular product, the | | | | | |
| | | 250:18 Bionic Wrench product? | | | | | |
| | | 250:19 A. I think it was incredibly important to this product. | | | | | |
| 78 | 251:17 -251:21 | Whitney, Adam 2015-10-02 | 00:00:18 | 00:51:35 | 00:11:59 | Whitney_A-100215- | M5.78 |
| | | 251:17 Q. We had talked about earlier how LoggerHead had | | | | | |
| | | 251:18 rejected the Sears vendor agreement that it had | | | | | |

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251:19 proposed. Did LoggerHead and Sears ever reach a
 251:20 vendor agreement on this product for 2012 for the
 251:21 sales of the Bionic Wrench?

| | | | | | | | |
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| 80 | 252:1 -252:5 | Whitney, Adam 2015-10-02 | 00:00:16 | 00:51:53 | 00:11:41 | Whitney_A-100215- | M5.80 |
| | | 252:1 A. Not that I'm aware of. I left Sears in 2012. That I 252:2 recall, we did absolutely not come to an agreement, a 252:3 contract to supply agreement or any agreement. 252:4 Q. Did Sears and LoggerHead attempt to come to terms 252:5 opinion on an agreement? | | | | | |
| 81 | 252:7 -252:17 | Whitney, Adam 2015-10-02 | 00:00:33 | 00:52:09 | 00:11:25 | Whitney_A-100215- | M5.81 |
| | | 252:7 A. It's an interesting question. I feel very strongly 252:8 that we attempted to come to an agreement with 252:9 LoggerHead multiple times with multiple compromises. 252:10 I can say that I don't feel as though there was the 252:11 same level of desire for them to come to an agreement 252:12 with us based on the multiple times they came back and 252:13 said, we're refusing to meet with you, they didn't 252:14 answer e-mails or phone calls. We would send them 252:15 terms and they would change them and add terms, change 252:16 subsidies, change their willingness to support 252:17 television, et cetera. | | | | | |
| 82 | 253:10 -253:13 | Whitney, Adam 2015-10-02 | 00:00:08 | 00:52:42 | 00:10:52 | Whitney_A-100215- | M5.82 |
| | Link > D283.1 | 253:10 Q. Mr. Whitney, you now have in front of you what's been 253:11 marked as Exhibit 41 to your deposition; is that 253:12 correct? 253:13 A. That's correct. | | | | | |
| 83 | 253:18 -254:9 | Whitney, Adam 2015-10-02 | 00:00:51 | 00:52:50 | 00:10:44 | Whitney_A-100215- | M5.83 |
| | Link > D283.1.1 | 253:18 Q. Can you just identify for the record who the author 253:19 and the recipient of the e-mail are and the date it 253:20 was sent? 253:21 A. This is from Dan Brown, Jr. to Stephanie Kaleta on 253:22 Thursday, May 10th, 2012 at 10:58 a.m. The subject is 253:23 LoggerHead tools promotion agreement. 253:24 Q. And if you could, read into the record the first 253:25 paragraph in the e-mail that he sent to Ms. Kaleta. 254:1 A. "Hi, Stephanie, After reviewing your latest changes. 254:2 I think we should probably reschedule Friday's 254:3 meeting. LoggerHead has two main issues that need to 254:4 be 254:5 resolved before the lawyers get involved, otherwise it 254:6 will be a waste of everyone's time." 254:7 Q. What that did that tell you about LoggerHead's 254:8 interest in finalizing an agreement as of May 10, 254:9 2012? | | | | | |

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| | | | | | | | |
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| 84 | 254:11 -255:2 | Whitney, Adam 2015-10-02 | 00:01:16 | 00:53:41 | 00:09:53 | Whitney_A-100215- | M5.84 |
| | 254:11 | A. In my opinion, it was another unusual stall tactic. | | | | | |
| | 254:12 | The whole purpose of the discussion and setting that | | | | | |
| | 254:13 | meeting up was so that we could formally sit down and | | | | | |
| | 254:14 | meet and have our attorneys there so they could talk | | | | | |
| | 254:15 | through any legalease needed and we could come to an | | | | | |
| | 254:16 | agreement. So it was in my mind perplexing, | | | | | |
| | 254:17 | disruptive and undermined further my trust and | | | | | |
| | 254:18 | credibility in the LoggerHead team as far as why they | | | | | |
| | 254:19 | continued to refuse to want to close this and come to | | | | | |
| | 254:20 | an agreement. Can I -- | | | | | |
| | 254:21 | BY MR. HILMERT: | | | | | |
| | 254:22 | Q. If you have something to add -- | | | | | |
| | 254:23 | A. As I read through the letter, I guess, to support my | | | | | |
| | 254:24 | point on why it was another example of being | | | | | |
| | 254:25 | disruptive, they say that, "Our offer of possible | | | | | |
| | 255:1 | exclusivity, to be clear LoggerHead will not be able | | | | | |
| | 255:2 | to offer exclusivity. In addition" -- | | | | | |
| 85 | 255:14 -255:16 | Whitney, Adam 2015-10-02 | 00:00:13 | 00:54:57 | 00:08:37 | Whitney_A-100215- | M5.85 |
| | 255:14 | Q. Is there anything else in this exhibit that was a | | | | | |
| | 255:15 | cause for concern for you regarding the LoggerHead | | | | | |
| | 255:16 | relationship at this time? | | | | | |
| 86 | 255:18 -256:10 | Whitney, Adam 2015-10-02 | 00:01:00 | 00:55:10 | 00:08:24 | Whitney_A-100215- | M5.86 |
| | 255:18 | A. Yes. | | | | | |
| | 255:19 | BY MR. HILMERT: | | | | | |
| | 255:20 | Q. What was that? | | | | | |
| | 255:21 | A. The comment about LoggerHead not being able to provide | | | | | |
| | 255:22 | exclusivity to Sears and the changes in terms on | | | | | |
| | 255:23 | forecast dating and that because that in order for | | | | | |
| | 255:24 | LoggerHead to produce product for Christmas, at that | | | | | |
| | 255:25 | time we need to plan and build for the product for the | | | | | |
| | 256:1 | fourth quarter, all these things, in my opinion, were | | | | | |
| | 256:2 | shifting from prior conversations that Stephanie had | | | | | |
| | 256:3 | had with them and again, undermine in my mind their | | | | | |
| | 256:4 | credibility as far as why they were cancelling this | | | | | |
| | 256:5 | meeting that we had thought we were going to agree to | | | | | |
| | 256:6 | to close the deal. It was unusual and didn't make | | | | | |
| | 256:7 | sense. | | | | | |
| | 256:8 | Q. How confident were you in the long-term partnership | | | | | |
| | 256:9 | with LoggerHead after receiving this e-mail? | | | | | |
| | 256:10 | A. Not confident. | | | | | |
| 87 | 258:5 -258:12 | Whitney, Adam 2015-10-02 | 00:00:30 | 00:56:10 | 00:07:24 | Whitney_A-100215- | M5.87 |
| | Link > D284.1 | 258:5 | | | | | |
| | | 258:6 | | | | | |
| | | Q. This has been marked as Exhibit 42 to your deposition | | | | | |
| | | today. I'd like to direct your attention to the | | | | | |

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258:7 middle e-mail on this page. Do you see that?
 258:8 A. Yes, I do.
 258:9 Q. And for the record, could you identify the author, the
 258:10 recipient, and the date of this e-mail?
 258:11 A. It's from Dan Brown, Jr. to Stephanie Kaleta on
 258:12 Thursday, May 17, 2012, at 11:08 a.m.

Link > D284.1.1

| | | | | | | | |
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| 88 | 258:16 -259:9 | Whitney, Adam 2015-10-02 | 00:00:49 | 00:56:40 | 00:06:54 | Whitney_A-100215- | M5.88 |
| | | 258:16 Q. I'd like to direct your attention to the second to | | | | | |
| | | 258:17 last paragraph of this e-mail, the one that begins, | | | | | |
| | | 258:18 "We appreciate the forecast." | | | | | |
| | | 258:19 A. Yes. | | | | | |
| | | 258:20 Q. Could you just read that whole paragraph into the | | | | | |
| | | 258:21 record, please? | | | | | |
| | | 258:22 A. We appreciate the forecast. I am hoping you are | | | | | |
| | | 258:23 working on the POs as they are key to the promotional | | | | | |
| | | 258:24 program we have put together. In fact, as we have | | | | | |
| | | 258:25 previously discussed, LoggerHead is having a strong | | | | | |
| | | 259:1 demand for the fourth quarter. Although we have | | | | | |
| | | 259:2 increased our production capacity based on what you | | | | | |
| | | 259:3 have forecast, it appears we will be selling our | | | | | |
| | | 259:4 production out. In order for us to manage who gets | | | | | |
| | | 259:5 what and at what time, we are allocating production | | | | | |
| | | 259:6 and delivery according to the POs that we receive." | | | | | |
| | | 259:7 Q. Did the statement that LoggerHead would be selling out | | | | | |
| | | 259:8 its production present any concern to Sears or to you? | | | | | |
| | | 259:9 A. Absolutely. | | | | | |
| 89 | 259:12 -259:20 | Whitney, Adam 2015-10-02 | 00:00:35 | 00:57:29 | 00:06:05 | Whitney_A-100215- | M5.89 |
| | | 259:12 Q. Why was that? | | | | | |
| | | 259:13 A. Because we needed this product to be able to put it on | | | | | |
| | | 259:14 television and make our plans which I'm held | | | | | |
| | | 259:15 accountable to ultimately keep my job. So it was | | | | | |
| | | 259:16 ultimately a concern in a major way. | | | | | |
| | | 259:17 Q. Can you characterize the degree of confidence that you | | | | | |
| | | 259:18 had as of May 17, 2012, that LoggerHead would actually | | | | | |
| | | 259:19 supply its product to Sears for the Christmas holiday | | | | | |
| | | 259:20 season? | | | | | |
| 90 | 259:22 -260:2 | Whitney, Adam 2015-10-02 | 00:00:24 | 00:58:04 | 00:05:30 | Whitney_A-100215- | M5.90 |
| | | 259:22 A. I did not feel confident at all based on the language | | | | | |
| | | 259:23 here and the multiple back and forths that we had that | | | | | |
| | | 259:24 we were going to be provided product which is why at | | | | | |
| | | 259:25 some point we started talking about a backup plan. We | | | | | |
| | | 260:1 felt that we were going to have no product to run DRTV | | | | | |
| | | 260:2 and have major millions of dollars in liability. | | | | | |
| 91 | 261:8 -261:19 | Whitney, Adam 2015-10-02 | 00:00:32 | 00:58:28 | 00:05:06 | Whitney_A-100215- | M5.91 |

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| | | | | | | | |
|-----------------|-----------------------|---|----------|----------|----------|-------------------|-------|
| Link > Hide | 261:8 | Q. Did there come a time when you personally saw the | | | | | |
| | 261:9 | Bionic Wrench in competitors of Sears's retail | | | | | |
| | 261:10 | outlets? | | | | | |
| | 261:11 | A. Yes. | | | | | |
| | 261:12 | Q. I believe that you had mentioned in your testimony | | | | | |
| | 261:13 | earlier today that you saw the Bionic Wrench at the | | | | | |
| | 261:14 | Menards? | | | | | |
| | 261:15 | A. I did. | | | | | |
| | 261:16 | Q. How would you characterize Menards with respect to | | | | | |
| | 261:17 | Sears business-wise; would they be competitors? | | | | | |
| | 261:18 | A. Direct competitors in tools, lawn and garden, several | | | | | |
| | 261:19 | different areas. | | | | | |
| <hr/> | | | | | | | |
| 92 | 261:24 -262:23 | Whitney, Adam 2015-10-02 | 00:01:29 | 00:59:00 | 00:04:34 | Whitney_A-100215- | M5.92 |
| Link > D285.1 | 261:24 | Q. Mr. Whitney, you now have Deposition Exhibit 43 in | | | | | |
| | 261:25 | front of you; is that right? | | | | | |
| | 262:1 | A. That's correct. | | | | | |
| | 262:2 | Q. Once again, if you look at the bottom item in the | | | | | |
| | 262:3 | e-mail chain here, could you identify the sender of | | | | | |
| | 262:4 | this e-mail, the date, and the recipient? | | | | | |
| Link > D285.1.1 | 262:5 | A. The sender is me. It's to me and it's from me and | | | | | |
| | 262:6 | it's from my iphone to my personal account and the | | | | | |
| | 262:7 | subject is "Menards has Bionic Wrench." | | | | | |
| | 262:8 | Q. And what is the date of this e-mail? | | | | | |
| | 262:9 | A. Saturday, June 9th. | | | | | |
| | 262:10 | Q. Do you recall when Father's Day is? | | | | | |
| | 262:11 | A. It is the -- I don't remember the specific date, but I | | | | | |
| | 262:12 | believe it was between June 15th and June 18th. | | | | | |
| | 262:13 | Q. Is it fair to say that you were in a Menards store in | | | | | |
| | 262:14 | the Father's Day general shopping season? | | | | | |
| | 262:15 | A. Generally we considered the three weeks leading up to | | | | | |
| | 262:16 | Father's Day being the core Father's Day spike. | | | | | |
| | 262:17 | Q. And is this during the period of time that Sears was | | | | | |
| | 262:18 | running the DRTV? | | | | | |
| | 262:19 | A. As I recall, it would have been, but I don't remember | | | | | |
| | 262:20 | the specific dates of DRTV. | | | | | |
| | 262:21 | Q. Was it relevant or concerning to you in your role at | | | | | |
| | 262:22 | Sears to see the Bionic Wrench at Menards during this | | | | | |
| Link > Hide | 262:23 | time? | | | | | |
| <hr/> | | | | | | | |
| 93 | 262:24 -262:24 | Whitney, Adam 2015-10-02 | 00:00:02 | 01:00:29 | 00:03:05 | Whitney_A-100215- | M5.93 |
| | 262:24 | A. Yes. | | | | | |
| <hr/> | | | | | | | |
| 94 | 263:2 -263:11 | Whitney, Adam 2015-10-02 | 00:00:37 | 01:00:31 | 00:03:03 | Whitney_A-100215- | M5.94 |
| | 263:2 | Q. And why is that? | | | | | |
| | 263:3 | A. Because we were paying for direct response TV with the | | | | | |
| | 263:4 | understanding that we were only ones selling the item. | | | | | |

Whitney A PLAYED on 5_4 and 5_5 20151002 PA DA PC DC PCC on 5-2-17

263:5 If we are not the only ones selling item, there is an
263:6 absolutely direct correlation to our sales performance
263:7 in the marketplace. So understanding what the
263:8 competition is doing and who is selling this item has
263:9 a direct relevance to our forecast and our ability to
263:10 partner and predict what we're going to need to buy
263:11 and sell.

95 **263:15 -263:19** Whitney, Adam 2015-10-02 00:00:15 01:01:08 00:02:26 Whitney_A-100215-4 M5.95

263:15 Did you ever recall LoggerHead telling you
263:16 that they were selling the Bionic Wrench to Menards?
263:17 A. No.
263:18 Q. Would you have expected as a partner with LoggerHead
263:19 for them to tell you that?

96 **263:21 -264:20** Whitney, Adam 2015-10-02 00:01:34 01:01:23 00:02:11 Whitney_A-100215-4 M5.96

263:21 A. I would have expected them to tell me that they're
263:22 selling it, at least if not they're going to give me
263:23 specific competitors, at least that they're going to
263:24 have the item out in a marketplace in a more material
263:25 way. Because, as I said, it has a huge impact to our
264:1 sales forecast. In a normal relationship with a
264:2 vendor, we would both want to understand what that
264:3 sales impact is so that we're not stuck with a
264:4 significant amount of product after that holiday time
264:5 frame and a huge mark down liability. It will damage
264:6 the product's image in the marketplace to have to mark
264:7 it all down and it will damage our profits and it
264:8 ultimately will damage the vendor's profits. If there
264:9 is a mutually sustainable relationship -- if not and
264:10 one party doesn't care that the retailer is stuck with
264:11 all these goods, then maybe, you know, we wouldn't
264:12 have that conversation. I would fully expect to be
264:13 advised on the general places that this item going to
264:14 be sold.
264:15 BY MR. HILMERT:
264:16 Q. Looking back at the relationship as a whole as you sit
264:17 here today three years later, can you give your
264:18 overall thoughts on your interactions with LoggerHead
264:19 as compared to other retailers, other vendors that you
264:20 have worked with over the course of your career?

97 **264:22 -265:4** Whitney, Adam 2015-10-02 00:00:36 01:02:57 00:00:37 Whitney_A-100215-4 M5.97

264:22 A. This is really such a unique situation and vendor, I
264:23 don't recall any that comes close. This is really so
264:24 far out of bounds and out of the norm. The entire
264:25 relationship was so contentious and so, you know,

Whitney A PLAYED on 5_4 and 5_5 20151002 PA DA PC DC PCC on 5-2-17

265:1 accusatory and lacking of trust and changing terms.
265:2 It was just very, very unusual for me. I don't recall
265:3 anything else in my career that really comes close to
265:4 that.

Play Time for this Script: **01:03:34**

Total time for all Scripts in this report: 01:03:34