



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RED OAK FUND, L.P., :
 :
 Plaintiff, :
 :
 vs. : Civil Action
 : No. 8559-VCN
 :
 DIGIRAD CORPORATION, JEFFREY E. :
 EBERWEIN, CHARLES M. GILLMAN, :
 JOHN M. CLIMACO, JAMES B. :
 HAWKINS, and JOHN W. SAYWARD, :
 :
 Defendants. :

- - -

Chancery Court
38 The Green
Dover, Delaware
Wednesday, August 7, 2013
9:30 a.m.

- - -

BEFORE: HON. JOHN W. NOBLE, Vice Chancellor

- - -

TRIAL TRANSCRIPT

- - -

CHANCERY COURT REPORTERS
410 Federal Street
Dover, Delaware 19901
(302) 739-3934

1 APPEARANCES:

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

ELIZABETH M. MCGEEVER, ESQ.
Prickett, Jones & Elliott, P.A.
-and-
DANIEL F. WAKE, ESQ.
of the Colorado Bar
Sander Ingebretsen & Wake, P.C.
for Plaintiff

JOHN M. SEAMAN, ESQ.
Abrams & Bayliss LLP
-and-
THOMAS J. FLEMING, ESQ.
JENNIFER L. HEIL, ESQ.
of the New York Bar
Olshan Frome Wolosky LLP
for Defendants

- - -

1 THE COURT: Good morning, everyone.
2 Good morning, Miss McGeever.

3 MS. MCGEEVER: I rise to make an
4 introduction, but if the Court has some other matters
5 to take care of, we can do that first.

6 THE COURT: I love social hour.

7 MS. MCGEEVER: I would like to
8 introduce my co-counsel, Daniel F. Wake of the
9 Colorado bar with the Sander Ingebretsen & Wake firm
10 in Denver.

11 THE COURT: Good morning, and welcome.
12 Sorry that we're putting you to work at 7:30 in the
13 morning.

14 MS. MCGEEVER: Well, Mr. Wake helped
15 try a case probably about 18, 19 years ago before
16 Chancellor Chandler, but we sat in Dover.

17 THE COURT: While you were still in
18 junior high school.

19 MS. MCGEEVER: I was almost in junior
20 high, but it was the old courthouse, and we were
21 downstairs in the courtroom on the left, so he's quite
22 impressed, as we all are, with the beautiful
23 accommodations that the State has given us.

24 THE COURT: The people of the State of

1 Delaware have been very, very kind to us here.

2 MS. MCGEEVER: I think Mr. Seaman has
3 the same.

4 THE COURT: Good morning.

5 MR. SEAMAN: Good morning, Your Honor.
6 John Seaman, Abrams & Bayliss on behalf of the
7 defendants. I have a few introductions to make as
8 well. Seated with me at counsel table this morning is
9 Thomas Fleming from Olshan, Frome & Wolosky in New
10 York. He's been admitted pro hac vice. Also seated
11 at counsel table is Jennifer Heil who has also been
12 admitted pro hac vice. And also in the courtroom with
13 us today are Mr. Jeffry Keyes, CFO of Digirad. We
14 have Mr. Charles Gillman, director of Digirad, and our
15 proxy solicitor, Mr. John Grau. Those are the other
16 folks present today from defendants.

17 THE COURT: Thank you, and they are
18 welcome.

19 MS. MCGEEVER: I have David Sandberg
20 who is with the plaintiff, Your Honor, and the first
21 witness.

22 MR. SEAMAN: I don't believe we have
23 any other housekeeping matters to address. I think we
24 discussed dealing with joint exhibits at the end of

1 the day, and other than that, I think unless
2 Miss McGeever has anything, we're ready to get
3 started.

4 THE COURT: Unless you had house-
5 keeping details, I had none, so call your first
6 witness please.

7 MR. WAKE: Your Honor, the plaintiff
8 calls David Sandberg.

9 (The first witness was called at 9:30
10 a.m.)

11 DAVID SANDBERG
12 having been first duly affirmed, was examined and
13 testified as follows:

14 THE COURT: You may proceed when you
15 are ready.

16 MR. WAKE: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. WAKE:

19 Q. Good morning, Mr. Sandberg. Can you
20 begin by telling us your current business?

21 A. Sure. I run Red Oak Partners, an
22 investment firm based out of New York. We have
23 several funds, including the Red Oak Fund, the
24 Pinnacle fund, Red Oak Fund II and V.

1 Q. What is the business of those funds?

2 A. We invest in public and private
3 companies.

4 Q. Do you invest monies of third parties
5 who provide money to you for investment management?

6 A. As well as my own. I'm an investor in
7 the funds as well.

8 Q. How long have you been with Red Oak
9 Partners?

10 A. I founded Red Oak Partners in March of
11 2003.

12 Q. In your investing with Red Oak, do you
13 have any particular focus in the areas in which you
14 invest?

15 A. Yes; typically smaller companies.
16 Typically microcap companies.

17 Q. Generally, how do you define a
18 microcap company?

19 A. There are many definitions. I
20 typically invest in companies that are under
21 \$200 million in market capitalization.

22 Q. Briefly, let me touch upon your
23 experience prior to starting Red Oak in 2002. When
24 and where did you graduate from college?

1 A. Carnegie Mellon University in 1994.

2 Q. What was your first professional
3 employment after college?

4 A. Coopers & Lybrand Consulting. I was a
5 strategic consultant.

6 Q. How long were you there?

7 A. For about two years.

8 Q. What was your next position after
9 Coopers & Lybrand?

10 A. MCM Associates which was a hedge fund
11 in New York.

12 Q. What did you do at the hedge fund MCM
13 Associates?

14 A. I was an analyst.

15 Q. Did you focus your analytics on any
16 particular sector?

17 A. I did. That's where I first started
18 to invest in microcap public companies.

19 Q. Were those particularly domestic or
20 foreign?

21 A. U.S.

22 Q. How long were you at MCM Associates?

23 A. For about two years.

24 Q. Where did you go after that?

1 A. J.H. Whitney & Company in Stanford,
2 Connecticut.

3 Q. What is J.H. Whitney?

4 A. It was a private equity firm that was
5 expanding into hedge funds and other businesses.

6 Q. What functions did you serve while
7 there?

8 A. I was the first member of a three-
9 person team starting up in managing a new hedge fund.

10 Q. How long were you there did you say?

11 A. I was there for about four years.

12 Q. While you were there, did you have a
13 focus in any particular market sectors?

14 A. I was again U.S. micro caps.

15 Q. Just generally speaking, from then to
16 now, can you give the Court an approximation of how
17 many, under your definition, how many microcap
18 companies you have invested in at these various
19 positions?

20 A. Maybe about 200.

21 Q. Have you ever been on the board of
22 directors of a publicly-held company?

23 A. Yes.

24 Q. How many such companies?

1 A. Five different companies.

2 Q. Have you ever been chairman of the
3 board of a public company?

4 A. Yes.

5 Q. How many?

6 A. Two such companies.

7 Q. Have you ever served on the audit
8 committee of a board of a publicly-held company?

9 A. For four companies, and as chairman of
10 the audit committee for two companies.

11 Q. Thank you.

12 Let's shift to Digirad. When did you,
13 on behalf of Red Oak, first make an investment in
14 Digirad Corporation?

15 A. Q-4, 2008.

16 Q. Have you stayed -- did you remain an
17 investor at Digirad since then?

18 A. I don't know if we retained -- if we
19 sold out completely, but at one point we sold out at
20 least a significant majority of our position.

21 Q. Did there come a time where you
22 reinvested in the company?

23 A. Yes.

24 Q. When you got back into the company and

1 upped your presence, just generally speaking, what
2 were the primary transactions that interested you in
3 Digirad?

4 A. It was a microcap company with
5 significant cash, a business we believed had value and
6 tax loss assets.

7 Q. When you say "tax loss assets," what
8 are you referring to?

9 A. The historical losses of the company
10 which could be carried forward and used to offset
11 taxable income in the future.

12 Q. Are those the NOLs or net operating
13 loss assets?

14 A. Yes.

15 Q. Have you previously invested in
16 companies with net operating losses?

17 A. I have.

18 Q. Have you previously been on the board
19 of directors of companies that had NOLs?

20 A. Four.

21 Q. Just generally directing your
22 attention to 2012, did there come a time where you
23 considered nominating a slate of directors to be run
24 at the next annual meeting?

1 A. For Digirad?

2 Q. Yes.

3 A. Yes. I actually submitted a
4 nominating letter in late 2011.

5 Q. Can you tell the Court just briefly
6 how that was resolved?

7 A. I reached an agreement with the
8 company. They adopted a number of governance
9 improvements. We asked that we maintain our rights to
10 reassess and potentially contest in the following
11 year. We signed an agreement, I believe, in June of
12 2012.

13 Q. The following year, of course, being
14 2013.

15 A. Yes.

16 Q. Then you mentioned you reserved the
17 rights for 2013. Did there come a time in 2013 where
18 you again submitted a nominating letter?

19 A. Yes.

20 Q. When was that?

21 A. Very late February 2013 at the
22 deadline.

23 Q. Again, just for general background,
24 can you describe -- generally this is all over proxy

1 materials, but can you describe generally what your
2 reasons were for deciding to run a dissident slate of
3 directors?

4 A. We did not have confidence in the
5 qualifications of the current directors, and we were
6 further disappointed that they had not returned the
7 excess cash to shareholders, including in 2012 when
8 tax rates were lower and hundreds of public companies
9 had accelerated returns of capital via dividends.

10 Q. By that it's fair to say you
11 anticipated corporate rates to go up in 2013?

12 A. They did.

13 Q. After you submitted your nominating
14 letter, did you engage any proxy solicitation firm to
15 help you?

16 A. We did, Alliance Advisors.

17 Q. Which individual at Alliance Advisors
18 worked most closely with you?

19 A. Probably Peter Casey. Second would be
20 Waheed Hassan.

21 Q. The Court is very familiar with the
22 proxy solicitors, but nevertheless can you give a
23 brief summary of what you engaged Alliance Advisors to
24 do in connection with the proxy contest with Digirad?

1 A. Sure.

2 I don't recall all of the items that
3 they covered for us in the engagement letter, but
4 generally speaking, their job is to manage the
5 solicitation process. They will give input into our
6 development and filing of the proxy. They will help
7 identify shareholders who we should solicit.

8 We will use their call center to
9 manage solicitations of many smaller shareholders.
10 They will give input as to how to -- and give
11 recommendations of ISS and other governance bodies,
12 and they will also receive and provide the preliminary
13 Broadridge reports which are relied on for strategic
14 decisions throughout the contest.

15 Q. You mentioned ISS briefly. What is
16 ISS?

17 A. ISS is an independent firm formerly
18 known as RiskMetrics, and they have a few businesses.
19 They have governance consulting, and I've used them in
20 the past for some of my public companies. But the
21 business they're most known for is as a proxy advisory
22 firm. So they review contests and advise their
23 clients on how to vote.

24 Q. We'll come back to ISS a little bit

1 later. Prior to the Digirad contest, have you ever
2 been involved in a proxy contest before in connection
3 with a publicly-held company?

4 A. I had; several times.

5 Q. Have you gotten to the point in those
6 contests, in any of those contests, where you had
7 mailed out proxy statements to shareholders?

8 A. Three times.

9 Q. Have there been proxy contests you
10 have been involved with that did not get to the point
11 of mailing out proxy statements to shareholders?

12 A. Yes. Three or four times we submitted
13 nominating letters but reached agreements with the
14 companies.

15 Q. In 2012, Digirad would be an example of
16 that?

17 A. Yes.

18 Q. In March of this year, how much --
19 what percentage of Digirad's stock did Red Oak and
20 Pinnacle hold?

21 A. I believe about just over 5 percent of
22 the company.

23 Q. What was your understanding of where
24 you ranked then in terms of the size of the

1 shareholders?

2 A. I believe Red Oak was the fourth
3 largest shareholder.

4 Q. You mentioned Alliance Advisors a bit
5 and what you asked them to do. As the proxy contest
6 that we're here to discuss today evolved, what
7 functions did you take on?

8 A. We had a lot of input into the proxy,
9 and as far as solicitations, we would receive the
10 information and tabulations from Alliance.

11 They would provide us with names and
12 contact information of shareholders that they had
13 identified that owned stock and that we could
14 potentially contact and solicit. And I would
15 typically speak -- or try and speak with many of the
16 top ten or even top 20 shareholders that they had not
17 reached individually.

18 Q. In terms of actually reaching out and
19 speaking with shareholders, how did you divide things
20 up between you and Mr. Casey?

21 A. Well, they had a call center, so I
22 believe shareholders with 1,000 or more shares were
23 contacted through their call center. The very larger
24 shareholders Alliance would try and contact or

1 schedule calls where they joined me, and in some cases
2 where they couldn't reach a decision-maker, they
3 provided me with the phone numbers and I would try and
4 call people.

5 Q. Now, when you talk about a
6 decision-maker in that context, what do you mean?

7 A. Well, you have firms, but ultimately
8 you want to reach a portfolio manager, someone with
9 the authority to make a decision on the vote who you
10 can walk through the rationale and the arguments and
11 some of the issues addressed in the proxy, effectively
12 state your case, and if you're successful, they may
13 say, "Okay, we understand, we'll vote with you."

14 Q. Did you consider that an important
15 part of the process getting through to decision-makers
16 and shareholders?

17 A. Absolutely.

18 Q. You mentioned a moment ago Broadridge.
19 Again, can you generally describe what Broadridge --
20 what role Broadridge plays in the progress of the
21 proxy contest?

22 A. They receive the vote tabulations, so
23 when shareholders place a vote, either by mail or on
24 line, it comes to Broadridge, and throughout the

1 election, they will provide the voting updates and
2 those preliminary tabulations to each side.

3 And they're an independent third
4 party. It's objective. It supports a fair election,
5 and each side has information from which they can base
6 decisions going forward in what tends to be a fluid
7 process.

8 Q. Now, specifically for Red Oak
9 Partners, who received these summary reports from
10 Broadridge?

11 A. Our proxy solicitor.

12 Q. Then, generally speaking, what did
13 Mr. Casey do with the summary reports?

14 A. He would often send them to me
15 typically at the end of the day.

16 Q. Could I ask you to take a look at what
17 we have marked as Exhibit 58? For the record, this is
18 an April 15th email from you to Mr. Casey.

19 Is this an example of one of the
20 occasions on which Mr. Casey would literally forward
21 to you the entire Broadridge report that he had
22 received?

23 A. Yes.

24 Q. Similarly, could you look at Exhibit

1 73 please.

2 A. Okay.

3 Q. This is much later. This is
4 April 25th from Mr. Casey to you, but he submits a
5 different -- he includes a different kind of
6 attachment. Did you receive these kinds of
7 attachments from Mr. Casey periodically?

8 A. Yes.

9 Q. And, in substance, how does the
10 attachment to Exhibit 73 differ from the raw
11 Broadridge report that he sent to you that we looked
12 at a moment ago?

13 A. This is a summary which aggregates the
14 votes for each proposal.

15 Q. If you look at the second page of
16 Exhibit 73, is it fair -- the blue card designation,
17 that represents which side?

18 A. I actually cannot read this very well,
19 but the blue card was my side, Red Oak side.

20 Q. The white card being management?

21 A. Yes.

22 Q. Now, did Mr. Casey provide you
23 feedback in other ways about how the returns were
24 coming in to Broadridge?

1 A. He would give periodic emails separate
2 from these suggesting how someone may have voted or
3 his thoughts or opinions.

4 Q. Did he ever discuss with you by
5 telephone what he was seeing in the Broadridge
6 reports?

7 A. Yes.

8 Q. Can you, just by way of example, take
9 a look at Exhibit 68 please?

10 A. Okay.

11 Q. Is this one of those sort of more
12 informal email reports from Mr. Casey regarding
13 developments in the election?

14 A. Yes.

15 Q. If you could look at the second page
16 please, it begins with an email at the bottom of page
17 one on April 23, and Mr. Casey identifies a few
18 shareholders. He says "Heartland, Eberwein, Boston
19 Avenue and Ensign Peak have voted with the board."

20 What was your understanding of how
21 Mr. Casey determined that those people had voted that
22 way?

23 A. That's a bit of a secret sauce with
24 solicitors. Their job is to use their expertise as to

1 understand where each fund has custody of the shares,
2 track how a broker will submit the votes, and match up
3 the shares that come in and provide their input on who
4 voted in which way.

5 Q. You mentioned how voters vote which
6 way. We looked at a Broadridge report briefly a
7 moment ago. Does Broadridge tell you the name of a
8 custodian who voted or the name of a beneficial owner
9 who actually owns those shares?

10 A. They'll tell you a custodian unless
11 it's -- I believe unless it's a record name holder
12 which would show. But if it's a beneficial holder who
13 happens to have a brokerage account at Goldman Sachs
14 and they voted through that account, then their name
15 won't show in the Broadridge system.

16 Q. Is that one of the things you expect a
17 proxy solicitor to determine for you; is to match up
18 custodian votes with actually beneficial owners?

19 A. Absolutely.

20 Q. You mentioned that you were involved
21 in a couple of proxy contests before the Digirad
22 contest. Had you engaged proxy solicitors in those
23 instances?

24 A. Yes, each time.

1 Q. Had you obtained information from the
2 proxy solicitors in those cases that identified how
3 specific shareholders voted?

4 A. Yes.

5 Q. If you would look to the first page of
6 Exhibit 68 please. Just generally speaking, does this
7 reflect email updates to you from Mr. Casey about who
8 he had determined had voted specific ways?

9 A. Yes.

10 Q. Looking at the top email on page 68,
11 the second paragraph, Mr. Casey says to you, "Yes,
12 working on Ensign and Vanguard." Can you explain a
13 little bit who is Ensign?

14 A. They were a shareholder.

15 Q. What did you know about Ensign and why
16 were you working on Ensign?

17 A. I believe he was working on reaching a
18 decision-maker to set up a conference call.

19 Q. We'll come back to Ensign a little bit
20 later. When you get this information from Mr. Casey,
21 from Broadridge, what do you do with it?

22 A. We assess it. It is a fluid process
23 and you make decisions as the information comes in.

24 Q. When you get these reports through

1 Broadridge, do you pay attention to who apparently has
2 voted for you?

3 A. Yes.

4 Q. Why is that important, if it is, in
5 terms of determining what you do next?

6 A. Well, we want to confirm, first of
7 all, that people have voted for us, particularly those
8 that we hoped would vote for us, and also once we know
9 that they voted for us, we'll then strategize and say
10 what next, how can we then achieve more votes.

11 We'll typically focus less on those
12 who already voted for us and focus more efforts on
13 getting votes from those who have not voted at all, or
14 those who voted against us.

15 Q. You anticipated my next question.
16 Part of what the Broadridge reports tell you, and what
17 Mr. Casey would tell you, would be who has not voted
18 at all as of a particular date, right?

19 A. Yes.

20 Q. Why is that information important to
21 you? How does that affect your decision of what to do
22 next?

23 A. Well, those are votes that, if you can
24 reach a decision-maker and get them to make their

1 vote, that only helps you towards winning an election.

2 Q. You also receive information, it looks
3 like here, from Mr. Casey as to people who have voted
4 against you. How does that work into your calculus of
5 what to do next in an election?

6 A. Well, we have to assess -- it depends
7 on that particular shareholder. There are
8 shareholders that we know with fairly good conviction
9 are simply against us, and we won't be able to get
10 them to change their vote, and it's not easy to get
11 someone to change their vote, but it is possible.

12 So we'll assess. And shareholders
13 that might be on the fence or in many cases -- because
14 typically, the incumbents or the companies have filed
15 their proxy first. They do their mailings first to
16 shareholders. They start getting votes first. And
17 they also start soliciting for votes first.

18 So, often times, someone will have
19 voted for the company when we haven't even contacted
20 them yet. They haven't even received our materials.
21 So we'll want at least to give a chance for an equal
22 opportunity to speak with them and present our case.

23 Q. Why not spend all the time on all
24 those functions no matter what the Broadridge reports

1 say?

2 A. Well, there's a cost benefit.
3 We run a business. This is one of
4 many companies that we're invested into. And again
5 it's a fluid process. If we are winning by
6 50 percent, we're probably not going to spend a heck
7 of a lot of time soliciting. If we're losing by
8 50 percent, we're probably not going to spend a heck
9 of a lot of time soliciting. But we make the
10 judgments based on where we are in the election, what
11 votes we think we can sway, and it's a cost benefit.

12 Q. Let's talk about a couple of
13 shareholders who you did contact. We mentioned
14 briefly Ensign Peak. What was your contact with
15 Ensign Peak, and why did you believe you had an
16 opportunity to get their vote?

17 A. Well, they initially voted against us,
18 and we had never spoken with them. Our solicitors had
19 not reached them. So initially we did try to connect
20 with them.

21 It was later in the process when I
22 learned that Thomson Horstmann & Bryant, which is
23 Digirad's largest shareholder, they had indicated
24 support for us, and Thomson had indicated that Ensign

1 Peak was one of their clients, and I had not known
2 that.

3 At that point, I asked, well, how come
4 it shows their votes are against us. Their portfolio
5 manager, Chris Cuesta, informed me that Thomson
6 Horstmann manages the investment or decides which
7 companies to invest Ensign Peak's money into. But the
8 account was held by Ensign Peak, I believe as a
9 managed account. And Ensign Peak actually made the
10 vote, but typically at the recommendation of the
11 manager.

12 I asked about that, and he said, well,
13 it looks like they voted the wrong way, and we had
14 expected and intended or hoped that they would come
15 back and vote towards us.

16 Q. Did Mr. Cuesta's preference for Red
17 Oak have any influence in subsequent activities you
18 took with respect to Ensign Peak?

19 MR. FLEMING: Objection, Your Honor.
20 I think this line of questioning is subject to a
21 hearsay objection at this point. What Thomson
22 Horstmann or Mr. Cuesta said is pure hearsay.

23 MR. WAKE: That would be true except I
24 was only asking about what actions he was taking with

1 respect to Ensign Peak, whether or not what Mr. Cuesta
2 told him was true.

3 THE COURT: If we're explaining why he
4 did what he did, that's fine.

5 THE WITNESS: Can you repeat that
6 question please?

7 Q. Sure. Did the fact that Mr. Cuesta
8 seemed to favor Red Oak have any effect on your
9 subsequent activities with respect to Ensign Peak?

10 A. Yes.

11 We did not try and contact them
12 initially once he informed me of that because he
13 indicated that he would be consistent with how he had
14 voted on those votes that he did control internally
15 when he voted for Red Oak. He indicated that on his
16 managed accounts, he would be seeking to insure that
17 they also voted for Red Oak, Ensign Peak being one of
18 them.

19 Q. Did you have contact with someone at
20 Perkins Capital?

21 A. I did; Dick Perkins, the portfolio
22 manager.

23 Q. Can you briefly describe that history?

24 MR. FLEMING: Objection. Hearsay,

1 Your Honor. He's about to tell us what Mr. Perkins
2 said to him about conversations he had with my
3 clients, and it's hearsay.

4 MR. WAKE: I'll rephrase the question.

5 Q. What did you tell Mr. Perkins when you
6 contacted him?

7 A. Sure.

8 So I didn't directly contact him. My
9 solicitor, Alliance Advisors, set up a call, and they
10 were on that call with me. We talked about the proxy
11 contest, about the company, and I presented the same
12 arguments that we had listed in our proxy about why we
13 thought change was important, about our concerns about
14 the current board, and why we thought our slate could
15 improve shareholder value.

16 Q. Did Perkins, at one time thereafter,
17 switch its vote from management to Red Oak?

18 A. It did. He had conveyed to me that he
19 was not happy with either side.

20 MR. FLEMING: Objection. Hearsay,
21 Your Honor.

22 Q. Just to your knowledge, he changed his
23 vote to Red Oak?

24 A. After that call, he did.

1 Q. Getting ahead of ourselves a little
2 bit, did he thereafter again change his vote back to
3 management?

4 A. He did.

5 Q. Let me direct your attention to
6 mid-April. Did there come a time when you learned
7 that a large block of shares had been voted for the
8 management slate by the custodian, Raymond James?

9 A. Yes, my solicitor at Alliance informed
10 me of that.

11 Q. Did you ask Mr. Casey to do anything
12 in response to learning that information?

13 A. I asked him to find out who the
14 shareholder was.

15 Q. Why did you want to know who the
16 shareholder was?

17 A. Because it was a lot of stock, and we
18 didn't know who it was, and we wanted a chance to
19 speak with that shareholder and present our case so we
20 had an equal chance to provide information and gain
21 their vote.

22 Q. As April wore on, did you ever get any
23 feedback from Mr. Casey as to who owned those shares
24 at Raymond James?

1 A. No, he could not find out who owned
2 it.

3 Q. I direct your attention to Exhibit 74
4 please. If you would look at the second page, the
5 last email entry in the chain is from Peter, Peter
6 Casey to you in which he points out "that the current
7 board has received a lot of voting support, 1,232,040
8 shares through broker Raymond James & Associates. Do
9 you have any contacts there? Maybe they can help us
10 identify those votes."

11 Was that part of that process of him
12 trying to find out, you and him, trying to find out
13 the beneficial owner of those shares?

14 A. Yes.

15 Q. You responded to him at the very top,
16 "Who else do you think voted with them and which
17 holders are at R. James?" What were you asking there?

18 A. I was trying to understand who at
19 Raymond James owned the stock.

20 Q. If you look at the first page please.
21 He responds to you on April 25th. That's a Thursday,
22 April 25th, about 8 days before the election, right?

23 A. Yes.

24 Q. He responds to you in the third

1 paragraph, "We do not know which holders used Raymond
2 James." He goes on to explain more.

3 As of that time, did you have any
4 information as to the actual owners of the 1.2 million
5 shares that had been cast by Raymond James for
6 management?

7 A. No.

8 Q. Why was that 1.2 million important to
9 you?

10 A. It was a lot of stock. It would have
11 made them the third or fourth largest shareholder of
12 the company.

13 Q. This email that we've been looking at,
14 Exhibit 74, is dated April 25th. Where were you -- in
15 your view, how did the election look in late April?

16 A. We were down a fair amount. I think
17 we were down 22 percent or thereabouts.

18 Q. At this time, were you trying to make
19 contact with another shareholder, the Dimensional
20 Fund?

21 A. I was. We had what I called an "in,"
22 meaning an in-road towards reaching decision-makers,
23 and that was through a mutual contact that I had with
24 the founder of Dimensional.

1 Q. How large was Dimensional?

2 A. I don't know. They're extremely
3 large, at least 10 billion.

4 Q. That was a poor question. How much
5 Digirad stock did they own?

6 A. They were a top five holder, more than
7 5 percent of the company.

8 Q. Did you have optimism in late April,
9 notwithstanding the large deficit, at least as to
10 Dimensional or what your prospects would be with
11 Dimensional?

12 A. We always thought that we would get
13 their vote, although in the vote counts that came
14 through, we were fairly certain that they had voted
15 with the company automatically because when I assessed
16 it, they recommended to vote with the company, but we
17 were optimistic is the way I would phrase it. We were
18 optimistic that we would be able to speak with a
19 decision-maker, present our case, and get them to vote
20 to us.

21 Q. You mentioned that they had about
22 5 percent, but are you saying that they had already
23 voted for -- voted that 5 percent for management?

24 A. Yes.

1 Q. So that if you were able to switch
2 them, it's a net gain of 10 percent?

3 A. Yes.

4 So from our view, the Broadridge
5 reports, which we relied on, did indicate we were down
6 by 22, but from our view, we were going through the
7 contest, and we had to, as though if we're going to
8 win this, that we're getting Dimensional and we will
9 reach a decision-maker because we have a good chance
10 to do so and present our arguments, and that really
11 we're really down by 12 percent, and that's what we
12 had to overcome.

13 Q. So even if you optimistically assume
14 you get Dimensional in the last week, you're down
15 about 12 percent. What was your sense of how likely
16 it was to overcome a 12 percent deficit?

17 A. That was a challenge, and the reason
18 it was a challenge was there were some more votes that
19 would come in the last week, but generally speaking,
20 many people had voted, and we believed we'd be able
21 to -- again, it's a strategic decision as you get the
22 Broadridge reports that come in, and you make
23 decisions, and we would have -- at 12 percent, even if
24 we made several more calls and converted one or two,

1 maybe three other shareholders, we could make up a
2 decent bit of that. But we didn't estimate that we
3 could make up 12 percent.

4 Q. You mentioned earlier that if you're
5 ahead by 50 percent, you don't bother much and if
6 you're behind by 50 percent, you don't bother much.

7 As you went into that last week or
8 through that last week, how did it affect your use of
9 resources seeing that according to Broadridge you were
10 22 points behind, and at best 12 if you can convince
11 Dimensional?

12 A. Well, again, it's a fluid decision,
13 and it's not down 50, but -- we didn't give up on the
14 election. We still made calls. But the fluidity
15 comes, and you assess. If you're close, you'll tell
16 the -- you might make decisions by telling the
17 solicitor, "Hey, go make another round of calls. We
18 weren't overly active."

19 We didn't give the solicitor the full
20 green light to call every shareholder five times. And
21 that's not uncommon. We may say, "Call everyone.
22 Find me another couple percent." We may say certain
23 shareholders that we, frankly, didn't chase down after
24 the fact, including Perkins, who had flip flopped,

1 and, frankly, was fairly -- seemed to be wavering a
2 fair bit from our perspective. We didn't chase them
3 down because even if we won them, that doesn't make up
4 the 12 percent. So, yeah, it had an impact.

5 Q. You mentioned that you had a contact
6 that made you optimistic about Dimensional. Can you
7 explain how that played out in getting you an
8 opportunity to talk to someone at Dimensional?

9 A. Sure.

10 It wasn't until late stage, just a day
11 before the meeting, when Joe Chi -- and I had not
12 heard his name until, I believe, shortly before then,
13 but Joe Chi called me. He's someone I hadn't spoken
14 with before.

15 When I had a call with Dimensional
16 which was arranged through my solicitor, Alliance
17 Advisors, and Alliance was on that call a week or two
18 beforehand, they had two other individuals on that
19 call, not Joe Chi.

20 My understanding is Joe Chi was the
21 decision-maker. He called me, and it was a very brief
22 call. He actually was not even certain which company
23 we were talking about. But he was calling through the
24 mutual contact requesting that he do so. We talked

1 about Digirad.

2 Q. What did you say to him, if anything,
3 about Somerset?

4 A. I didn't mention Somerset by name to
5 him. We talked about the election. He admitted it
6 was late stage, and I asked him if it would be helpful
7 for him to talk to other large shareholders, including
8 one that had recently changed -- recently confirmed
9 that it was voting for us when initially we did not
10 think it was.

11 Q. What happened after that? What did he
12 say?

13 A. He asked if he could speak with them,
14 and I said I would facilitate, and later that
15 afternoon, I sent an email to introduce the two of
16 them, and I never spoke with him again.

17 Q. Could you turn to Exhibit 37 please?

18 A. Okay.

19 Q. You just mentioned that you sent an
20 email to introduce them. Is Exhibit 37 that email?

21 A. Yes.

22 Q. To the extent those two spoke, did you
23 participate in their conversation?

24 A. No.

1 Q. The two of them then -- we haven't
2 talked about Somerset, and I think I will right now.
3 Somerset was how large a shareholder?

4 A. They were the third largest
5 shareholder.

6 Q. So both Somerset and Dimensional were
7 top five shareholders?

8 A. Yes.

9 Q. Let's talk about Somerset. Who is the
10 individual at Somerset who runs, to your knowledge,
11 runs that investment?

12 A. Ross Taylor.

13 Q. What background did you have with Ross
14 Taylor, if any, before Digirad?

15 A. He had emailed me maybe seven months
16 or six months prior regarding another value microcap
17 stock that we owned publicly because we had publicly
18 filed a 5 percent plus position in ownership.

19 He dug out my phone number from
20 somewhere and my email, and he emailed me asking to
21 speak about it. I honestly didn't return that email.
22 But six, seven months later, when we had announced
23 that we were nominating potential directors for a
24 proxy contest and we saw Somerset was a large

1 shareholder, I reached out to him, replied to that
2 email and mentioned that, hey, he had contacted me and
3 let's talk.

4 Q. Six, seven months later being early
5 2013?

6 A. I think in March 2013. I think it's
7 after we submitted our nominating letter.

8 Q. Have you ever met Mr. Taylor?

9 A. No.

10 Q. Can you just generally describe what
11 your interaction was with Mr. Taylor at the outset,
12 say throughout March? We're talking about March and
13 April. But in March, what was your interaction with
14 Mr. Taylor?

15 A. Well, we talked about Red Oak's
16 stance, and I tried to present why I thought a change
17 was needed. We talked about the company a little bit.
18 I hadn't met the guy ever before. We had not spoken
19 on the phone until that month, so it was a little bit
20 of a "getting to know you."

21 Q. What part did he appear to play in
22 trying to forge a compromise between you and the
23 company's management?

24 A. He had stated very clearly that he did

1 not want to see a proxy contest if there was a way to
2 avoid it. He said that he would not support Red Oak
3 if Red Oak forced a contest and the other side was
4 willing to reach an agreement. But he would support
5 Red Oak if it was the other side that was unwilling to
6 be reasonable and Red Oak was willing to compromise.

7 He made it very clear that avoiding a
8 contest was important to him.

9 Q. Did he communicate to you the
10 substance of any communications that he was having
11 with management?

12 A. Later on he was -- as the contest
13 ensued, he would mention that he just spoke with Jeff
14 Eberwein or someone else, and he'd make little quips
15 and comments in an email to me, yes.

16 Q. Did you understand he was passing his
17 communications with you on to management?

18 A. He didn't tell me so, but I assumed he
19 might be.

20 Q. Could you take a quick look at Exhibit
21 13 please?

22 A. Okay.

23 Q. This is an email from Ross Taylor to
24 you dated March 25. Is this one of those emails where

1 he talks about promoting the foundations for a
2 settlement?

3 A. Yes.

4 Q. How did things change with Mr. Taylor
5 as the contest progressed through April?

6 A. Well, I think he was still hoping to
7 get to a settlement, and as it became clear that the
8 other side was not interested, he indicated his
9 support for us, I think even starting in late March.
10 And in our communications, he was supportive, but he
11 did not vote for us until the very late stage, which
12 kept us a bit nervous.

13 Q. How late did he actually vote?

14 A. April 23rd, 24th, 25th, but quite
15 late. Well, sorry, late for someone who had indicated
16 that he generally supported us.

17 Q. Now, did there come a time where he
18 told you that he was angry at some developments with
19 management?

20 A. Yes.

21 Q. You were not party to any of those
22 directly, his communications with management, which
23 caused him to be angry, correct?

24 A. Correct.

1 Q. Generally, what did he tell you had
2 caused him to express anger?

3 A. I think he had a few emails, including
4 maybe -- maybe I'm misrecollecting, but not being
5 happy with the buyback, but he certainly had one where
6 he felt that an improper offer had been made through a
7 broker by the company to him.

8 Q. Can you take a quick look at Exhibit
9 31 please?

10 A. Okay.

11 Q. This is an email of April 25 from Ross
12 Taylor to you, and the subject line is "an offer I did
13 refuse." Did you receive this from Mr. Taylor?

14 A. Yes.

15 Q. Did that relate to then what you found
16 out to be his view that some offer had been extended
17 to him?

18 A. Yes.

19 Q. Could you take a look at Exhibit 33
20 please?

21 A. Okay.

22 Q. Is this another email that you
23 received from Ross Taylor in which he discusses his
24 view about having an offer made to him.

1 A. Yes.

2 Q. Incidentally, speaking of Somerset and
3 Ross Taylor, did there come a time where you actually
4 shared with him specific information about the
5 Broadridge vote?

6 A. Yes.

7 Q. Could you take a look at Exhibit 32
8 please?

9 A. Okay.

10 Q. Is this the email where you passed on
11 specific voting information to him?

12 A. Yes.

13 Q. In the time line, when did you send
14 this?

15 A. This was after he finally had voted
16 for us, and it was clear that he was -- that he
17 supported us, and, frankly, we were done soliciting
18 him.

19 Q. Did you give him any of this data
20 before he had told you that he had voted for you?

21 A. No.

22 Q. In fact, in Exhibit 32, you told him
23 you were behind, right?

24 A. Yes.

1 Q. Did Ross Taylor ever call any
2 shareholders for you?

3 A. No.

4 Q. Did you ever ask him to call any
5 shareholders for you?

6 A. No.

7 Q. This Exhibit 32 does talk about
8 voting -- it reflects voting results. Why, in your
9 opinion, does it matter if one side, say the leading
10 side, does disclose to people where the preliminary
11 Broadridge results are?

12 MR. FLEMING: Objection, Your Honor.
13 This is opinion evidence and he's not an expert.

14 MR. WAKE: These are contestants, Your
15 Honor. He's allowed to testify why he would be
16 concerned about that issue.

17 THE COURT: Ultimately, the question
18 is why did Red Oak bother to file a complaint, and
19 that's one of the things I'm curious about, and it's
20 questions like this that will help me understand why
21 we are here today.

22 With that, I will allow the question.

23 A. I think there's two main reasons why.
24 One, if a vote is conveyed as being

1 lopsided, it can dissuade shareholders from voting at
2 all. You want shareholders to vote. You want as many
3 votes as possible because that's how you really get an
4 election to reflect the opinions of the true owners of
5 the business, the shareholders. And it's not just a
6 fraction of the shareholders, but you want as many as
7 possible. So that's one reason.

8 The second reason why is because it
9 can, frankly, pressure certain shareholders not to
10 want to vote against what's clearly the winning side.
11 That's really a more prevalent concern in smaller
12 companies and microcaps because there's no one -- you
13 have to make decisions when you're investing money,
14 which there's a pressure and responsibility to do so.

15 You have to make decisions responsibly
16 and after real diligence, learning about companies
17 that you have not learned about before. And the only
18 way to get that information when you're a smaller
19 company is by understanding through management.

20 You typically don't have any outside
21 banks or firms that cover you for research. So if I'm
22 investing in Microsoft, I don't need to speak to the
23 CEO because there's a lot of ways to learn about that
24 company.

1 But after 17 years, I've been doing
2 only small companies, and I would say less than
3 5 percent of my companies have any research coverage.
4 So it is very important to speak to management.

5 The problem here is that management --
6 there's no rules that say that they have to speak to
7 everybody. They get to choose who they want to speak
8 to and who they don't. That is common for them to
9 freeze people out on conference calls if they don't
10 like them and don't want them to ask questions.

11 They can frequently not reply.
12 Companies that I've contested or simply argued with,
13 they don't contact me back, and that affects how I
14 will act with them. This is really a very well known
15 thing within the industry and amongst small company
16 investors.

17 Q. If you have contact with a microcap
18 company, what are the kinds of questions, in general,
19 that you could ask them that you aren't going to get
20 from publicized research, because there isn't any?

21 A. Well, you're not asking for material
22 non-public information as to, you know, how is the
23 quarter doing and are you guys going to beat your
24 numbers. You're not asking that.

1 You're trying to learn about the
2 business, do diligence. You're asking can you tell me
3 more of the management team. You've got some limited
4 information in the bios, but what decisions did you
5 really make in your past employment and how did you
6 think and react to certain situations. Hey, I just
7 want to hypothesize in your industry if some of these
8 other things happen or these other companies are
9 coming into play, what are ways that you can defend
10 against competitive pressures.

11 Or can you tell me more about your
12 products and where do you source it from, and is there
13 a way to maybe streamline that process.

14 All of that learning about the
15 business is something that any investor, particularly
16 institutional investors, they need to learn about.
17 That's not material non-public information. That's
18 something that, frankly, any professional investor
19 does with a management team, and that's why management
20 teams meet with different investors.

21 Q. Is that a process you typically follow
22 with all your microcap companies?

23 A. Every company I've ever invested in.

24 Q. What is your concern about having

1 access to that kind of information if you are known to
2 a management team to have voted against them in an
3 election?

4 A. If you don't support them, they have
5 no reason or obligation to want to spend their time
6 speaking with you, and even -- I've had times when
7 I've owned a lot of stock, and there's no return phone
8 calls if they don't like what they're hearing. And
9 that's a balance that you have to really take.

10 Q. How does that then translate into
11 pressures in a proxy contest with a microcap company
12 in terms of who you vote for?

13 A. Well, if you're a shareholder and
14 you're being told by the company that "this is won,
15 we've got this one, it's a land slide," why would
16 you -- when their solicitor will ultimately be able to
17 root out how you voted and inform them of that, why
18 will you then vote against them?

19 They see that, and you now risk owning
20 a piece of this company but being shut off from any
21 access to information, or really being at a
22 disadvantage versus the general marketplace as to the
23 value of the company.

24 Q. You yourself have, at times, told

1 shareholders that you thought the election would be
2 close, right?

3 A. I did from the outset.

4 Q. Why did you do that?

5 A. Because I did think it would be close,
6 and I was asked my opinion, and that was my response.

7 Q. Had you ever heard any feedback about
8 what people were hearing from the company?

9 MR. FLEMING: Objection, Your Honor.
10 This sounds like it's all hearsay at this point.

11 THE COURT: I think that you're going
12 to have to ask the question differently. There may be
13 a way to get to what you're looking for.

14 Q. Why would you tell anyone that you
15 thought the election would be close?

16 A. Well, for one reason, I was hearing
17 from every investor that I did speak with --

18 MR. FLEMING: Objection, Your Honor.
19 Hearsay.

20 MR. WAKE: Your Honor, in the trial
21 briefs --

22 THE COURT: I have been fairly
23 flexible. It's the nature of a bench trial. As I
24 have indicated, I am very curious as to why we're

1 here, and maybe this is the way I'm going to have to
2 get to it.

3 I understand your concern. It's one
4 thing for "this is why we're here;" it's another thing
5 for "this is a fact" that has evidentiary purpose.
6 That's the distinction. At some level I can't give
7 you anything better than "you're going to have to
8 trust me on it."

9 MR. FLEMING: I just want to be clear,
10 Your Honor, to the extent there were communications
11 with the people who have been deposed or Dimensional,
12 Tyson Bauer and Ross Taylor, we have not been
13 asserting any hearsay objections because the
14 declarants are all available. It's the unavailable
15 people we object to.

16 THE COURT: I understand that. Thank
17 you.

18 BY MR. WAKE:

19 Q. Let me ask it this way, Mr. Sandberg.
20 Did you feel that you were attempting to discourage
21 people from voting by expressing the view that you
22 thought it would be close?

23 A. No. I was hoping to encourage people
24 to vote.

1 Q. We talked before, Mr. Sandberg, about
2 Raymond James. I'd like to return to that subject.
3 Did you ever find out, before the election, that
4 Raymond James held treasury shares?

5 A. No.

6 Q. Did you ever find out, before the
7 election, that Raymond James had voted treasury
8 shares?

9 A. No.

10 Q. Did you ever find out that the
11 Broadridge reports that you received every day or so
12 reflected about 1.2 million shares that were, in fact,
13 ineligible to vote?

14 A. No.

15 Q. Did you ever find out before the
16 election that the Broadridge reports overstated
17 management's support by 5 or 6 percent of the total
18 shareholder base?

19 A. No.

20 Q. When did you first find out that the
21 Broadridge reports were, in fact, misleading about the
22 votes cast for management?

23 A. After the election.

24 Q. I direct your attention to Exhibit 129

1 please.

2 A. Okay.

3 Q. Is this an email exchange you had with
4 Mr. Brooks, one of your nominees?

5 A. He replied to it, but I believe I sent
6 this to all of my nominees.

7 Q. In your email to him of May 3rd,
8 that's the date of the election, right?

9 A. Yes.

10 Q. So that's the afternoon after the
11 election was held in the morning?

12 A. Yes.

13 Q. You said to the addressees, "We lost
14 today by approximately 46 percent to 34 percent," when
15 I think we've stipulated in this case that the actual
16 vote was about 40 percent to 34 percent.

17 Why did you tell your nominees that
18 you had lost by a greater margin?

19 A. Because my knowledge and my reliance
20 was on the Broadridge information, which is what, in
21 my experience, I've always relied on during proxy
22 contests. That information indicated that we were
23 down by the 12 percent we talked about earlier.

24 Q. So even after getting Dimensional, you

1 thought you had lost by 12 percent because of the
2 misleading Broadridge reports that never changed.

3 A. Correct.

4 Q. Would it have been important to you to
5 know, prior to the election, that, in fact, you were
6 about 6 percent closer than Broadridge claimed you
7 were?

8 A. It was a game changer.

9 Q. Why is that important?

10 A. As I mentioned earlier, 12 percent --
11 when we assessed what votes we thought we could bring
12 our way, 12 percent at that stage seemed an
13 unrealistic hurdle. 6 percent is entirely different.

14 6 percent means we only had to change
15 votes of 3 percent or just achieve 6 percent in total.
16 A whole new slew of options would become available to
17 us. I could go to the solicitor and say, "Make those
18 calls. We held back. We didn't go for quite the same
19 iterations of calls for shareholders. Let's make
20 them. Get me 250 or 500,000 more votes."

21 Ensign Peak we didn't chase down. We
22 were of the belief --

23 Q. Let me interrupt you. How big was
24 Ensign Peak?

1 A. They were two and a half percent, so
2 just switching them would have made it a 1 percent
3 vote.

4 Q. By that you mean switching two and a
5 half percent is a 5 percent swing?

6 A. Yes. They had voted for management
7 slate, and we believed that they would have voted for
8 us.

9 Q. You talked before about how you had
10 had some discussions with Mr. Cuesta about Ensign
11 Peak, but you never contacted them directly, correct?

12 A. Correct.

13 Q. If you had known that you were within
14 6 percent, would you have reevaluated whether it was
15 worth the additional effort to contact Ensign Peak and
16 track down that vote?

17 A. Well, there's no question -- I would
18 have reevaluated, but there's no question we would
19 have made every effort to track that down because at
20 that point, we were quite confident that if we did
21 track that down -- and during proxy season, many firms
22 deal with a lot of votes.

23 It's a busy time. Sometimes
24 administrative delays and what-have-you do occur.

1 Certainly with Dimensional. But we felt they hadn't
2 necessarily been responsive until the very end when
3 they gave a phone call because, again, it's a busy
4 time period for everybody, including us.

5 But we would have tracked down Ensign
6 Peak, and we were confident we'd switch that vote and
7 then it's just a 1 percent game.

8 Q. Can you think of other specific
9 examples of where you might have had the most
10 opportunity to invest more effort in that last week
11 had you known you were really only within 6 percent?

12 A. Sure.

13 There were a lot of -- towards the
14 tail end of the top 20 holders, there were a lot of
15 holders that were between point two or point three to
16 one percent, and I was not very active trying to call
17 them because, again, in aggregate, they could not have
18 swung a 12 percent deficit we saw. I absolutely would
19 have been reaching out actively to them.

20 And in addition, Perkins Capital had
21 already flip flopped twice, and I never tried to
22 contact them after they switched back to management
23 because, again, with a 12 percent differential, I
24 couldn't get there. That's an easy call for me to try

1 and make at that stage.

2 Q. Would you turn to Exhibit 83 please?

3 A. Okay.

4 Q. After the election and after you
5 learned that, in fact, you were closer than the
6 Broadridge reports indicated, did you then get more
7 curious about what happened with Ensign?

8 A. I did, because I was under the belief
9 that they were switching their vote to us.

10 Q. In fact, it didn't happen.

11 A. Correct, and we had not chased that
12 down as we've discussed.

13 Q. Let me shift gears a little bit,
14 Mr. Sandberg. I direct your attention to -- strike
15 that.

16 Did you see the company's earnings
17 release of May 6, 2013?

18 A. Yes.

19 Q. Would you turn to Exhibit 188 please?

20 A. Okay.

21 Q. This is a form 8-K which includes a
22 copy of the press release. Did you see the earnings
23 release issued published by the company on May 6,
24 2013?

1 A. Yes.

2 Q. Did you see it that day?

3 A. Yes, I believe so.

4 Q. Can you describe what struck you as
5 most notable about the earnings release?

6 A. Well, it was a surprising result. It
7 was much poorer than the prior result, and therefore,
8 it was a surprise to me and to those investors that I
9 spoke with.

10 Q. Can you point to those disclosures in
11 the earnings release itself that you thought were the
12 most negative?

13 A. Well, the revenue had declined sharply
14 which was in stark contrast to the prior quarter. And
15 the gross profit had declined significantly.

16 It was down 900,000 versus the prior
17 year quarter, whereas in the immediately preceding
18 quarter that the company had announced, the gross
19 profit had increased significantly year over year.

20 Q. Are you looking at the figures on what
21 is noted as page three of 12 in Exhibit 188?

22 A. Yes.

23 Q. There's a summary in bold print that
24 says "First Quarter 2013 summary." I take it the

1 second bullet point regarding gross profit is the one
2 you were just talking about?

3 A. Yes.

4 Q. So if it declined percentage-wise, how
5 big of a decline is that in the revenue declines from
6 3.7 million to 2.8 million?

7 A. It's a 24 percent decline, and that
8 wasn't just year over year, but it was also a huge
9 decline from the prior quarter that they had announced
10 just about two months prior.

11 Q. Does the earnings release, Exhibit
12 188, attempt, as far as you could read, to attribute
13 any of those declines in revenues and profits to
14 restructuring expenses that the company had incurred?

15 A. No.

16 As is customary with public company
17 reporting, you will separately discuss the
18 restructuring charges because you want to segment them
19 out as one time so that investors can understand how
20 the business performs. So the third bullet indicates
21 excluding the 1 million in expenses incurred related
22 to restructuring.

23 Q. The third bullet talks about net loss.

24 A. Yes.

1 Q. That does address restructuring
2 expenses.

3 A. Right. But the restructuring does not
4 affect the revenue, or, to my knowledge, the gross
5 profit listed here.

6 Q. Why are these numbers important?

7 A. Shareholders know that a restructuring
8 is occurring. The company has made statements about
9 taking costs out. So, frankly, that's one of the
10 reasons we invest, is that we expected the business
11 could be improved. So that part is known.

12 But the lack of health on both the top
13 line and the gross profit level is material, and that
14 wasn't known. Just the prior quarter they actually
15 pre-released results when they're positive. But in
16 this case, they released them later than we certainly
17 expected.

18 Q. When you say "top line," are you
19 referring to the total revenue?

20 A. I am.

21 Q. Had you seen any disclosures by the
22 company prior to May 6th to indicate that the revenue
23 and the gross profits for the first quarter would
24 decline?

1 A. No.

2 Q. Incidentally, I forgot to ask you,
3 Mr. Sandberg, we mentioned ISS. This goes back to the
4 vote part of this case. Did you consider getting the
5 endorsement or the recommendation of ISS to be
6 important?

7 A. Yes.

8 Q. Did you tell people after the election
9 that you lost because of ISS?

10 A. I sent that email to my nominees and
11 also to the solicitor highlighting that as a key
12 reason we lost.

13 Q. Let me direct your attention to
14 Exhibit 129.

15 A. Okay.

16 Q. This is an email we looked at before
17 to Mr. Brooks, one of your nominees in which you
18 indicated to him on May 3rd, "Ultimately we lost due
19 to losing ISS." Is that true?

20 A. Yes. It's one of the reasons we lost.

21 Q. Is there a single reason that you lose
22 an election?

23 A. No. This was a close election.
24 There's several reasons why we lost.

1 Q. Do those reasons include what we've
2 talked about this morning?

3 A. Yes.

4 Irrespective of those other reasons,
5 had I gained ISS's support, I believe we would have
6 won. Conversely, without ISS's support, had we known
7 that -- had we known that the vote was closer than the
8 information we were receiving and we had pushed
9 harder, I think we would have won.

10 Q. I note that this statement you made
11 regarding losing due to losing ISS is on the afternoon
12 of May 3rd. On the afternoon of May 3rd, had you yet
13 learned about the fact that the treasury shares had
14 been voted?

15 A. No.

16 Q. I'm sorry; not that the treasury
17 shares had been voted, but that they had been included
18 in Broadridge's reports.

19 A. I don't know if I learned of that on
20 May 3rd. I thought that I learned of it after the
21 election from Peter Casey. But I'm not sure. It
22 certainly was after the election.

23 Q. Had you seen the earnings release for
24 Q-1 when you wrote Exhibit 129?

1 A. No. At the time that I wrote this
2 email, I did not know about the earnings, and I did
3 not know about the treasury shares. This was based on
4 the Broadridge results that I had received.

5 Q. Let me shift gears, Mr. Sandberg, to
6 the tax benefits preservation plan. Can you take a
7 look at Exhibit 195 please?

8 A. Okay.

9 Q. Is this the announcement that the
10 company had adopted a tax benefit preservation plan?

11 A. Yes.

12 Q. Can you generally describe the
13 difference between an NOL rights plan and what is
14 sometimes called a poison pill rights plan?

15 A. Based on my experience, a poison pill
16 is meant to dissuade hostile takeovers and is
17 typically set such that no shareholder can exceed 20,
18 sometimes 15 percent ownership without the company's
19 permission or simply as a hard stop.

20 Digirad, in fact, has such a plan to
21 restrict anyone from owning too much stock under a
22 poison pill.

23 Q. In terms of those percentage
24 limitations, how did that differ with an NOL rights

1 plan?

2 A. An NOL rights plan is intended to
3 preserve the tax loss carry forwards, and per I.R.S.
4 Section 382, governing change of control and
5 limitations on those carry forwards, once shareholders
6 own more than 4.9 percent, there's risk of a change of
7 control. So an NOL rights plan will limit -- often
8 limit shareholders to owning less than 5 percent.

9 Q. I'm sorry. I asked you this at the
10 outset. How many companies are you on the board of
11 directors which adopted NOL rights plans?

12 A. I am on the board of --

13 Q. Evaluated or adopted.

14 A. Three.

15 Q. Can you just generally describe the
16 process you've observed in the companies in which you
17 are on the board of directors for how an NOL rights
18 plan is evaluated and adopted?

19 A. Well, procedurally, I've generally
20 been the one taking the reins and running that
21 process, and you engage a firm. You have to do a
22 Section 382 study.

23 There's often what's called a SRLY
24 Study which relates to an entity if -- there can be

1 different entities in an organization and it may have,
2 at that time, tax losses. Another may have the
3 operations. You need a study to insure that you can
4 use the losses versus that other entity within the
5 company.

6 You get the analysis back from the
7 provider, and that typically can take a week or two
8 weeks to do. A week is actually very short. The
9 board will then review it and then go back to the
10 provider with a scenario analysis, and that scenario
11 is, well, based on what you're telling us, if we want
12 to issue equity to raise capital or for an
13 acquisition, or if these current shareholders who own
14 more than 5 percent, if they sell, which can also
15 potentially do a change of control, what does that do
16 to us.

17 And the tax provider will then
18 reanalyze and send it back. The board then makes a
19 decision on how they want to proceed. And then you go
20 to legal drafting. It's a fairly long, complex
21 document that takes some time. It comes back for
22 review by the board, at which time, if there are no
23 further comments, it will adopt the plan.

24 Q. Is it fair to say there are some

1 advantages to rights plans?

2 A. Yes. I've supported them in several
3 instances.

4 Q. And sometimes certain shareholders
5 will oppose them?

6 A. Absolutely. Shareholders don't like
7 their rights being restricted, and my experience with
8 ISS -- and again, I have brought them into some of my
9 public companies on the consulting practice and asked
10 them this directly as well.

11 MR. FLEMING: Objection, Your Honor.
12 Hearsay on what he's told by ISS.

13 A. My experience is that it's frowned
14 upon by most investors, and by ISS.

15 Q. Do you believe it would be relevant
16 information to a voter, a shareholder voting on a
17 May 3rd election, to know what the company's plans
18 were regarding adopting the NOL rights plan that it
19 adopted three weeks later?

20 A. They would want to know about it
21 because it's material.

22 Q. Incidentally, I'm sorry. We spoke
23 briefly about the earnings release. What did you
24 observe happened to the stock price of Digirad after

1 the May 6th earnings release?

2 A. It dropped for four consecutive days.

3 MR. WAKE: Your Honor, I have no more
4 questions.

5 THE COURT: Thank you.

6 Let's take ten minutes.

7 (The Court recessed at 10:45 a.m.)

8 - - -

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

1 (The proceedings resumed at 10:57 a.m.)

2 THE COURT: You-all may know more
3 about this than I do, but if nothing else, it is
4 simply a heads-up and there's nothing to do about it
5 at this point.

6 My assistant got a phone call from a
7 Michael Gold, who apparently represents Dimensional,
8 who indicates that there are some exhibits that have
9 been presented from Dimensional or involving
10 Dimensional for which he may be requesting
11 confidential treatment.

12 MR. FLEMING: We spoke with
13 Dimensional about that, Your Honor, and we're, you
14 know, fine with the confidential treatment. They have
15 their own privacy concerns about public disclosure in
16 how they make their decisions. And nobody here as
17 any -- we don't have any objection to it. I don't
18 think the plaintiff does, either.

19 THE COURT: I still have to live with
20 Rule 5.11. I had to look it up because I couldn't
21 remember whether it's only parties, but the rule says
22 "any person may." So that solves that problem.

23 Anyway, I don't have anything in
24 writing officially yet, but I thought I would share

1 that.

2 With that --

3 MR. FLEMING: My understanding, it's
4 very limited. We talked to them. I think it's just a
5 few exhibits we may be able to pull out, at the end of
6 the day so they may not be in the record, to avoid the
7 issue for everybody.

8 THE COURT: I was simply sharing what
9 I know. Obviously you know more about it than I do,
10 which is pretty much what I would have expected.

11 With that, you may proceed.

12 MR. FLEMING: Thank you.

13 BY MR. FLEMING:

14 Q. Good morning, Mr. Sandberg. Let me
15 ask you first about some of your testimony you gave on
16 Raymond James.

17 Now, you learned after the annual
18 meeting that shares had been voted that were treasury
19 shares held at Raymond James; correct?

20 A. Yes.

21 Q. Okay. Now, did it ever come to your
22 attention early on in the proxy contest that there was
23 an overhang in the vote?

24 A. I don't recall, and I'm not sure I

1 knew what that meant.

2 Q. Okay. Did it ever come to your
3 attention -- by the way, you're familiar with the --
4 the innerworkings of how votes are quantified and
5 tabulated; correct?

6 A. What do you mean by that?

7 Q. Well, you're familiar with DTC;
8 correct?

9 A. Yes.

10 Q. Okay. Did it ever come to your
11 attention that there were more shares within the DTC
12 system than were issued and outstanding?

13 A. I'm not sure.

14 Q. Okay. Does the term "overhang" in
15 your experience apply when there are more shares in
16 the DTC system than are eligible to vote?

17 A. That -- that's, in my experience, I've
18 not dealt with the term "overhang" with respect
19 to -- to contests. That's why I'm not that familiar
20 with what that would mean.

21 Q. Did Mr. Waheen [sic] or Mr. Casey of
22 Alliance ever tell you that the DTC number that was
23 recorded as eligible to vote included approximately
24 1 million treasury shares?

1 A. I don't recall them ever telling me
2 that before the election.

3 Q. Okay. I'd like to ask you to take a
4 look at Exhibit 90, if you would, please. It's an
5 e-mail exchange between your solicitor, Mr. Casey, and
6 the solicitors who were representing Digirad
7 incumbents, and InvestorCom. Do you have that in
8 front of you?

9 A. Yes.

10 Q. Could you take a look at the first and
11 second e-mail in the string, both dated April 8?
12 First one is from Michelle Frosch at InvestorCom to
13 Mr. Casey sending the requested Digirad files; do you
14 see that?

15 A. Yes.

16 Q. And that was the shareholder list and
17 the participants list and other information?

18 A. Okay.

19 Q. And do you see Mr. Casey responds,
20 "The record date DTC reflects 20,169,852 shares and
21 the share outstanding is 19,266,685, as per DRAD's
22 proxy statement. Can you explain why the difference?
23 Is it treasury shares?"

24 And you see Mr. Jaffe's response,

1 "The overhang in DTC is in fact due to treasury
2 shares"?

3 A. Yes, I read that.

4 Q. Yeah. Did Mr. Casey or Mr. Waheen
5 [sic] ever share that information with you at this
6 point in the process?

7 A. Not to my recollection.

8 Q. Now, let me also ask you to take a
9 look, if you would, at what's Exhibit 89. And, again,
10 this is more e-mail exchange between the same two
11 parties. And there's an e-mail at the bottom of the
12 first page of 89 from Ms. Frosch at InvestorCom to
13 Mr. Casey saying, "You are correct. 1,073,641 to be
14 exact are treasury shares and should be backed out of
15 the DTC number." Do you see that?

16 A. I do.

17 Q. Is it your testimony that Mr. Waheen
18 [sic] and Mr. Casey never told you that there were a
19 million-plus treasury shares in the DTC number that
20 had to be backed out?

21 A. I don't recall them telling me that.
22 But can you clarify? When you're saying "backed out,"
23 backed out from where?

24 Q. The --

1 A. From the total shares that were
2 eligible to vote?

3 Q. Shares reported on the DTC run.

4 A. I don't recall. They may have told
5 me, but I don't recall that.

6 Q. The DTC run gave you a list of all the
7 participants and the amount of shares of each
8 participant; correct?

9 A. Right.

10 Q. And the participants are clearing
11 brokers, by and large, who are holding shares --

12 A. Right.

13 Q. -- for their institutional and retail
14 customers; correct?

15 A. Right.

16 Q. And the DTC list will have a bottom --
17 a number at the bottom that sums up all of the
18 participants' holdings to a grand number?

19 A. Correct.

20 Q. Correct?

21 And is it your testimony that
22 Mr. Waheen [sic] and Mr. Casey at Alliance never told
23 you that that total number included 1,073,641 treasury
24 shares?

1 A. I don't recall, but I don't think that
2 would matter, because that's not how the shares --
3 that doesn't indicate what shares voted. That's just
4 if the company had treasury shares and there's some
5 error, maybe it would show there; but it had nothing
6 to do with the shares voted.

7 Q. Well, you were looking at the DTC run;
8 right?

9 A. I was focusing on the summary
10 tabulations which were who voted. I cared about who
11 voted, what the vote counts were.

12 Q. And you also looked to see what shares
13 weren't voted because that was a pool of votes you
14 could bring in to your side?

15 A. Right. And that's why we tried to
16 chase down the Raymond James shares to understand
17 where they were.

18 Q. It's your testimony that you did not
19 understand that that DTC number you were looking at,
20 the for, against, and unvoted, included somewhere a
21 million shares of treasury stock.

22 A. Yeah, I don't recall before the
23 election.

24 Q. Now, you did know before the election

1 that there was a buyback campaign being run out of
2 Raymond James.

3 A. Yes.

4 Q. Okay. And it never occurred to you
5 that the buyback program at Raymond James was
6 accumulating and accountable for the treasury shares?

7 A. No, because you had a million -- over
8 a million shares that were showing as, you know, what
9 we've now found are treasury shares, but a million
10 shares that were Raymond James. Raymond James, from
11 the little we had heard, which was from traders -- or
12 what I put in my deposition -- and from other people
13 telling me, Raymond James was handling the trading but
14 was quite inactive.

15 So my view, based on the volume that
16 had been trading, there was no way that Raymond James
17 could have bought a million shares or anywhere near
18 close to that by that time period. So there's no
19 connection whatsoever between a 1.2 million share
20 number and treasury shares at Raymond James.

21 Q. Am I correct it's your testimony that
22 you weren't -- because you weren't aware of it, you
23 weren't looking for a million treasury shares inside
24 the DTC number?

1 A. We weren't trying to solicit a million
2 shares of treasury shares, no.

3 Q. In the DTC total numbers you were
4 looking at, your testimony this morning was that you
5 did not know that somewhere in there included a
6 million shares of treasury stock.

7 A. Yeah, I didn't focus on it, and I
8 wasn't --

9 Q. Okay.

10 A. -- looking at that.

11 Q. Having looked at these e-mails, do you
12 agree that your proxy solicitor certainly knew that
13 included in the DTC numbers was a million shares of
14 treasury stock?

15 A. Yes.

16 Q. Okay. Now, when shares are voted in
17 the DTC system or not voted -- I guess there are three
18 possibilities; correct? There could be three -- basic
19 possibilities: voted for management, voted for Red
20 Oak, or unvoted.

21 A. Yes.

22 Q. So you knew that if there were
23 treasury shares in the system, they weren't being
24 voted for you; correct?

1 A. I -- I assumed treasury shares were
2 not voted at all.

3 Q. Right. But you knew who was voting
4 for you, by and large.

5 A. We thought we did.

6 Q. Right. And you knew that you didn't
7 have a million shares of treasury shares voting for
8 you.

9 A. I knew neither side did.

10 Q. Right. Well, by process of
11 elimination, your proxy solicitors must have known
12 that the million shares were either not voted or voted
13 for management; correct?

14 A. Not correct.

15 Q. Okay. Why not correct?

16 A. Because I asked them specifically
17 "Where's Raymond James' shares?" And they had no idea
18 who the owners were, and they never mentioned once
19 that any treasury shares had been -- had been voted.
20 And after they found out, they were as surprised as I
21 was.

22 Q. But -- and in your conversations they
23 never told you, your testimony, that there was a
24 million treasury shares included in the DTC number

1 which was, on its face, too large.

2 A. They may have and I just don't recall.

3 Q. Okay. Now, the treasury shares -- you
4 gave some testimony earlier this morning about things
5 you say you did or did not do by looking at the vote
6 totals. You mentioned Ensign. Isn't it true that
7 when it came to Ensign, you were counting on Chris
8 Cuesta at Thomson Horstmann to vote those shares?

9 A. Initially, until we stopped
10 pressuring.

11 Q. Well, didn't Mr. Cuesta tell you that
12 he had done what was necessary to get the vote from
13 Ensign?

14 A. Yes. He was confident. He told me
15 that he had spoken with them and they were switching
16 the vote.

17 Q. Right. And, in fact, you told the
18 proxy solicitor after the contest that you had
19 Ensign's vote, and the solicitor said that's
20 incorrect.

21 A. Yes.

22 Q. And so the decision not to pursue
23 further with Ensign is because you had been reassured
24 by Mr. Cuesta that you already had that vote.

1 A. The decision at that time, which is
2 about a week in advance.

3 Q. And, in fact, you were telling people
4 up to right before the meeting that the vote was
5 close, weren't you?

6 A. I believe so.

7 Q. Right. And even the day before the
8 meeting, you were still soliciting votes, weren't you?

9 A. I spoke with Dimensional, yes.

10 Q. But you wanted to get Dimensional's
11 vote, and you were putting effort in because you
12 thought you had a chance of winning?

13 A. They returned my call later than I
14 hoped, and I absolutely wanted their vote.

15 Q. Okay. In fact, the overvote or the
16 voting of treasury shares at Raymond James had no
17 impact at all on the outcome of this contest, did it?

18 A. No. I testified to the contrary.

19 Q. Well, are you claiming that you lost
20 the election contest here because the treasury shares
21 were voted for management and included in these
22 tabulations?

23 A. No.

24 Q. Okay. Let me switch gears and cover

1 some -- basics of the contest.

2 You were calling shareholders on
3 behalf of Red Oak; correct?

4 A. Yes.

5 Q. And you also had your solicitors,
6 Mr. Waheen [sic] and Mr. Casey, placing calls.

7 A. I'm not sure if Mr. Waheed Hassan did,
8 but I believe Mr. Casey did.

9 Q. Over the course of the contest you
10 spoke to 10 to 20 shareholders?

11 A. 20 might be heavy, but 10-plus.

12 Q. Okay. And those shares included
13 Mr. Cuesta, who was at Thomson Horstmann.

14 A. Yes.

15 Q. They were the largest shareholder in
16 the -- in the -- in Digirad --

17 A. Yes.

18 Q. -- correct?

19 They also had some other managed
20 accounts that they controlled that added to their
21 share power?

22 A. To my knowledge, that was included in
23 their filings --

24 Q. Uh-huh.

1 A. -- but yes.

2 Q. And then you also spoke to Mr. Taylor.

3 A. Yes.

4 Q. Dimensional.

5 A. Yes.

6 Q. And gentleman named Tyson Bauer.

7 A. He wasn't a shareholder, to my
8 knowledge, but yes.

9 Q. And you also spoke to two other
10 shareholders, Mr. Moore and Mr. Perkins.

11 A. Yes.

12 Q. So you spoke to approximately five to
13 10 more shareholders besides those shareholders.

14 A. Yes.

15 Q. And the shareholders that you spoke to
16 were institutional investors; correct?

17 A. Generally. I received a few calls
18 from individual shareholders, including some small
19 ones, and I would speak with them.

20 Q. The ones you reached out to call were
21 the top 10 or top 20 shareholders who were
22 institutional players; correct?

23 A. Yes.

24 Q. Okay. And Mr. Casey also called some

1 of the institutional shareholders.

2 A. Yes.

3 Q. Okay. And during the course of the
4 contest, isn't it true that you told one or more
5 shareholders that other specific shareholders had
6 voted for the Red Oak slate?

7 A. I don't recall.

8 Q. Okay. Well, isn't it a fact that you
9 told Dimensional that Somerset was now voting for you?

10 A. Yes.

11 Q. So in your --

12 A. Yes.

13 Q. -- experience and judgment, it was not
14 improper to say "This particular shareholder has voted
15 for me"?

16 A. I didn't tell Dimensional that.

17 Q. Did you tell anybody else?

18 A. I think the -- the document, we saw --
19 the e-mail we saw where I provided the -- my estimate
20 of the votes to -- to Somerset.

21 Q. Right. And -- and you also shared
22 with Somerset specific percentages as to where the
23 votes stood; correct?

24 A. Not per the Broadridge tabulations but

1 to where I estimated the votes would be.

2 Q. Right. So you told Somerset -- and
3 the e-mail's in evidence -- something to the effect of
4 "We have direct confirms from 34.18 percent are
5 awaiting a 5 percent holder, Dimensional, usually ISS,
6 but we think we will a real shot. Estimate at least
7 2 percent for noninstitutions."

8 That was something you shared with
9 Mr. Taylor.

10 A. I believe so, yes.

11 Q. And Mr. Taylor was someone who you
12 knew who had been in the Digirad stock as an investor
13 for over a year; correct?

14 A. I didn't know over a year.

15 Q. Well, you knew he had a 13G on file?

16 A. Yes.

17 Q. So other investors could easily find
18 out that Mr. Taylor at Somerset was a major
19 shareholder; correct?

20 A. Yes.

21 Q. And you knew that Mr. Taylor talked to
22 other shareholders on a regular basis, didn't you?

23 A. I didn't know which other shareholders
24 he talked to, but I presumed he talked to at least

1 one.

2 Q. And you gave Mr. Taylor these
3 percentages, and you never said to him, "This is on
4 the QT. Don't tell the other shareholders"?

5 A. I did not tell him anything about
6 disclosing it.

7 Q. Right. And, in fact, you did also
8 tell Mr. Taylor that with a few more votes, you were
9 going to win the contest, didn't you?

10 A. I don't recall if that's my wording.

11 Q. Well, take a look at Exhibit 32. It's
12 an April 26 [sic] e-mail.

13 A. Okay.

14 Q. If you take a look at the last
15 sentence in your e-mail on that date to Mr. Taylor,
16 you say, "That said, if we get a few of the above then
17 we should have this"; correct?

18 A. Yes.

19 Q. And when you told Mr. Taylor that
20 "with a few votes you would have this," you weren't
21 trying to pressure him or create some sort of
22 bandwagon effect, were you?

23 A. No.

24 Q. And didn't you also tell Mr. Bauer

1 that you were going to win the election?

2 A. Maybe earlier on.

3 Q. You didn't tell Mr. Bauer -- when did
4 you tell Mr. Bauer that you were going to win the
5 election?

6 A. I don't recall telling him, but -- I
7 don't know if you've got an e-mail that says
8 otherwise.

9 Q. Let me read you Mr. Bauer's testimony,
10 if I could, and see if it refreshes your recollection.

11 I'm reading from Mr. Bauer's
12 transcript at page 95, lines 16 to 24.

13 "Is there anything further that you
14 recall Mr. Sandberg said to you on the subject of the
15 vote count or where the vote stood before the contest,
16 before the actual vote was taken?"

17 "Answer: He shared in my skepticism
18 of their," meaning Digirad management's, "portrayal of
19 hard numbers.

20 "Question: Anything further?"

21 "Other than that they still thought
22 that Red Oak was going to win."

23 Is that what you told Mr. Bauer, that
24 you thought Red Oak was going to win?

1 A. When you say "still," what time period
2 are you referring to?

3 Q. This is about the time period when you
4 had the -- Mr. Taylor called you the week of
5 April 22nd.

6 A. I thought the deposition you just read
7 indicated that before the election. And before the
8 election we did think we'd win, which is why we
9 pursued the contest.

10 Q. Right. Well, you recall there was a
11 time when Mr. Taylor told you that he had received
12 some vote totals or vote predictions through
13 Mr. Bauer --

14 A. Right.

15 Q. -- from Mr. Gillman?

16 A. Uh-huh.

17 Q. At that point in time didn't you tell
18 Mr. Bauer that you were skeptical of those numbers and
19 that you thought that Red Oak was still going to win?

20 A. At that time, no. Earlier in the
21 election or before we started the contest --

22 Q. Uh-huh.

23 A. -- yes.

24 Q. So if that's what Mr. Bauer testified

1 to, you disagree with him?

2 A. If he's testifying at that late date I
3 was saying that, then I disagree with that.

4 Q. Okay. Now, just so I understand what
5 you -- you think has an effect or doesn't have an
6 effect on voters, you say that it's okay for you to
7 tell voters or shareholders that "I expect the vote to
8 be close"; correct?

9 A. I think it's okay -- yes.

10 Q. And that's what you told people, that
11 "I expect the vote to be close."

12 You told Mr. Bauer that, didn't you?

13 A. Right.

14 Q. And you knew that Mr. Bauer was
15 somebody who spoke to other shareholders and had other
16 clients who were invested in Digirad.

17 A. I did not know he had other clients
18 invested in Digirad, and I did not know who he spoke
19 to.

20 Q. Right. You didn't know that
21 Mr. Bauer --

22 A. Except for Tyson Bauer.

23 Q. I'm sorry, Mr. Bauer.

24 You did not know that Mr. Bauer had

1 other clients invested in Digirad?

2 A. I knew that he had Somerset and
3 Thomson Horstmann Bryant as clients.

4 Q. Okay. Did you ever hear from him that
5 he had other clients who were invested in Digirad?

6 A. He didn't share with me any other
7 clients then.

8 Q. Okay. But you told shareholders that
9 you expected the vote to be close, and that's
10 something that you don't think causes any problems;
11 correct?

12 A. Correct.

13 Q. But you claim that it would be
14 unacceptable to say that "I expect that the vote won't
15 be close."

16 A. I think it would be unacceptable to
17 predict that you're clearly winning and trying to sway
18 votes that way.

19 Q. And it's your view it's okay to say
20 "The current vote is close." And, in fact, that's
21 what you told shareholders, isn't it?

22 A. I said, "We currently expect this to
23 be close."

24 Q. And you never said "The current vote

1 is close"?

2 A. If I did, I was only conveying our
3 expectation --

4 Q. Okay.

5 A. -- that it was close.

6 Q. And it's your claim that the
7 shareholders who heard statements that "I expect the
8 vote won't be close" were somehow pressured into
9 voting for management?

10 A. I'm not speaking definitively. I'm
11 saying that that's something that can absolutely
12 happen.

13 Q. Right. But is it true -- isn't it
14 true, that as you sit here today, you don't know a
15 single shareholder who allegedly heard these
16 statements and voted against Red Oak?

17 A. No, but I wouldn't.

18 Q. Right. Isn't it true that the
19 shareholders who told you that they heard these
20 statements all casted their votes for Red Oak?

21 A. Right. They're the only ones who
22 would tell us that.

23 Q. Right. But the shareholders who need
24 access to this due diligence and other information,

1 those would be the larger shareholders, wouldn't they?

2 A. They felt -- they clearly felt
3 strongly enough with our -- with the position and with
4 Red Oak's strength of its nominees relative to Digirad
5 that they were still willing to vote for change.

6 Q. So these statements had no effect on
7 the larger shareholders; is that your testimony?

8 A. I think it had an effect, and my guess
9 is that's why Somerset still made us wait so long
10 before casting their vote.

11 Q. Right. We'll get to Somerset in a
12 second.

13 Mr. Casey, he was also calling
14 shareholders on Red Oak's behalf; correct?

15 A. Yes.

16 Q. And did you talk to him daily
17 throughout the contest?

18 A. If not, then at least three times a
19 week.

20 Q. Okay. And isn't it true that
21 Mr. Casey never told you that he ever heard from any
22 shareholder that he spoke to that Digirad management
23 was talking about election results or vote count or
24 making some predictions?

1 A. He did not convey any separate
2 conversations that he heard that, no.

3 Q. And, in fact, you testified earlier
4 about the e-mail that you sent to your slate saying
5 "We lost due to ISS"; correct?

6 A. Yes.

7 Q. At that point when you sent that
8 e-mail, you had heard from the shareholders that you
9 were talking to about these alleged statements;
10 correct?

11 A. Yes.

12 Q. And you never said in your e-mail "We
13 lost due to these statements." You said, "We lost due
14 to ISS."

15 A. It was one obvious reason of many.

16 Q. Okay. But it's not in your e-mail, is
17 it?

18 A. I didn't list all the reasons. There
19 were several.

20 Q. In fact, you had another series of
21 e-mail exchanges with your proxy solicitor in which
22 you went through a list of factors that affected the
23 outcome of the election, didn't you?

24 A. Yes.

1 Q. And you identified, among other
2 things, how they had operated the phone bank and how
3 many votes they had gotten in through the phone bank.

4 A. Yeah.

5 Q. And your e-mail with your proxy
6 solicitor going with that list of factors doesn't
7 mention anything about Digirad management talking
8 about the vote count.

9 A. That -- correct.

10 Q. Let me just ask you a few other
11 questions about this vote count theory.

12 It's your testimony that when
13 shareholders vote, it's very unusual for them to
14 change their rote; correct?

15 A. It's not -- sure.

16 Q. Right. So to the extent a shareholder
17 had already voted and then spoke to Digirad
18 management, whatever they heard from Digirad
19 management wouldn't have any effect on them.

20 A. No. Well, what I testified earlier
21 was it's not as frequent, but it does happen.

22 Q. Well -- I understand. So, in fact, in
23 the course of this contest, you're aware of just two
24 shareholders whose votes were changed over the course

1 of the contest.

2 A. No. I think -- I think there's more
3 than that. I think that Cuesta changed over,
4 LASERS -- sorry. That's right. LASERS, Perkins back
5 and forth. And I thought there may have been some
6 other accounts that changed.

7 Q. And Dimensional changed as well,
8 didn't it?

9 A. And I'm sorry. And Dimensional.

10 Q. But the -- the only ones that changed
11 as a result of talking to you and getting the Red Oak
12 side of things were Perkins and Dimensional.

13 A. And the Cuesta accounts, the Thomson
14 Horstmann accounts.

15 Q. To the best of your knowledge, all the
16 other shareholders who cast their votes voted and did
17 not change.

18 A. Yes, including the ones we didn't call
19 on again.

20 Q. So to the extent those shareholders
21 voted before they'd even spoken to Digirad management,
22 the conversations with Digirad management didn't have
23 any effect on them at all.

24 A. True. I wouldn't know about that.

1 Q. And there were also some shareholders
2 who used the ISS service and would rely on ISS's
3 recommendation; right?

4 A. Syes.

5 Q. And there were some that will actually
6 give ISS their proxy to vote their shares?

7 A. Yes.

8 Q. In your analysis of the top 10 or top
9 20 shareholders, did you ever sit down and go through
10 and try to figure out which shareholders were relying
11 on ISS and which ones weren't?

12 A. I think my solicitors did that.

13 Q. Right.

14 A. I don't recall the analysis, but I
15 think they did that.

16 Q. And in connection with looking at the
17 impact of all these events, you claim, had on your
18 solicitation, did you ever go through and try and
19 figure out which shareholders were voting with ISS
20 because that's the way they were -- that's the setup
21 they had?

22 A. We didn't do a post mortem on that.

23 Q. Well, wouldn't the shareholders who
24 were subscribers to ISS and voting as a matter of

1 course with ISS, wouldn't those be ones that wouldn't
2 be affected at all by any remarks of the Digirad
3 management about the vote totals?

4 A. If they had already voted with them,
5 probably less so.

6 Q. Let me ask you some questions about
7 the call you say you had with Dimensional.

8 Dimensional was the fourth largest
9 shareholder; correct?

10 A. I believe so, yes.

11 Q. Okay. And are they what's sometimes
12 referred to as a quant. fund, meaning they're like an
13 index fund?

14 A. To my knowledge, yes.

15 Q. So they typically hold a portfolio
16 that's geared to having the top 100, top 600 or some
17 other designation.

18 A. I think in this case some other
19 designation, but yes.

20 Q. All right. And that's in contrast to
21 what you would call a managed portfolio, which is
22 somebody who tries to pick winners and losers and uses
23 their judgment to find undervalued companies and
24 invests accordingly.

1 A. Yes.

2 Q. Okay. And in this case you called up
3 Mr. Chi at Dimensional the day before the meeting;
4 correct?

5 A. No.

6 Q. When did you call Mr. Chi?

7 A. He called me.

8 Q. Okay. But you asked -- placed a call
9 to Mr. Chi and you received a return call the day
10 before the meeting.

11 A. I sent an e-mail to the general
12 corporate governance e-mail at Dimensional maybe two
13 or three days before just as a last follow-up, and
14 then he responded.

15 Q. Okay. You told Mr. Chi in that call
16 that Somerset had recently changed its vote for Red
17 Oak, didn't you?

18 A. No, I didn't identify Somerset. I
19 asked him if it would be helpful to him to speak with
20 a large shareholder that had recently confirmed its
21 vote for Red Oak.

22 Q. Didn't you, in fact, tell him that it
23 was a large shareholder who had recently changed its
24 vote?

1 A. No. What I said was it was a large
2 shareholder who had -- which had confirmed its vote
3 for Red Oak after initially being opposed to us.

4 Q. Let me read your deposition transcript
5 to you. It's at page 133, line 8. Starting at
6 line 4.

7 "Did you talk to Taylor" ... I think I
8 got the wrong ... Never mind. I withdraw the
9 question.

10 So you told Dimensional that Somerset
11 had initially supported management. Is that your
12 testimony?

13 A. I asked them if they wanted to speak
14 with the shareholder that had informed us that they
15 initially supported the other side.

16 Q. Right. And is it your testimony that
17 you never mentioned anything to Dimensional about any
18 sort of inducements or some suggested impropriety
19 between Digirad management and Mr. Taylor?

20 A. I don't recall mentioning anything
21 like that.

22 Q. Okay. You just told him that he had,
23 in your words, "recently just confirmed their vote for
24 us after initially early in the stage supporting the

1 incumbents"; correct?

2 A. Yes.

3 Q. But isn't it true that on March 28,
4 even before your proxy material was sent, you
5 considered Mr. Taylor to be with you, meaning Red Oak?

6 A. I hoped so, but prior to that I didn't
7 think he was.

8 Q. Well, you sent an e-mail on March 28th
9 describing Somerset as a top five holder "who is with
10 us"; correct?

11 A. Right.

12 Q. And that's because you believed he was
13 with Red Oak at that point.

14 A. Right. And the date I'm referencing
15 for Dimensional was that prior to that I didn't think
16 he was with us.

17 Q. Okay. And -- so when you were talking
18 to Dimensional, you were suggesting -- you didn't --
19 you were -- you were trying to leave -- I'm sorry.

20 Weren't you trying to leave the
21 impression that Mr. Taylor at Somerset had changed his
22 mind during the course of a proxy contest?

23 A. I had told him that it was a
24 shareholder that had confirmed. And the reason that I

1 relayed "confirmed" was because throughout --
2 certainly since March 28th, I was banking on and
3 really hoping and if I was going to win this contest,
4 I had to get Somerset and, frankly, I had to get
5 Dimensional, too; but -- so I was hoping that they
6 were with us.

7 Q. Okay.

8 A. However, the guy made us wait. He
9 didn't vote for the first two weeks after we filed, or
10 whathaveyou, until April 20-something when he actually
11 voted. So I didn't know if he was really with us
12 until he confirmed his vote.

13 Q. And -- but isn't it true that through
14 late March into early April he sent you e-mails in
15 which he was highly critical of the Digirad slate?

16 A. He did. And I just didn't know if he
17 was sending them e-mails critical of me and my slate.

18 Q. Didn't he tell you that -- in one
19 e-mail that some of the guys on the slate "might not
20 get their mothers to vote for them"?

21 A. That sounds familiar. I'd have to see
22 the e-mail, but --

23 Q. That sounds like the kind of thing
24 Mr. Taylor might say?

1 And did he also suggest that Mr.
2 Eberwein and Mr. Gillman were doing something with the
3 buyback that was to their personal advantage?

4 A. I don't recall.

5 Q. Right. But there was no doubt in your
6 mind throughout April that Mr. Taylor was supportive
7 of Red Oak; correct?

8 A. I was hopeful that he was throughout
9 the whole month.

10 Q. Right. And he never indicated to you
11 that he was going to vote for Digirad management
12 during the month of April, did he?

13 A. Well, you asked if there was no doubt
14 in my mind. And there was doubt in my mind as to
15 support, because he didn't vote for us until very
16 late.

17 Q. Right. Now, in fact, some of the
18 things that Mr. Taylor suggested to you in his e-mails
19 were actually part of the -- your -- your Red Oak
20 program; correct?

21 A. What do you mean by "program"?

22 Q. Well, didn't Mr. Taylor -- let's just
23 take a step back.

24 Digirad had a substantial amount of

1 cash for a company its size, approximately
2 \$15 million; correct?

3 A. I think it was closer to 27.

4 Q. \$27 million.

5 And one of the issues that the board
6 had to address was how much of that money to return to
7 shareholders, how it was returned to shareholders and
8 how much was used for acquisitions and to grow the
9 company.

10 A. Correct.

11 Q. Okay. And Mr. Taylor early on told
12 you that he wanted the Digirad board to return
13 \$10 million in, you know, prompt fashion to
14 shareholders.

15 A. That sounds pretty familiar.

16 Q. Right. And, in fact, when you made
17 your presentation to ISS under your plan, you included
18 your plan to return \$10 million to shareholders
19 through a tender offer, a dividend, or some other
20 fashion.

21 A. Correct.

22 Q. Okay. And that was in sync with what
23 Mr. Taylor had requested of you; correct?

24 A. He actually wanted more.

1 Q. Okay. But -- and when you did that,
2 you weren't doing anything improper to obtain the
3 support of Mr. Taylor, were you?

4 A. No.

5 Q. Okay. And, in fact, Mr. Taylor also
6 shared with you his criticism of the Raymond James
7 firm.

8 A. I'm not sure.

9 Q. Okay. Let me take a step back. The
10 company's buyback program during the contest, when the
11 contest was under way, was being run by a brokerage
12 firm called Raymond James.

13 A. Yes.

14 Q. Correct?

15 And did Mr. Taylor ever suggest to you
16 that he was critical of Raymond James in the way they
17 were handling the buyback?

18 A. I think he relayed -- I'm a little
19 foggy on this. I think he relayed some comment by a
20 trader named Clifton Gray, who then had approached me,
21 too. So he knew the trade on common. I think that
22 trader conveyed the same information about the
23 inactivity of the buyback.

24 Q. Right. And you're -- you sent out --

1 one of your fight letters to shareholders, you
2 actually included criticism of Raymond James,
3 suggesting that they weren't doing a first-class job.

4 A. Based on what the trader told me, yes.

5 Q. And when you did that, you weren't
6 doing anything improper to obtain the support of
7 Somerset or any other shareholder, were you?

8 A. I was trying to obtain the support of
9 every shareholder.

10 Q. Right. Right. And the proposals you
11 were making would affect all shareholders the same;
12 correct?

13 A. Yes.

14 Q. I just want to confirm. After you
15 spoke to Mr. Chi at Dimensional, you learned that he
16 had called Mr. Taylor directly; correct?

17 A. Yes.

18 Q. Mr. Taylor reported that back to you?

19 A. Yes.

20 Q. Okay. And Mr. Taylor was somebody who
21 you spoke to throughout the contest; correct?

22 A. We probably had 10 phone calls --

23 Q. Right.

24 A. -- through the contest.

1 Q. And at one point you sent him a list
2 of shareholder names and asked him if he could contact
3 any of them?

4 A. No.

5 Q. Well, didn't you ask him if he knew
6 any contacts, any of them?

7 A. I asked if he knew decision-makers
8 there --

9 Q. All right.

10 A. -- yes.

11 Q. And at some point you learned that
12 Mr. Perkins, after voting for Red Oak, had voted back
13 for Digirad management; correct?

14 A. Yes.

15 Q. And didn't you ask Mr. Taylor to call
16 Mr. Perkins to see if he could turn him around?

17 A. No.

18 Q. Well, didn't you ask him to call
19 Mr. Perkins?

20 A. No. I asked if he would speak with
21 him, just like I asked if he would speak with Mr. Chi.

22 Q. Right. And you didn't think when he
23 spoke to Mr. Perkins, that he was going to do that to
24 try and get a vote for Red Oak?

1 A. I asked if he would speak to him,
2 including to facilitate my being able to speak to
3 Mr. Perkins.

4 Q. Well, had you tried to call
5 Mr. Perkins back?

6 A. We didn't -- we did not at that time,
7 no.

8 Q. Right. Instead, you asked Mr. Taylor
9 to give him a call.

10 A. Yes.

11 Q. Right. And you did so because you
12 hoped that that would ultimately bring in a vote for
13 Red Oak; correct?

14 A. If I was successful with Mr. Perkins,
15 yes.

16 Q. And Mr. Taylor responded "I can chat
17 with anyone necessary on Monday"; correct?

18 A. Yes.

19 Q. And do you know if he ever called up
20 to -- to chat?

21 A. He did not.

22 Q. Okay. Let me switch gears here and
23 ask you a few questions about the Form 10-K.

24 You gave some testimony about the

1 gross revenue -- I'm sorry -- the growths margin and
2 the revenue figures; correct?

3 A. Yes.

4 Q. And isn't it true that the
5 first-quarter figures as compared to the prior
6 years' first quarters, the net loss from operating was
7 the same, once you excluded the restructuring charges?

8 A. I showed the net loss a hundred
9 thousand greater.

10 Q. Okay. But it was seven cents a share.
11 And you testified that the price went
12 down for four straight days after the 10-Q was
13 released; correct?

14 A. After the earnings were released --

15 Q. Right.

16 A. -- yes.

17 Q. Okay. And did the price thereafter go
18 up?

19 A. I believe it went up because they
20 became active in the buyback. And when I look at the
21 volume of trades, that seems to be the case.

22 Q. Isn't it true that this is just
23 speculation on your part, what's moving the stock
24 price up and down?

1 A. Right.

2 Q. Let me ask you a few questions about
3 the -- the net operating loss assets.

4 The company had a net operating loss;
5 correct?

6 A. Yes.

7 Q. And that was a significant asset for
8 the company; correct?

9 A. Potentially.

10 Q. And -- potentially.

11 In fact, the restructuring plan
12 contemplated that the company would at some point
13 become profitable and get some value from these net
14 operating losses.

15 A. They -- it did not indicate, to my
16 knowledge, profitability. They said they would
17 improve cash flow. Profitability depends on the
18 depreciation, amortization. And so even if you have
19 positive EBITDA of 3 to 4 million, if your
20 depreciation, amortization is 3 to 4 million and they
21 haven't -- they have some depreciation, amortization,
22 you might not be very profitable from the perspective
23 of utilizing the NOLs because you may not have
24 significant pretax income.

1 Q. But isn't the -- the company at this
2 point was losing money; correct?

3 A. Or around break-even.

4 Q. When you're operating in that fashion,
5 am I correct that you don't really get any advantage
6 from your net operating losses?

7 A. True.

8 Q. You need to have taxable income that
9 you can shelter or to get the value out of them?

10 A. The key isn't cash flow. The key is
11 pretax income.

12 Q. Okay. Fair enough.

13 And that's what the company was -- the
14 Digirad board was striving to achieve; correct?

15 A. They -- from all the communications I
16 saw, they were focused on cash flow. And I didn't see
17 any -- anything related to pretax income.

18 Q. All right. And in your experience,
19 it's not unusual for a board with a NOL, a valuable
20 NOL, to adopt a rights plan that's intended to protect
21 that asset; correct?

22 A. It is unusual, but I've done it.

23 Q. In fact, you, sir, currently on two
24 boards that have implemented NOL rights plans, NOL

1 preservation rights plans; correct?

2 A. I do.

3 Q. And you serve on another board that
4 has a rights plan, even though there is no NOL that's
5 being protected.

6 A. Correct, although I didn't support --
7 I don't support non-NOL rights plans.

8 Q. Uh-huh. During the course of the
9 proxy contest, you never made any statement or
10 assurance to the Digirad shareholders that you would
11 not be putting in a shareholder rights plan to protect
12 the NOL.

13 A. I didn't comment on it. I didn't
14 comment on a lot of things that were theoretical.

15 Q. Right. And during the contest, nobody
16 commented on your service on boards involving rights
17 plans or NOL rights plans; correct?

18 A. When you say "nobody commented," who
19 are you referring to?

20 Q. The Digirad slate did not criticize
21 you for your involvement with rights plans.

22 A. No.

23 Q. And the way these -- the rights plan
24 works is it -- am I correct that a 5 percent or more

1 shareholder -- I'm sorry. How the rights plan works
2 is that shareholders can't acquire more than 5 percent
3 of the stock; right?

4 A. Sure.

5 Q. And at the time of adoption, those who
6 are over the 5 percent level are grandfathered in;
7 correct?

8 A. Yes.

9 Q. And can't acquire any more.

10 A. Yes.

11 Q. So wouldn't it be fair to say that the
12 shareholders who are principally affected by the NOL
13 rights plan would be the shareholders who own more
14 than 5 percent?

15 A. No.

16 Q. Okay. Well, those are the ones who
17 are directly affected by it; correct?

18 A. Everyone is.

19 Q. Okay. And aren't the -- how is
20 someone who owns less than 5 percent affected when it
21 comes to buying some more stock?

22 A. Well, unless -- unless you're saying
23 it's okay to just cap anyone who's under 5 and just
24 tell them "No matter what you want to do, you're not

1 allowed to own more stock," there's an impact.

2 Q. Right. But the ones who own more than
3 5 percent at that point can't buy any more stock;
4 correct?

5 A. So you're referring to just who's not
6 allowed to buy a single share.

7 Q. Right.

8 A. You're right.

9 Q. Those are the ones who are directly
10 affected by the adoption of the plan and in terms of
11 they're prevented from adding to their totals;
12 correct?

13 A. Prevented from buying any additional
14 stock, yes.

15 Q. And in the case of Digirad, isn't it
16 true that all of the shareholders who owned more than
17 5 percent other than one voted for Red Oak?

18 A. Four of the five, yes.

19 Q. Right. And the one shareholder who
20 didn't vote for Red Oak was a company called
21 Heartland; correct?

22 A. Yes.

23 Q. And isn't it true that Heartland early
24 on in the contest released -- issued its own press

1 release in support of the Digirad board?

2 A. Yes.

3 Q. And you never bothered to call
4 Heartland to try and get their vote, did you?

5 A. Correct.

6 Q. You considered them, in effect, a sort
7 of lost cause?

8 A. Right.

9 MR. FLEMING: Can I just confer with
10 my cocounsel, Your Honor?

11 THE COURT: You may.

12 MR. FLEMING: Just one more question.

13 BY MR. FLEMING:

14 Q. One of the criticisms -- one of the
15 proposals that Red Oak had as part of its solicitation
16 was that it wanted to conduct a 382 study regarding
17 the NOL?

18 A. Right.

19 Q. Right. And did you read in the
20 Digirad management material that they already had
21 conducted a 382 study?

22 A. Yes.

23 Q. So you understood that as of the time
24 of the contest, Digirad management already had

1 someplace some form of a 382 study.

2 A. Yes. But it was dated.

3 Q. You say the -- their study was dated?

4 A. You have to do a most current study.

5 For instance, they didn't say the timing of this.

6 Now, Red Oak only went over 5 percent a little bit

7 before the contest. So our shares would impact that

8 study. So any study that they did would have to be

9 redone and refreshed. There's also public groups you

10 have to track. There's actually -- there's quite a

11 bit of complexity with this. And so it's a lot of

12 moving pieces.

13 Q. Did you have access to the Digirad NOL
14 study?

15 A. No.

16 Q. So when you're -- these deficiencies
17 you're citing, what are they based on?

18 A. It's all based on timing. If they had
19 it done at the very last moments of the contest, then
20 it would be more current.

21 Q. Right. Are these things -- can these
22 things be updated? If you have one, can you just
23 update when you got some information?

24 A. A week or so it can get updated.

1 MR. FLEMING: Your Honor, those are
2 the questions I have for Mr. Sandberg.

3 THE COURT: Thank you.

4 Mr. Wake, I have one question before
5 you get redirect.

6 BY THE COURT:

7 Q. If one is, for example, a Digirad
8 director and worried about the loss of the NOLs with
9 the operation of 382, what other strategies are
10 available to a board to protect those NOLs if there's
11 going to be a change of ownership around the 5 percent
12 number other than adopting a poison pill NOL or an NOL
13 poison pill?

14 A. The poison pill is -- is one key piece
15 of it. And, quite honestly, with respect to Digirad
16 -- I think I've said this before -- but I didn't
17 necessarily oppose the plan. What I opposed was not
18 disclosing it.

19 THE COURT: Mr. Wake.

20 REDIRECT EXAMINATION

21 BY MR. WAKE:

22 Q. I have only one question. You were
23 asked about your views and whether or not Digirad
24 should return capital to shareholders. Did you have

1 views about whether Digirad should return to
2 shareholders the capital before you ever communicated
3 with Ross Taylor?

4 A. Yes. And I had conversations with
5 Jeff Eberwein, the chairman of the board, about this.

6 Q. Had you expressed the views, later
7 reflected in your proxy statement, much earlier to the
8 effect that the company should return capital to
9 shareholders?

10 A. I did. I spoke with them before the
11 end of 2012 and asked "When is the dividend coming?"
12 I was disappointed that Pete almost gave them a shot.

13 Q. Your position in that regard had
14 nothing to do with Ross Taylor's position.

15 A. Correct.

16 MR. WAKE: Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. FLEMING: May I just ask one more
19 question, Your Honor?

20 THE COURT: You may.

21 RECCROSS EXAMINATION

22 BY MR. FLEMING:

23 Q. Could you take a look, please, at
24 Exhibit 54. It's a March 28 e-mail.

1 A. Okay.

2 Q. This is an e-mail that you received
3 from Mr. Taylor on March 28. This is the same day as
4 you sent your e-mail saying he was "with us"; correct?

5 A. Yes.

6 Q. And Mr. Taylor's relating to you a
7 conversation that he had with Digirad -- with Jeff
8 Eberwein of Digirad; correct?

9 A. It doesn't say with him, but I
10 presume, yes.

11 Q. Right. And in this e-mail Mr. Taylor
12 says, "Told them they needed to ensure" -- "assure
13 investors that they would return to us the
14 [10 million] in capital this year, and that the only
15 likely way to do that is to do a Dutch, which I would
16 take a shot at doing in the [\$2.60 to \$2.75] range
17 soon enough you can get back in if it fails."

18 So Mr. Taylor at that point was saying
19 \$10 million was his number; correct?

20 A. Well, it wasn't so much the
21 10 million. He wanted 10 million via a Dutch tender
22 offer.

23 Q. And you're one of the -- your proxy
24 materials and your presentation to ISS included the

1 \$10 million figure and the prospect of a possible
2 Dutch tender offer.

3 A. Right.

4 Q. Thank you.

5 THE COURT: Thank you, Mr. Sandberg.
6 You may step down.

7 (Witness excused)

8 MR. SEAMAN: Your Honor, by agreement
9 of the parties, I think we're still in plaintiff's
10 case in chief. We understand that -- correct me if
11 I'm wrong -- that plaintiff will be calling Mr. Grau
12 as the next witness; but pursuant to our agreement,
13 we'll present his direct first, followed by his cross.

14 THE COURT: That's fine. My read of
15 the pretrial order said that all of the other
16 witnesses that are plaintiff's witnesses, if I can
17 call them that, are going to be done through
18 deposition; is that correct, except for what you get
19 out of the witnesses controlled by the defendant who
20 you will be examining afterwards?

21 MR. WAKE: Yes, Your Honor.

22 THE COURT: Mr. Seaman, please
23 proceed.

24 MR. SEAMAN: So with that, we call

1 John Grau as our witness.

2 JOHN GRAU, having been first duly
3 affirmed, was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. SEAMAN:

6 Q. Good morning, Mr. Grau.

7 A. Good morning.

8 Q. Where are you employed?

9 A. InvestorCom.

10 Q. And what is InvestorCom?

11 A. InvestorCom is a proxy solicitation
12 firm.

13 Q. And what is your title at InvestorCom?

14 A. I'm the founder and president.

15 Q. Are you also an owner?

16 A. Yes.

17 Q. And how long have you been a proxy
18 solicitor?

19 A. 26 years.

20 Q. And of those 26 years, how many of
21 those have you been the owner of a proxy solicitation
22 firm?

23 A. 23.

24 Q. Okay. Mr. Grau, have you ever met

1 Mr. Sandberg before?

2 A. Not in person. We've spoken by phone
3 and have worked together.

4 Q. Why don't you explain to me how you
5 came to make Mr. Sandberg's acquaintance previously.

6 A. Sure. I met Mr. Sandberg a few years
7 ago via telephone introduction. I had never worked
8 with him on a proxy contest. However, David had
9 referred proxy solicitation business to me for
10 companies that are in his portfolio. And my direct
11 contact with those companies was with the management
12 team, not with Mr. Sandberg directly.

13 Q. Okay. And did you, in fact, end up
14 representing a management team and a slate of
15 directors for election that included Mr. Sandberg in
16 the past?

17 A. I'm sorry. Can you repeat that?

18 Q. Sure. Did you, in fact, end up
19 advising a slate of directors for election to the
20 board of a company that included Mr. Sandberg?

21 A. Yes.

22 Q. Okay. Okay. Now, how did you become
23 involved in the Digirad proxy contest?

24 A. Sure. Through Jeff Eberwein -- I met

1 Mr. Eberwein last year. We worked together on one
2 other proxy contest for Atrium. And Mr. Eberwein and
3 I, you know, spoke on a regular basis. And that was
4 during the fall of 2012. And we continued our
5 relationship and dialogue. And that continued up
6 until the time I received the call from Mr. Eberwein
7 regarding the Digirad proxy contest.

8 Q. And when were you engaged in
9 connection with the Digirad proxy contest?

10 A. I believe on around March 1st.

11 Q. All right. So other than Mr. Eberwein
12 at the company, who were your primary contacts for the
13 purposes of the proxy contest?

14 A. It would be Jeffrey Keyes, chief
15 financial officer. It would be Matt Molchan, the
16 incoming CEO at the time; and it would be Todd Clyde,
17 the CEO at the time of the contest.

18 Q. Okay. In connection with your
19 communications with the company, did you take
20 instruction from Mr. Gillman at the company in
21 connection with the proxy contest?

22 A. No.

23 Q. Okay. At the beginning of the proxy
24 contest, what did you first do to get started?

1 A. The early stages of a proxy contest
2 are very, you know, mechanical and back-office
3 related. A lot pertains to getting the necessary
4 lists from the Depository Trust Company; obtaining a
5 NOBO list, a list of nonobjecting beneficial owners;
6 and real just gearing up for the mailing of the proxy.

7 Q. Once you identified NOBO list, a DTC
8 list, and looked at any public filings, does that
9 identify all the stockholders in the company?

10 A. No, it does not.

11 Q. Explain why.

12 A. Well, there are stockholders in street
13 name who would appear on a NOBO list, yet -- the
14 stockholders in street name are made up of those that
15 are on a NOBO list and those that are considered
16 objecting holders, those who object to having their
17 names released. So that information isn't publicly
18 available. What is publicly available would be any
19 13F or 13G filings with the SEC.

20 So between the NOBO listing, a
21 registered holder listing, which is fairly
22 insignificant in this case, and the public filings,
23 we're able to put our best efforts together to put
24 together a list of top holders for the company.

1 Q. Did you provide any other services to
2 Digirad other than specific -- the proxy advice
3 services you were providing?

4 A. Yes. During the course of the proxy
5 contest, after the record date, we were retained to do
6 shareholder surveillance to identify any trading
7 patterns and ownership changes, and also some minor
8 investor relations work that -- that we continued to
9 do for the company.

10 Q. Did you assist management in the
11 preparation of proxy materials, fight letters, things
12 of that nature?

13 A. Indirectly. I added comments to those
14 letters as they were distributed to the working group.

15 Q. I want you to take a look with me,
16 please, at Exhibit 108, which should be in your
17 binder. Let me know when you have that.

18 A. Yes.

19 Q. For a little context here, do you
20 recall April 4th to be the date that the company's
21 proxy statement went definitive?

22 A. That sounds correct.

23 Q. Okay. This is an April 4th e-mail.
24 And what's the attachment to that e-mail?

1 A. It's our internal working document
2 that we share with the client on the major holders of
3 Digirad stock, contact information, when available,
4 their affiliation with outside vote recommendation
5 agencies such as ISS and Glass Lewis. This is not a
6 full listing. There's some shareholders that aren't
7 on the listing, namely, perhaps -- in this case,
8 namely, some, you know, insiders, perhaps Chuck
9 Gillman or Jeff Eberwein and others who, you know, we
10 obviously wouldn't be reaching out to. But this is
11 fairly complete.

12 Q. Okay. And how do you use this tool
13 throughout the proxy contest?

14 A. Again, it's a working copy that just
15 updates everyone that I'm working with on this project
16 on the status of my outreach to those institutional
17 holders on the list.

18 Q. I think you indicated that you would
19 contact some of these stockholders on this list. Do
20 you recall specifically how many of these stockholders
21 you were personally involved with contacting?

22 A. I'd say about 25 stockholders on this
23 list.

24 Q. Why don't we step back. Why don't you

1 explain to me what else is going on at your firm in
2 terms of contacting the stockholders on the list and
3 how that was allocated.

4 A. Sure. The solicitation process is --
5 is very fluid. One of the early steps that we do in
6 the solicitation process is just contact shareholders
7 and really have the equivalent of an investor call
8 with them. We distribute the most recent investor
9 presentation. We're really just talking more about
10 the business than we do the proxy contest.

11 So in this particular case with
12 Digirad, this list really represented, you know, a
13 call status with those calls initially and then
14 graduated into more discussion over the proxy contest
15 as -- as the material was mailed and votes were
16 accumulating.

17 Q. Okay. When you're talking about the
18 discussion of the business and the operation of the
19 business and an investor call, is that you that's
20 making that presentation or is it somebody else from
21 the company?

22 A. No. I'm sorry. I'm a participant on
23 the call and I arrange for the call, yet it is a
24 management team actually giving the presentation.

1 Q. So once the proxy statement --
2 definitive proxy statement has been filed, the
3 solicitation process begins; right?

4 A. Uh-huh.

5 Q. So what's the nature of the
6 communications with stockholders during the
7 solicitation process? And what I'm asking
8 specifically is: What do you say to them?

9 A. Sure. Initially, first and foremost,
10 we contact shareholders to make sure that they have
11 received their materials and if for some reason they
12 haven't or misplaced them, we work to facilitate
13 getting them additional proxy materials. And, again,
14 early on it's very mechanical. We just want to make
15 sure shareholders have the materials.

16 The calls are really made in two
17 separate ways. The smaller individual retail
18 shareholders are contacted through my call center,
19 which is located in my office. And the institutions
20 are handled more directly by me.

21 Q. Is there a script that you and your
22 team follow when communicating with stockholders?

23 A. There is, yes.

24 Q. Can you describe what that script is

1 and how it works?

2 A. Sure. It's just a script instructing
3 our solicitors what to say and how to address any
4 questions that they receive. Typically the
5 conversation with the shareholder doesn't go off
6 script, since we're really contacting the shareholders
7 to make sure that they've received their proxy
8 packages. And then should it become more involved,
9 then it's something that we would deal with on a, you
10 know, case-by-case basis.

11 Q. Now, I think you indicated that of
12 this list of about 40, maybe the top 40 stockholders,
13 you were personally involved in contacting about 25 of
14 those or so?

15 A. Yes.

16 Q. And how do you decide which ones
17 you're involved in contacting?

18 A. Well, there's some institutions that I
19 would know not to contact. Some institutions who we
20 know in 26 years of doing this, you know, I'll know
21 that certain institutions will subscribe to the ISS or
22 Glass Lewis recommendations. I'll know which
23 institutions will vote directly in accordance with
24 those recommendations. So I'm less likely to focus on

1 doing outreach or trying to contact a decision-maker
2 at those institutions, because it wouldn't be a
3 prudent use of my time.

4 Other institutional holders we would
5 have less, if you would, visibility on their proxy
6 voting guidelines or who the contact should be. So
7 that -- it's at that time that I contact those
8 shareholders to try to determine what the process
9 would be for setting up a management presentation
10 or -- or later on soliciting their vote.

11 Q. Turn with me, please, to Exhibit 109,
12 next tab, in your binder. Can you explain to me and
13 the Court what that document is?

14 A. Sure. Exhibit 109 appears to be an
15 updated version of the previous list that we reviewed,
16 with my indication of what my expectation was with
17 respect to how certain shareholders had voted.

18 Q. Is this a final list?

19 A. No.

20 Q. Is this a list that's a work in
21 progress?

22 A. Yeah. As I said earlier, the list is
23 a -- is a continuing work in progress. It's really
24 just a working document to keep updated -- to keep the

1 group, management group, updated on the latest
2 knowledge I have of who had voted at that time.

3 Q. How do you know for sure how a
4 stockholder had voted?

5 A. Well, in some cases I do and in some
6 cases I don't. For example, in the case of -- I'll
7 give you a good example. Well, in the case of
8 Renaissance Technology in 109 --

9 Q. Is that Entry 7 on --

10 A. Yes, it is.

11 Q. -- Exhibit 109?

12 A. It is. I know, through both
13 experience but also through verification with
14 Renaissance directly, that they will only vote with
15 respect to ISS. And I believe they actually have ISS
16 vote the proxy on their behalf.

17 So it's likely that the date of this
18 list or my acknowledgment of Renaissance of voting for
19 management is directly related to the ISS
20 recommendation that was issued recommending a vote for
21 management on the white card. Therefore, I noted
22 that. And I would have likely have seen the vote
23 increase by a certain number of shares. So I felt
24 comfortable in indicating that Renaissance had voted.

1 Q. Okay. That's one example of how you
2 know how a stockholder may have voted.

3 A. Yes.

4 Q. Do stockholders -- do you ever ask
5 stockholders how they voted?

6 A. Stockholders typically will --
7 institutional stockholders are more reluctant to
8 discuss with me how they vote. A retail shareholder
9 will typically tell us how they vote, if they choose
10 to speak with us at all.

11 So if that answers that.

12 Q. All right. We've heard some
13 discussion today about the Broadridge report. When do
14 you first get a Broadridge report in connection with a
15 proxy contest?

16 A. The first preliminary Broadridge
17 report is issued approximately -- or issued at 15 days
18 before the meeting date.

19 Q. And when's the next report after that?

20 A. Nine days before the meeting date.

21 Q. And then after that.

22 A. Then daily.

23 Q. Okay. Take a look at Exhibit 201,
24 please.

1 A. Yes.

2 Q. Can you explain what -- Exhibit 201 is
3 an e-mail with an attachment. Can you explain to me
4 what that is?

5 A. Sure. Exhibit 201 is an e-mail to
6 my -- myself and members of my company, in addition to
7 Red Oak solicitor, with the first contest, what's
8 called the contested vote, which is really the first
9 official vote tally that comes out the day before the
10 meeting date. Numbers issued prior to that are -- are
11 deemed as preliminary.

12 Q. So you're pointing out that -- this is
13 a May 2 e-mail and that the meeting was the next day,
14 May 3rd; right?

15 A. That's correct.

16 Q. When you get these reports from
17 Broadridge, what do you do with them?

18 A. I analyze them. I generally don't
19 forward them directly to the client. It can be
20 somewhat confusing. We take the numbers that are
21 listed in what's called the two subtotals -- really
22 just the totals for both the management card and the
23 opposition card. And I just put them in a pretty
24 simple Excel spreadsheet showing just the cumulative

1 numbers voted on each card. Then I send that report
2 to the management team of my client, Digirad. And
3 then internally while that's happening, I have a
4 research person at my company looking at the actual
5 voting within each custodian, bank and brokerage firm
6 on that Broadridge report to just make sure that, you
7 know, there's no -- no shares voted more than what's
8 in DTC or anything along those lines.

9 Q. And we're going to get to that.

10 Actually, if you look at page ending
11 in the Bates number 5332 of Exhibit 201, there's an
12 entry there for Ensign Peak Advisor. Do you see that?

13 A. I'm sorry. Can you read --

14 Q. Sure. The Bates number is at the
15 bottom right. It's 5332. Do you see the entry for
16 ...

17 A. Yes, I do.

18 Q. Do you see the entry for Ensign Peak
19 Advisor?

20 A. Yes, I do.

21 Q. Does this indicate that that entity
22 holds certificated shares or what is the -- why is
23 there a specific entry and how do we know specific
24 information about Ensign Peak Advisor?

1 A. It's an unusual case in that Ensign
2 Peak, while being its own beneficial owner, for some
3 reason has its own custodial position through DTC. So
4 in this case, with crystal-clear knowledge, I'll look
5 at the Broadridge report, see the Ensign Peak total
6 position as reported by Broadridge, total number of
7 shares voted as reported by Broadridge, and can
8 directly link that to Ensign Peak's position as being
9 voted.

10 Q. So there's no mystery in determining
11 what their vote is.

12 A. None whatsoever.

13 Q. Some other stockholders we've heard
14 reference to this morning other than Ensign Peak
15 are -- one was Mr. Moore at CMJ. Did you have any
16 telephone communications with Mr. Moore at CMJ?

17 A. Yes, I did. I had, I believe, a
18 couple of conversations with Mr. Moore, one being one
19 of those initial investor calls to go through -- to
20 have -- to be on the call with management reviewing
21 the management presentation, management giving that
22 presentation, and then perhaps to follow up on the
23 proxy vote.

24 Q. Was anything discussed on the call

1 with Mr. Moore about the status of the current vote
2 totals?

3 A. No.

4 Q. Was there anything discussed with
5 Mr. Moore about any voting percentages?

6 A. No.

7 Q. Was there -- was there anybody from
8 management on the call had you spoke to Mr. Moore?

9 A. Yes, yes. The -- I believe a full
10 management team, and I believe that was it. I don't
11 believe there were any directors on that call.

12 Q. Right. Was there anything said on the
13 call with Mr. Moore about a view regarding
14 management's chances of success at the annual meeting?

15 A. Yes.

16 Q. Same -- oh, well, do you know how
17 Mr. Moore ended up voting, at the end of the day?

18 A. He voted against.

19 Q. Against management.

20 A. Correct.

21 Q. Okay. You've heard about Mr. Perkins.
22 Did you have calls with Mr. Perkins on which
23 management was present?

24 A. I did, yes.

1 Q. Okay. And what was said on those
2 calls?

3 A. Very similar to the way the calls went
4 with Mr. Moore. The initial call was an investor
5 call. Again, just reviewing what -- what the
6 company's doing to execute on their going-forward
7 plan. And then we had a follow-up call, I believe, to
8 discuss more details of the proxy contest or with,
9 really, tying in, you know, how management is
10 executing their strategy, really, and to, you know,
11 going-forward strategy, giving management enough
12 time to execute their plan.

13 Q. Okay. Did Mr. Perkins say anything to
14 you on that call about what he had heard from the Red
15 Oak side?

16 MR. WAKE: Objection, Your Honor;
17 calls for hearsay.

18 Q. Did you understand that Mr. Perkins
19 changed his vote at some time?

20 A. Yes.

21 Q. What did you understand the reason was
22 that he changed his vote?

23 A. Mr. Perkins had spoken with
24 Mr. Sandberg, and I believe --

1 MR. WAKE: Objection, Your Honor;
2 calls for hearsay.

3 Q. You did understand that Mr. Perkins
4 changed his vote; right?

5 A. Yes.

6 Q. What was your understanding as to why
7 he changed his vote without reference to what either
8 Mr. Sandberg said or anything else? What were the
9 words that he said to you, Mr. Perkins?

10 A. Mr. Perkins told me that --

11 MR. WAKE: Objection, Your Honor;
12 still calls for --

13 THE COURT: Isn't that the -- his
14 words, wouldn't that be the most hearsay objectionable
15 way ever getting the answer?

16 MR. SEAMAN: Sure.

17 BY MR. SEAMAN:

18 Q. The fact of the matter is you
19 understood he changed his vote from management to Red
20 Oak?

21 A. That's right.

22 Q. Did he change his vote back?

23 A. He did.

24 Q. Okay. What did you tell

1 Mr. Perkins -- how -- did he tell you he was changing
2 his vote back?

3 A. Yes.

4 Q. Okay. And what was the presentation
5 to Mr. Perkins prior to the time that he changed his
6 vote back?

7 A. Same presentation that we have been
8 giving all along.

9 Q. Any discussion about how close the
10 vote was?

11 A. No.

12 Q. Was there any discussion about vote
13 totals?

14 A. No.

15 Q. Was there any discussion about
16 management's expectations for success at the annual
17 meeting?

18 A. No.

19 Q. Shifting gears a little bit, we've
20 already heard a little bit about ISS. Were you
21 involved in assisting management in its presentations
22 to ISS?

23 A. Yes. I was involved in both arranging
24 for the call with ISS. I was involved in adding some

1 comments to the presentation, the PowerPoint
2 presentation, that was given to ISS, and just advising
3 Digirad on talking points, things of that nature.

4 Q. Okay. And do you recognize -- why
5 don't you turn to Exhibit 179. Do you understand what
6 Exhibit 179 is?

7 A. It appears to be the presentation used
8 for ISS.

9 Q. Okay. Did Red Oak also make a
10 presentation to ISS?

11 A. Yes.

12 Q. And that was published, filed with the
13 SEC as well.

14 A. Correct, yes.

15 Q. Right. We've also heard about Glass
16 Lewis. Was there a presentation to Glass Lewis?

17 A. No. Glass Lewis, while producing a
18 similar vote recommendation, they do not accept
19 presentations from both management and -- and
20 dissident side. They rely simply on public documents.

21 Q. What did ISS and Glass Lewis
22 recommend?

23 A. ISS and Glass Lewis both recommended
24 shareholders vote for all of management's proposals on

1 the white management proxy.

2 Q. Did the company -- did the company
3 issue a press release in connection with that?

4 A. Yes.

5 Q. Take a look at Exhibit 193. Is that
6 the press release announcing the ISS and Glass Lewis
7 recommendations?

8 A. Yes, it is.

9 Q. And do you recall that that occurred
10 on or about April 23rd?

11 A. That's right, yes.

12 Q. Did you have a role in assisting
13 management with the preparation of this press release?

14 A. Again, from the standpoint of adding
15 any comments to the press release that's it.

16 Q. In your experience, what's the
17 significance of an ISS and Glass Lewis recommendation
18 to a proxy participant?

19 A. The ISS and Glass Lewis recommendation
20 is -- is very important, both from the standpoint of
21 obviously directly affecting how shareholders vote,
22 given institutional shareholders' proxy voting
23 guidelines, and also from the standpoint of really
24 clarifying to all shareholders, you know, what their

1 position is on the proxy contest.

2 Q. And how significant was the ISS and
3 Glass Lewis recommendation in connection with this
4 proxy contest?

5 A. It was somewhat significant.

6 Q. And why do you say that?

7 A. I say that because every company has a
8 very different shareholder base. Digirad was a
9 company that had very few institutional shareholders,
10 maybe 5 percent. The ISS or Glass Lewis
11 recommendations would not be terribly relevant in
12 terms of the vote. In Digirad's case, there's a, you
13 know, approximately 40 percent institutional
14 shareholder base.

15 So in very broad terms, I say that the
16 ISS and Glass Lewis recommendations are -- are
17 somewhat important to -- to winning a proxy contest,
18 just based on the specific characteristics of the
19 Digirad shareholder base.

20 Q. We had just looked at Exhibit 193 from
21 April 23rd. Take a look with me at Exhibit 100,
22 please.

23 A. Yes.

24 Q. Do you have that?

1 A. I do.

2 Q. Do you recognize that as the e-mail
3 exchange between you and Mr. Eberwein from April 24?

4 A. Yes, I do.

5 Q. Okay. In Mr. Eberwein's e-mail to
6 you, do you see the statement in the middle of the
7 page if "we hit 50% of all shares out, does that
8 warrant a press release?"

9 A. Uh-huh.

10 Q. What did you understand Mr. Eberwein
11 to mean when he said that "If we hit 50%"?

12 A. I interpreted that as being 50 percent
13 of the outstanding shares voting for the management's
14 directors.

15 Q. And how many shares would that be?

16 A. Approximately 9 1/2 to 10 million
17 shares.

18 Q. Okay. Did -- did the company ever hit
19 50 percent of its shares outstanding?

20 A. No.

21 Q. What did he mean -- what did you
22 understand him to be asking about press release?

23 A. Mr. Eberwein and I have a ongoing, you
24 know, dialogue with -- you know, where Mr. Eberwein

1 would contact me and just do a lot of brainstorming
2 over, you know, different ideas. Mr. Eberwein is very
3 smart and creative and will -- will, you know, make
4 suggestions and -- and then run it by the -- the --
5 you know, the proper folks who could determine whether
6 or not, you know, these ideas should be implemented.

7 Q. Okay. In your response to
8 Mr. Eberwein, you say "I think it does. It's a good
9 tactic to give investors a sense of confidence in the
10 company and also deflate the dissident"

11 You go on to say, "Not sure how
12 specific we can get about the vote in the press
13 release, but we can send a confidently strong
14 message."

15 The first question: Was there a press
16 release issued in response to Mr. Eberwein's comments?

17 A. No.

18 Q. Right. Why -- can you explain in your
19 answer why you say it's a good tactic and why you
20 commented about the specificity of the vote?

21 A. Yeah. It's very probable, given the
22 timing of this e-mail and the timing of the ISS
23 recommendations, that, you know, perhaps giving
24 investors a sense of confidence is really reflective

1 in the press release that just went out. So I was
2 essentially telling Jeff Eberwein in this e-mail, I
3 was being respectful of his idea, you know, keeping in
4 mind he's a client of mine, but also saying, you know,
5 "Listen, if I were in your shoes, I might be thinking
6 that, too" is how -- is my interpretation of how I
7 phrased that e-mail very softly. And then following
8 that I said, "Not sure how specific we can get" with
9 respect to the numbers.

10 So saying that, you know, "We
11 certainly want to send a strong message, but we really
12 can't talk about the numbers."

13 Q. Why do you say that, you can't talk
14 about the numbers?

15 A. It's just -- in my 26 years of doing
16 proxy contests, it has not been my practice to -- to
17 have a press release issued regarding the current
18 numbers, especially given the fact that the numbers
19 are constantly changing and, as I've been saying, the
20 proxy process is very fluid.

21 Q. Did you tell Mr. Eberwein that he
22 could not discuss vote totals or percentages with
23 stockholders?

24 A. No, but I believe he already -- he had

1 received that advice from counsel, perhaps shortly
2 after that or -- it may have come up -- it may have
3 come up indirectly on a follow-up phone call I had;
4 but this e-mail was one of, you know, of dozens of
5 exchanges that were a little more informal than --
6 than what one would indicate.

7 Q. What did you understand you could
8 discuss vote totals and percentages with?

9 A. Essentially my client and, really,
10 that's -- as a proxy solicitor, it's not really my job
11 to go outside of the scope of what's in the proxy
12 statement.

13 So -- so that's -- I communicate the
14 current numbers to -- to my client.

15 Q. Okay. Based on your experience, did
16 you have an understanding whether it was proper or
17 improper to discuss with stockholders whether the vote
18 was close?

19 A. No. We never had that discussion
20 because it was never any part of any, you know,
21 conversation we had regarding strategy or -- or
22 process. It just was never an issue.

23 Q. But in your experience, is it your
24 understanding that it's proper or improper to discuss

1 with stockholders the votes going to be close?

2 A. Oh, I'm sorry. No. In my experience,
3 it certainly would not be proper to discuss either the
4 specific numbers or how the vote is going or anything
5 along those lines.

6 Q. But in your experience, do you see in
7 communicating with stockholders confidence that
8 they're going to going to win the election?

9 A. Yes. And that could be, you know,
10 though, based on a number of factors. I wouldn't say
11 confidence -- I wouldn't say confidence about winning
12 the election; but I would say confidence regarding
13 their -- their platform on, you know, what they're
14 standing for election based on.

15 Q. And do insurgents express the same
16 type of confidence regarding their platforms and
17 chances?

18 A. Sure.

19 Q. Have you ever heard the phrase or the
20 term "bandwagon effect"? Do you have an understanding
21 of what it means?

22 A. I have an understanding of what it
23 means; and, again, in 26 years maybe the phrase has
24 come up two or three times.

1 Q. Okay. Why don't you explain what you
2 understand it to mean.

3 A. Well, it's my understanding that a
4 bandwagon effect would be if one shareholder either --
5 if one shareholder knows how another shareholder is
6 voting or perhaps has information on the vote and how
7 the vote is going, that could create a more forward
8 momentum for, you know, the one side that is perhaps
9 currently ahead, and that's really the extent of my
10 knowledge on it.

11 Q. Was -- did you have a view that that
12 was what was going on in the Digirad proxy contest?

13 A. No.

14 Q. Why?

15 A. Because anytime the word "bandwagon
16 effect" had been referenced, it's for -- it's for
17 companies really with very unsophisticated, small,
18 individual holders. Now, I know we refer to Digirad
19 as a microcap stock, and perhaps by definition it is;
20 but Digirad is very different from a stock trading at
21 a penny that has zero institutional ownership and a
22 very unsophisticated and -- very unsophisticated
23 process by which voting decisions are made.

24 Digirad, on the other hand, has a

1 reasonable -- a reasonable amount of institutional
2 ownership. Those institutions are, indeed, much more
3 sophisticated in making their proxy voting decisions,
4 most of them having published proxy voting guidelines.

5 So it's my understanding that a
6 bandwagon effect is completely irrelevant in this
7 case.

8 Q. And how do institutional investors
9 make their voting decision, if not based on a
10 bandwagon effect?

11 A. Through a number of ways. As we
12 discussed, through ISS or Glass Lewis. It can be more
13 complicated than that because there are firms that
14 will make proxy voting decisions based on the ISS
15 policy directly. There are other firms that will
16 receive the ISS voting recommendation and just use
17 those guidelines to influence their own internal
18 voting decisions. And then there are -- and the same
19 holds true for Glass Lewis. And then there are
20 shareholders, institutional shareholders, that will
21 internally review the proxy and make a proxy decision
22 either by a committee or through one individual,
23 perhaps a portfolio manager or somebody else.

24 Q. Did you and Digirad management ever

1 develop a strategy to discourage stockholders from
2 voting because you believed that that would favor
3 management?

4 A. Never.

5 Q. Okay. Did you ever communicate to
6 stockholders that the election was a landslide?

7 A. Never.

8 Q. Did you ever communicate to the
9 stockholders that the election was not even close?

10 A. Never.

11 Q. Or that you had had the election "all
12 sown up"?

13 A. No.

14 Q. Did you ever hear anyone from
15 management say those things?

16 A. No.

17 Q. Was it your view that the results of
18 the election were ever a foregone conclusion?

19 A. No.

20 Q. In fact, if you did believe that the
21 results of the election were a foregone conclusion,
22 what would you do?

23 A. It's hard to say because I never
24 believe that, but -- so -- I would never stop

1 soliciting proxies because it ain't over until it's
2 over, as they say. And anything can change up to the
3 moments leading up to the meeting.

4 So while my -- my strategy in the
5 event my client has a large lead may be to hold on
6 soliciting heavily some institutions, there still is
7 somebody that we're contacting in that where we're
8 following up on with or looking out for up until the
9 time the polls are closed.

10 MR. SEAMAN: Just one wrap-up
11 question, and maybe it would make sense to take our
12 break after that, although I'm happy to keep going.
13 I'll take direction from my Your Honor.

14 THE COURT: I'm sitting here watching
15 the clock and deciding how much time you have before
16 we break. So one question is probably the right
17 number.

18 BY MR. SEAMAN:

19 Q. Earlier today Mr. Sandberg testified
20 about how he might allocate resources towards the
21 proxy contest based on how far ahead or how far behind
22 one might be in the proxy contest.

23 How did you allocate resources based
24 on your understanding of where things were in the

1 proxy contest?

2 A. I allocated my resources, making no
3 assumptions about whether votes were coming in or not,
4 even to the point where when votes were coming in,
5 even votes for management, I made no assumptions that
6 those votes would stay in the tally.

7 So I allocated all of my resources
8 consistently throughout the whole process and really
9 didn't decide to, if you would, pull back on the
10 throttle or forward based on what the numbers looked
11 like at that one point in time. It was an ongoing,
12 constant process.

13 MR. SEAMAN: May make sense to end
14 right there or -- or break.

15 THE COURT: I think we're at the
16 breaking time to take our lunch break. I will see
17 everybody at 1:30.

18 MR. SEAMAN: Thank you, Your Honor.

19 (Court adjourned at 12:31 p.m.)

20 - - -

21

22

23

24

1 THE COURT: Good afternoon, everyone.
2 Before we get started, you should have
3 gotten a copy of Mr. Gold's letter that came through
4 our fax machine just as I was coming back here. I am
5 sure that he doesn't get up every morning and read our
6 Rule 5.1 first thing. But there is no showing of good
7 cause in the letter, at least as I have read it, so
8 this is just something we're going to have to deal
9 with down the road.

10 MR. FLEMING: I think we can just take
11 care of it right now, Your Honor. We'll withdraw
12 these three exhibits from proposed evidence.

13 THE COURT: Including the deposition?

14 MR. FLEMING: We spoke to him, and
15 we'll provide a redacted version of the deposition
16 that will conform to what we think is important that
17 should make him happy.

18 THE COURT: If it makes Mr. Gold happy
19 and doesn't offend anybody else, then that will work
20 for me.

21 MR. FLEMING: That's our goal, Your
22 Honor. Thank you.

23 THE COURT: With that, you may
24 proceed.

1 CONTINUED DIRECT EXAMINATION

2 BY MR. SEAMAN:

3 Q. Mr. Grau, this morning when we were
4 talking, you described the manner in which you and
5 management communicated with stockholders Perkins and
6 Moore. In communications with the other 23 or 25
7 other stockholders, were the communications any
8 different than the ones you just described earlier
9 regarding the discussions with Perkins and Moore?

10 A. No.

11 Q. Turning your attention to the treasury
12 share issue and Raymond James, when did you first come
13 to understand there was an issue regarding the total
14 number of shares issued and outstanding?

15 A. I would say early April. I'm guessing
16 right around that time frame. It wasn't determined as
17 soon as we received the depository trust company
18 lists. There was just a point in time where we
19 reviewed those lists and did our own analysis, and
20 then it was also brought to our attention, probably
21 right around the same time, that the Red Oak solicitor
22 reached out to us with that question.

23 Q. Let's be specific. What was the
24 discrepancy that you identified?

1 A. The discrepancy was an overhang of
2 approximately 1,075,000 shares that was held through
3 DTC that appeared to be greater than the shares
4 outstanding as per the company's proxy statement.

5 Q. Turn with me in your binder to Exhibit
6 90 please. At the bottom of the second page of
7 Exhibit 90 is Miss Frosch's email to Mr. Casey
8 attaching the requested files, and Mr. Casey
9 identifies -- is that the discrepancy that you were
10 just referring to?

11 A. Yes.

12 Q. He asked "is it treasury shares," and
13 in the following email, Mr. Jaffe responds. And who
14 is Mr. Jaffe?

15 A. He is managing director of my capital
16 markets group.

17 Q. If you take a look at Exhibit 89, the
18 bottom of the first page, Miss Frosch also responds
19 and she says, "Peter, you are correct," and she says
20 "1,073,641 to be exact are treasury shares and should
21 be backed out of the DTC number. I hope this helps."

22 Is that what you're referring to as
23 the overhang?

24 A. Yes.

1 Q. Had you seen this happen before that
2 there are more shares in the DTC list than there are
3 authorized or issued and outstanding?

4 A. I've seen it happen before on rare
5 occasion. I don't think I've ever seen it happen to
6 where it's related to treasury shares in my career.

7 So if I can just elaborate on that a
8 little bit, usually when I'm identifying, or when I
9 see treasury shares, it is listed on the transfer
10 agent's list along with the registered stockholders,
11 DTC is showing their position, and then the one
12 position is listed as treasury shares.

13 Q. You identified the overhang situation.
14 At some point, it came to your attention that there
15 was also an over-vote situation. When did you learn
16 about an over-vote, and how is that different than the
17 overhang?

18 A. Well, I'm not really sure if I would
19 phrase it as I learned first about an over-vote. But
20 I learned that -- I learned about the overhang. It
21 took us a while to determine that those shares were
22 held at Raymond James. I'm sorry, that the
23 overhang -- I'm sorry. Let me back up if I may.

24 When we informed Peter Casey that the

1 overhang was due to treasury shares, that response to
2 Peter Casey was more of a generic response. For
3 example, Doug Jaffe, who works for me in my capital
4 markets group, sent that email to Peter Casey. I
5 think it was more of like an initial response to a
6 request.

7 I really don't think, at the time,
8 that Doug Jaffe had researched it, determined exactly
9 those shares as being treasury shares, where they were
10 held. I think it was more of an issue, "Oh, there's
11 an overhang. It's treasury shares."

12 Doug Jaffe also isn't involved in the
13 proxy solicitation department of my company per se, so
14 he really would normally not even have a dialogue with
15 Peter Casey. I think in this case, Michelle Frosch
16 forwarded the email to Doug Jaffe, and Doug just
17 responded directly not really knowing what the
18 protocol would be.

19 In terms of there being an over-vote,
20 well, you know, an over-vote implies that more shares
21 in DTC are voted than shares outstanding. So I think
22 I would define it more in terms of it being, you know,
23 the shares that we eventually identify as being
24 treasury shares held in street name for some unknown

1 reason at Raymond James, the day we identified that
2 those shares, in fact, were, for whatever reason, I'll
3 never know, held at Raymond James, it probably
4 coincides with the timing that those shares were
5 actually showing as being voted.

6 Maybe -- we identified those Raymond
7 James shares as being treasury shares maybe shortly
8 after they were voted.

9 Q. Let me see if I can focus in on that
10 time frame. Take a look at JX 120. That's an email
11 with you and some of the management at Digirad. It
12 starts at the bottom on the second page with you
13 asking Mr. Clyde. "Can you tell me which broker you
14 hold your shares through?"

15 Why were you asking Mr. Clyde where he
16 held his shares?

17 A. I saw a large number of shares held
18 through Raymond James that were being voted at Raymond
19 James. Normally, I wouldn't think much of it other
20 than there being perhaps a number of retail accounts
21 that voted or perhaps management shares that were
22 voted. A million shares seemed to equal roughly what
23 Mr. Eberwein and Mr. Gillman held. I thought maybe
24 that could be it.

1 So I was seeking clarification on
2 whether or not there were any other insiders that held
3 stock at Raymond James that I was not aware of.

4 Q. So if you look at the first page of JX
5 120, Mr. Clyde responds that he, in fact, does hold
6 shares at Raymond James, is that correct?

7 A. Yes.

8 Q. So Raymond James holds treasury shares
9 and non-treasury shares.

10 A. That's correct.

11 Q. You respond what you just explained to
12 me; that you had a million shares voting but not too
13 many holders to attribute that to. You asked him
14 that, and what did you do?

15 A. I'm sorry, can you --

16 Q. You asked him if he knew who owned the
17 shares at Raymond James or could put you in touch with
18 a contact at Raymond James. Did you do that?

19 A. I did ask him to put me in touch with
20 contacts at Raymond James. It was at that time, give
21 or take a half a day, that we actually then confirmed
22 that those shares at Raymond James were treasury
23 shares.

24 Q. Let me direct your attention to

1 Exhibit 121, the next tab. Also on April 26th you
2 asked Mr. Keyes, "Does Digirad have shares held in
3 treasury at Mr. Raymond James," and Mr. Keyes is the
4 company's CFO, right?

5 A. Yes.

6 Q. Did he give you an answer?

7 A. No.

8 Q. I think the sequence -- that was at
9 8:15 a.m., an email, and if you turn back to JX 120,
10 you'll see an email at the top later in the day also
11 on April 26th, and you flag the issue.

12 You say, "Per our email exchange
13 below, I am concerned that for some reason Raymond
14 James voted the 1,000,000 shares being held in
15 treasury as part of the buyback. These shares are not
16 part of the shares outstanding per my email below, but
17 shouldn't be voted."

18 That's what you told management,
19 right?

20 A. That's right.

21 Q. Turning back to 121, the next email in
22 sequence, I direct you to an April 27th email from you
23 to Mr. Keyes. You explain, "Raymond James voted the
24 treasury shares. This should not have been voted and

1 doesn't count. It's okay in that I excluded it from
2 the numbers as soon as I saw it."

3 What does that mean you excluded it
4 from the numbers as soon as you saw it?

5 A. As soon as I determined that Raymond
6 James -- the Raymond James vote represented treasury
7 shares, I removed it from my vote report and any other
8 correspondence that went to the company.

9 Now, at that time, it was still, from
10 a proxy solicitation standpoint, fairly early on in
11 the process. So there was really very limited, maybe
12 one voting report, that the company ever saw where
13 that million share position -- there was no indication
14 of any shares at Raymond James. But there was a
15 million shares in my total numbers that had been voted
16 that included that Raymond James piece.

17 So, remember, when I'm sending my
18 client, Digirad management, voting reports, they're
19 not seeing the Broadridge breakdown of the custodian,
20 banks and brokers. They're only seeing my summary of
21 the vote totals on each proposal.

22 So my client never had knowledge of
23 those Raymond James shares ever voting outside of
24 these couple of email correspondences that we're

1 referring to now.

2 And it really never was relevant from
3 the standpoint of understanding where we were in terms
4 of how far ahead or behind we were in the proxy
5 solicitation, because as soon as those -- as soon as
6 we identified that those shares that had voted at
7 Raymond James were, in fact, treasury shares, well,
8 there was another million shares coming, voting at
9 other banks and brokers that collectively added up to
10 about a million shares.

11 So the voting report that Digirad
12 management saw really, in fact, never had to be
13 adjusted because the numbers netted out to be
14 unchanged.

15 I didn't give the client, in the
16 earlier stages of the proxy solicitation, a daily vote
17 update. I gave them an update when the numbers
18 meaningfully moved. The daily updates really occur in
19 the final days of the solicitation where there's much
20 more activity.

21 So the fact that that Raymond James
22 vote that I saw on the Broadridge report ended up on
23 the first voting report I sent to management was kind
24 of irrelevant because, I don't know if it's a week or

1 a few days, the timing between that first voting
2 report that I sent out and the next voting report that
3 I sent them shortly after understanding the Raymond
4 James shares, well, the million shares plus had
5 already voted during that period. So there was never
6 really any meaningful difference in the numbers by
7 backing that out.

8 If you follow me on that.

9 THE COURT: I'm confused. What
10 numbers was Broadridge giving to the Red Oaks proxy
11 solicitor?

12 THE WITNESS: The same information
13 that we were receiving.

14 THE COURT: But they had an extra
15 million shares shown in the information going to them,
16 didn't they?

17 THE WITNESS: They did, but what I did
18 when I received the information from Broadridge, I too
19 added that million shares, and I believe it came up on
20 the first voting report. So when I gave Digirad
21 management the first voting report, those million
22 shares were included.

23 Then when I got my next voting report
24 from Broadridge, it also still included the Raymond

1 James number, the vote, but it was at that time that I
2 determined that those were treasury shares. So I
3 never changed -- I should say I removed that vote from
4 any other voting report I gave to my client from that
5 point forward.

6 THE COURT: I understand that
7 Digirad's management was getting substantially
8 accurate information. But you knew that the
9 information going to Broadridge was inaccurate, and,
10 therefore, the information going to Red Oaks solicitor
11 was inaccurate. Therefore, Red Oaks' information was
12 inaccurate, and that gets us to the 6 percent versus
13 12 percent differential.

14 If I'm missing that, please correct me
15 because that's where I am really confused right now.

16 Do you understand my question,
17 Mr. Seaman?

18 MR. SEAMAN: I think I do. Maybe I
19 can use an exhibit.

20 THE COURT: In other words, the
21 Digirad side knew about the problem, but did the Red
22 Oak side know about the problem. That's what I'm
23 trying to figure out.

24 MR. SEAMAN: Maybe this will help.

1 Q. Let's take a look at Exhibit 201 which
2 is a Broadridge report, and we'll look at what the
3 Raymond James vote is in that Broadridge report.

4 Mr. Grau, if you look at Exhibit 201,
5 this is a example from May 2nd?

6 THE COURT: If this is too confusing
7 to give to the clients, it's probably too confusing to
8 give to the Court too.

9 Q. Is that the case; that that is a
10 reason why you don't give it to your clients?

11 A. That's exactly why. I would spend
12 more time answering questions about the report.

13 Q. If you look at page 5328, you'll see a
14 Raymond James position as the second entry. That's
15 for 1.3 million or so shares, correct?

16 A. Yes.

17 Q. That's how it comes reported to you in
18 a format like this, correct?

19 A. Yes.

20 Q. If you look at the address at the
21 bottom, this is the one that's addressed to Digirad,
22 correct?

23 A. That's right.

24 Q. And there are actually two versions of

1 this report in the same exhibit. There's also the
2 version of the report that went to Red Oak, and if we
3 look at page 5342, you can see the Raymond James entry
4 for 1.3 million shares, and then at the bottom of the
5 page, you'll see this is the one that's addressed to
6 Alliance Advisors.

7 A. Yes.

8 Q. So you are getting the same
9 information regarding the Raymond James vote at the
10 same time that Red Oaks' proxy solicitor is getting
11 the same information about the Raymond James vote,
12 correct?

13 A. That's right.

14 Q. We can go back to the first page of
15 201. That's the email that goes to both of you at the
16 same time from Broadridge.

17 A. That's right.

18 Q. Now, once you suspect that these may
19 be treasury shares that had been voted, you started
20 doing your investigation.

21 A. Yes.

22 Q. That's what you were talking about in
23 Exhibits 120 and 121. It was on or about the 26th or
24 the 27th that you came to the conclusion that treasury

1 shares had voted and they needed to be backed out.

2 A. That's right.

3 Q. Take a look with me at Exhibit 90.

4 A. Yes.

5 Q. Exhibit 90, which we looked at, starts
6 on April 5th, but on the first page, the email in the
7 middle is an email from Mr. Casey to you, Mr. Jaffe
8 and Miss Frosch on April 26th asking for followup
9 regarding which custodian holds the treasury shares.

10 "Would you please let me know today."

11 What were you doing at the time you
12 were getting these questions from Mr. Casey about who
13 holds the treasury shares?

14 A. We were still trying to confirm that
15 the treasury shares were held at Raymond James and
16 that that vote did, in fact, represent shares in
17 treasury.

18 Q. Then the email at the top is your
19 response to Mr. Casey, and why did you give him that
20 response?

21 A. Because it's standard practice in my
22 business to provide the other solicitor in a proxy
23 contest with the lists requested, and I think it's the
24 responsibility of each solicitor to do the necessary

1 research regarding shareholders and where accounts are
2 held, and you know, there's -- part of my job is not
3 just making phone calls, but it's also trying to
4 uncover where certain shares are held.

5 In this particular case -- first of
6 all, the fact that treasury shares were in street name
7 was something that I would never have expected to see.
8 So it's something that I never would just assume were
9 there or assume that to be true.

10 And then the fact that those shares
11 are voted makes it even more absurd to believe. So it
12 was only reasonable and prudent for me to do my due
13 diligence to determine that they were, in fact, voted
14 and they were treasury shares. And it wasn't until
15 long after the end of the annual meeting that I
16 actually found out how those shares were voted.

17 So, well up to and including and
18 beyond the day of the annual meeting, May 3rd, I had
19 no idea how those shares were voted because, clearly,
20 there was some highly unusual issue with respect to
21 Raymond James and why those shares were being held in
22 street name. It just seemed absurd to me at the time
23 that that could be a possibility.

24 Q. Once you concluded that treasury

1 shares had been voted, what's the procedure for
2 dealing with that situation?

3 A. It would be the same procedure as
4 would be when I identify any votes or any shares; just
5 the normal course of business in my role as proxy
6 solicitor is to -- in that particular case, I just
7 excluded it from the numbers, and I continued on with
8 my job of soliciting proxies.

9 Q. Could the company have simply unvoted
10 those shares?

11 A. No.

12 Q. Why not?

13 A. You really can't unvote a proxy that's
14 been voted, especially certainly in street name. You
15 can change your vote. You can vote on a white card or
16 you can vote on a blue card. But -- and this is
17 perhaps more from a mechanical standpoint, which,
18 unfortunately, in the world of dealing with
19 Broadridge, sometimes we're forced to rely on the
20 restraints of Broadridge.

21 You can't call Broadridge and tell
22 them "I don't want to vote anymore," or "I choose not
23 to vote." At least it's my experience. So you can't
24 unvote a proxy.

1 THE COURT: So you can't change your
2 vote to abstain?

3 THE WITNESS: You can change your
4 vote, but you cannot unvote.

5 THE COURT: Well, wouldn't changing a
6 vote to abstain have the same effect?

7 THE WITNESS: It potentially could.
8 But even during -- if that were the case, and if that
9 was a course of action that I thought needed to be
10 taken, there would not have been a person at Raymond
11 James that I would have contacted to execute that
12 vote. Because at that time, there wasn't -- there was
13 no knowledge of who at Raymond James or who anywhere
14 had voting authority over those shares.

15 So I think the answer to your
16 question, Your Honor, lies within who had the voting
17 authority over those shares, and that once that
18 mystery was resolved, then it could have been possible
19 to have those shares vote abstain. But never during
20 the course of the process did I even know who could
21 vote them.

22 THE COURT: Well, why couldn't Digirad
23 call Raymond James and say "Those are our treasury
24 shares. We want them voted as abstained"?

1 THE WITNESS: I don't know -- I don't
2 recall if that was ever discussed, but I do recall
3 there being some dissatisfaction with, I guess, the
4 capabilities of some of the folks at that broker.

5 And it's one thing calling a -- I have
6 quite a bit of experience working with these
7 situations. I mean, you certainly can get a lot of
8 answers by calling a brokerage firm office, but when
9 you're calling a branch office of a retail broker,
10 most of these folks really aren't familiar with proxy
11 voting and dealing with Broadridge.

12 Then you're referred on to kind of the
13 chain of various other back office personnel who even
14 rarely return a phone call. Really, that's why it
15 would not have been as easy as making a call to the
16 Raymond James office, in my opinion.

17 THE COURT: Mr. Seaman, I apologize.
18 I probably asked more questions in the last five
19 minutes than I have asked in my entire time on the
20 bench, but I am just confused beyond belief.

21 Raymond James gets a statement --
22 Raymond James sends Digirad a statement, I would
23 presume, showing what it's holding for them. In my
24 experience, and really my experience is with Merrill

1 Lynch, but any account statement I've ever gotten has
2 a human being's name on it.

3 Can't you call that human being? What
4 am I missing here?

5 MR. SEAMAN: Would it help to look at
6 that exhibit?

7 THE WITNESS: Please.

8 THE COURT: Again, I haven't reviewed
9 the exhibits. These may turn out to be incredibly
10 stupid questions, and if so, I apologize, but I am
11 confused.

12 BY MR. SEAMAN:

13 Q. First a point of clarification. The
14 proxy card lists "for, against," and what's the other
15 category?

16 A. Withhold.

17 Q. It's withholding --

18 THE COURT: For my purposes, whether
19 it's "withhold" or "abstain," I don't think it
20 matters.

21 Q. Let's take a look at Exhibit 174.

22 THE COURT: Mr. Wake, if I'm getting
23 in your way with my questions, I also apologize to
24 you.

1 MR. WAKE: You're doing a better job
2 than I would have.

3 THE COURT: All I can say is my
4 condolences then.

5 Q. Mr. Grau, have you seen Exhibit 174
6 before?

7 A. Yes, I have.

8 Q. In what context?

9 A. In preparing for the trial.

10 Q. There are two emails on 174. One is
11 from Raymond James & Associates with a "mailto:id"
12 address of "id@ProxyVote.com".

13 What's that mailing address that
14 that's from? Is that a Raymond James address, or
15 where does that come from, if you know?

16 A. It actually appears to be coming from
17 Broadridge.

18 Q. And the addressee is Dan Warnock. Do
19 you know today who Dan Warnock is?

20 A. A Digirad employee.

21 Q. What is this email from Broadridge
22 saying that it's on behalf of Raymond James to
23 Mr. Warnock? What is this?

24 A. It appears to be a Broadridge version

1 of a proxy card coming from Raymond James.

2 Q. Why would Raymond James or Broadridge
3 be sending a proxy card for treasury shares?

4 A. They shouldn't. There's absolutely no
5 reason why they would.

6 Q. Once you became aware that treasury
7 shares had been voted, what did you do in connection
8 with the inspector of elections?

9 A. I notified the inspector of elections
10 of there being an over-vote at Raymond James and
11 specifically tied it into the treasury shares.

12 Q. What did he say?

13 A. He acknowledged that he would make a
14 note of that and then use that in his calculation of
15 the numbers at the annual meeting.

16 Q. Who is the individual at the inspector
17 of elections? What's his name?

18 A. Sam Bavely.

19 Q. What do you understand Mr. Bavely did
20 with the over-vote situation?

21 A. Excluded them from the numbers.

22 Q. In communicating with your client, did
23 you ever intentionally inflate the percentage
24 advantage that your client had in the proxy contest by

1 including treasury shares that had been voted in that
2 total?

3 A. No. The only time the client saw a
4 vote report reflecting those treasury shares voted was
5 in the first voting report that I referenced, and
6 beyond that, they never saw a voting report from
7 InvestorCom reflecting those numbers. They've always
8 been removed from our vote totals, and Digirad never
9 saw the Broadridge reports.

10 Q. Shifting your attention to your
11 discussions with Mr. Bauer, how did you come to know
12 Mr. Tyson Bauer?

13 A. I got a call from Mr. Eberwein -- I'm
14 sorry, an email from Mr. Eberwein letting me know that
15 he left me a long voicemail, and in that voicemail and
16 a followup email, he had asked me to -- well, in the
17 voicemail, there were a number of just small items
18 unrelated to Digirad he wanted to talk about.

19 And he also mentioned to me that there
20 was somebody at Kansas City Capital that he wanted me
21 to talk to who could help us out with the
22 solicitation. And he followed up with an email, and I
23 believe the email said something along the lines of
24 "Can you please contact Tyson Bauer. Here's his phone

1 number, and I think he can help out with the
2 solicitation."

3 Q. Is that JX 103 that email that you're
4 referring to?

5 A. Yes.

6 Q. The second page is where he says "I
7 want you to please call this guy, but I want to speak
8 to you first."

9 Did Mr. Eberwein instruct you to
10 discuss with Mr. Bauer the subject of the stock
11 buyback plan?

12 A. No.

13 Q. Who was going to address the stock
14 buyback plan with Mr. Bauer?

15 A. I had no idea. I wasn't involved with
16 it.

17 Q. Did Mr. Eberwein or Mr. Gillman
18 instruct you to discuss any settlement with Mr. Bauer?

19 A. No.

20 Q. When you spoke to Mr. Bauer, were you
21 aware of whether or not he had previously spoken to
22 Mr. Gillman about the subject of stock buyback plan or
23 settlement?

24 A. No. That had nothing to do with

1 anything related to my reason for calling him.

2 Q. What was your reason for calling him?

3 A. It was my understanding that Tyson
4 Bauer is a broker, and he may have clients who owned
5 positions in Digirad who collectively could have been
6 meaningful, or perhaps other brokers within his
7 office, which is very common, who would have clients
8 who owned Digirad.

9 So, collectively, by contacting
10 Tyson -- it was my intention that by contacting Tyson
11 Bauer, he could have assisted me in following up with
12 certain holders of the stock and getting their vote.

13 Q. How many calls did you have with
14 Mr. Bauer?

15 A. I recall two.

16 Q. Do you recall if you contacted him
17 later in the day on April 24th?

18 A. I recall it was either later in the
19 day or the next morning fairly early, but it was
20 probably late in the day on the 24th.

21 Q. Looking at JX 103, if you still have
22 that open, the top email from Mr. Eberwein to you
23 says, "Chuck has a call with Tyson today and he's
24 pushing for a quid pro quo, help us with Somerset & TH

1 and we'll help you get the buyback program."

2 What did you understand that to be a
3 reference to?

4 A. I really didn't understand it, to be
5 honest with you. It was my job to call Tyson, try to
6 find out if he had -- it was my understanding that he
7 was just an agent of Digirad's or somebody working
8 with the company who was going to assist me in
9 reaching out to shareholders that may be clients of
10 his. I was assuming he was standard retail broker at
11 Oppenheimer.

12 So that was my reason for calling him,
13 and that was how my questions were directed to him
14 when I spoke to him.

15 Q. Can you explain what happened on your
16 call with Mr. Bauer?

17 A. I remember this call probably more
18 than any of the other calls I made on this because he
19 was doing more -- he was asking me the questions, and
20 I was looking for answers from him on, you know, who I
21 could contact who may own shares of Digirad and I
22 could get their proxy vote.

23 So I remember that precisely because I
24 was just very confused by the call. He wanted to know

1 more information than I would have ever expected
2 anyone to be interested in. But since it was my
3 understanding that he was working with Digirad in some
4 capacity, it was my understanding that, you know, he
5 was essentially on our team working on the
6 solicitation.

7 Q. What did you discuss about the
8 specific stockholders with Mr. Bauer on that call?

9 A. I think it was right around the time
10 or shortly after the ISS report came out, and he was
11 asking me questions about different shareholders and
12 how they may have voted, and I felt fairly
13 uncomfortable with that, because, again, it wasn't
14 consistent with what I expected to happen on the phone
15 call.

16 So I said, well -- I said something
17 along the lines of, well, you know, the ISS report
18 came out, so obviously we should get -- I listed a few
19 institutions that typically vote directly with ISS. I
20 think it was limited to that.

21 Q. Did you have any discussion with
22 Mr. Bauer about the status of the current vote?

23 A. He was asking me about the status of
24 the current vote, and again being a point in time

1 where the ISS recommendation was just issued, and
2 also, you know, highlighting the fact that it's highly
3 unusual to have that kind of a question with a broker
4 as part of the proxy solicitation process -- I don't
5 even want to say unusual. It just doesn't occur or
6 hasn't for me, I felt, you know, somewhat
7 uncomfortable.

8 But then knowing at the time, or
9 believing at the time, that he was an agent of
10 Digirad's, I gave him just some back-of-the-envelope
11 numbers on where I thought the vote was. I think at
12 the time I was factoring in like where the vote would
13 be given the ISS recommendation.

14 Q. Did you communicate to Mr. Bauer the
15 view that the election was over and that management
16 had won in a land slide?

17 A. No.

18 Q. Did you give Mr. Bauer any different
19 assessment of the current status of the vote than you
20 had given management?

21 A. No.

22 Q. After your first call with Mr. Bauer,
23 did you report on that to anyone, the results of that
24 call?

1 A. I may have reported back to Mr.
2 Eberwein, more likely by phone, but quite frankly, in
3 my mind at the time, the call was more or less a waste
4 of my time because he didn't direct me to any of who I
5 thought would be his clients who owned shares of
6 Digirad. It was more just being asked a lot of
7 questions.

8 Q. Did you have a follow-up call with
9 Mr. Bauer?

10 A. As a courtesy to Mr. Eberwein who had
11 asked me, I think he had asked me to follow up with
12 Tyson Bauer, I put a call, another call in to him, but
13 really like I limited any information I gave him for
14 two reasons.

15 I really thought it was a waste of
16 time to follow up with Tyson Bauer again since the
17 first call wasn't very productive for me, and that
18 secondly, I had just, at that point, became very
19 uncomfortable with him. He seemed somewhat outspoken
20 and just didn't appear to be anybody who would be of
21 use to me in the solicitation.

22 Q. When you communicated the percentages
23 that you described, did you give specific numbers?

24 A. I may have given specific numbers, but

1 it was probably phrased along the lines of, "Well,
2 with ISS, we would be at about X percent or Y
3 percent".

4 Q. Did you inflate the lead for
5 management by including treasury shares in your vote
6 count?

7 A. No.

8 Q. Were you intending Mr. Bauer to
9 communicate those percentages to other stockholders?

10 A. No.

11 Q. Did you understand Mr. Bauer was in
12 communication with Mr. Taylor --

13 A. No.

14 Q. -- from Somerset.

15 A. No.

16 Q. Did Mr. Bauer tell you he was going to
17 communicate those percentages from your call to other
18 stockholders?

19 A. No.

20 Q. Did you discuss with Mr. Bauer the
21 likelihood of management winning at the election,
22 whether it would be a land slide or locked up?

23 A. No.

24 Q. Did you know that Bauer was going to

1 tell Taylor who was then going to tell Mr. Sandberg
2 what he had learned from you in that call?

3 A. No. I thought Mr. Bauer was working
4 for us.

5 Q. If you knew that Mr. Bauer was going
6 to communicate the results of your conversation with
7 other stockholders, would you have given him the
8 interim information that you did?

9 A. No.

10 MR. SEAMAN: If I could confer with my
11 colleague quickly.

12 THE COURT: You may.

13 MR. SEAMAN: One set of follow-up
14 questions, Mr. Grau.

15 Q. Do you have an understanding what the
16 difference is between a vote to abstain on a proxy
17 card indicating that a stockholder is abstaining from
18 voting and withholding from voting?

19 Is there a difference in your mind in
20 connection with an election of directors?

21 A. It's somewhat unclear, but, yes.

22 Q. What's the difference between
23 withholding and abstain?

24 A. On an election of directors?

1 Q. For election of directors
2 specifically.

3 A. A withhold vote would be an indication
4 that, in my experience, that the shareholder chooses
5 to not vote on that proposal. They withhold their
6 authority to vote on a proposal. An abstention would
7 be more of a proactive way of casting a vote neither
8 for or against.

9 Q. Does a withhold send any message to
10 the participants in the contest about whether or not
11 the withholding stockholder could be persuaded one way
12 or the other?

13 MR. WAKE: Objection, Your Honor.
14 Leading.

15 Q. Did the proxy card have "abstain" as a
16 choice for the election of directors?

17 A. Honestly, I don't recall. It would
18 most likely be "for" or "against" or "withhold," but I
19 don't recall.

20 Q. Take a look at 176, Mr. Grau.

21 If you go to the last page, I think
22 that's a proxy card.

23 A. Yes.

24 Q. Can you explain to me what the choices

1 are for election of directors?

2 A. The choices for the election of
3 directors would be for all nominees, withhold
4 authority for all nominees, and then an area for a
5 director exception, so to withhold authority with the
6 exception of certain directors.

7 Q. There is an abstain category, but
8 that's for other voting points; not for the election
9 of directors?

10 A. That's right. I mean, the way other
11 proposals are treated on a proxy card can be different
12 from the options given for the election of directors.

13 Q. Is a "withhold" the same as a vote
14 against?

15 A. No.

16 Q. Have you seen the use of a withhold
17 vote as a tool to express displeasure with current
18 directors?

19 A. Yes.

20 Q. Did you focus on the withhold vote in
21 connection with your advice to your client in advising
22 which stockholders you ought to approach perhaps to
23 get them to change their vote in favor of management?
24 Is that a tool that you use?

1 A. I'm sorry, can you repeat that again?

2 Q. On the Broadridge report, you'll see
3 "for, against or withhold."

4 A. Yes.

5 Q. Do you focus on trying to win votes
6 back from withhold voters as part of your strategy in
7 order to win a proxy contest?

8 A. Yes. A withhold vote would indicate
9 some type of dissatisfaction with the board.

10 MR. SEAMAN: No further questions.
11 Thank you.

12 MR. WAKE: I apologize, Your Honor.
13 May I take a quick restroom break?

14 THE COURT: Take five minutes.

15 (At this time a short recess was taken)

16 THE COURT: You may proceed when you
17 are ready.

18 MR. WAKE: Thank you, Your Honor.

19 CROSS EXAMINATION

20 BY MR. WAKE:

21 Q. Mr. Grau, I'd like to address a couple
22 of things with you and first take my shot at helping
23 clear up the treasury shares issue.

24 Is it fair to say that when you first

1 noticed that Raymond James had cast about a million
2 votes for management, your initial thought was that
3 it's no big deal; that it was probably insider shares
4 or retail shares, something like that?

5 A. My initial thought that -- my initial
6 thought was that those shares were voted, and voted by
7 a street name shareholder or many street name
8 shareholders.

9 Q. And you instructed people in your
10 office to try to find out which beneficial owners held
11 those shares as part of your typical practice in
12 providing proxy services, correct?

13 A. I think during the normal course of my
14 solicitation work on this project, we likely didn't
15 focus on identifying shares through Raymond James,
16 because Raymond James being mostly a retail brokerage
17 firm would not be the normal custodian broker for a
18 shareholder with a meaningful share position.

19 Q. Didn't you at one time ask Michelle
20 Frosch to look into that?

21 A. Sure. We do that with each custodian.

22 But, you know, within a reasonable
23 review of the holdings at that broker, it would be
24 standard part of our process. But I wouldn't call it

1 an extensive research effort.

2 Q. Did you ask Miss Frosch to try to find
3 out who the beneficial owners were behind those
4 Raymond James shares?

5 A. It's possible, yes.

6 Q. And she couldn't find that out, could
7 she?

8 A. I don't believe so, no.

9 Q. Were you in court this morning when I
10 was asking Mr. Sandberg about emails between he and
11 Mr. Casey in which they were inquiring about who owned
12 the -- who beneficially owned the shares at Raymond
13 James?

14 A. I recall that.

15 Q. That generally would have reflected
16 what you were doing in your own firm trying to figure
17 out who owns these shares, right?

18 A. Yes.

19 However, a couple of things. The
20 Raymond James shares voted very early on in the
21 process, and I was somewhat of the assumption that
22 they were either company related, meaning insider
23 owned shares, or that there was some type of an
24 explanation to who voted those shares.

1 Q. As time passed in April until we get
2 to the treasury share issue that I'll talk about in a
3 moment, you were not able to determine who held those
4 shares, is that right?

5 A. Yes.

6 Q. You learned at some point from Todd
7 Clyde that Raymond James was the broker handling the
8 buyback program, correct?

9 A. Yes.

10 Q. It still didn't make sense -- strike
11 that. Even then, you didn't connect the share buyback
12 program with the fact that there had been a position
13 in Raymond James, a treasury position that would have
14 been voted in street name, correct?

15 A. That would be correct, with the
16 understanding that when you're referring to the share
17 buyback program, I'm also tying in the connection
18 between the share buyback program and treasury shares.

19 Q. And there came a time where somebody
20 gave you the name of the broker at Raymond James to
21 call, right?

22 A. Yes.

23 Q. And even then you didn't really
24 connect the share buyback with a position at Raymond

1 James that would have been voted in street name, did
2 you?

3 A. There would have been, at the time, an
4 illogical reason to think that those shares at Raymond
5 James would have been related to treasury shares.

6 Q. And that's because in all of your
7 experience, I think you said 26 years, you had never
8 seen a situation in which treasury shares were held in
9 street name and then voted in a proxy contest, right?

10 A. I don't recall ever seeing that in a
11 proxy contest or general annual meeting.

12 Q. You've seen situations where treasury
13 shares might be reflected on a transfer agent's list,
14 right?

15 A. Yes.

16 Q. Or maybe on a registered holder list,
17 right?

18 A. Yes.

19 Q. But never in street name and voted,
20 correct?

21 A. That's right.

22 Q. You were asked some questions about
23 Exhibit 120, and I'd like to ask you to turn to that
24 please.

1 A. Okay.

2 Q. This email exchange begins on the
3 second page on April 24th, right?

4 A. Yes.

5 Q. As of April 24th, you were still
6 trying to figure out who owns these shares that had
7 been voted by Raymond James, right?

8 A. Yes.

9 Q. And then the CFO, Mr. Keyes or
10 somebody said to you, "Yes, there are a million shares
11 we have through the share buyback through Raymond
12 James." Is that correct?

13 A. I'm sorry. Can you point me to where
14 on 120?

15 Q. Actually, I'm sorry, sir. I'm not
16 talking about 120 with this question.

17 When you started asking about where
18 the treasury shares were, Mr. Keyes or somebody else
19 told you, "Yes, there are a million shares we have
20 through the share buyback through Raymond James,"
21 right?

22 A. Yes, but, again, I'm differentiating
23 the understanding of shares held -- treasury shares
24 and shares affiliated with the buyback program.

1 So if somebody tells me that the
2 buyback program is through Raymond James, that would
3 not lead me to, without doubt, conclude that those are
4 treasury shares, because you just don't see treasury
5 shares in street name.

6 Q. So at some point in this puzzle, you
7 were aware the company had treasury shares. You were
8 aware the company had a buyback program at Raymond
9 James. And you were aware that Raymond James had
10 voted over a million shares.

11 But even with all your experience, you
12 didn't connect that together because it's so unheard
13 of. Right?

14 A. Eventually I did.

15 Q. And you had trouble accepting that
16 fact because it's so unheard of.

17 A. Yes.

18 Q. Now, now I am going to ask you about
19 Exhibit 120. This is a series of emails, and the top
20 one is you to Mr. Clyde. He's the president or was
21 the president of the company?

22 A. CEO.

23 Q. Mr. Keyes who was the CFO, correct?

24 A. Yes.

1 Q. And Mr. Eberwein who was the chairman
2 of the board, right?

3 A. Yes.

4 Q. Incidentally, you mentioned that the
5 Digirad solicitation team included Mr. Keyes and
6 Molchan and Clyde, but it also included Mr. Eberwein
7 when he was available, correct?

8 A. Yes.

9 Q. Now, looking back at 120, in Exhibit
10 120, you tell all three of those gentlemen that as of
11 Friday, April 26th, one week before the election,
12 right?

13 A. Mm-mmm.

14 Q. "I am concerned that for some reason
15 Raymond James voted the million shares being held in
16 treasury as part of the buyback."

17 As of Friday afternoon, April 26th,
18 you were getting pretty close to having figured it
19 out, right?

20 A. Yes. I knew that there was clearly a
21 discrepancy.

22 Q. If you turn the page to Exhibit 121 on
23 April 27th which is the following Saturday morning,
24 you tell Mr. Keyes, "For some reason, Raymond James

1 voted the treasury shares." So is it fair to say that
2 by that morning, you had figured it out?

3 A. Yeah, by that morning I was
4 comfortable enough to relay that information to
5 Mr. Keyes.

6 Q. In order to get to that conclusion,
7 you had asked questions about the treasury shares of
8 the president and the CFO, correct?

9 A. I asked questions about the -- I'm
10 sorry, can you repeat that question again?

11 Q. In your investigation to help you get
12 to this point, you had communicated with the company's
13 management, right?

14 A. Yes.

15 Q. And you heard from Mr. Keyes -- you
16 had heard at one point there was a buyback program at
17 Raymond James, and you heard at another point that
18 there were a million shares at Raymond James, right?

19 A. That's right.

20 Q. Red Oak didn't have access to
21 Mr. Clyde and Mr. Eberwein and Mr. Keyes, did they?

22 A. I don't believe so.

23 Q. Now, you were talking about -- correct
24 me if I'm wrong, when you reached this conclusion, you

1 realized that the Broadridge reports were inaccurate,
2 correct?

3 A. Yes.

4 Q. And you adjusted for that inaccuracy
5 by ceasing to include the Raymond James shares in the
6 reports that you gave to your clients at Digirad,
7 right?

8 A. Yes. However, the reports I gave to
9 my clients at Digirad only had one report which was
10 the first report early on when the solicitation did
11 reflect the numbers of Raymond James.

12 Q. Well, I'm just trying to focus on the
13 fact that after you learned on the 26th or the 27th
14 time frame about the Raymond James shares being
15 included in Broadridge reports, you made an adjustment
16 for those numbers before you communicated them on to
17 Digirad. Is that right?

18 A. I hate to ask you to repeat that
19 again. I just want to get the correct phrasing of
20 that.

21 Q. Absolutely. Let me try to ask it
22 better.

23 You testified earlier that, if I think
24 I understand, that after you realized what had

1 happened, you never actually got to a point where you
2 sent Digirad an amended prior report, correct?

3 A. No. There was no need to since the
4 solicitation is so fluid.

5 Q. Because of the fluidity, I think you
6 said that at the time you realized that Broadridge was
7 wrong, there was another million shares that had come
8 in anyway, so you could just net them out and convey
9 to Digirad what the real totals were.

10 A. Right. And there was also a lapse of
11 time between my client getting the first voting report
12 and on or about April 26th, that Friday. So there
13 really wasn't much communication about the vote at all
14 because of the fact that the numbers really didn't
15 move that much.

16 Q. When you saw the Broadridge reports,
17 all of them, after about the 26th or the 27th, you
18 personally knew that they included about a-million-two
19 that were ineligible for management, right?

20 A. To be safe and conservative, I took
21 them out of our numbers. I believe that they would be
22 ineligible, yes.

23 Q. You did not tell Broadridge that
24 Broadridge was counting shares that were ineligible,

1 did you?

2 A. Broadridge would have had nothing to
3 do with that.

4 Q. You didn't tell them, did you?

5 A. No. Broadridge will only report a
6 vote on share positions for their clients who are the
7 banks and brokers based on what those banks and
8 brokers report.

9 So if Raymond James tells Broadridge
10 that they have 1.3 million shares, telling Broadridge
11 that those 1.3 million shares, or a million of those
12 shares, whatever the number is, is not the correct
13 way, and would not lead to resolving the problem in
14 any way.

15 Q. And you did not tell Red Oak, right?

16 A. No.

17 We don't -- again, after providing the
18 shareholder lists, which is typical protocol in my
19 business, there's not a communication back and forth
20 with respect to -- I work on the identification of
21 shareholders on our side. And on the other side, the
22 Red Oak solicitor works on the identification of
23 shareholders as well just as if -- for example, if
24 David Sandberg knew of share ownership information and

1 communicated that, those ownership positions, to Peter
2 Casey at Alliance Advisors, I wouldn't expect Peter
3 Casey to call me and tell me that those share
4 positions exist.

5 Q. I think you said it was your standard
6 procedure to provide shareholder lists. That's
7 usually the NOBO and the DTC list, right?

8 A. Yes.

9 Q. It's not your standard procedure to
10 provide more information, right?

11 A. It's not really anybody's standard
12 procedure in my business.

13 Q. There really is no standard procedure
14 for the situation in which a company has treasury
15 shares in street name that get voted, are there,
16 because in your experience, it's never happened.

17 A. That's correct.

18 Q. Now, we were looking at Exhibit 90.
19 This is where -- actually, let me first direct you
20 briefly to Exhibit 89. This shows that as early as
21 April 8th, in the middle email from Mr. Casey to
22 Michelle Frosch of your office, after he determined
23 that there was -- that treasury shares existed, he
24 then asked your firm to tell them where they were

1 held. Right?

2 A. On April 8th, yes.

3 Q. He says, "Would you know which broker
4 or brokers are holding the shares."

5 Now, I'm sorry to make you flip back
6 and forth, but if you would look at Exhibit 90 again,
7 in the middle of the page, Mr. Casey sends an email to
8 you and others in your firm following up on Exhibit
9 89.

10 He says, "Hello all. I didn't hear
11 back as to which custodian was holding the treasury
12 shares. Can you please let me know today."

13 There is no question in your mind that
14 Mr. Casey was trying to figure out where the company
15 held treasury shares.

16 A. Yes.

17 Q. At no time before the election did you
18 ever communicate to Red Oak where the treasury shares
19 were held, correct?

20 A. Did I personally? No.

21 Q. At no time before the election did you
22 ever inform them what you knew and they did not know;
23 that the Broadridge reports were misleading by the
24 tune of 1.2 million shares, correct?

1 A. Even up until the time of the meeting,
2 I never had any -- really only until perhaps around
3 the time of the depositions, I never had any concrete
4 evidence, any crystal clear evidence, that those
5 voting those shares at Raymond James were voted
6 treasury shares.

7 And as I said earlier, it really
8 isn't -- there really is no type of ongoing sharing of
9 identification of shareholders amongst solicitors
10 during a proxy contest.

11 Q. I think in response to a question from
12 Mr. Seaman, you said something to the effect that
13 regardless of the apparent margin in any proxy
14 contest, you -- I think the question had to do with
15 allocation of resources. You said you would never cut
16 back or alter your approach based upon what the vote
17 looked like.

18 Do I have that right?

19 A. Yes.

20 Q. You're not the client in that
21 situation, are you?

22 A. Right.

23 Q. The client decides how much effort and
24 how much expense to put into the proxy solicitation

1 process, correct?

2 A. Sometimes yes, sometimes no. I mean,
3 quite honestly, on occasion, there are many cases
4 where I'm relied on as the expert to determine how
5 much additional effort and resources are required to
6 get a vote.

7 Q. And the client then makes a decision
8 based upon your recommendation.

9 A. Yes.

10 Q. So I'd like to hit a couple other
11 things and I'll try to address them as quickly as we
12 can.

13 Talking in general about the proxy
14 solicitation services you provide, one of the services
15 you provide is to identify for your client which way
16 specific shareholders are voting in the election,
17 right?

18 A. Yes.

19 Q. And you did that for Digirad.

20 A. Mm-mmm.

21 Q. Right?

22 A. Yes.

23 Q. We looked at Exhibit 108 before, and
24 that was the one where, if you wouldn't mind turning

1 to it briefly, where you identified the 40 largest
2 shareholders. Are you there, sir?

3 A. Yes.

4 Q. One of your purposes of preparing this
5 log is to identify who you had already contacted,
6 right?

7 A. Really more of a list on which I
8 can -- this is an Excel spread sheet on which I can
9 just update the status, whether it be for my own use
10 or for the use of my client, to update the status on
11 any outreach that I've had with the institutions.

12 Q. One of the purposes for this call log
13 is to identify how you expect specific shareholders to
14 vote, right?

15 A. To some degree, or identify if I need
16 to follow up with a phone call, or if they would not
17 speak to me, or whatever the situation may be case by
18 case.

19 Q. This particular call log is addressed
20 to Mr. Keyes, Clyde and Molchan. That was the primary
21 solicitation team at Digirad. Do I have that right?

22 A. Maybe to a lesser extent Mr. Molchan.

23 Q. This was sort of a living document
24 that you had updated periodically as you had new

1 intelligence?

2 A. Yes. In many ways for internal use.
3 I would say for every five times I updated it, I one
4 time sent it to the client.

5 Q. But you did send it to the management
6 team.

7 A. Sure; just as a subsequent FYI.

8 Q. Briefly looking at 109, this was an
9 FYI that gave them further information about who was
10 voting in which way, correct?

11 A. Yes, and, again, limited more to the
12 best of my knowledge.

13 Q. In fact, you shaded the particular
14 shareholders for which you were saying had voted one
15 way or the other, right?

16 A. I shaded the shareholders that I
17 believe had voted one way or the other as of that
18 time.

19 Q. You would expect any competent proxy
20 solicitor to get generally to the same conclusions as
21 you did in estimating which shareholders are voting
22 which way.

23 A. It's really -- it's not an exact
24 science. It's very case by case. If two solicitation

1 firms were to work on the same list, you may have a
2 number of differences in the information that's
3 provided with respect to who had voted and who hadn't
4 voted.

5 So some of it's very straightforward
6 based on the institution and the custodian through
7 which they hold. Some of it is much more process of
8 deduction and even guesswork to some degree in the
9 course of what's shared with the client.

10 Q. If you have a competent proxy
11 solicitor on their side, in your view, the general
12 assumption would be that there should be some equal
13 level of understanding. Is that right?

14 A. I would say so with respect to major
15 institutional holders. If there was a small hedge
16 fund holding through a very large custodial brokerage
17 firm, then I wouldn't judge the qualifications of the
18 solicitation firm based on their ability to identify
19 that fund.

20 Q. Let me shift gears.

21 Could you look at Exhibit 100 please?
22 This is the email in which you responded to Mr.
23 Eberwein's inquiry as to whether it would warrant a
24 press release if you hit 50 percent of all shares.

1 Are you there?

2 A. I am.

3 Q. And you told him, "I think it does.
4 It's a good tactic to give investors a sense of
5 confidence in the company and also deflate the
6 dissident," your words, correct?

7 A. Yes.

8 Q. It is known that -- you had some
9 discussion during direct examination about ISS and
10 Glass Lewis. This email doesn't say anything about
11 ISS at all, am I right?

12 A. No.

13 I think the spirit of the discussions
14 around this time though -- I think all of our
15 discussions included some influence as a result of ISS
16 just based on the timing of when the ISS
17 recommendation came out.

18 Then specific to this April 24th date
19 on the email, that's really just, I think, two days
20 after the ISS recommendation came out. So then I
21 think we did a press release the day before.

22 Q. Was it also part of the spirit of your
23 conversations to talk about the value of deflating the
24 dissident?

1 A. No.

2 Really the spirit of this email is
3 more kind of a brainstorming session as I think I had
4 mentioned before, between myself and really with Mr.
5 Eberwein sharing many of his ideas, this being one of
6 them; some of them wonderful ideas and others good
7 ideas but not so practical.

8 So perhaps this is my way of informing
9 Mr. Eberwein that while I can understand why he would
10 think this would be a great way to -- or this would
11 warrant a press release if we ever got to that point,
12 which we never did apparently, I was more -- my choice
13 of words, it was much less strategic and much more
14 along the lines of just kind of addressing something
15 in a brainstorming session, if you would.

16 Q. I just want to quickly address one
17 other subject. If you would look at what I briefly
18 asked about, Exhibit 103.

19 Is it fair to say that it was this
20 email exchange with Mr. Eberwein, the chairman, that
21 led you to make your first call to Tyson Bauer, the
22 broker in Kansas City?

23 A. What led me to make the call was
24 simply two things; a voicemail that Mr. Eberwein had

1 left for me with a quick reference to Tyson Bauer, and
2 then obviously the email dialogue asking me to call or
3 providing him me with his contact information.

4 Q. And then you told him that the
5 voicemail message that you got regarding Mr. Bauer was
6 pretty clear. You felt confident about what your
7 purpose was in calling him. Is that fair to say?

8 A. No.

9 I had a long conversation with Mr. --
10 actually, I'm sorry. Mr. Eberwein's email or
11 voicemail to me was very long. I remember in these
12 papers it was the long winding voicemail. And Jeff
13 Eberwein had spoken to me on a number of topics.
14 Probably 10 percent of that long voicemail was related
15 to just asking me to contact Tyson Bauer who was
16 assisting us with a solicitation.

17 Q. Is it fair to say that you received
18 Exhibit 103, and in the second email from the top, you
19 communicated to Mr. Eberwein that you thought his
20 voice message to you was pretty clear and you will
21 call Tyson now?

22 A. Yes, but me telling Mr. Eberwein that
23 his voicemail was pretty clear is unrelated to my call
24 to Tyson Bauer or his instructions for me to call

1 Tyson Bauer. It's related to a totally different
2 project.

3 Q. I see. Okay.

4 Look at the very top part then of
5 Exhibit 103. Did you receive this email from Mr.
6 Eberwein before calling Mr. Bauer?

7 A. Most likely, just given the timing
8 stamped on the emails.

9 Q. And you understood before you called
10 Mr. Bauer that Mr. Eberwein was telling you "Chuck,"
11 that's presumably Chuck Gillman, right?

12 A. Yes.

13 Q. "Chuck has a call with Tyson today,"
14 the same guy you're calling, right?

15 A. Mm-mmm.

16 Q. "And he," meaning Gillman, "is pushing
17 for a quid pro could i.e. help us with Somerset and TH
18 and we'll help you get the buyback program."

19 Did you understand that before you
20 called Mr. Bauer?

21 A. Honestly, I didn't fully understand,
22 nor did I really care.

23 Q. One last question. You talked about
24 the proxy card and how it has an entry for "withhold."

1 Is it accurate to say that if the
2 company had revoted and put "withhold" for the Raymond
3 James shares, then the Broadridge report would no
4 longer have been misleading as to the total number of
5 votes in favor of management?

6 A. The one exception to that would be the
7 company would never have known or been able to revote.

8 Q. Because you didn't tell them. Strike
9 that.

10 If they submitted a new vote regarding
11 the Raymond James shares and put "withhold," then
12 1.2 million shares would have been no longer reflected
13 in the "for management" column. Is that accurate?

14 A. During the course of the proxy
15 contest, the company would not have had the ability to
16 do that because I do not believe anybody knew how
17 those shares were voted, and, therefore, how to
18 reverse that vote.

19 It was my belief -- it was my
20 understanding that those shares -- it was the
21 company's understanding, and, therefore, my
22 understanding as well, that perhaps a broker at
23 Raymond James or a back office at Raymond James voted
24 those shares through some administrative error.

1 There was never anything strategic
2 discussed with respect to those Raymond James shares,
3 how to handle them in the solicitation, how to exclude
4 them or include them.

5 It was just a footnote in my
6 solicitation process to say that these shares seemed
7 to be -- although it's almost beyond my belief that
8 they would be, but they seemed to be treasury shares
9 that were voted. I've removed them from the numbers,
10 so when you receive your report, the numbers are
11 accurate as of shares that are vote-able.

12 Q. When did you inform the inspector of
13 elections that the treasury shares, ineligible
14 treasury shares, had been voted?

15 A. Prior to the meeting, and at the
16 meeting, and as any independent inspector of elections
17 would do, they obviously go through their own process,
18 I believe with Broadridge in this case.

19 I'm not exactly sure what this
20 inspector did. But just to have some confirmation of
21 those shares, and I believe also the company confirmed
22 the number of treasury shares at some point perhaps on
23 the day of meeting.

24 MR. WAKE: Thank you, Your Honor. I

1 have no more questions.

2 MR. FLEMING: May I confer with
3 Mr. Seaman?

4 THE COURT: You may.

5 MR. SEAMAN: No further questions,
6 Your Honor.

7 THE COURT: Thank you.

8 Mr. Grau, you may step down. Thank
9 you.

10 (The witness was excused at 3:00.)

11 THE COURT: I know we took a break a
12 half hour, 40 minutes ago, but because we're doing
13 daily copy, I need to try to break up the time for the
14 court reporters equally, so let's take another very
15 short ten minutes. And then we can move on.

16 (At this time a short recess was taken)

17 - - -

18

19

20

21

22

23

24

1 (The proceedings resumed at 3:10 p.m. as follows:)

2 MS. HEIL: Your Honor, similar to Mr.
3 Grau, I believe that the next witness in plaintiff's
4 case in chief is going to be Mr. Jeffry Keyes, but we
5 will be doing the direct exam of him first.

6 THE COURT: Then call the witness,
7 please.

8 MS. HEIL: Okay. Defendants call
9 Mr. Jeffry Keyes.

10 JEFFRY KEYES, having been first duly
11 affirmed, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MS. HEIL:

14 Q. Good afternoon, Mr. Keyes.

15 A. Good afternoon.

16 Q. Can you please tell the Court where
17 you work?

18 A. I work at Digirad Corporation.

19 Q. What is your title or position at
20 Digirad?

21 A. I'm the chief financial officer.

22 Q. And can you just describe basically
23 what your responsibilities are as the chief financial
24 officer at Digirad?

1 A. In general, I'm responsible for all
2 financial compliance for the company, financial
3 analysis and results, interaction with shareholders
4 and other investors; some legal operations capacity
5 and information technology services at the company.

6 Q. And do you oversee a department
7 underneath you that also works on those type of
8 responsibilities?

9 A. I do.

10 Q. And approximately how many people are
11 in that department?

12 A. Estimating, but it's about -- for --
13 on the finance side, about seven or eight folks.

14 Q. And how long have you worked at
15 Digirad?

16 A. Since September 2012, early
17 September 2012.

18 Q. In general, what type of professional
19 experience did you have prior to joining Digirad?

20 A. My whole career has been in a finance
21 and -- capacity. I've worked in public accounting
22 firms as well as publicly traded companies, as well as
23 a couple start-up and high-growth companies and
24 ones that have gone through an IPO process.

1 Q. Did you have any responsibilities
2 regarding the 2013 proxy contest that is at issue in
3 this litigation?

4 A. I did.

5 Q. And can you explain what those
6 responsibilities were?

7 A. In general, I oversaw the drafting the
8 proxy statement along with legal counsel, including
9 disclosures and the financial information included in
10 that proxy statement.

11 Q. Would you consider yourself part of
12 the core management team that was working on the proxy
13 contest?

14 A. I do.

15 Q. And what were the other members of
16 that team?

17 A. Primarily it was Todd Clyde and Jeff
18 Eberwein. Matt Molchan was a member to a certain
19 extent, but he was still catching up on a variety of
20 the aspects associated with the contest.

21 Q. As part of that team, were you ever --
22 did you ever speak on telephone calls with
23 shareholders during the proxy election?

24 A. I did. I estimated I was on about 10

1 to 15 calls with investors, along with the management
2 team and sometimes Jeff Eberwein.

3 Q. Do you recall which shareholders you
4 spoke with on those calls?

5 A. Unfortunately, I was still learning
6 most of the shareholders at that time because it was
7 still pretty early after I joined DRAD. I do remember
8 Dimensional Fund Advisors and Perkins Capital
9 Management specifically; but beyond that, I didn't
10 remember all the specific calls that I was on, but I
11 was on a number of them.

12 Q. Were the calls that you were on
13 primarily with institutional investors?

14 A. Yes.

15 Q. Do you recall having any calls along
16 with the rest of the management team with any
17 individual shareholders?

18 A. There may have been a handful, but I
19 think we were generally concentrating on the larger,
20 more institutional shareholders during our process.

21 Q. Can you generally describe what was
22 discussed during these calls?

23 A. I had created an investor deck that
24 called about the company and its forward progress

1 after we announced a restructuring plan on
2 February 28th. In that deck we talked about
3 restructuring, changes in the management team,
4 operational changes that we were going to make going
5 forward, and our intention on turning the company
6 around financially to drive cost savings and forward
7 cash flow generation at the company.

8 Q. Anything else that you can recall was
9 discussed on those -- on those calls?

10 A. That was it in general. We had two
11 sets of calls. I mean, the first set of calls were
12 where we created an investor deck before we had an ISS
13 presentation, where generally it was just an update
14 for shareholders on why we thought our going-forward
15 restructuring plan was a good value and a good
16 progress for shareholders; and then there's other sets
17 of calls where we talked to some of the same
18 shareholders, where after our proxy had gone out and,
19 you know, after some communications between us and Red
20 Oak and the public market, where we wanted to
21 reiterate our message to these shareholders.

22 Q. And the majority of the -- well,
23 approximately when were those second set of calls
24 done, if you can recall?

1 A. It's becoming a blur to me to a
2 certain extent, but there was a lot in the April time
3 frame. You know, somewhere early April, and the rest
4 were in the late April time frame.

5 Q. And the ones -- the calls that were
6 done with the shareholders during the late April time
7 frame, is it correct to say that those calls were done
8 after the company had already received some of the
9 vote results from the proxy election?

10 A. Yeah, I would say that's fair, yep.

11 Q. On any of those calls did you
12 personally ever give anyone any preliminary vote
13 tallies?

14 A. No.

15 Q. Do you recall anyone else during those
16 calls doing that?

17 A. No.

18 Q. During those calls did you personally
19 ever say anything to the effect that the election was
20 a landslide or that it was all sown up?

21 A. No.

22 Q. To your knowledge, did anyone else on
23 the call say anything to that effect?

24 A. No.

1 Q. On any of those calls did you
2 personally ever try to dissuade any shareholder from
3 voting in the proxy election?

4 A. No.

5 Q. And did anyone else, to your
6 knowledge?

7 A. No.

8 Q. And similarly, on those calls, did you
9 ever discuss with the shareholders what management's
10 expectations of success were at the annual meeting?

11 A. In general, we -- we expressed
12 confidence. I would say we expressed confidence
13 generically as far as the proxy contest and our
14 restructuring plan for the company, but it never went
15 beyond that we were confident that we were going to
16 have a successful contest.

17 Q. Okay. And I think my last question
18 was did you personally, and now I'm going to ask you:
19 Did anyone else on the call ever have any discussions
20 regarding management's expectations of success at the
21 annual meeting?

22 A. So same answer. Yeah. Myself or the
23 management team, same answer; that we just expressed
24 confidence but never any particular metrics.

1 Q. Do you recall a specific call in that
2 time frame with Mr. Robert Moore of CMJ?

3 A. I don't, specifically.

4 Q. Do you recall a specific call with
5 Dick Perkins of Perkins Capital Management?

6 A. I do.

7 Q. During that call with Mr. Perkins
8 during that time frame, similar to the questions that
9 I just asked you, do you recall yourself or anyone
10 else ever giving Mr. Perkins preliminary vote tallies?

11 A. No.

12 Q. Or saying anything to the effect that
13 the election was all sown up or a landslide?

14 A. No.

15 Q. Or did you try to dissuade Mr. Perkins
16 from voting the Perkins shares in any way?

17 A. No.

18 Q. You've heard some testimony today
19 regarding some treasury shares.

20 A. Yes.

21 Q. And I'd like to ask you a few
22 questions about that. Did there come a time when you
23 personally learned that there was a, quote unquote,
24 overhang with respect to the shares that were listed

1 on the DTC list at the beginning of the proxy contest?

2 A. I don't remember anything specifically
3 early in the process regarding the overhang. I think
4 my -- my first general knowledge regarding the
5 treasury share concept came in the late April time
6 frame.

7 Q. Can I ask you to please look at
8 Exhibit 120 in the binder in front of you, please?

9 A. Okay.

10 Q. This is an e-mail chain. You're
11 included on some of the e-mails in the chain, and
12 it's -- it's on -- it's during the April 24th through
13 April 26th time period. Do you see that?

14 A. Yes.

15 Q. And this is a discussion with Mr. Grau
16 and Mr. Clyde and yourself regarding some shares that
17 were voted at Raymond James, approximately 1 million
18 shares. Is this what you're talking about when you
19 said that this is the first time that you had heard
20 anything about an overhang or an overvote?

21 A. Yes, I believe that's the case, yep.

22 Q. Can you please describe what you knew
23 at that time and how -- how this came about in your --
24 in your own mind, and how you learned about this

1 1 million shares?

2 A. So at this time I had, just through
3 conversations amongst us -- when I would say "us,"
4 John Grau and Todd Clyde -- that there were a
5 difference in the -- either the voting shares or the
6 outstanding shares associated with the proxy contest
7 and the annual meeting.

8 Through courses of conversations, what
9 I generally became aware of was that the treasury
10 shares had somehow been voted in the process, and it
11 appeared that Raymond James somehow had voted them;
12 but there was confusion on how or why that occurred,
13 and I still didn't have knowledge at the time of how
14 that happened.

15 Q. And when you say "at the time," do you
16 mean the April 24th or the April 26th time frame that
17 is mentioned in Exhibit 120?

18 A. Correct. And -- and, really, until
19 many weeks after that.

20 Q. Did you personally have any
21 discussions with anyone at Raymond James regarding
22 this issue?

23 A. In the midst of this time frame, no.
24 I think that there was a call made to Dan Horgan, but

1 I don't recall who made that call, Dan Horgan being
2 the branch manager of Raymond James that we utilized
3 for the share buyback program.

4 Q. Mr. Horgan would have been your
5 primary contact at Raymond James with regard to the
6 company's buyback program?

7 A. That's correct.

8 Q. You said a call may have been placed.
9 Was that by someone at Digirad?

10 A. Yeah. I believe -- and I'm going off
11 of memory here. But I believe that Todd had -- Todd
12 Clyde had made a call to him, asking about the status;
13 and I believe that Dan Horgan didn't understand what
14 was going on here, either.

15 Q. And did you learn anything or, to your
16 knowledge, did anyone at Digirad learn anything from
17 the call with Mr. Horgan or anyone else at Raymond
18 James at this time on this issue?

19 A. Not that I'm aware of, no.

20 Q. Also at that time -- and -- and
21 forgive me if I've asked this question already; but
22 did you know for sure at that time that the shares had
23 been voted, that the treasury shares had been voted?

24 A. No, I did not know for sure.

1 Q. And did you know for sure that Raymond
2 James, or it was someone at Raymond James that had
3 voted the shares?

4 A. We thought Raymond James had voted,
5 but I did not know for sure.

6 Q. If I can ask you to turn to the next
7 exhibit, Exhibit 121 in your binder, please.

8 A. Okay.

9 Q. This appears to be an e-mail chain
10 between you and Mr. Grau around that same time frame,
11 April 26 and April 27th. And if I can direct your
12 attention to to the bottom e-mail from Mr. Grau to
13 you, he asks, "Does DRAD have shares held in treasury
14 at Raymond James?" Do you see that?

15 A. Yes.

16 Q. And then the next day your response
17 was, "Did you get this figured out?"

18 Do you know if in between those two
19 e-mails you had any other communications with Mr. Grau
20 about the treasury shares at Raymond James?

21 A. I -- I believe I may have had a phone
22 call with him, because a full day had elapsed. And
23 I'm trying to remember. I might have been in a lot of
24 meetings at the tail end of that day. So I didn't get

1 a full update to him; but I had a quick call with him
2 on the fact that maybe these were treasury shares
3 voted by Raymond James. And that prompted me to
4 e-mail him back to ask did it get figured out.

5 Q. And then it looks like Mr. Grau
6 responded to you, saying "For some reason, Raymond
7 James voted the treasury shares."

8 On that day, which was April 27th, did
9 you have any understanding of whether that was true or
10 not, that Raymond James had voted the shares?

11 A. Well, I had replied that it was good
12 feedback on Saturday, but I think I had some phone
13 conversations with him at the time and he gave me more
14 color on the situation. And, again, it was thought
15 that the treasury shares were somehow voted by Raymond
16 James, but I wasn't sure and neither was John Grau
17 that they were sure that they were voted at that time.

18 Q. When you say "more color on the
19 situation," can you explain what you mean by that?

20 A. Well, just more explanation than what
21 came out in the e-mail. We had, you know, probably a
22 several-minute phone conversation and what was going
23 on about the overvote situation and what his thoughts
24 were on that situation as far as where -- where it

1 came from and his thoughts that the treasury shares
2 somehow some way got voted at Raymond James. But,
3 again, it seemed like that was case, but we weren't
4 positive that that was the case.

5 Q. And you had mentioned that -- your
6 return e-mail, which is the top e-mail on Exhibit 121,
7 you say, "Ok that is good feedback."

8 What did you mean by that?

9 A. I meant it in context that, you know,
10 if -- if, indeed, Raymond James had voted those shares
11 some way somehow, that I wasn't going to be too happy
12 with him from a broker standpoint. And I believe that
13 was the context of my e-mail, that I might have to do
14 something with Raymond James long term as far as a
15 broker if, indeed, that was case. But, again, I
16 didn't know if those shares were truly voted by them
17 or not.

18 Q. At that time, were you considering any
19 changes with respect to the relationship that you had
20 with Raymond James?

21 A. Yeah. As part of my joining Digirad,
22 I was reviewing all the relationships that Digirad had
23 from a financial perspective, and Raymond James was
24 one that I was considering at the time because they do

1 a variety of services for us and I was still getting
2 acclimated to them; but they weren't performing at an
3 optimal level in some of those services.

4 Q. And does your e-mail which is at the
5 top of Exhibit 121 refer in any way to that
6 consideration you were giving to the Raymond James
7 relationship at the time?

8 A. It does, because the way I perceived
9 this, like, "It looks like something may have been
10 screwed up in the process here. Thank you for the
11 feedback. I'm going to take that under advisement as
12 far as their level of service and activity if, indeed,
13 that's what they have done."

14 Q. So it looks like -- and correct me if
15 I'm wrong -- on April 27th -- or April 26th and
16 April 27th this is when you were having conversations
17 with Mr. Grau specifically about "Okay, we understand
18 what this approximately 1 million-share vote at
19 Raymond James was." Is that right?

20 A. Yeah, yeah.

21 Q. What did the company determine to do
22 after figuring that out to try and, if you will, fix
23 that situation with respect to the proxy election?

24 A. Well, I think near or about the same

1 time or a few days I had a conversation with Sam
2 Bavely, who is the independent inspector of elections.
3 And we had discussed the -- the treasury share
4 situation. And in our conversation he understood,
5 became aware of it. And just to solidify that
6 concept, Sam asked me to write him a brief letter to
7 talk about the disposition of the treasury shares and
8 where they were at so he could appropriately reflect
9 it in the results as far as his independent inspector
10 of election duties.

11 Q. If I can direct your attention to to
12 Exhibit 159 in the binder.

13 A. Okay.

14 Q. And this is an e-mail from you, which
15 is a couple business days later after the Exhibit 121
16 that we were looking at previously -- I don't know if
17 you want to flip back and forth -- but after you had
18 discussed this with Mr. Grau.

19 Is this what you're referring to in
20 terms of sending a letter to Mr. Bavely?

21 A. Yeah. I sent him this letter because
22 he -- you know, we talked about the existence of -- of
23 treasury shares. Again, at the time it wasn't an
24 absolute that we knew that Raymond James had voted the

1 treasury shares at their brokerage, but I was
2 notifying Sam the fact that there were treasury shares
3 in existence and they were at Raymond James and I
4 wanted to make sure that the vote results
5 appropriately reflected that fact.

6 Q. And it looks like in the e-mail that
7 you have attaching this letter on the first page, your
8 e-mail says, "Sam, let me know if this does not work."

9 Had Mr. Bavely given you an idea of
10 what he was looking for in terms of this communication
11 that you were sending to him?

12 A. Yeah. I remember that the main
13 context of --

14 MR. WAKE: Objection, Your Honor;
15 calls for hearsay.

16 THE COURT: If you could develop it a
17 little bit more, I think that would work.

18 BY MS. HEIL:

19 Q. Who at Digirad, if you know, put
20 together the letter that's attached to Exhibit 159?

21 A. I did.

22 Q. And how did you determine what to
23 put -- what information to put in that letter, not
24 necessarily with reference to what someone else told

1 you?

2 A. From a phone conversation discussion
3 with Sam Bavely, I wanted to make sure that the fact
4 that the company owned treasury shares was known and
5 documented and appropriately reflected. So based on
6 that, I wrote up a brief letter to Sam Bavely to
7 indicate as such, and sent a letter to him and scanned
8 it and e-mailed it to him, and just asked him to let
9 me know if the format of this letter was sufficient
10 for his needs.

11 Q. Was it your understanding at this time
12 that this was an appropriate way to, quote unquote,
13 fix the situation in terms of the treasury shares that
14 we had been discussing?

15 A. From my understanding, yes, because
16 Sam was the independent inspector of elections, the
17 guy that would tabulate the official vote results that
18 would get reported to the SEC and would dictate the
19 final results of the election. So my assumption was
20 that if I provided him with this information, then he
21 would have all the accurate information that was
22 required to have an accurate vote result.

23 Q. Do you recall if Mr. Bavely ever asked
24 you to provide anything else other than the letter

1 that is at Exhibit 159?

2 A. No. From the best of my memory, this
3 is everything that I had provided him or the last set
4 of information that I had provided him. Of course, I
5 had provided him basic information at the beginning of
6 the election, you know, various, you know, reports, so
7 on and so forth, so he could get started on his -- his
8 analysis and share count; but this was the last piece
9 of information.

10 Q. And do you feel as though what you
11 were relaying to him was the extent of your own
12 knowledge of what had happened with respect to the
13 voting of the treasury shares?

14 A. Absolutely. I thought I was making it
15 clear for Sam and believed, beyond why and how the
16 treasury shares might have been voted, I believed I
17 was providing all the needed information to Sam to --
18 to do an accurate vote count, which is what I was
19 concerned about.

20 Q. Do you recall ever learning anything
21 different at a later date as to how exactly it came
22 about that treasury shares got voted?

23 A. Yeah. Late in -- I guess it was
24 probably in the July time frame, through the process

1 of discovery here, I became aware of the fact that it
2 appeared that one of the folks on my finance team may
3 have inadvertently voted the treasury shares from
4 getting an e-mail from Raymond James routed through
5 Broadridge.

6 Based on that, I went and talked to
7 the individual. His name is Dan Warnock. He's an
8 accounting manager at Digirad. And I discussed with
9 him the fact that it appears that somebody at Digirad
10 may have voted the treasury shares. And from looking
11 at the statements that had been -- being sent to
12 Digirad and Dan's name had been on those statements,
13 along with his e-mail address as the primary person
14 that reconciles those investment statements, I'd asked
15 him did he receive anything. And he -- he dug up an
16 e-mail and said, "Yes. I had gotten this voting
17 instruction from Raymond James. I wasn't sure at the
18 time, but I" -- he had been there for five years. He
19 thought he owned a few shares of Digirad stock. So
20 he -- it was an electronic voting link, and he clicked
21 on the link and believed it to be his own shares. And
22 he went ahead and voted those shares at that time.

23 I had asked him, you know, why he had
24 done that. And, again, he said he thought he owned a

1 few shares. And it wasn't apparent to him when he
2 pulled up the link how many shares were in question
3 here to be voted or the fact that they might have been
4 the company's treasury shares. He just thought they
5 were his own shares. So he went ahead and voted on
6 them.

7 Q. If I can direct your attention to
8 Exhibit 174.

9 A. Okay.

10 Q. You had mentioned an e-mail that
11 Mr. Warnock found when he went back and looked in his
12 e-mails. Is Exhibit 174 your understanding of what
13 that e-mail was that he was referencing?

14 A. Yes, it was.

15 Q. And if you look at the e-mail that was
16 the one directly to Mr. Warnock, you'll see that there
17 is an account number that begins -- some of it's
18 blocked out but it begins with 1509. Do you see that?

19 A. Yes.

20 Q. What do you know that account number
21 to reference now, as you sit here?

22 A. So I believe it's the first four
23 digits of the account number for the Digirad treasury
24 shares that are being held at -- that were being held

1 at Raymond James.

2 Q. And what is, to the best of your
3 knowledge, the reason why Mr. Warnock would have
4 received something relating to the treasury shares
5 that are being held at Raymond James?

6 A. Because the statement, though it had
7 the Poway, California, address on it, it was directed
8 attention directly to Dan Warnock. And from that
9 account statement they also had his e-mail address on
10 file as well. And I believe, based on that, that the
11 voting instructions for those shares got e-mailed
12 directly to Dan Warnock.

13 Q. And just to be clear, other account
14 statements relating to the treasury shares had also
15 been sent to Mr. Warnock in paper or e-mail form; is
16 that right?

17 A. Please state your question again.

18 Q. Previous to this e-mail, to your
19 knowledge, Mr. Warnock was the one receiving the
20 accounts for the treasury share -- I'm sorry -- the
21 statements for the accounts for the treasury shares
22 that are being held at Raymond James?

23 A. That's correct. He would get all the
24 monthly statements because he was in charge of

1 reconciling the account and making sure that the
2 financial activity through the account was
3 appropriate.

4 Q. Now, if I can direct your attention to
5 the top e-mail on Exhibit 174, it is actually an
6 e-mail dated April 22nd from Mr. Warnock to you. And
7 Mr. Warnock writes to you, "Do you know why I received
8 this from [Raymond James]?"

9 And do you recall receiving this
10 e-mail at the time?

11 A. I do not.

12 Q. Do you know why you don't recall
13 receiving it at the time?

14 A. So that that time of the month is
15 extremely busy for me. Not only was I working as --
16 on part of this proxy contest, but I was working on
17 financial analysis for our 10-Q and a variety of other
18 things.

19 Plus, in the midst of this proxy
20 contest, employees were getting electronic voting
21 instructions to company addresses as well as home
22 addresses. They were getting blue proxy cards. They
23 were getting white proxy cards. They were getting
24 proxy cards that were based from Broadridge as well as

1 the transfer agent. I had a number of people come in
2 to my office and show me different versions of proxy
3 cards and voting instructions, and so on, so forth.
4 So I was kind of inundated. And it got to a point
5 where I told everybody, "Great. Thanks, guys. Go
6 over management, you know, in general as far as those
7 proxy cards and things coming in."

8 I just -- I was shown so many, that
9 it just became overwhelming, and I wasn't going to go
10 and look at every one because obviously if people own
11 shares, they're going to get instructions and proxy
12 cards at the time. So if this had come up at the
13 time -- and I don't specifically recollect it -- I
14 wouldn't have thought much of it because I had been
15 shown many of them.

16 Q. And is it your understanding as you
17 sit here today that it was the treasury shares that
18 Mr. Warnock voted after he received the e-mail that is
19 Exhibit 174?

20 A. Yes, it is.

21 Q. Did you personally instruct
22 Mr. Warnock to vote the shares that way?

23 A. Absolutely not.

24 Q. To your knowledge, did anyone in

1 Digirad management or anyone on the Digirad board of
2 directors instruct Mr. Warnock to vote the shares in
3 that way?

4 A. No. No.

5 Q. I'd like to move on to asking some
6 questions regarding your role with respect to the
7 preparation of financial statements that are filed
8 with the SEC.

9 A. Okay.

10 Q. Can you please explain your role with
11 respect to those type of financial statements? And by
12 that I mean the preparation of Forms 10-Q or Forms
13 10-K.

14 A. Sure. So at the end of each quarter
15 there's kind of a whole set of sequence of events that
16 needs to occur to get up to the point of doing an
17 earnings release and Form 10-Q filing.

18 Q. Can I have you step back for a moment?

19 A. Sure, sure.

20 Q. What I meant to ask was if you could
21 explain your role personally with respect to just --

22 A. Sure.

23 Q. -- you know, as the CFO what is your
24 role personally. And then I --

1 A. Okay.

2 Q. -- may have some further questions
3 after that.

4 A. Sorry.

5 So I oversee the entire process and
6 work collaboratively with other management, the CEO
7 and the audit committee and board members, on some of
8 the higher-level concepts. But in general, I oversee
9 the entire process of the financial reporting, 10-Q,
10 earnings release preparation.

11 Q. And then is there anyone who works in
12 your department who is also personally responsible for
13 a lot of the, if you will, leg work regarding
14 collecting the data that needs to go into the -- the
15 end-of-quarter filings?

16 A. Yes. There's a individual in my
17 department named Oliver Yasbek. He's the controller
18 of Digirad. His responsibility is to oversee a
19 financial close process, which includes accounting
20 entries and related adjustments required to get to
21 preliminary numbers and collection of all the data to
22 culminate and put in in an earnings release or Form
23 10-Q.

24 Q. And I think you started to answer this

1 question earlier --

2 A. Sure.

3 Q. -- but can you just very basically
4 explain what happens once a quarter is closed in terms
5 of preparing whatever form needs to be filed with the
6 SEC?

7 A. Sure. So it's a whole series of
8 events that need to occur. The first part of the
9 series is a financial close process where, you know,
10 financial information or accounting entries are
11 collected and posted into an accounting software
12 package. Ours just happens to be called QAD.

13 And this process goes on through a
14 proscribed amount of steps until we're, quote unquote,
15 closed. But after that close process, there's a
16 variety of other analysis that occurs as far as
17 fluctuations, reconciliations. You know, once it's
18 posted in the accounting system, reconciliations need
19 to be prepared and reviewed by other accountants. So
20 there's kind of a two-step review process.

21 This process at the end of each
22 quarter needs to be reviewed formally by our outside
23 independent registered accounting firm. Financial
24 analysis and board presentations need to be prepared

1 and provided to the audit committee and the board of
2 directors, as well as preparation of an earnings
3 release. Ernst & Young, are our outside auditors,
4 need to look at this information and sign off on it.
5 Management has to provide certain representations to
6 Ernst & Young; and then, finally, once that process is
7 done, then we're ready to file an earnings release and
8 a Form 10-Q.

9 Q. Or 10-K.

10 A. Or 10-K. The process is even more
11 robust at the end of the year for a 10-K process
12 because E & Y does more extensive procedures as of the
13 end of the year.

14 Q. What you just described, I believe,
15 was the -- the, quote unquote, usual process at the
16 end of a quarter.

17 Was there anything different that was
18 done with respect to the first quarter of 2013?

19 A. Yes, there was. On February 28th we
20 had announced our restructuring of the company, which
21 included a lot of reduction in force across the
22 company for personnel, management changes that the --
23 the changing soon of the CEO role, and a variety of
24 other things. And so as part of that process it

1 engaged a more complex accounting process which
2 required more in-depth review by Ernst & Young and a
3 lot of analysis on certain things, such as inventory
4 reserves, accruals for severance, and other related
5 activities.

6 On top of that I was dealing with a
7 pretty green team of, among myself, who hadn't been
8 there that long. I had just hired Oliver. He joined
9 at the end of January. So this was his first full
10 quarter in with the company.

11 In addition, Oliver, the controller,
12 went out for paternity leave in mid-April, as well as
13 the fact that my audit partner from Ernst & Young was
14 still recovering to a certain extent from having his
15 appendix taken out the prior month.

16 So that, combined with a green staff
17 and all the activities, really made an interesting
18 quarter close for us to get all this financial
19 analysis done.

20 Q. I'm just going to walk you through a
21 few steps of the process that you just described. If
22 I can have you turn to Exhibit 156, please.

23 A. Okay.

24 Q. And at the -- at the bottom of

1 Exhibit 156 you had sent an e-mail to Fred Jamet. Who
2 is Fred Jamet?

3 A. Fred Jamet is a manager in the Raymond
4 James office that we utilize for a variety of
5 services, including our share buyback activity.

6 Q. And in that e-mail you were asking
7 Mr. Jamet for the amount of treasury shares that the
8 company held at March 31st of this year. What was the
9 reason for you sending him that e-mail?

10 A. Most likely the reason was is to
11 report the accurate amount of shares on the face of
12 our balance sheet for our Form 10-Q. Since we have
13 shares issued in that standing listed by our transfer
14 agent, AST, and the fact that Raymond James holds our
15 treasury shares, we have to deduct those treasury
16 shares from what we have listed at AST to get to an
17 accurate share count.

18 And so typically at the end of each
19 quarter we would ask Raymond James for the number of
20 shares that they held.

21 Q. Did your e-mail that we're talking
22 about here at the bottom of the first page of
23 Exhibit 156 have anything to do with the treasury
24 share issue that we had discussed a few minutes ago?

1 A. To the extent that we're talking about
2 the same concept as far as shares being held by
3 Raymond James, yes.

4 Q. Were you sending this e-mail to
5 Mr. Jamet because of something that had to do with the
6 proxy contest that was ongoing at that point?

7 A. No. This would have been for Form
8 10-Q reporting only.

9 Q. Now if I can get you to turn to
10 page -- to Exhibit 160, please. And Exhibit 160 is an
11 e-mail amongst a few people -- well, at least the
12 earlier e-mails were amongst a few people at Digirad.
13 There's someone named Rica Lindsey on a couple of
14 e-mails. Who is Ms. Lindsey?

15 A. She's an administrative assistant to
16 myself and Todd Clyde.

17 Q. On the second page of Exhibit 160
18 there's an e-mail from Ms. Lindsey to Mr. Molchan and
19 Mr. Clyde. And she is listing the upcoming earnings
20 calls for the quarters. Do you see that?

21 A. Yes, I do.

22 Q. And with respect to the first call
23 listed in her e-mail, which originally appears to have
24 been for Thursday, April 25th, 2013, is that when you

1 understood was the original planned date for the
2 earnings call for the first quarter of 2013?

3 A. Yeah. It was the general plan; but we
4 set our earnings dates out many -- many quarters out
5 into the future, mainly as an exercise to make sure
6 that all our board members are available and we try to
7 schedule things out. But they can always change
8 because we don't announce our specific earnings
9 release dates typically until a couple weeks before
10 the actual date. But it had preliminarily been
11 planned for April 25th.

12 Q. And then Ms. Lindsey's e-mail on that
13 same line goes on to say that that call; namely, the
14 first quarter of 2013 earnings call, will most likely
15 change to May 3rd.

16 Was it your understanding that
17 that's -- that at that time that the date of the
18 earnings call was going to change to May 3rd?

19 A. I believe in general, yes. That was
20 my understanding, it was going to change, yeah.

21 Q. And do you know why it was going to
22 change?

23 A. I think there was a variety of
24 factors, mainly related to what I mentioned earlier

1 about the complexities of the quarter-end: new staff,
2 complex accounting going on, the restructuring, the
3 paternity leave for my controller, and the fact that I
4 had an E & Y partner that was recovering from surgery.

5 Q. And who at Digirad determines the date
6 of the earnings calls?

7 A. In general, the CEO and CFO would
8 propose and generally conclude on the dates, but we
9 may or may not get input from board members on
10 specific dates; but generally it's the CEO and CFO.

11 Q. With respect to this particular
12 earnings call, do you recall who was who discussed the
13 change from April 25th to May 3rd?

14 A. It generally was me and Todd figuring
15 this stuff out, the CEO, at the time, just because of
16 all the complexities for the quarter-end.

17 Q. If I can get you to turn to
18 Exhibit 162, please.

19 A. Okay.

20 Q. And the bottom part of this is an
21 e-mail from Mr. Yasbek to a number of people I believe
22 in your department, copying yourself. And the first
23 line of Mr. Yasbek's e-mail is "March numbers are in
24 QAD and finalized."

1 Can you explain what your
2 understanding is of what that means?

3 A. QAD is our accounting software
4 package. So this would have been the first kind of
5 general phase of the close process up and to reporting
6 earnings in our Form 10-Q.

7 What this generally means in terms, as
8 we communicate in the finance department, is is that
9 all the general proscribed steps for recording journal
10 entries and recording financial impacts on the
11 business were complete. After this, we likely would
12 have needed to conduct a tax provision adjustment,
13 which takes a few days or up to a week or two after
14 this point in time, as well as do account
15 reconciliations and financial analysis to make sure
16 that the numbers that we had at that point in time
17 made sense, were reconcilable and had gone through a
18 full review process.

19 So, you know, this is, I guess -- I
20 think at one point in time I called this Step 2 of 500
21 steps that are required to get to a Form 10-Q filing
22 because there are many other things that happen after
23 this that are done to help analyze the numbers to make
24 sure what we have recorded makes sense and has -- has

1 kind of gone through a formal review process,
2 including going through Ernst & Young's review process
3 and having them sign off.

4 Q. So in your mind, as of the date of
5 Mr. Yasbek's e-mail, which is April 10th, when he says
6 "finalized," did that -- did that mean that the
7 numbers are finalized, such that they could be put
8 directly into a Form 10-Q and filed?

9 A. Absolutely not, because, you know, he
10 even says in his e-mail as you read on there, some of
11 the major activities that need to occur. We got to do
12 a 10-Q draft; adaptive planning, which is another
13 software package that we use. Numbers need to be
14 loaded in that so we can prepare internal management
15 financial analysis that are distributed and analyzed
16 before we talk about numbers. We had to prepare a
17 bunch of analysis for Ernst & Young. That's what we
18 call an E & Y PBC client list so they can do analysis
19 on our numbers. Then we got to do account
20 reconciliations and journal entry reviews was his
21 No. 4 item there, to be comfortable with the number.
22 So there's a variety of other things that needed to be
23 completed.

24 Q. And you responded to Mr. Yasbek's

1 e-mail on the same day. And in your response you say,
2 "Great job on this milestone everyone. I know it has
3 been a challenging quarter."

4 What was the reason why you called it
5 a challenging quarter? Was that similar to the
6 reasons that you explained earlier?

7 A. Generally, yes; but beyond that, I
8 guess if you could paint a picture of the scene at the
9 office there, this is April 10th. So on
10 February 28th we announced our restructuring. So over
11 the course February -- did I say February 28th? Over
12 the course of -- on February 28th, about 20 people
13 walked out the door from our restructuring
14 announcement. And over the course of March, another
15 10 or so people left Digirad and -- and were severed
16 from the company. And so these folks were going
17 through all these activities and restructuring and
18 accounting and analysis in the midst of seeing a lot
19 of their coworkers leave Digirad. So it was
20 challenging for them, both professionally and
21 mentally, because there was a lot of stuff going on.

22 Q. If I can ask you to turn to the prior
23 exhibit, No. 161.

24 A. Okay.

1 Q. This e-mail chain references someone
2 named Matt Clawson. Can you explain who that is?

3 A. Matt Clawson is a outsource investor
4 relations individual that Digirad has used for a few
5 years. And we utilize him to help coordinate earnings
6 release and investor conference calls.

7 Q. And there's an e-mail from Mr. Clyde.
8 It's a e-mail on April 11th that is -- appears to be
9 asking you "... do we have Q1 numbers? I would delay
10 talking with [Mr. Clawson] until we have the numbers."
11 Do you see that?

12 A. Yes.

13 Q. And then I think your response is,
14 "Being finalized today. I will let him know."

15 Can you just explain very briefly what
16 the process is in terms of giving numbers to
17 Mr. Clawson for his purposes?

18 A. Yeah. When I say "Being finalized
19 today," this would have been the -- kind of that first
20 step in the whole close process where we have reported
21 all our financial journal entries and we begin
22 analysis of all that and other information. But from
23 those numbers we would produce preliminary financial
24 reports and given those to Matt Clawson to take a look

1 at, and then typically we arrange a brief conference
2 call to talk about the general themes of what occurred
3 during that period and so he could start crafting an
4 earnings release draft along with an earnings release
5 narrative script to be used on our conference call.

6 Q. And since this is on April 11th, this
7 appears to be at least three or a little bit more
8 weeks before the anticipated date that you were going
9 to be doing the earnings call and filing the Form
10 10-Q.

11 Is that usual, to give Mr. Clawson
12 the, if you will, preliminary numbers that far in
13 advance so that he can work on his drafts?

14 A. It is. He typically gets these
15 preliminary numbers to get to rough things because
16 even if some numbers change, he understands the
17 general idea. Plus I like to get him working on those
18 drafts while we're doing all the rest of the stuff.
19 Typically he'll draft these things up and will be
20 editing over the next couple few weeks during the
21 process.

22 Q. If I can get you to turn to
23 Exhibit 165, please.

24 A. Okay.

1 Q. And can you -- can you please explain
2 what that is, to the best of your understanding?

3 A. So this is an e-mail from me to Matt
4 Molchan, the president of Digirad and incoming CEO
5 Todd Clyde, the outgoing CEO, and Matt Clawson,
6 copying him from Allen Caron, the investor relations
7 firm, just letting him know that I had gone through
8 the earnings release and had marked it up, plus I had
9 some questions on certain financial analysis at the
10 company. So I was sending him back a marked-up
11 draft as well as posing a few questions to the group.

12 Q. As of the date of this e-mail,
13 April 18th, were you very close to being able to file
14 this -- the earnings release that is attached in draft
15 form to Exhibit 165?

16 A. No. We -- we had many days and really
17 a couple weeks' worth of work yet to complete because
18 we still needed to get through our Ernst & Young
19 review process. As it would happen, we actually
20 recorded a journal entry and adjustment, I would say
21 at least a week after this date. So there was still a
22 lot of activity going on.

23 Q. And if I can direct your attention to
24 Exhibit 164. You mentioned that there was some

1 back-and-forth with Ernst & Young. Is this an example
2 of -- of what you're talking about would be
3 communications that you have with Ernst & Young back
4 and forth during that period?

5 A. Yes, it is. This is Ernst & Young
6 giving comments on our Form 10-Q on April 19. So this
7 would have been the first round of comments on our
8 draft document.

9 Q. Their first round.

10 A. I would suspect, based on the date and
11 timing, that it would be the first round, yeah.

12 Q. And then if you could look at
13 Exhibit 167.

14 A. Okay.

15 Q. This appears to be a response e-mail
16 to what we were just looking at in Exhibit 164. Does
17 that sound right to you?

18 A. Yeah. I think I was responding to
19 some of the comments in the marked-up 10-Q draft
20 that they had sent me, as well as I believe I was
21 responding to some verbal questions that they had,
22 too, that weren't specifically identified in that 10-Q
23 draft they sent back.

24 Q. And, again, is this an example of what

1 you had mentioned earlier in that there was a lot of
2 kind of back and forth happening at this time with
3 respect to Ernst & Young and comments on the 10-Q?

4 A. Yes, that's correct.

5 Q. In your mind, as of the time of these
6 e-mails, April 19th, how close were you to having
7 something that would be ready for filing with the SEC?

8 A. Probably around a couple weeks.

9 Q. Now, if I can get you to turn to
10 Exhibit 168.

11 A. Okay.

12 Q. This appears -- this is an e-mail
13 dated April 24th and appears to attach a blackline of
14 the 10-Q. And this is -- this is several days later
15 after the exhibit that we were just looking at,
16 Exhibit 167.

17 Can you just explain briefly, you
18 know, what this represents in the process and -- what
19 this represents in the process?

20 A. Sure. So this was an e-mail from --
21 from Oliver Yasbek, the controller, to the Ernst &
22 Young team, giving them an updated draft Form 10-Q
23 that had been blacklined from a prior draft that they
24 had gotten. I had mentioned that the restructuring

1 process has a lot of complex accounting in it. And
2 during that process we identified an adjustment that
3 needed to be made. And so we had made that
4 adjustment, and we're required to adjust all our
5 financial analysis in Form 10-Q and financial results.
6 So this was a draft back of those adjustments to Ernst
7 & Young.

8 Q. And then if I can have you now turn to
9 Exhibit 169, the next exhibit.

10 A. Okay.

11 Q. And if I can direct your attention to
12 the top e-mail, which is from you dated April 25th.
13 The first sentence in that e-mail says, "I know that
14 you have not gotten this yet, but reminder we'll be
15 filing on the 6th now"

16 Is that referring to now filing the
17 10-Q and the earnings release and also having the
18 earnings call on May 6th rather than May 3rd?

19 A. Yes, that's correct.

20 Q. And to the best of your recollection,
21 do you know why that change was made from May 3rd to
22 May 6th?

23 A. Well, I think part of it was that we
24 initially had planned on Friday, May 3rd; but as a

1 result of this late adjustment and kind of unforeseen
2 activity that we were going to have, plus the fact
3 that we didn't typically have calls on Friday -- we
4 became aware that a lot of East Coast investors often
5 are not available for the calls due to the time
6 difference, and they may be off on the weekend and a
7 lot of folks in New York. (Continuing) -- we decided
8 to move it to Monday instead of Friday because we
9 wanted to make sure that we didn't inappropriately,
10 you know, leave anybody from the call that might want
11 to attend the conference call, plus give ourselves a
12 little bit more time to, you know push through this
13 adjustment and changes that we came acrossed.

14 Q. When you say "we decided," who
15 primarily made that decision?

16 A. Yeah. It was primarily Todd Clyde and
17 myself. I think there might have been a couple others
18 that we talked to, but I just don't recollect who we
19 may have talked to at this point in time.

20 Q. In the discussion with respect to
21 moving the filing of the 10-Q and the earnings release
22 from May 3rd to May 6th, was there any discussion
23 about making that change so that you would not have to
24 file the 10-Q before the 2013 annual meeting?

1 A. No, no, not that I remember. It was
2 mainly based on logistics of the changes and the
3 Friday timeline of East Coast investors.

4 Q. Did anyone in Digirad management or on
5 the board of directors instruct you to make that
6 change from May 3rd to May 6th?

7 A. No.

8 Q. If I can get you to turn to
9 Exhibit 171, please.

10 A. Okay.

11 Q. Now, this is an e-mail from Mr. Yasbek
12 to you and some people from Ernst & Young, as well as
13 Mr. Warnock. And -- so -- and dated April 26th.

14 And, first, along the lines of what we
15 were just talking about, under the heading "Filing
16 Date," Mr. Yasbek reiterates, "We will be filing with
17 an effective date of Monday, May 6th."

18 And then he goes on to say, "We will
19 submit both the earnings release and 10-Q after 2:30pm
20 [Pacific time] on Friday the 3rd, so that they get
21 released first thing Monday morning."

22 First, is that your understanding of,
23 you know, what the plan was with respect to the filing
24 of those documents?

1 A. Yes, it is.

2 Q. What was the reason for that plan?

3 A. On the -- the -- the timing
4 specifically?

5 Q. Yes, the timing with respect to filing
6 it on Friday is so that it would get released first
7 thing on Monday morning.

8 A. Well, in general, we were, I guess, in
9 the same -- we were letting E & Y know that we have a
10 variety of things that need to get completed and we
11 better move along to get that done.

12 We were letting them know we would
13 file after 2:30 because often the filing concepts
14 related to these Qs and Ks come down to an
15 hour-by-hour completion from Ernst & Young and
16 ourselves to make sure everything's in align so we can
17 actually file the document.

18 Specifically, we wanted to make sure
19 that -- and I don't remember the exact cutoff times
20 for EDGAR; but after 2:30, if you file something
21 after 2:30, it gets accepted that day, but it posts
22 the following business day. In this case it would
23 have been Monday morning. So we had a window
24 between 2:30 and I believe it was 7 o'clock Pacific

1 time to get this thing filed, and we were alerting why
2 we needed to get this stuff done to be able to hit
3 that window.

4 The reason that we filed within that
5 window is we typically have our earnings release; and
6 often, but not always, our 10-Q go out before the
7 market opens and we have our call that morning. So we
8 were trying to get lined up to make sure everything
9 would go out before the market opens on Monday.
10 Otherwise, we would have to be up at 3 o'clock in the
11 morning on Monday, and nobody wanted to do that.

12 Q. To the best of your recollection, was
13 your team ready to file those documents previous to
14 that, namely, that period between 2:30 and 7:30
15 Pacific time on May 3rd?

16 A. No, we weren't. I'm trying to
17 remember just about everything that needed to occur.
18 But we hadn't had sign-off on the 10-Q from Ernst &
19 Young. They hadn't gotten back to us on our earnings
20 release. And, actually, I believe we had provided a
21 draft earnings release to our full board based on the
22 complexities going on this particular quarter, and
23 they hadn't provided feedback, either, yet.

24 Q. So is it safe to say that when this

1 did get filed, it was, if you will, down to the wire
2 on -- on May 3rd to try and get it out on time for the
3 scheduled call on Monday, May 6th?

4 A. Yeah. We didn't -- we didn't have a
5 lot of breathing cushion in this process based on all
6 the activities that were going on. We needed all
7 those extra days to get everything completed.

8 Q. If I can get you to turn to
9 Exhibit 170, please.

10 A. Okay.

11 Q. And I believe that you just mentioned
12 that you were still waiting for certain things like
13 board approval on the -- on the press release. Is --
14 is Exhibit 170 an example of what you were talking
15 about when you -- when you mentioned that?

16 A. Yeah. So on Tuesday, the 30th, I had
17 sent a reminder e-mail that I wanted some feedback
18 from folks on the board on our press release if
19 they -- if they had any. I wanted to give them
20 another opportunity to respond.

21 Q. And if I can get you to turn to
22 Exhibit 172, please.

23 A. 172?

24 Q. 1-7-2, yes.

1 A. Okay.

2 Q. And, again, you had mentioned that
3 around the time, meaning the couple of days leading up
4 to the actual filing date of the afternoon of May 3rd,
5 there are still some things going on with respect to
6 your communications with Ernst & Young.

7 Is Exhibit 172 an example of some of
8 the communications that you were still having at that
9 time?

10 A. Yes. So this is an e-mail from Oliver
11 Yasbek, the controller, to Chad Wilson, one of the
12 auditors on the E & Y team. And he was asking for the
13 management representation letter, which is prepared by
14 Ernst & Young to management to -- that management
15 needs to sign before we can file our 10-Q.

16 So we were still waiting for this
17 document. It's required to be signed by us before we
18 can file our 10-Q.

19 Q. With respect to the 10-Q and the
20 earnings release that did come out on May 6th of 2013,
21 there were certain losses that were disclosed in that
22 10-Q; is that correct?

23 A. No, no losses per se. It displayed
24 our financial results for the quarter, which -- which

1 we were in a net loss position. So yes.

2 Q. In -- in your mind, the fact that you
3 were in a net loss position, was that a surprise at
4 the time that the 10-Q was -- was filed on May 6th?

5 A. No, not at all. And, in fact, I
6 expected it. As a result of our restructuring
7 activities, I believe that we had a restructuring
8 charge of just over a million dollars that we recorded
9 for the quarter. I knew that this was coming; and,
10 therefore, in our actual earnings release which is
11 often done, I presented our earnings release on an
12 adjusted basis which backs out the restructuring
13 charges associated with our February 28th
14 restructuring announcement. And after backing out
15 that restructuring charge, our net loss per charge was
16 actually equal to the prior year for the same quarter
17 of 7 cents per share.

18 Further, we did have some revenue
19 declines on a consolidated basis, but that was also
20 expected, to a certain extent, as well as our
21 restructuring plan. So we had warned investors I
22 think eight different places in our form 10-K that was
23 filed on March 13th, 2013, that as a result of our
24 restructuring plan, that our product sales, namely,

1 our camera sales, we would expect to decline in the
2 future -- though we think we might get more cash flow
3 from them, we would expect the revenue from those
4 product sales to decline to the future. So I feel we
5 sufficiently warned the market in that case.

6 And, finally, in our 10-K in our risk
7 factors we disclose the fact that our camera sales
8 business is a cyclical business and it can go up and
9 down in any particular quarter for a number of
10 factors, including people's budgets and capital market
11 trends, and so on and so forth. We have never had,
12 kind of, a consistent quarter on camera sales revenue.
13 It can go up or down each quarter. And that's also a
14 known fact.

15 So the earnings release was not a
16 surprise, by any means, to myself.

17 Q. With respect to the numbers that were
18 filed on May 6th, both in a Form 10-Q and as well as
19 announced in an earnings release on May 6th, was there
20 ever any consideration of disclosing the earnings
21 release ahead of May 6th for any reason?

22 A. No, it was never discussed. In
23 hindsight, there would have been no reason to -- to do
24 so.

1 In addition, I don't think we would
2 have been administratively capable of doing that based
3 on all the activity that happened in the quarter-end.

4 Q. And you did have an earnings call on
5 May 6th; is that correct?

6 A. That's correct, yeah.

7 Q. To the best of your knowledge, was
8 anyone restricted from calling in to that earnings
9 call?

10 A. No, absolutely not.

11 Q. And to the best of your knowledge, was
12 anyone restricted from asking questions, if they
13 wanted to, on that earnings call?

14 A. No, no.

15 Q. You've heard some testimony earlier
16 regarding an NOL pill that was put in place on or
17 about May 23rd of this year. Do you recall that
18 testimony?

19 A. Yes.

20 Q. Did you personally have anything to do
21 with -- well, let me step back.

22 Is it correct that -- that the company
23 has NOLs that it views as an asset?

24 A. That is correct. As part of our

1 restructuring plan, we intend to utilize NOLs that we
2 already have outstanding to offset taxable income on a
3 go-forward basis. As of December 31st, we had about
4 \$90 million of federal NOLs associated with past
5 losses at Digirad.

6 MR. WAKE: Your Honor, I'm going to --
7 I'm in a peculiar situation here. I think I have to
8 object because this is exactly the information that
9 Digirad refused to produce in discovery, even though
10 in their objections they said they would do so if the
11 Court ruled as you did, that our amendment would be
12 accepted.

13 So now I'm in an awkward position of
14 hearing testimony for the first time at trial on an
15 issue in which the defendants refused to provide any
16 discovery.

17 MS. HEIL: Your Honor, it was our
18 understanding, I believe, with -- with plaintiff's
19 counsel that we were going to go forward today with
20 respect to this issue. I know Mr. Sandberg did
21 testify on it. And, you know, if Mr. Wake would like
22 to first cross-examine Mr. Keyes, as long as we have
23 an opportunity to redirect on that issue, we'd be
24 happy to do that. But it was my understanding that we

1 were still going to go forward with as much as we
2 could today.

3 THE COURT: All of which brings me to
4 a discussion I need to have with Ms. McGeever and
5 Mr. Seaman. I was promised that getting done today
6 would not be a problem. I tossed out a couple ideas
7 and they were shot down because it was unnecessary.
8 Maybe I forgot how to read the clock, but I have no
9 basis whatsoever for believing we're going to get done
10 today.

11 Anybody got any thoughts on that
12 topic?

13 MR. SEAMAN: In terms of calling any
14 other witnesses?

15 MR. FLEMING: I don't think we have
16 any.

17 MR. SEAMAN: I don't think we're going
18 to have any other witnesses today.

19 THE COURT: Mr. Gillman is not going
20 to testify.

21 MR. FLEMING: I don't believe at this
22 point we need Mr. Gillman's testimony.

23 MS. MCGEEVER: Then it sounds like
24 maybe we can finish today.

1 THE COURT: But I don't know how long
2 Mr. Wake plans to take.

3 MS. MCGEEVER: I don't know how much
4 time Ms. Heil has.

5 THE COURT: Especially since we're
6 dealing with the poison pill stuff.

7 MR. WAKE: Yeah. Other than the
8 rights plan, I would guess 20 minutes of
9 cross-examination.

10 THE COURT: Well, maybe we can.

11 I am going to let the testimony get
12 in, just because we have the witness here. Questions
13 can be asked without discovery. Whether I consider it
14 or not remains to be seen. I think that's the most
15 efficient thing to do at this point.

16 MR. WAKE: Thank you, Your Honor.

17 MS. HEIL: Your Honor, I'm at the very
18 end in terms of time.

19 THE COURT: I would hope so.

20 MS. HEIL: Thank you for your
21 indulgence.

22 BY MS. HEIL:

23 Q. Mr. Keyes, if you can briefly explain
24 what Digirad had been doing with respect to its NOLs

1 in terms of any study that you understand or know
2 about.

3 A. We've always recognized our NOLs as a
4 tremendous asset if we were to produce profitability
5 going forward to be able to offset the taxable income
6 for that profitability.

7 And, also, as part of an audit process
8 every year over the last few years, as I understand
9 it, but certainly at the end of 2012, we had had an
10 NOL study conducted by Ernst & Young from their
11 national NOL practices office out of Los Angeles that
12 calculated what ownership changes are and would relay
13 that information, not only for management purposes of
14 being able to make sure that we didn't trip any
15 triggers that would cause us to have our NOLs limited,
16 but for their financial statement audited as far as
17 disclosures and comfort and things that they needed
18 disclosed as part of an audit process.

19 So that process had always been
20 ongoing. And since my joining Digirad, I've refreshed
21 that NOL study at least twice.

22 Q. Do you recall when that was?

23 A. I refreshed it in early March, after
24 Red Oak became a 5 percent owner, early March-April

1 time frame. I'm trying to remember exactly, but after
2 Red Oak became a 5 percent owner. And I had updated
3 as recently as last week.

4 Q. And when you say "March," you mean
5 March of this year; correct?

6 A. Correct. March or April. I'm trying
7 to remember exactly. The first quarter time frame.

8 Q. Did you personally -- well, you
9 mentioned that there was a -- if you would, an NOL
10 pill that was put in place on or about May 23rd. Did
11 you personally have anything to do with that?

12 A. I generally oversaw the legal firm
13 that helped us write that plan and put it in place.

14 Q. And to the best of your recollection,
15 when did that process start? And when I say "that
16 process," I mean the process where Digirad started to
17 put the NOL pill into place.

18 A. Informally, between just me and a
19 couple management team members, we've always, kind of,
20 considered the concept as just part of prudent
21 fiduciary duty for the company to make sure that our
22 NOLs weren't limited. But it wasn't until towards the
23 end of April time frame that we kind of kicked off a
24 process to determine the feasibility of putting a plan

1 in place and, if so, what a potential plan would look
2 like. There certainly wasn't any conclusion on what
3 to do about that at that point in time. That's where
4 I just started conversations with a law firm that
5 helped us, Wilson Sonsini, ultimately just
6 investigating the feasibility of a plan.

7 Q. And when you say "we were considering
8 the feasibility," who exactly was that?

9 A. Management and some -- and some board
10 members.

11 Q. And which board members were those?

12 A. Jeff Eberwein and John Climaco.

13 Q. Were there any other board members who
14 you were discussing that with at the time?

15 A. At the time, at the end of April the
16 entire board became kind of aware of the concept and
17 aware of the potential of the feasibility of putting
18 it into place, but no decision was made. After that,
19 I just worked specifically with John Climaco as the
20 chair of the strategic advisory committee to look at
21 analysis to see if it would make sense to put one in
22 place.

23 Q. And when you say that at the very end
24 of April the entire board was -- was thinking about

1 it, had any draft language been presented to the board
2 at that time?

3 A. No.

4 Q. And to the best of your recollection,
5 when was some language presented to the full board in
6 terms of the draft language for the NOL pill?

7 A. It was approximately May 20th, I
8 believe, that we gave something to the board to look
9 at, a draft plan. I had been working on it for a
10 couple weeks prior to that; but we convened a board
11 meeting at that point in time to look at a draft plan
12 and talk about the merits of putting a plan in place
13 and what some of the -- you know, the feasibility
14 concepts, the triggers, how it would affect our
15 shareholder base, so on and so forth.

16 Q. How exactly was the -- was the pill
17 put into place by the full board?

18 A. So at that meeting we discussed a
19 variety of topics. Subsequent to that meeting I made
20 some adjustments to the plan with Wilson Sonsini's
21 help. Then around May 23rd, give or take a couple
22 days, we circulated a unanimous written consent to
23 approve that plan as drafted and then we announced it
24 to the market.

1 Q. Is there anything that you know of
2 that -- that led to that specific timing? Was there
3 anything that you know of one way or the other that
4 led to the -- that timing of the NOL pill being put
5 into place during the, I think it was the second
6 quarter of this year?

7 A. Nothing specifically that I can
8 recall. We were, you know, busy on a variety of
9 topics, and that was kind of next on the list to -- to
10 consider and think about; but nothing specific.

11 Q. Was -- was there a -- any worry that
12 something imminent was going to happen that would
13 affect the -- the NOLs one way or the other at that
14 time?

15 A. Well, there was, to a certain extent,
16 yes, because as part of our restructuring plan as on a
17 going-forward basis, we anticipated on a quarterly
18 basis of generating net income starting in Q3 of 2013
19 and as well as Q4 2013. For the full year we didn't
20 anticipate having taxable income, but going into 2014
21 we definitely anticipated having taxable income. So
22 protecting those NOLs were very important.

23 So from a timing perspective, yes, for
24 the mere fact we're going to have taxable income. We

1 wanted to make sure that those NOLs were protected,
2 because a key part of a restructuring plan in
3 generating cash flow going forward was the fact that
4 most of our taxable income wouldn't be taxed by
5 utilization of those NOLs. I mean, to be clear, this
6 is the first time in Digirad's history that they will
7 have actually utilized NOLs to offset taxable income.
8 So we wanted to make sure that they were protected.

9 Q. And the NOL plan went into -- into
10 effect in June of this year; is that correct?

11 A. Yeah, I believe it was June 10th.

12 MS. HEIL: I have no further questions
13 at the moment.

14 One more question.

15 Q. Will the -- the NOL pill or the -- the
16 preservation -- the tax preservation plan, be subject
17 to a vote in 2014?

18 A. Yeah. When we -- when we developed
19 the plan, we were very cognizant of the fact that we
20 wanted to make a plan that was acceptable to the
21 general market and, in particular, ISS. We wanted to
22 make sure that it conformed to their parameters
23 because we wanted to make sure that all our
24 shareholders were appropriately addressed and

1 reflected as part of the plan. So as part of that, we
2 announced publicly that the plan would be put up for
3 shareholder approval at our 2014 annual meeting.

4 MS. HEIL: No -- no more questions at
5 this time, Your Honor. Thank you.

6 CROSS-EXAMINATION

7 BY MR. WAKE:

8 Q. Good afternoon. It's -- it is
9 Mr. Keyes; right?

10 A. Correct.

11 Q. Okay. Thank you.

12 I'd like to address a few questions
13 regarding the treasury share issue first.

14 A. Sure.

15 Q. You were aware generally in April of
16 2013 that the company had treasury shares held at
17 Raymond James.

18 A. Yes.

19 Q. Correct?

20 A. Yes.

21 Q. In fact, you always knew that because
22 they had always been there, since the time you joined
23 the firm.

24 A. Yeah, I didn't set up the relationship

1 like that, but they had been there before my arrival.

2 Q. And I think we looked at some exhibits
3 where you had periodically, in fact, specifically
4 asked Raymond James for how many shares they held in
5 treasury at the firm; right?

6 A. Correct.

7 Q. Virtually every quarter you did that?

8 A. It would be required every quarter,
9 yep.

10 Q. If you would look at ... Exhibit 120,
11 please.

12 A. Okay.

13 Q. You previously testified about
14 Exhibit 120. Is it fair to say that on Wednesday,
15 April 24th, you received Mr. Grau's inquiry about a
16 million shares voting at Raymond James?

17 A. Yes.

18 Q. And you, before you even get the
19 further communications, you are one of the people
20 within the company that is aware that the buyback
21 shares were held at Raymond James.

22 A. Yes.

23 Q. And Mr. Clyde, the president, knew
24 that as well.

1 A. Yes.

2 Q. And, in fact, it was Mr. Clyde who set
3 up the program by which the buyback shares were held
4 in street name at Raymond James; is that right?

5 A. He didn't set up the program, but he
6 was aware of it.

7 Q. And then on -- looking at the top of
8 that e-mail, on Friday, April 26th --

9 A. Okay.

10 Q. -- did you interpret Mr. Grau's
11 comments to you to indicate that he was concerned that
12 Raymond James had voted a million shares and that
13 those shares should not be voted?

14 A. I took it that he was concerned that
15 some reason Raymond James had voted the shares, but I
16 don't think there was a conclusion that the shares
17 were voted. I think there was still confusion at this
18 point in time.

19 Q. Let's look at Exhibit 121, please.

20 A. Okay.

21 Q. The next morning he was pretty
22 unequivocal about saying that Raymond James had voted
23 the treasury shares for some reason. Do you agree
24 with that, sir?

1 A. Yeah. Looks like John Grau was --
2 concluded that they had voted it for some reason.
3 Again, we don't know why or how.

4 Q. Now I'll take you to Exhibit 159,
5 please. As I -- as I understand it, this is the
6 notice that you gave -- the written notice that you
7 gave to the inspector of elections that the company
8 held a million-plus treasury shares at Raymond
9 James.

10 A. That's correct, yep.

11 Q. But if I understand correctly, you
12 said you actually had conversations with him before
13 this letter in which you vetted this same issue.

14 A. Yeah, I believe. Obviously it's not
15 reflected in the e-mail, but that conversation
16 prompted this letter.

17 Q. And do I understand correctly that the
18 reason you had those phone calls and sent this letter
19 is because you were concerned that Raymond James had
20 voted more than a million treasury shares and you
21 wanted to make sure they were not counted by the
22 inspector of elections?

23 A. Yeah. I think I sent a letter -- and
24 going off my best memory here, but I believe I sent a

1 letter for the concept that Raymond James held a
2 million treasury shares or 1,073,000, not necessarily
3 that they had voted them, because, again, at the time
4 I was still confused about the fact that they had been
5 voted. John Grau might have been, you know, from his
6 e-mail, clear on it, but I guess I wasn't completely
7 clear on the process, because John Grau was much more
8 vested in what's going on than I was at that
9 particular time range because I had a lot of other
10 stuff going on.

11 Q. Is it fair to say at least by some
12 phone call, the date of some phone call with the
13 inspector of elections that predated May 1, you, like
14 Mr. Grau, at least had a concern that there was a
15 million-plus treasury shares that had been voted?

16 A. I knew that John Grau was concerned.
17 I knew that something was going on. I didn't
18 necessarily have a specific concern that treasury
19 shares had been voted.

20 Like I was saying, I was unclear what
21 was going on at the time. I believe that my letter's
22 intent was the fact that I wanted to reflect to Sam
23 Bavely that there were treasury shares out there in
24 concept at Raymond James, whether voted or unvoted,

1 that I wanted to make sure that he understood. I was
2 still unclear at this point in time, you know, in the
3 midst of these few days exactly what happened. Again,
4 I didn't know how or why, if they were voted, why they
5 were voted. So I hadn't reached really a conclusion
6 about the disposition of the voting of the treasury
7 shares. Others may have, but I have not.

8 Q. And to your knowledge, nobody at
9 Digirad ever told Broadridge about this treasury
10 share -- treasury shares being voted --

11 A. No.

12 Q. -- correct?

13 I may have too many negatives.

14 To your knowledge, did anyone at
15 Digirad ever tell Broadridge about the treasury
16 shares?

17 A. No.

18 Q. And to your knowledge, did anyone ever
19 tell Red Oak or its solicitor about the same issue you
20 just told the inspector about in Exhibit 159?

21 A. I didn't have any conversations with
22 Red Oak regarding the -- the treasury shares
23 specifically, no.

24 Q. In the defendants' pretrial brief

1 submitted on last Friday, on page 14 it says,
2 "Disclosure by Grau might well have caused harm to
3 Digirad, as Red Oak could have touted this innocent
4 error as evidence of mismanagement or wrongful
5 conduct."

6 Is that one of the reasons, Mr. Keyes,
7 that no one told Red Oak, because you were afraid they
8 would tattletale?

9 A. Well, I don't have that brief in front
10 of me so I can't look at the context of that. But I
11 was not worried. I think that my e-mail to Sam
12 Bavelly, and as I've testified, I just wanted an
13 accurate election. I'm a numbers and finance guy.
14 I'm concerned about getting things reported correctly
15 and accurately. And that was my only intent through
16 this whole process.

17 Q. Let me shift gears a moment. You were
18 asked and testified this afternoon a fair amount about
19 preparation of a 10-Q and a 10-K. I want to ask you
20 specifically about an earnings release.

21 A. Okay.

22 Q. Would you agree -- and I think you
23 will -- that an earnings release is a voluntary
24 submission news release that a company can choose to

1 provide to the general public to give them an advance
2 view of a financial performance for a particular
3 period before any type of regulatory filing with the
4 SEC or other agency is required to be filed?

5 A. Yes, that is correct.

6 Q. And would you agree that an earnings
7 call is a verbal communication process in which
8 management typically will take a release, a news
9 release of earnings information, and discuss that
10 information on a call for which investors and other
11 folks can attend and ask questions about that period's
12 activity?

13 A. Yes, that's correct.

14 Q. And is it true that an earnings
15 release is different than a Form 10-Q, which has a
16 proscribed format and required information?

17 A. Generally, yes. I mean, the only
18 thing I would say, that is if you put certain
19 information within an earnings release that is
20 contrary to some SEC rules, you could get in trouble,
21 such as non-GAAP financial measures and other types of
22 disclosures; but yes, generally, there's no proscribed
23 format. There's just certain rules you need to adhere
24 to.

1 Q. And an earnings release is not
2 required by the SEC.

3 A. No, it is not.

4 Q. You don't have to file your 10-Q on
5 the same date as your earnings release date, do you?

6 A. No, but a lot of time companies will
7 because it is a culmination of completion of a
8 financial review process. So I think you find a lot
9 of times in smaller companies in particular, they file
10 them very closely, the same time frame, versus larger
11 companies like Microsoft, GE or very large companies
12 that have robust finance departments may come up with
13 earnings release information sooner than the time
14 frame in which they file a Form 10-Q or 10-K.

15 Q. Let me ask you two things. Digirad
16 never had to file its 10-Q on the same date as its
17 earnings release date, did it?

18 A. No. No.

19 Q. And, in fact, there have been times
20 even since you joined the company where Digirad
21 announced -- issued an earnings release before it
22 released its periodic filing with the SEC.

23 A. There was one instance related to the
24 restructuring in which we did. Beyond that, I can't

1 remember any time in which we provided an earnings
2 release that was more than a day or so before filing
3 our Form 10-Q.

4 Q. Incidentally -- so how many quarter --
5 reporting periods have you been the CFO for Digirad?

6 A. So it would be fourth quarter -- I'm
7 sorry -- third quarter of 2012, fourth quarter, first
8 quarter, and second quarter. So four quarters.

9 Q. Have you ever -- I'm sorry to digress.
10 Have you ever been involved in a proxy
11 contest before this one?

12 A. No.

13 Q. Getting back to the issue of earnings
14 releases, is it accurate to say a prerelease may be
15 made in advance of a full earnings release if a
16 company has determined key financial metrics before a
17 full financial statements are complete?

18 A. Sure, if a company chooses to do so.

19 Q. And would it be appropriate to use as
20 an example that some companies may release revenue
21 numbers because they have revenue numbers figured out
22 and completed but they don't have the rest of their
23 income statement completed, so they'll release the
24 revenue numbers as a key indicator for the company?

1 A. Possibly, but I've never been part of
2 a company that's done that routinely. So I don't
3 really know, kind of, the general form and content of
4 how you would go about doing that.

5 Q. Let's take a look, sir, at
6 Exhibit 197, please.

7 A. Okay.

8 Q. Do you recognize this to be the Form
9 8-K for -- dated February 28th of 2013?

10 A. Yep, that's correct.

11 Q. How does February 28 of 2013 compare
12 to the date by which you were -- Digirad was required
13 to file its 10-K for the year 2012?

14 A. Compared to the 10-K. So the 10-K is
15 due 90 days after year-end. Form 10-Q is due 45
16 days after year-end. So this earnings release came
17 out -- or -- I'm sorry -- this release, because it has
18 not all the information in there -- it was mainly for
19 restructuring announcement -- came out a month before
20 our Form 10-K was officially due.

21 Q. A month before.

22 And if I can direct your attention to
23 the third page. This appears to be a copy of the
24 earnings release itself that was then part of your --

1 your 8-K filing. Do I have that right?

2 A. That's -- I'm sorry. Restate your
3 question.

4 Q. We're on page 3. Is this, then, a
5 copy of the earnings release that was issued on
6 February 28th, 2013?

7 A. So I wouldn't really refer to this as
8 an earnings release. I would refer to this as a
9 restructuring announcement. And we did provide
10 certain financial information within this release.
11 But this release occurred two months after our
12 quarter-end or year-end. So we had sufficient time
13 to come up with some numbers related to the activity.

14 But the main purpose of this release
15 was the fact that on February 27th, the day before
16 this, our board of directors had voted to -- to go
17 forward with the restructuring plan. We had
18 previously announced, I believe, on February 14th that
19 we were going to have an announcement on
20 February 28th. So we felt compelled that we should be
21 releasing something on that date since we had
22 announced to the market that we were going to release.
23 And the primary concept of this release was putting
24 out -- putting out the restructuring announcement.

1 And we put out preliminary financial information on
2 the rest of the company, only because we felt we
3 needed to do something from our previous announcement.

4 Q. Okay. Now, you've said this was, I
5 think, primarily about the restructuring. Is it fair
6 to say the very first paragraph of this release
7 provides preliminary fourth-quarter revenue numbers?

8 A. It does, but then the third paragraph
9 and the rest of that page and the beginning of the --
10 the next page talks about the restructuring plan. And
11 that was really the gist of this particular release,
12 because we had been going through a lot of strategic
13 and financial reviews for quite awhile, and we were
14 ready to announce it to the market. And this was a
15 day after the board approved that plan. So it was a
16 twofold release. But I looked at it as mainly a
17 restructuring announce.

18 Q. I'm still looking at the first
19 paragraph of the entire release.

20 A. Oh, I'm sorry.

21 Q. If you look at the second sentence,
22 you point out, "The Company generated positive cash
23 flow from operations during the fourth quarter ended
24 December 31, 2012"

1 Do you see that?

2 A. I do.

3 Q. Was that conclusion drawn on -- from
4 the preliminary financial information that you used to
5 provide the information in this paragraph?

6 A. I was.

7 Q. Okay. And then in the second
8 paragraph of the entire release, it quotes Mr. Clyde,
9 saying "'We achieved solid commercial results in the
10 2012 fourth quarter.'" "

11 Was that statement based on the
12 preliminary fourth-quarter information that you had
13 as of February 28th?

14 A. It was.

15 Q. So when Digirad wants to provide the
16 earnings release based upon preliminary revenue
17 information, it knows how to do it; correct?

18 A. Based on the context, possibly.
19 Again, in the context of this situation, this release
20 came 60 days -- or 58 days or 59 days, if I'm counting
21 my months correctly, after the year-end was
22 completed. As you're considering the first quarter,
23 our release came out roughly 36 days after the
24 quarter-end.

1 So in this instance I had sufficient
2 time to go through our financial results to be able to
3 provide some of this information. And this was the
4 first time, I believe, in Digirad's history or
5 certainly since I had been there, that we had released
6 preliminary financial information. And I had
7 sufficient time to do it.

8 When I went in to first quarter, I
9 didn't have any time to release preliminary
10 information, nor would I choose to, until our auditors
11 have gone through it and felt more comfortable. In
12 this situation, we felt that we needed to have a
13 release on this date because we had already announced
14 to the market that we would have a release. So we
15 decided amongst the restructuring announcement that we
16 would provide preliminary financial information.

17 Q. You felt that in that particular
18 instance you owed it to the market and your own
19 shareholders to release that preliminary information?

20 A. Simply based on the fact that we
21 announced that we were going to provide information on
22 this day, not based on the necessary financial results
23 that came about of this fourth quarter.

24 Q. Now, let me regress a little bit. I

1 was asking you about the earnings release activity in
2 general. Is it fair to say that you coordinate the
3 company's activities associated with an earnings
4 release?

5 A. Yeah. Yep.

6 Q. And typically it's you, the CFO, and
7 the CEO who are involved in the process of preparing
8 the earnings release.

9 A. For the most part, but we also utilize
10 our investor relations firm, and we also provide a
11 draft to our audit committee.

12 Q. Okay. In fact, you talked about the
13 investment relations firm. That's -- that was
14 actually Mr. Clawson; right?

15 A. Correct, Matt Clawson.

16 Q. Now, you provide information to
17 Mr. Clawson so that he can prepare the first draft of
18 an earnings release; right?

19 A. Correct, yep.

20 Q. Okay. He typically prepares the draft
21 earnings release and a script, a narrative script,
22 that would accompany it.

23 A. Yep.

24 Q. And the script being the narrative

1 that the CEO and the CFO will use during the earnings
2 call when you have that.

3 A. That's correct.

4 Q. Now, when the PR, public relations,
5 firm provides a draft to you, you then personally are
6 involved in editing that draft.

7 A. That's correct.

8 Q. And when you and the CEO are satisfied
9 with the earnings release, you provide it to the audit
10 committee of the board for review and comment.

11 A. Correct.

12 Q. I believe you told Ms. Heil that when
13 it came time to moving the at-one-time scheduled
14 April 25 release date to May 3, that was done by you
15 and Mr. Clyde more or less; do I have that right?

16 A. For the most part, yeah. There might
17 have been others that were part of the conversation;
18 but I think he and I, to the best of my memory, were
19 the ones basically making the decision.

20 Q. The two of you were most involved in
21 the proxy solicitation contest for the management team
22 as well.

23 A. For the management team, yes, uh-huh.

24 Q. Now, I'm sorry to bounce back. We

1 were talking about Mr. Clawson.

2 Typically you give him information and
3 then you have a discussion with him about what
4 happened in the quarter to assist him in preparing the
5 news release.

6 A. We'll give him preliminary financial
7 information and have a call with him, and he'll take
8 that information and information from the call and
9 come up with a draft of those documents.

10 Q. You want him to be sufficiently
11 informed so he can get going and prepare those --
12 those drafts.

13 A. Correct.

14 Q. Now, if you would look at -- briefly
15 at Exhibit 161, please.

16 A. Okay.

17 Q. In the middle there's an e-mail on
18 April 11th at 11:02. When you say "Being finalized
19 today," were you referring to finalizing that
20 information that you would give to Mr. Clawson to go
21 draft an earnings release?

22 A. Yeah. I mean, the interpretation on
23 this is -- and how we talk internally is the
24 preliminary financial information before

1 reconciliation review, auditors, all that kind of
2 stuff, is going to be ready later that day. And
3 that's what he would utilize for his first cut at the
4 draft earnings release and script.

5 Q. Then if you would look at Exhibit 166,
6 please.

7 A. Okay.

8 Q. Is it accurate to say that the
9 attachment to 166 is that first earnings release
10 provided to you by Mr. Clawson?

11 A. Yeah, that's correct.

12 Q. And --

13 A. I'm assuming it's Draft 1. I just
14 don't remember each draft.

15 Q. Sure. In any event, it's a draft from
16 Mr. Clawson for your review and comment.

17 A. Yep.

18 Q. And then on Wednesday, April 17th, you
19 were sending it along to Todd Clyde -- no. I take
20 that back. It looks like he was delivering it to you
21 on April 17th. Do I read that correctly?

22 A. That's correct.

23 Q. Okay. And then if you would look at
24 his draft release, the first page of it, which is the

1 second page of the exhibit, in the very first
2 paragraph he -- I assume it was him or he, who
3 included language that he put in gray, that he shaded
4 that says, "The Company generated positive cash [flow]
5 from operations during the first quarter"

6 So those were his -- that was his
7 suggestion; is that right?

8 A. Yeah. And I don't know if that's his
9 suggestion or if that's more of a carryover from the
10 prior release that we had put out, because I believe
11 it had similar language.

12 As a matter of process, I believe
13 Mr. Clawson copies over the prior earnings release and
14 modifies it for the current quarter. So he'll leave
15 certain concepts and language in within that document
16 as he carries it over.

17 Q. Any financial information that's
18 reflected in this earnings release, this draft
19 earnings release, would be financial information that
20 he got from you.

21 A. I would say in general. But this
22 document is certainly tied out before release. I
23 mean, as you can see, the next page and throughout
24 this document there's a lot of Xs in there depicting

1 potential financial information. And half the time,
2 you know, the numbers in here are incorrect, too, and
3 we get -- we update them. In general, these release
4 drafts that Mr. Clawson sends to me I probably edit a
5 good 50 percent of it.

6 Q. Let's talk about what you edited in
7 this one.

8 A. Okay.

9 Q. Would you turn to Exhibit 165, please.

10 A. Okay.

11 Q. This has a e-mail from you to others
12 and there is attached release. And if I understand
13 correctly, this reflects your proposed edits to
14 Mr. Clawson's proposed earnings release.

15 A. Yep.

16 Q. And then for starters, you deleted
17 that reference to a "positive cash [flow] from
18 operations" because you knew -- you knew as of
19 April 17th that it would not be true.

20 A. Yeah, because we had recorded a
21 million dollars' worth of restructuring charges in the
22 quarter. I don't think anybody would have expected us
23 to have positive cash flow in the midst of a
24 restructuring event.

1 Q. Well, turn to the third page of it,
2 would you please, which begins "First Quarter 2013
3 Summary."

4 A. I'm sorry. Where are you at? On the
5 third page?

6 Q. Yeah. My --

7 A. Yeah.

8 Q. It's the third page of the draft
9 release.

10 A. All right.

11 Q. "First Quarter 2013 Summary." And the
12 first bullet point is "Total revenue"

13 Do you see that?

14 A. I do.

15 Q. Mr. Clawson put in the "Total revenue
16 for the first quarter of 2013 was 11.5 million,
17 compared to 13.0 million for the same period in the
18 prior year."

19 And it looks to me like you did not
20 edit any of that. Did I interpret that correctly?

21 A. It appears so, yeah.

22 Q. And in the next bullet point -- I'll
23 just paraphrase -- he says that gross profit for the
24 first quarter fell from 3.7 million to 2.8 million.

1 And you did not edit any of that; correct?

2 A. That's correct. I didn't edit those
3 because that was the result of reduced camera sales
4 that we experienced during the quarter, as I warned
5 eight times in our Form 8-K, that as the result of
6 restructuring activities, we may experience depressed
7 camera sales as we move forward. And as a result of
8 that announcement and the revenue decline, I wasn't
9 really concerned about those differentials and
10 explained it any more because we had already disclosed
11 that information to the market.

12 Q. For starters, you didn't correct any
13 of those numbers because you thought they were
14 accurate as of about April 18th?

15 A. So far as I knew, our -- our financial
16 review process by Ernst & Young, including revenue
17 recognition, wouldn't have been completed at that
18 time. So I wouldn't have had any reason to edit it;
19 but also as a matter of course, I'm not the one that's
20 taking and tying every number in these earnings
21 release. I have a finance team that does that. They
22 would have done that later on in the process after
23 this date.

24 Q. Did anyone ever edit the revenue

1 number -- the total revenue numbers reflected in your
2 April 18th version of the earnings release?

3 A. I don't recall specifically. I think
4 that these numbers are probably accurate; but, again,
5 we just go through a process and I don't have every
6 number memorized.

7 Q. Did anyone ever edit the gross profit
8 numbers reflected in this April 18th version of the
9 earnings release?

10 A. Again, I don't remember specifically.
11 Probably not.

12 Q. Now, this release, this
13 April 18th version of the release, Exhibit 165, does
14 not attribute any of the decline in total revenue to
15 restructuring, does it?

16 A. Again, I don't know if this is the
17 final draft of the release; but, actually, in the
18 first paragraph, we do. We say, "... reflecting a bit
19 of disruption as we deployed our restructuring plan"
20 in the final sentence of the first paragraph. And
21 Diagnostic Imaging includes the business unit in which
22 we have camera sales.

23 Q. And did that attempt to attribute part
24 of the decline in revenue to the restructuring plan

1 get edited out of in release at any point?

2 A. Again, I don't recall. I don't have
3 the actual release memorized.

4 Q. Isn't it fair to say that you don't
5 know whether the restructuring costs even did have any
6 effect on revenues?

7 A. I would say that it would be fair to
8 say that I wouldn't be able to quantify the fact that
9 the restructuring plan had a specific dollar impact on
10 our sales. However, I was certainly cognizant of the
11 concept. And, again, why we have disclosure in our
12 Form 10-K filed on March 13, 2013, that warned at
13 least eight times that our camera sales going forward
14 may be depressed as a result of our restructuring
15 plan.

16 Q. You'd be guessing at whether or not
17 the -- I'm sorry. You'd be guessing at what amount
18 the restructuring -- would affect --

19 A. For a particular amount, yes. From --
20 from a business trend or concept, no. I think that we
21 would be able to, kind of, have a general idea. And
22 certainly as we discuss about business activities and
23 earnings release and operations of the business, it's
24 expected that we provide insight on what we think is

1 going on with the business. Some of that is easily
2 quantifiable and some of it is not.

3 Q. And one of the things that you can
4 quantify is the impact or any alleged impact of the
5 restructuring on gross profits; correct?

6 A. Not -- not beyond specific charges
7 that we would have taken during the period. For
8 example, during this period, we took a charge of, I
9 think, 3 or 400,000 for inventory adjustments that
10 went through our gross profit. And it may have not
11 been discussed in this release, but I believe it was
12 discussed in our Form 10-K or 10-Q.

13 Q. Did the audit committee of the board
14 of directors meet on April 23rd?

15 A. That date sounds about right.

16 Q. And after the audit committee met, did
17 you distribute the draft earnings release to the full
18 board on April 25th?

19 A. I believe I did, yes, because later on
20 I saw some e-mails where I was soliciting feedback on
21 that earnings release.

22 Q. Let's look briefly at 170. If I'm
23 looking -- the second e-mail, on April 25th you
24 distributed the complete proof of the Q1 2013 press

1 release to the full board of directors; do I read that
2 right?

3 A. Yeah, that's correct. I particularly
4 wanted them to look at it because it was the first
5 time that we had introduced non-GAAP financial
6 measures within the release. So I was soliciting
7 feedback on that format.

8 Q. Incidentally, you spoke a little bit
9 about some logistical reasons for why the earnings
10 release date was pushed back twice, including some
11 personnel issues and the like. Aside from that e-mail
12 you discussed where you made reference to a
13 challenging quarter --

14 A. Uh-huh.

15 Q. -- which included the restructuring --

16 A. Uh-huh.

17 Q. -- is there any -- are you aware of
18 any other exhibits that reflect these personnel or
19 memorialize these personnel issues and the like that
20 supposed were the basis for the extensions?

21 A. Exhibits within the evidence here?

22 Q. Yes.

23 A. No, but I can give you my controller's
24 wife's birth record and some other things to show you

1 about the difficulties I had during the quarter. I
2 mean, I had a new controller's wife had a baby. I had
3 temporary staff. I had new people. I was relatively
4 new. I was up to my eyeballs in work.

5 Q. I'm just wondering if there's ever any
6 e-mail where you said to Mr. Clyde, you know, "I'm
7 going to have trouble meeting this date ."

8 A. No. I -- I haven't seen anything.

9 Q. Finally, could I ask you to look at
10 Exhibit 188.

11 A. Okay.

12 Q. Now, this is the May 6th release that
13 does include the earnings release for the first
14 quarter; right?

15 A. Yep. It looks like it, yep.

16 Q. And for the sake of expediency, it
17 would be fair to say as a general proposition, we can
18 compare the April 18th draft that you and I discussed
19 to the final draft and see the extent to which any of
20 the disclosures about revenues or gross profits
21 changed, if at all, during that three-week period.

22 A. Yeah, we could certainly compare the
23 two, yep.

24 Q. I'm just going to ask you one or two

1 questions as fast as I can about the NOL matter.

2 A. Okay.

3 Q. How does the fact that the company's
4 involved in a buyback affect the implementation or
5 operation of an NOL rights plan?

6 A. Please state your question again.

7 Q. Sure. Does the fact that the company
8 is involved in a buyback have any effect on the
9 operation of the NOL rights plan?

10 A. It -- it could indirectly. I think as
11 part of an NOL plan and -- and being prudent and
12 monitoring your NOLs as a company, the concept around
13 382 is if you go over 50 percent ownership change,
14 your NOLs get limited significantly under the IRS
15 codes. As you buy back shares, you reduce the
16 dilution for outstanding shareholders. And so their
17 relative ownership percentage of the company
18 increases, as would a tender offer or a variety of
19 other things that would happen from a share repurchase
20 or -- or having less shares outstanding on the street.

21 So as part of that plan, you need to
22 be cognizant of those situations and monitor that.

23 Q. Do you recall any analysis done in
24 connection with the NOL rights plan of valuing what

1 the effect of the buyback would be for shareholders
2 because the buyback plan would raise their relative
3 percentage ownership of the company?

4 A. I wouldn't -- I would say that yes, we
5 are aware of the concept. We didn't write the NOL
6 protection plan specifically in relation to the timing
7 or the amount of shares that we buy back; but it is
8 something that I monitor closely and am aware of.
9 Beyond that, the plan has certain provisions in it
10 that if, you know, somebody is brought in above
11 5 percent by a fact of a corporate action, that those
12 situations are not deemed a -- they're not deemed an
13 acquiring person under the plan that would cause the
14 -- the extensive dilution that could occur under the
15 plan.

16 MR. WAKE: I'm going to stop from
17 asking more questions, Your Honor.

18 MS. HEIL: We have no further
19 questions, Your Honor.

20 THE COURT: Mr. Keyes, you may step
21 down.

22 THE WITNESS: Thank you.

23 (Witness excused)

24 THE COURT: My understanding is there

1 are no more witnesses. Is that correct? Except for
2 the deposition designations.

3 MR. SEAMAN: That's correct, Your
4 Honor.

5 MR. FLEMING: Correct.

6 THE COURT: Where are we in terms of
7 the exhibits?

8 MR. SEAMAN: I think we're in
9 agreement we're going to move in the joint exhibit
10 list en masse with the exception of three exhibits
11 that we're going to claw back based on the facts that
12 Your Honor received today from the Dimensional folks.

13 THE COURT: The Dimensional exhibits.

14 MR. SEAMAN: And those exhibits for
15 the record are 134, 139, and 140. Those will not be
16 moved into evidence.

17 Along those same lines there are a
18 couple pages from the Sandberg deposition transcript
19 that we want to also make sure are in evidence. The
20 transcript of a party opponent, we want to make sure
21 that those are designated. I think Mr. Fleming has
22 those page numbers. And if it makes sense, we can
23 read those into the record.

24 MS. MCGEEVER: Well, that's what the

1 pretrial order provided, Your Honor. The pretrial
2 order provided for designations of those witnesses who
3 did not appear to testify and testify at trial. So
4 there are five witnesses deposed who weren't here and,
5 that's what the pretrial order says will be
6 designated. We've proceeded under the assumption,
7 based on the pretrial order, that if a witness
8 testified, then his deposition wasn't going to be
9 designated.

10 MR. SEAMAN: I think under Rule 32 we
11 can designate portions of an adverse party's
12 deposition.

13 MS. MCGEEVER: You could, but it
14 wasn't in the pretrial order. That's not what we
15 agreed to as part of the pretrial, Your Honor.

16 THE COURT: Let me do this before I
17 lose track of what's been done.

18 All of the exhibits which are
19 listed -- and there may be some gaps, but running from
20 1 through 202, with the specific exceptions of 134,
21 139, and 140, which are related to the Dimensional
22 matter, are admitted.

23 (Joint Exhibit Nos. 1 through 133, 135
24 through 138, and 141 through 202 were received in

1 evidence.)

2 THE COURT: We have five depositions
3 that were lodged yesterday, I think

4 MS. MCGEEVER: Yes, Your Honor. And
5 we delivered sets.

6 THE COURT: And that would be Taylor,
7 Casey, Eberwein, Chi, and Bauer. And Chi was the one
8 for whom there was concern about the confidentiality,
9 but these depositions were lodged under seal. So to
10 the extent there's a concern about that, I think the
11 lodging of those depositions under seal at least takes
12 care of this for awhile.

13 MS. MCGEEVER: I agree.

14 MR. SEAMAN: Agreed, Your Honor.

15 THE COURT: Now, that gets us to what
16 to do about the deposition designation of the
17 principal of Red Oak.

18 MR. SEAMAN: We wouldn't be permitted,
19 I don't think, under the ordinary rules to designate
20 portions of a transcript for a witness who would be
21 coming to testify live. It wouldn't -- it wouldn't
22 occur to us to designate that in the pretrial. We
23 don't know what his testimony is going to be on the
24 stand. So he testifies as to what he testifies to;

1 and if he doesn't address certain things, then they're
2 not addressed. And that's the reason for designating
3 certain line and page matters for the record.

4 MS. MCGEEVER: He was cross-examined,
5 and anything that they wanted to draw out about his
6 testimony could have been brought out on
7 cross-examination, Your Honor. The -- that's why he
8 was here. So to now start going and saying "Now we
9 want to lob in portions of his deposition," he
10 appeared live at trial. He testified. He was
11 cross-examined. Any point they wanted to draw out
12 they could have drawn out. They knew what he said in
13 his deposition.

14 So my position is they had his -- they
15 had their shot with him, and let's -- and the pretrial
16 order is governing at this point as to who he would
17 designate, and it would be from those five witnesses
18 who didn't appear. We'll have a separate issue at
19 some point because of Mr. Gillman because he was going
20 to testify and didn't. I don't think we'll end up
21 needing to designate anything from him. But as far as
22 Sandberg is concerned, he was here and they had the
23 chance.

24 THE COURT: Can you give me a

1 15-second Cook's tour as to what the designation
2 portion would address? I'm not interested in
3 substance. I'm just interested in an idea --

4 MR. FLEMING: Sure. Your Honor, I --
5 I can address it. It's four pages, and as part of
6 defendants' case, it's our -- I believe it's our right
7 to designate these party admissions. One is a page
8 that deals with the impact that the treasury shares
9 had upon him. Mr. Sandberg gave testimony that's 180
10 degrees different from what he gave on the stand here.

11 Another, two other portions deal with
12 this exchange between Taylor and Bauer and
13 Mr. Gillman, which has not been the subject of much
14 direct testimony, but I would like to preserve in the
15 record.

16 And the other involves communications
17 that Alliance heard from major shareholders about the
18 supposed vote counting --

19 MS. MCGEEVER: Your Honor --

20 MR. FLEMING: -- and it's four pages
21 total.

22 MS. MCGEEVER: -- it sounds like most
23 of this would have been some type of impeachment
24 evidence which they wanted to use which they should

1 have done when he was up on the stand, at which point,
2 then, we might have had some opportunity to do some,
3 if it were true impeachment, do some rehabilitation of
4 the witness. Now we're just getting this when we
5 don't have any chance to examine the witness about it.

6 THE COURT: There's no question that
7 if we had thought about this and done this from the
8 beginning, it could have been presented and admitted.

9 My problem is the pretrial order
10 doesn't admit depositions generally. I concede
11 because Mr. Gillman was here but didn't -- I guess can
12 say ran out of time from testifying, we may have to
13 look at that differently. But where we don't have a
14 reservation of rights with respect to deposition
15 testimony and where the witness was here and fully
16 subject to cross-examination, I can't come up with a
17 good reason for letting those four pages in at this
18 late date.

19 MS. MCGEEVER: Thank you, Your Honor.

20 Then the last issue we'll have to deal
21 with is the NOL poison pill discovery. There was a
22 procedure agreed to during the course of
23 Mr. Eberwein's deposition where they were directing
24 witnesses to refuse to answer any questions with

1 respect to the poison pill. Mr. Wake asked that -- "I
2 understand you're waiting for a ruling from the Court.
3 I'm not disagreeing with you. I'm just trying to
4 understand" -- this is page 39 and 40 of Eberwein --
5 "I'm just trying to understand that if that
6 amendment" -- this was our amended pleading -- "is
7 accepted or if your motion to strike is denied, is it
8 your view that the NOL calculations would then be
9 relevant?"

10 "MS. HEIL: Yes.

11 "And if you later would like the
12 opportunity we can talk about a later opportunity to
13 reopen questions about the topic" -- "those topics."

14 So that's how it was addressed in --
15 and I see Your Honor is looking at the clock. I can
16 make a submission on this.

17 THE COURT: No, I'm not looking at the
18 clock. I'm looking at the ceiling. It's my way of
19 thinking.

20 MS. MCGEEVER: So that's how we
21 agreed, the parties agreed to handle deposition --
22 additional deposition testimony or questions on it.

23 With respect to document production,
24 in their written responses to our second request,

1 Request No. 1, they stated that they would produce
2 responsive poison pill type documents "in the event
3 the Court does not strike or dismiss the claims in the
4 verified amended complaint relating to Digirad's
5 implementation of the tax benefit preservation plan."

6 So that happened on Monday, that
7 ruling. We've not gotten the document productions
8 that they said they would produce when that ruling was
9 made. So we haven't had any opportunity, either to
10 develop an affirmative case on this or to
11 appropriately address the evidence that was offered at
12 trial on this. And we're going to need that
13 opportunity. I'm happy to discuss it with Mr. Seaman
14 to see if we can come up with a very streamlined
15 process for dealing with this.

16 THE COURT: Is this simply a matter of
17 document production, or are we reopening the entire
18 scope of discovery?

19 MS. MCGEEVER: I don't -- I think we'd
20 need to look at the document production, but I'm
21 hopeful that we'd just be able to get some documents
22 and decide okay, here's what we have. But ...

23 THE COURT: How long would it take you
24 to get the documents together? You've seen the

1 request.

2 MR. SEAMAN: Two days.

3 THE COURT: Why don't you produce the
4 documents, and then we'll see where we are.

5 MS. MCGEEVER: Thank you, Your Honor.

6 MR. SEAMAN: We'll do that, Your
7 Honor.

8 THE COURT: Yeah. That begs the next
9 question. What kind of post-trial submittals do
10 you-all want to make? I'm sure you-all just want to
11 sit down in your briefs what you already wrote in your
12 opening briefs.

13 MS. MCGEEVER: No. Your Honor, we had
14 actually talked about following Your Honor's
15 suggestion of having a summation. But obviously that
16 didn't -- that wasn't going to happen. But I will
17 talk to Mr. Seaman. I did mention to him that perhaps
18 we could have just a summation by phone to Your Honor.

19 THE COURT: We can certainly gather by
20 phone. There's no sense dragging back everybody
21 together. And if -- if you have some urge to focus on
22 a couple things, I just think a brief would be a waste
23 of everybody's time and energy.

24 MS. MCGEEVER: I think we both agree

1 with that.

2 THE COURT: Whether a brief letter --
3 let me not even use "a brief letter" -- a short letter
4 so there's ambiguity. If you want to focus on
5 something, if you all can agree on four or five pages
6 or something like that -- if you think that would be
7 helpful -- and I'm not even pushing that. I just
8 don't want to preclude it; that's all.

9 MS. MCGEEVER: Thank you, Your Honor.
10 But we will get back promptly. We do agree that we
11 don't need big briefs.

12 MR. SEAMAN: That's certainly agreed.

13 THE COURT: After you have had a
14 chance to look at the documents, let me know where we
15 are, and then we will schedule a post-trial oral
16 argument as promptly as possible. This is one of
17 those things which, for all kinds of reasons, I want
18 to get to as soon as I can.

19 MS. MCGEEVER: Understood, Your Honor.
20 Thank you for your time.

21 THE COURT: Last time I checked,
22 that's what I get paid for. So I don't have a whole
23 lot of choice in the matter.

24 Is there anything else that we need to

1 address this afternoon or evening, as the case may be?

2 MS. MCGEEVER: No.

3 MR. SEAMAN: Do we need a date by
4 which we need to get back to Your Honor if we're
5 producing documents by Friday, submissions by the next
6 Wednesday or Thursday and whatever Your Honor's
7 schedule permits after that? Might as well start that
8 discussion now.

9 MS. MCGEEVER: I'm hopeful --

10 THE COURT: Do you have any idea how
11 voluminous -- I can't imagine it will be voluminous
12 but I don't know that, because part of it is --

13 MR. SEAMAN: We do.

14 THE COURT: -- they've got to have an
15 opportunity to review it.

16 MR. SEAMAN: We do.

17 MS. HEIL: It's less than a hundred
18 documents, Your Honor. We think actually it might be
19 closer to 50.

20 MS. MCGEEVER: Okay. I guess my best
21 suggestion is to speak to Mr. Seaman tomorrow and
22 report to the Court as to what we think is a realistic
23 time frame that would get this thing wrapped up before
24 next week -- by the end of next week.

1 THE COURT: I can trust counsel to do
2 that. Just let me know where things stand. If I have
3 to get involved, I will be.

4 MS. MCGEEVER: Thank you, Your Honor.

5 MR. SEAMAN: Thank you, Your Honor.

6 THE COURT: I want to thank you all.
7 This took a little longer than we thought, but at
8 least we got done today. There was a period of time
9 when I didn't think we were. I do appreciate
10 everyone's efforts. Obviously a lot of work went into
11 getting this matter ready for trial, and I do
12 appreciate that. I know you-all have traveling do. I
13 wish you safe travels.

14 With that, recess Court, please.

15 MS. MCGEEVER: Thank you.

16 MR. SEAMAN: Thank you, Your Honor.

17 (Court adjourned at 5:19 p.m.)

18 - - -

19

20

21

22

23

24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

INDEX

PLAINTIFF'S WITNESSES

Direct

Cross

Redr.

Recr.

David Sandberg

5

66

111

112

DEFENDANT'S WITNESSES

John Grau

115

180

-

-

Jeffry Keyes

206

266

-

-

- - -

JOINT EXHIBITS

No.

In Evid.

1 - 133

297

135 - 138

297

141 - 202

297

- - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE

We, MAUREEN M. McCAFFERY and NEITH D. ECKER,
Official Reporters for the Court of Chancery of the State of
Delaware, do hereby certify that the foregoing pages
numbered 3 through 307 contain a true and correct
transcription of the proceedings as stenographically
reported by us at the hearing in the above cause before the
Chancellor of the State of Delaware, on the date therein
indicated.

IN WITNESS WHEREOF we have hereunto set our
hands at Dover, this 7th day of August 2013.

/s/ Maureen M. McCaffery

Official Court Reporter

/s/ Neith D. Ecker

Official Court Reporter