

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

----- x
 In the Matter of Arbitration between: :
 :
 BRIDGESTONE LICENSING SERVICES, INC. :
 and BRIDGESTONE AMERICAS, INC., :
 :
 Claimants, :
 : Case No.
 and : ARB/16/34
 :
 REPUBLIC OF PANAMA, :
 :
 Respondent. :
 ----- x Volume 4

ORAL HEARING

Thursday, July 1, 2019

The World Bank Group
1225 Connecticut Avenue, N.W.
Conference Room C 3-100
Washington, D.C.

The hearing in the above-entitled matter
commenced on at 9:00 a.m. before:

LORD NICHOLAS PHILLIPS, President of the
Tribunal

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MR. J. CHRISTOPHER THOMAS, QC, Co-Arbitrator

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P R O C E E D I N G S

1
2 PRESIDENT PHILLIPS: Good morning,
3 everyone. Are we ready to go?

4 MS. KEPCHAR: Yes, we are.

5 PRESIDENT PHILLIPS: Good.

6 Any housekeeping?

7 MS. HORNE: Not from Panama, Mr. President.

8 MS. KEPCHAR: Not from Claimants.

9 SECRETARY TORRES: I do have a very small
10 one, Mr. President. This is Luisa here speaking.

11 The United States has inquired whether
12 either of the Parties or the Tribunal would have any
13 problem with two of their interns from the U.S. State
14 Department attending the Closing Statements tomorrow.
15 And before I answer, I wanted to confirm whether
16 anybody had any concerns?

17 MS. KEPCHAR: We have no concerns.

18 MS. HORNE: None for Panama.

19 SECRETARY TORRES: Thank you.

20 PRESIDENT PHILLIPS: All right. Then let's
21 proceed.

22 MS. KEPCHAR: Mr. President, Claimants call

1 their next witness, Roberta Jacobs-Meadway.

2 ROBERTA JACOBS-MEADWAY, CLAIMANTS' WITNESS, CALLED

3 PRESIDENT PHILLIPS: Good morning.

4 THE WITNESS: Good morning.

5 PRESIDENT PHILLIPS: You will find in front
6 of you an expert declaration. If you would read it
7 to yourself and if happy with it, read it to us.

8 THE WITNESS: I solemnly declare upon my
9 honor and conscience that my statement will be in
10 accordance with my sincere belief.

11 PRESIDENT PHILLIPS: Thank you.

12 DIRECT EXAMINATION

13 BY MS. KEPCHAR:

14 Q. Good morning, Ms. Jacobs-Meadway.

15 A. Good morning.

16 Q. I refer you to Tabs 1 and 2 in the white
17 binder in front of you. Will you please take a look
18 at those documents and let me know if those are the
19 Expert Reports you prepared in this proceeding.

20 (Witness reviews documents.)

21 A. They appear to be, yes.

22 Q. Are there any typographical or translation

1 errors or the like that you would like to point out
2 and correct?

3 A. I'm aware of none.

4 Q. Are there any updates to your curriculum
5 vitae you would like to make?

6 A. The only significant update would be that I
7 retired from BakerHostetler, effective May 31st of
8 this year.

9 Q. Thank you.

10 Ms. Jacobs-Meadway, are you familiar with
11 Section 10bis of the Paris Convention?

12 A. Yes, I am.

13 Q. What does Section 10bis cover?

14 A. Section 10bis covers acts of unfair
15 competition.

16 Q. Ms. Jacobs-Meadway, I'm going to have
17 Page 16 of your Second Report put up on the
18 screen, and, for the record, that is Paragraph 32 of your
19 Report.

20 Can you expand the three subparagraphs?

21 Ms. Jacobs-Meadway, your Report refers to,
22 and discusses, Article 10bis of the Paris Convention,

1 and gives examples of unfair competition; correct?

2 A. Yes.

3 Q. Is that what's on the screen?

4 A. That is correct. That is from the
5 Convention itself. The drafters provided not only
6 the language of what would be unfair competition, but
7 provided specific examples to illustrate what acts
8 were considered within the scope of Section 10bis.

9 Q. Ms. Jacobson testified yesterday that
10 Section 10bis of the Paris Convention covers
11 unsuccessful trademark proceedings within the ambit
12 of the unfair competition provisions of the section;
13 do you agree?

14 A. No, I don't.

15 Q. Why not?

16 A. The purpose of Article 10bis is to provide
17 for acts of unfair competition in a commercial or
18 industrial setting. This is an equivalent to Section
19 43(a) of the Lanham Act in the United States, and the
20 object is to set rules against unfair competition in
21 the nature of acts that are misleading, deceptive,
22 with respect to the characteristics or qualities of a

1 goods, service, or business. This is not directed to
2 legal proceedings.

3 Q. And does your understanding comport with the
4 text of Section 10bis that is on the screen?

5 A. Yes, it does.

6 Q. So, very briefly, what are the three
7 examples that Section 10bis gives with respect to
8 unfair competition?

9 A. The first is your likelihood of confusion,
10 which is the basis for opposition in infringement
11 proceedings, where you're dealing with trademarks,
12 tradenames and the like;

13 False allegations in the course of trade.
14 This is basically commercial libel; false
15 representations, allegations about the nature of a
16 good or service or business;

17 And the third is the allegations in the
18 course of the trade which are likely to mislead the
19 public as to the nature, process, characteristic,
20 suitability for the purpose, or the quantity of the
21 goods.

22 So, this is directed to representations in a

1 commercial context which have a tendency to deceive,
2 mislead, or discredit falsely.

3 Q. Thank you.

4 In your expert submissions, you state that
5 you're unaware of any decision anywhere in which a
6 trademark opposer was assessed damages for the fact
7 that the registration of applicant's mark was
8 unsuccessfully opposed. In the course of preparing
9 your expert reports, did you look to see if any such
10 cases exist?

11 A. I did.

12 Q. Is it still the case, as we speak today,
13 that you're not aware of such a case?

14 A. That is correct.

15 There are some regimes where the party that
16 is unsuccessful has to reimburse the successful party
17 for costs, but that's different than damages.

18 Q. Ms. Jacobs-Meadway, I would refer you to the
19 Second Expert Report of Nadine Jacobson; that's at
20 Tab 4.

21 Are you familiar with this Report?

22 A. Yes, I am.

1 Q. In Section 2, starting on Page 3,
2 Ms. Jacobson argues that Claimants cannot claim
3 damage to the goodwill inherent in the BRIDGESTONE
4 and FIRESTONE trademarks under any theory because
5 they are Licensees not the owners of the trademark
6 registration. Further, in Paragraph 6, Ms. Jacobson
7 states: The "reality is that goodwill is not shared
8 between trademark owner and Licensee."

9 Do you see that language?

10 A. Yes, I do.

11 Q. Do you agree with that argument?

12 A. No, I don't.

13 Q. Why not?

14 A. The entire purpose for a business entity to
15 take a license is to share in the goodwill, and
16 particularly in the commercial context, where you
17 have a trademark owner that may be a holding company,
18 may be the trademark equivalent of a non-practicing
19 entity. You have the goodwill that is, in fact,
20 being created to inure to the benefit of the
21 trademark owner by the Licensee, and exclusive
22 Licensees in particular, whether that's with respect

1 to a product or a geographic market, in fact, have
2 many of the indicia of ownership, including the
3 ability to bring opposition proceedings, to initiate
4 litigation against passing off.

5 So, to say that a licensee, especially an
6 exclusive licensee, does not share in, and
7 participate in, the goodwill that's associated with
8 the mark is simply not true.

9 Q. Can a trademark licensee itself generate
10 goodwill in a mark?

11 A. Of course. As I said, often, the trademark
12 owner, in fact, is not engaged in making the products
13 or selling the goods, and the commercial activity
14 that generates the goodwill is based on the efforts
15 of the Licensee pursuant to the License Agreement.

16 Q. Ms. Jacobson further contends that any
17 goodwill in a mark is "owned" only by the trademark
18 owner.

19 My first question to you is: Is it correct
20 to use the concept of "ownership" when discussing
21 goodwill?

22 A. It's misleading because the concept of

1 goodwill itself is not clearly well-defined. The
2 Lanham Act has no definition for "goodwill" in the
3 definition section.

4 What is intended depends very much on the
5 context. By way of example, if you have a trademark
6 which is filed on the basis of intent to use in the
7 United States with no use, there are restrictions on
8 the ability to transfer that trademark because there
9 is no goodwill associated with the business in the
10 mark. But once an allegation of use in commerce is
11 made and accepted, that mark can be transferred with
12 the goodwill, even if the commercial transaction has
13 been relatively limited.

14 Similarly, you can have goodwill without any
15 kind of technical trademark use at all.

16 Q. Does the concept of "ownership" fit the
17 notion of "goodwill," and the concept of ownership
18 meaning "title to a trademark", "title to goodwill",
19 is that consistent--well, let me rephrase that.

20 Is that a separate consideration? A separate
21 issue then, the goodwill and how it functions in the
22 marketplace?

1 A. Yes, it is. And again, we go back to the
2 fact that the actual trademark owner, whose benefit
3 the goodwill inures, is not necessarily the party
4 engaged in the commercial transactions who is most
5 directly and intimately involved in the day-to-day
6 business of the use of the mark and generating the
7 goodwill.

8 And irrespective of the actual title of
9 ownership of the trademark and the goodwill
10 associated with it, the Licensee who is engaged in
11 the commercial activity obviously has the interest in
12 creating the goodwill, maintaining the goodwill, and
13 is going to be damaged if that goodwill is damaged.

14 Q. Even if we accept Ms. Jacobson's premise
15 that a licensee does not have legal title to
16 goodwill, do trademark licensees have valuable
17 trademark rights under a license agreement?

18 A. Of course they do. That's why they're
19 paying money, or other consideration. It need not be
20 money changing hands. But, what you have is a
21 situation where a Trademark Licensee, and as I say,
22 an exclusive Licensee has a lot of the indicia and

1 rights of the trademark owner. The Trademark
2 Licensee may be charged by the trademark owner, in
3 fact, with controlling the quality of the goods and
4 services, and so maintaining the goodwill in the
5 mark. The exclusive Licensee will have the right to
6 bring actions to enforce the trademark rights in the
7 mark based on the licensed rights that that exclusive
8 Licensee has.

9 Q. So, in the context of what you've just
10 described, Ms. Jacobs-Meadway, if trademark goodwill
11 is damaged or impaired in some way, does the
12 trademark licensee suffer damage as well?

13 A. Yes, and that's simply because if I am an
14 exclusive Licensee and I'm using a mark, I'm
15 promoting a mark. I'm having goods made and sold, and
16 I am looking to the trademark to help maintain a
17 market position, and to prevent the use of
18 confusingly similar marks on the same or related
19 goods, anything that weakens the scope of protection
20 that that mark is entitled to, anything that is
21 detrimental to the goodwill, is going to impact
22 adversely on the business that the Licensee is

1 conducting under the Licensor's mark.

2 Q. Ms. Jacobson yesterday presented to the
3 Tribunal her position that a trademark license is not
4 an "intellectual property" right for the licensee and
5 doesn't create an "intellectual property" right for
6 the licensee; is that correct?

7 A. I don't believe so, no.

8 Q. Why is that?

9 A. Because, again, if you have a license, and,
10 particularly, an exclusive license, you have the
11 rights that are those that append on a trademark that
12 is in use in commerce, the right to, if you will,
13 bring an action for passing off for an opposition,
14 the ability to--depending on the contract with the
15 licensor participate in litigation as the party who
16 is most directly concerned in the marketplace with
17 any conduct that would be adverse to the strength of
18 the mark or value of the goodwill and the value of
19 the license.

20 Q. Can you explain to the Tribunal why a
21 trademark license is not like an ordinary contract?

22 A. The trademark license is not the same as an

1 ordinary contract because, among other things, you do
2 have this concept of goodwill which is associated
3 with the mark. It's why, in the United States,
4 trademarks technically can't be assigned without the
5 goodwill because you can't separate the mark from the
6 goodwill, and that leads to a host of other
7 considerations in terms of assignability that are
8 unlike an ordinary contract.

9 Q. Thank you.

10 In preparing your Expert Report,
11 Ms. Jacobs-Meadway, did you attempt to determine
12 whether there existed any cause of action for
13 so-called "trademark bullying"?

14 A. Yes.

15 Q. Did you identify any causes of action for
16 trademark bullying?

17 A. There are no such causes of action as I have
18 been able to identify. You have a Senate hearing
19 that took place because one particular Senator was
20 petitioned by a client who felt he had been bullied,
21 but there was no legislation that resulted, and
22 "bullying" is simply a term that some people apply to

1 enforcement of trademark rights that they deem
2 overaggressive.

3 Q. Now, I would like to ask you some questions
4 about trademarks that coexist in a certain
5 marketplace.

6 Is the simple fact that marks have coexisted
7 operate as a bar to opposing trademark registration?

8 A. No.

9 Q. Why not?

10 A. Because the trademark-application process
11 gives an applicant the ability to claim trademark
12 rights broader than the use of the mark that's being
13 made in commerce, to begin with, so that if you're
14 looking at the opposition to the claim of exclusive
15 right that's being made, the application is what's
16 relevant, not so much the use.

17 Obviously, in regimes where you do not have
18 to have use before you file, there is no coexistence
19 except to the extent that there may be pre-marketing
20 activity.

21 But, in other regimes, a mark can be filed
22 based on actual use, in which case, the mark has

1 obviously been in use based on the filing
2 Declaration, and an opposition is entitled to be
3 filed once the mark has been published for opposition
4 purposes.

5 So, oppositions are commonly brought against
6 marks which have been in use, as well as marks that
7 are intended to be in use. Now, sometimes the
8 opposition is brought where the claim of right by the
9 applicant is broader than the applicant's actual use,
10 but the timing is not material as far as the use
11 goes. Actual confusion is a factor in the likelihood
12 of confusion analysis. Obviously, you can't have
13 actual confusion until there's some use. So, if
14 you're going to be alleging actual confusion in a
15 notice of opposition, clearly the applicant's mark
16 must have been used at some point in some place for
17 the confusion to have occurred.

18 Q. Is the filing of an opposition when
19 trademarks have coexisted abusive trademark
20 enforcement, in your opinion?

21 A. No.

22 Q. Why not?

1 A. Again, because the statutory scheme for the
2 registration of trademarks that permits oppositions
3 to be filed, permits oppositions to be filed as long
4 as the opposing party has standing and grounds.
5 "Standing" is a commercial interest in the
6 proceeding. You can't just be a stranger on the
7 street who's got a particular gripe. And "grounds"
8 means the ability to claim that there is a likelihood
9 of confusion and abandonment, use of the mark to
10 misrepresent the source, nature, or qualities of the
11 goods. There are a number of different grounds, in
12 this case the ground was likelihood of confusion.

13 But, to the extent that the statute permits
14 an opposition to be filed on the grounds of
15 likelihood of confusion in a timely manner after the
16 opposition period opens, it's very clear that the
17 fact that a mark has been in use is certainly not a
18 bar to the filing or dispositive of the action.

19 Q. Is the trademark opposition procedure
20 fundamentally different, or different at all, than a
21 trademark infringement action?

22 A. The proceedings are very different.

1 To begin with, an opposition proceeding
2 addresses only the right to register. The scope of
3 relief is much more limited. Trademark opposition
4 proceedings do not award damages, profits. The scope
5 of relief is limited to the grant or the denial or
6 cancellation of a registration.

7 Generally speaking, opposition proceedings
8 move along on a much swifter schedule than
9 litigation.

10 Q. Do some--I'm sorry. Go ahead.

11 A. Litigation, on the other hand, is directed
12 to the right to use, rather than the right to
13 register. The Court has many more tools to manage
14 the proceeding. And generally speaking, at the end
15 of the day, if there is a final decision, it involves
16 a determination that the mark may or may not be used,
17 and there may or may not be damages, lost profits
18 awarded in consequence; there is mandatory as well as
19 injunctive relief that can be granted in litigation,
20 that cannot be granted in an opposition proceeding,
21 such as seizure, such as recall.

22 Q. Why would a company choose an opposition

1 proceeding rather than litigation?

2 A. There are a number of reasons. One of them
3 is the time factor. Generally speaking, oppositions
4 are resolved in a much shorter period of time than
5 litigation. There is a cost-factor, litigation,
6 because of the different issues that come into play,
7 tends to be more expansive and much more expensive.

8 There are times when a party may decide that
9 if it is able to succeed in the opposition
10 proceeding, the other party may determine not to
11 pursue use of the mark further rather than compel the
12 Parties to go to litigation to resolve the issue of
13 use.

14 There are any number of circumstances that
15 impact on a company's decision to take one route
16 rather than the other. Certainly in any company,
17 there are budgetary constraints, as well as simply
18 determinations as to what markets are most important,
19 what marks are most important, and what is in the
20 overall scheme of the intellectual-property
21 protection policy the soundest way to proceed.

22 Q. Do some trademark regimes have a

1 cost-shifting provision?

2 A. They do in connection with oppositions such
3 as the U.K.

4 Q. Thank you.

5 In preparing your First Report, did you
6 assume the Supreme Court's decision in this matter to
7 be correct?

8 A. No.

9 Q. What was your approach to reviewing the
10 decision?

11 A. I first read the decision in the initial
12 opposition proceeding, and then I read the decision
13 of the Supreme Court. I went back and read some of
14 the underlying evidence in the opposition proceeding.

15 Q. Did you consider the reasoning of the Court
16 in preparing your opinions?

17 A. Yes, I did.

18 Q. Did you consider the result of the
19 Court--Decision, rather, based on your analysis of
20 the documents you've described?

21 A. Based on my analysis of the documents and as
22 well on my experience as a trademark attorney working

1 in opposition proceedings and litigation primarily in
2 the U.S. but also supervising proceedings outside the
3 United States over a period of many, many years.

4 Q. And in your Report, do you opine on
5 Panamanian law?

6 A. No, I don't.

7 Q. In your reports, do you consider
8 international trademark norms and treaties?

9 A. Yes.

10 Q. Thank you, Ms. Jacobs-Meadway.

11 MS. KEPCHAR: Mr. President?

12 MS. HORNE: Mr. President, a point of order
13 if I may, before we proceed with the witness, we had
14 mentioned yesterday that we would potentially like to
15 apply to recall our own trademark expert, Ms. Nadine
16 Jacobson.

17 In view of the fact that the expert was
18 explicitly asked to react to Ms. Jacobson's
19 testimony, we would like to exercise that right to
20 apply now. As you know, the schedule had set out
21 that Panama's expert would follow Ms. Jacobs-Meadway,
22 as is the usual course, and so we would like to

1 exercise the right to recall Ms. Jacobson in order
2 that she may respond to Ms. Jacobs-Meadway's
3 testimony.

4 MS. KEPCHAR: We don't object,
5 Mr. President. We would just like to understand when
6 and where that might occur in the schedule.

7 MS. HORNE: We would be prepared to do so
8 after the examination of Ms. Jacobs-Meadway.

9 PRESIDENT PHILLIPS: That seems appropriate,
10 doesn't it?

11 MS. KEPCHAR: That's fine, Mr. President.

12 PRESIDENT PHILLIPS: Very well, your
13 application is granted.

14 MS. HORNE: Thank you very much, Mr.
15 President.

16 CROSS-EXAMINATION

17 BY MS. HORNE:

18 Q. Ms. Jacobs-Meadway, I apologize for that
19 brief interruption. My name is Katelyn Horne, and
20 along with my colleagues here, I represent the
21 Republic of Panama. I'm going to ask you a few
22 questions in connection with your testimony this

1 morning and in your two expert reports.

2 For your convenience, we're going to pass
3 out a set of binders. They include hard copies of
4 your two expert reports, as well as a few documents
5 to which I may refer during our questions.

6 (Pause.)

7 Q. If you have any trouble locating the
8 documents or if you'd like a break, please do just
9 let me know.

10 A. Thank you.

11 Q. Ms. Jacobs-Meadway, you formerly worked at
12 Akin Gump?

13 A. I was with Akin Gump after it acquired the
14 Panitch Schwarze Jacobs & Nadel firm that I helped
15 found. That was in October of 1999. I left the firm
16 in the beginning of February of the year 2001.

17 Q. 2001, thank you.

18 And, for the record, Akin Gump represents
19 the Claimants in this arbitration?

20 A. That's correct.

21 Q. Did you serve as the Head of Akin Gump's
22 trademark practice during your time there?

1 A. I was the Head of the trademark practice as
2 more or less a title during the time that I was at
3 the firm.

4 Q. During your time at Akin Gump, did you work
5 with any of the attorneys or staff seated at counsel
6 table?

7 A. I had worked with Karol Kepchar when she was
8 in the Philadelphia Office of Akin Gump. Before I
9 left the firm, she had relocated to the Northern
10 Virginia office, and we were not working together.

11 Q. And when did you first meet Ms. Kepchar?

12 A. It would have been some time, I would think,
13 in the mid-Nineties.

14 Q. Were you involved in hiring her at your
15 former law firm before you joined Akin Gump?

16 A. Yes.

17 Q. And Ms. Kepchar was your associate?

18 A. She was an associate and then a partner in
19 the firm.

20 Q. And she moved with you when you moved your
21 practice to Akin Gump?

22 A. That is correct.

1 Q. So, your relationship with her began over 20
2 years ago.

3 A. And we have not worked together since the
4 Year 2000.

5 Q. I understand.

6 In your direct examination, you discussed
7 briefly, I think, the distinction between opposition
8 and infringement proceedings; is that right?

9 A. Yes.

10 Q. Your discussion was based on the operation
11 of those two types of proceedings in the United
12 States; is that correct?

13 A. Primarily in the United States but not
14 exclusively. As I say, I've supervised oppositions
15 and litigation in many countries over the years, and
16 the basic differences and similarities in oppositions
17 and litigation carry through.

18 Q. Are you aware that in Panama, opposition
19 proceedings and infringement proceedings are both
20 litigations?

21 A. "Litigation" is sort of a term that's used
22 for oppositions as well as cancellation proceedings.

1 If someone is asked are they a litigation or
2 transactional lawyers and they do oppositions,
3 they're litigators.

4 Q. But, in Panama, are you aware that those two
5 types of proceedings go to the same court, the same
6 tribunal?

7 A. They go to the same tribunal, but they're
8 different proceedings.

9 Q. I understand that, but unlike in the U.S.,
10 the opposition proceeding doesn't go to a separate
11 tribunal; is that right?

12 A. It's interesting, if you consider the appeal
13 from an opposition proceeding in the United States,
14 it will go to a district court which is obviously the
15 court of first instance for civil litigation, so it's
16 not all that different, although it's an appeal from
17 the decision of the Patent and Trademark Office,
18 Trademark Trial and Appeal Board that gets taken to
19 the Court for a de novo proceeding, and, in fact, the
20 district court which hears litigation will hear
21 basically the appeal from the opposition and at the
22 same time a claim for infringement if one is made.

1 Q. I understand. But in terms of the first
2 instance proceeding, you understand that in Panama
3 it's somewhat different than the United States?

4 A. Each one of the regimes have some
5 differences and some similarities. There is not a
6 uniform trademark law or trademark practice. You do
7 have norms that carry through in the procedure, and
8 especially in connection with some of the legal
9 principles from jurisdiction to jurisdiction.

10 Q. Certainly. So, it is somewhat different in
11 Panama?

12 A. It's different in almost every jurisdiction
13 to some extent based on the law – the precedent if
14 it's a common-law country – and the specific regime,
15 but the basic principles carry through.

16 Q. I would like to turn now to some of the
17 opinions that you've submitted about the Supreme
18 Court Judgment. So, if you'll open your binder to
19 your First Report, which should be behind the first
20 tab.

21 And if you will turn to Paragraph 39,
22 please.

1 On Page 16, in the middle of the page,
2 towards the end of the paragraph, you stated that the
3 Supreme Court found that an opposition was unlawful
4 because the mark opposed was already in use; is that
5 correct?

6 A. The sentence reads: "The Supreme Court's
7 finding that an opposition is unlawful because the
8 mark opposed was already in use is inconsistent with
9 harmonized likelihood of confusion analysis, which
10 takes into account actual confusion as described."

11 Q. So, in the first part of that sentence,
12 you're referring to the Supreme Court's finding that
13 an opposition is unlawful because the mark opposed
14 was already in use; is that correct?

15 A. That's what it says.

16 Q. Did you include a footnote pointing to the
17 part of the Supreme Court Judgment that expresses
18 this apparent finding?

19 A. There is no footnote listed.

20 Q. Let's turn back to Paragraph 36 of that
21 First Report, if you will.

22 And a few lines down, you observed that your

1 opinion is based on "my understanding of the Supreme
2 Court's findings as described by Mr. Arjona."

3 Is that correct?

4 A. "Based on my years of experience with
5 reservation of rights Letters, both in the U.S. and
6 non-U.S. trademark matters, the plain language of the
7 letter and my understanding of the Supreme Court's
8 findings as described by Mr. Arjona, the Supreme
9 Court also misread the Reservation of Rights Letter."

10 Q. That's correct.

11 So, you're referring there to your opinion
12 of the Supreme Court Judgment which you've explicitly
13 stated is based on the findings described by
14 Mr. Arjona; is that right?

15 A. And not solely. No. That's one of the
16 elements.

17 Q. One of the elements.

18 The first two elements you're discussing
19 your experience with reservation of rights letters
20 and the plain language of the letter. But in terms
21 of the Supreme Court's findings, you're talking about
22 Mr. Arjona's descriptions; is that right?

1 A. In this paragraph, yes.

2 If you look at the Supreme Court Decision
3 that's involved here, it also suggests that the
4 letter was inappropriate, reckless, and based on what
5 I think is a misreading of the Letter.

6 Q. And we will certainly turn to that, but I'm
7 just trying to appreciate your understanding of the
8 Judgment, and you're stating here that that's based
9 on the findings of Mr. Arjona; is that correct?

10 A. Among other things.

11 Q. And elsewhere in your Report, when you refer
12 to your understanding of the Supreme Court Judgment,
13 are you also referring to what you understood from
14 Mr. Arjona?

15 A. No.

16 Q. You're not?

17 A. No.

18 I am referring to what I read when I look at
19 the Judgment of the Supreme Court.

20 Q. So, this is the only place where you would
21 be referring to Mr. Arjona?

22 A. I believe so. I haven't reviewed the

1 footnotes in particular detail, but my reading of the
2 Supreme Court Opinion informs most of my opinions on
3 what was done.

4 Q. Could you turn, please, to Paragraph 18 of
5 your First Report.

6 There at Footnote 11, there is a reference
7 to the Expert Report of Mr. Arjona; is that correct?

8 A. Yes.

9 Q. And will you turn, please, to Paragraph 39.

10 I apologize, Ms. Jacobs-Meadway, to
11 Paragraph 40, at the very end of that page, you
12 state: "I understand from Mr. Arjona's Report."
13 That's how the sentence begins; is that correct?

14 A. "I understand from Mr. Arjona's Report that
15 this Decision does not bind other courts in other
16 cases in Panama because Panama does not have a
17 common-law system of precedent."

18 Yes.

19 Q. And if you will turn to Paragraph 51 of your
20 First Report now. The beginning of that sentence
21 reads: "I understand from the Report of Mr. Arjona
22 in this arbitration." Is that correct?

1 A. "I understand from the Report of Mr. Arjona
2 in this arbitration that it is not possible to rule
3 out that in the future other courts in Panama may
4 follow the Supreme Court's criteria for the
5 resolution of other similar cases; and that this risk
6 may apply if it is a case involving opposition by
7 BSLs or BSJ to a trademark application by one of
8 their existing competitors that involves the use of
9 the term '-STONE.'"

10 Yes. As I said on my direct examination, I
11 do not claim to be an expert in Panamanian Law, and
12 this clearly relates to Panamanian Law.

13 Q. And if I represent to you that there are a
14 number of other footnotes in which you refer to
15 Mr. Arjona, will you accept that?

16 A. Without having any context, the report says
17 what it says.

18 Q. And just a few moments ago, you had
19 indicated that Paragraph 36 was probably the only
20 place where you had referred to Mr. Arjona, but I
21 think we've established that you've referred to
22 Mr. Arjona throughout your Report; would you agree?

1 A. No.

2 I think we're talking about some references
3 to Mr. Arjona with respect to Panamanian Law again
4 where I don't claim to be an expert.

5 And as I say, if you want to show me the
6 Supreme Court opinion, you can go through where you
7 tie my opinions to the opinion of the Supreme Court.

8 Q. I'm just trying to clarify. You did refer
9 to Mr. Arjona throughout your Report, did you not?

10 A. Not throughout my Report. There are some
11 references in footnotes to where he informed my
12 understanding, particularly with respect to the
13 consequences under Panamanian Law.

14 Q. Ms. Jacobs-Meadway, I've just taken you to a
15 number of paragraphs where above the line you state
16 "I understand from Mr. Arjona."

17 Do you disagree with that?

18 A. The Report says what it says.

19 Q. It does, indeed. It refers to Mr. Arjona.
20 Now, let's turn to Paragraph 42 of your
21 First Report, please.

22 In the first sentence, and again, describing

1 the outcome of the Supreme Court Judgment, you refer
2 to "the concept that merely bringing an opposition
3 constitutes negligence or recklessness and supports a
4 finding of bad faith when a junior mark is use in a
5 jurisdiction is detrimental to the protection of
6 trademark rights in the Republic of Panama and
7 elsewhere."

8 Is that correct?

9 A. Yes. "Being contrary not only to the
10 applicable law, (as I understand it) but also to due
11 process and established procedure as it relates to
12 the registration process internationally recognized."

13 Q. Is this characterization also based on
14 Mr. Arjona's Report?

15 A. No.

16 Q. I think you've stated that you have read the
17 Supreme Court Judgment?

18 A. Yes.

19 Q. Do you speak or read Spanish?

20 A. Actually, I read Spanish, not terribly well.
21 I don't speak Spanish. I never did have a lot of
22 verbal fluency, but I have been working from the

1 translation.

2 Q. I understand.

3 If you will turn to that translation, it's
4 at Exhibit R-34 in your binder. You will see from
5 the first page of the exhibit that it is the Supreme
6 Court Judgment dated 28 May 2014.

7 Do you see that?

8 A. I see the Supreme Court of Justice Civil
9 Chamber 28 May 2014?

10 Q. Yes.

11 If you'll turn to Page 16 of the Judgment,
12 please.

13 At the bottom of the page, the Judgment
14 states: "It is not this Chamber's intention to say
15 that initiating a legal action to claim a right may
16 be interpreted as a synonym for the damages that may
17 be caused to a plaintiff."

18 Did I read that correctly?

19 A. "Thus creating a coercion element for anyone
20 who feels entitled to a claim and to use the means
21 provided by the law to do so."

22 Q. Thank you.

1 So, the Supreme Court here clarified that
2 the mere initiation of an Opposition Proceeding does
3 not create liability and tort; is that correct?

4 A. That's not exactly the case. What the Court
5 says in the first sentence is they don't intend to
6 say that there is an issue. However, they go on to
7 state that there was evidence that the plaintiffs/
8 appellants had a legal right to market a product,
9 that said product was substantially important,
10 commercially competitive. "Such a situation may be
11 key for anyone who, with no strong legal grounds and
12 the will to cause damages wishes to jeopardize the
13 Party's dominant market presence." And here we come
14 to the "rub," if you will, and that is the notion
15 that (a) there is an assumption that there is a legal
16 right to market a product that has not yet been
17 tested, and that without strong legal grounds, the
18 abuse of process regimes talk about "groundless"
19 threats, and that is a threat is groundless if there
20 is no real legal basis whatsoever.

21 And on the record in this proceeding, and
22 even with the facts as found in the Opposition

1 Decision which was adverse to the Bridgestone
2 parties, it's clear that this was not a case that was
3 filed with no legal grounds that was unjustified
4 because there were no legal grounds. In this case,
5 there were ample legal grounds. The Court in the
6 Opposition Proceeding made some findings that were,
7 if you will--I won't comment on Panamanian Law, but
8 are rather unusual in the context of an opposition
9 proceeding, but being the findings they are there.

10 And the findings in the Opposition
11 Proceeding where the appeal was not pursued indicate
12 that, in fact, the goods of the parties were not
13 competitive to the point where there was a likelihood
14 of confusion, and that was part of the gravamen of
15 the decision against the Bridgestone Parties, the
16 fact that Bridgestone and Firestone were promoted
17 together primarily for Formula One Racing which was a
18 distinct market from the market of the RIVERSTONE &
19 DESIGN tire mark.

20 So, you have a conflict here where you have
21 a proceeding--

22 Q. If I may, Ms. Jacobs-Meadway, I think you've

1 extended beyond the scope of my question. It was
2 directed to the specific language of this paragraph.

3 A. And I'm--

4 Q. And particularly the first part.

5 A. And I'm talking about the paragraph because
6 you can't read the first sentence without the second
7 sentence.

8 Q. I read it into the record, and I asked you
9 if that was a correct statement; is that right?

10 A. It's a correct statement that that is the
11 first sentence in that paragraph.

12 Q. Um-hmm.

13 A. It's not a correct statement of what the
14 Court is then proceeding to do because there is a
15 second sentence that follows the first.

16 Q. So--

17 A. And you can't--

18 Q. The second sentence means that we should
19 ignore the first one?

20 A. No, it means that you have to read them
21 together.

22 Q. You read them together?

1 A. Yes.

2 Q. And that includes reading the first sentence
3 which says the mere initiation of an opposition
4 proceeding will not create liability in tort?

5 A. And then you need to read it, "however, in
6 the present case," and it's the "however" and the
7 drawing out of the consideration which was behind the
8 Decision of the Supreme Court in Panama that informs
9 why this Decision is so arbitrary and capricious.

10 Q. So, we read that first sentence along with
11 the rest of the Judgment?

12 A. Yes.

13 Q. I think you acknowledge in your Report that
14 the Supreme Court didn't rely solely on the
15 initiation of the Opposition Proceeding; is that
16 correct?

17 A. That's correct.

18 Q. So, elsewhere in your Report, when you refer
19 to a finding that the mere initiation of an
20 Opposition Proceeding was unlawful, that's not
21 precisely what the Supreme Court found?

22 A. If you want to point me to a section in the

1 Report?

2 Q. Certainly.

3 If you will turn to Paragraph 42 of your
4 First Report.

5 We read this sentence before. Again, you
6 will note at the beginning, you're discussing the
7 concept that merely bringing an opposition
8 constitutes negligence or recklessness, so that's not
9 quite what the Supreme Court did?

10 A. Well, and again, you're not reading the
11 whole sentence: "The concept that merely bringing an
12 opposition constitutes negligence or recklessness and
13 supports a finding of bad faith when a junior mark is
14 in use in a jurisdiction is detrimental to the
15 protection of trademark rights in the Republic of
16 Panama and elsewhere, being contrary not only to the
17 applicable law as I understand it, but also to due
18 process and established procedure as it relates to
19 the registration process internationally recognized."

20 And here, you have the finding of lack of
21 grounds by the Panama Supreme Court coupled with this
22 notion that because the mark was in use, bringing an

1 opposition that the Bridgestone Parties were lawfully
2 entitled to bring was somehow reckless and abusive.

3 Q. It was reckless and abusive in conjunction
4 with other conduct that was considered; is that
5 right?

6 A. There was a secondary consideration for the
7 Reservation of Rights Letter which is another problem
8 with the opinion.

9 Q. So, I'll take that as a yes, that it was
10 reckless and abusive in conjunction with other
11 conduct?

12 A. In conjunction with the allegations made by
13 a misreading of the Reservation of Rights Letter,
14 yes.

15 Q. So, anywhere in your Report that you're
16 making a finding based on a characterization of the
17 Supreme Court Judgment as finding that it was abusive
18 merely to bring the Opposition Proceeding, those
19 findings wouldn't quite be consistent with the
20 Supreme Court Judgment; is that right?

21 A. No, you're wrong because everything is
22 predicated on the Opposition being brought and lost.

1 If the Opposition had been brought and won, there
2 wouldn't be any issue that we would be discussing
3 here. The predicate for everything is the Opposition
4 being filed and unsuccessful.

5 Q. So, the fact that, in your opinion, that was
6 the predicate for the finding means that you can
7 ignore the rest of the findings about Bridgestone's
8 other conduct?

9 A. Oh, no. As I say, that's the Reservation of
10 Rights Letter, and again the Supreme Court, I think,
11 misinterpreted that, wilfully or otherwise, in
12 ignoring what was said, by whom to whom, and the
13 clear language of the letter itself.

14 Q. I don't want to continue to parse the
15 language of the Judgment with you, but I think we
16 have reached the conclusion that it was more than the
17 mere initiation of the Opposition Proceeding that the
18 Supreme Court took into account.

19 A. Your argument.

20 Q. You disagree?

21 A. You've heard my testimony. I can repeat it,
22 and we can take more time on this or you can ask

1 another question.

2 Q. It is your position that the Demand Letter
3 was not taken into account by the Supreme Court?

4 A. Oh, no, it was taken into account wrongly,
5 it was taken into account by misreading it, it was
6 taken into account out of context.

7 Q. But it was taken into account.

8 A. Oh, yes.

9 Q. Excellent. Thank you very much.

10 A. You're welcome.

11 Q. I think we will move forward.

12 Now, in your First Report, you had stated
13 that your understanding of the facts of this case was
14 based on your review of the Request for Arbitration
15 and the exhibits thereto; is that right?

16 A. Yes.

17 Q. The Claimants' request for arbitration: it
18 referenced the decisions of the First Instance Court,
19 the Appellate Court, and the Supreme Court in the
20 Tort Proceeding; is that right?

21 A. Yes.

22 Q. So, you've reviewed all of those exhibits.

1 A. Yes.

2 Q. And I think you stated during your direct
3 testimony that you had also reviewed some of the
4 Opposition Proceeding in Panama; is that correct?

5 A. Some of the other declarations that were
6 submitted in the course of the proceeding.

7 Q. In the course of the Trademark Opposition
8 Proceeding?

9 A. In the course of the Opposition Proceeding
10 and in the course of some of the appellate
11 proceedings.

12 Q. So, the Tort and the Opposition Proceedings,
13 then?

14 A. Yes.

15 Q. But you've not reviewed the motions or
16 briefs submitted by the Bridgestone Litigants in the
17 Tort Proceeding?

18 A. I did not spend a lot of time with the
19 briefs.

20 Q. Did you review the expert reports, witness
21 statements--or other testimony submitted by the
22 Bridgestone Litigants or the Muresa plaintiffs in the

1 Tort Proceeding?

2 A. I read some of the declarations in
3 connection with the Tort action.

4 Q. So, you've read some of the record.

5 A. Yes. Not all of it.

6 Q. Are you aware that the record comprises
7 about 5,500 pages for the Tort Proceeding?

8 A. Oh, I am. I printed out a fair amount of
9 them and decided that I would focus on other things
10 because time constraints being what they were and my
11 focus being relatively narrow, as fascinating as it
12 was, I would forego the pleasure.

13 Q. Certainly. It was a very large record, and
14 I'm afraid a lot of trees may have been killed during
15 this proceeding.

16 But if you had to guess, approximately how
17 much of that record would you say that you've
18 reviewed?

19 A. At this point, it would be a guess.

20 I looked at some of the background on the
21 damages claim simply because I was interested in it.

22 I looked at the testimony on some of the

1 marketing because it bore on what the First Instance
2 Court did in the opposition.

3 I read some of the discussion about the
4 proceedings outside Panama, particularly with respect
5 to the claim that there had been a seizure in the
6 Dominican Republic.

7 Q. So, a hundred pages?

8 A. Considerably more, but I would not want to
9 hazard a guess in the context of this case.

10 Q. Let's turn to Paragraph 12 of your Second
11 Report.

12 The first sentence of that paragraph reads:
13 "It is my affirmative opinion that the evidence does
14 not support a conclusion that the Bridgestone Parties
15 engaged in unjustified threats of trademark
16 litigation or abusive legal process under the
17 generally accepted principles set forth in the
18 Jacobson Report."

19 Did I read that correctly?

20 A. Yes.

21 Q. So, it's your opinion that the evidence does
22 not support the Supreme Court's finding.

1 A. That's correct.

2 Q. The evidence that you're referring to there
3 is the evidence in the Tort Proceeding?

4 A. It includes the evidence in the initial
5 Opposition Proceeding and evidence in the Tort
6 Proceeding.

7 Again, you need to look at the initial
8 Opposition Proceeding to see whether, in fact, there
9 was a justification or legal grounds to bring the
10 Opposition Proceeding.

11 Q. Absolutely.

12 And the evidence in the Tort Proceeding, I
13 believe, did include the Trademark Opposition
14 Proceeding record.

15 So, your affirmative opinion as to what the
16 evidence in the Tort Proceeding shows is actually
17 based on a review not of all of the evidence, but
18 perhaps some fraction of the evidence?

19 A. It's based on my review of the opinions of
20 the Tribunals. It's based on my review of the
21 evidence that I'd reviewed. And I was looking
22 particularly in connection with the Opposition

1 Proceeding and the Reservation of Rights Letter which
2 are the two elements that the Supreme Court focuses
3 on.

4 Q. So, your affirmative opinion about the
5 sufficiency of the evidence is based on the evidence
6 that you reviewed.

7 A. Yes.

8 And, in addition, my 45 years of experience
9 as a trademark attorney working on oppositions and
10 litigations in the U.S., and supervising proceedings
11 outside the United States.

12 Q. Your experience in trademark proceedings.

13 A. Yes.

14 Q. If you will, please turn back to your First
15 Report, to Paragraph 23.

16 In the middle of the paragraph, you state:
17 "The Panama Supreme Court considered legally
18 immaterial matters when it said that it was
19 'reckless' of BSLS and BSJ to bring the opposition
20 proceedings when it was clear that the RIVERSTONE &
21 DESIGN mark was already in use and tires were already
22 being sold."

1 Did I read that correctly?

2 A. Yes.

3 Q. And I think we've established that the
4 Panamanian proceeding at issue here was a Tort
5 Proceeding.

6 A. It's a Tort Proceeding, yes.

7 Q. So, the Supreme Court was applying
8 principles of Panamanian Tort Law.

9 A. The Panamanian Court, when it was looking at
10 Tort Law, was looking at the underlying Opposition
11 Proceeding as the predicate for looking at anything
12 else.

13 Again, had the Opposition Proceeding been
14 successful, as opposed to unsuccessful, there would
15 not be a claim here to be adjudicated in connection
16 with the alleged tort.

17 Q. Aside from your speculation about that, I
18 want to confirm, you agree that the Supreme Court was
19 applying Tort Law?

20 A. The Supreme Court was applying Tort Law, but
21 to apply Tort Law, it had to look at whether or not
22 the bringing of the Opposition was unjustified,

1 reckless, or otherwise abusive. You can't decide the
2 Tort claim without looking at the underlying claim.

3 Q. Certainly. You have to look at the facts.

4 But, when a tribunal is looking at certain
5 facts, it's applying the law to those facts; would we
6 agree on that?

7 A. The issue is not one of strict law or fact.
8 You have questions that are mixed questions of law
9 and fact where the law is dependent on the facts and
10 what facts are material are dependent on the law.

11 Q. Precisely.

12 A. You can't draw a neat line.

13 Q. I certainly understand, but what facts are
14 material are dependent on the law.

15 And you don't have any experience applying
16 Panamanian Tort Law; is that right?

17 A. That's correct.

18 Q. Yet, you're still comfortable stating what
19 facts are "legally immaterial" as a matter of
20 Panamanian Tort Law; is that right?

21 A. And as a matter of general law, if you are
22 looking at whether a claim was brought without good

1 faith and recklessness, you need to look at the
2 claim.

3 Q. As a matter of general law?

4 A. As a matter of general law and generally
5 accepted jurisprudence. You can't evaluate whether a
6 claim was brought without justification without
7 looking at the claim and the facts underlying the
8 claim.

9 Q. I want to make sure I understand what you
10 mean when you say "general law."

11 So, if we were considering a tort proceeding
12 in Germany, where I understand tort law is applied in
13 the trademark context, you would still feel
14 comfortable, without experience with German tort law,
15 determining what's legally material or not?

16 A. If you're looking at whether a threat is
17 unjustified, you need to look at the basic underlying
18 legal issue to determine whether the threat was
19 justified.

20 That's not so much a matter of pure tort law
21 because in each of these regimes where you're talking
22 about unjustified threats, the question is: Was the

1 claim made without any legal basis? And that reverts
2 back to the underlying cause of action.

3 Q. So, you're comfortable making this
4 determination as a matter of Panamanian tort law?

5 A. It says what it says.

6 Q. Indeed.

7 A. I will reject your characterization, but we
8 can bandy it back and forth for a long time and not
9 change our minds.

10 Q. That does seem to be the case, so we can
11 move forward.

12 You drafted your Expert Reports?

13 A. Yes.

14 Q. As is common practice in a lot of these
15 cases, counsel had some say in its contents; right?

16 MS. KEPCHAR: Again, Mr. President, as
17 occurred previously in this Hearing, I would object
18 to exploration of work product in the questioning.

19 MS. HORNE: Mr. President, if I may, I
20 assure you I will not be exploring work product.
21 It's a simple question as to whether counsel was
22 involved. It's not unusual in these types of

1 proceedings, as I indicated in my question.

2 PRESIDENT PHILLIPS: Yes, I think the
3 question is legitimate, and I allow it.

4 THE WITNESS: I sent a draft of my Report to
5 Ms. Kepchar before it was finalized to see if there
6 was any point that I had missed that she had wanted
7 me to cover.

8 BY MS. HORNE:

9 Q. So, there was an exchange with counsel?

10 A. I sent the draft for approval and review.

11 Q. You're not an expert in denial of justice
12 claims under international law, are you?

13 A. No, I'm not.

14 Q. Are you aware that the words "manifestly
15 unjust and arbitrary" are used in denial of justice
16 claims?

17 A. As I say, I am not here as an expert in
18 anything except on trademark law and practice, and
19 specifically as it relates to oppositions and the
20 international harmonization of basic principles of
21 trademark law.

22 Q. Okay.

1 If you will turn, please, to Page 15 of your
2 First Report. In the middle of the page, there's a
3 section heading titled "Section 4." There you state:
4 "The action of the Panama Supreme Court in overruling
5 the Decision of the Superior Court, which affirmed
6 the determination of the lower court adverse to the
7 complainant, was manifestly unjust and arbitrary
8 under harmonized trademark practice, and impacted
9 BSLs and BSJ's international portfolio of BRIDGESTONE
10 and FIRESTONE trademarks."

11 Did I read that correctly?

12 A. Yes.

13 Q. The phrase "manifestly unjust and arbitrary"
14 was one of the phrases that counsel asked you to
15 include?

16 A. No, I don't think so--

17 MS. KEPCHAR: Mr. President, again, I
18 believe she's getting into work product.

19 PRESIDENT PHILLIPS: I think you are.

20 MS. HORNE: Thank you, Mr. President.

21 BY MS. HORNE:

22 Q. Ms. Jacobs-Meadway, you had raised the issue

1 of the Demand Letter, and I promised to turn back to
2 it, so at this point, I think we can turn there.

3 I think we established that the Supreme
4 Court based its decision, in part, on the Demand
5 Letter; is that right?

6 A. Yes.

7 Q. For your reference, that letter is at
8 Exhibit C-13 of your binder.

9 I understand it's your position that this is
10 not a demand letter?

11 A. It is a demand letter with respect to the
12 United States, and it is not a Demand Letter with
13 respect to any other jurisdiction. It's a
14 Reservation of Rights Letter.

15 Q. So, it's both?

16 A. Yes.

17 The first part of the letter relates to the
18 United States because this is a letter sent by U.S.
19 counsel to U.S. counsel, and it states that:

20 "Although it is not aware of any current use of the
21 RIVERSTONE mark in the United States,

22 Bridgestone/Firestone hereby makes formal demand upon

1 your client," that was L.V. International, "to
2 refrain from any use of the RIVERSTONE trademark in
3 the United States now or at any time in the future."
4 That's a demand. And what follows afterwards is the
5 Reservation of Rights section which relates to
6 jurisdictions other than the United States.

7 Q. A reservation of rights letter typically
8 identifies a concern and then reserves a right to
9 object in the future; is that right?

10 A. That's one way of putting it.

11 Basically, a Reservation of Rights Letter is
12 any letter that puts a party on notice that there may
13 be an issue at another time depending on
14 circumstances, facts, and law.

15 Q. If we look at the third paragraph, towards
16 the bottom of that paragraph, it states: "You and
17 your client should know that Bridgestone/Firestone
18 objects to and does not condone the use or
19 registration anywhere in the world of the mark
20 RIVERSTONE for tires."

21 Did I read that correctly?

22 A. Yes.

1 "Hence, L.V. International, Inc., is acting
2 at its own peril if it chooses to use the mark
3 RIVERSTONE in other countries."

4 Q. The word "objects" indicates a present
5 objection; right?

6 A. It does not indicate a demand. It says
7 there's an objection, and it also says above that:
8 "Without undertaking a country-by-country analysis at
9 this time and without making any specific demand at
10 this time directed to use of the RIVERSTONE mark in
11 any particular foreign country."

12 Q. Returning to the word "objects," I had
13 asked: It indicates a present objection; is that
14 right?

15 A. It is an objection, not a demand, yes.

16 Q. I think you stated previously that a
17 Reservation of Rights Letter is putting a party on
18 notice that there may be an issue at another time.

19 A. That's right, at another time, in another
20 place, depending on the facts and the law.

21 Here, it's very clear that this is putting
22 the Party on notice that there will be a

1 country-by-country analysis or maybe, at some other
2 time, there has not yet been a country-by-country
3 analysis, and this is without making any specific
4 demand time at this time directed to use of the
5 RIVERSTONE mark in any particular foreign country.

6 That is, this is expressly not a demand.

7 Q. So, we should read the word "objects" to say
8 "may object in the future"?

9 A. I think it is: "We object to and do not
10 condone the use or registration." That basically
11 says "We're reserving our right to do something
12 depending on the results of the case-by-case analysis
13 in any particular foreign country. You're on notice.
14 We're going to look at other countries on a
15 case-by-case basis. L.V. International is acting at
16 its own peril if it chooses to use the mark
17 RIVERSTONE in other countries. Your client should be
18 doing the same kind of analysis if it's going to
19 proceed."

20 Q. So "objects" is not objects?

21 A. "Objects" is objects, but it's not a demand.

22 Q. If we could return briefly to your Second

1 Report, Ms. Jacobs-Meadway, and specifically Page 3.

2 Footnote 4, at the bottom of that page,
3 reads: "I note that the Jacobson Report referenced
4 this letter as the Bridgestone Demand Letter and
5 opines that the letter is a Demand Letter that
6 threatened legal action rather than a letter that
7 reserved Bridgestone's rights to do so. As set forth
8 in detail in my initial Report, I disagree with the
9 Jacobson Report based on the plain language of the
10 letter, which I note was sent after Bridgestone's
11 successful registration of RIVERSTONE tires in the
12 United States."

13 Is that right?

14 A. "After Bridgestone's successful opposition
15 to registration of RIVERSTONE in the United States."
16 Yes.

17 Q. I apologize.

18 But you stated that you disagree with the
19 characterization of this as a Demand Letter. I
20 understand your testimony now to be that it's, in
21 part, a Demand Letter.

22 A. The part of the Jacobson Report that I'm

1 talking about is that the first part is a demand with
2 respect to the U.S. The part of the letter which is
3 of concern in the Panama Supreme Court Opinion and
4 the part of the letter that has been at issue in this
5 proceeding is the section that's not directed to the
6 United States; it is the section that is directed to
7 other jurisdictions where there is no demand.

8 Q. So, part of it is a Demand Letter.

9 A. The part that relates to the United States
10 where the proceeding had already been concluded in
11 favor of the Bridgestone Parties is based on the
12 conclusion of the opposition and the Judgment of the
13 Trademark Trial and Appeal Board.

14 This is a demand that you don't do anything
15 in the United States now looking at the rest of the
16 world beyond notice that we reserve our rights to
17 act.

18 Q. So, that second part of the letter is
19 directed to the rest of the world.

20 A. Yes, but no specific jurisdiction, such as
21 Panama.

22 Q. You have experience drafting and responding

1 to both Reservation of Rights--

2 PRESIDENT PHILLIPS: The natural meaning and
3 implications of this letter appear to me to be a
4 matter for this Tribunal and not one on which expert
5 evidence is likely to assist.

6 MS. HORNE: I understand, Mr. President. So
7 you wouldn't like to hear from her regarding the
8 interpretation of the Demand Letter?

9 PRESIDENT PHILLIPS: Do you consider this as
10 a matter of expert evidence?

11 THE WITNESS: The plain language of the
12 letter is exactly what it says. I could elucidate
13 from my own experience, but the letter says what it
14 says.

15 (Tribunal conferring.)

16 PRESIDENT PHILLIPS: Mr. Thomas has one
17 question on this point.

18 The Tribunal is not shutting out any
19 cross-examination. I just wanted to make my own view
20 about this matter plain.

21 MS. HORNE: I understand, Mr. President, and
22 we certainly want to be helpful to you, but I will

1 cede to Mr. Thomas.

2 ARBITRATOR THOMAS: Thank you.

3 I had one question about the letter because
4 I have heard you go back and forth with counsel on
5 this question.

6 "Without conducting a country-by-country
7 analysis" appears to me to be a term of art in the IP
8 world, at least in the United States litigation.

9 What does it mean?

10 THE WITNESS: It means that because the
11 facts will be different in each country, the number
12 of third-party uses, the period of coexistence of any
13 particular judicial precedent in jurisdictions where
14 that's significant, you can't simply make a
15 determination, as a party with trademark rights, that
16 I'm going to oppose this mark everywhere, or I'm only
17 going to oppose this mark in this one narrow area.
18 You need to look, as the opportunity to oppose comes
19 up, at the specific facts and the specific law in
20 each jurisdiction.

21 And that is, in fact, what has happened in
22 this case. The Bridgestone Parties looked at the law

1 and the facts, and made determinations on a
2 country-by-country basis as to whether there were
3 grounds to proceed, and that's common in the field.

4 As a trademark practitioner working with
5 multinational clients and portfolio maintenance,
6 there are occasions where you'll have oppositions in
7 one particular country and not in another. There are
8 other instances where you may have a series of
9 proceedings in different countries.

10 And in each, the priority dates may be
11 different, the identification of goods may be
12 different, the channels of trade--the different
13 factors that the courts consider in determining
14 whether or not an opposition will succeed, varies
15 tremendously so that you can't simply say "I'm
16 opposing this everywhere."

17 You need to look at each jurisdiction to
18 make a determination whether there are sound grounds
19 to proceed.

20 ARBITRATOR THOMAS: Thank you. That's very
21 helpful.

22 And I noticed when you were discussing the

1 type of work that you do--and this actually arose
2 yesterday in the examination of Ms. Jacobson--both of
3 you have said that in addition to your practice
4 within the United States, you supervise intellectual
5 property enforcement proceedings that are undertaken
6 in other countries.

7 And do I take from that, that what the
8 concern is, that the local conditions and the local
9 law is not U.S. law and not U.S. local conditions
10 and, therefore, you work with local counsel to deal
11 with whatever nuances or peculiarities of that
12 particular local law may be; is that correct?

13 THE WITNESS: That's very much the case.

14 I'm not licensed to practice law in the
15 U.K., so that when there is an issue in the U.K., I
16 will consult with, as appropriate, solicitor,
17 barrister, and determine how best to proceed in that
18 jurisdiction based on both the facts and the law in
19 that jurisdiction.

20 There are instances, in fact, where you have
21 litigation going on in many different countries, and
22 you want to make sure that you're coordinating the

1 efforts so that a position isn't taken in one country
2 that is adverse in another.

3 And you want to have an understanding of
4 priority in the countries where you may have
5 proceedings, because, it wasn't the factor in this
6 case, but there are instances where one of the
7 parties will have priority in a group of countries,
8 the other party will have priority in a different
9 group of countries, so that you could be plaintiff on
10 one side, and defendant in another country.

11 And it's important to have consistency in
12 the position and to understand the implications of
13 taking action in a jurisdiction where you may not
14 have prior rights.

15 ARBITRATOR THOMAS: Understood. Thank you.

16 BY MS. HORNE:

17 Q. Ms. Jacobs-Meadway, I won't dwell on this
18 topic, but I did just want to return briefly.

19 I think you've indicated in response to
20 questions, you have significant experience drafting
21 and responding to both Reservation of Rights Letters
22 and Demand Letters?

1 A. Yes.

2 Q. And whether it's one or the other, there are
3 certain due diligence steps that you always take as
4 you're drafting the letter.

5 A. That is correct.

6 Q. You've written articles on this subject, in
7 fact.

8 A. Yes.

9 Q. So, to start with, you determine the
10 particular jurisdiction at issue?

11 A. There's one of the factors.

12 Q. You identify your client's rights?

13 A. Yes.

14 Q. You determine whether the party that you're
15 looking to oppose has registered or attempted to
16 register in the jurisdiction at issue?

17 A. Yes.

18 Q. You are thereby able to determine whether
19 your client has priority rights?

20 A. That's not strictly accurate. There are
21 marketplace investigations that you do because a
22 party may, in fact, have rights based on use, such as

1 trade name rights which would not be subject of a
2 registration or application.

3 Q. In the event that you're considering a
4 trademark opposition, though, you first determine
5 whether there's a priority right?

6 A. Yes.

7 Q. And you--in that context, you may also
8 analyze whether there's a likelihood of confusion; is
9 that right?

10 A. The likelihood of confusion analysis
11 obviously is part of it.

12 If the issue that you're addressing is
13 likelihood of confusion, you might do a Reservation
14 of Rights Letter or threaten an opposition on other
15 grounds.

16 Q. But if you are considering opposing on the
17 basis of confusing similarity, then you would conduct
18 that analysis?

19 A. Yes.

20 Q. And you also consider the tone of the
21 letter?

22 A. Yes.

1 Q. These are steps that you take in order to
2 protect your client?

3 A. They are steps that I take in order to, with
4 my client, work on a strategy of protection of marks
5 that is based on economic and legal reality.

6 Q. Because if you don't take those steps, there
7 are certain risks associated with letters like this?

8 A. That depends. If it's a Reservation of
9 Rights Letter, it's not going to trigger a
10 declaratory judgment action. If you make a demand
11 and threaten litigation, or if the letter is seen as
12 threatening litigation, you may trigger a declaratory
13 judgment action.

14 Q. So there are certain risks associated?

15 A. Depending on the place and the letter, there
16 are consequences to an improvident letter.

17 Q. And in the articles that you've written on
18 this, that you referenced in your Report, you
19 recommend that others in your field take those same
20 due diligence steps; is that right?

21 A. We recommend that people in the field,
22 before they send a cease and desist letter, in

1 particular, and a Reservation of Rights Letter,
2 consider the possible adverse consequences, including
3 what we refer to as the "Streisand effect." You may
4 be legally entitled to do something, but it may not
5 be a good idea.

6 Q. I saw that. It was a catchy article title.

7 I only have a few more questions for you,
8 Ms. Jacobs-Meadway, and I'd like to talk about what
9 you see as the potential effects of the Supreme Court
10 Judgment.

11 To begin with what you stated this morning
12 in your examination, you stated that if the goodwill
13 in a trademark is damaged, then a Trademark Licensee
14 will also suffer damages.

15 Is that right?

16 A. That's correct.

17 Q. And that would be because the Trademark
18 Licensee has a commercial interest in the mark; is
19 that right?

20 A. The Trademark Licensee has a commercial
21 interest in the mark. The Trademark Licensee as an
22 exclusive Licensee also has a legal interest.

1 Q. Are you aware that the trademark licenses at
2 issue in this proceeding were not exclusive licenses?

3 A. Yes.

4 Q. So, as it applies to this case, there's a
5 commercial interest from the Licensees.

6 A. There's clearly a commercial interest.

7 There's also a legal interest to the extent
8 that anything that damaged the ability or the cost of
9 policing the mark, which may discourage the Licensor
10 from pursuing aggressively a third-party user, has
11 the capacity to impact adversely on the market
12 position and the scope of rights that the Licensee
13 has contracted to enjoy.

14 Q. That adverse impact, that would show up in
15 the commercial returns, the sales?

16 A. Not necessarily. Certainly not right away.
17 There are many factors that impact on the sales and
18 profitability of business. Trademarks are one,
19 competition is another. There are many other factors
20 that play into the marketplace.

21 But what happens is that, if you have
22 adverse decisions that permit the use of marks which

1 are arguably similar in connection with similar or
2 related goods, you have a whittling away of the
3 strength of the mark which can impact on the ability
4 of the Licensee to enjoy the market position that it
5 is contracted for.

6 Q. So, the impact will be on its market
7 position that it's contracted for. That would be,
8 again, sales or perhaps a loss in market share?

9 A. It could also be a lack of the
10 distinctiveness of the mark, which makes it more
11 difficult to preclude others from coming into the
12 market, and you have, with well-known marks such as
13 the BRIDGESTONE mark, the question of dilution and
14 the diminishment of the distinctiveness, the aura,
15 whatever you want to refer to it as, that gives the
16 mark sufficient appeal that somebody wants to take a
17 license for not only the tires, perhaps, but for the
18 ancillary products that would be sold by other
19 Licensees to enjoy the benefit of the goodwill that
20 the tire Licensee has generated.

21 Q. I understand from your answer, then, that it
22 is--there are a combination of factors that might be

1 considered when you're looking at this damage, but
2 from everything you've said, you've talked about
3 dilution of the distinctiveness, dilution of the
4 market, drop in sales, a drop in market share; is
5 that right?

6 A. And the inability to police the mark more
7 effectively from companies that may seek to trade on
8 the goodwill or to cause some confusion in the
9 marketplace or to benefit from some confusion in the
10 marketplace.

11 Q. And again, that detriment that you're
12 discussing, I think hypothetically, is--would show up
13 when more companies were entering the market; then
14 BRIDGESTONE or FIRESTONE tires would lose share in
15 the market?

16 A. And again, not necessarily because there's
17 not a one-to-one correlation. You have a whole host
18 of factors that impact on what happens in the
19 marketplace. You can mitigate the effects of
20 competition by spending more on advertising. You can
21 mitigate the impact of low-cost competition by
22 developing what's called a "flanker" brand.

1 There are various ways of addressing the
2 situation that would preclude a dollar-for-dollar
3 sort of analysis from being made or being at all
4 useful.

5 Q. So, then, there's some sort of damage that
6 we just can't put a number on?

7 A. There is the damage to the goodwill, which
8 is an intangible where it's difficult to put a number
9 on it, and there is damage when you don't have a
10 two-company market where it's very difficult; and I
11 defer to the damages experts on the way in which you
12 might calculate the nature and extent of damage, if
13 any.

14 ARBITRATOR GRIGERA NAÓN: I have a question
15 on that.

16 We have been hearing a lot about goodwill,
17 and normally you know the value of the goodwill when
18 you sell the business. How do you establish the
19 value of the goodwill in connection with the
20 trademark?

21 THE WITNESS: It's very difficult. You've
22 got the accounting definition of "goodwill," which is

1 basically the price differential once you've taken
2 into account the value of the hard assets. Anything
3 over and above that on the purchase price is your
4 goodwill.

5 But if you're not selling a business,
6 goodwill is, if you will, sort of like setting the
7 license fee for a trademark. It's a movable target,
8 depending on a lot of factors, and it's a concept
9 that is, in fact, even in trademark law, as I say,
10 somewhat amorphous because you can have goodwill
11 that's associated with a mark once the mark is put
12 into commercial use even without a sale. You can
13 have more or less goodwill.

14 But once you get outside the accounting
15 context, the valuation is a very difficult issue.
16 And again, to a certain extent, I defer to the
17 damages issue--the damages expert on those issues.

18 ARBITRATOR GRIGERA NAÓN: But what you are
19 telling me, if I understand you correctly, is that
20 you have to look at the books, it's an intangible.
21 And on the books, that intangible must have a certain
22 value, and the accountant must have to take into

1 account certain variables to determine that value.

2 Do you have any idea what those variables
3 would be?

4 THE WITNESS: The variables when--

5 ARBITRATOR GRIGERA NAÓN: The factors taken
6 into account.

7 THE WITNESS: The factors, if you will.

8 ARBITRATOR GRIGERA NAÓN: Yes.

9 THE WITNESS: And as I say, often it's a
10 marketplace analysis, if you will, if I can go back
11 to an example.

12 There's a company in Atlanta that sells a
13 cola beverage sometimes in a green, hourglass-shaped
14 bottle. If all of the physical assets of that
15 company in Atlanta were destroyed overnight, the only
16 thing that that company would need to get all of the
17 money from the banks that it needed to rebuild is one
18 piece of paper: The certificate of registration for
19 the Coca-Cola trademark.

20 How do you put a number on that?

21 And not every mark is Coca-Cola. You have
22 many marks that are in the marketplace, and is there

1 any real value over the hard assets of the business?
2 Maybe, maybe not. But that doesn't mean that the
3 trademark can't be transferred with the goodwill
4 separate from the assets of the business.

5 It's a very difficult and amorphous concept,
6 and putting a number on it outside the accounting
7 sphere is very difficult.

8 ARBITRATOR GRIGERA NAÓN: Thank you.

9 BY MS. HORNE:

10 Q. If you'll turn now back to your First Report
11 to Paragraph 47, please.

12 In that paragraph, you assert: "The
13 consequences of the Supreme Court's action are real
14 and several. Decisions of one tribunal may influence
15 the determination of the issue in other jurisdictions
16 and impact on determinations as to good faith or its
17 absence in the taking of legal positions, although
18 trademark law is territorial in nature."

19 Did I read that correctly?

20 A. Yes.

21 Q. I would just like to pause here to make sure
22 I understand your reasoning.

1 Is it your position that the Decision of the
2 Panamanian Supreme Court in this case could influence
3 courts in other countries?

4 A. Yes.

5 Q. You've not included a source for that
6 statement; is that right?

7 A. No.

8 And, in fact, though, if you look at the
9 Rejoinder of Panama, it makes a deal in its papers of
10 an adverse legal decision relating to the Bridgestone
11 Parties in a different context.

12 Q. So, it's your view that this judgment may be
13 followed by courts in other countries?

14 A. It may be followed--I wouldn't say
15 "followed" so much as it may be given some weight in
16 the determination of whether a party is a good actor
17 or a bad actor.

18 Being involved in litigation where you have
19 been found to have engaged in abusive conduct, the
20 kind of conduct which is characterized as "reckless"
21 can have a spillover effect when it's brought to the
22 attention of another tribunal.

1 Q. But you're not aware of any decision that
2 was influenced by or cited this judgment of the
3 Panamanian Supreme Court; is that correct?

4 A. That is correct.

5 Q. So, your characterization is that this could
6 happen?

7 A. It could.

8 And, in fact, the Rejoinder of Panama in
9 this proceeding, bringing up an adverse decision to
10 the Bridgestone parties in a different proceeding in
11 a different jurisdiction, I think is classic of the
12 potential damage of having a party painted by
13 something irrelevant elsewhere.

14 Q. So, it could happen?

15 A. Yes.

16 Q. It's also part of your testimony that courts
17 within Panama may be influenced by the Supreme Court
18 Judgment; is that right?

19 A. That's correct.

20 Even if it's not binding, it can have an
21 impact.

22 Q. That's your opinion not as a Panamanian

1 lawyer but as a trademark lawyer?

2 A. That's correct.

3 Q. About a tort decision in Panama.

4 A. A tort decision based on a finding that the
5 Opposition Proceeding that was filed was reckless and
6 unjustified.

7 Q. In your opinion, the risk that you've
8 articulated of these potential court decisions in
9 Panama and in other countries: it has the potential
10 to diminish the value of the BRIDGESTONE and
11 FIRESTONE trademarks in Panama; is that right?

12 A. It has more than the potential, but again,
13 it's a matter of probability, possibility,
14 likelihood. It raises a risk of harm that otherwise
15 would not be there.

16 Q. It raises a risk of harm; that's correct?

17 A. Yes.

18 Q. If you will turn now to Paragraph 40 of your
19 First Report. And this is on Page 17, a couple of
20 lines down.

21 There's a sentence that reads: "If the
22 Supreme Court Decision were to be followed such that

1 trademark owners could not oppose trademarks of
2 competitors without incurring the risk of significant
3 monetary penalty, Panama's trademark system would be
4 rendered largely meaningless."

5 Did I read that correctly?

6 A. Yes.

7 Q. So, it's your opinion that the impact of the
8 Supreme Court Judgment extends beyond just the
9 BRIDGESTONE and FIRESTONE trademarks in Panama; is
10 that right?

11 A. If the Supreme Court Decision were to be
12 followed, it would have an adverse impact, yes, on
13 the ability of companies to take proper steps to
14 enforce what they legitimately believe are their
15 trademark rights.

16 Q. So, as I understand it, your opinion is
17 that, there may be damage – if the Supreme Court
18 Judgment is followed – to every trademark registered
19 in Panama; is that correct?

20 A. Not to every trademark registered in Panama.
21 What we're talking about here is the ability to bring
22 opposition proceedings.

1 What's done is done and is not subject to
2 challenge unless, of course, you've got grounds to
3 bring a cancellation proceeding. But going forward,
4 it certainly has a chilling effect on the ability to
5 take steps to properly enforce trademark rights.

6 Q. And that chilling effect applies to all
7 trademark owners in Panama?

8 A. To--yes, any trademark owner who wants to
9 take appropriate steps to oppose the mark of a party
10 who is selling the same or similar type of goods
11 within the jurisdiction.

12 Q. And we've established it's your opinion that
13 that chilling effect has the potential to decrease
14 the value of the trademarks themselves?

15 A. Yes.

16 Q. So there is the potential in this case,
17 according to you, that the value, not only of the
18 BRIDGESTONE and FIRESTONE trademarks in Panama, but
19 of all trademarks in Panama, will be decreased in
20 value significantly.

21 A. The issue is, as I say, whether a trademark
22 owner will be reluctant or unwilling to take steps to

1 protect trademark rights if, in fact, this is the
2 outcome that they might find themselves confronted
3 with.

4 Q. And if this is the outcome that they might
5 find themselves confronted with: in that hypothetical
6 scenario, the value of all of these trademarks would
7 be decreased?

8 A. The value of the trademarks of the company
9 that decides it's not worth the risk to protect its
10 mark is decreased.

11 Q. The value of all of those trademarks in
12 Panama?

13 A. The value of the trademark that the company
14 would otherwise seek to enforce through an opposition
15 proceeding would be damaged.

16 Q. Thank you very much, Ms. Jacobs-Meadway.

17 MS. HORNE: Mr. President, that concludes
18 our questions.

19 MS. KEPCHAR: No questions, Mr. President.

20 QUESTIONS FROM THE TRIBUNAL

21 PRESIDENT PHILLIPS: Could I just ask you
22 this: Under international intellectual property

1 norms, would it amount to an abuse of process to
2 oppose the registration of a trademark on the ground
3 of risk of confusion where there are no reasonable
4 grounds for believing that such risk exists?

5 THE WITNESS: You then get into the
6 question, Mr. President, of the unjustified threats
7 and the abuse of legal process.

8 And as you look at the cases and the norms
9 and the--particularly the unjustified threats
10 provisions, if you are bringing a proceeding seeking
11 the relief from a court with an intent to deceive the
12 court by making claims that have, in fact,
13 demonstrable falsehoods involved, if you're taking
14 action to convince a court to take action that it
15 would not otherwise have taken by deceptive means,
16 you are then outside the, if you will, protection of
17 the norms that say you can bring an opposition
18 proceeding against registration of a mark if you've
19 got grounds as well as standing. And the grounds
20 really does require an arguable case, if you will.

21 If the marks are not at all similar, if the
22 goods are not at all similar, and there is no other

1 grounds besides likelihood of confusion, you can
2 argue that the action has been brought in bad faith.

3 If you have a case as here, where you have a
4 mark that's been registered, a mark that's been used,
5 a mark that's been well-known, the registration is
6 for tires, the application that is filed is also for
7 tires, the suffix is the same, the prefix is
8 different, and you have a mark that is recognized as
9 having renown and reputation, the filing of the
10 opposition proceeding is certainly justified and not
11 without legal basis.

12 PRESIDENT PHILLIPS: Thank you.

13 You are now free to go, and please enjoy
14 your retirement.

15 THE WITNESS: Thank you.

16 (Witness steps down.)

17 MS. HORNE: Mr. President, may I propose
18 that we have a break before we re-call Ms. Jacobson?

19 PRESIDENT PHILLIPS: Yes. Shall we take a
20 quarter-of-an-hour break now?

21 MS. HORNE: That would be helpful. Thank
22 you.

1 (Brief recess.)

2 NADINE H. JACOBSON, RESPONDENT'S WITNESS, RECALLED

3 PRESIDENT PHILLIPS: Very well. We shall
4 now resume.

5 MS. HORNE: Mr. President, we would like to
6 call again Ms. Nadine Jacobson.

7 PRESIDENT PHILLIPS: Welcome back, and your
8 previous Declaration remains in force.

9 THE WITNESS: Doing an encore.

10 DIRECT EXAMINATION

11 BY MS. HORNE:

12 Q. Ms. Jacobson, were you present for the
13 testimony of Ms. Jacobs-Meadway this morning?

14 A. Yes, I was.

15 Q. I'm going to ask you a series of questions
16 about that testimony. And I'll begin with this:

17 Ms. Jacobs-Meadway made a number of
18 statements in her direct examination about licenses,
19 trademark licensees: their rights, particularly in
20 the context of exclusive licenses. Do you have any
21 reaction to that?

22 A. Yes.

1 I think when she was asked about the
2 interest of the Licensees in this proceeding, she
3 mentioned that exclusive licensees can have certain
4 rights that take on the indicia of IP rights – the
5 right to bring proceedings against infringements, and
6 what have you. And I think that is true, generally
7 speaking, in other countries, but I don't think it's
8 relevant for the consideration of the Licensee's
9 interest here because it's very clear that both the
10 Bridgestone License to the BSAM Parties [*sic*] and the
11 Bridgestone Services License relating to the
12 FIRESTONE mark to the BSAM Parties [*sic*] were
13 non-exclusive licenses. They did not prevent the
14 trademark owner from using the mark. And in fact,
15 the text of the License Agreements themselves, if you
16 look at them – and they're in the record – it clearly
17 provides that the trademark owner should engage in
18 the enforcement of the marks, not the trademark
19 licensee. It doesn't grant that right to the
20 Licensee.

21 And actually, that's very common in
22 non-exclusive licenses because most trademark owners

1 wouldn't want a licensee enforcing the rights. They
2 may pick fights the licensor doesn't want them to get
3 into, and if they lose, it could be, you know,
4 unfortunate, so they generally don't permit licensees
5 to enforce the mark.

6 PRESIDENT PHILLIPS: My recollection is
7 that, in Panama, the licensee could join in the
8 enforcement action; is that not right?

9 THE WITNESS: Yes. It would be at the
10 discretion of the trademark owner, and the trademark
11 owner may want the licensee to join, especially if
12 they want to get damages because the licensee is the
13 one that's using the mark, so they would have a lot
14 of information about the use that would help them in
15 bringing their case. But still it's the trademark
16 owner that decides because, as I mentioned
17 considerably yesterday, the trademark owner is the
18 one that owns the goodwill, and they want to control
19 how the mark is enforced.

20 BY MS. HORNE:

21 Q. Ms. Jacobson, Ms. Jacobs-Meadway had
22 mentioned that opposition is not an act of unfair

1 competition. Do you agree with that?

2 A. No, I do not.

3 I think we're all--many of us, if not all of
4 us in this room are lawyers, and I think people
5 understand that it's not uncommon for people to try
6 to get a business advantage against a competitor by
7 filing a legal process that may be less than
8 justified. Even in the trademark context, I've
9 encountered many cases. I have some pending right
10 now where a competitor brought, for example, a
11 non-use action against my client's mark knowing very
12 well the mark is in use. It was a case in Italy.
13 And after we proved the use, the judge said "well,
14 you know, I think this use has been established."
15 And the plaintiff said "yes, we knew the mark was in
16 use," and judge said "then why did you bring this
17 action," and they were very angry about it. The
18 plaintiff just smiled. They did it for competitive
19 reasons.

20 So I think bringing legal process,
21 especially if it's unjustified, can be an act of
22 unfair competition, yes.

1 Q. And I believe Ms. Jacobs-Meadway had
2 indicated that the goodwill in a trademark can be
3 shared.

4 What is your reaction?

5 A. I heard her say both things. I think
6 initially she said that the licensee can share in the
7 goodwill of the mark, and later she said that the
8 trademark owner--the trademark and its goodwill can't
9 be separated, and they belong to the trademark owner
10 alone.

11 I think, as I testified yesterday, clearly
12 the attractiveness of the mark is something that
13 benefits the commercial interest of the licensee: it
14 attracts sales; the licensee wants sales.

15 So, they certainly wouldn't license the mark
16 if they weren't getting some benefit from it, but the
17 nature of that benefit is really a commercial
18 benefit. It's not an IP right, and they don't own
19 the goodwill.

20 Q. The President of the Tribunal had asked a
21 question of Ms. Jacobs-Meadway and I would like to
22 pose it to you. And please, let me know if I do you

1 any injustice, Mr. President.

2 If a claim has no legal basis, is that a
3 basis for a finding of abuse?

4 A. Clearly, if you've brought a claim that has
5 no legal basis, that can be the basis for a finding
6 for abuse. But, you know, in the context of
7 unjustified threats, especially in the U.K., it often
8 occurs in the context of a counterclaim for a
9 trademark or a patent infringement case, and there
10 might have been some colorable claim but the way it
11 was litigated and the way it was enforced, the courts
12 will sometimes find that the threat that was made and
13 the process that was asserted was unjustified and the
14 defendant, as a counter-claimant, is entitled to
15 damages, so that can happen.

16 ARBITRATOR GRIGERA NAÓN: Which court
17 determines that?

18 THE WITNESS: It's either--in the U.K., if
19 you bring a claim for groundless threat, it's the
20 court that considers the proceeding. I think there
21 is the IPEC Court, sometimes it's the High Court, and
22 sometimes it goes up on appeal. These are claims

1 that can either be brought on their own in the High
2 Court or they can be brought as counterclaims. And
3 claims for infringement in the U.K. are typically
4 initiated in the High Court.

5 ARBITRATOR GRIGERA NAÓN: But in the case of
6 the cease and desist letter on which apparently some
7 tortious conduct will be premised, which court has to
8 decide whether a tort has been committed?

9 THE WITNESS: I think it varies by
10 jurisdiction. It depends on the court that's
11 empowered in that country to hear tort claims. They
12 are the ones that would decide.

13 ARBITRATOR GRIGERA NAÓN: So, it's a matter
14 first of determining which national court can take
15 jurisdiction to establish whether a tort has been
16 committed.

17 THE WITNESS: Yes--

18 ARBITRATOR GRIGERA NAÓN: And only then you
19 will know which court will have to decide that, and
20 then you have to wait a decision of that court to
21 determine if a tort has been committed; is that
22 correct?

1 THE WITNESS: Yes. If it's a tort--if it's
2 a claim in tort, as many countries have decided that
3 the way they're going to offer enforcement – a remedy
4 for enforcement of abuse of rights – is through tort
5 law as opposed to the trademark law, then you would
6 have to bring it in the court in that country that
7 can hear tort claims.

8 However, some countries have provided that
9 you can bring it as a counterclaim to infringement
10 and the claim for abuse of right is part of the
11 trademark law, not the tort law. That's the case in
12 the U.K., in Australia, and some other British
13 Commonwealth countries. And, in that case, the court
14 hearing the trademark claim and is the one that can
15 hear the counterclaim for abuse.

16 But again, I don't think there would
17 necessarily be a difference. I think the High Court
18 hears trademark cases. I'm not sure who hears tort
19 claims, but I'm sure Lord Phillips would know.

20 BY MS. HORNE:

21 Q. Just a few more questions, Ms. Jacobson.

22 Ms. Jacobs-Meadway testified at length about

1 the text of the Demand Letter at issue, and I wanted
2 to know if you had any reactions to that?

3 A. Yes, I had a couple of reactions.

4 First, I was glad to see that she did
5 finally admit that the second paragraph did make a
6 demand with regard to use of the RIVERSTONE mark in
7 the United States. I think that was clear from the
8 language of the letter itself. I was surprised that
9 she didn't admit that in her First Report. I think
10 she did implicitly admit it in her Second Report, and
11 I was glad to see that she admitted it here, because
12 I think it's clear on its face that that's what that
13 was.

14 With regard to the third paragraph and use
15 of the mark anywhere else in the world, I largely
16 agree with what Meadway said about how you evaluate
17 whether you can go after a mark in a particular
18 jurisdiction. Country-by-country analysis isn't
19 really a term of art in trademark law, but it is
20 something that practitioners like Ms. Meadway and I
21 myself would do: we would look at the claim in a
22 particular country, we would look at our client's

1 rights, we'd look at what the opponent's mark is and
2 we'd look at all these different factors to determine
3 whether we have a viable legal basis to bring an
4 opposition or an infringement claim. I think that's
5 what prudent trademark lawyers advising their clients
6 would do.

7 And I think it's very clear, though, from
8 the third paragraph of this letter that when they say
9 "we object to and do not condone your use of the mark
10 anywhere in the world and you do so at your peril,"
11 that is language that would be understood by a
12 reasonable person as making a demand, and it's clear
13 that they did not do this analysis before making this
14 demand, and it had adverse consequences for them in
15 Panama, as it should have.

16 Q. One final question, Ms. Jacobson: Based on
17 your years of experience practicing trademark law in
18 the United States and around the world, if you
19 represented Bridgestone and you had this Supreme
20 Court Judgment of a finding of liability in tort in
21 Panama, would you be concerned that it would impact
22 your client's rights around the world or that

1 tribunals in other countries would somehow take
2 account?

3 A. I would not be concerned. I think I've
4 testified very clearly, and I think it's beyond
5 dispute, that, you know, trademark rights are
6 territorial, each country has its own sovereign
7 system of law. They are not bound to follow the
8 judgments of one country--one tribunal in one country
9 in tort--when you go to another country.

10 You know, as Ms. Meadway said, a lot of
11 times we will help protect marks all over the world,
12 and you'll have the same or similar marks fighting
13 each other in more than one country. Even in this
14 proceeding, you know, the opposition that the
15 Bridgestone Parties lost in Panama: they opposed the
16 mark in other countries and lost as well, including
17 in China, in Korea, in Indonesia, in Ecuador.

18 So, similar facts can arise with similar
19 circumstances between the same parties in other
20 countries of the world.

21 And I wish it were the case that I could
22 take a decision from one country, admit it in another

1 country and have them say: "Sure, we're going to
2 follow this." This is just not how it works.

3 And certainly in torts, where the issue is
4 the behavior of the parties, which is very
5 fact-specific, and, you know, I think evaluated
6 properly under the laws and rules of a particular
7 country's tort law, it would just be inapplicable in
8 other countries. It's not something they'd look at
9 or be interested in, and certainly not be anything
10 that they would feel bound to follow.

11 Q. Thank you, Ms. Jacobson.

12 MS. HORNE: Mr. President, that concludes
13 our questions.

14 PRESIDENT PHILLIPS: Thank you very much.

15 Again, you are free to go.

16 THE WITNESS: Thank you.

17 MS. KEPCHAR: Mr. President, will we not
18 have a chance to ask further questions?

19 PRESIDENT PHILLIPS: Sorry, I beg your
20 pardon.

21 Come back, come back.

22 MS. KEPCHAR: Thank you.

1 CROSS-EXAMINATION

2 BY MS. KEPCHAR:

3 Q. Ms. Jacobson, your testimony seems very
4 inconsistent with Panama's position. You're
5 testifying that, very confidently, that in no case
6 would a decision or action from another country be
7 used in a proceeding in a different jurisdiction; yet
8 in this very case, the issue of the letter that
9 occurred outside of the United States and involving
10 non-U.S. attorneys is part of the record in the
11 Supreme Court decision and quite a critical piece of
12 evidence.

13 Wouldn't you agree?

14 A. Yes, I think that they relied, in part, on
15 the letter significantly in the Supreme Court
16 decision, yes.

17 Q. So there is fluidity in terms of how a
18 decision in one country can be used in a proceeding
19 in another country; wouldn't you agree?

20 A. No, I don't agree, and I made this point in
21 my Second Report, which is there's a difference
22 between the binding effect of a legal judgment, which

1 is what the basis of the Claimants', you know,
2 assertion here, that the Supreme Court judgment is
3 going to have an adverse effect, and a letter which
4 reflects conduct and threatened conduct by the party.

5 Conduct and someone's determination to
6 challenge you is not something that's bound by
7 borders in the same way that a legal decision is
8 bound by borders. So I think that the threat saying,
9 "We're going--if you use the mark or try to register
10 the RIVERSTONE mark anywhere in the world, you do so
11 at your peril because we don't condone this," is a
12 threat that clearly did not stop at the boundaries of
13 the United States. It's a threat on its face to
14 challenge you anywhere in the world, and Muresa
15 properly understood it as such.

16 Q. So couldn't the conduct that the Supreme
17 Court found reckless be brought to light in a
18 jurisdiction in another case as evidence of that
19 party's pattern of reckless conduct?

20 You would agree to that, wouldn't you,
21 Ms. Jacobson?

22 A. No, I wouldn't, because I think the Supreme

1 Court Decision about how they behaved in Panama was
2 particular to whether there was a tort in Panama, and
3 someone's conduct in Panama wouldn't be relevant or
4 actionable as a tort in other countries.

5 Q. That's not my question. Could it be used as
6 a point of evidence in a case in another jurisdiction
7 to show a pattern of conduct if a party is alleging
8 recklessness or abuse of enforcement of trademark
9 rights?

10 A. I think it would be irrelevant, and a
11 tribunal in another country would not consider it.

12 Q. That's your opinion--

13 A. It's my opinion.

14 Q. --but is it possible that the Tribunal could
15 accept that?

16 A. I don't think so. I think it would be
17 viewed as irrelevant.

18 Q. That's your opinion.

19 A. Yes, it is.

20 Q. You testified about how a trademark owner
21 and a trademark licensee, in your view, have
22 different rights under their relationship under a

1 trademark license; is that correct?

2 A. I don't quite understand what you're saying.

3 Q. Okay. So you're--let's just go straight to
4 my question without the context.

5 You're aware that this case does not involve
6 unaffiliated licensors and licensees; correct?

7 A. Yes, it's my understanding that the licensee
8 is an affiliated company of the trademark owner, yes.

9 Q. And both trademark licensees in this case
10 are all part of one affiliated enterprise.

11 A. That's my understanding.

12 Q. Are you aware that the licensees to the
13 BRIDGESTONE and FIRESTONE marks in this case have, in
14 fact, exclusive rights to use the marks in Panama?

15 A. That's not what the license agreements say.

16 Q. Are you aware that, in fact, that is the
17 case?

18 A. I would have no basis for knowing that that,
19 in fact, is the case.

20 Q. Under the groundless-threats regimes, isn't
21 it true for liability to lie in those types of
22 actions there has to be no legal basis for the claim,

1 and the party must have known that there was no legal
2 basis for the claim?

3 A. No. I think that they look and see, is the
4 threat unjustified based on the total circumstances
5 at issue in the case? And many times, as I said,
6 when it's raised as a counterclaim, they rejected the
7 underlying claim and in counterclaim they grant it as
8 having been a groundless threat because the claim was
9 rejected. So presumably it didn't have a sufficient
10 legal basis.

11 Q. So, any case without a sufficient legal
12 basis could qualify as a groundless threat?

13 A. I think as I said in my Report, you have to
14 look at the totality of the circumstances as to
15 whether the nature of the threat was reasonable. So
16 that's something that would govern it, so...

17 Q. And I think you would also have to look at
18 the legal requirements for that particular cause of
19 action; isn't that true?

20 A. Yes. You would have to look at the legal
21 requirements as part of whether your threat is
22 legitimate or unjustified, sure.

1 Q. And the Party making a groundless threat
2 must know that it's making a groundless threat in
3 order for it to be actionable; isn't that the case?

4 A. I think they should understand that if their
5 threat is overbroad, like the case I talked about
6 yesterday in Best Buy, if you only have a right in
7 Spain and you're threatening someone to not use the
8 mark anywhere in Europe, when you don't really have a
9 basis for making that threat, then it's arguably a
10 groundless threat.

11 Q. Okay. Thank you, Ms. Jacobson.

12 A. Thank you.

13 THE WITNESS: Am I really done?

14 PRESIDENT PHILLIPS: You really can go now.

15 THE WITNESS: Thank you.

16 (Witness steps down.)

17 MS. HORNE: Mr. President, if I may, one
18 point of order.

19 PRESIDENT PHILLIPS: Yes.

20 MS. HORNE: A housekeeping matter.

21 We have translations of Ms. Lasso de la
22 Vega's expert presentation from yesterday, and we're

1 happy to pass them out in hard copies.

2 Ms. Torres, a copy has also been uploaded to
3 the Box account.

4 PRESIDENT PHILLIPS: Thank you very much.

5 Ms. Kepchar, I just wanted to ask one
6 question arising out of a question you've just asked.

7 MS. KEPCHAR: Yes, Mr. President.

8 PRESIDENT PHILLIPS: I understood that the
9 Claimants' case on the effect of the Supreme Court
10 judgment was that it risked devaluing trademarks in
11 general, certainly in Panama because of the risk that
12 you'll be zapped with a claim for damages if you took
13 reasonable steps to enforce your trademark.

14 MS. KEPCHAR: Yes.

15 PRESIDENT PHILLIPS: The question you just
16 asked suggested that the implications of the Supreme
17 Court judgment were specific to the Bridgestone group
18 in that it would tar the Bridgestone group with the
19 reputation of making reckless claims, which is a
20 different part.

21 MS. KEPCHAR: It is different, and I think
22 the two exists, the two situations exist.

1 So the Bridgestone parties are exposed to
2 that risk of groundless threats claims, but also, as
3 Ms. Jacobs-Meadway testified, the fact of the Supreme
4 Court Judgment, which is public and available for
5 trademark lawyers to advise their clients on, creates
6 a risk to those owners. Those owners see that, in
7 the facts of that case, there was a trademark
8 opposition brought, and it was unsuccessful on that
9 particular record, and they later were subjected to a
10 tort claim and assessed 5 million plus costs.

11 So, it does devalue in the sense that it
12 deters or chills the ability of trademark owners and
13 Panama generally to enforce their trademark rights in
14 Panama, and that is the Claimants' position.

15 MS. HORNE: I believe the next witness to be
16 called is that of Claimants?

17 MS. KEPCHAR: No, I believe that's
18 Mr. Fried.

19 Oh, I apologize.

20 I would like to introduce, Mr. President,
21 Brian Daniel.

22 PRESIDENT PHILLIPS: Yes, please.

1 MS. KEPCHAR: Mr. Daniel is a partner in
2 Charles River Associates, and he's being offered by
3 Claimants on the issue of damages separate and apart
4 from the 5.4 million figure.

5 Mr. Daniel.

6 If we could, Mr. President, Mr. Daniel is
7 making a presentation, so it will take a couple of
8 minutes just to get him up and loaded.

9 MS. GEHRING FLORES: I was actually going to
10 ask, Mr. President, if we could have just a brief
11 pause to play musical chairs. Thank you.

12 PRESIDENT PHILLIPS: We will have a
13 five-minute break.

14 (Brief recess.)

15 BRIAN M. DANIEL, CLAIMANTS' WITNESS, CALLED

16 PRESIDENT PHILLIPS: Good morning,
17 Mr. Daniel. You will have there a witness
18 declaration, and if you will read it to yourself, and
19 if you're happy with it, then read it please aloud.

20 THE WITNESS: Good morning.

21 I solemnly declare upon my honor and
22 conscience that my statement will be in accordance

1 with my sincere belief.

2 PRESIDENT PHILLIPS: Thank you.

3 DIRECT PRESENTATION

4 THE WITNESS: Good morning, Mr. President
5 and Members of the Tribunal and counsel. My name is
6 Brian Daniel, I am a Vice President in the
7 intellectual property practice of Charles River
8 Associates, an economic consulting firm. I have been
9 asked to present my findings and opinions that I
10 formed in connection with my work in this matter,
11 including the preparation of two expert reports.

12 Just to give you a brief overview of the
13 topics that I will discuss today, the first three
14 bullet points provide some background and context for
15 the analyses and methods that I applied. The final
16 two bullet points provide some detail regarding the
17 specific methods that I applied and the opinions that
18 I formed regarding economic harm and damages in this
19 matter.

20 If at any point, I know I don't need to
21 remind you, but please feel free to interrupt or ask
22 for clarification as we go.

1 With that, one of the first things I did in
2 connection with my work on this case is review and
3 reference a study that quantified the economic
4 consequences that judicial decisions have when they
5 alter legal rights. Those consequences are
6 measurable; they are real. I reference a study in my
7 Report that I referred to as the Heath & Mace study.
8 It was conducted in 2017 and evaluated the impact of
9 U.S. Supreme Court nullification of a provision in
10 the Federal Trademark Dilution Act. This study took
11 a look at trademark rights before, during, and after
12 the enactment of the Federal Dilution Provisions, and
13 observed, quantified a correlation between the
14 increase or decrease in trademark rights and the
15 increase or decrease in firm value. They were
16 directly correlated according to that study.

17 As such, it is reasonable for me as an
18 expert in this case to consider as a form of damage
19 the impact of the Supreme Court Decision in Panama on
20 the economic value of the trademark rights.

21 My assignment in this case, again, was to
22 determine the economic harm, if any, attributable to

1 the Supreme Court decision. I was not asked to make
2 any conclusions or opinions regarding the legal
3 rights. That's an assumption that I will get to
4 later as well as my methodology. Based on my review
5 of the record and testimony from others, my
6 experience in other matters, I've identified and
7 quantified two primary ways that the trademark rights
8 have been impacted economically.

9 The Claimants have effectively, from an
10 economic standpoint, lost exclusivity of the
11 trademark rights. Exclusive rights, all else equal,
12 are more valuable than non-exclusive rights.
13 Non-exclusive rights are less valuable than exclusive
14 rights.

15 There is additionally increased risk and
16 uncertainty regarding the enforcement and protection
17 of those trademark rights. When you have increased
18 risk, you have, the effect, is to lower the value,
19 the higher the level of risk the lower the level of
20 value. Both of those factors were taken into account
21 in my analysis, and ultimately formed the basis for
22 my opinion, and allow me to quantify the decrease in

1 the value of those trademark rights before and after
2 the Supreme Court Decision.

3 I just alluded to some assumptions that I'm
4 making with respect to my analysis, areas that I'm
5 not qualified as an expert to offer an opinion on,
6 but that are important for me to model and to take
7 into account in determining the amount of economic
8 harm.

9 First and foremost, it is not for me to
10 determine but for, rather, the Tribunal to determine
11 to the extent that Claimants were injured by the
12 Supreme Court decision. And by "injured," I'm
13 equating that to harm or liability that I might refer
14 to in another proceeding. As a damages expert, I'm
15 typically tasked and asked to assume liability; and,
16 in the event that liability is found in this
17 instance, if injury is found, then to quantify the
18 economic harm associated with that injury. That is
19 also--my analysis is consistent, I believe, with
20 testimony provided by Ms. Jacobs-Meadway and by
21 Mr. Arjona regarding the impact of diminished legal
22 rights on the Claimants in this matter.

1 Generally speaking, my methodology is an
2 income-based approach; it's a valuation. Valuation
3 is not "bizarre," I think was a word I heard earlier
4 in the proceedings. Valuation can be difficult.
5 I've heard that several times. I would agree with
6 that, valuation can be difficult. That's why there
7 is a whole profession around appraising intangible
8 assets, business interests, assets in general.
9 Qualified appraisers with many years of experience
10 and training applying generally accepted
11 methodologies, perform valuations all the time in a
12 variety of contexts for a variety of reasons. That's
13 no different than what we're doing in this matter.
14 We're applying generally accepted valuation
15 methodology to determine the amount of economic harm
16 attributable to the diminished legal rights resulting
17 from the Supreme Court decision.

18 To apply an income-based approach, there are
19 three main parameters. There's three things to do.
20 It's, in general, what you're doing is taking a look
21 at expected future cash flows. You are taking those
22 expectations and through the financial model,

1 bringing those back, stating them at a particular
2 point in time as a present value, a lump-sum amount.

3 There's three main parameters that drive that
4 calculation:

5 What are the expected amounts of the cash
6 flows, in this case, what are the expected cash flows
7 attributable to the use of the Subject Trademark
8 rights in the respective geographic regions, Panama
9 and BCSR Region, for the BRIDGESTONE and FIRESTONE
10 trademarks;

11 What is the duration and timing associated
12 with the expectations of those future cash flows.
13 That's the second parameter.

14 And the third parameter relates to the
15 riskiness of those cash flows and the determination
16 of an appropriate discount rate that reflects and
17 captures the risk of those future cash flows to
18 properly state them as a present value.

19 So, in general, again, my methodology was a
20 Discounted Cash Flow Approach. It's a form of the
21 Income Approach. It is a very generally accepted
22 appraisal technique that's used in the context of

1 litigation. It's used in the context of valuation
2 for tax purposes--many different reasons.

3 Within my application of the Income
4 Approach, I developed a number of discounted cash
5 flow models. I took a look at the value of the
6 trademark rights by Claimant, by geography, by
7 trademark. It all starts, and it's all based on the
8 economic value that's attributable to the use of
9 those trademark rights. From an economic standpoint,
10 these trademark rights can be quantified through a
11 discounted cash flow of the expected future cash
12 flows to the licensor as well as to create a
13 discounted-cash-flow model for the economic benefits
14 attributable to the licensee.

15 The value for the licensor depicted on this
16 particular slide is a circle cut in half. We have a
17 red slice and a yellow slice. The licensor slice, or
18 the yellow slice, you can think of those rights as
19 the present value of the licensor--in this instance,
20 BSLs or BSJs, a non-Claimant--what are the royalties
21 expected to be received from the licensee for use of
22 the property.

1 The value of the trademark rights to the
2 Licensee is a function of the royalty payments that
3 it remits to the licensor but also the Licensee
4 retains a portion of the benefits that is generated
5 from use of the marks. So, there's some sharing,
6 some profit split or pool that is shared between the
7 licensee and the licensor in a transaction, very
8 generally accepted within the appraisal community.

9 There are a number of factors that influence
10 the expected profit split between Licensors and
11 licensees. I have evaluated those factors in this
12 case. I have considered the risks that were borne by
13 the parties; I've considered the expenses that were
14 borne by the parties; and I've considered the
15 negotiating leverage that each party would bring to
16 such a negotiation.

17 The factors--two of the three factors
18 weighed in favor of the licensee; so, for purposes of
19 conservatism, and my calculations in this matter,
20 I've assumed that the profits generated through the
21 use of the trademarks, those expected benefits would
22 be shared equally between the licensee and the

1 licensor, or BSAM as the licensee and the licensors,
2 BSLS and BSJ.

3 Next, I would like to talk about each of the
4 three prongs of the Income Approach that I mentioned
5 earlier: The amount of the cash flows, duration of
6 the cash flows, and the risk of the cash flows. I
7 will start with the amount, the first parameter. In
8 this case, I have quantified the expected future cash
9 flows from both the perspective of Licensor BSLS for
10 the FIRESTONE mark, as well as the expected cash
11 flows for the Licensee BSAM for both the FIRESTONE
12 and the BRIDGESTONE trademarks. I've looked at that
13 in both Panama and the BSCR Region, and it is a
14 function, as you can see by the equations underneath
15 the first two bullet points, the product revenue
16 multiplied by a royalty rate for the licensor and the
17 product revenue multiplied by an earnings rate, the
18 amount retained by the licensee, net of those royalty
19 payments.

20 PRESIDENT PHILLIPS: Could I just ask you
21 about this 1 percent rate.

22 THE WITNESS: Yes, please.

1 PRESIDENT PHILLIPS: Because I know nothing
2 about your science, but as a layman, it struck me as
3 quite extraordinary that the market rate for an
4 exclusive license to use a valuable trademark should
5 be as low as 1 percent of earnings.

6 THE WITNESS: I understand your surprise at
7 seeing a number as low as one. I can tell you in my
8 experience working on trademark matters for about the
9 last 25 years, royalty rates are a function of a
10 number of factors. Certainly the significance of the
11 trademark, how well it's known, its history; it's a
12 function of the industry; it's a function of the
13 products; it's a function of the underlying
14 profitability of the business. It wouldn't make
15 sense, for example, to charge a royalty rate of
16 10 percent on a product that only generate 5 percent
17 profit margins. Conversely, if a product is
18 extremely profitable, and the majority of that profit
19 is attributable to a trademark or some other asset,
20 there will be the ability to extract a higher royalty
21 rate for use of that property. A 1 percent royalty
22 rate is, I would say, not unusual in cases. It is

1 typically, if you were to ask me independent of any
2 industry, independent of any product, guess the
3 royalty rate for this trademark, I would probably
4 select a number somewhere in the 1 to 5 percent
5 range, but that's a function of not knowing anything
6 else about the facts and circumstances of the
7 question.

8 So, I hope that helps frame the 1 percent
9 relative to what other numbers may be.

10 ARBITRATOR THOMAS: Just while you pause to
11 answer that question, you had said that there were
12 three factors that you had identified, and two of the
13 three factors weighed in favor of the licensee. You
14 didn't identify which of the three weighed in favor
15 of the licensee. I'm assuming that the third one,
16 which you said was the relative negotiating power,
17 bargaining power of the two parties, is that--I'm
18 assuming that's the one that doesn't weigh in favor
19 of the licensee in this case; is that right?

20 THE WITNESS: Yes, you are absolutely
21 correct.

22 The two factors that did weigh in favor for

1 the licensee were the risks and expenses associated
2 with the operations. Because these are related
3 parties and companies within the Bridgestone group, I
4 elected to treat that factor as neutral or not
5 favoring either party in this instance.

6 ARBITRATOR THOMAS: Thank you.

7 THE WITNESS: Okay.

8 PRESIDENT PHILLIPS: Just before you move
9 on, when arriving at your 1 percent rate, did you
10 look at the profits that were actually being derived
11 from the use of these trademarks?

12 THE WITNESS: Yes. In my analysis, I will
13 give you a little more context about the 1 percent
14 rate. That's the rate that is established in the
15 company license agreements for use of the property.

16 I also conducted some independent research
17 regarding trademark royalty rates in this particular
18 industry and found rates consistent with that amount.

19 PRESIDENT PHILLIPS: You looked I think at
20 four or five other tire companies. Were these all
21 arm's length agreements, or were they in-house?

22 THE WITNESS: I don't specifically recall,

1 sitting here, but I believe they were arm's length
2 rates, but I can confirm that by referring to my
3 Report. But that is typically something that I would
4 take into account, though, for reasons to be
5 discussed later. Unless you have a reason to believe
6 an inter-company agreement would be not arm's length,
7 I think it's proper to operate under the assumption
8 that it is.

9 But to answer your question more directly
10 regarding the--I will use the word "corroboration" or
11 "assessment" of the trademark royalty rate as a
12 percentage of profitability--I looked at that. I did
13 not have data available to me to assess that for
14 Panama-specifically because the Panama financial
15 activities roll up, and are presented within the BSCR
16 financial information. I did look at BSCR financial
17 information and assessed that royalty rate as a
18 percentage of both gross profits and operating
19 profits. I don't have the numbers right in front of
20 me, but I think as a percentage of gross profits, it
21 may have been--I think that range between operating
22 profit and gross profit may have been something in

1 the Order of 6 to 17 percent, so there is no
2 acceptable rule of thumb, there is no one number you
3 could point to that says that's too high or too low.
4 But in my experience and my work on other valuation
5 cases, to have a trademark royalty rate representing,
6 let's say, 17 percent of the operating profits of the
7 business, that is not unusual in any way; in fact,
8 much in line with what I would expect.

9 So, again, back to my determination of the
10 royalty amount and the cash flow amounts, the
11 expectations of the parties for the use of the
12 subject trademarks, I looked at that before and after
13 the Supreme Court decision. The one aspect of this
14 slide that we haven't addressed yet is the
15 non-exclusive adjustment. And as I've mentioned
16 earlier, non-exclusive rights are less valuable than
17 exclusive rights.

18 I've referenced and referred to two studies
19 in my analysis, I will refer to them as the Varner
20 study and the E&Y study. These are studies that I
21 was previously aware of, I've used in valuation
22 matters in context. They're studies that quantify

1 the relative decrease in value from exclusive rights
2 versus non-exclusive rights. It's typical in those
3 studies that non-exclusive rights represent
4 approximately 50 to 60 percent of the value of
5 exclusive rights. Based on that information, I was
6 able to quantify the before and after, the exclusive
7 versus non-exclusive, for the cash flows of the
8 subject marks.

9 One other final point on this slide that I
10 want to make sure is clear with respect to my
11 analysis is, I'm using expectations of a licensor and
12 a licensee or parties that would negotiate over the
13 value of these marks. And as referenced in these two
14 equations that I have on my slide, product revenue is
15 multiplied by these earnings rates or royalty rates.
16 My "before" model and my "after" model uses the same
17 projections and expectations regarding sales of the
18 Bridgestone and Firestone products in Panama and in
19 the BSCR Region. It is not, in any way, dependent
20 upon an expected decline in sales of those products.
21 It uses the exact same revenue expectations for both
22 my "before" scenario and my "after" scenario.

1 The second prong in the Income Approach that
2 I mentioned earlier is the duration. The duration
3 and timing of cash flows impact the value stated as a
4 point in time present valuing. I am aware of the
5 long history of the BRIDGESTONE and FIRESTONE
6 trademarks. I'm not a lawyer. I'm one of the few
7 people perhaps in the room that is not trained in the
8 legal profession, but my understanding as an
9 appraiser is that trademark rights will not expire if
10 properly maintained, as opposed to patent rights or
11 other types of property rights that may have an
12 expiration. Because of those reasons, it's
13 appropriate and very common in the valuation of
14 trademarks to project those cash flows into
15 perpetuity.

16 What may be surprising to some if they're
17 not familiar with the valuation framework, is
18 perpetuity is a long time. That's forever. Is that
19 reasonable to do? And the answer to that is yes
20 because of the discounting of future cash flows, and
21 those cash flows that occur very far out in time are
22 worth much less today, all things equal compared to

1 an expected cash flow from next year.

2 The final element in an application of an
3 Income Approach is the determination of the proper
4 discount rate to capture the riskiness of those cash
5 flows. I undertook several distinct analyses in this
6 case to determine the appropriate Discount Rate to
7 apply to the streams of cash flows, the expected cash
8 flows. I started with an analysis of the weighted
9 average cost of capital, abbreviated on this slide as
10 "WACC," a term in the appraisal world, as well as the
11 cost of equity. A discount rate for this matter, in
12 my opinion, it's appropriate. It could be a WACC
13 rate. It could be a cost of equity rate. It could
14 be something in between. Appraisers will exercise
15 their judgment. I have presented my calculations for
16 the benefit of the Tribunal in using both of those
17 discount rates.

18 A WACC is especially appropriate in
19 instances where brands are well-known and long-lived.
20 One of the treatises that I cite for other reasons in
21 my analyses has some discussion about that, and in
22 situations like that, using a weighted average cost

1 of capital reflects the fact that the brand is as
2 risky as the business in total, so it's judgment, but
3 not unusual to consider this range of discount rates.

4 I started with data from the United States
5 companies in this industry, identified rates,
6 publicly available information. I then adjusted it
7 to account for the fact that these cash flows would
8 be not in the United States, but the expectations
9 regarding Panama and the BSCR Region.

10 And, finally, I made an additional
11 adjustment that would not be captured in my first
12 adjustment, and that is to reflect the additional
13 risk that would be associated with an environment
14 where there is diminished protection and enforcement
15 of trademark rights. I did that by reference to--I
16 will use the term "benchmarking" or studies that are
17 available on a country-by-country basis that assess
18 the relative strength of trademark protection in
19 different countries. I benchmarked Panama and the
20 BSCR Region to account for this Risk Premium relative
21 to a country that had the lowest identified level of
22 protection and risk as a proxy for the riskiness that

1 exists after the Supreme Court decision.

2 I've talked a lot about my assumptions and
3 inputs. They're certainly more than are presented on
4 this slide, but these are some of the key inputs I've
5 selected and presented here. Again recapping, the
6 revenue of branded products that I mentioned earlier,
7 I'm not making any assumptions or adjustments to
8 reflect a decrease in sales before and after the
9 Supreme Court decision. I'm using the same
10 projections. And in fact, they were projected to
11 grow over the period 2014 to 2020 or 2021 for both
12 the FIRESTONE and BRIDGESTONE marks.

13 I've used a royalty rate of 1 percent on an
14 exclusive basis and a range again presented for the
15 benefit of the Tribunal's consideration as to an
16 appropriate adjustment for exclusive versus
17 non-exclusive rights.

18 Based on the profit-split analysis that I
19 described earlier, my calculation is predicated on an
20 even, 50:50 split between the licensor and the
21 licensee, which makes the math relatively
22 straightforward. If the licensee and licensor are

1 sharing the profits equally, then the licensee will
2 also retain 1 percent and .5 to .6 percent.

3 The discount rates that I identified in
4 Panama ranged, as you see on the slide, as well as
5 for the BSCR Region from approximately 10 percent to
6 16 or 17. And after the Supreme Court decision, I
7 incorporated approximately a 3 to 4 percent
8 adjustment to reflect this additional risk of
9 diminished enforcement and protection.

10 So, a lot of talk about a lot of the inputs.
11 What's the final outcome, what's the takeaway with
12 respect to the economic harm or damage. I've
13 summarized my findings and those calculations on the
14 following slides: The amounts presented on this
15 slide are the difference in value. This is taking
16 into account the model as I've described it,
17 calculating the amount before the decision,
18 incorporating the impacts from the decision, and
19 subtracting the value after, from the value before.

20 So, with respect to Panama, it's my opinion
21 that the FIRESTONE trademark rights of Licensor BSLS,
22 Bridgestone Licensing Services, has been damaged in

1 the range of approximately 60,000 to \$110,000.

2 I did a similar calculation for the BSCR
3 Region with respect to the Licensor BSLS and the
4 FIRESTONE trademark.

5 I performed a similar analysis for the
6 Licensee BSAM in Panama as well as the BSCR Region.
7 Again, and finally, present the totals for
8 consideration. It's my opinion that any amount
9 within these ranges would be reasonable and
10 appropriate to award as a measure of damage based on
11 my calculations. Again, I'm not offering an opinion
12 with respect to the entitlement of Claimants. I'm
13 not offering an opinion with respect to the
14 appropriate geographic territory or trademark rights
15 that should be--that's a question for the Tribunal to
16 answer, and my role as an expert in this matter, my
17 assignment was to quantify these various measures of
18 economic harm and present these ranges based on
19 information I had available to me and for the
20 Tribunal's consideration in determining an
21 appropriate award of damages in this case.

22 Those are my prepared comments.

1 PRESIDENT PHILLIPS: Thank you.

2 Could I just revert to the 1 percent. When
3 I look at these figures, they seem to demonstrate
4 that the licensees were benefiting enormously more
5 from the trademarks than the licensors.

6 THE WITNESS: I would like to answer that
7 question, but I want to make sure I understand your
8 conclusion or identification that the licensee is
9 benefiting more, and I think perhaps what's not
10 captured on this slide and what is leading to that
11 observation is that the licensor, BSJ, who I
12 understand is not a Claimant in this matter, is the
13 licensor of the BRIDGESTONE trademark rights, and
14 that is--on my slide, you will see N/A. There is no
15 amounts presented there because I have not captured
16 the economic value attributable to the Licensor from
17 the Bridgestone trademarks.

18 PRESIDENT PHILLIPS: My point was a rather
19 simpler one, going back to what I would expect from
20 an arm's-length transaction, having regard to the
21 value that these trademarks had to the licensees, I
22 would have expected the licensor to have struck a

1 rather better bargain so far as the royalties they
2 were paying.

3 THE WITNESS: Well, I think that is
4 something that I considered and in doing the
5 profit-split analysis I think the factors tend to
6 point towards the licensee retaining a larger share.
7 I think that's consistent with the facts in this
8 case.

9 Perhaps the consternation involves whether a
10 1 percent royalty rate is an appropriate starting
11 point. I think everything that I've seen indicates
12 to me that a 1 percent royalty rate is an appropriate
13 starting point.

14 If anything in my analysis, I think the
15 licensee is in a better position to extract that
16 value because of its expenses and the risks that it
17 bears in the commercial activities of the enterprise.
18 The licensor in this instance has some
19 responsibilities as well but is not the entity that's
20 transacting business in these regions.

21 PRESIDENT PHILLIPS: A completely different
22 question: As I understand it, the premise underlying

1 all your calculations was that the effect of the
2 Supreme Court judgment was to deprive these licenses
3 of their exclusivity?

4 THE WITNESS: From an economic standpoint.
5 I can't speak to the legal implications, but you are
6 correct in that my analysis is predicated on a
7 diminished ability to enforce and protect, to the
8 point that the benefits of exclusive rights have been
9 removed, and I have measured and tried to quantify
10 that from an economic standpoint.

11 PRESIDENT PHILLIPS: What was the basis for
12 your conclusion that the judgment would have that
13 effect and to the extent that you have calculated?

14 THE WITNESS: Fair question, and again I
15 want to be clear: My assumption is that the Tribunal
16 will determine that it's effectively a change from
17 exclusive rights to non-exclusive rights through as a
18 result of the Supreme Court decision. My role as an
19 expert starts from that and then, if I'm to ask how
20 much did that impact the company, what was the
21 quantity, what was the amount, I'm starting from the
22 assumption that those rights have effectively become

1 non-exclusive. That's not an opinion I can form on
2 my own.

3 PRESIDENT PHILLIPS: Yes, thank you.

4 THE WITNESS: Thank you.

5 CROSS-EXAMINATION

6 BY MS. GEHRING FLORES:

7 Q. Good afternoon, Mr. Daniel.

8 A. Good afternoon.

9 Q. I'm Gaela Gehring Flores, and I represent
10 the Republic of Panama in this arbitration. Thank
11 you for your time. I see that I don't think we're
12 going to have a problem with the pace at which we
13 both talk. I think we both talk pretty slowly, and I
14 see our Court Reporter David celebrating that fact.

15 I'm going to place a binder in front of you
16 with documents. And you will see once you get the
17 binder, you will see that your First and Second
18 Reports have--the first two tabs, behind the first
19 two tabs in that binder.

20 A. Thank you.

21 Q. And Mr. Shopp's first two expert reports
22 follow.

1 Of course, if you need a break at any time,
2 please just let us know.

3 A. Thank you.

4 Q. Mr. Daniel, I would like to turn you to your
5 First Report, Appendix 14, and I believe you state
6 that you have no past or present relationship with
7 Bridgestone Licensing Services; correct?

8 A. Correct.

9 Q. And you have no past or present relationship
10 with Bridgestone Americas?

11 A. No.

12 I have no prior relationship. I've
13 purchased BRIDGESTONE tires, but I want to be honest,
14 but that was before my retention in this case.

15 (Laughter.)

16 Q. I may have as well at some point,
17 Mr. Daniel.

18 But you do state in that first paragraph in
19 Appendix 14 to your First Report that you are
20 presently consulting on an unrelated matter with
21 legal advisors to Bridgestone; is that right?

22 A. At the time that was correct, yes.

1 Q. But that's no longer the case?

2 A. I believe that case has been resolved.

3 Q. Okay. When you say "legal advisors to
4 Bridgestone," are you referring to counsel, current
5 counsel, for Bridgestone in this--

6 A. Yes.

7 Q. I'm sorry, go ahead.

8 A. Yes.

9 Q. Was that other matter related to this
10 matter?

11 A. No.

12 Q. So, essentially, you acted as a damages
13 expert for Akin Gump in a different, unrelated
14 proceeding?

15 A. I worked in a consulting capacity on another
16 matter with attorneys from Akin Gump. I did not
17 testify--or the case settled. It went away.

18 Q. But it doesn't have anything to do with this
19 case?

20 A. Nothing at all.

21 Q. Have you previously worked with Akin Gump as
22 either a damages consultant or a damages expert?

1 A. No. My first interaction with counsel from
2 Akin Gump was on that other unrelated matter to this
3 one, and then my present involvement in this case.

4 Q. And have you previously done work for any
5 Bridgestone entity?

6 A. No.

7 Q. You work for, or with, Charles River
8 Associates; correct?

9 A. I'm an employee of Charles River Associates.

10 Q. And is Bridgestone a client of Charles River
11 Associates?

12 A. Other than my relationship?

13 Q. Yes.

14 A. I don't know.

15 Q. Do you perform--do you normally perform
16 conflicts checks when asked to engage as an expert
17 for particular clients?

18 A. Yes.

19 Q. And did you do one for this matter?

20 A. Yes.

21 Q. And did you find out as a result of that
22 whether Charles River Associates works for

1 Bridgestone or has worked for Bridgestone?

2 A. Typically, when we conduct our conflict
3 check, we're looking for instances where we're
4 adverse to a party that is attempting or wants to
5 engage us, so there are other reports or ways I can
6 obtain that information in our system. I don't
7 recall, sitting here, that that information was part
8 of our conflict-checking process. Meaning, I don't
9 know that it identified other projects that our firm
10 may have been retained on in the past to consult with
11 Bridgestone on. The conflict check that I ran was
12 for purposes of determining that there was nothing
13 that would preclude our involvement in this case.

14 Q. You've previously provided expert testimony
15 about valuation and damages in other cases; correct?

16 A. Both testimony and appraisal reports, yes.

17 Q. And you're aware that Claimants in this case
18 are seeking compensation for the \$5.431 million they
19 were ordered to pay by the Panamanian Supreme Court?

20 A. I've seen that claim, yes.

21 Q. But you don't discuss that particular
22 damages claim in either of your two reports, do you?

1 A. That's correct.

2 Q. You've reviewed both of Mr. Shopp's Reports;
3 correct?

4 A. Yes.

5 Q. And you've seen his analysis of the claim
6 for \$5.4 million?

7 A. Yes.

8 Q. So, you're familiar with the \$6 million
9 so-called "loan" that BSAM gave to BSLS?

10 A. Only insofar as I've heard it discussed
11 during these proceedings and mentioned in reports
12 that that analysis of the--I will use the term "other
13 damages" for them because I was supposed to be the
14 "other damages" for us.

15 The 5.431 million is not something that I
16 have been asked to evaluate or address. That's
17 outside of the scope of my expert opinions that I'm
18 providing in this case.

19 Q. So, I take it, you haven't reviewed the
20 terms of that supposed loan.

21 A. I don't recall if I've seen terms regarding
22 that loan. Again, that wasn't a focus of my analysis

1 and is not something that I'm offering opinions on.

2 Q. Mr. Daniel, could you please turn to
3 Mr. Shopp's First Report at Page 70.

4 A. Yes.

5 Q. There, you will see Figure 4.

6 Have you seen this figure before,
7 Mr. Daniel?

8 A. Yes. I've seen this in my review of
9 Mr. Shopp's Report.

10 Q. And you are a Certified Financial Analyst;
11 correct?

12 A. I hold the designation--

13 Q. Chartered.

14 A. CFA, and they get very persnickety about how
15 that's used. I'm supposed to say I have the
16 designation, I hold a designation, not to use it as a
17 trademark, so the "CFA" designation is something that
18 I hold.

19 Q. And you have an MBA as well?

20 A. Correct.

21 Q. So, I think it's fair to say that you're
22 well-versed in financial analysis?

1 A. I hope so.

2 Q. So, when you look at Figure 4--and I will
3 represent to you that that's BSLS's cash balance over
4 the years 2012 through mid-2017--if you were to
5 analyze this from a financial perspective, and you
6 can see in July of 2016, this is when the reported
7 \$6 million loan came in to BSLS's account, and then
8 it was shortly thereafter paid out, looking at this
9 figure, would it be fair to say that BSLS is not
10 financially worse off before the Supreme Court
11 Judgment as opposed to after?

12 A. I don't have any opinion on that. This is
13 not something that I analyzed or looked at in
14 connection with my work.

15 Q. Then let's just say hypothetically.

16 A. I wouldn't know how to answer that question
17 without additional context and information, and I
18 hadn't--haven't been asked to do that in this case.

19 Q. We have a cash balance over time, and you
20 see a cash inflow and a cash outflow. You can't tell
21 me if from looking at this cash balance that BSLS is
22 either--whether it's worse off because of the Supreme

1 Court Decision?

2 A. I can't answer that question by looking at
3 one graph.

4 Q. Let's turn to Paragraph 39 of your First
5 Report. We're also pulling it up on the screen.
6 There, you state: "If the effect of the Supreme
7 Court Judgment is that it is unlawful for BSLS (or
8 BSJ) to defend its trademark against actions by
9 competitors, it follows that the economic value of
10 the trademark is reduced."

11 Did I read that correctly?

12 A. Yes.

13 Q. So, it's your position in this case that--
14 (Pause.)

15 Q. Excuse me.

16 So, is your testimony in this case that the
17 effect of the Judgment would be to damage the
18 Claimants, I guess, including Bridgestone Japan's
19 trademark enforcement rights?

20 Is that correct?

21 A. I want to make sure I'm answering the
22 question as you intended.

1 As I mentioned during my presentation, I'm
2 quantifying the harm that was suffered by the
3 Claimants under the assumption that the Supreme Court
4 Decision diminished the legal rights associated with
5 the BRIDGESTONE and FIRESTONE trademarks.

6 Q. Now, you based this determination, in part,
7 on your conclusion in Paragraph 42 of your First
8 Report, where you state: "When legal protections for
9 trademarks," and I think maybe you meant to say "are"
10 there, "are reduced or removed, statutorily or
11 judicially, the trademark owner's economic position
12 is damaged."

13 Did I read that correctly?

14 It's on Page 12.

15 A. That's where I'm trying to get.

16 Yes, and thank you for fixing my "are"
17 instead of "is."

18 Q. Of course.

19 A. Appreciate that.

20 Yes, you read that correctly.

21 Q. And you base that conclusion on a study of
22 trademarks in the United States which studied the

1 financial performance of trademarks following a major
2 change in the trademark legal regime in the United
3 States.

4 Is that correct?

5 A. The study that I referenced in this
6 paragraph and then in my presentation is a study that
7 I reviewed and referenced to frame the context of my
8 analysis to illustrate that judicial decisions that
9 impact legal rights have economic consequences; and
10 that study looked specifically at the impact of a
11 U.S. Supreme Court Decision on the Trademark Dilution
12 Act in the United States.

13 Q. And that study found that all of the
14 companies that were subject--were the subject of the
15 study experienced these negative financial impacts;
16 correct?

17 A. I don't recall if the study used the term
18 "all." I know the study was a statistical analysis
19 that looked at a universe of companies before,
20 during, and after and quantified the change in firm
21 behavior and profits and value before and after. I
22 think you may have asked "all."

1 What I can't answer is: if there were 500
2 companies, did all 500 experience the same
3 directional movement, or was it in aggregate. I just
4 don't recall.

5 But the take-away from that study was that
6 increasing trademark rights led to increased value,
7 and decreasing trademark rights led to impaired
8 value.

9 Q. I guess on the basis of that, with that
10 foundation, is it your opinion that the Supreme Court
11 Judgment affected trademark enforcement rights in
12 Panama so that all trademark owners in Panama would
13 suffer a decrease in value?

14 A. I can't offer an opinion with respect to
15 that. I know it's been discussed today while I have
16 been in the proceedings.

17 I am offering opinions with respect to the
18 value of the BRIDGESTONE and FIRESTONE trademarks. I
19 have not conducted an analysis, and I'm not offering
20 any legal opinions, with respect to the implications
21 of the Decision on companies other than the
22 Claimants.

1 Q. Okay. I'm just trying to understand because
2 you're using a study of rather general application,
3 and it seems to bear logic that you're essentially
4 doing the same thing in Panama. That, because a
5 Supreme Court Judgment in the United States resulted
6 in the change of a legal regime, it affected all
7 trademark owners, and that's why you can say that the
8 Supreme Court Decision in Panama affects Bridgestone,
9 which would be one of all of the trademark owners in
10 Panama.

11 Is that not what you were going for?

12 A. In my words, what I've done is reference
13 that study and identified it for helping to explain
14 to someone who may not be familiar with trademark
15 valuation or implications of changes in legal rights
16 and how that may impact companies economically.

17 I'm not using that study to quantify
18 anything in my Report. I'm using that study to help
19 illustrate the economic consequences that can be the
20 result of changes in legal rights.

21 Q. You calculated an approximate 60 percent
22 decrease in the value of the Subject Trademarks;

1 correct?

2 A. Now is my turn to correct.

3 I think the Shopp Report mentions a
4 60 percent reduction. It's actually 40 to
5 50 percent. It's not 60 percent.

6 Q. Okay. Well, I guess we will hear what
7 Mr. Shopp has to say about that later, but just going
8 with you on that, so you calculated an approximate 40
9 to 50 percent decrease in the value of the Subject
10 Trademarks; is that right?

11 A. I've quantified the impact from exclusive to
12 non-exclusive rights by reference to studies that
13 I've identified that indicated
14 exclusive--non-exclusive rights are typically 40 to
15 50 percent lower than exclusive rights.

16 Q. And so you believe that - correct me if I'm
17 wrong - you believe that all trademarks in Panama are
18 40 to 50 percent less valuable today due to the
19 Supreme Court Decision?

20 A. No, I haven't offered that opinion.

21 Q. Your discount rate applies to all of Panama;
22 right?

1 A. The discount rates that I calculated and
2 applied in this matter, I determined an appropriate
3 range of discount rates for Panama for the Subject
4 Trademarks, and I determined an appropriate range of
5 discount rates for the Subject Trademarks in the BSCR
6 Region.

7 Q. Okay. And I guess, just kind of back to the
8 whether it's 40 or 50 or 60, you added a discount
9 rate to your calculations; correct, of--when you were
10 valuing the Subject Trademarks before the Decision,
11 after the Decision? Correct?

12 A. I used a discount rate in my calculations.
13 I'm not sure what you mean by "added a discount
14 rate."

15 Q. You applied a discount rate in your
16 calculations to the value before and the value after.

17 A. That's correct.

18 Q. Okay. You also assumed that, after the
19 Supreme Court Decision, the royalty rate would be cut
20 by about half, or that's the 40 to 50?

21 A. Again, I incorporated into my model, the
22 cash-flow model, expectations regarding the value of

1 exclusive rights versus non-exclusive rights, and
2 that difference is the 40 to 50 percent that I was
3 referring to just a few minutes ago.

4 Q. If you accumulate the effect of the
5 decreased royalty rate and the increased discount
6 rate after the Supreme Court Decision, does that
7 result in a decreased value of 60 percent?

8 A. It may. I haven't looked at--

9 Q. Oh, okay.

10 A. --haven't looked at that.

11 Q. So that may be where your issue with
12 Mr. Shopp lies, perhaps?

13 A. I wouldn't say I have an issue with
14 Mr. Shopp, but maybe if I was referring to his
15 Report, I could see reference to that.

16 I seem to recall some descriptions,
17 narrative descriptions, in the Report where I thought
18 "60" should have said "40." But if you want me to
19 look at something in particular, I'm happy to do so.
20 I think I understand my calculation; I just want to
21 make sure I'm answering your question directly.

22 Q. Sure.

1 So you don't--in your damages calculation,
2 you don't believe that the application of a discount
3 rate leads to a further decrease in the value
4 post-Supreme Court Decision?

5 A. I don't understand that question.

6 Q. Okay.

7 And it's your testimony that you have no
8 opinion as to the effect of the Supreme Court
9 Decision on all other trademarks in Panama; is that
10 right?

11 A. I'm not quantifying that, and I'm not
12 offering any legal opinions.

13 Q. So your opinion is that there has been an
14 actual change in the law in Panama that only affects
15 the Bridgestone trademarks, the Subject Trademarks.

16 A. I'm not offering any opinion with respect to
17 the change in the law. I'm taking into account an
18 assumption regarding the BRIDGESTONE and FIRESTONE
19 trademark rights, and if those rights were
20 diminished, legal rights were diminished as a result
21 of the Supreme Court Decision, and I'm quantifying
22 the economic impact associated with that.

1 Q. But you have no--you're not concluding that
2 the Supreme Court Decision changed legal trademark
3 rights in Panama?

4 A. I'm not offering an opinion, any legal
5 opinions. My calculation is predicated on a finding
6 by the Tribunal that the Claimants' legal rights have
7 been injured.

8 Q. By the Supreme Court Decision.

9 A. Correct.

10 Q. You state - in Paragraph 39 of your First
11 Report, if you would like to go there - I think we've
12 seen this sentence before: "If the effect of the
13 Supreme Court Judgment is that it is unlawful for
14 BSLs or BSJ to defend its trademark against actions
15 by competitors, it follows that the economic value of
16 the trademark is reduced."

17 A. Yes.

18 Q. The Supreme Court Judgment is not binding on
19 future courts, is it?

20 A. I'm not qualified to offer an opinion on
21 that.

22 Q. I guess you state this on the basis of

1 Mr. Arjona's statement, that you quote at
2 Paragraph 38.

3 A. I reference Mr. Arjona, yes, in
4 Paragraph 38.

5 Q. And Mr. Arjona, in Paragraph 38, says--of
6 his Report--

7 (Pause.)

8 Q. --which you quote in your--sorry, you quote
9 him in your Paragraph 38. It says: "It is not
10 possible to rule out that in the future these
11 criteria may be used for the resolution of other
12 similar cases. In my opinion, it is possible"--oh,
13 sorry. Let me go back.

14 "It is not possible to rule out that in the
15 future, these criteria may be used for the resolution
16 of other similar cases. In my opinion, it is
17 possible and not to be ruled out that the
18 aforementioned risk could materialize itself if, in
19 the future, the BSLS and BSJ companies decide, in
20 protection of its trademarks, to enter into a process
21 of opposition to the registration of a given
22 trademark with the suffix '-STONE,' which one of

1 their competitors intends to register."

2 Did I read that correctly?

3 A. Yes.

4 Q. Your argument is that if future courts
5 follow the Supreme Court Decision, it would amount to
6 making it unlawful for BSLS or BSJ to oppose
7 trademark registration applications?

8 A. I don't have an argument. That's not my
9 quote.

10 Q. Okay. But it is--I guess that is the
11 foundation of what you are using as your premise for
12 your damages calculations?

13 A. I reference Mr. Arjona's statement in the
14 context of my analysis because I'm not offering a
15 legal opinion with respect to the harm to the
16 Claimants' legal trademark rights resulting from the
17 Supreme Court Decision. That's a starting point for
18 my analysis.

19 Q. Okay. At some point you reference
20 Mr. Molino in your Second Report, I believe.

21 A. I believe that's right, because Mr. Molino's
22 First Report, I think, was in March. It did not

1 exist at the time of my First Report.

2 Q. Okay.

3 And if I'm--do you remember how you cited to
4 Mr. Molino?

5 A. Generally. I recall citing to Mr. Molino's
6 Report in my Second Report in response to a section
7 of Mr. Shopp's Report. I think it might be about a
8 paragraph in my Second Report.

9 Q. Okay. It's Paragraph 49 in your Second
10 Report.

11 A. Yes.

12 Q. You say: "It's my understanding that
13 Claimants' trademark law expert, Mr. Edwin Molino,
14 believes that the Supreme Court Decision has impacted
15 'intellectual property' rights in Panama beyond just
16 the Subject Trademark rights. For example, I
17 understand the changes to Panamanian trademark law
18 practice are already being felt, and that other
19 defendants have already started to refer to
20 recklessness or temerity on the part of other
21 plaintiffs in trademark opposition cases."

22 "I understand Mr. Molino had never seen this

1 before the Supreme Court Decision, and in his view,
2 this is a direct result of the Supreme Court
3 Decision."

4 Did I read that correctly?

5 A. Yes.

6 Q. Now, that's not a quote from Mr. Molino's
7 Expert Report; correct?

8 A. Correct. That's my understanding of the
9 opinions he's offering.

10 Q. Right. And so, your understanding of
11 Mr. Molino's Expert Report is that the Supreme Court
12 Decision is affecting trademark rights for everyone
13 in Panama; is that right?

14 A. I understand that's Mr. Molino's--that's
15 information is addressed in Mr. Molino's Report.

16 Q. And you used Mr. Molino's Expert Report to
17 justify the specific risk I believe that you used to
18 calculate a discount rate post-Supreme Court
19 Decision; is that right?

20 A. No, that's not correct.

21 Q. On the basis of Mr. Molino's Reports, did
22 you conclude that Panama is a riskier country when it

1 comes to intellectual property rights post-Supreme
2 Court Decision?

3 A. No.

4 Q. No?

5 A. No. I think I mentioned earlier my First
6 Report is the Report that I did the discount rate
7 calculations. That Report was prepared in September
8 of 2018. I did not receive or review Mr. Molino's
9 Report until March of 2019.

10 Nowhere in my First Report do I cite a
11 reference or anything from Mr. Molino. The only
12 citation to Mr. Molino is in my Second Report in this
13 Paragraph 49.

14 Q. Well, perhaps it would help to read the
15 first part of this paragraph, where it says:
16 "Mr. Shopp asserted that Panama's
17 intellectual-property protection ratings increased
18 from 2014 to 2018, and asserted that it demonstrates
19 that the country has become less risky overall, not
20 far riskier as Mr. Daniel claims."

21 Now, do you understand the context of this
22 paragraph, that it's talking about your First Report?

1 A. Mr. Shopp is talking about my First Report.

2 Q. Right.

3 A. I don't know anything else other than that.

4 Q. You don't think that you're defending the
5 risk analysis that you made in your First Report in
6 this paragraph?

7 A. No. I'm rebutting Mr. Shopp's statement.

8 Q. Okay. So this has nothing to do with a
9 justification for the risk analysis that you did in
10 your First Report?

11 A. Yes.

12 I want to be perfectly clear: Mr. Molino's
13 Report was produced six months after my initial
14 report. My initial report quantified the Discount
15 Rates that I use in my analysis. In no way, shape,
16 or form did I consider it or use it as justification
17 for the calculations that I performed.

18 Q. It does seem that you're using it as a post
19 hoc justification, however, after the fact. When
20 Mr. Shopp is criticizing your risk analysis from your
21 First Report, you come back with Mr. Molino's Expert
22 Report as proof that your risk analysis is correct.

1 That's what it seems to me, but maybe I'm
2 completely wrong.

3 A. I can tell you how I referenced it, and I
4 think it's plain from the sentence that I've drafted
5 for this Report.

6 I'm referencing Mr. Molino's Report
7 specifically to rebut Mr. Shopp's assertion that
8 Panama's intellectual-property protection ratings
9 increased from 2014 to '18, and that it demonstrates
10 the country has become less risky.

11 That is the only reason that I've included
12 it in this Report.

13 Q. Okay. So, I think we've established that
14 your basis for this premise--excuse me--that courts
15 in the future or future courts will follow the
16 Supreme Court Judgment comes from Mr. Arjona's Expert
17 Report; is that right?

18 A. If you're pointing to a specific section of
19 my Report, I can answer that. Again, I'm not
20 offering a legal opinion with respect to the legal
21 rights.

22 Q. If you refer to Paragraphs 38 and 39 of your

1 First Report.

2 A. Yes.

3 Q. So, yes, your--the basis for the premise
4 that future courts will follow the Supreme Court
5 Judgment is based on Mr. Arjona's Expert Report; is
6 that correct?

7 A. I'm not offering an independent opinion with
8 respect to that. If I'm citing Mr. Arjona, that's
9 his opinion.

10 Q. Okay. But your expert opinion is based on
11 Mr. Arjona's conclusion; is that right?

12 A. My expert opinion is regarding the amount of
13 economic harm that Claimants suffered under the
14 assumption, the premise, that the legal rights have
15 been diminished as a result of the Supreme Court
16 Decision in Panama.

17 Q. Right.

18 And that that premise is based on
19 Mr. Arjona's conclusion that other courts in the
20 future will follow the Supreme Court Decision; is
21 that right, or not?

22 A. Again, that's not for me to determine. I've

1 identified his opinion. I think that's something the
2 Tribunal will determine, and others have provided
3 testimony and opinions regarding.

4 I have--I'm aware of that information, and
5 I'm aware of those opinions, but I'm using that as a
6 starting point for my analysis. I'm not--I'm not
7 offering any opinions on that.

8 Q. I guess maybe try it this way: If no future
9 court were to ever rely on the Supreme Court
10 Decision, would there be any injury? Could you
11 assume that there's injury in that circumstance?

12 A. I don't know. I'm not--I can't make that
13 determination of the impact to the legal rights.

14 What, again, I'm basing my analysis on is
15 the legal rights have been diminished. Others are
16 offering opinions as to how and why that is the case,
17 and I am quantifying it--quantifying the economic
18 impact, assuming that's the finding.

19 PRESIDENT PHILLIPS: For myself, I do find
20 it essential to try to identify why you have
21 proceeded on the premise that this Tribunal is going
22 to find that the effect of the Supreme Court Judgment

1 was to remove the exclusivity from the trademarks.

2 Could I perhaps explore this by reference to
3 Paragraph 95 of your First Statement.

4 THE WITNESS: Yes.

5 Paragraph 95 on Page 23?

6 PRESIDENT PHILLIPS: That's right.

7 THE WITNESS: Okay.

8 PRESIDENT PHILLIPS: "In this matter, as I
9 understand it," the result of the Supreme Court
10 Decision is that BSLS is exposed to the risks that
11 you've set out.

12 What is the basis of that understanding "as
13 I understand it"?

14 THE WITNESS: The opinions and information
15 that I've referenced in this Report that needs to be
16 proven.

17 So I would draw a similar analogy if this
18 were a trademark infringement action or a patent
19 infringement action; that I'm asked as a damages
20 expert to assume facts will be put forth and a claim
21 will be made, that there will be a determination. If
22 there is no injury, there's no purpose for my damages

1 calculation.

2 PRESIDENT PHILLIPS: There are two
3 questions: One is, was there an injury; and then the
4 second question is, what is the nature of that
5 injury?

6 Now, this paragraph is dealing with the
7 first one, that there was an injury. But you say "as
8 I understand it," not "as I am instructed," but "as I
9 understand it."

10 So, what is the basis of that understanding?

11 THE WITNESS: First, I want to be clear.
12 I'm not--if I were to rewrite that sentence, I might
13 use a different word.

14 PRESIDENT PHILLIPS: Yes. Well--

15 THE WITNESS: But my understanding is I'm
16 not forming an opinion. My understanding is, again,
17 based on what I have seen others offer or what
18 someone else will determine.

19 PRESIDENT PHILLIPS: Well, what someone else
20 will determine is conjecture. I don't see how you
21 can base an understanding on what we may determine.

22 THE WITNESS: And again, perhaps I should

1 have worded that more clearly.

2 I am relying upon someone else, the
3 Tribunal, other experts, to inform me as to what
4 those diminished legal rights are and what--and, in
5 fact, it did happen, and then I use that as my
6 starting point to quantify the impact.

7 PRESIDENT PHILLIPS: So are you saying that
8 the statement "as I understand it" does not represent
9 the true position; the true position is "as I assume
10 it will turn out"?

11 THE WITNESS: I think that's a proper
12 interpretation of how I've used "understand." "As I
13 understand," I did not mean that I'm forming an
14 opinion or I have a basis to establish that.

15 PRESIDENT PHILLIPS: Can we look at next
16 sentence.

17 THE WITNESS: Yes.

18 PRESIDENT PHILLIPS: "The exposure to those
19 risks has the effect of impairing the exclusivity or
20 legal protection of the Claimants' trademark rights
21 which is increases the likelihood of products being
22 confusingly similar marks competing against," et

1 cetera.

2 Now, is that a conclusion that you have
3 drawn from the first statement--from the first
4 sentence, or is this also--has this also got some
5 other basis?

6 THE WITNESS: Again, this "exposure to those
7 risks," someone, the Tribunal or others, will have to
8 determine the extent of the impact to the legal
9 rights. And I'm predicating my analysis on a
10 determination that those rights have been impaired
11 and effectively changed them from what would be
12 economically exclusive rights to economically
13 non-exclusive rights.

14 And that, again, is in part why I referenced
15 the Heath & Mace study to help explain from an
16 economic standpoint why I am quantifying the change
17 in the value of the trademarks that would be
18 attributable to a diminished legal right.

19 PRESIDENT PHILLIPS: I can understand that
20 you or I might draw the conclusion from the first
21 sentence of Paragraph 95 that as a result of the
22 matters set out in the first sentence, the effect

1 will be to impair the exclusivity. It seems to me a
2 fairly logical conclusion to draw.

3 I'm just anxious to find out whether that is
4 a conclusion that you, yourself, have drawn, or not.

5 THE WITNESS: I cannot draw the legal
6 conclusion. I can apply my economic analysis to a
7 finding that the legal rights have been impaired.

8 And again, this reads on, as I understand
9 it, what the, for lack of a better word, the
10 liability or the cause, what is the injury. I can't
11 define the injury. I need that to be an assumption.
12 And by "injury," I don't mean economic harm. By
13 injury," I mean the impact on the legal rights.

14 PRESIDENT PHILLIPS: So this is a further
15 assumption, then.

16 THE WITNESS: It is an assumption; it frames
17 the purpose for my analysis. Because if this were
18 not true, if there was no finding of diminished legal
19 rights, and no one is offering an opinion or the
20 Tribunal does determine that that is the case, then
21 the economical analyses that I've provided are going
22 to be of no assistance.

1 PRESIDENT PHILLIPS: The third sentence
2 begins "Therefore."

3 THE WITNESS: Yes.

4 PRESIDENT PHILLIPS: So, that is a
5 conclusion drawn from the first two sentences.

6 THE WITNESS: Yes.

7 PRESIDENT PHILLIPS: Is that your
8 conclusion?

9 THE WITNESS: Again, I think it--what I'm
10 explaining here is the basis for the determination
11 that the legal rights have been impaired, that I'm
12 not offering that opinion.

13 But if, in fact, the Supreme Court Decision
14 does place the Claimants in a diminished legal
15 capacity, that has economic implications from
16 increased competition and from the loss of
17 exclusivity.

18 And I'm distinguishing in my--my opinions
19 deal with the economic implications, not the legal
20 determinations.

21 PRESIDENT PHILLIPS: What we're exploring is
22 the premise of your calculations.

1 THE WITNESS: Yes.

2 PRESIDENT PHILLIPS: And I think we find the
3 premise at Paragraph 96 beginning with the words
4 "Accordingly."

5 "Accordingly." What did you mean by using
6 the word "Accordingly"?

7 THE WITNESS: Accordingly for my analysis to
8 be helpful to the Tribunal in this matter in
9 assessing economic harm or damages, it has to be that
10 Paragraph 95 is a finding. It has to be the case.

11

12 If that's not the case, then what I do in
13 Paragraphs 96 and beyond are not useful.

14 PRESIDENT PHILLIPS: Yes. I follow that.

15 Can we look at 96: "Accordingly, I have
16 quantified the economic impact of the Supreme Court
17 Decision on Claimants by calculating the difference
18 in value between exclusive and non-exclusive rights
19 to the Subject Trademarks in a licensing context."

20 THE WITNESS: Yes.

21 PRESIDENT PHILLIPS: That is a hard-and-fast
22 premise to start from. "I'm valuing these on the

1 basis that they are non-exclusive rights."

2 THE WITNESS: That's right.

3 PRESIDENT PHILLIPS: Yes.

4 Is that a premise that you, yourself,
5 derived from the matters that you had assumed in
6 Paragraph 95?

7 THE WITNESS: Again, I am--my calculation is
8 premised on--requires a determination that the legal
9 rights have become non-exclusive, and I have
10 familiarity with quantifying exclusive rights versus
11 non-exclusive rights. And that's how I constructed
12 my analysis starting from the assumption or
13 understanding or finding that someone is going to
14 make regarding how these legal rights were impacted.

15 PRESIDENT PHILLIPS: Well, I follow that you
16 start with the assumption that we are going to find
17 that there's been an impact on the rights. What I'm
18 trying to find out is on what basis you assume that
19 we are going to conclude that the effect of that
20 impact is that the trademarks should be treated as
21 giving rise to non-exclusive rather than exclusive
22 rights.

1 THE WITNESS: The best I can answer that
2 question is that's the context that I'm familiar with
3 in valuation and that I've seen quantified.

4 If you were to ask me, is there a--if the
5 Tribunal were to determine that it's not exclusive
6 but something else, I don't know what you call it,
7 but--

8 PRESIDENT PHILLIPS: Something in between.

9 THE WITNESS: Something in between, let's
10 call it "something in between."

11 PRESIDENT PHILLIPS: Yes.

12 THE WITNESS: --my calculations have not
13 contemplated what that "something in between" would
14 be.

15 PRESIDENT PHILLIPS: Thank you.

16 BY MS. GEHRING FLORES:

17 Q. So, if I understand correctly, you have
18 assumed as a legal question the existence of injury;
19 am I right?

20 A. I'm equating the term "injury" as I would in
21 a different type of proceeding where I'm asking to
22 assume liability, where injury in this case I might

1 equate to liability where there's been harm, and then
2 I'm quantifying economically the impact of that
3 injury or harm.

4 I'm not determining that the injury took
5 place. But if the injury is as it's described and
6 assumed in my Report, then this is the amount of
7 economic harm attributable to that injury.

8 Q. So, again, "injury" to you is a legal
9 question.

10 A. "Injury" as I'm using it as a non-attorney,
11 as a damages expert in this matter--I believe I had a
12 slide in my presentation that specifically used the
13 word "injury." Injury is a requirement for damages;
14 and, if there's injury, then let's look at the
15 damages question. If there's no injury, then send me
16 home.

17 But if there is injury, then how much is the
18 damage; what is the economic impact,. And that's the
19 question that I've answered as my assignment in this
20 case.

21 Q. So, questions of liability are not to be
22 determined by the damages expert; correct?

1 A. Generally speaking, yes, that's correct.

2 Q. Okay.

3 Questions of injury are also not to be
4 determined by a damages expert; is that correct?

5 A. I don't know if other damages experts are
6 being asked to assess injury. I don't know--I can't
7 speak for others. I can speak for myself and the
8 opinions that I've formed in this case, and I am not
9 qualified and able, and I have not been asked to form
10 an opinion with respect to the legal rights that were
11 injured or not injured as a result of the Supreme
12 Court Decision.

13 Q. I guess, to me, if you assume the existence
14 of an injury--well, wait, let me go back.

15 So, liability, injury are questions for the
16 lawyers in your approach.

17 A. They're questions for someone other than me.

18 Q. Okay. Questions for someone other than
19 damages experts.

20 But--and the only thing that damages experts
21 are supposed to do is quantum, is just quantify the
22 injury that's been assumed by--that was caused by the

1 liability that's assumed.

2 A. Are you talking about this case, or are you
3 talking about in general?

4 Q. Let's start with this case.

5 A. Well, again, I think I've been as clear as I
6 can be about what my assignment was and what
7 assumptions I'm making. And I'm assuming that the
8 legal rights have been diminished and that exclusive
9 rights have become effectively non-exclusive rights,
10 and then I'm quantifying that impact.

11 Q. Diminished by a little? By a lot?

12 A. Again, I think that goes to Mr. President's
13 question regarding something in between.

14 I'm offering my calculation as the
15 difference between exclusive and non-exclusive
16 rights.

17 If, for example, the legal implications were
18 that you can't oppose a trademark on Monday but you
19 can do it any other day of the week, or, you know,
20 pick some silly analogy, clearly, there would be a
21 different way that I would quantify that injury than
22 I have in this matter.

1 So it's predicated on a finding of a
2 specific injury that I'm not offering an opinion on.

3 Q. And the "specific injury," in your words, is
4 that Bridgestone--that the Bridgestone entities will
5 no longer be able to enforce their trademark rights
6 in opposition proceedings in Panama as they have
7 before?

8 A. I'm not--again, I'm not offering that
9 opinion. There's a lot of testimony that's been
10 offered. I've heard testimony about infringement
11 proceedings, opposition proceedings, willingness,
12 ability, legal ability. All of that is taken into
13 account by whoever is determining how the legal
14 rights have been impaired.

15 I'm not qualified to offer an opinion as to
16 why the legal rights have been impaired, and I am not
17 offering an opinion other than quantifying the
18 economic damage associated with a finding of
19 exclusive rights becoming non-exclusive.

20 Q. Right.

21 But I'm trying to figure out, Mr. Daniel,
22 how is it that the trademark rights moved from being,

1 as you say, exclusive to completely non-exclusive?
2 I'm just trying to figure out what the assumption is
3 there.

4 And is the assumption there that trademark
5 courts in Panama are not going to allow Bridgestone
6 to exercise their rights to defend their trademark?
7 I think it's an essential assumption.

8 I'm just trying to figure out, how does the
9 diminishment happen? Does one day, you know, before
10 the Supreme Court opinion, does Bridgestone wake up
11 and it can defend itself to the full extent; and then
12 the day after the Supreme Court Decision, the courts
13 are closed to Bridgestone? Is that how it works?

14 I'm just trying to understand, like, how
15 does this diminishment work, like, on a basic level?
16 What went into the assumption?

17 A. I'm trying to be as clear as I can. I can't
18 answer that question. That's a question that someone
19 else needs to answer. I'm just looking at the final
20 answer. I'm not--they're not showing their work.
21 They're not--I'm not taking that into account.

22 I need to know--and I'm starting from the

1 standpoint that the question is: how were the legal
2 rights are impaired? Final answer, they are
3 non-exclusive. And that's my assumption.

4 I can't answer that question for you because
5 that's for the Tribunal to determine or other experts
6 in this case. I can't offer opinions regarding that.

7 Q. I'm just trying to determine if you know
8 what your assumptions are, Mr. Daniel.

9 In Paragraph 95, which you just went over
10 with the President of the Tribunal--

11 A. Right.

12 Q. --you list two results of the Supreme Court
13 Decision. You're not quoting anyone there, and you
14 say "as I understand it," and I think we've
15 determined that this is an assumption of yours.

16 A. Right.

17 Q. And one of those assumptions is, and I
18 quote: "That it will be unlawful for BSLs or BSJ to
19 oppose a trademark application by an existing
20 competitor altogether in the future."

21 Is that one of your assumptions, or is it
22 not?

1 continue, please.

2 MS. KEPCHAR: Mr. President, before we
3 continue with Mr. Daniel's testimony, I would like to
4 raise a point. I hope I can be helpful to the
5 Tribunal.

6 Mr. Daniel, obviously, I think was very
7 clear that he wasn't opining on the effects, the
8 causation of the Supreme Court Decision on the fact
9 of injury. I would suggest to the Panel, if you
10 would, that Ms. Jacobs-Meadway is the basis for that,
11 and in her Report she lays out the details of that,
12 and, if you like, I can point to particular
13 paragraphs, if it would be useful to the Tribunal.

14 MS. GEHRING FLORES: Excuse me, excuse me.
15 Counsel for Claimants is interrupting my
16 cross-examination and attempting to correct the
17 testimony of this expert. This is highly
18 inappropriate.

19 MS. KEPCHAR: Not at all. Not at all.

20 MS. GEHRING FLORES: If this expert wishes
21 to explain this in his own words during my
22 cross-examination, that's fine, but counsel for

1 Claimants has an opportunity for closing arguments.

2 And also has an opportunity for redirect,
3 but not to sit here and testify in the shoes of the
4 expert. This is highly inappropriate.

5 PRESIDENT PHILLIPS: I don't think it's
6 appropriate, either, and we will continue with the
7 cross-examination.

8 CONTINUED CROSS-EXAMINATION

9 BY MS. GEHRING FLORES:

10 Q. Mr. Daniel, I guess, back to Paragraph 95 of
11 your First Report, and I don't want to get into a
12 protracted discussion about whether these are
13 assumptions or understandings or predicates, and I
14 hope that perhaps we can agree on the term
15 "assumptions" for now, if that's okay.

16 A. Okay.

17 Q. But you calculate damages based on the
18 assumptions in Paragraph 95 to determine the damage
19 to the Subject Trademarks in Panama; correct?

20 A. In Panama and the BSCR Region, yes.

21 Q. Okay. So, you use the assumptions in
22 Paragraph 95 also to calculate damages to the Subject

1 Trademarks outside of Panama; is that correct?

2 A. Yes.

3 Q. The BSCR Region, Mr. Daniel, includes the
4 following countries: Honduras, Nicaragua, El
5 Salvador, Belize, Jamaica, Haiti, Bermuda, The
6 Bahamas, the Cayman Islands, Aruba, Barbados,
7 Curaçao, Guyana, St. Lucia, Suriname, Trinidad and
8 Tobago, the United States, and Canada. Is that
9 correct?

10 A. I don't recall, but I will take it at your
11 word.

12 Q. You don't recall the countries that are
13 included in the BSCR Region for your calculation of
14 damages?

15 A. I don't have that list of countries
16 memorized.

17 Q. Okay. But does it sound fair?

18 A. I remember other countries as well that may
19 not be listed.

20 Q. So, there might be other countries in
21 addition to these?

22 A. That's what I'm trying to recall as I sit

1 here. I remember I think Dominican Republic and
2 Puerto Rico, there may be others. I don't recall the
3 exact list as I sit here.

4 Q. And I believe Mr. Shopp pointed out in his
5 First Report that 50 percent of the sales that you
6 include in the BSCR Region are for sales to the U.S.
7 and Canada; is that right?

8 A. I don't recall that specific section. I can
9 look at it but in my analysis included sales that are
10 reported on the BSCR Financial Statements.

11 Q. I will represent to you that you didn't
12 refute Mr. Shopp on that point.

13 A. Okay.

14 Q. So, we can move on.

15 I guess one thing that I would like to
16 understand, Mr. Daniel, is that: what do you mean
17 exactly by "non-exclusive rights"? What do you mean
18 that the Subject Trademarks or that Bridgestone's
19 trademarks are non-exclusive? What exactly does
20 "non-exclusivity" mean to you? Because I'm not sure
21 I understand.

22 A. Are you asking me for my understanding is

1 from an economic point of view or from a legal point
2 of view?

3 Q. The way that you used it in your damages
4 Report, because I don't understand.

5 A. Okay. When I use the word "non-exclusive"
6 versus "exclusive," I'm--with respect to my
7 calculations--I'm using that in an economic sense.
8 So, an exclusive trademark right has, according to
9 the studies that I've referenced, more value than
10 non-exclusive trademark rights from an economic
11 standpoint.

12 I've considered the operations, the
13 cash-flow projections, the value of those rights
14 that--the trademark rights, whether they're used by a
15 licensor or a licensee, and assessed the difference
16 in value between economic--between exclusive and
17 non-exclusive rights on an economic basis.

18 Q. Okay, but Mr. Daniel, I guess I have a
19 simpler question; maybe act like I'm seven years old.
20 What do you mean when Bridgestone's trademark rights
21 become non-exclusive? It's kind of important for us
22 to figure this out. I don't understand what you

1 mean. Because I need to understand when this happens
2 and how this happens.

3 A. Well, when and how again is, I think, a
4 different question than I'm answering. I'm answering
5 how much value is the difference--

6 Q. Okay. Let me--

7 A. Okay.

8 Q. --let me stop you just a second.

9 A. Okay.

10 Q. Do you understand that Bridgestone's
11 trademark rights now are exclusive or non-exclusive?

12 A. Where?

13 Q. Let's start in Panama.

14 A. In Panama, I cannot give you an opinion with
15 respect to whether Bridgestone's rights are exclusive
16 or non-exclusive. That's a legal determination.

17 Q. How could you possibly calculate the damage
18 if your damages analysis is based on a change from
19 exclusivity to non-exclusivity? I'm asking you a
20 very simple question. Right now, are the BRIDGESTONE
21 trademark rights in Panama exclusive or
22 non-exclusive? Because you're doing a comparative

1 analysis; right?

2 A. No. I'm calculating the value of the marks
3 as of May 28th, 2014, before and after the Supreme
4 Court Decision.

5 Q. Okay. So, before May 28, 2014, they were
6 exclusive; and, after May 28th, 2014, they're
7 non-exclusive, is that what you're saying?

8 A. That's the assumption that I've been
9 describing regarding the change in the legal rights
10 of the trademarks as a result of the Supreme Court
11 Decision.

12 Q. Okay. But now I really need you to define
13 "non-exclusive." What does it mean, Mr. Daniel, or
14 do you not have an understanding of what it means?
15 What is your understanding, to do your damages
16 analysis? I think you need to have some basic
17 understanding of what your assumption means. What
18 does "non-exclusive" mean, please?

19 A. From an economic standpoint?

20 Q. From the way--no. Explain to me what is a
21 non-exclusive trademark right?

22 A. I can tell you what I mean by

1 "non-exclusive" in terms of valuation. It's
2 predicated on those rights legally being exclusive or
3 non-exclusive. From a valuation standpoint, there is
4 a difference. Exclusive rights are--there is one
5 user. Non-exclusive rights is an erosion of the
6 economics that flowed through to that single-user.

7 Q. An erosion or--because "non-" kind of
8 connotes "nothing," so there was one user and now
9 everybody can use it?

10 A. Right. "Non-exclusive" I don't believe I
11 have ever described in another matter or this matter,
12 for that matter, that "non-exclusive" means no value.
13 Non-exclusive rights have value. That's why there
14 are--

15 Q. I'm not talking about value, Mr. Daniel.
16 I'm asking you to define the term. You cannot define
17 non-exclusive trademark rights by giving me a value.
18 You can't.

19 A. I'm not an attorney, so I can't tell you
20 what legally a non-exclusive right is relative to an
21 exclusive right. I can tell you how I value
22 exclusive and non-exclusive rights.

1 PRESIDENT PHILLIPS: Can you tell us whose
2 rights you're talking about?

3 THE WITNESS: Yes, Mr. President.

4 When I'm referring to "rights," I'm
5 referring to either the owner/user, in which case
6 there wouldn't be a license. For example, if an
7 entity owned its rights and also used them and didn't
8 license them to anyone else, that would be an example
9 of an exclusive use, but it's through the context of
10 ownership.

11 There could also be an owner/licensor. In
12 this instance, a good example would be: BSJ is the
13 owner and licensor from an economic standpoint, as I
14 understand it, of the Subject Trademarks in Panama.

15 The licensee/user of those marks is BSAM.
16 There could be multiple licensees that are authorized
17 to use the Subject Trademarks in Panama. There could
18 be unauthorized users, potential infringers. There
19 could be others that use marks, a legal term, but
20 confusingly similar marks, but not the identical
21 marks.

22 Those are examples of how I viewed the

1 ownership of trademarks and the licensed the use of
2 trademarks from an exclusive and non-exclusive
3 standpoint. Does that answer your question?

4 PRESIDENT PHILLIPS: I think it does.

5 You're talking about the rights of those who
6 are making use of the trademarks, typically
7 licensees; is that right?

8 THE WITNESS: Typically licensees, though it
9 doesn't have to be a licensee if the marks aren't
10 licensed.

11 PRESIDENT PHILLIPS: I don't know whether
12 that helps.

13 BY MS. GEHRING FLORES:

14 Q. According to your Reports, Mr. Daniel, the
15 value of the Subject Trademarks decreased by – you
16 may say 40 or 50, Mr. Shopp may say 60 – but it
17 decreased by some percentage between 40 and
18 60 percent the day after the Supreme Court Judgment;
19 correct?

20 A. I have calculated that difference as of the
21 date of the Supreme Court Judgment when it became
22 final.

1 Q. So – and I know that you might object to me
2 using 60 percent, but let's just say hypothetically
3 for the moment – your calculations assumed the day
4 after the Supreme Court Judgment that the Subject
5 Trademarks' valued decreased to 40 cents on the
6 dollar?

7 A. It's my opinion that the value of those
8 marks was diminished/decreased by--I haven't looked
9 at Mr. Shopp's Report since you asked me about it,
10 but based on the question you asked me, I think I
11 understand where the distinction between 40 and 60
12 comes from. I've made an adjustment to the amount,
13 and then I've made an adjustment to additional risk
14 associated with those amounts. And it is my opinion
15 that that is a real actual decrease in value. That
16 is the result of that Decision – all again based on
17 the assumption that the legal rights have been
18 effectively changed from exclusive rights to
19 non-exclusive rights.

20 Q. So, I take it, “yes,” the Subject
21 Trademarks' value the day after the Supreme Court
22 Judgment decreased to 40 cents on the dollar?

1 A. Again, I don't have the math in front of me,
2 but that is--that's the intention and the basis for
3 my opinion, that's correct.

4 Q. Let's assume that Bridgestone Corporation,
5 the parent company in Japan, hired you the week after
6 the Supreme Court Judgment to value the BRIDGESTONE
7 trademark because a potential acquirer was interested
8 in purchasing it. You would have advised Bridgestone
9 Japan to sell the BRIDGESTONE trademark for 40 cents
10 on the dollar; correct?

11 A. I would have conducted my analysis, taking
12 into account the information that was available to
13 me. I don't know that I would use the term "advised"
14 them to sell. I would have conducted a valuation of
15 the mark.

16 Q. A valuation like the one you did for this
17 case; right? That's what you did.

18 A. A discounted-cash-flow model was a very
19 common way to assess the value of intellectual
20 property, including trademarks. I would not think
21 that would be unusual.

22 Q. So, if you stand by your Reports,

1 Mr. Daniel, presumably you would advise them that
2 selling their trademark for 40 cents on the dollar
3 was okay?

4 A. I'm not--I wouldn't offer that type of
5 advice. Typically, when I'm retained, I'm asked to
6 determine what is the value of something, and value
7 can be determined under different scenarios,
8 different contexts. If I was asked a question
9 regarding the value of those trademark rights in an
10 anticipated transaction, this is certainly the type
11 of analysis and information I would take into account
12 and consider in determining that value.

13 Q. Kind of like when you determine the value of
14 the Subject Trademarks in your Reports; right,
15 Mr. Daniel? Would you like to take them back?

16 A. Absolutely not.

17 Q. Okay.

18 A. That's the valuation analysis that I
19 performed to determine damages.

20 Q. Okay. So, let's just assume that, on the
21 basis of the valuation analysis in your Expert
22 Reports, you tell Bridgestone Japan to go ahead and

1 sell the BRIDGESTONE trademark for 40 cents on the
2 dollar — that's a hypothetical — the day or the week
3 after the Supreme Court Judgment.

4 Now, I'm not sure if you have been following
5 in the Transcript or following with the live feed,
6 but according to Mr. Molino, companies in Panama
7 continue to file opposition actions against existing
8 competitors. Are you aware of that?

9 A. I don't think I've seen--I didn't listen to
10 Mr. Molino's testimony.

11 Q. Okay.

12 A. I just don't recall--

13 Q. Okay.

14 A. --that testimony.

15 Q. And I will represent to you--and that's
16 Transcript Day 3 at Page 69--sorry, Page 691.

17 And also according to Mr. Molino, sometimes
18 these companies that bring these opposition actions
19 against existing competitors win. I don't know if
20 you heard about that from Mr. Molino's testimony.
21 Did you hear about that?

22 A. I don't have a specific recollection of

1 that.

2 Q. Okay. Since the Supreme Court Judgment,
3 Bridgestone's financials don't show any impairments
4 to their "intellectual property" rights, do they?

5 A. Not that I'm aware of. The financial
6 statements that I reviewed – I believe Mr. Shopp
7 referenced them in his Report – indicate that there
8 have not been any impairments identified.

9 Q. And sales of BRIDGESTONE and FIRESTONE
10 branded tires have actually increased between the
11 date of the Supreme Court Judgment and today; is that
12 right?

13 A. I believe that is correct, that--and the
14 numbers that I referenced in my presentation earlier
15 about the historical sales from 2014 through '16, and
16 I used projections for '17 and beyond, but those
17 amounts in general were greater than they were in
18 2014.

19 Q. Yeah. In fact, I believe you project that
20 sales revenues will increase by 4 percent until the
21 Year 2021; is that correct?

22 A. For Panama?

1 Q. For Panama.

2 A. Yes.

3 Q. And profits from sales in the BSCR Region
4 have increased as well.

5 A. Again, I don't recall the specific numbers.
6 I know sales have increased, as we've discussed.

7 Q. If you'd like, you can go to Appendix 7 of
8 your First Report.

9 A. Okay. Okay.

10 Q. It looks like these are Bridgestone and
11 Firestone sales. This is Appendix 7 from
12 Mr. Daniel's First Report, historical and projected
13 income statements. You'll see at the maybe midway
14 down the page, it says "Net Profit."

15 MS. KEPCHAR: Excuse me, Ms. Gehring Flores.

16 MS. GEHRING FLORES: Yes.

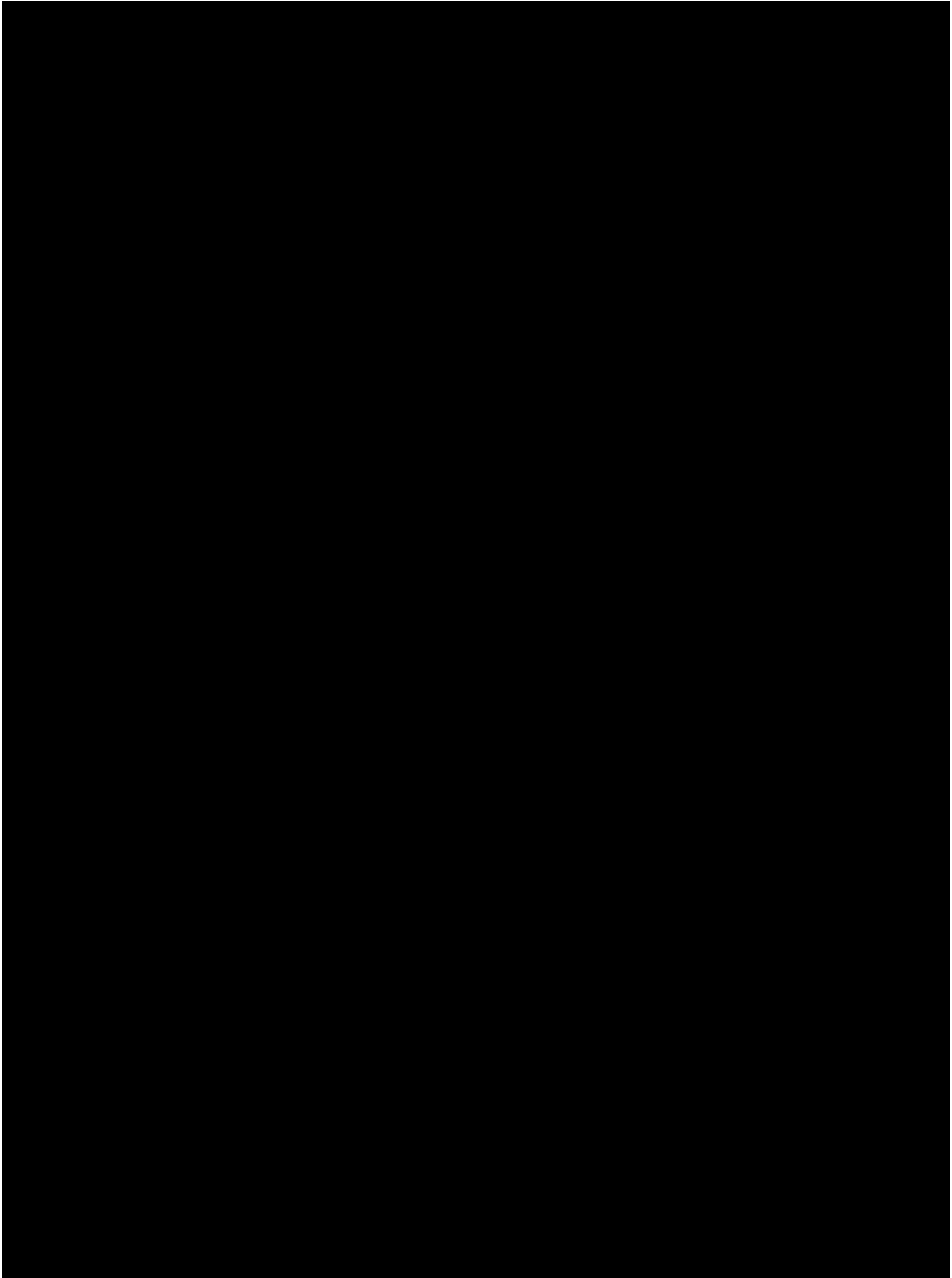
17 MS. KEPCHAR: So, I think we're getting into
18 protected information, and I would request that we go
19 off the feed.

20 MS. GEHRING FLORES: Understood.

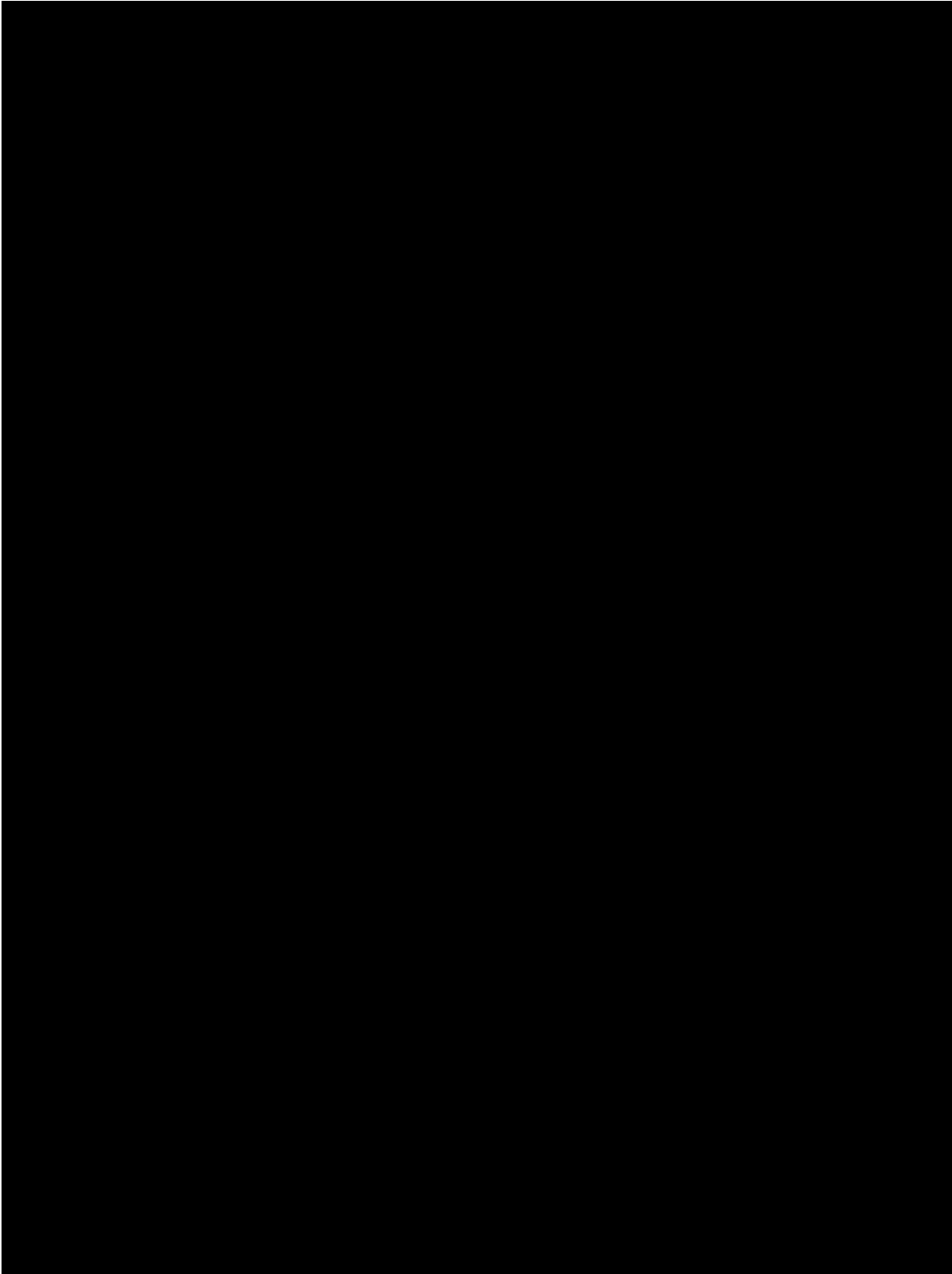
21 PRESIDENT PHILLIPS: Anyone who is not a
22 representative of the Parties, please leave the room.

1 (End of open session. Attorneys' Eyes Only
2 information follows.)

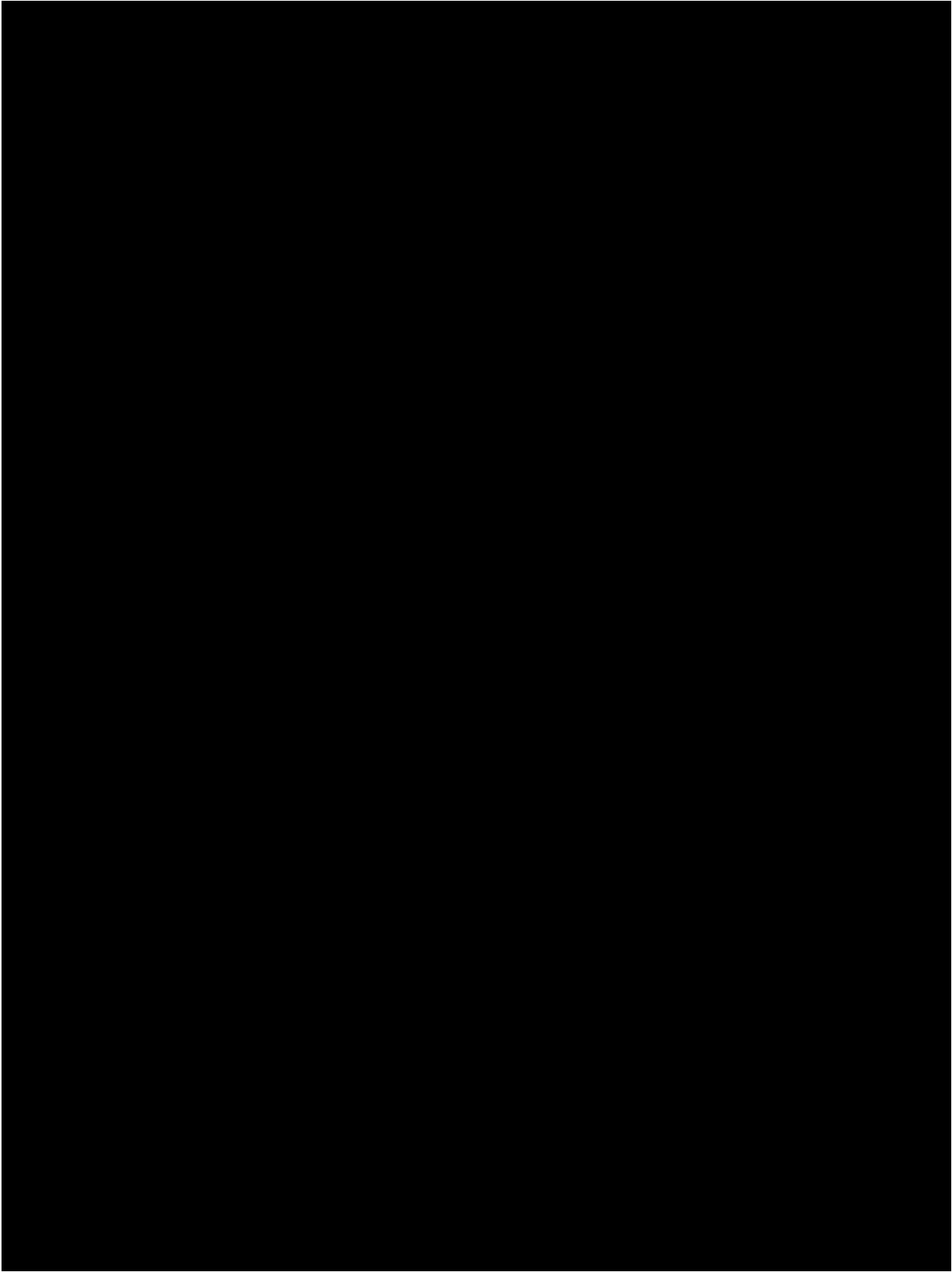
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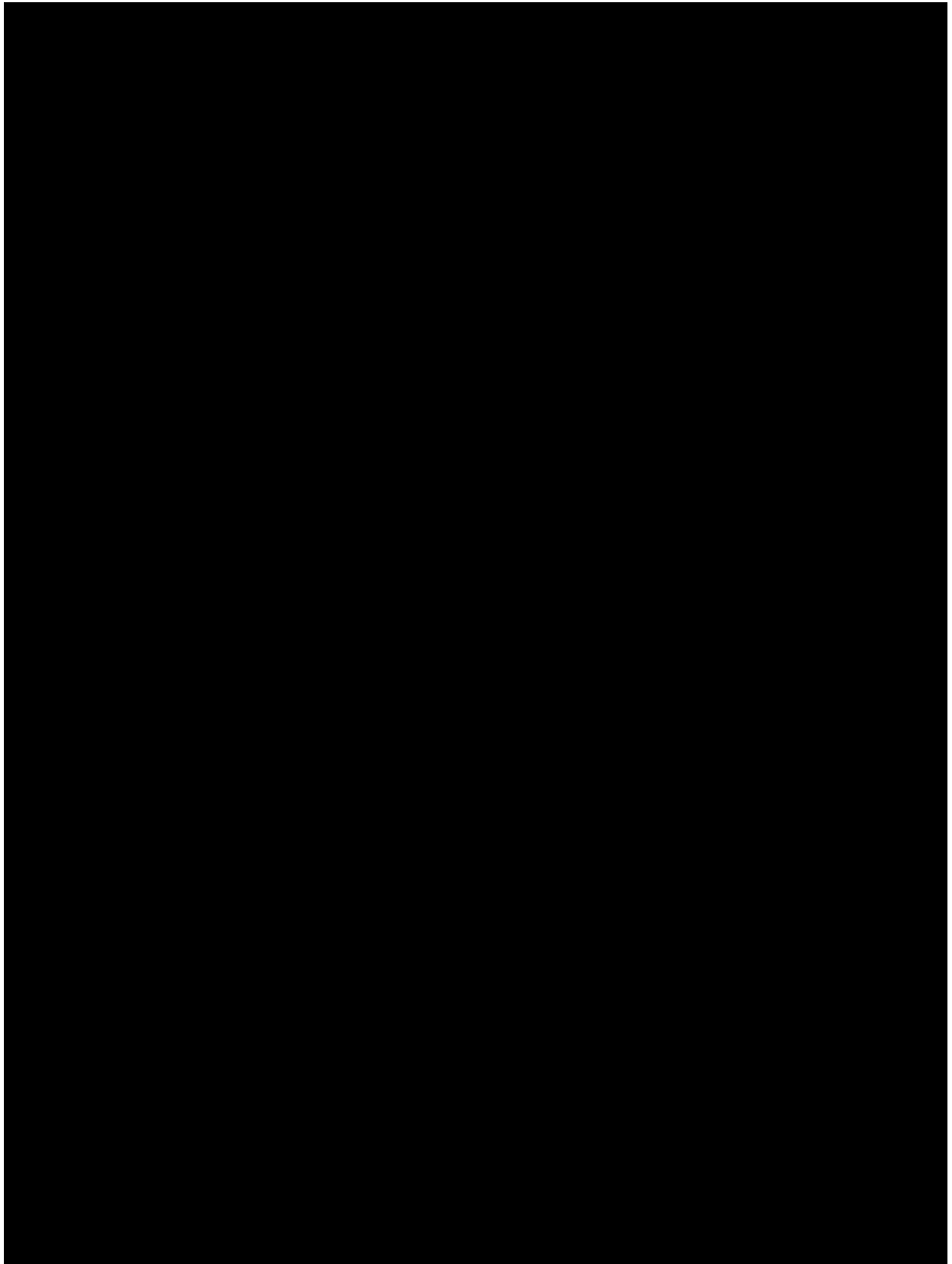
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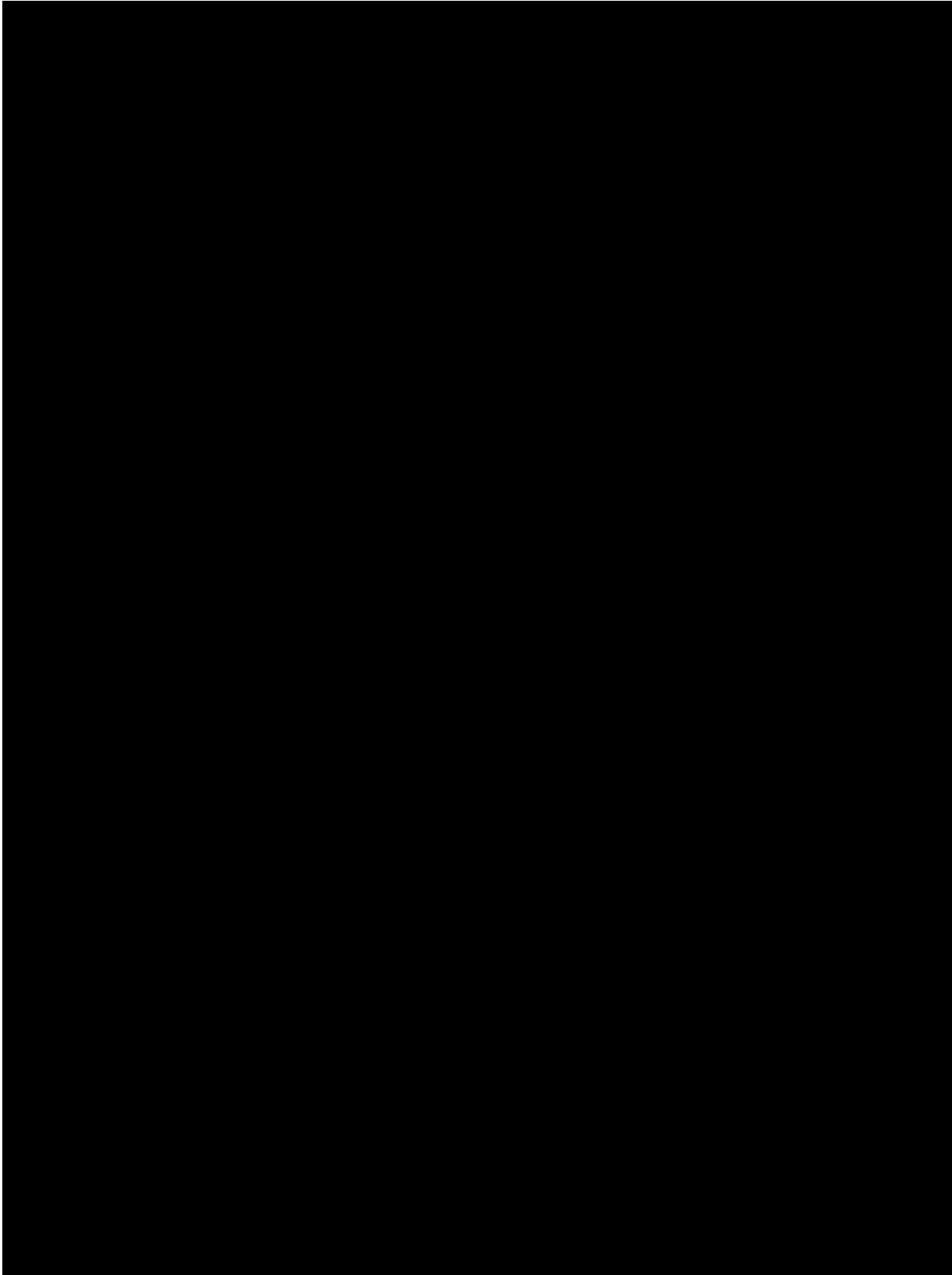
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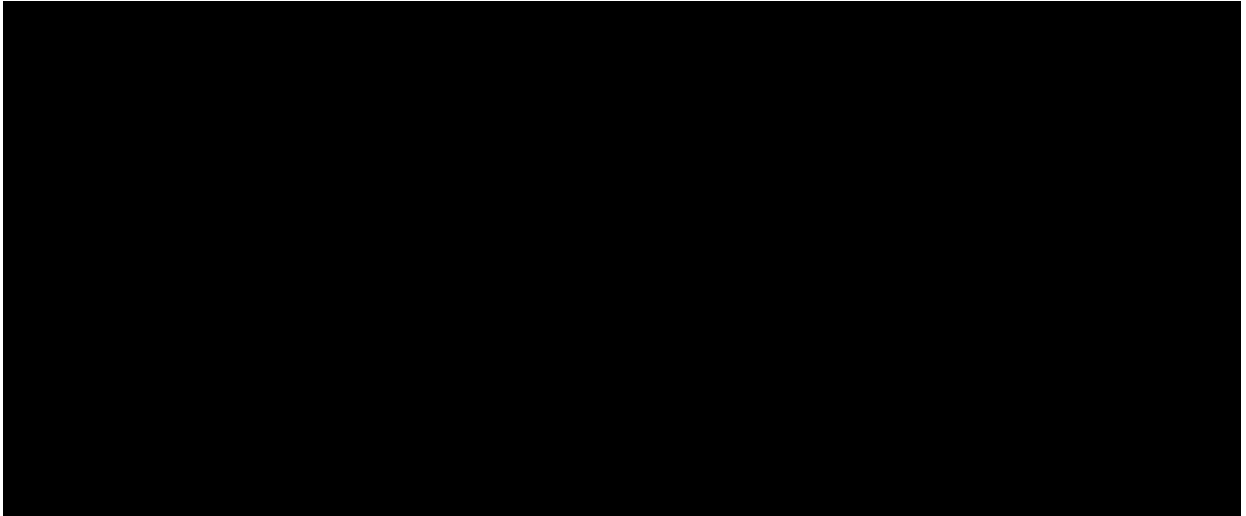
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OPEN SESSION

BY MS. GEHRING FLORES:

Q. Mr. Daniel, let's turn to Paragraph 20 of your Second Report.

A. Okay.

Q. There, you provide a formula for the valuation or the value of a trademark license; is that correct?

A. Generally, yes, part of that.

Q. All right. And I believe the formula is [A] minus [B] over [C]. Is that correct?

A. Yes.

Q. Now, I would like to define the terms, so we have [A], [B], [C]. [C] is a discount rate; is that correct?

A. I referenced it as the discount rate or a capitalization rate, but yes, that's the numerator in this equation.

PRESIDENT PHILLIPS: Could I just ask what period you're looking at?

MS. GEHRING FLORES: I'm sorry, this is Paragraph 20 of Mr. Daniel's Second Expert Report.

1 PRESIDENT PHILLIPS: Yes, but it talks about
2 income. Income depends upon what period you're
3 calculating the income over.

4 MS. GEHRING FLORES: You might want to ask
5 Mr. Daniel that.

6 PRESIDENT PHILLIPS: That's what I think
7 would help.

8 THE WITNESS: Yes, Mr. President. This
9 equation, I would use is period-dependent, so you
10 would be looking at a period of time, it might be a
11 year, it could be more than a year, a quarter, a
12 month, whatever it might be. But it would have a
13 time associated with it to then determine what the
14 appropriate amount of time to discount back to two
15 would be.

16 PRESIDENT PHILLIPS: Thank you. So, this is
17 the formula you apply to a particular period?

18 THE WITNESS: Correct.

19 BY MS. GEHRING FLORES:

20 Q. [B] is the Licensor's income; is that
21 correct?

22 A. Yes. [B] is the Licensee's royalty expense,

1 which I think you just described as the Licensor's
2 income. Those would be one and the same.

3 Q. Okay. And that is--that's the royalty rate
4 or the royalty expense times revenue; right?

5 A. It can be. In this case in particular, the
6 product revenue is the royalty base, and the royalty
7 rate is stated as a percentage of revenue.

8 Q. Okay. And [A] is the Licensee's income?

9 A. [A] in this formula is the Licensee's
10 income, and by that I'm referencing my presentation
11 earlier where I talked about the value attributable
12 to the Subject Trademark rights is shared or split
13 between the Licensor and the Licensee. So, the
14 Licensee's income before payments of royalties is
15 [A].

16 Q. Okay. Right. So, [A] is the Licensee's
17 income before they incur the royalty expense?

18 A. Attributable to the use of the trademark
19 before payment of the royalty rate associated with
20 that trademark, that's correct.

21 Q. Okay. Let's flip to your Second Report at
22 Paragraph 26.

1 PRESIDENT PHILLIPS: Just before you do,
2 could I ask, does the discount rate vary according to
3 the period?

4 THE WITNESS: The discount rate, as I've
5 applied it, I've used the same discount rate to bring
6 back cash flows that would have been expected to
7 occur one year from now, two, three years. What that
8 has the effect of doing is I calculated present-value
9 factors that would take into account the time period.
10 I'm not using a different discount rate for Year 1,
11 Year 2, Year 3, but I'm using different present-value
12 factors that are a function of time and one rate of
13 risk. You could have a different rate of risk per
14 each period, and it would just mean the calculation
15 of the factor that you use to bring it back would be
16 slightly different mathematically. I've only used
17 one discount rate but multiple present-value factors
18 due to the timing.

19 BY MS. GEHRING FLORES:

20 Q. And so, starting at Paragraph 26 of your
21 Second Report and also referring to Figure 3 of your
22 Second Report, which is above Paragraph 26, you give

1 us a bit more information about [A] and [B], I
2 believe; is that right?

3 A. This is a mathematical illustration of the
4 earnings under different profit splits.

5 Q. Okay. In Paragraph 26 you say that BSAM
6 pays BSJ a 1 percent royalty rate on revenue earned
7 from sales of BRIDGESTONE branded products; correct?

8 A. That's what's captured here. Yes, that's
9 correct.

10 Q. Yes.

11 A. I don't think that that was an exact quote,
12 but yes, the spirit of what you said is correct.

13 Q. And you state that, assuming that BSAM
14 receives 50 percent of the economic benefit of the
15 BRIDGESTONE trademark--pardon me. I have to find
16 this myself. "BSAM currently pays its Licensor BSJ a
17 Royalty Rate of 1 percent of revenue earned on
18 products that utilize the BRIDGESTONE trademark."
19 And you can see in Figure 3 above, there is a [B] in
20 Figure 3 above that says "BSAM's royalty Expense Rate
21 to BSJ." And that's stated as 1 percent before the
22 Supreme Court Decision; is that correct?

1 A. That's right.

2 Q. And then you go to say: "As presented in
3 Figure 3 above, assuming BSAM receives 50 percent of
4 the economic benefit of the BRIDGESTONE trademark,"
5 and you say that implies a total economic benefits of
6 2 percent.

7 So, in Figure 3, you find that 2 percent in
8 the row that says "percentage of income attributable
9 to the BRIDGESTONE trademark, and there is an [A]
10 right there, and a 2 percent, so [A] is 2 percent and
11 [B] is 1 percent before the Supreme Court Judgment?

12 A. Yes.

13 Q. Okay. So, from this, we learn from your
14 approach that [A] equals 2[B]; is that correct? If
15 [B] is 1 percent and [A] is 2 percent, [A] equals
16 2[B]?

17 A. When the profit split is 50:50?

18 Q. Assuming the profit split is 50:50 which is
19 what you assume in Paragraph 26, and I believe that's
20 what you assume in your actual damages calculation;
21 is that right, Mr. Daniel?

22 A. I apply a 50:50 percent based on the

1 analysis of the three factors that I described
2 earlier.

3 Q. Let's go with that. So, [A] equals $2[B]$; is
4 that correct?

5 A. I think that's what we just said, yes.

6 Q. Yeah, okay.

7 And I think you'd agree with me that this
8 same approach is applied to the FIRESTONE trademark
9 in Paragraph 32 and Figure 6; is that correct? Of
10 that same Second Report.

11 A. Paragraph 32 and Figure 6 show similar
12 calculations with respect to BSAM's payments to BSLs
13 for the FIRESTONE trademark.

14 Q. Okay. I do not represent being any
15 mathematical genius, Mr. Daniel, but from this
16 information about [A] and [B], and using this formula
17 above, I can get to $2[B]$ because [A] equals $2[B]$;
18 right? So, in place of [A] I'm putting $2[B]$ minus
19 [B] over [C]. Is that a sound jump?

20 A. You're asking me if that's--that would yield
21 the same answer in the way that I've used it on these
22 figures.

1 Q. Yes?

2 A. It's the same answer, you would get the same
3 answer.

4 Q. Great.

5 2[B] minus [B] is [B]?

6 A. That's right.

7 Q. So, this formula--with this approach,
8 Mr. Daniel, the value of the Trademark License [A]
9 minus [B] over [C] actually equals [B] over [C]; am I
10 right?

11 A. Yeah. You're asking me is [B] over [C]
12 equals [B] over [C], yes, that's right.

13 Q. Yes, [B] over [C] equals [B] over [C]?

14 A. Right.

15 Q. Mr. Daniel, is [B] over [C] the value of the
16 trademark to the Licensor?

17 A. Speaking generally, again, we have to
18 associate it with a time period and a duration,
19 discount it back to a present value. The [B]
20 represents what I referred to earlier as the net
21 earnings after royalty expense. That's the income
22 for the Licensee, I think you asked me, the Licensee,

1 that's their share of the income attributable to the
2 Subject Trademark.

3 Q. According to you [A] minus [B] over [C]
4 equals the value of the trademark license; correct?

5 A. 2--

6 Q. And [B] over [C] is the value of the
7 trademark to the Licensor; correct?

8 A. In the profit split where it's 50:50.

9 Q. Yes.

10 A. By definition the value of the benefits is
11 shared equally, so the value that's realized by the
12 Licensor is equal to the value realized by the
13 Licensee, again net of the royalty payments to the
14 Licensor. It's splitting my circle that I had in my
15 presentation in half.

16 PRESIDENT PHILLIPS: Could I ask, on the
17 facts of this case, is it reasonable to proceed upon
18 the basis that the value of the trademark is equally
19 split between Licensor and Licensee?

20 THE WITNESS: Yes.

21 Mr. President, in my opinion, I believe it's
22 reasonable, but I also believe it's conservative, and

1 I believe it's conservative for the reasons that we
2 discussed earlier about the risks that are borne by
3 the Parties, the relative sharing of risk and the
4 relative expenses that are borne by the Parties.

5 I have presented an alternative profit-split
6 analysis to demonstrate what would the economics be
7 if--rather than an equal sharing of profits between
8 the Licensor and the Licensee the scales were tipped
9 in favor of the Licensee retaining more of that
10 profit.

11 So said differently, if the royalty rate
12 were to stay at 1 percent and the profit split was,
13 rather than 50:50, it was 75 percent is retained by
14 the Licensee and only 25 percent is paid to the
15 Licensor in the form of a royalty, that would imply
16 and indicate that the total benefit to be shared,
17 that that pie is bigger. It's not 2 percent now.
18 Now it's a 4 percent pie and it's being split
19 one-quarter/three-quarters.

20 PRESIDENT PHILLIPS: Well, if the split was
21 50:50 and if profits were repatriated in the form of
22 dividends by the Licensee, you would expect the

1 dividend to be the same as the royalty; is that
2 right?

3 THE WITNESS: I do want to answer that
4 question. I haven't thought about it from the
5 context of dividending, but I guess the way I'm
6 thinking about it is if you didn't cut the pie in
7 half--or I give you a half and then you send it back
8 to me, then I've got my full pie again. That would
9 be the case.

10 The only distinction that the profit split
11 helps identify is the size of the pie.

12 BY MS. GEHRING FLORES:

13 Q. Mr. Daniel, the value of [B] or [B] over
14 [C], if you will, but if we want to put the Discount
15 Rate aside for the time, the value of [B] you
16 calculated with real-world data--correct?--in your
17 First Report?

18 A. Are you referring to the actual 1 percent
19 growth rate?

20 Q. Right, because--

21 A. Yes.

22 Q. I'm sorry. I didn't want to--

1 A. I believe, if that's what you're referring
2 to as the "real-world data," that's the 1 percent
3 that is also presented in Figures 3 and 6.

4 Q. Right. But the royalties that--these are
5 the royalties that are received by the Licensor;
6 correct?

7 A. Currently, as I understand it, the Licensee
8 is paying royalties to the Licensors, both BSJ and
9 BSLs, in the amount of 1 percent of annual sales on a
10 percentage basis.

11 Q. Right. So, it's 1 percent times sales
12 revenue.

13 And you used actual numbers from
14 Bridgestone's financials to calculate [B] in your
15 Reports; correct?

16 A. I used--are you asking me now about my
17 Discounted Cash Flow model--

18 Q. No.

19 A. --not just an annual split of the profits?

20 Q. Yes.

21 In your Discounted Cash Flow Model, did you
22 use actual numbers from actual financial documents

1 from Bridgestone Corporation and BSLS to calculate
2 [B]?

3 A. I, in my Discounted Cash Flow Model, when I
4 calculated the Present Value of these rights before
5 the Supreme Court Decision, I determined that value
6 as of May 28th, 2014, the date of the Decision.

7 By definition, it was a discounted cash flow
8 of the expected amounts from that point forward. So,
9 in my model, I had the information for actual sales
10 in 2014, '15, and '16, and then I had projected
11 sales, either from the Company or calculations that I
12 performed, for years roughly through to '20, '21, and
13 then projections thereafter.

14 Q. But between 2014 and, say, 2016 and perhaps
15 '17, you were using actual numbers from actual
16 financial statements that exist.

17 A. The product revenue line from my equation
18 earlier today, that product revenue was the actual
19 revenue, and that's the revenue that I used for both
20 my before and my after. That's the one that I said I
21 didn't change.

22 Q. But, in your damages calculation,

1 Mr. Daniel, you don't use real-world data to
2 calculate [A]--am I right?--at any point.

3 A. I conducted an analysis to determine what
4 the sharing of those benefits would be, and I've
5 multiplied that by the real-world data for the
6 Licensor and the Licensee.

7 Q. [A] equals 2[B]; right?

8 A. When it's a 50:50 profit.

9 Q. When it's a 50:50 split, [A] equals 2[B];
10 right?

11 A. Yes, that's correct.

12 Q. That's--okay.

13 So, essentially this discussion, this
14 approach, is to solve for [A]. Because you have
15 real-world data for [B], and you're solving for [A]
16 without using real-world data; is that correct?

17 A. I'm using the facts and circumstances of
18 this case to assess what an appropriate profit split
19 may be, and I've made the determination, through my
20 analysis of that information in the record, that it
21 would be at least 50 percent to the Licensee, and it
22 may be greater.

1 Q. But you--but you don't want to use actual
2 data to figure out [A]. You only want to solve for
3 [A]. You only want to use the information from [B]
4 to solve for [A]; is that correct?

5 A. I did use actual data in determining [A].

6 Q. You didn't--but you didn't use the
7 Licensee's income. You didn't use the Licensee's
8 sales revenues.

9 A. The Licensee's income, by definition, is the
10 amount left over after paying royalties.

11 Q. But why solve for [A] when you've got the
12 information, when you know what the sales are? You
13 didn't use those sales. You solved for [A]; right?

14 A. I used the sales because I applied them to
15 the rates.

16 Q. Okay.

17 In any event, [A] always equals 2[B]; right?

18 A. It always equals 2[B] under the 50:50 profit
19 split.

20 Q. Right. Under that very conservative
21 assumption.

22 A. Yes.

1 Q. So I would like to consult now your Figure 9
2 on Page 25 of your Second Report.

3 A. I'm sorry, what page?

4 Q. It's Page 25 of your Second Report.

5 A. Yes, yes. Sorry.

6 Q. And essentially applying the approach of [A]
7 equals 2[B], and let me just see what Figure 9 is.

8 We have the Licensor BSLS at the top. In
9 the middle is the Licensee BSAM, and the total, and
10 it's titled "Summary of BSLS's and BSAM's Economic
11 Harm Resulting From the Supreme Court Decision as of
12 28 May 2014."

13 Now, we have--so from what I understand,
14 you're representing the damage to the Licensor BSLS
15 and the Licensee BSAM as expressed through the damage
16 to the respective trademarks; is that right?

17 A. Through the trademark rights to the Licensor
18 and the Licensee, yes.

19 Q. Okay. So, we have at the top, we have
20 Licensor BSLS, and in the first row of BRIDGESTONE
21 trademark, we have N/A, not applicable. I assume
22 that's because Bridgestone Japan is not a Claimant in

1 this case; is that right?

2 A. That's my understanding.

3 Q. Okay. And then--so the Licensor--the damage
4 to the Licensor BSLS only includes the FIRESTONE
5 trademark; correct? And we have in Panama, we have
6 the numbers for in Panama "Low" and "High," and then
7 in the BSCR Region "Low" and "High."

8 I think for our purposes, let's just focus
9 on Panama.

10 A. Okay.

11 Q. And then below that we have damages to the
12 Licensee BSAM and Panama low and high scenarios. And
13 because BSAM is the Licensee for both the BRIDGESTONE
14 and FIRESTONE trademarks, you've included values for
15 both--for damages to both the BRIDGESTONE trademark
16 and the FIRESTONE trademark; is that right?

17 A. Yes. BSAM, the Bridgestone line is not N/A.
18 Now it has numbers.

19 Q. Okay.

20 Now, I guess in order to appreciate your [A]
21 equals 2[B] approach, you might want to turn to
22 Appendix 15 of your Second Report.

1 A. Okay.

2 Q. And we see at the very bottom of this
3 particular table, we have "Decrease in Indicated
4 Value of Subject Trademark Rights as of 28 May 2014."
5 If you go all the way to the bottom right corner, and
6 this says "Total BSLs, BSAM, and BSJ," you have a
7 number here. Below is 877,963, so \$877,963 for
8 Bridgestone?

9 A. For Panama Bridgestone, yes.

10 Q. Okay. And the low number for the FIRESTONE
11 trademark is 118,622; is that right?

12 A. Yes.

13 Q. So, I gather that if we were to populate the
14 first row in that first table of Licensor BSLs, if we
15 were to populate those values where there are those
16 N/As, that would be the damage to the BRIDGESTONE
17 trademark as experienced by Bridgestone Japan;
18 correct?

19 A. Yes.

20 Maybe another way to think about it is we'd
21 add another level, and it would be Licensor BSJ. And
22 Licensor BSJ would have amounts for the BRIDGESTONE

1 trademark, but N/As for the FIRESTONE trademark.

2 Q. All right. But we have these figures with
3 the N/As now, we have them from your First Report;
4 right?

5 If we could go to your First Report at
6 Figure 1.

7 A. Okay.

8 Q. And you'll see the top right says--well, and
9 the top row says "BRIDGESTONE Trademark Panama Low,
10 438,982." Is that correct?

11 A. On Figure 1 of my First Report, Panama--

12 Q. Low.

13 A. BRIDGESTONE trademark low is 438,982.

14 Q. Okay. If we wanted to put that number in
15 that--if we changed that first table "Licensor BSLS"
16 to just "Licensors," in that first cell where
17 "BRIDGESTONE Trademark Low Panama," we would just put
18 438,982; correct?

19 A. Correct.

20 And you can see that number in--the amount
21 is the same in Licensee BSAM for Bridgestone Panama
22 low because, again, the 50:50 profit split.

1 Q. Okay. So that allows me to jump ahead a
2 little bit.

3 So, the value to the Trademark Licensee--or
4 the value of the Trademark License is always equal
5 to, in your approach, the value of the trademark to
6 the Licensor--correct?--which is what we--again,
7 assuming the 50:50 split, which is what we've just
8 determined from the chart behind this. Right?

9 A. Yes. All else equal assuming the 50:50
10 split--

11 Q. Right.

12 A. --that those numbers would necessarily be
13 the same.

14 Q. Okay. And, therefore, just putting that
15 approach forward, then the damage to the Trademark
16 License is always, in your approach, the same as the
17 damage to the Trademark Licensor.

18 A. It has to be by the way I've constructed the
19 value that--and defined the value that is being
20 shared by the Licensor and the Licensee.

21 Q. If we were to actually change the total now,
22 change the totals to include the Bridgestone Japan

1 numbers--and which I do believe you do this in
2 Appendix 15 of your Second Report--the total number
3 on the bottom left would be 996,586, and the high
4 would be 1,971,135; is that right?

5 A. Those numbers appear to be right. They
6 match the numbers that I have on Appendix 15 and
7 would reflect the inclusion of BSJ as a licensor for
8 the BRIDGESTONE trademark.

9 Q. Okay. Could I turn you to Figure 1 of your
10 First Report again, Mr. Daniel.

11 A. Yes.

12 Q. The title of Figure 1, of your First Report,
13 Mr. Daniel, is "Summary of BSLS and BSAM's Economic
14 Harm Resulting from the Supreme Court Decision."
15 Correct?

16 A. Yes.

17 Q. And the title to Figure 9 of your Second
18 Report is "Summary of BSLS's and BSAM's Economic Harm
19 Resulting from the Supreme Court Decision as of
20 May 28, 2014."

21 Is that essentially the same title,
22 Mr. Daniel?

1 A. Yes.

2 Q. If you look at the totals in Figure 1, just
3 focusing on Panama, would you agree--and compare them
4 to the totals in Figure 9, would you agree that the
5 total damage is double between your First Report and
6 your Second Report?

7 A. Are you asking me about the numbers that
8 you've written in--

9 Q. Yes.

10 A. --or the numbers that are in my schedule?

11 Q. The numbers that I've written in.

12 A. Mathematically, those numbers look to be
13 double.

14 Q. Okay. If you want to not focus on putting
15 Bridgestone Japan in there, we could just focus on
16 the FIRESTONE trademark. And would you agree,
17 Mr. Daniel, that the damages associated with the
18 FIRESTONE trademark double between your First Report
19 and your Second Report?

20 A. The amounts are double.

21 Q. Okay.

22 In Paragraph 7 of your First Report,

1 Mr. Daniel, you say: "I have been engaged by
2 Claimants to produce a report setting out my opinion
3 on the basis of my professional expertise as to what,
4 if any, economic harm has been suffered by the
5 Claimants."

6 Is that correct?

7 A. That's what it says.

8 Q. Okay. And now in Paragraph 78 of your First
9 Report you state the following: "The following
10 sections describe my analyses to determine the amount
11 of economic harm suffered by BSLS and BSAM,
12 specifically the decrease in the indicated value of
13 the Subject Trademarks in Panama and BSCR resulting
14 from the Supreme Court Decision."

15 Is that right?

16 A. That's what it says.

17 Q. You also say in your First Report: "I
18 determined the economic harm suffered by the
19 Claimants as a result of the Supreme Court Decision."

20 Is that correct?

21 A. Yes.

22 Q. And at Paragraph 107: "I've calculated the

1 amount of economic harm suffered by BSLS and BSAM."

2 Is that correct?

3 A. Yes.

4 Q. And at 108, you say: "I determined the
5 economic harm suffered by BSLS and BSAM as a result
6 of the 28 May 2014 Supreme Court Decision."

7 Is that correct?

8 A. Yes.

9 The sentence continues, but yes.

10 Q.

11 There are two Claimants in this arbitration,
12 you're aware, Mr. Daniel; right?

13 A. I--when I used the term "Claimant," I'm
14 referring to BSLS and BSAM.

15 Q. Okay. And that's what you meant in your
16 First Report?

17 A. What I calculated in my First Report was the
18 value of trademark rights from an owner/licensor
19 perspective. It was something that I had discussed
20 with counsel, and understood my assignment was to
21 value the trademark rights, ownership rights, as
22 opposed to license rights.

1 Q. And so you're telling me, then, in your
2 First Report you only calculated the value to the
3 Licensors, who are whom? Who are the Licensors,
4 Mr. Daniel?

5 A. From my understanding, reviewing the
6 Licenses, the Licensors, as indicated earlier, are
7 BSLS and BSJ.

8 Q. Okay. BSAM isn't a licensor?

9 A. Not that I understand them. I understand
10 them to be the Licensee.

11 Q. And, in fact, Mr. Daniel, you might be
12 particularly attuned to "licenses" and "licensees"
13 because I understand you're a Certified Licensing
14 Professional; is that right?

15 A. That's another professional designation that
16 I hold.

17 Q. Now, I guess we were all a little surprised
18 when we got your Second Report and kind of saw
19 damages, at least with respect to Firestone, double.
20 We saw a lot of damages appear that weren't in your
21 First Report.

22 Let me ask a few more questions.

1 There are three investments that are the
2 subject of this arbitration; are you aware?

3 A. I have--I will say a non-legal understanding
4 of what those investments are that I've valued.

5 I've undertaken work in my First and Second
6 Report, and as is presented on this whiteboard, to
7 determine the cash flows or the value attributable to
8 the Trademark License for Firestone, the Bridgestone
9 License, and the FIRESTONE trademark as licensed by
10 BSLs.

11 Q. Okay.

12 A. Those are three of the rows that I have
13 calculated amounts for.

14 Q. Okay.

15 So, when we opened your Second Report and
16 turned to Figure 9 and saw a lot of damages figures
17 that weren't in your First Report, we wondered what
18 had happened, and--but then we saw in Paragraph 13 of
19 your Second Report you say: "The damages amounts in
20 my initial report focus solely on the Licensor's lost
21 royalty income attributable to the BRIDGESTONE and
22 FIRESTONE trademarks."

1 Is that right?

2 A. Yes.

3 Q. And also in Paragraph 18, you say: "The
4 damages amounts for Claimants BSLS, the Firestone
5 Licensor, and BSAM, the Bridgestone and Firestone
6 Licensee not previously quantified in my initial
7 report."

8 Did I read that correctly?

9 A. Yes.

10 The BSAM, Bridgestone and Firestone
11 Licensee, not previously quantified, that is correct.
12 Paragraph 18?

13 Q. Yes.

14 A. Yes.

15 Q. So, you didn't calculate damages to BSAM in
16 your First Report.

17 A. As I've just described, I calculated the
18 change in the value of the trademark rights from the
19 perspective of the licensor, not the licensee. And
20 BSAM is, as I understand, the licensee in this
21 matter.

22 Q. Can you tell me the percent of damages that

1 injury to BSAM represents – not with our added
2 figures but in your damages calculation in Figure 9.

3 What's the percent of damages that BSAM
4 represents?

5 A. I don't have a calculator with me, but you
6 could calculate that by taking for each respective
7 column, whether you're in Panama low, Panama high,
8 BSCR low or BSCR high, you would simply take the BSAM
9 amount and divide it by the total amount.

10 Q. Would you think it would be fair to say that
11 it's around 90 percent?

12 A. I haven't done the calculation, but if you
13 want to divide the numbers we can.

14 Q. Okay.

15 A. It is what it is.

16 Q. We can, I'm sure, all go home and have fun
17 with our calculators if we want. I'll represent to
18 you that it's around 90 percent.

19 A. Okay.

20 Q. So, I guess my question is: and given
21 Paragraphs 13 and 18 in your Second Report, and
22 that--so when did you find out that you hadn't

1 quantified BSAM's damage, Mr. Daniel?

2 A. Well, I would say I knew from the beginning
3 that I hadn't quantified any licensee's damages.

4 Q. In your First Report, Mr. Daniel, Figure 1
5 of your First Report says: "Summary of BSLS and
6 BSAM's Economic Harm Resulting from the Supreme Court
7 Decision."

8 A. Yes.

9 Q. I don't see "BSJ" there. I see "BSAM."

10 A. That's right.

11 Q. So, did you, or did you not, calculate
12 BSAM's damage – the licensee's damages?

13 A. I did not calculate the licensee's damages.

14 Q. But you said you did?

15 A. I said I calculated the economic harm for
16 the Claimants. I understand that the investments in
17 this matter, there's some--some decisions that need
18 to be made regarding what investments are appropriate
19 to consider for damages purposes.

20 When I was originally engaged to conduct my
21 work, my understanding of the case and the
22 calculations that I performed, I calculated the value

1 of ownership rights only from the perspective of the
2 trademark owner, not from the perspective of a
3 licensee using those rights.

4 Q. Okay. Maybe this--would you be surprised if
5 you mentioned BSAM 58 times in your First Report,
6 Mr. Daniel?

7 A. I don't know that I would be surprised.

8 Q. And you, I think, explained in your First
9 Report, even, that BSAM is a licensee and has a
10 license to the BRIDGESTONE trademark and a license to
11 the FIRESTONE trademark; right?

12 A. That's correct.

13 Q. Okay. And Figure 1 says it's a summary of
14 BSLs and BSAM's economic harm; right?

15 A. Yes.

16 Q. Are you telling me that you didn't realize
17 when you wrote your First Report that BSAM has a
18 license?

19 A. No, I'm not.

20 Q. But you are telling me that you did not
21 calculate BSAM in your First Report?

22 A. I did not calculate damages from the

1 perspective of a licensee in my First Report.

2 Q. And that was on instruction by counsel, I
3 assume?

4 A. It was on--I wasn't instructed to do or not
5 do. I was informed by counsel and, based on our
6 discussions, determined that I would calculate the
7 value of the trademark rights from an
8 owner/licensor's perspective.

9 Q. And--but according to you, Mr. Daniel--so,
10 you're saying that you valued all the damage to the
11 trademark in your--to the Subject Trademarks in your
12 First Report; right?

13 A. From the perspective of the Licensor.

14 Q. Did you say that in your First Report?

15 A. I don't recall using that language.

16 Q. Yeah--no, I think in your First Report you
17 said it was BSLS and BSAM's language [sic].

18 Are you aware that counsel for Bridgestone
19 in this case thinks that you did calculate damages to
20 BSAM in your First Report?

21 A. It's my understanding that there is some
22 determination to be made with respect to the

1 investments that are allowed to be recovered or
2 compensated for injury, and I can't speak to the
3 legal standing of Parties or the legal rights. All I
4 can provide to you and the Tribunal are my
5 calculations of the economic harm associated with
6 trademark rights as I've organized them by trademark,
7 by Claimant, and by geographic region.

8 Q. In your First Report, Mr. Daniel, at
9 Paragraph 13, you say: "The Claimants are BSLS, a
10 Delaware incorporated company, that is the owner of
11 the FIRESTONE trademarks outside the United States,
12 including in Panama, and BSAM, a Nevada incorporated
13 company that is the owner of the Licenses to use the
14 BRIDGESTONE and FIRESTONE trademarks, the Subject
15 Trademarks, in Panama and other jurisdictions."

16 Is that correct?

17 A. Yes.

18 Q. And in Paragraph 17 you say--of your Second
19 Report, sorry, Paragraph 17: "For these reasons, the
20 Subject Trademarks, not the Licenses, that are
21 merely"--"they are merely a mechanism for exploiting
22 a unitary asset are the proper focus of the damages

1 analysis."

2 A. I'm sorry, I had to catch up.

3 I'm on Paragraph 17 of my Second Report?

4 Q. Paragraph 17, um-hmm.

5 A. Paragraph 17 of my Second Report. Yes.

6 Q. "The Subject Trademarks, not the Licenses,
7 that are merely a mechanism for exploiting a unitary
8 asset, are the proper focus of the damages analysis."

9 That's what you say in your Second Report at
10 Paragraph 17; correct?

11 A. I'm sorry, my eyes were crossing.

12 What sentence is that, and I can read it? I
13 was looking at the page. I'll look at the
14 highlighting.

15 Q. Page 6, last sentence of Paragraph 17.

16 A. Okay. If you give me just a minute, I'd
17 like to read it to myself or I can read it out loud.
18 I just want to remember the context of that sentence.

19 Q. Sure.

20 A. I think this whole section, Section 4.1 of
21 my Report, starting on Paragraph 13 and continuing
22 through Paragraph 19 before we get to our equation,

1 sets forth my understanding of the investments and
2 what I was asked to do and what I calculated in my
3 First Report and my Second Report.

4 I wouldn't want to--I don't know that I can
5 focus on one sentence there because I think this is
6 something that requires a read of those six or seven
7 paragraphs.

8 Q. Okay. But, in your Report, and as a general
9 matter, from my understanding from both of your
10 Reports and the trademark valuation treatise that you
11 cite so often in both of your Reports, once you
12 define the value of the "unitary asset" --that is your
13 term -- of the trademark, you've defined the universe
14 of value; is that correct?

15 A. What I want make sure I'm clear on is the
16 distinction between the work I have done from an
17 economic standpoint and my understanding as to what
18 the Claimants' investments or--

19 Q. Well, let me--

20 A. --or rights in this case.

21 Q. Could I get my question answered first?

22 A. Sure.

1 Q. So, you valued the Subject Trademarks in
2 your First Report; correct?

3 A. From the perspective of a licensor, correct.

4 Q. And you valued the Subject Trademarks in
5 your Second Report; correct?

6 A. From the perspective of a licensor and a
7 licensee as we've described in Figure 9 on the
8 whiteboard.

9 Q. Because, according to you and the trademark
10 treatise and the trademark valuation treatise, the
11 entire value of a trademark is the value to the
12 licensor and the value to the licensee; expect?

13 A. That's how I used that framework
14 economically.

15 Legally, I can't speak to that, but what
16 I've done is isolated the rights by mark, by region,
17 by Claimant, and applied economic methods to
18 determine the change in value of those rights.

19 Q. And I understand that now you're saying--now
20 you're saying that your First Report was valuing the
21 Subject Trademarks just from the perspective of the
22 licensor; correct?

1 A. That is what my First Report did.

2 Q. Right. But you didn't say that in your
3 First Report, did you?

4 A. I can't point to that specific language in
5 my First Report. That is what the calculations
6 represent.

7 Q. I don't know, Mr. Daniel, I'm trying to
8 figure out--I'm trying to make sense of this. You
9 are a designated chartered financial analyst; you
10 have an MBA, you are a Certified Licensing
11 Professional, designated as, and it sounds like
12 you're telling me that you either forgot or omitted
13 to mention the actual formula for calculating the
14 value of a trademark, the entire value of a
15 trademark, in your First Report, or you forgot to
16 calculate the Licensee in your First Report, or you
17 forgot two out of the three investments involved in
18 this claim in your First Report, or you hid the fact
19 that you were not doing what you were saying in your
20 First Report.

21 In your First Report you said over and over
22 and over "I'm giving you the value of the Subject

1 Trademarks before and after the Supreme Court
2 Decision."

3 Did you not?

4 A. Yes, I did.

5 Q. And you said the same thing in your Second
6 report, did you not? "I'm giving you the value of
7 the Subject Trademarks before and after the Supreme
8 Court Decision."

9 Did you not?

10 A. Yes, with the additional Section 4.1 that
11 describes my basis for doing so.

12 Q. And the result of that, Mr. Daniel, is that
13 damages double.

14 A. The damages did not double. The amounts
15 increased. They doubled for--the amounts doubled--

16 Q. Let's focus on Firestone. Firestone
17 doubles?

18 A. Firestone. The amounts are necessarily
19 greater because I've included the rights to the
20 Licensee as well as the Licensor.

21 Q. Are you telling me, Mr. Daniel, that this is
22 the type of rigorous analysis that a damages expert,

1 an independent damages expert, should put forth in a
2 case where you are calculating damages for
3 multimillions of dollars?

4 A. Yes, that's why I'm here answering your
5 questions.

6 Q. Okay. [A] equals 2[B]. That's your
7 rigorous analysis, from your First Report to your
8 Second.

9 A. Yes.

10 I think we've discussed the basis behind
11 that.

12 Q. Okay. Thank you.

13 MS. GEHRING FLORES: No further questions.

14 MS. KEPCHAR: Mr. President, would it be
15 appropriate to take a short break at this point?

16 PRESIDENT PHILLIPS: Certainly. Would you
17 like 10 minutes?

18 MS. KEPCHAR: Thank you.

19 PRESIDENT PHILLIPS: You're in purdah.

20 (Brief recess.)

21 PRESIDENT PHILLIPS: Ready, Ms. Kepchar?

22 MS. KEPCHAR: I am. Thank you, Mr.

1 President.

2 REDIRECT EXAMINATION

3 BY MS. KEPCHAR:

4 Q. Mr. Daniel, I think after the questioning by
5 Ms. Gehring Flores, the record is not clear with
6 respect to what you did in your First Report and why,
7 and what you did in your Second Report ask why. In
8 the First Report, you testified that you relied on a
9 certain premise of law, which is that a trademark is
10 a unitary asset; is that correct?

11 A. Yes.

12 Q. And, based on that legal premise, you
13 conducted your economic analysis; correct?

14 A. Yes.

15 Q. You didn't select the legal premise,
16 Mr. Daniel?

17 A. That's correct.

18 Q. In your Second Report, you analyzed the
19 value of licenses, if I understand your testimony; is
20 that correct?

21 A. In addition to other ownership rights.

22 Q. Why did you do that second analysis?

1 A. I performed that second analysis after
2 reviewing Mr. Shopp's Report and furthering my
3 understanding of what would be relevant and important
4 for the Tribunal to consider in assessing damages,
5 potential damages, in this matter. I organized my
6 analysis and prepared it in a way that would allow
7 for isolating the value of specific rights be it how
8 they are defined legally.

9 I've quantified those amounts from an
10 economic perspective and presented them again by
11 Claimant, by trademark, and by geographic region.

12 Q. So, you were responding to Mr. Shopp's
13 position that you looked at trademarks in the wrong
14 way, that you reviewed the wrong assets in developing
15 your First Report?

16 MS. GEHRING FLORES: Could counsel please
17 refrain from suggesting answers to her witness,
18 please.

19 THE WITNESS: I did not evaluate licenses in
20 my First Report, and prepared my Second Report to
21 clarify the amounts that I'm determining and the
22 basis behind which I calculated them.

1 Q. You said that was in response to Mr. Shopp's
2 Report.

3 A. Yes.

4 Q. In each case, Mr. Daniel, with respect to
5 your First Report and with respect to your Second
6 Report, you calculated the damage that you believe
7 BSAM and BSLS would incur as a result of the Supreme
8 Court Decision; is that right?

9 MS. GEHRING FLORES: Excuse me. I just
10 asked that counsel refrain from testifying. Counsel
11 is suggesting the entire answer to the witness, and
12 the witness is basically called on for a "yes" or
13 "no" answer. Could we stop, please?

14 Tribunal?

15 PRESIDENT PHILLIPS: I think that's a fair
16 comment, isn't it?

17 BY MS. KEPCHAR:

18 Q. Mr. Daniel, in your First Report, who were
19 the Parties that you calculated injury to?

20 A. I listed the injury as applying to the
21 Claimants, BSLS and BSAM.

22 Q. And, in your Second Report, you calculated

1 damages with respect to which Parties?

2 A. The Claimants BSLS and BSAM.

3 Q. So, with respect to Ms. Gehring Flores's
4 suggestion, and even accusation, that you were
5 somehow intentionally being misleading, do you agree
6 with that assessment?

7 A. No, I do not.

8 Q. Why not?

9 A. Because for the reasons I described, I
10 understood my assignment to be the quantification of
11 trademark rights from the perspective of an owner.

12 Q. And you're not opining on whether the proper
13 analysis relates to trademarks as a unitary asset or
14 trademark licenses?

15 A. No, I'm not.

16 Q. Mr. Daniel, your analyses involved the
17 concept of "risk"; is that correct?

18 A. That's correct.

19 Q. In general, how does risk impact the
20 valuation of cash flows?

21 A. In general and in this matter, risk is a
22 factor that impacts cash flows. The greater the risk

1 of realization of cash flows, the lower the value of
2 those cash flows; the lower the risk, the greater the
3 value.

4 Q. If you were informed that, as a legal
5 matter, the Supreme Court decision created risk,
6 could you quantify that in economic terms?

7 A. Yes.

8 Q. Did you do so in your First Opinion?

9 A. Yes.

10 Q. Did you do so in your Second Opinion?

11 A. Yes.

12 PRESIDENT PHILLIPS: Could you just clarify
13 what kind of risk you're talking about?

14 THE WITNESS: Yes, Mr. President.

15 The risk that I believe counsel is asking me
16 about is the additional risk associated with the
17 diminished legal rights and enforcement and
18 protection of the subject rights. I had, as I
19 previously described, calculated a discount rate for
20 Panama and the BSCR Region from my "before" cash
21 flows, and I used a discount rate for my "after" cash
22 flows, taking those Panama and BSCR discount rates

1 and applying an additional adjustment to reflect this
2 increased risk associated with the enforcement and
3 protection.

4 PRESIDENT PHILLIPS: So, Stage 1 is to
5 calculate the cash flows at a hundred percent, and
6 Stage 2 is then to apply a discount to reflect the
7 risk?

8 THE WITNESS: Stage 1 calculates the cash
9 flows I will say "nominally." Stage 2 discounts the
10 nominal cash flows for the "before" scenario; and
11 Stage 3 discounts the cash flows in the "after"
12 scenario using a slightly higher discount rate.

13 BY MS. KEPCHAR:

14 Q. Mr. Shopp says in his Expert Report that
15 utilizing or considering both a discount rate and a
16 decreased royalty is double-dipping. Do you agree
17 with that?

18 A. No.

19 Q. Why not?

20 A. In my analysis, I have quantified the impact
21 of risk to both the cash flows and the nominal amount
22 of the cash flows and the riskiness of those cash

1 flows.

2 With respect to the nominal amount of the
3 cash flows, I used as a proxy in this matter the
4 adjustment that's observed in exclusive and
5 non-exclusive agreements. In that framework, the
6 risk of the parties is the same before and after in
7 that exclusive and non-exclusive licensing context.
8 This is a different situation that we have after the
9 Supreme Court decision, so not only do we have an
10 adjustment from the exclusive cash flow to the
11 non-exclusive cash flow, we also have an environment
12 that has changed legally with protection and
13 enforcement that is now riskier than it was before
14 the decision, and that is why it is not
15 double-dipping, and why I have captured those effects
16 in both aspects of my Discounted-Cash-Flow Model.

17 Q. Can you explain the concept of "unrealized
18 losses" in non-financial terms?

19 A. Yes.

20 An "unrealized loss" is a term, an
21 accounting term. I think of it from the standpoint
22 of an asset is worth a certain amount as of a certain

1 point in time. Something happens, the value of that
2 asset changes. From an accounting standpoint, there
3 may or may not be a recognition of that loss. From
4 an economic standpoint, it doesn't mean that it
5 hasn't occurred. It's a real loss. It's an actual
6 loss, whether it's been reported or recognized for
7 accounting purposes. You can think about it with
8 respect to really any asset. If you bought a car for
9 a certain amount or a house for a certain amount,
10 something happens, impairs the value of that asset,
11 you may not have reported your loss because you
12 haven't transacted or sold that asset, but if you
13 were to, that loss would then be realized. So, it's
14 unrealized until it's reported or triggered.

15 Q. Can you explain the differences between
16 Mr. Shopp's approach to damages in this case and your
17 approach to damages?

18 A. Yes.

19 At a high level, I have conducted a
20 valuation analysis to determine the impact on the
21 value of the trademark rights before and after the
22 Supreme Court decision based on assumptions regarding

1 the impairment of those legal rights as we've
2 discussed.

3 As I understand Mr. Shopp's analysis, it's
4 limited to a superficial observation that there
5 hasn't been a decline in sales and, therefore, there
6 should be no loss associated with the decision, and
7 that's, in my opinion, not a proper way to evaluate
8 the economic harm suffered by the
9 plaintiffs--Claimants, excuse me.

10 Q. Could you expand on that point in the
11 context of the passage of time?

12 A. Yes.

13 I've calculated--

14 MS. GEHRING FLORES: Excuse me, just one
15 moment. According to the Procedural Order governing
16 this case, redirect is supposed to be limited to the
17 questions that were placed on cross. I think for the
18 past few questions we've gone--I don't think I
19 mentioned unrealized loss once during my cross, and
20 I'm not sure where this is coming from, either.

21 PRESIDENT PHILLIPS: I was having the same
22 reaction. This seems to be new material.

1 MS. KEPCHAR: Okay.

2 PRESIDENT PHILLIPS: At the same time, if
3 you want to make an application to ask some further
4 questions on the basis that it will be open to the
5 Respondents to questions, you can make an
6 application.

7 MS. KEPCHAR: I do so, Mr. President.

8 PRESIDENT PHILLIPS: You do make that
9 application?

10 MS. KEPCHAR: I do make the application.

11 PRESIDENT PHILLIPS: I will allow it because
12 I was going to ask some questions about this anyway.

13 BY MS. KEPCHAR:

14 Q. Mr. Daniel, you were speaking about the
15 differences between your approach to damages in this
16 case and Mr. Shopp's, and Mr. Shopp focuses on the
17 passage of time since the Supreme Court judgment.
18 Could you expand on your prior comments with respect
19 to Mr. Shopp's point, mainly the passage of time
20 since the judgment?

21 A. Yes.

22 My calculations are as of May 2014, and

1 isolated the impact on the value of the trademark
2 rights at that time.

3 The risk impacts expectations for Parties
4 with respect to the exploitation of those trademark
5 rights, and that can manifest itself in a number of
6 ways; but, as I understand the legal implications, as
7 I've assumed them in this case, the riskiness of
8 those cash flows is not something that can be undone.
9 The value implications today are the same as they
10 would have been five years ago because the
11 expectations of the Parties, again predicated on the
12 assumption that the rights have been diminished from
13 exclusive to non-exclusive legal rights. The
14 valuation implications remain today.

15 Q. How did you determine and compare the value
16 from the perspective of a potential buyer or seller
17 before and after the Supreme Court decision?

18 A. Again, generally speaking, I prepared
19 valuation models that incorporated expectations
20 regarding future cash flows, discounted those to a
21 present value both before and after, and I evaluated
22 those cash flows from the standpoint of or the

1 perspective of a licensor and a licensee, a potential
2 buyer and a potential seller, what is the economic
3 implication of this decision, and how does it impact
4 the value of the rights to be shared from a
5 licensor-licensee, a buyer-seller, there's different
6 ways to quantify that, but the way that I've
7 quantified it is through a Discounted-Cash-Flow Model
8 that takes into account the decrease or impact on the
9 cash flows and an impact on the riskiness of those
10 cash flows.

11 Q. What is the bottom line that you want to
12 leave with the Tribunal with respect to your
13 analysis?

14 A. The bottom line is that valuation's real.
15 The damage is real, assuming the legal rights have
16 been impacted. The fact that the marks haven't been
17 sold or sales haven't dropped off a cliff does not
18 eliminate the fact that the value of the marks has
19 been harmed, and that the Claimants have suffered
20 real actual damage.

21 Q. Thank you, Mr. Daniel.

22 MS. GEHRING FLORES: If I could ask some

1 questions about the new questions.

2 RE CROSS-EXAMINATION

3 BY MS. GEHRING FLORES:

4 Q. Mr. Daniel, about time and how it elapses:
5 so, from your perspective, even if 100 years go by
6 and sales are still the same or going up and market
7 share is still the same or going up, everything in
8 the real world shows you that everything is just
9 fine, your conclusion would be the same, your damages
10 conclusion would be the same; is that what you're
11 telling us?

12 A. No.

13 Q. When would it change? In six years? If
14 things change in six years, is that enough? Is that
15 where you draw the line? Seven?

16 A. I haven't done an analysis of what the marks
17 would be worth 100 years from now. I have evaluated
18 information that's available to me and formed my
19 opinions based on what the expectations of a buyer or
20 seller or a licensee or licensor would be. A
21 five-year period is a relatively short period of
22 time, given the history of both the BRIDGESTONE and

1 FIRESTONE marks' usage. It's been used in Panama,
2 the FIRESTONE mark for almost 100 years. The
3 BRIDGESTONE mark for a significant period of time as
4 well. I don't know how to answer your question what
5 would happen 100 years from now.

6 Q. What would be the net present value of this
7 unrealized loss that you say exists 100 years from
8 now?

9 A. Well, I think--if you're asking me what's
10 the value of the loss that took place, I've
11 quantified that. If you want me to bring that
12 forward in time, that's a mathematical exercise that
13 I could easily perform. What I can't tell you is
14 what would--what would cause the value of the
15 trademark rights to change between May 28, 2014, and
16 100 years from now and apportion that to the Supreme
17 Court Decision versus other factors.

18 Q. The loss that took place already but will
19 always take place tomorrow? Is that what you're
20 talking about, this loss that you assume is always
21 going to happen tomorrow in your damages analysis?

22 A. No, the loss has been incurred. It is real.

1 Q. But it's independent of elapsed time.

2 A. The loss was incurred when the rights were
3 diminished. The rights have not been restored and
4 cannot be restored.

5 Q. So, if 10 years from now nothing has
6 changed, would you say maybe you would call it quits
7 then?

8 A. I don't know how to answer that question. I
9 can answer it based on what I've reviewed and
10 considered, as I sit here today.

11 Q. Okay. It just--it just seems to me--I guess
12 I gather--I can follow your hypothesis. I can follow
13 that, and I can reduce your formula to [A] equals B
14 essentially, or [A] equals 2[B]. And I understand
15 that from your First Report to the Second Report,
16 essentially things double, but what I don't
17 understand is how one would ever test this
18 hypothesis? With what real-world data does one test
19 this hypothesis of [A] equals 2[B]?

20 A. Exactly the way I described it in my
21 testimony: An analysis of the factors that determine
22 the profit split between licensors and licensees.

1 Q. Where you just guess that two out of those
2 three factors go in, I think your words are, in favor
3 of the licensee? You just say, well, I think these
4 go in favor of the licensee. That's the analysis
5 that should take place here?

6 A. That's not a guess. That's my opinion based
7 on the information that I've reviewed.

8 Q. Right.

9 MS. GEHRING FLORES: No further questions.

10 PRESIDENT PHILLIPS: I'm afraid I'm left a
11 little confused.

12 QUESTIONS FROM THE TRIBUNAL

13 PRESIDENT PHILLIPS: I thought that the
14 exercise you have carried out is to place a value on
15 the "trademark rights," if you can call them that,
16 the day after the Supreme Court Judgment to reflect
17 the anticipated effect of the Supreme Court Judgment
18 on cash flows.

19 THE WITNESS: That's correct. I've
20 calculated that amount at that point in time based on
21 the expectations of the parties that would exist as a
22 result of that decision.

1 PRESIDENT PHILLIPS: Well, if that is what
2 you did, I don't see how the answer you reached is
3 going to change, regardless of what happens in five
4 years or 10 years or 20 years thereafter.

5 THE WITNESS: The point that I was trying to
6 distinguish was: there's a difference between
7 calculating the value of the trademarks as of May 28,
8 2014, before the Supreme Court Decision, and then
9 comparing that amount to the value of the trademarks
10 today after the Supreme Court Decision, because
11 things happen. Let's say the value of the trademarks
12 quadrupled in that time because people wanted to get
13 new tires every three months. That doesn't mean that
14 the harm did not--the harm did not occur as a result
15 of that Decision. It would be masked by the change
16 in trademark value between then and now.

17 So, what I'm saying is, to properly identify
18 and isolate that impact, I looked at it from the
19 standpoint of the expectations of the parties at that
20 time.

21 PRESIDENT PHILLIPS: So, are you now saying
22 that the evidence you've given is evidence of the

1 value of the trademark rights as of today?

2 THE WITNESS: No, no. I hope I was clear
3 about that. My schedules and all my analyses and
4 discussion today relate to the value that I
5 calculated as of that point in time. The risk still
6 exists today. I haven't calculated the value of the
7 trademark today. I could, but I don't know how that
8 would be used for purposes of calculating the damage
9 that took place five years ago.

10 PRESIDENT PHILLIPS: Well, five years ago,
11 on your hypothesis, there was a drop in value of the
12 trademark rights because of anticipated events in the
13 future. If we are now five years into the future and
14 those anticipated events have not actually happened,
15 does that cause you to review your initial
16 calculations?

17 THE WITNESS: With respect to the expected
18 events, again, I'm evaluating it from the standpoint
19 of what a buyer or seller of these trademarks would
20 expect to receive in a transaction involving the
21 rights, and the risk that informed my determination
22 of the change in cash flow and the riskiness of those

1 cash flows still exists today. It hasn't gone away.
2 The expectations would be the same. The value may be
3 different because it's at a different point in time,
4 a different sales base, but the framework, the
5 methodology is still appropriate.

6 PRESIDENT PHILLIPS: I don't follow why you
7 say that the expectations haven't gone away. If they
8 were expectations of what was going to happen in the
9 future, and the future started the day after the
10 Supreme Court Judgment, and we have now had five
11 years of that future period, and what was anticipated
12 has not happened, why do you say they're still
13 precisely that same fear that's going to happen in
14 the future?

15 THE WITNESS: Yes, because similar to my
16 initial calculation, it would be predicated on a
17 determination or a finding that the rights and a
18 diminished ability to enforce and protect those
19 rights, result in a legal impairment of the legal
20 rights, that the legal rights have been impaired,
21 that would still be an assumption I would need to
22 make to value the trademarks today. That would be no

1 different than the assumptions I had to make five
2 years ago.

3 So, if I'm making that same assumption, I
4 would conduct my analysis in the same way, and that's
5 a question that I can answer, but it's predicated on
6 someone's determination of the actual legal rights as
7 they exist today.

8 PRESIDENT PHILLIPS: Thank you.

9 I think there are no further questions for
10 you, so you are now free to leave the stand and talk
11 about the case to anyone you wish to.

12 THE WITNESS: Thank you, Mr. President and
13 Members of the Tribunal.

14 (Witness steps down.)

15 MS. HORNE: Mr. President, with your
16 permission, we will bring Mr. Fried to the stand.

17 PRESIDENT PHILLIPS: Yes, please.

18 MS. KEPCHAR: Mr. President, before the
19 demonstratives leave the room--oh, I think they have
20 already left the room--the Claimants would request
21 some copy or representation of Ms. Gehring Flores'
22 demonstratives.

1 SECRETARY TORRES: I took a picture of it,
2 and my plan is to circulate it at the end of the day.

3 MS. KEPCHAR: Thank you.

4 GABRIEL FRIED, RESPONDENT'S WITNESS, CALLED

5 PRESIDENT PHILLIPS: Good afternoon. Do you
6 have in front of you the Witness Declaration?

7 THE WITNESS: Yes, I do.

8 I solemnly declare upon my honor and
9 conscience that my statement will be in accordance
10 with my sincere beliefs.

11 PRESIDENT PHILLIPS: Thank you.

12 DIRECT EXAMINATION

13 BY MS. HORNE:

14 Q. Mr. Fried, can you please describe your
15 credentials and practice?

16 A. Sure.

17 I have a Bachelor's degree and graduate
18 education in economics.

19 For the last 20 years, I have provided
20 valuations of intellectual property portfolios,
21 principally trademarks. Most of these are for
22 issuances of new capital, principally for secured

1 lenders.

2 In addition, the business that I manage has
3 a practice disposing of intellectual-property
4 portfolios, including the sale of trademark
5 portfolios with and without licenses that extend in
6 many cases beyond the U.S.

7 And also in my capacity in the business that
8 I run, we periodically acquire trademark portfolios,
9 so we represent and have substantial experience in
10 valuation in sell-side advisory and as a buyer's
11 agent or a buyer for our own account.

12 Q. In preparing your written and oral testimony
13 for this arbitration, what documents have you
14 reviewed?

15 A. I reviewed the pleadings of Claimant and the
16 Respondent.

17 I have reviewed both the First and Second
18 Damages Reports from Mr. Daniels (sic) and Mr. Shopp.

19 I have reviewed the Report from Mr. Molino.

20 And I believe that is it.

21 Q. In this arbitration, Claimants have argued
22 that there are no set methods for determining the

1 value of the trademarks at issue in this case. Do
2 you agree with that?

3 A. I don't agree. The valuation professionals
4 in this case and the valuation professionals that we
5 use in our valuation practice rely principally on
6 variations of a discounted-cash-flow model for doing
7 trademark valuations. It's quite common. There are
8 sub-methods within that, but this is a standard
9 which--for which there are actual standards, there
10 are heavily reliance in the financial markets by tax
11 professionals and accounting professionals and using
12 these basic techniques for valuing trademarks.

13 Q. You're aware that, at the heart of this case
14 is a decision by the Panamanian Supreme Court
15 regarding Bridgestone's abusive conduct in tort law?

16 A. Yes. That is my understanding.

17 Q. From what we understand, Claimants have
18 argued that this finding of liability in tort caused
19 injury to their trademarks. They admit that
20 consumers would be or have been unaware of the
21 Supreme Court Judgment, but that Claimants
22 nevertheless suffer from an unrealized loss from the

1 perspective of a potential purchaser of their
2 trademark.

3 Based on your experience in this field,
4 what's your response to that?

5 A. So, I don't agree with that assessment, and
6 I would like to borrow Mr. Daniel's car analogy.

7 My understanding of the situation here is
8 that I have a sports car, a Ferrari. I drive it in a
9 manner that is unsafe or disrespectful. I cause
10 someone else to have an accident. I have to pay to
11 repair their damages but my car is not damaged, and
12 going forward, the value of my car is the same as it
13 would be under any other circumstance. I just now
14 have to operate it in a manner that's more respectful
15 and law-abiding than I did before.

16 That seems to me to be the appropriate car
17 analogy. The car itself is the same, the car drives
18 the same, it has the same value, but the way in which
19 I as a manager manage the car has to comport with
20 whatever the generally accepted practices are for
21 being a good player on the road.

22 Q. If there were injury to the car or to the

1 trademarks, would you expect to see that, and if so,
2 where?

3 A. They would be detectable. So, in this case,
4 if there was injury to the mark itself, it would show
5 up either in lost sales, lost market share, poor
6 margin, restricted access to markets – there are any
7 number of ways in which you can tangibly quantify
8 damage to trademarks.

9 And to your earlier point that the end
10 customer who buys these products is largely unaware
11 of any of the goings on in this room or at the
12 Panamanian Supreme Court kind of underscores the
13 point that, from the brand owner's perspective, the
14 brand itself is not impaired.

15 Q. You've represented clients buying and
16 selling trademarks, I think, for nearly 20 years, you
17 said?

18 A. Correct.

19 Q. If you represented the Bridgestone companies
20 and you were attempting to sell the BRIDGESTONE or
21 FIRESTONE trademarks in Panama, would you expect that
22 this Supreme Court Judgment would affect the price

1 that you could get?

2 A. No.

3 The foundation for determining value –
4 whether it's in this case, what you're asking about
5 is a fair market value for a willing buyer and a
6 willing seller – would principally be based on the
7 discounted cash flows with a risk adjustment that was
8 appropriate for the tire industry, whatever that is.
9 There is nothing specific about Bridgestone and
10 Firestone in this instance that creates any sort of
11 outside-of-the-industry risk as it relates to
12 determining value.

13 So, I would think that what happened
14 happened, and going forward an independent buyer who
15 sought to acquire the marks in Panama would mostly
16 ignore that.

17 Q. Finally, what, if any, conclusion do you
18 draw from the fact that this judgment was issued in
19 2014, and we are here before the Panel today in 2019?

20 A. Well, I think you have in the interim period
21 between when this judgment was handed down and the
22 last reporting period for Bridgestone, a substantial

1 amount of data that demonstrates that they haven't
2 lost market share, their margins haven't eroded, they
3 were not forced under duress to renegotiate the
4 Contract between the Licensor and the Licensee to
5 account for some sort of hit that they took in the
6 marketplace; and that all of the indicia going
7 forward indicate, especially when you factor in
8 successful attempts to enforce their mark in Panama
9 after this Decision was handed down, it very much
10 looks like business as usual and nothing untoward has
11 happened to Bridgestone/Firestone.

12 Q. Thank you, Mr. Fried.

13 MS. HORNE: Mr. President, that concludes
14 our questions.

15 CROSS-EXAMINATION

16 BY MS. KEPCHAR:

17 Q. Good afternoon, Mr. Fried.

18 A. Good afternoon.

19 Q. You say you've worked on trademark
20 valuation, but you're--of course.

21 Your testimony is you have worked on
22 trademark valuation, but you're not offering a

1 valuation in this case, are you?

2 A. That was not the scope of my work.

3 I was asked to answer two specific
4 questions, one of which was whether or not there are
5 sort of established norms for determining trademark
6 value; and the second one related to whether or not
7 there was any indicia of impairment.

8 Q. So, you have a binder in front of you?

9 A. I have my Report in front of me.

10 Q. I'm sorry. You have your Report. It's not
11 in a binder.

12 Could you turn to Page 3, please.

13 A. Sure.

14 Q. In Paragraph 6, you talk about how you
15 determined the price of a trademark; is that correct?

16 A. No. This is not a question about--I'm not
17 indicating that I've determined a price of a
18 trademark. What I'm suggesting here--what I'm
19 stating here is that in working with buyers and
20 sellers of trademarks, one of the standard diligence
21 items is recent, current, or pending litigation
22 related to those marks, and that's used principally

1 to understanding whether or not there are
2 encumbrances or whether or not there are
3 opportunities to expand the use of the mark in the
4 relevant territories and categories under
5 consideration.

6 This is not with respect to determining a
7 specific value only with respect to determining what
8 the opportunities are and whether or not there are
9 specific limitations or risks.

10 Q. In Paragraph 6 you state: "The appropriate
11 price," I presume you're referring to a trademark,
12 "is always," and that's in italics, "determined based
13 on the three factors I discussed above: One, the
14 historic and forecasted sales of trademarked product,
15 two, the margin associated with those sales, and
16 three, the growth forecast of the trademarked
17 products in each respective category and market."

18 Do you see that?

19 A. Yes, correct.

20 Q. Your testimony, though, is not that the
21 appropriate price is always determined that way. You
22 testified on your direct that it's principally based

1 on discounted cash-flow mode with risk adjustment for
2 the tire industry.

3 A. Yes.

4 Q. Why are you changing your testimony,
5 Mr. Fried?

6 A. So, in my experience, I have not seen an
7 application of a trademark-specific risk factor
8 applied to a discount rate.

9 So my experience, discount rates are largely
10 exogenously determined. You look up cost of capital
11 and cost of debt in various markets. Those have--and
12 I'm simplifying for just in the interest of time.
13 Those vary by market whether it's by product, market,
14 or by region, and those costs typically have whatever
15 the market-specific risks built into them.

16 So, engaging in a new investment project in
17 a country that has a shaky legal infrastructure might
18 require valuing your investment with a higher
19 Discount Rate to account for that risk.

20 The trademark-specific inputs are
21 principally the ingredients in the numerator, which
22 are sales, and then absent a specific royalty rate,

1 understanding how the--how the profit of the entity
2 in question is divided to determine how much of that
3 is attributable to the trademark and how much of that
4 is attributable to the return on investment needed to
5 run the rest of the business.

6 Q. I understand why that would be the analysis
7 if you were working with a seller, but if you were
8 working with a buyer who wanted to understand the
9 full spectrum of risk to the trademark asset,
10 wouldn't that buyer do more extensive investigation?

11 A. I think that as part of the diligence, the
12 buyer would look at whether or not there were
13 specific encumbrances. And in this particular
14 instance, a theoretical encumbrance that's five years
15 old that hasn't manifested itself in any other
16 adverse impact in the marketplace, would be largely
17 discounted as not something for people to be
18 concerned about.

19 Q. Do you understand that the Supreme Court
20 judgment remains in place?

21 A. I understand that the judgment was specific
22 to the methods that Bridgestone/Firestone used to

1 enforce their rights but not the enforcement of their
2 rights generally.

3 And yes, I understand that it's still in
4 place.

5 Q. So, we're talking about five years that have
6 passed since the judgment. It may be that
7 Bridgestone has gotten very lucky. You're assuming
8 that the risk has dissipated simply because of the
9 passage of time; isn't that correct?

10 A. No, not simply because of the passage of
11 time. I also understand from other experts who have
12 testified in this matter that Bridgestone has
13 successfully opposed other trademark registrations in
14 Panama, and has engaged in the sort of normal course
15 of opposing trademarks that they believed threatened
16 their marks in Panama ever since 2014.

17 Q. Did you also hear that those cases did not
18 involve evidence of use of the mark in Panama?

19 A. I did hear some of that. It's not--I
20 haven't delved into the opposition to understand
21 which involved "use" and which involved "intent to
22 use."

1 Q. So, going to your Ferrari example,
2 Mr. Fried, your example puts blame on the driver. If
3 the driver were found to be careful--in other words,
4 not violating any laws--would your analysis be
5 different?

6 A. No. The issue at question is what's the
7 value of the car. The value of the car doesn't
8 change based on who's driving it. The value of the
9 car in this case is the value of the car. There's an
10 independent set of metrics to determine what's the
11 value of the car.

12 So, to push that example a little further,
13 there is a--you know, car valuation is different than
14 trademark valuation, but there is a book, and you
15 would look it up, and you would provide some
16 discounts whether or not it had high mileage or it
17 had been in an accident. If it had been driven
18 recklessly and the driver was found liable for damage
19 to somebody else, but the car itself was not damaged,
20 then whether it was lawful or unlawful is beside the
21 point.

22 Q. Isn't a better analogy that an owner uses

1 his car to secure a loan and there's an encumbrance
2 on the car, isn't the car worth less because of the
3 lien, or the encumbrance, than it was beforehand?

4 A. No. The value is the value. The value is
5 an independent thing. The value on my house is not
6 diminished because I have a mortgage, nor is the
7 value of my car diminished because I have a loan. I
8 have less equity in my car if I have a loan. My
9 balance sheet looks different if I have the loan, but
10 the value of the car is the value of the car.

11 A buyer who comes to buy my car, or a buyer
12 who comes to buy my house, or in this case, a buyer
13 that comes to buy my trademark, is not particularly
14 concerned with what the balance sheet of the
15 underlying business is.

16 Q. I think the problem, Mr. Fried, is that a
17 car is not a trademark, and that the value of
18 intangible rights can be impacted.

19 You disagree with that premise?

20 A. There are ways to adversely impact the value
21 of trademark rights, but they're testable and
22 quantifiable. You can see that a trademark is--now

1 has to be shared because of a coexistence agreement,
2 or you can see a loss of market share because there
3 are confusingly similar products in the market. You
4 can see that a trademark can't be used in a related
5 category because somebody has that and, therefore,
6 its value based on growth potential is somehow
7 hampered because there are categories you can't get
8 into.

9 But, you can identify very clearly what
10 those things are and value them using regular
11 valuation techniques.

12 Q. But, Mr. Fried, don't regular valuation
13 techniques take into account risk?

14 A. Sure. All valuation techniques take into
15 account risk. But the notion that the risk
16 adjustment you would make is specific to a specific
17 trademark seems to be putting the input in the wrong
18 part of the equation, in my opinion.

19 The high variation associated or the
20 unpredictability associated with cash flows would
21 show up in a discount factor. If they were specific
22 to a trademark, they would likely show up in a

1 Royalty Rate, in a guaranteed minimum royalty, or
2 some other kind of an arrangement between a licensee
3 and a licensor, if that was the type of relationship
4 we were talking about.

5 It's not--discount rates typically, in my
6 experience, and my experience is limited to the
7 several hundred of these that my company and I have
8 done over the years--those are typically calculated
9 based on factors that have to do with the product
10 category, the country-specific risk factors, and
11 whatever the current market conditions are in terms
12 of what the risk-free rate of return is.

13 Q. Have you ever valued any trademark
14 properties in Panama?

15 A. In Panama specifically, no, but we have
16 valued trademark portfolios that are licensed
17 internationally, we have acquired international
18 portfolios that are licensed internationally. We
19 have an extensive amount of experience dealing with a
20 common brand that is subject to licenses in different
21 territories where you have market-stability risk, you
22 have exchange-rate risk, you have other sort of

1 cost-of-capital risks associated with them.

2 Q. Have you ever valued goodwill in the
3 trademark context? Not as a matter of accounting,
4 but as a matter of trademark valuation.

5 A. Specifically carving out goodwill to be
6 valued in the context of a trademark valuation, I do
7 not believe that we have outside of a Purchase Price
8 allocation or some other kind of compliance type of
9 work.

10 Q. If a trademark owner, say, for example,
11 Nike, has an issue with, say, child labor abroad, and
12 its reputation, the reputation for the company, the
13 reputation for the mark, is tarnished, how would you
14 value that?

15 A. Typically, you would look for--you would
16 measure the period of time between when that news was
17 generally unknown and when the news was known, and
18 you would look for closing off of certain avenues of
19 distribution, you would look at declining sales, you
20 would look at--you could do things like count news
21 articles that name the Company and see whether or not
22 the general balance of opinion in the news media was

1 more or less in favor.

2 You could look at loss of sponsored
3 athletes. There's a number of indicia you could use
4 that are quantifiable to say "this is an indicator
5 that things have not gone well since that news
6 broke," and then you can back into putting a dollar
7 value on that.

8 Q. You do patent valuations as well, Mr. Fried?

9 A. Not nearly as frequently as we do trademark
10 valuations, but yes.

11 Q. Are you familiar with the Supreme Court case
12 called "Alice"?

13 A. Yes. I'm not deeply familiar with Alice,
14 but I am familiar with it.

15 Q. So, Alice found that certain business method
16 patents were invalid; correct?

17 A. I believe that is the principal finding of
18 the Alice decision.

19 MS. HORNE: Counsel, excuse me. I'm not
20 sure that this is within the scope of the Expert's
21 Report or that this decision is in the record of the
22 case.

1 BY MS. KEPCHAR:

2 Q. The point I'm trying to get to, Mr. Fried,
3 if there's a legal decision that says a certain type
4 of asset is invalid, or calls into question the
5 validity of that asset, wouldn't you take that into
6 account in valuing the asset?

7 A. I think I need to get some clarification.

8 Are you talking about a specific asset, or
9 are you talking about an entire class of assets?

10 Q. I'm talking about a specific asset. I mean,
11 I don't--it really doesn't matter if the Court
12 Decision called into question the validity of an
13 asset, be it an asset or asset class, and you were
14 valuing either that asset or an asset in that class,
15 of course, you would take account of that Decision,
16 wouldn't you?

17 A. So, in the context of an entire asset class,
18 you would--I think it's safe to say that if your
19 ability to enforce your rights as an owner of an
20 asset in a particular asset class was, you know,
21 significantly altered after a particular day, you
22 would see some additional risk factor applied to

1 valuations in that case. But only if you could
2 support that with some indicia that after that--you
3 can test whether or not that hypothesis is reasonable
4 by looking at the actual sales and margin data after
5 the fact.

6 So doing that ex ante to say, well, I
7 perceive that there's this great new risk is all well
8 and good, but if that risk applies to everybody
9 operating in the market with those particular assets,
10 and nobody seems to have suffered any consequence
11 from that, other than just maybe altering in a tiny
12 little way the way they conduct themselves under
13 ordinary business--so in the case of a car analogy,
14 like, I drive more carefully now than I used to, but
15 the car is the car.

16 So, you could apply an additional risk
17 factor in your valuation analysis, but if you were
18 presented with evidence that actually nothing
19 happened in the market as a result of whatever this
20 sort of landscape shift from a Court Decision after 5
21 years of data, you might say that that was
22 unreasonable or that was overly aggressive in terms

1 of the way I discount it because it turns out there's
2 no additional risk here.

3 Like, to ordinary people running ordinary
4 businesses in a responsible--in a responsible manner,
5 they're not faced with new threats as a result of
6 whatever that Decision is.

7 And with respect to Alice, patenting
8 business methods has changed, but the market for
9 starting up companies with new business methods has
10 not.

11 I mean, I haven't studied that specifically,
12 but my sense from looking around at what's hot in the
13 public markets these days is that there are a lot of
14 new business methods out there post-Alice that don't
15 seem to have a hard time attracting capital and
16 attracting customers.

17 Q. Well, focusing back on the issue at hand, so
18 if there is a legal landscape shift, as you were
19 discussing, and that shift is permanent, Alice is not
20 overruled, let's assume, for purposes of my question,
21 and a business method patent owner doesn't sell its
22 patent or market its patent immediately after

1 Alice--it doesn't have to; it could wait five years,
2 it could wait 10 years--if that legal landscape is
3 the same, isn't the risk the same at that later point
4 in time?

5 A. So, specifically with respect patents, one
6 of the things you run into--

7 Q. No, my question--I'm sorry, Mr. Fried. It's
8 not a question specifically with respect to patents.

9 The question is with respect to a shift in
10 the legal landscape for an intellectual-property
11 asset.

12 This case involves trademarks. So, if
13 there's a shift in the legal landscape for an
14 intellectual-property asset and the owner of that
15 asset doesn't sell it the next day, doesn't license
16 it the next day, may license it in five years, may
17 sell it in 10 years, who knows what their plans are,
18 if that landscape remains, doesn't that risk remain?

19 A. I think you have to answer that question by
20 looking at, how has the capital market responded to
21 this event in terms of how it perceives risk when you
22 determine your discount factor?

1 So if there were massive capital outflows
2 from Panama and consumer product companies stopped
3 selling products in Panama because they thought, I
4 can't enforce my rights, then I would say, okay,
5 there's a lot of evidence here that capital
6 investment and consumer products that are protected
7 by trademarks in Panama is super risky, nobody wants
8 to do it, let's apply a really big discount rate to
9 this, and let's assume that the discount rate has an
10 adverse effect on value.

11 But it turns out that based on the evidence
12 provided by the company, and based on the analysis
13 done by the various damage experts, and based on the
14 testimony of the international trademark
15 professionals involved in this case, that there isn't
16 a landscape shift in terms of creating a handicap for
17 incumbent product-selling trademark owners in Panama
18 from enforcing their rights. The car is still worth
19 whatever the car was worth before I drove it
20 recklessly.

21 Q. That is your assumption, I understand that,
22 that is your opinion.

1 A. Correct.

2 Q. And it's based on anecdotal experience from
3 your career; correct?

4 A. Correct.

5 If we were asked by buyers to evaluate the
6 riskiness of acquiring the Bridgestone/Firestone
7 portfolio of trademarks in Panama, and this came up
8 in the course of ordinary diligence, and we said,
9 when did this happen, and they said it was five
10 years, and we said, what's happened since then, and
11 they said, nothing operationally, our market share is
12 largely the same, there's growth, the markets
13 growing, our profits are the same, we have the same
14 license in place with the parent company, et cetera,
15 then we would say, you don't have anything to worry
16 about because--and we would look at how the other
17 Parties in the marketplace are behaving, but based on
18 the sort of general indicia from the company, if the
19 risks are not realized in the--and there aren't even,
20 like, suggestions that these risks are going to be
21 realized in the first five years, at least as far as
22 I can tell, then does the risk exist? Sure. The

1 risk exists. Is it material? I don't think so.

2 Q. But that's a matter of debate. If a buyer
3 were approaching that transaction, and took it into
4 account, certainly they would adjust their price
5 accordingly?

6 A. You are a hundred percent correct about
7 that, but a fair-market analysis would be a willing
8 buyer and a willing seller. And if a buyer came
9 along and said, I'm only willing to give you X, and
10 the seller said, I insist on 2X because this is what
11 it's worth to me, and they were willing to waiting
12 for someone to give them 2X for value, you wouldn't
13 have a transaction.

14 So, in a competitive market where someone
15 was going out to try to acquire the number--global
16 Number 1 or 2 market-share holder in the category of
17 replenishables, I would think there would be
18 competition to buy that business. And in the process
19 of competing to buy the business, if there was a real
20 formal sale process, these risks would go nearly
21 completely away if they even arose to the level of
22 being examined by anybody in the first place, and I'm

1 not sure they would.

2 Q. You're making a lot of assumptions.

3 A. That's correct.

4 Q. But they certainly could be, you did agree
5 with me on that point. They could be considered by a
6 buyer in approaching that transaction as a risk that
7 has a devaluating impact.

8 A. A very minute risk.

9 I think there's risk in everything. There's
10 risks that you buy the Company and the tire they made
11 last year has a significant defect in it. That
12 happens not infrequently. There are all sorts of
13 risks associated with this business.

14 This particular risk assumes that it
15 handicaps the Company's ability to enforce its
16 trademark, and I'm not sure that that's been
17 demonstrated, which is one of the reasons why I don't
18 believe that the damages that were paid create sort
19 of a basis for a pattern of replicability if
20 Bridgestone wants to enforce its marks.

21 This, by the way, is way outside my general
22 scope of expertise because I'm not a trademark

1 enforcement lawyer, but my understanding from
2 everybody who's testified is that, that's sort of how
3 this has played itself out; that Bridgestone has
4 attempted to enforce its marks, sometimes
5 successfully, sometimes unsuccessfully, but that
6 their before-and-after decision track record
7 is--doesn't reflect any significant change either in
8 the way Bridgestone has responded to new potential
9 entrants, or in the way the courts have responded to
10 Bridgestone.

11 Q. But that's an important point. You aren't a
12 trademark expert--

13 A. Correct.

14 Q. --or have trademark experience beyond your--
15 (Overlapping speakers.)

16 Q. --beyond your experience as a valuation
17 professional.

18 A. Correct.

19 Q. So, in the context of trademark enforcement,
20 of which you're not an expert, there is a possibility
21 that there is future enforcement? You understand
22 that? Bridgestone enforces its marks?

1 MS. HORNE: Counsel, he's just indicated
2 that he's not a trademark expert. He's acknowledged
3 that, and yet you're asking him questions about
4 trademark enforcement mechanisms.

5 MS. KEPCHAR: This is not a question about
6 trademark enforcement mechanisms.

7 BY MS. KEPCHAR:

8 Q. If a lawsuit were brought in Panama by
9 Bridgestone and the counter-party relied on the
10 Supreme Court case and there was an adverse result
11 for Bridgestone, isn't that an ongoing risk, an
12 ongoing risk to Bridgestone? We don't know when
13 cases will be filed. There could be one filed
14 tomorrow.

15 A. So, again, I'm not a trademark enforcement
16 expert, but one of the assumptions made here is that
17 the counter-party goes back and cites what happened
18 in this particular case as precedent--am I
19 understanding that correct?

20 Q. No. They offer it as example or evidence of
21 reckless behavior.

22 I mean, no matter what happens, Mr. Fried,

1 this Decision that says Bridgestone was reckless
2 remains as a decision that people can cite, offer as
3 evidence of a pattern of reckless behavior...

4 A. So, if I may, because I think simple is
5 better, the decision to choose specific tactics and
6 techniques to enforce their rights is equivalent to
7 the Decision for me to pass someone too close in my
8 Ferrari and not use my turn signal. It is not--the
9 byproduct of that is there was a damages assessment.
10 It is not a prohibition from future use of the
11 passing lane to get around slow-moving traffic.

12 If I were to do that again, would I be
13 subject to the same type financial consequence?
14 Possibly.

15 Are there other ways to achieve that
16 objective that don't put me in jeopardy for creating
17 damage? I can initiate my path sooner, I can use my
18 turn signal, I can wait until I have a better line of
19 sight before I pass.

20 There are lots of ways to get around the car
21 in front of me and advance my, in this case, business
22 interest, the Ferrari, down the road without sort of

1 wrecking my car, so to speak.

2 My understanding, based on what happened in
3 2014, and what happened subsequent to that, is that
4 the Company's tactics may have evolved to be a little
5 bit more, you know, buttoned up and disciplined in
6 terms of the way they approached trademark
7 enforcement.

8 That could change, for sure, but that's not
9 unique to Bridgestone.

10 Q. No, I think your analogy didn't really
11 relate to my question, but I have a couple of final
12 questions, which relate to your Report.

13 A. Okay.

14 Q. You don't cite any studies in the Report or
15 legal authority; is that correct?

16 A. That is correct.

17 Q. Did you conduct any interviews in connection
18 with preparing your Report?

19 A. I reviewed a number of recent valuations
20 that my firm had conducted, just to make sure that I
21 was up to speed on whatever the current methods and
22 best practices were, and that I was aware of what the

1 relevant inputs were into valuation models, but
2 that's--that's largely it.

3 Q. So, it's mostly, or if not entirely,
4 experiential. It's based on your experience in
5 dealing with your transactions, not in Panama; is
6 that correct?

7 A. That is correct.

8 Q. I have no other questions. Thank you,
9 Mr. Fried.

10 MS. HORNE: No questions for Panama,
11 Mr. President.

12 PRESIDENT PHILLIPS: Thank you very much,
13 Mr. Fried. You're free to go.

14 THE WITNESS: Thank you.

15 (Witness steps down.)

16 COURT REPORTER: Could we take five minutes?

17 PRESIDENT PHILLIPS: Five minutes.

18 We may not have any further business for
19 today.

20 SECRETARY TORRES: It's still 4:45, and then
21 we have--we could--I understand the Parties have
22 decided that they were going to continue with

1 Mr. Shopp. I don't know this.

2 MS. GEHRING FLORES: I guess--well,
3 Mr. Shopp would have a direct presentation of
4 approximately a half an hour, and I don't know how
5 much time counsel plan on taking with Mr. Shopp on
6 cross. And we would not want to be in a position
7 where Mr. Shopp was in purdah overnight when we're
8 preparing our closings for tomorrow.

9 So I don't know--do counsel for the other
10 side plan on taking only a half an hour on cross so
11 that we're done by 6:00 or--

12 MS. KEPCHAR: No, I don't think it's--if
13 he's going to present for half an hour, I think our
14 cross will go beyond half an hour, unfortunately.

15 PRESIDENT PHILLIPS: Well, in that case,
16 unless you're prepared to release him from purdah, it
17 doesn't seem sensible to attempt to get through his
18 evidence this evening.

19 MS. GEHRING FLORES: I think that would be
20 fair, if that's agreeable to Claimants.

21 MS. KEPCHAR: That's fine.

22 PRESIDENT PHILLIPS: Very well. We shall

1 adjourn early, then, and resume tomorrow at 9:00.

2 MS. GEHRING FLORES: Thank you.

3 (Pause.)

4 MS. GEHRING FLORES: I just wanted to ask if
5 the Tribunal had wanted to send us with any questions
6 that it might want to keep in mind--or might want us
7 to keep in mind in closings or perhaps you will give
8 them to us tomorrow. Obviously, it would be
9 appreciated if we had a bit of time to think about
10 them.

11 (Tribunal conferring.)

12 PRESIDENT PHILLIPS: The Tribunal hasn't any
13 questions formulated at the moment. If we,
14 overnight, think of some, we will give you
15 forewarning at 9:00 tomorrow.

16 MS. GEHRING FLORES: Thank you very much.

17 MS. KEPCHAR: Thank you.

18 (Whereupon, at 4:52 p.m., the Hearing was
19 adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



DAVID A. KASDAN