

**PUBLIC**

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

**In the Matter of**

**Meta Platforms, Inc., et al.,**

**Respondents.**

**Docket No. 9411**

**PUBLIC**

**RESPONDENTS' MOTION IN LIMINE TO EXCLUDE  
EXPERT TESTIMONY OF DR. HAL SINGER**

Respondents Meta Platforms, Inc. (“Meta”), Within Unlimited, Inc. (“Within”), and Mark Zuckerberg (collectively, “Respondents”), respectfully move to exclude certain opinions and testimony offered by Complaint Counsel’s expert witness Dr. Hal J. Singer that “VR Dedicated Fitness Apps” constitute a relevant product market.<sup>1</sup> In Dr. Singer’s expert report submitted in *FTC v. Meta Platforms Inc., et al.*, 5:22-cv-04325, (N.D. Cal.) and his expert report submitted in this Court,<sup>2</sup> Dr. Singer blindly relied on Qualtrics for the survey that provides the indispensable basis for his market-definition opinion; such reliance on the expertise of an absent (and undisclosed) expert is impermissible, rendering his entire opinion in support of Complaint Counsel’s market definition fatally unreliable under 16 C.F.R. § 3.43(b) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).<sup>3</sup> Furthermore, even if Dr. Singer knew how

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<sup>1</sup> On December 15, 2022, Respondents filed a similar motion in the U.S. District Court for the Northern District of California, which is currently pending before Judge Davila. *See* Defendants’ Motion to Strike Expert Testimony of Dr. Hal J. Singer, *FTC v. Meta Platforms Inc., et al.*, 5:22-cv-04325, Dkt. Entry 470 (N.D. Cal. Dec. 15, 2022).

<sup>2</sup> Dr. Singer’s expert report before this Court is substantially the same as the expert report that Dr. Singer submitted in the district court.

<sup>3</sup> When ruling on the admissibility of expert opinions, this Court routinely relies upon Federal Rules of Evidence (“FRE”) 702 and the “factors” in *Daubert*, 509 U.S. 579. *See, e.g., In*

his survey was implemented, the survey results are so obviously nonsensical that his reliance on that data violates *Daubert* standards. The Court should thus exclude Dr. Singer's opinion that "VR Dedicated Fitness Apps" constitute a relevant product market.

## I. BACKGROUND

To support its putative antitrust market, Complaint Counsel served a report from Dr. Singer. Dr. Singer's opinion is based on his "hypothetical monopolist test"; indeed, Dr. Singer has admitted that he offered no market-definition opinion independent of that test. *See* Ex. A<sup>4</sup> ¶¶ 51-53; Ex. B<sup>5</sup> 416:5-418:11. He has likewise conceded that his test is based solely on a survey implemented by Qualtrics. *Id.* at 416:5-418:11; 540:16-18 ("I rely on the survey analysis to get the actual loss."). Dr. Singer's reliance on that survey data violates basic *Daubert* standards for two reasons.

*First*, Dr. Singer admits he relied on Qualtrics' survey implementation simply because (Dr. Singer says) Qualtrics is an expert at implementing surveys. Ex. B at 463:20-464:4. Complaint Counsel offers no evidence or expert opinion from Qualtrics – or from anyone else – that the survey on which Dr. Singer relies was implemented according to accepted survey principles or that the sample from which Qualtrics drew was representative of the Supernatural users that Dr. Singer said were in his target population. No data that would allow such verification was relied upon by Dr. Singer or disclosed to Respondents. Where, as here, an expert fails to independently verify the validity of underlying data and instead relies on someone else's un-offered, untested, and unadmitted expertise, *Daubert* requires exclusion.

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*the Matter of LabMD, Inc.*, 2014 WL 2331056, at \*3 (F.T.C. May 8, 2014) (Chappell, J.) (citing FRE 702 and *Daubert*).

<sup>4</sup> Expert Report of Hal J. Singer, Ph.D., dated November 22, 2022.

<sup>5</sup> Excerpt of Transcript of the December 13, 2022 Trial Testimony of Dr. Singer in *FTC v. Meta Platforms Inc., et al.*, 5:22-cv-04325, (N.D. Cal.).

*Second*, the data that Dr. Singer has produced – his survey results – are transparently flawed and unreliable. Nearly every survey respondent submitted multiple answers that reflect either deliberately incorrect answers (perhaps to receive payment for completing the survey) or an inability to understand even basic questions. Dr. Singer offers no justification for waving aside these obviously incorrect answers while trusting the answers on which he relies.

Dr. Singer’s failure to apply reliable methodology in conducting a hypothetical monopolist test requires excluding his market-definition opinion in its entirety. *See In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 987-89, 994 (C.D. Cal. 2012).

## **II. ARGUMENT**

### **A. The Court Should Exclude Dr. Singer’s Opinion On Market Definition**

#### **1. Dr. Singer Improperly Relied on Qualtrics’ “Expertise” And Failed To Verify Its Data Or Methodology**

“Case law plainly holds that an expert cannot adopt another’s data without verifying its validity and reliability.” *York v. Starbucks Corp.*, 2011 WL 8199987, at \*14 (C.D. Cal. Nov. 23, 2011); *see Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 630 (W.D. Wash. 2011) (similar). For similar reasons, “[a]n expert is not entitled to testify to opinions that rely on the opinion of another expert, simply because the other is an expert.” *Scantlin v. Gen. Elec. Co.*, 2011 WL 13130835, at \*4 (C.D. Cal. Apr. 8, 2011) (quotation omitted); *see Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 789 (7th Cir. 2017) (similar). Courts regularly exclude unverified reliance on surveys on this basis. *See Kim v. Benihana, Inc.*, 2022 WL 1601393, at \*8 (C.D. Cal. Mar. 25, 2022) (excluding where expert admitted he “did not even request access to the ‘raw’ or underlying survey data to assess independently whether” the results were “accurate”); *A & M Recs., Inc. v. Napster, Inc.*, 2000 WL 1170106, at \*7-\*8 (N.D. Cal. Aug. 10,

2000) (declining to rely on expert who “played a minimal role in overseeing the administration of the survey” and had “limited knowledge of how the[] surveys were conducted”).

Exclusion under these standards is required here. Although he claimed in his expert report that he had “[w]ork[ed] alongside . . . Qualtrics” to “implement[]” the survey, Ex. A ¶ 62, Dr. Singer professed unabashed ignorance of and deference to Qualtrics regarding, most importantly, two fundamental issues: the determinations of (1) who would be sampled (i.e., which people would actually receive the survey) and (2) how to ensure that the responses were representative of the broader population Dr. Singer needed to represent. *See, Reference Manual on Scientific Evidence* 375-76 (3d ed. 2011) (“The secondary expert who gives an opinion about the adequacy and interpretation of a survey . . . should demonstrate familiarity with . . . the survey being discussed”). He did not know the response rate or whether Qualtrics made any effort to ensure that the panels to whom the survey was sent were not a skewed population. Instead, Dr. Singer testified: “I’m depending on Qualtrics and the quality of Qualtrics to stand behind its survey results, no matter whether they do it if they’re virtually [sic] integrated or if they use third parties.” Ex. B 465:6-7 (“I don’t get to interface with [any third party panel providers]”); *id.* 478:13-14 (“Q. How many received the survey? A. We don’t know.”); *id.* 465:12-14; *see also id.* 468:16-21 (“I’ve done very little investigation of [panel provider] Cint . . . I can infer that if Qualtrics uses them and Qualtrics is the gold standard, then at least Qualtrics believes that these panel providers are sound and of high quality”); *id.* 366:14-17 (“once we have the instrument, we hand it off to Qualtrics . . . they do everything on the back end”).

Dr. Singer did nothing to investigate or verify how Qualtrics found his sample or how it ensured the sample was representative of Supernatural users, and his unverified assumptions

regarding how Qualtrics conducted the survey were wrong. *Compare* Ex. B 466:8-10 (“Q. Were you aware that Qualtrics does not maintain its own panels of survey respondents? . . . A. That it fully outsources? I’m not aware of that.”) *and id.* 465:24-466:7 (“I was uncertain as to how many [panels] they used”) *with* Ex. C (Qualtrics email explaining that “Qualtrics does not maintain its own panels of survey respondents” and instead “engaged three panel firms to implement Econ One’s survey”) *and* Ex. D ¶ 5 (similar Qualtrics declaration).<sup>6</sup> Dr. Singer did not know how participants were compensated. *See* Ex. B 483:10-11. Indeed, Dr. Singer never spoke to Qualtrics at all. *See id.* 464:22-23. Such lack of rigor is impermissible. *See In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 556 (C.D. Cal. 2014) (explaining that an expert cannot adopt another’s data without verifying its validity and reliability).

If Dr. Singer and Complaint Counsel wished to rely on Qualtrics’ alleged expertise in sourcing and identifying representative survey respondents, they should have disclosed that expert. That would have given Meta the opportunity to obtain discovery into the survey methodology and implementation, so that it could investigate and “direct[ly] challenge” the survey’s reliability. *See Sound View Innovations, LLC v. Hulu, LLC*, 2019 WL 9047211, at \*14 (C.D. Cal. Nov. 18, 2019), *aff’d*, 33 F.4th 1326 (Fed. Cir. 2022) (expert “cannot rely on the undisclosed opinion of another expert to support his analysis”); *see also ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 293 (3d Cir. 2012) (similar). Making matters worse, Dr. Singer does not even assert that *Qualtrics* ever claimed – much less provided any documentation to establish – that it had obtained reliable responses from a representative sample of Supernatural

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<sup>6</sup> Respondents produced Exhibits C and D in the proceeding in the U.S. District Court for the Northern District of California. *See FTC v. Meta Platforms Inc., et al.*, 5:22-cv-04325, (N.D. Cal.) (Exhibits DX1317 and DX1325, respectively).

subscribers. Dr. Singer should not be permitted to deflect questions about the survey, the essential basis for his market definition opinion, by pointing to the Qualtrics black box.

As in *Kim*, where an expert improperly relied on another expert's summary of a survey without validating the survey data, Dr. Singer's market-definition opinion based on the Qualtrics survey should be excluded. *See* 2022 WL 1601393, at \*8; Ex. B 416:5-418:11 (no market definition opinion without survey); Ex. E<sup>7</sup> ¶¶ 3, 34 (same).

## 2. Dr. Singer's Survey Is Facially Unreliable

Independently of Dr. Singer's improper deference to the expertise of Qualtrics, Dr. Singer's market-definition opinions based on the survey should be excluded because the survey's results are unreliable on their face.

For a survey to be admissible, the proponent must show it to be (1) "conducted according to accepted principles" and (2) "relevant" to the issues in the case. *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt.*, 618 F.3d 1025, 1036 (9th Cir. 2010). A survey should be excluded as unreliable if it "suffer[s] from serious methodological flaws." *Obrey v. Johnson*, 400 F.3d 691, 696 (9th Cir. 2005); *In re: Autozone, Inc.*, 2016 WL 4208200, at \*16 (N.D. Cal. Aug. 10, 2016) ("[S]ubstantial deficiencies in the design or execution of a survey of individuals is grounds for its complete exclusion."); *M2 Software, Inc. v. Madacy Ent.*, 421 F.3d 1073, 1087 (9th Cir. 2005) (affirming exclusion where the expert failed to show that "the survey was conducted in accordance with generally accepted survey principles."). Where, as here, the proposed testimony is based on data collected from a survey, the admissibility of the survey is dispositive of the admissibility of the testimony. *NetAirus Techs., LLC v. Apple, Inc.*, 2013 WL 12322092, at \*6 (C.D. Cal. Oct. 23, 2013).

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<sup>7</sup> Reply Expert Report of Hal J. Singer, Ph.D., dated November 21, 2022, submitted in *FTC v. Meta Platforms Inc., et al.*, 5:22-cv-04325, (N.D. Cal.).

A simple tally of the answers demonstrates Dr. Singer's survey to be thoroughly unreliable. For example, 21 of the survey respondents said that they use all 27 branded fitness products in the survey more than once a month – nearly a physical impossibility, which Dr. Singer admits is implausible. *See* Ex. B 504:4-8; 512:10-14; *see also id.* 504:10-25; 507:21-508:1; 509:18-24; 511:9-16; 513:5-514:1. Effectively acknowledging that these responses need to be thrown out, Dr. Singer asserts that it does not change his results. *See id.* 537:5-10; *see also* 484:19-485:3; 487:6-17; 507:11-15; 510:23-511:3; 525:22-526:7. But he presented no basis for that ipse dixit – and he elsewhere insisted that 150 valid survey respondents was the minimum he required for his conclusions. *See id.* 454:21-25 (“So we did the math . . . that told us that we needed to get to 150 in order to say something . . . to make an extrapolation to the population of Supernatural users”).

Moreover, Dr. Singer never claimed that he could defend his results if more than the 21 were dropped, and he did not dispute that 90 of the respondents – 60% of the sample – claimed to use 10 or more fitness products each more than once a month. *See id.* 523:1-4. He did not dispute that 43 respondents said that they simultaneously used (and paid for) two different connected rowing machines. *See id.* 522:14-16. And he did not dispute that 37 respondents said that they used (and paid for) three different connected fitness bikes. *See id.* 522:10-13. Courts exclude surveys predicated on impossible responses because such responses illustrate that the data is fundamentally unreliable. *See, e.g., Casey v. Home Depot*, 2016 WL 7479347, at \*17 (C.D. Cal. Sept. 15, 2016) (excluding survey where respondents provided “inconsistent” responses); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 950-51 (C.D. Cal. 2015), *aff'd sub nom. Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. 2017) (excluding where answers “indicate[] some misunderstanding among the survey respondents”).

Dr. Singer provides no reason why the court should trust any of his survey responses – including those to the only questions indicating whether the respondent actually subscribes to Supernatural. Instead, Dr. Singer says we “just have to assume that [respondents are] telling the truth.” Ex. B 539:16-17. Courts disagree, because *assuming* reliability is not survey science. *See, e.g., NetAirus Techs.*, 2013 WL 12322092, at \*5 (citing *Reference Manual on Scientific Evidence* 386 (3d ed. 2011)); *see also* Ex. B 538:15-16 (“They could have been confused about the question. They could have been liars.”). Here, where a majority of respondents offered highly implausible answers, the survey – and Dr. Singer’s market definition testimony – warrants exclusion.

It is Dr. Singer’s burden to establish the representativeness of the survey sample. *See Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 485 (C.D. Cal. 2008), *aff’d*, 639 F.3d 942 (9th Cir. 2011). His failure to do so or to explain how he has otherwise preserved his survey’s integrity neglects basic accepted principles of survey conduct and warrants excluding his market-definition opinion. *See Autozone*, 2016 WL 4208200, at \*17-\*19 (excluding survey where expert failed to account for representativeness, low response rate, and non-response bias, among other requirements); *NetAirus Techs.*, 2013 WL 12322092, at \*4 (excluding where “[t]he survey did not take measures to adjust for response rates to balance the gender of [the] respondents”); *see also Reference Manual on Scientific Evidence* 383 (3d ed. 2011) (“It is incumbent on the expert presenting the survey results to analyze the level and sources of nonresponse, and to assess how that nonresponse is likely to have affected the results.”).

**CONCLUSION**

For the reasons stated above, Respondents respectfully request that the Court exclude Dr. Hal Singer's opinion that "VR Dedicated Fitness Apps" constitute a relevant product market.

DATED: December 21, 2022

Respectfully submitted,

/s/ Mark C. Hansen

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**CERTIFICATE OF SERVICE**

I hereby certify that, on December 21, 2022, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission’s e-filing system, and I also served the documents via email to:

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***Counsel for Respondent Within Unlimited, Inc.***

/s/ Luke Sullivan

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the original filing and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

/s/ Luke Sullivan  
Luke Sullivan

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

**In the Matter of**

**Meta Platforms, Inc., et al.,**

**Respondents.**

**Docket No. 9411**

**STATEMENT IN SUPPORT OF RESPONDENTS’ MOTION *IN LIMINE* TO EXCLUDE  
EXPERT TESTIMONY OF DR. HAL SINGER**

Pursuant to Paragraph 4 of the Scheduling Order entered on September 2, 2022, Respondents hereby represent that counsel for the moving parties has conferred with Complaint Counsel by email in an effort in good faith to resolve by agreement issues raised by the motion. The parties corresponded by email on December 20, 2022 to discuss a potential agreement with respect to the evidence that Respondents seek to exclude in this motion. The parties were unable to reach an agreement.

Respectfully submitted,

/s/ Luke Sullivan  
Luke Sullivan

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

**In the Matter of**  
  
**Meta Platforms, Inc., et al.,**  
  
**Respondents.**

**Docket No. 9411**

**[PROPOSED] ORDER ON RESPONDENTS’ MOTION *IN LIMINE* TO EXCLUDE  
EXPERT TESTIMONY OF DR. HAL SINGER**

Upon consideration of Respondents’ Motion *In Limine* To Exclude Expert Testimony of Dr. Hal Singer and attached Exhibits, it is hereby ORDERED that Respondents’ Motion is GRANTED.

IT IS HEREBY ORDERED that Dr. Hal Singer’s opinion and testimony in support of Complaint Counsel’s market definition are hereby stricken from the record and excluded.

ORDERED:

Date:

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D. Michael Chappell  
Chief Administrative Law Judge

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

**In the Matter of**

**Meta Platforms, Inc., et al.,**

**Respondents.**

**Docket No. 9411**

**DECLARATION OF LUKE SULLIVAN**

I, Luke Sullivan, declare and state:

1. I am an associate with the law firm of Weil, Gotshal & Magnes LLP, counsel for Respondent Meta Platforms, Inc. (“Meta”). I submit this Declaration in Support of Defendants’ Motion *In Limine* to Exclude the Expert Testimony of Dr. Hal J. Singer.

2. The document cited in the Motion as Ex. A is a true and accurate copy of the Expert Report of Dr. Hal J. Singer dated November 22, 2022 that was submitted in this Court.

3. The document cited in the Motion as Ex. B is a true and accurate copy of an excerpt of the trial testimony of Dr. Hal Singer in *FTC v. Meta Platforms Inc., et al.*, 5:22-cv-04325, (N.D. Cal.).

4. The document cited in the Motion as Ex. C is a copy of an e-mail from Rachael McChrystal to Evan Leo dated December 10, 2022 and marked in *FTC v. Meta Platforms Inc., et al.*, 5:22-cv-04325, (N.D. Cal.) as exhibit DX1317.

5. The document cited in the Motion as Ex. D is a copy of the Declaration of Rachael McChrystal dated December 12, 2022 and marked in *FTC v. Meta Platforms Inc., et al.*, 5:22-cv-04325, (N.D. Cal.) as exhibit DX1325.

6. The document cited in the Motion as Ex. E is a true and accurate copy of the Reply Expert Report of Dr. Hal J. Singer dated November 21, 2022 that was submitted in *FTC v. Meta Platforms Inc., et al.*, 5:22-cv-04325, (N.D. Cal.).

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 21st day of December 2022.

*/s/ Luke Sullivan*

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Luke Sullivan

# **Exhibit A**

**Submitted In Camera**

# Exhibit B

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION, )  
 ) CV-22-04325 EJD  
 )  
 ) PLAINTIFF, )  
 ) DECEMBER 13, 2022  
 )  
 ) V. )  
 ) VOLUME 2  
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 ) META PLATFORMS, INC., ET )  
 ) AL., ) PAGES 304 - 591  
 )  
 ) DEFENDANTS. ) **SEALED PAGES 385 - 395**  
 ) **SEALED PAGES 588 - 590**  
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TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE EDWARD J. DAVILA

UNITED STATES DISTRICT JUDGE

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PRODUCED WITH COMPUTER

10:28AM 1  
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A. RIGHT.  
AND SO HERE, YOUR HONOR, WE COME ACROSS AN OBSTACLE, AS WE OFTEN DO IN CASES, IN THAT WE ARE LOOKING FOR EVIDENCE OF HOW SUPERNATURAL CUSTOMERS MAY HAVE REACTED TO A PRICE INCREASE TO ENGAGE THEIR PRICE SENSITIVITY.

THE OBSTACLE THAT WE HAVE HERE WAS THAT THERE HAS NEVER BEEN A CHANGE IN THE SUPERNATURAL PRICE. IT'S ALWAYS BEEN 18.99 FROM DAY ONE.

SO THE PATH THAT AN ECONOMIST WOULD NATURALLY THINK TO GO DOWN, WHICH IS LET'S GO GET DATA, TRANSACTION DATA, AND SEE WHAT HAPPENED TO THEIR SUBSCRIBER BASE, CONTROLLING FOR ALL OTHER THINGS, WHEN THEY RAISED PRICE, THAT WE HAD TO SET TO THE SIDE. OKAY?

Q. SO WHAT DID YOU DO?

A. RIGHT. RIGHT.

SO THE NEXT BEST THING THAT I COULD DO WAS TRY TO IDENTIFY SUPERNATURAL USERS AND TO ASK THEM, THROUGH A SURVEY, WHAT THEY WOULD DO IF THE PRICE WERE TO GO UP BY 5 PERCENT. IT TURNS OUT THAT A 5 PERCENT INCREASE ON 18.99 IS ROUGHLY A DOLLAR PER MONTH.

THE COURT: AND THESE ARE SUBSCRIBERS THAT WERE SURVEYED?

THE WITNESS: CORRECT.

BY MR. ELMORE:

Q. AND HOW DID YOU COME UP WITH THIS SURVEY?

10:30AM 1 A. SO I CAME UP WITH A SURVEY THE SAME WAY THAT I'VE COME UP  
10:30AM 2 WITH ALL SURVEYS THAT I DO IN THESE LITIGATION MATTERS, WHICH  
10:30AM 3 IS THAT I WORK WITH A FIRM CALLED QUALTRICS, IT'S THE NUMBER  
10:30AM 4 ONE SURVEY FIRM I THINK IN THE WORLD. WE CONSIDER IT TO BE THE  
10:30AM 5 GOLD STANDARD.

10:30AM 6 AND THERE ARE TWO DIFFERENT PARTS. I AM RESPONSIBLE FOR  
10:30AM 7 WHAT'S -- FOR CREATING WHAT IS CALLED THE SURVEY INSTRUMENT,  
10:30AM 8 WHICH IS WHAT, WHAT ACTUALLY SURVEY RESPONDENTS ARE GOING TO BE  
10:30AM 9 EXPOSED TO. IT'S THE SET OF BACKGROUND QUESTIONS AND  
10:30AM 10 DEMOGRAPHIC QUESTIONS, AND THEN ULTIMATELY WE'RE GOING TO GET  
10:30AM 11 TO THE PRICE INCREASE. THAT'S, THAT'S MY RESPONSIBILITY.

10:30AM 12 I WORK -- I SHOULD SAY MY TEAM WORKS WITH QUALTRICS IN THE  
10:31AM 13 DESIGN OF THIS INSTRUMENT.

10:31AM 14 BUT ONCE IT'S SETTLED, ONCE WE HAVE THE INSTRUMENT, WE  
10:31AM 15 HAND IT OFF TO QUALTRICS AND THEN QUALTRICS GOES INTO THE FIELD  
10:31AM 16 AND THEY ACTUALLY, YOU KNOW, FIND THE PANELS, YOU KNOW, THEY DO  
10:31AM 17 EVERYTHING ON THE BACK END.

10:31AM 18 SO THERE'S A CERTAIN POINT AT WHICH I DO THE HANDOFF, AND  
10:31AM 19 THAT HANDOFF IS WHEN I FINISH THE INSTRUMENT, YOU KNOW, I HAVE  
10:31AM 20 TO TURN IT OVER TO QUALTRICS.

10:31AM 21 BUT IN TURNING IT OVER TO QUALTRICS, IT'S LIKE TURNING  
10:31AM 22 OVER A PACKAGE TO UPS. I CAN ASSEMBLE THE PARCEL, BUT ONCE I  
10:31AM 23 GIVE IT TO THEM, THEY ARE THE EXPERTS IN THE FIELD OF GOING OUT  
10:31AM 24 AND ACTUALLY FINDING AND IMPLEMENTING THE SURVEY.

10:31AM 25 AND I SHOULD JUST NOTE, YOUR HONOR, THAT QUALTRICS WAS THE

10:31AM 1 FIRM THAT I USED IN THE MACBOOK KEYBOARD DEFECT CASE TO DO THAT  
10:31AM 2 SURVEY.

10:31AM 3 QUALTRICS WAS THE FIRM THAT I USED TO DO THE SURVEY IN THE  
10:32AM 4 JUUL CASE THAT JUDGE ORRICK CERTIFIED THE CASE AROUND.

10:32AM 5 AND A LOT OF THE PUSHBACK FROM DEFENDANTS IS WITH RESPECT  
10:32AM 6 TO THE QUALITY OF QUALTRICS, AND I JUST WANT TO SAY THAT IN MY  
10:32AM 7 ESTIMATION, THEY ARE THE GOLD STANDARD. YOU CAN'T DO BETTER  
10:32AM 8 THAN QUALTRICS. AND THEY'RE USED BY THE MAJORITY OF FORTUNE  
10:32AM 9 500 FIRMS. THEY'RE USED BY META THEMSELVES. META IS A PARTNER  
10:32AM 10 WITH QUALTRICS IN DOING THEIR OWN SURVEYS. YOU JUST, YOU CAN'T  
10:32AM 11 DO BETTER THAN QUALTRICS.

10:32AM 12 THE COURT: SO THE PROCESS IS THAT YOU CREATE THE  
10:32AM 13 INSTRUMENT -- YOU'RE THE EXPERT, YOU DESIGN THE INSTRUMENT, YOU  
10:32AM 14 KNOW WHAT THE PROBLEM IS. YOU CREATE AN INSTRUMENT THAT  
10:32AM 15 HOPEFULLY WILL INFORM, WITH ITS ANSWERS, TO HELP YOU ASSESS AND  
10:32AM 16 CREATE AN OPINION.

10:32AM 17 YOU CREATE THE INSTRUMENT, YOU GIVE IT TO QUALTRICS, IT'S  
10:32AM 18 HANDS OFF, YOU'RE NOT CALLING ANYONE, YOU'RE NOT IN THE FIELD.  
10:32AM 19 THAT'S THEIR -- THAT'S WHAT THEY DO.

10:32AM 20 THEY DO WHATEVER THEY DO, AND THEY RETURN THE DOCUMENTS,  
10:33AM 21 THE INSTRUMENTS, THEIR RESULTS TO YOU, AND THEN YOU ANALYZE IT?  
10:33AM 22 IS THAT HOW THAT WORKS?

10:33AM 23 THE WITNESS: THAT'S ABSOLUTELY RIGHT, YOUR HONOR.

10:33AM 24 ONE SMALL CAVEAT, BUT IT'S IMPORTANT, IS THAT WE HAVE DONE  
10:33AM 25 THIS SO MANY TIMES WITH QUALTRICS. THERE ARE CASES I DIDN'T

12:44PM 1 YOU HAVE NO OPINION ON ANY COORDINATED BEHAVIOR BY ANY OF  
12:44PM 2 THE NINE VR FITNESS FIRMS THAT YOU INCLUDE IN YOUR DEFINITION  
12:44PM 3 OF THE RELEVANT ANTITRUST MARKET; CORRECT?

12:44PM 4 A. MY OPINION -- I HAVE NOT REACHED AN OPINION AS TO WHETHER  
12:44PM 5 THEY'RE CURRENTLY COORDINATING IN THEIR PRICING NOW.

12:44PM 6 I DO, HOWEVER, THINK THAT THE HIGH CONCENTRATION OF THE  
12:45PM 7 MARKET MAKES IT SUSCEPTIBLE TO COORDINATION.

12:45PM 8 Q. PUTTING ASIDE PRICING BEHAVIOR, YOU HAVE NOT YET  
12:45PM 9 DEMONSTRATED THAT THE EXISTING PARTICIPANTS ARE ENGAGING IN  
12:45PM 10 COORDINATED BEHAVIOR; CORRECT?

12:45PM 11 A. THAT'S CORRECT. I DON'T THINK THAT'S A NECESSARY ELEMENT  
12:45PM 12 OF THE ECONOMIC PROOF.

12:45PM 13 Q. WELL, I DIDN'T REALLY ASK YOU ABOUT THAT, SIR.

12:45PM 14 I ASKED YOU IF YOU AGREED THAT YOU HAD NOT YET REACHED  
12:45PM 15 SUCH AN OPINION, AND YOU HAVE NOT; CORRECT?

12:45PM 16 A. I DIDN'T DO IT, AND IT'S NOT NECESSARY.

12:45PM 17 Q. YOU HAVE NOT OFFERED AN OPINION THAT YOU CAN DEFINE THE  
12:45PM 18 RELEVANT ANTITRUST MARKET INDEPENDENT OF THE STATED PREFERENCE  
12:45PM 19 SURVEY THAT YOU SAY YOU DESIGNED AND IMPLEMENTED; CORRECT?

12:45PM 20 A. I THINK THAT THE SURVEY WAS AN IMPORTANT ELEMENT OF THE  
12:45PM 21 QUANTITATIVE ASSESSMENT THAT I PERFORMED TO ARRIVE AT THE  
12:45PM 22 RELEVANT MARKET.

12:45PM 23 BUT I ALSO, AS I EXPLAINED THIS MORNING AND AS I EXPLAINED  
12:45PM 24 IN THE DEPOSITION AND IN MY REPORT, THAT THERE ARE TWO PRONGS  
12:45PM 25 TO MY MARKET DEFINITION PART OF THE REPORT. I BEGIN WITH A

12:46PM 1 QUALITATIVE PRONG, OR I APPLY THE BROWN SHOE FACTORS, AND THEN  
12:46PM 2 I MOVE ON TO THE QUANTITATIVE.

12:46PM 3 OF COURSE THE SURVEY HAS NOTHING TO DO WITH THE  
12:46PM 4 QUALITATIVE ASSESSMENT.

12:46PM 5 Q. DID YOU OFFER THE OPINION THAT IF YOUR HYPOTHETICAL  
12:46PM 6 MONOPOLIST TEST FAILED, THAT YOU COULD NEVERTHELESS DEFINE THE  
12:46PM 7 MARKET BASED ON CHARACTERISTICS?

12:46PM 8 A. I DON'T THINK I'VE OFFERED THAT OPINION. IT TURNED OUT  
12:46PM 9 THE TEST WORKS, SO I PROVIDED -- MY OVERARCHING OPINION IS THE  
12:46PM 10 COMBINATION OF THE QUALITATIVE EVIDENCE AND THE QUANTITATIVE  
12:46PM 11 EVIDENCE.

12:46PM 12 Q. LET'S LOOK AT PAGE 74 OF YOUR DEPOSITION, LINES 1 THROUGH  
12:46PM 13 7.

12:46PM 14 DO YOU RECALL BEING ASKED THE FOLLOWING QUESTION AND  
12:46PM 15 GIVING THE FOLLOWING ANSWER:

12:46PM 16 "NO. I'M ACTUALLY ASKING YOU WHETHER YOU'VE OFFERED THAT  
12:46PM 17 OPINION. YOU CAN'T DISCLOSE NEW OPINIONS NOW. DID YOU OFFER  
12:46PM 18 THAT OPINION THAT IF YOUR HYPOTHETICAL MONOPOLIST TEST FAILED,  
12:46PM 19 THAT YOU COULD NEVERTHELESS DEFINE YOUR MARKET BASED ON  
12:46PM 20 CHARACTERISTICS?

12:46PM 21 "ANSWER: I NEVER OFFERED THAT OPINION."

12:47PM 22 WAS THAT YOUR TRUTHFUL TESTIMONY?

12:47PM 23 A. YES, AND IT STILL IS.

12:47PM 24 Q. IN YOUR REBUTTAL REPORT, YOU MADE CLEAR THAT THE WAY YOU  
12:47PM 25 DEFINED THE CONTOURS OF THE RELEVANT MARKET WAS BY APPLYING THE

12:47PM 1 HYPOTHETICAL MONOPOLIST TEST; CORRECT?

12:47PM 2 A. YES, I MADE CLEAR THAT.

12:47PM 3 BUT I DID NOT ABANDON THE QUALITATIVE EVIDENCE. THE

12:47PM 4 QUALITATIVE EVIDENCE STILL STANDS ON ITS OWN.

12:47PM 5 Q. LET'S LOOK AT PARAGRAPH 3 OF YOUR REBUTTAL REPORT.

12:47PM 6 "IN MY INITIAL REPORT, I DEFINED THE CONTOURS OF THE

12:47PM 7 RELEVANT PRODUCT MARKET BY APPLYING A HYPOTHETICAL MONOPOLIST

12:47PM 8 TEST," AND ON.

12:47PM 9 IS THAT WHAT YOU WROTE?

12:47PM 10 A. YES.

12:47PM 11 Q. AND YOU ALSO WROTE IN YOUR REBUTTAL REPORT, AGAIN AT

12:47PM 12 PARAGRAPH 3, THAT NONE OF THAT ANALYSIS RELIED ON COMMON

12:47PM 13 FEATURES OF VR DEDICATED FITNESS APPS; CORRECT?

12:47PM 14 A. THE HMT TEST, WHICH IS A QUANTITATIVE ANALYSIS, DOES NOT

12:47PM 15 RELY ON COMMON FEATURES OF VR DEDICATED FITNESS APPS.

12:48PM 16 Q. IN PARAGRAPH 31 OF YOUR REBUTTAL REPORT, YOU TELL US THAT

12:48PM 17 YOU DO NOT EMPLOY A COMMONALITY OF FEATURES ANALYSIS; CORRECT?

12:48PM 18 A. WELL, THIS IS IN CONTEXT. YOU HAVE TO UNDERSTAND WHAT ALL

12:48PM 19 FOUR OF YOUR EXPERTS ASSERTED, FALSELY UNFORTUNATELY, WAS THAT

12:48PM 20 I EMPLOYED A COMMONALITY OF FEATURES ANALYSIS TO IDENTIFY THE

12:48PM 21 MARKET PARTICIPANTS, AND I DID NOT DO THAT.

12:48PM 22 Q. YOU BASED YOUR MARKET DEFINITION ON A COMPARISON OF THE

12:48PM 23 CRITICAL LOSS TO THE ACTUAL LOSS, THE LATTER OF WHICH TURNED ON

12:48PM 24 THE SURVEY YOU CONDUCTED; RIGHT?

12:48PM 25 A. I BASED MY MARKET DEFINITION, AS I EXPLAINED EARLIER

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TODAY, ON A COMBINATION OF THE QUALITATIVE EVIDENCE THAT I REVIEWED TO INFORM THE BROWN SHOE FACTORS, AND ON THE QUANTITATIVE ANALYSIS THAT I PERFORMED, WHICH TURNED ON THE HYPOTHETICAL MONOPOLIST TEST.

Q. LET'S GO TO ANOTHER PARAGRAPH OF YOUR REBUTTAL REPORT, PARAGRAPH 34. DIDN'T YOU WRITE IN THAT REPORT, QUOTE, "I BASED MY MARKET DEFINITION ON A COMPARISON OF THE CRITICAL LOSS TO THE ACTUAL LOSS, THE LATTER OF WHICH TURNED ON THE SURVEY I CONDUCTED."

AM I READING THAT RIGHT?

A. YOU'RE READING THAT RIGHT.

Q. LET'S MOVE ON TO A DIFFERENT OPINION THAT YOU'VE GIVEN.

YOU HAVE NOT GIVEN AN OPINION THAT FEW FIRMS, OTHER THAN META, ARE CAPABLE OF EFFECTIVE ENTRY INTO THE ALLEGED VR DELIBERATE FITNESS MARKET?

THE COURT: COULD YOU REPEAT THAT QUESTION?

MR. HANSEN: OF COURSE, YOUR HONOR.

Q. YOU HAVE NOT GIVEN AN OPINION THAT FEW FIRMS, OTHER THAN META, ARE CAPABLE OF EFFECTIVE ENTRY INTO THE ALLEGED VR DELIBERATE FITNESS MARKET; CORRECT?

A. I MIGHT HAVE TO SEE THAT QUESTION IN FRONT OF ME. IT BEGINS WITH A NOT AND THEN FEW AND THEN TAKES A FEW OTHER TWISTS AND TURNS.

I JUST DON'T EVEN KNOW IF I CAN FOLLOW IT.

Q. OKAY. LET ME SEE IF I CAN CLARIFY. THANK YOU FOR

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POINTING THAT OUT.

YOU'VE TESTIFIED THAT SONY IS CAPABLE OF DEVELOPING A DELIBERATE VR FITNESS APP; CORRECT?

A. I DON'T RECALL HAVING TESTIFIED TO THAT.

Q. OKAY. LET'S LOOK AT YOUR DEPOSITION, PAGE 49, LINES 8 THROUGH 11.

"QUESTION: SO IS IT YOUR -- IS IT YOUR OPINION THAT SONY IS INCAPABLE OF DEVELOPING A FITNESS APP?

"ANSWER: THAT'S -- THAT'S NOT MY OPINION. I THINK SONY COULD."

AND IT GOES ON.

YOU THOUGHT SONY COULD DEVELOP SUCH AN APPLICATION; CORRECT?

A. OKAY.

Q. BYTEDANCE CAN OFFER A VR FITNESS APP, CAN'T IT?

A. IT POSSIBLY COULD.

Q. DO YOU EVEN KNOW WHAT PICO IS?

A. NOW THAT I'VE BEEN REMINDED, PICO IS THE BRAND NAME THAT BYTEDANCE USES TO SELL VR HEADSETS OUTSIDE OF THE U.S.

Q. YOU DIDN'T KNOW IT LAST MONDAY, DID YOU?

A. I DIDN'T KNOW PICO. OF COURSE I KNEW WHO BYTEDANCE WAS.

Q. YOU SAID YOU NEVER HEARD OF PICO AT THE TIME OF YOUR DEPOSITION, DIDN'T YOU?

A. THAT'S TRUE.

Q. AND YOU DIDN'T KNOW WHO OWNED PICO; CORRECT?

01:31PM 1 ULTIMATELY PRODUCED THE INSTRUMENT AND GAVE IT TO QUALTRICS AND  
 01:31PM 2 IT WAS EVERYONE'S UNDERSTANDING THAT THEY WOULD GO OUT IN THE  
 01:31PM 3 FIELD AND CONDUCT THE SURVEY.

01:31PM 4 Q. SO THE SURVEY WAS LAUNCHED ON OCTOBER 3RD OF THIS YEAR;  
 01:31PM 5 CORRECT?

01:31PM 6 A. I DON'T KNOW THE EXACT LAUNCH DATE.

01:31PM 7 Q. WELL, YOU SAY IT IN YOUR REPORT IN PARAGRAPH 62, SO YOU  
 01:31PM 8 MUST HAVE KNOWN IT WHEN YOU WROTE YOUR REPORT?

01:31PM 9 A. YES.

01:31PM 10 Q. OKAY. DO YOU ACCEPT WHAT YOU WROTE IN YOUR REPORT AS  
 01:31PM 11 TRUE?

01:31PM 12 A. YES.

01:31PM 13 Q. THAT WAS 24 DAYS BEFORE YOUR REPORT WAS DUE IN THIS CASE;  
 01:31PM 14 CORRECT?

01:31PM 15 A. I HAVEN'T DONE THE MATH, BUT THAT SOUNDS RIGHT.

01:31PM 16 Q. THE REPORT WAS DONE ON THE 27TH, AND THE 3 FROM 27 EQUALS  
 01:31PM 17 24?

01:31PM 18 A. YEAH. I DO RECALL THAT THERE WAS NOT A LOT OF TIME.

01:31PM 19 Q. WOULD IT BE FAIR TO SAY THAT YOU WERE IN A BIT OF A RUSH?

01:32PM 20 A. WE -- KNOWING HOW LONG IT WAS GOING TO TAKE QUALTRICS TO  
 01:32PM 21 PERFORM THE SURVEY AND KNOWING THAT WE WERE TARGETING A FAIRLY  
 01:32PM 22 UNIQUE GROUP OF USERS, I KNEW THAT IT NEEDED TO GO OUT AT THE  
 01:32PM 23 BEGINNING OF OCTOBER.

01:32PM 24 Q. YOU SAY YOU DIRECTED QUALTRICS TO GET 150 SUPERNATURAL  
 01:32PM 25 SUBSCRIBERS; CORRECT?

01:32PM 1 A. THAT'S CORRECT. WE HAD DONE THE MATH TO FIGURE OUT THAT  
01:32PM 2 150 WAS THE NUMBER WE NEEDED TO BE ABLE TO SAY AND MAKE AN  
01:32PM 3 EXTRAPOLATION TO THE POPULATION WITH A CERTAIN LEVEL OF  
01:32PM 4 CONFIDENCE AND PRECISION.

01:32PM 5 Q. BUT THAT'S NOT TRUE, IS IT?

01:32PM 6 A. I DON'T KNOW WHAT IS NOT TRUE ABOUT THAT.

01:32PM 7 Q. DIDN'T YOU ASK QUALTRICS TO GET YOU 500 COMPLETED SURVEYS  
01:32PM 8 FROM SUPERNATURAL PEOPLE?

01:32PM 9 A. QUALTRICS WAS READY TO GIVE US UP TO 500, BUT WE LET THEM  
01:32PM 10 KNOW BEFOREHAND AND WE LET THEM KNOW AS SOON AS WE HIT 150 THAT  
01:32PM 11 THE SURVEY WAS DONE.

01:32PM 12 Q. DID YOU OR DID YOU NOT GIVE INSTRUCTIONS TO QUALTRICS TO  
01:33PM 13 GET YOU 500 SURVEYS?

01:33PM 14 A. WE WERE NEVER GOING TO DO THAT, AND THE REASON WHY WE WERE  
01:33PM 15 NOT EVER GOING TO GET TO 500 WAS BECAUSE QUALTRICS CHARGED US A  
01:33PM 16 PREMIUM FOR THIS SURVEY.

01:33PM 17 QUALTRICS TOLD US -- EVEN THOUGH WE HAD USED QUALTRICS  
01:33PM 18 SOMETHING LIKE TEN TIMES IN THE PAST, QUALTRICS TOLD US THAT ON  
01:33PM 19 THIS PASS, THEY WERE GOING TO CHARGE US A PREMIUM BECAUSE IT  
01:33PM 20 WAS GOING TO BE HARDER TO FIND SUPERNATURAL CUSTOMERS.

01:33PM 21 SO WE DID THE MATH USING THAT FORMULA THAT YOU PROBABLY  
01:33PM 22 KNOW THAT TOLD US THAT WE NEEDED TO GET TO 150 IN ORDER TO SAY  
01:33PM 23 SOMETHING, MAKE THIS IT'S CALLED EXTERNAL VALIDITY, WHICH IS TO  
01:33PM 24 MAKE AN EXTRAPOLATION TO THE POPULATION OF SUPERNATURAL USERS  
01:33PM 25 WITH A CERTAIN LEVEL OF CONFIDENCE AND PRECISION.

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SO GOING IN WE KNEW AND QUALTRICS KNEW THAT WE WERE GOING TO TERMINATE AT 150.

NOW, IT'S CONCEIVABLE THAT THE CONTRACT WITH QUALTRICS SAID UP TO 500, BUT THEY KNEW GOING IN BEFOREHAND, AND WE WERE MONITORING THIS THROUGHOUT THE DAY, AND AS SOON AS WE GOT TO 150, WE REACHED THE LEVEL OF THE SAMPLE SIZE THAT WE NEEDED AND WE CALLED IT QUILTS.

Q. LET'S TAKE A LOOK AT DX1317.

WERE YOU AWARE THAT QUALTRICS PROVIDED INFORMATION PURSUANT TO A SUBPOENA HERE?

A. I'M AWARE.

MR. ELMORE: OBJECTION, YOUR HONOR.

THE COURT: IS THIS A FOUNDATIONAL OBJECTION?

MR. ELMORE: YEAH. IT'S A DISCOVERY OBJECTION BECAUSE THIS INFORMATION WAS RECENTLY PROVIDED TO US WITHIN THE LAST DAY OR SO.

MR. HANSEN: WE'RE USING IT TO IMPEACH AND FOR REFRESHING RECOLLECTION, YOUR HONOR.

IT WAS RECEIVED BY SUBPOENA. WE BELIEVE IT'S ENTIRELY APPROPRIATE.

WHETHER IT WILL BE ADMITTED AS EVIDENCE IS A DIFFERENT QUESTION.

THE COURT: WHY DON'T YOU CITE TO THE PAGE AND PARAGRAPH SO YOUR COLLEAGUES HAVE IT?

MR. HANSEN: I'M SORRY, YOUR HONOR?

01:41PM 1 FROM INDIVIDUALS WHO HAVE PLAYED THE GAME SUPERNATURAL."

01:41PM 2 WAS THAT THE INSTRUCTION?

01:41PM 3 A. THAT'S HOW RACHEL -- I'M SORRY, I CAN'T SEE HER LAST

01:41PM 4 NAME -- MUST HAVE INTERNALIZED.

01:41PM 5 BUT YOU KNOW THAT WE MAKE THE RESPONDENT, TO MAKE IT TO

01:41PM 6 OUR SURVEY, YOU HAVE TO ATTEST ON FOUR OCCASIONS, FOUR

01:41PM 7 OCCASIONS, THAT YOU ARE A PAYING SUPERNATURAL SUBSCRIBER AND

01:41PM 8 YOU PAY FOR YOUR OWN SERVICE AS OPPOSED TO SOMEONE ELSE PAYING

01:42PM 9 FOR YOU.

01:42PM 10 WE GAVE THOSE -- WE GAVE OUR SCRIPT TO QUALTRICS.

01:42PM 11 QUALTRICS KNOWS THE SCRIPT.

01:42PM 12 I THINK THAT WHOEVER WROTE THIS QUESTION DIDN'T KNOW

01:42PM 13 PRECISELY WHAT WE WERE GOING FOR.

01:42PM 14 BUT WE CERTAINLY WEREN'T TRYING TO IDENTIFY RESPONDENTS

01:42PM 15 WHO PLAYED IT ONCE.

01:42PM 16 WE WERE TRYING TO FIND CURRENT SUBSCRIBERS, AND WE MADE

01:42PM 17 THEM AFFIRM AND ATTEST TO THAT FOUR TIMES THROUGHOUT THE SURVEY

01:42PM 18 BEFORE WE ALLOWED THEM TO COMPLETE IT.

01:42PM 19 Q. SO THE GOLD STANDARD QUALTRICS GOT ANOTHER THING WRONG

01:42PM 20 HERE? IS THAT WHAT YOU'RE TELLING US?

01:42PM 21 A. I THINK WHAT YOU'RE CONFUSING IS THE QUALITY OF A

01:42PM 22 LITIGATION-INSPIRED DECLARATION THAT WAS CO-AUTHORED BY

01:42PM 23 KELLOGG HUBER, AND YOU'RE JUDGING THE QUALITY OF THAT AGAINST

01:42PM 24 THE QUALITY OF QUALTRICS'S SURVEY.

01:42PM 25 IT'S NIGHT AND DAY. THOSE ARE TWO DIFFERENT THINGS.

01:42PM 1 Q. SO YOU DIDN'T CARRY OUT OR ACCOMPLISH -- I'M SORRY, LET ME  
01:43PM 2 WITHDRAW THAT.

01:43PM 3 WE'VE PREVIOUSLY SHOWN YOU THE REPORT WHERE YOU SAID YOU,  
01:43PM 4 DR. SINGER, DESIGNED AND IMPLEMENTED A SURVEY.

01:43PM 5 BUT YOU DIDN'T IMPLEMENT THE SURVEY, DID YOU?

01:43PM 6 A. WELL, I, I WROTE THE INSTRUMENT.

01:43PM 7 BUT AT THAT POINT, AS WE NOW PAINFULLY UNDERSTAND, I HAVE  
01:43PM 8 TO TURN IT OVER TO QUALTRICS TO GO OUT IN THE FIELD AND CONDUCT  
01:43PM 9 THE SURVEY.

01:43PM 10 Q. SO YOU THINK QUALTRICS IMPLEMENTED THE SURVEY?

01:43PM 11 A. WELL, I DIDN'T USE THE WORD "IMPLEMENT" RIGHT THERE IN MY  
01:43PM 12 SENTENCE, BUT I DON'T THINK THERE SHOULD BE ANY CONFUSION HERE.

01:43PM 13 I WRITE THE INSTRUMENT, GET SOME FEEDBACK FROM QUALTRICS.  
01:43PM 14 ONCE EVERYONE IS HAPPY, WE UPLOAD THE INSTRUMENT INTO THE  
01:43PM 15 QUALTRICS SOFTWARE AND QUALTRICS GOES OUT INTO THE FIELD AND  
01:43PM 16 FINDS THE RESPONDENTS.

01:43PM 17 Q. SO YOU DID NOT COMMUNICATE ANYTHING TO QUALTRICS ABOUT  
01:44PM 18 WHAT PADDLE PROVIDER TO USE OR NOT USE; CORRECT?

01:44PM 19 A. CORRECT.

01:44PM 20 Q. BECAUSE YOU -- AS YOU SAID THIS MORNING, QUALTRICS HAS THE  
01:44PM 21 EXPERTISE; CORRECT?

01:44PM 22 A. IN CHOOSING PANELS, YES, I WOULDN'T TRY TO OVERTURN  
01:44PM 23 QUALTRICS'S CHOICE OF PANELS, THE SAME WAY I WOULDN'T TRY TO  
01:44PM 24 OVERTURN UPS'S CHOICE OF LOGISTICS SOFTWARE.

01:44PM 25 THIS IS SOMETHING THAT WE JUST TURN OVER TO THEM, YES.

01:44PM 1 Q. YOU WERE DEFERRING TO QUALTRICS'S EXPERTISE AND JUDGMENT,  
01:44PM 2 WERE YOU NOT?

01:44PM 3 A. NOT IN WRITING DECLARATIONS, BUT DEFINITELY IN CONDUCTING  
01:44PM 4 THE SURVEY, YES.

01:44PM 5 MR. HANSEN: YOUR HONOR, I MOVE TO STRIKE THE FIRST  
01:44PM 6 PART OF THAT ANSWER.

01:44PM 7 THE COURT: WELL, WE HAD A VERY FULSOME CONVERSATION  
01:44PM 8 ABOUT ALL OF THAT. I THINK I CAN PARSE THAT OUT. THAT'S FINE.

01:44PM 9 MR. HANSEN: THAT'S FINE.

01:44PM 10 Q. IT'S NOT PROPER, IS IT, DR. SINGER, FOR AN EXPERT TO RELY  
01:44PM 11 ON THE EXPERT WORK OF ANOTHER?

01:44PM 12 A. THAT IS NOT A TRUE STATEMENT.

01:44PM 13 Q. YOU'RE FAMILIAR WITH THE LAW ON THAT SUBJECT?

01:45PM 14 A. I'VE DONE THIS ENOUGH TIMES THAT I KNOW THAT ON MANY  
01:45PM 15 OCCASIONS I WILL WORK ALONGSIDE, FOR EXAMPLE, AN INDUSTRY  
01:45PM 16 EXPERT WHERE THE INDUSTRY EXPERT OFFERS AN OPINION AND I RELY  
01:45PM 17 IN PART ON THAT OPINION BECAUSE I DON'T HAVE THE EXPERTISE TO  
01:45PM 18 GO INTO THE PARTICULAR INDUSTRY.

01:45PM 19 Q. YOU'VE TOLD US QUITE A LOT ABOUT QUALTRICS, BUT ISN'T IT  
01:45PM 20 TRUE THAT YOU PERSONALLY NEVER SPOKE OR INTERACTED WITH  
01:45PM 21 QUALTRICS REGARDING THE SURVEY?

01:45PM 22 A. THAT IS TRUE. I HAVE A PROJECT MANAGER AND SHE IS THE  
01:45PM 23 PERSON WHO INTERACTS WITH QUALTRICS.

01:45PM 24 Q. AND QUALTRICS DIDN'T IMPLEMENT THIS SURVEY EITHER, DID IT?

01:45PM 25 A. WELL, I THINK THEY DID.

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Q. WELL, WHEN YOU TESTIFIED AT YOUR DEPOSITION, YOU BELIEVED THAT QUALTRICS WAS THE FIRM THAT APPROACHED POTENTIAL RESPONDENTS; CORRECT?

A. WELL, I THINK I MADE THIS CLEAR, THAT QUALTRICS MIGHT SUBCONTRACT WITH OTHER OUTFITS TO EVENTUALLY -- TO ACTUALLY PERFORM THE SURVEY, BUT I DON'T GET TO INTERFACE WITH THOSE OTHER PARTIES.

JUST, AGAIN, I GO BACK TO MY UPS EXAMPLE. UPS MIGHT CONTRACT WITH THIRD PARTIES FOR LOGISTICS, BUT I DON'T GET TO KNOW WHO THOSE ARE AND I DON'T GET TO CONTRACT WITH THEM AND CHOOSE THEM.

I'M DEPENDING ON QUALTRICS AND THE QUALITY OF QUALTRICS TO STAND BEHIND ITS SURVEY RESULTS, NO MATTER WHETHER THEY DO IT IF THEY'RE VIRTUALLY INTEGRATED OR IF THEY USE THIRD PARTIES.

Q. AT THE TIME OF YOUR DEPOSITION, YOU THOUGHT QUALTRICS HAD PANELS AVAILABLE TO IT AND IT WAS GOING TO USE THOSE PANELS; CORRECT?

A. NO, I DON'T THINK THAT'S WHAT I TESTIFIED TO. I THINK I ACKNOWLEDGED THAT QUALTRICS MIGHT USE THIRD PARTY PANEL PROVIDERS MANY TIMES.

Q. YOU THOUGHT THAT QUALTRICS WENT WITH ONE PANEL AND IT WAS THEIR OWN PANEL; CORRECT?

A. NO, THAT'S NOT WHAT I SAID.

Q. LET'S LOOK AT YOUR DEPOSITION AT PAGE 139, LINES 15 TO 21.

"WHAT IS YOUR UNDERSTANDING?"

01:47PM 1 "YOU SEE, I THINK THEY WENT WITH ONE."

01:47PM 2 A. WELL, YOUR QUESTION JUST NOW IS, "I WENT WITH ONE AND IT

01:47PM 3 WAS QUALTRICS, SO THAT IS NOT WHAT I TESTIFIED TO.

01:47PM 4 THE CONVERSATION HERE WAS HOW MANY THEY USED, AND I WAS

01:47PM 5 UNCERTAIN AS TO HOW MANY THEY USED.

01:47PM 6 MY UNDERSTANDING WAS THAT THE VAST MAJORITY, IF NOT ALL,

01:47PM 7 WAS COMING FROM ONE PANEL.

01:47PM 8 Q. WERE YOU AWARE THAT QUALTRICS DOES NOT MAINTAIN ITS OWN

01:47PM 9 PANELS OF SURVEY RESPONDENTS? WERE YOU AWARE OF THAT?

01:47PM 10 A. THAT IT FULLY OUTSOURCES? I'M NOT AWARE OF THAT.

01:47PM 11 WHEN YOU GO TO THE QUALTRICS WEBSITE, I'M NOT AWARE THAT

01:47PM 12 THEY DON'T DO ANY OF THEIR OWN PANELS.

01:47PM 13 Q. LET'S LOOK AT PARAGRAPH 3 OF WHAT QUALTRICS SENT OVER THE

01:47PM 14 WEEKEND, AND THIS HAS ALSO BEEN INCLUDED IN THE SWORN

01:47PM 15 DECLARATION.

01:47PM 16 IT SAYS, "QUALTRICS DOES NOT MAINTAIN ITS OWN PANELS OF

01:47PM 17 SURVEY RESPONDENTS, BUT INSTEAD SUBCONTRACTS THESE SERVICES TO

01:47PM 18 THIRD PARTIES."

01:47PM 19 IS THAT NOT TRUE?

01:47PM 20 A. I DON'T KNOW HOW TO VERIFY THIS. WHAT I -- I DON'T KNOW

01:48PM 21 IF THIS COULD BE ASCERTAINED SOLELY BY GOING TO, SAY, ITS

01:48PM 22 WEBSITE.

01:48PM 23 Q. WELL, QUALTRICS HAS ALSO TOLD US THAT THEY ENGAGE THREE

01:48PM 24 FIRMS IN PARAGRAPH 4 TO IMPLEMENT, I'LL USE THE WORD IMPLEMENT,

01:48PM 25 "ECON ONE'S SURVEY: CINT (ALSO KNOWN AS LUCID/FEDERATED)

01:48PM 1 DYNATA, AND TORFAC."

01:48PM 2 IS THAT TRUE?

01:48PM 3 A. I HAVE NO REASON TO BELIEVE IT'S NOT TRUE.

01:48PM 4 Q. AT THE TIME OF YOUR DEPOSITION LAST WEEK, YOU DIDN'T KNOW

01:48PM 5 THE NAME OF ANY OF THESE FIRMS; CORRECT?

01:48PM 6 A. THERE'S NO WAY THAT I COULD KNOW THE NAMES OF THEM.

01:48PM 7 Q. AND YOU DIDN'T KNOW WHAT THEY DID TO IMPLEMENT THE SURVEY,

01:48PM 8 DID YOU?

01:48PM 9 A. I DON'T KNOW WHAT YOU MEAN BY THE QUESTION.

01:48PM 10 Q. DID YOU KNOW WHAT THEY DID TO IMPLEMENT THE SURVEY?

01:48PM 11 A. I KNOW ROUGHLY THAT ANY PANEL PROVIDER HAS A LIST OF

01:48PM 12 RESPONDENTS AND THEY RANDOMLY SELECT AMONG THAT LIST AS TO WHO

01:49PM 13 IS GOING TO GET THE SURVEY, AND THEY NOTIFY THEM I BELIEVE VIA

01:49PM 14 EMAIL, AND THAT'S THE INITIATION OF THE SURVEY.

01:49PM 15 Q. YOU DON'T KNOW ANYTHING ABOUT WHO THESE THREE FIRMS

01:49PM 16 CONTACTED; CORRECT?

01:49PM 17 A. THEY CONTACTED RESPONDENTS WHO WERE IN THEIR PANEL.

01:49PM 18 THAT'S WHAT I KNOW.

01:49PM 19 Q. DO YOU KNOW ANYTHING ELSE ABOUT IT? DO YOU KNOW ANYTHING

01:49PM 20 ELSE OTHER THAN THEY CONTACTED PEOPLE WHO WERE IN THE PANELS?

01:49PM 21 A. I HAVE AN UNDERSTANDING, WORKING FROM CONVERSATIONS AGAIN,

01:49PM 22 NOT DIRECTLY BUT THROUGH MY CASE MANAGER AND QUALTRICS, THAT

01:49PM 23 SOMETIMES THE PANELS WILL USE FILTERS IN ORDER TO INCREASE THE

01:49PM 24 LIKELIHOOD THAT THEY FIND A SUBSCRIBER OR USER, PARTICULARLY IF

01:49PM 25 IT'S A USER FROM A REMOTE POPULATION.

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01:49PM 4  
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01:51PM 24  
01:51PM 25

Q. AND YOU HAVE NO BASIS FOR THINKING THAT THAT HAPPENED  
HERE, DO YOU?

A. IT COULD HAVE HAPPENED. LIKE, FOR EXAMPLE, TO THE EXTENT  
THAT ONE OF THESE PANELS TITLED THE SURVEY VR SURVEY, THEN IF  
SOMEONE IS NOT INTERESTED IN VR, WHEN THEY GET THE EMAIL, THEY  
MIGHT JUST NOT CLICK ON IT.

BUT THAT WOULD BE A VERY EFFICIENT WAY TO DRILL DOWN TO  
THOSE WHO ARE IN THE PERSPECTIVE MARKET.

Q. IN FACT, THE BULK OF THE RESPONDENTS WERE SOLICITED FROM  
THAT FIRM CALLED CINT; CORRECT?

A. THAT'S MY UNDERSTANDING, BUT ONLY FROM READING THIS  
DECLARATION. I WOULD NOT HAVE KNOWN THAT, NOR COULD I HAVE  
KNOWN THAT FROM WHAT I HAD DONE WITH QUALTRICS.

Q. AND CINT IS NOT A FIRM THAT YOU KNOW ANYTHING ABOUT THE  
REPUTATION OF; CORRECT?

A. I'VE DONE VERY LITTLE INVESTIGATION OF CINT. I UNDERSTAND  
THAT THEY HAVE PARTNERSHIPS WITH OTHER PANEL PROVIDERS IN THIS  
MARKETPLACE.

I CAN INFER THAT IF QUALTRICS USES THEM AND QUALTRICS IS  
THE GOLD STANDARD, THEN AT LEAST QUALTRICS BELIEVES THAT THESE  
PANEL PROVIDERS ARE SOUND AND OF HIGH QUALITY.

Q. DO YOU KNOW THAT CINT HAS PROVIDED A DECLARATION IN THIS  
MATTER?

A. I DON'T KNOW. I DON'T KNOW IF THEY DID.  
CERTAINLY IF IT CAME IN, IT WOULD HAVE COME IN LAST NIGHT,

01:51PM 1  
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01:52PM 25

BUT I'M NOT AWARE OF IT.

Q. ARE YOU AWARE THAT CINT OR LUCID SOURCED 183 RESPONDENTS THAT FULLY COMPLETED SURVEYS?

A. I DON'T KNOW THE NUMBER THAT CAME FROM CINT.

Q. AND, IN FACT, YOU HAVE DATA THAT SHOWS FAR FEWER REVIEWS BY YOU IN YOUR SURVEY, APPROXIMATELY 137; RIGHT?

A. QUALTRICS IMPOSES CERTAIN QUALITY PROVISIONS, FILTERS -- I'M SORRY. THIS IS IMPORTANT.

QUALTRICS IMPOSES CERTAIN QUALITY CONTROLS ON SURVEY RESPONSES THAT THEY GET BACK FROM A PANEL PROVIDER. AND TO THE EXTENT THE RESPONSE DOESN'T MEET THE CRITERIA, THE QUALITY CRITERIA OF QUALTRICS, THEN THAT RESPONSE COULD BE THROWN OUT.

Q. DO YOU KNOW WHY 46 RESPONSES TO YOUR SURVEY WERE THROWN OUT?

A. FOR THE REASONS THAT I -- MY BEST SURMISE IS FOR THE REASONS I'VE JUST LAID OUT.

Q. AND IT'S JUST A SURMISE, ISN'T IT?

A. WELL, I DID NOT CALL UP QUALTRICS AND INTERVIEW THEM AS TO WHY THEY PRESENTED ME THE RESULTS THAT THEY DID.

WHAT I KNOW IS THAT -- I'M JUST NOW LEARNING THIS LITERALLY IN REAL TIME, THAT THE NUMBER THAT THEY GOT BACK FROM CINT YOU ASSERT IS 180, THEY IMPOSE CERTAIN FILTERS, WE KNOW THIS, AND THAT WOULD BE THE BEST EXPLANATION AS TO WHY THEY DON'T ALL GET INTO THE FINAL SURVEY.

BUT IT'S IMPORTANT TO NOTE FOR YOUR HONOR AND FOR THE

02:02PM 1  
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SURVEYS, YOU HAVE TO ATTEST THAT FOUR TIMES.

AND SO, YES, WE ARE INTERPRETING THEM TO BE SUPERNATURAL CUSTOMERS.

Q. AND THERE'S NO VALIDATION FOR THIS. YOU'RE JUST RELYING ON WHAT PEOPLE TELL YOU; CORRECT?

A. WE HAVE TO RELY ON WHAT PEOPLE TELL US, AS DOES ANYBODY WHO PUTS A SURVEY IN THE FIELD.

Q. SO, FIRST OF ALL, IT WAS HIGHLY UNLIKELY THAT YOU ACTUALLY GOT 150,000 SUPERNATURAL SUBSCRIBERS FROM 10,000 EMAILS BEING SENT OUT; CORRECT?

THE COURT: 150,000?

BY MR. HANSEN:

Q. 150 RESPONSES FROM 10,000 SURVEYS RESPONDENTS -- I'M SORRY.

IT WAS IMPLAUSIBLE THAT, FROM A POOL OF 10,000 PEOPLE CONTACTED BY SOME SURVEY FIRM THAT YOU DIDN'T KNOW, IT WOULD BE IMPLAUSIBLE THAT FROM THAT SOLICITATION, YOU WOULD FIND 150 ACTUAL SUPERNATURAL SUBSCRIBERS IN THAT 10,000; RIGHT?

A. WELL, IT IS PLAUSIBLE, AND THE REASON WHY IT IS PLAUSIBLE IS THAT, NUMBER ONE, NOW WE KNOW THAT THEY REACHED OUT ACTUALLY TO 12,000 ACCORDING TO LAST NIGHT'S DECLARATION THAT WAS SUBMITTED, BUT EVEN SO, YOU MAY NOT UNDERSTAND, BUT THOSE ARE SURVEYS THAT ARE INITIATED BY A RESPONDENT.

THE CAST, THE NET OF THOSE WHO RECEIVED THE SURVEY INSTRUMENT WAS PRESUMABLY MUCH LARGER.

02:03PM 1 TO GET IT INTO THAT 12,000, YOU HAVE TO ACTUALLY INITIATE  
02:03PM 2 THE SURVEY RESPONSE.  
02:03PM 3 Q. LET'S DO THE MATH. I'VE GOT A DEMONSTRATIVE UP TO TRY TO  
02:03PM 4 HELP US DO THAT.  
02:03PM 5 YOU SAID YOU GOT 150 COMPLETED SUPERNATURAL RESPONSES;  
02:03PM 6 RIGHT?  
02:03PM 7 A. CORRECT.  
02:03PM 8 Q. AND WE'LL USE 10,000 BECAUSE THAT'S WHAT YOU THOUGHT PRIOR  
02:04PM 9 TO YESTERDAY; RIGHT?  
02:04PM 10 A. 10,000 INITIATED THE SURVEY.  
02:04PM 11 BUT THAT'S NOT THE NUMBER OF RESPONDENTS WHO RECEIVED THE  
02:04PM 12 SURVEY.  
02:04PM 13 Q. HOW MANY RECEIVED THE SURVEY?  
02:04PM 14 A. WE DON'T KNOW.  
02:04PM 15 Q. IN FACT, THERE WERE ONLY 10,000 PEOPLE CONTACTED; ISN'T  
02:04PM 16 THAT RIGHT?  
02:04PM 17 A. NO, THAT IS NOT RIGHT.  
02:04PM 18 Q. LET'S GO BACK TO PARAGRAPH 68 OF YOUR REPORT AND SEE WHAT  
02:04PM 19 YOU TOLD US THERE. WE HAVE GONE THROUGH THIS BEFORE, BUT YOU  
02:04PM 20 SAY, "I REACHED OUT TO QUALTRICS WHO CONFIRMED THAT THE SURVEY  
02:04PM 21 WAS DISTRIBUTED TO APPROXIMATELY 10,000 POTENTIAL RESPONDENTS."  
02:04PM 22 THAT TELLS US IT WAS DISTRIBUTED OUT, NOT THAT IT WAS  
02:04PM 23 INITIATED BY 10,000 PEOPLE, DOESN'T IT?  
02:04PM 24 A. THAT'S WHAT IT SAYS.  
02:04PM 25 BUT MY UNDERSTANDING NOW IS THAT THE 10,000 IS THE

02:04PM 1 INITIATIONS.

02:04PM 2 Q. WELL, WHAT IT SAYS --

02:04PM 3 A. OKAY.

02:04PM 4 Q. WELL, THIS IS WHAT YOU SAID IN YOUR REPORT?

02:04PM 5 A. THAT'S CORRECT, THAT'S WHAT I SAID.

02:04PM 6 Q. LET'S GO BACK TO MY DEMONSTRATIVE.

02:04PM 7 150 OUT OF 10,000 IS WHAT PERCENTAGE?

02:05PM 8 A. I DON'T KNOW.

02:05PM 9 Q. IT'S 1.5 PERCENT; CORRECT?

02:05PM 10 A. THAT SEEMS RIGHT.

02:05PM 11 Q. OKAY. THERE ARE ABOUT 250 MILLION ADULTS IN THE

02:05PM 12 UNITED STATES, AREN'T THERE?

02:05PM 13 A. APPROXIMATELY.

02:05PM 14 Q. OKAY. WELL, LET'S USE 200 MILLION JUST FOR EASE OF

02:05PM 15 CALCULATION.

02:05PM 16 1.5 PERCENT OF 200 MILLION IS WHAT? 3 MILLION; RIGHT?

02:05PM 17 THE COURT: IT'S REALLY UNFAIR TO ASK THAT QUESTION.

02:05PM 18 MR. HANSEN: THAT'S WHY WE DID IT ON THE SCREEN,

02:05PM 19 YOUR HONOR.

02:05PM 20 Q. I'M NOT TESTING YOUR MATH, BUT WOULD YOU ACCEPT MY

02:05PM 21 REPRESENTATION THAT IF YOU DO THE MATH, 1.5 PERCENT OF 200

02:05PM 22 MILLION IS 3 MILLION?

02:05PM 23 A. SURE.

02:05PM 24 Q. AND, IN FACT, SUPERNATURAL HAS NOWHERE NEAR THAT NUMBER OF

02:05PM 25 SUBSCRIBERS; CORRECT?

02:08PM 1 TO SPEED THE PROCESS AND BECOME MORE EFFICIENT IN FINDING THESE  
02:08PM 2 REMOTE POPULATIONS?  
02:08PM 3 Q. IS THE ANSWER TO MY QUESTION, YES, THEY USE GENERAL  
02:08PM 4 POPULATION PANELS?  
02:08PM 5 A. I THINK IT'S FAIR THAT AS A BEGINNING THAT THEY WOULD USE  
02:08PM 6 A GENERAL POPULATION PANEL, YES.  
02:08PM 7 Q. OTHER THAN THAT, SITTING HERE -- ALL YOU'RE DOING IN YOUR  
02:09PM 8 WITNESS CHAIR THERE IS SPECULATING WHAT MIGHT HAVE HAPPENED;  
02:09PM 9 RIGHT? YOU HAVE NO KNOWLEDGE OF WHAT ACTUALLY HAPPENED, DO  
02:09PM 10 YOU?  
02:09PM 11 A. I'M TELLING YOU, I DON'T GET TO INTERVIEW THESE PANELS,  
02:09PM 12 BUT I DID GET TO ASK, THROUGH MY CASE MANAGER, HOW THE PANELS  
02:09PM 13 CAN MORE EFFICIENTLY TARGET REMOTE POPULATIONS, AND I WAS  
02:09PM 14 TOLD -- I'M GETTING THIS BACK FROM MY CASE MANAGER -- THAT  
02:09PM 15 FILTERS CAN BE USED, AND ALSO THE QUESTIONNAIRE CAN BE USED AS  
02:09PM 16 A WAY TO EFFICIENTLY GET TO THE REMOTE POPULATION.  
02:09PM 17 Q. WHAT YOU GOT FROM THE 150 RESPONSES WAS HUNDREDS OF FALSE  
02:09PM 18 ANSWERS FROM VIRTUALLY EVERY ONE OF THE RESPONDENTS; CORRECT?  
02:09PM 19 A. NO.  
02:09PM 20 Q. LET'S LOOK AT SOME OF THE DATA THAT WAS PROVIDED TO YOU ON  
02:09PM 21 OCTOBER 21. LET'S START OUT WITH YOUR SURVEY.  
02:09PM 22 IT'S FILLED OUT ONLINE; CORRECT?  
02:09PM 23 A. CORRECT.  
02:09PM 24 Q. AND THE FIRST QUESTION THAT WAS ASKED LOOKS LIKE THIS FROM  
02:09PM 25 YOUR REPORT AT 107. QUESTION 1 IS, HOW OLD ARE YOU; RIGHT?

02:09PM 1  
02:09PM 2  
02:09PM 3  
02:10PM 4  
02:10PM 5  
02:10PM 6  
02:10PM 7  
02:10PM 8  
02:10PM 9  
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02:10PM 25

A. YES.

Q. AND BY THE WAY, PEOPLE WHO WANT TO GET PAID HAVE TO MAKE IT ALL THROUGH THE SURVEY QUESTION 22. IF FOR SOME REASON THEY'RE DROPPED BEFORE THEN, THEY DON'T GET PAID; RIGHT?

A. I THINK THAT COULD BE RIGHT, BUT SITTING HERE, I DON'T HAVE A DEFINITIVE ANSWER ON THAT.

Q. WELL, DID YOU TESTIFY TO THAT EFFECT AT YOUR DEPOSITION?

A. IT'S POSSIBLE THAT I HAD BEEN TOLD PRIOR TO THAT DEPOSITION THAT THAT'S HOW IT WORKED.

SITTING HERE, I CAN'T TELL YOU WHAT THE QUALIFICATIONS ARE TO ACTUALLY BE PAID.

Q. DO YOU RECALL TESTIFYING THAT, QUOTE, "MY UNDERSTANDING IS THAT YOU ONLY GET COMPENSATION AT THE MARGIN, THAT IS, FOR COMPLETING THE SURVEY"?

A. OKAY, I SAID THAT. BUT IT'S POSSIBLE GOING INTO THAT DEPOSITION I ASKED SOMEBODY HOW YOU GOT PAID.

BUT SITTING HERE, IT'S JUST NOT A FACT THAT I CAN RECALL.

Q. WAS THAT YOUR TESTIMONY?

A. THAT WAS -- I DON'T KNOW. I DON'T HAVE MY DEPOSITION TRANSCRIPT.

Q. LET'S PUT IT UP. SINGER DEPOSITION, 172, 16 TO 21.

"DO YOU KNOW IF THE INCENTIVE WAS PROVIDED TO RESPONDENTS WHO DIDN'T COMPLETE THE SURVEY?

"ANSWER: MY UNDERSTANDING IS THAT YOU ONLY GET COMPENSATION AT THE MARGIN, THAT IS FOR COMPLETING THE SURVEY.

02:11PM

1

YOU DON'T GET INCREMENTAL COMPENSATION UNLESS YOU COMPLETE THE

02:11PM

2

SURVEY."

02:11PM

3

WAS THAT YOUR TRUTHFUL TESTIMONY?

02:11PM

4

A. YES.

02:11PM

5

Q. SO THE FIRST SUBSTANTIVE QUESTION IS QUESTION 4; RIGHT?

02:11PM

6

WE'LL PUT UP QUESTION 4. IT ASKS ABOUT FITNESS OFFERINGS.

02:11PM

7

A. YES.

02:11PM

8

Q. AND FOR THAT QUESTION, THAT'S WHERE YOU QUALIFY WHETHER

02:11PM

9

YOU'RE GOING TO GET SUPERNATURAL SUBSCRIBERS OR NOT? IF PEOPLE

02:11PM

10

DON'T CHECK THE BOX FOR SUPERNATURAL HERE, THEY GET TOSSED FROM

02:11PM

11

THE SURVEY?

02:11PM

12

A. THAT IS THE FIRST OF FOUR FILTERS, YES.

02:11PM

13

Q. BUT IT'S A FILTER THOUGH, ISN'T IT?

02:11PM

14

A. YES. WE'RE TRYING TO IDENTIFY WHO IS SUPERNATURAL WITHOUT

02:11PM

15

LETTING THEM KNOW THAT THIS IS ABOUT SUPERNATURAL.

02:11PM

16

Q. AND IT'S NOT A CONFUSING QUESTION, IS IT?

02:11PM

17

A. I DIDN'T THINK IT WOULD BE CONFUSING, OF COURSE, WHEN I

02:11PM

18

DRAFTED IT AT THE TIME.

02:11PM

19

Q. WELL, LET'S READ IT. "WHICH OF THE FOLLOWING FITNESS

02:11PM

20

OFFERINGS DO YOU REGULARLY USE (I.E. USE MORE THAN ONCE PER

02:12PM

21

MONTH)? (SELECT ALL THAT APPLY.)"

02:12PM

22

VERY CLEAR, THOUGH, RIGHT?

02:12PM

23

A. I WOULD HOPE SO. BUT YET WE GOT A SUBSET OF CUSTOMERS WHO

02:12PM

24

CHECKED ALL OF THE BOXES.

02:12PM

25

SO YOU WOULD HOPE IT WAS CLEAR, BUT ONE OF TWO THINGS

02:12PM 1 COULD HAVE HAPPENED.

02:12PM 2 WE HAD 21 RESPONDENTS, YOUR HONOR, OF THE 150 WHO CHECKED

02:12PM 3 ALL OF THE BOXES HERE.

02:12PM 4 Q. I'M JUST ASKING IF THE QUESTION WAS CLEAR. I DON'T THINK

02:12PM 5 WE NEED A WHOLE LOT OF EXPLANATION.

02:12PM 6 A. OH.

02:12PM 7 Q. IS THE QUESTION CLEAR OR NOT CLEAR?

02:12PM 8 A. I THOUGHT IT WAS CLEAR WHEN I WROTE IT AT THE TIME, YES.

02:12PM 9 Q. GREAT.

02:12PM 10 SO THE TIMING FOR THIS IS IN OCTOBER; RIGHT?

02:12PM 11 A. CORRECT.

02:12PM 12 Q. AND SO YOU'RE ASKING PEOPLE WHAT THEY USE REGULARLY IN

02:12PM 13 OCTOBER?

02:12PM 14 A. YES.

02:12PM 15 Q. AND THERE'S NO WAY FOR A RESPONDENT TO KNOW WHAT THE RIGHT

02:12PM 16 ANSWER TO QUESTION 4 IS, CORRECT, IN THE SENSE THAT YOU DON'T

02:12PM 17 KNOW WHICH BOX YOU HAVE TO CHECK TO BE ALLOWED TO CONTINUE IN

02:12PM 18 THE SURVEY; TRUE?

02:12PM 19 A. YOU DON'T KNOW WHICH BOX YOU HAVE TO CHECK, THAT'S

02:12PM 20 CORRECT, YES.

02:12PM 21 Q. OKAY. AS YOU SAID, YOU CAN'T TELL PEOPLE THIS IS FOR

02:12PM 22 SUPERNATURAL SUBSCRIBERS BECAUSE THAT WOULD BIAS THE SURVEY;

02:13PM 23 CORRECT?

02:13PM 24 A. IT COULD IF THEY KNEW WHAT IT WAS ABOUT, YES.

02:13PM 25 Q. BUT ONE WAY YOU COULD MAKE SURE YOU GOT TO CONTINUE IN THE

02:13PM 1 SURVEY AND GET PAID WOULD BE TO CHECK ALL OF THE BOXES; RIGHT?

02:13PM 2 A. RIGHT. WELL, I MEAN, THAT COULD BE THE MOTIVATION.

02:13PM 3 I THINK MORE LIKELY WHAT HAPPENED IS THAT THOSE 21

02:13PM 4 PEOPLE -- 21 OF THE 150 CHECKED ALL OF THE BOXES.

02:13PM 5 I KNOW THAT COUNSEL'S INTERPRETATION WAS THAT THEY WERE

02:13PM 6 LYING. ANOTHER INTERPRETATION WAS THAT THEY JUST MISUNDERSTOOD

02:13PM 7 THE QUESTION.

02:13PM 8 BUT IMPORTANTLY, IF YOU EXCLUDE ALL 21 OF THOSE

02:13PM 9 RESPONDENTS --

02:13PM 10 Q. THAT'S REALLY BEYOND THE QUESTION.

02:13PM 11 A. YOU DON'T WANT THIS TO COME OUT AND YOU DON'T WANT THE

02:13PM 12 JUDGE TO KNOW THIS; RIGHT?

02:13PM 13 Q. PLEASE ANSWER MY QUESTION.

02:13PM 14 THE COURT: PLEASE TALK ONE AT A TIME.

02:13PM 15 ASK YOUR NEXT QUESTION.

02:13PM 16 BY MR. HANSEN:

02:13PM 17 Q. LET'S HAVE THE QUESTION, PLEASE.

02:13PM 18 IT'S TRUE, IS IT NOT, THAT A PERSON COULD CHECK ALL 27 OF

02:13PM 19 YOUR BOXES AND STILL BE ALLOWED TO CONTINUE IN YOUR SURVEY?

02:13PM 20 TRUE OR FALSE?

02:13PM 21 A. YOU COULD CONTINUE THROUGH HERE, BUT YOU WOULD HAVE TO

02:13PM 22 PASS THREE MORE TESTS BEFORE WE WOULD RULE YOU IN AS A

02:14PM 23 SUPERNATURAL PAYING SUBSCRIBER.

02:14PM 24 Q. BUT IN THOSE THREE MORE TESTS, YOU KNOW THE ANSWER IS

02:14PM 25 SUPERNATURAL BECAUSE IT'S BEING ASKED SPECIFICALLY ABOUT

02:14PM 1  
02:14PM 2  
02:14PM 3  
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02:15PM 20  
02:15PM 21  
02:15PM 22  
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02:15PM 24  
02:15PM 25

SUPERNATURAL; CORRECT?  
A. CORRECT.  
Q. OKAY. SO THE ONLY ONE YOU DON'T KNOW FROM THE QUESTION,  
OR THE RIGHT ANSWER IS SUPERNATURAL, IS QUESTION 4; CORRECT?  
A. CORRECT.  
Q. LET'S NOW LOOK AT THE DATA.  
YOU CHARACTERIZED IN YOUR REBUTTAL REPORT THAT THERE ARE,  
QUOTE, A HANDFUL OF SPECIFIC RESPONSES THAT ARE IN DISPUTE.  
DO YOU RECALL THAT PART OF YOUR REPORT?  
A. NO. I'M SORRY. I'VE SAID QUITE CLEARLY THERE ARE ALL 21  
WHO CHECKED THE BOXES. I DON'T KNOW IF YOU WANT TO CALL A THAT  
A HANDFUL OR NOT. IT'S 21 OUT OF 150.  
BUT IMPORTANTLY, IF YOU REMOVE ALL 21, THERE'S NO  
EFFECT -- IF YOU REMOVE THE 21 RESPONDENTS WHO CHECKED ALL  
OPTIONS, THERE IS BARELY ANY EFFECT, NO EFFECT ON THE ACTUAL  
SHARE LOSS. IT STILL COMES IN BELOW THE CRITICAL LOSS AND,  
THEREFORE, IT HAS NO EFFECT ON THE OUTCOME OF THE SURVEY.  
Q. WITH ALL RESPECT, COULD YOU PLEASE ANSWER MY QUESTION?  
MY QUESTION WAS WHETHER YOU PUT IN YOUR REBUTTAL REPORT  
THAT THERE WERE A HANDFUL OF SPECIFIC RESPONSES THAT WERE  
CRITICIZED BY DR. DUBE?  
A. OH, NOW YOU'RE SAYING RESPONSES.  
SO THERE WERE A HANDFUL OF RESPONSES -- MAYBE I'M CONFUSED  
WITH RESPONSES.  
Q. LET'S LOOK AT YOUR REBUTTAL REPORT AT PARAGRAPH 101.

02:15PM 1  
02:15PM 2  
02:15PM 3  
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02:15PM 6  
02:15PM 7  
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02:15PM 9  
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02:16PM 11  
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02:16PM 25

DIDN'T YOU WRITE AT PARAGRAPH 101 THAT "DR. DUBE POINTS TO A HANDFUL OF SPECIFIC RESPONSES IN IMPLYING THAT MY SURVEY OVERALL IS UNRELIABLE."

IS THAT WHAT YOU WROTE?

A. YES.

Q. SO YOU THINK THERE ARE ONLY A HANDFUL OF SPECIFIC RESPONSES THAT ARE AT ISSUE HERE; IS THAT RIGHT?

A. I THINK "HANDFUL" WAS MEANT IN RELATIONSHIP TO THE QUESTIONS. MAYBE THAT WAS AN INARTFUL WAY OF DOING IT.

BUT I THINK DR. DUBE SEIZED IN ON QUESTION 4 AND THE RESPONSES TO QUESTION 4 AND THE RESPONSES TO QUESTION 6.

Q. LET'S LOOK AT SOME SPECIFIC RESPONSES TO SEE IF WE'RE TALKING ABOUT A HANDFUL.

IF YOU HAVE IN YOUR BINDER DX1314 AT TAB 10, THAT'S THE PRINTOUT OF THE EXCEL DATA REGARDING A PARTICULAR RESPONDENT, WHO IS NUMBER 77.

AND WE CAN HELP YOU. IF YOU LOOK AT THE TAB FOR DX -- TAB 10 OF 13 AND WE WILL PUT UP ON THE SCREEN -- DX1314 IS THE EXHIBIT, AND TAB 10 IN YOUR BINDER.

DO YOU HAVE IT?

THE COURT: WHAT PAGE IS THAT ON?

MR. HANSEN: YOUR HONOR, IT IS --

MR. LOWDON: YOUR HONOR, IT'S THE FINAL TAB IN THE BINDER.

BY MR. HANSEN:

02:55PM 1 IT'S CONCEIVABLE, AS I SAID BEFORE, IF THIS IS ALL WE KNEW  
02:55PM 2 ABOUT THE PERSON, COULD HE BE USING AN ERGATTA AT A GYM IN  
02:55PM 3 ADDITION TO SUPERNATURAL? IT'S CONCEIVABLE.

02:55PM 4 Q. I'M NOT THERE YET.

02:55PM 5 THE FIRST QUESTION IS -- THIS IS AN ERGATTA AT THE TOP;  
02:55PM 6 RIGHT?

02:55PM 7 A. YES.

02:55PM 8 Q. OKAY. WHEREVER IT MAY BE USED.

02:55PM 9 BUT MR. 77 DOESN'T JUST USE AN ERGATTA REGULARLY, HE ALSO  
02:55PM 10 SAYS HE REGULARLY USES SOMETHING CALLED A HYDROW; ISN'T THAT  
02:55PM 11 RIGHT?

02:55PM 12 A. I DON'T KNOW. IF HE'S ONE OF THE 21 WHO CHECKED ALL OF  
02:55PM 13 THE BOXES, THEN, YES, HE SAID HE DID THAT AS WELL.

02:55PM 14 Q. DO YOU WANT TO CHECK THE DATA TO SEE IF I'M  
02:55PM 15 MISREPRESENTING?

02:55PM 16 A. IF YOU'RE TELLING ME THAT HE CHECKED ALL OF THE BOXES,  
02:55PM 17 I'LL BELIEVE YOU. THERE WERE 21. I KNOW THIS. THIS HAS BEEN  
02:55PM 18 THE SUBJECT OF THE ENTIRETY OF MY DEPOSITION AND ONE OF YOUR  
02:55PM 19 EXPERT REPORTS.

02:55PM 20 Q. LET'S SEE WHAT THAT LOOKS LIKE. THAT'S ANOTHER VERY LARGE  
02:55PM 21 AND BULKY ROWING MACHINE THAT COSTS \$4,194, PLUS \$68 A MONTH;  
02:56PM 22 CORRECT?

02:56PM 23 A. CORRECT.

02:56PM 24 Q. NOW, LET'S SEE IF WE CAN AGREE ON THIS. NO ONE REGULARLY  
02:56PM 25 USES TWO DIFFERENT EXPENSIVE ROWING MACHINES EVERY MONTH, DO

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THEY?

A. I CAN'T SAY THAT. WHAT IF YOU HAD ONE IN YOUR HOME AND ONE IN A GYM? I JUST DON'T KNOW.

Q. DIDN'T YOU SAY AT YOUR DEPOSITION THAT YOU FOUND THIS, QUOTE, FAIRLY IMPLAUSIBLE?

A. I DID FIND IT IMPLAUSIBLE, AND I DO CONTINUE TO FIND IT IMPLAUSIBLE, THAT MR. 77, OR ANY OF THE RESPONDENTS WHO CHECKED ALL OF THE BOXES, REGULARLY USE ALL OF THESE FITNESS PRODUCTS.

Q. WELL, THAT WASN'T MY QUESTION.

DO YOU THINK IT'S PLAUSIBLE THAT A SINGLE USER COULD PURCHASE EXPENSIVE ROWING MACHINES OF TWO DIFFERENT TYPES THAT THEY REGULARLY USE?

A. THAT'S NOT -- I DON'T KNOW. BUT THAT'S CERTAINLY NOT IMPLICATED BY THE SURVEY QUESTION.

THE QUESTION IS USE. THEY DON'T SAY PURCHASE. IT JUST SAYS, WHAT DO YOU REGULARLY USE?

IF YOU'RE AT A GYM, YOU COULD USE TENS OF THOUSANDS OF DOLLARS WORTH OF EQUIPMENT THAT YOU DON'T PURCHASE.

Q. TAKE A LOOK AT YOUR DEPOSITION, PAGE 231, LINES 18 TO 21.

"QUESTION: DO YOU THINK IT'S PLAUSIBLE THAT A SINGLE USER COULD PURCHASE EXPENSIVE ROWING MACHINES OF TWO DIFFERENT TYPES THAT THEY REGULARLY USE?

"ANSWER: I'LL GRANT YOU IT'S FAIRLY IMPLAUSIBLE."

THAT WAS YOUR TESTIMONY; CORRECT?

A. IT STILL IS.

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Q. IS NUMBER 77 ALONE WITH THIS FALSE ANSWER THAT HE USES TWO DIFFERENT ROWING MACHINES REGULARLY EVERY MONTH?

A. I DON'T UNDERSTAND WHAT YOU MEAN BY "THIS FALSE ANSWER."

Q. THE ONE WE JUST WENT THROUGH WHERE HE SAID HE USES BOTH OF THEM REGULARLY.

A. AGAIN, I'M NOT GOING TO -- I'M NOT IN A POSITION TO INFER THAT HE'S FALSELY, INTENTIONALLY FALSELY GIVING US WRONG ANSWERS.

IT'S CONCEIVABLE THAT HE'S MISINTERPRETED THIS QUESTION TO MEAN WHICH ONES HAVE YOU USED IN THE PAST OR ASPIRE TO USE?

Q. OKAY. ARE YOU AWARE THAT 43, 43 OF YOUR 150 RESPONDENTS CLICKED, CHECKED BOXES CLAIMING THEY REGULARLY USE BOTH OF THESE EXPENSIVE ROWING MACHINES?

A. I'M NOT AWARE OF THAT.

Q. SO IF DR. DUBE COMES AND SAYS HE SEES THAT IN YOUR DATA, YOU HAVE NO BASIS TO DISPUTE IT; RIGHT?

A. THE DATA SAY WHAT THEY SAY.

Q. ARE WE DONE WITH 77'S FALSE ANSWERS?

I'LL ANSWER MY OWN QUESTION.

LET'S TALK ABOUT SOMETHING CALLED AN ICAROS.

DO YOU KNOW WHAT THAT IS?

A. I DON'T KNOW SITTING HERE.

Q. DON'T YOU THINK IT WAS YOUR RESPONSIBILITY TO ACTUALLY LOOK INTO THESE THINGS THAT YOUR RESPONDENTS WERE SAYING THAT THEY USED?

02:58PM 1 A. NO. THIS IS A BACKGROUND QUESTION. IT WAS A SUBTLE WAY  
02:58PM 2 OF A FIRST PASS OF WHO USES SUPERNATURAL, AND HAD WE ALLOWED  
02:58PM 3 THIS KIND OF PERSON IN BASED SOLELY ON HIS ANSWERS TO Q4, I CAN  
02:58PM 4 UNDERSTAND SOME AMOUNT OF SENSITIVITY.

02:58PM 5 BUT INSTEAD WE MAKE SOMEONE ATTEST ON FOUR SEPARATE  
02:58PM 6 OCCASIONS THAT THEY'RE SUPERNATURAL USERS.

02:58PM 7 SO WHAT OTHER THINGS THEY SAID THEY WERE USING IN THE  
02:59PM 8 BACKGROUND QUESTION IS OF MINIMAL INTEREST.

02:59PM 9 Q. LET'S SEE WHAT AN ICAROS LOOKS LIKE.

02:59PM 10 IT'S A BIZARRE LOOKING CONTRAPTION, ISN'T IT?

02:59PM 11 A. I'LL AGREE WITH YOU ON THAT. IT IS BIZARRE.

02:59PM 12 Q. DID YOU KNOW WHAT IT LOOKED LIKE BEFORE I SHOWED YOU THE  
02:59PM 13 PICTURE?

02:59PM 14 A. I DON'T THINK I'VE SEEN ONE BEFORE.

02:59PM 15 Q. PRETTY RARE DEVICE, ISN'T IT?

02:59PM 16 A. I DON'T KNOW.

02:59PM 17 Q. DO YOU KNOW IF YOU COULD EVEN BUY THIS OUTSIDE OF EUROPE?

02:59PM 18 A. I DON'T KNOW. BUT I DON'T KNOW IF GYMS IN AMERICA HAVE  
02:59PM 19 THEM.

02:59PM 20 Q. DO YOU KNOW IF IT'S PRICED IN EUROS IF YOU GO ONLINE TO  
02:59PM 21 LOOK FOR IT?

02:59PM 22 A. NO, I DON'T KNOW.

02:59PM 23 Q. SO LET'S SEE HOW MANY OF YOUR RESPONDENTS SAY THEY OWN  
02:59PM 24 THIS BIZARRE CONTRAPTION. IT'S 48 OUT OF THE 150, ISN'T IT?

02:59PM 25 A. I'M SORRY. YOU'RE MISREPRESENTING WHAT THE RESPONDENTS

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SAY.

THE QUESTION WAS, WHAT DO YOU REGULARLY USE? YOU KEEP CONVERTING IT TO OWN. I KNOW THAT MAKES IT BETTER FOR YOU.

BUT LET'S AT LEAST TRY TO HUG TO WHAT THE QUESTION WAS.

Q. DO YOU KNOW HOW MANY OF YOUR RESPONDENTS CHECKED THE BOX SAYING THAT THEY REGULARLY USE THIS ICAROS CONTRAPTION?

A. NO, I DON'T.

Q. WOULD IT SURPRISE YOU THAT IT WAS 48 OUT OF 150, OR JUST ABOUT A HAIR SHORT OF A THIRD?

A. NO.

Q. THERE IS NO WAY THAT A THIRD OF YOUR 150 RESPONDENTS ACTUALLY REGULARLY USE THIS THING, IS THERE?

A. I WOULD TEND TO AGREE THAT SOMETHING IS SEEMINGLY IRRATIONAL WITH THESE 21 RESPONDENTS WHO CHECKED ALL OF THE SURVEY RESPONSES.

BUT AGAIN, YOU KNOW, THE QUESTION IS, WHAT DO WE DO IN RESPONSE TO THAT? DO WE RUN AWAY FROM THE SURVEY?

Q. WITH ALL REQUEST, I'LL ASK THE QUESTIONS OR THE JUDGE WILL ASK THE QUESTIONS. WILL YOU PLEASE ANSWER MINE?

A. SURE. I THOUGHT I WAS ANSWERING IT.

Q. NO. YOU'RE POSING QUESTIONS YOURSELF AND GIVING A SPEECH.

LET ME ASK ANOTHER QUESTION. WE'RE NOT TALKING ABOUT 21 PEOPLE HERE. WE'RE TALKING ABOUT 48 OUT OF 150 RESPONDENTS.

THERE IS NO WAY THAT 48 OUT OF YOUR 150 RESPONDENTS REGULARLY USE THIS CONTRAPTION, IS THERE?

03:01PM 1 A. IT SEEMS IMPLAUSIBLE THAT 48 DO. BUT I CAN'T RULE OUT  
03:01PM 2 THAT ANY ONE OF THEM USES IT, NO MATTER HOW REMOTE THE  
03:01PM 3 CONTRAPTION IS.

03:01PM 4 Q. MR. 77 ALSO SAYS THAT HE USES SOMETHING CALLED  
03:01PM 5 NIKE+ KINECT TRAINING; TRUE?

03:01PM 6 A. I DON'T KNOW BY MEMORY, BUT I'M GOING TO ASSUME THAT YOU  
03:01PM 7 PICKED HIM BECAUSE HE DID ALL OF THE -- HE PICKED ALL OF THE  
03:01PM 8 OPTIONS.

03:01PM 9 Q. I'M GOING TO ASK YOU ABOUT HIM BECAUSE HE PICKED THIS  
03:01PM 10 PARTICULAR OPTION, WHICH IS WHAT I'M TELLING YOU ABOUT. IF YOU  
03:01PM 11 WANT TO CHECK THE DATA, PLEASE TAKE A MINUTE AND DO SO.

03:01PM 12 DO YOU DISPUTE THAT MR. 77 CLICKED THE BOX SAYING THAT HE  
03:01PM 13 REGULARLY USES NIKE+ KINECT TRAINING?

03:01PM 14 A. I DON'T KNOW WHAT 20 -- I DON'T KNOW WHAT MR. 77 SAID ON  
03:01PM 15 THAT.

03:01PM 16 Q. WELL, DO YOU KNOW WHAT NIKE+ KINECT TRAINING IS?

03:01PM 17 A. I HAVE A -- I DON'T HAVE A VERY CONCRETE UNDERSTANDING OF  
03:01PM 18 WHAT NIKE+ KINECT TRAINING IS.

03:01PM 19 Q. OKAY. LET'S TAKE A LOOK AT IT SO WE CAN GET YOU ORIENTED.  
03:01PM 20 IT HAS THESE DIFFERENT PIECES.

03:02PM 21 THIS IS AN EASY ONE, ISN'T IT, BECAUSE MR. 77 CAN'T BE  
03:02PM 22 REGULARLY USING THIS AT ALL BECAUSE MICROSOFT DISCONTINUED  
03:02PM 23 NIKE+ KINECT IN 2017.

03:02PM 24 DO YOU KNOW THAT?

03:02PM 25 A. NO, I DON'T KNOW THAT.

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Q. IT'S NOT POSSIBLE FOR PEOPLE TO BE USING A PRODUCT DISCONTINUED FIVE YEARS AGO, ISN'T IT?

A. WE WOULDN'T HAVE PUT IT IN OUR LIST OF ALTERNATIVES IF IT WAS UNAVAILABLE.

AND EVEN IF IT WERE REMOVED FROM THE MARKET, THAT WOULDN'T REMOVE THE POSSIBILITY THAT IT WAS STILL IN SOMEONE'S HOME OR SOMEONE'S GYM.

Q. 87, 87 OF YOUR 150 RESPONDENTS CLICKED ON THE BOX ATTESTING THAT THEY REGULARLY USE THIS DISCONTINUED NIKE+ KINECT FITNESS PRODUCT.

DO YOU KNOW THAT?

A. NO, I DON'T KNOW THAT.

Q. DO YOU HAVE ANY BASIS FOR DISPUTING DR. DUBE IF HE COMES TO COURT AND SAYS THAT HE'S ACTUALLY READ YOUR DATA AND COMES UP WITH THAT NUMBER?

A. I DON'T HAVE A BASIS TO DISPUTE, BUT THEY ARE WHAT THEY ARE.

Q. 87 OF 150 RANDOMIZED SURVEYED RESPONDENTS SIMPLY CAN NOT ALL BE REGULARLY USING A PRODUCT THAT HAS NOT BEEN SOLD FOR FIVE YEARS, CAN THEY?

A. IF, IF WHAT YOU'RE SAYING IS TRUE, AND I HAVE NO -- THERE'S NOTHING IN THE RECORD TO SUGGEST IT'S TRUE, I THINK YOU'RE JUST OFFERING TESTIMONY -- BUT IF WHAT YOU'RE SAYING IS TRUE, THEN IT BECOMES IMPLAUSIBLE, YES.

Q. SO BECAUSE WE DON'T HAVE ALL DAY, I'M GOING TO PAUSE HERE

03:03PM 1 BECAUSE WE'RE NOT GOING TO GET MR. 77 ALL OF THE WAY FIT, HE'S

03:03PM 2 NOW TOLD US THAT HE REGULARLY USES MORE THAN 10 OF THE 27

03:03PM 3 LISTED FITNESS PRODUCTS, CORRECT, AND WE HAVE GONE THROUGH TEN?

03:03PM 4 A. I DON'T KNOW IF WE'VE GONE THROUGH TEN, BUT SURE.

03:03PM 5 Q. OKAY. ACCEPT MY REPRESENTATION. I THINK WE'VE GONE

03:03PM 6 THROUGH TEN.

03:03PM 7 THERE'S LITERALLY NO WAY THAT NUMBER 77 COULD TRUTHFULLY

03:03PM 8 ANSWER THAT HE REGULARLY USES, REGULARLY USES ALL 10 OF 27

03:03PM 9 LISTED FITNESS PRODUCTS, IS THERE?

03:03PM 10 A. I THINK THAT THERE ARE GOING TO BE SOME FOLKS WHO, AT A

03:04PM 11 GYM, USE MULTIPLE PIECES OF EQUIPMENT, SO I CAN'T RULE OUT --

03:04PM 12 IF THIS WAS JUST ONE PERSON, COULD I SAY WITH 100 PERCENT

03:04PM 13 CERTAINLY HE WAS WRONG? I COULDN'T DO THAT JUST BY CHECKING

03:04PM 14 TEN BOXES OF EQUIPMENT THAT COULD BE IN A GYM THAT HE WORKS OUT

03:04PM 15 IN.

03:04PM 16 Q. WELL, DO YOU KNOW HOW MANY PEOPLE IN YOUR SURVEY RESPONDED

03:04PM 17 THAT THEY REGULARLY USE TEN OF THE LISTED FITNESS APPS?

03:04PM 18 A. I DO NOT.

03:04PM 19 Q. WOULD IT SURPRISE THAT YOU 90, 9-0, OF YOUR 150

03:04PM 20 RESPONDENTS CLICKED ON TEN BOXES INDICATING REGULAR USE OF TEN

03:04PM 21 DIFFERENT FITNESS PRODUCTS?

03:04PM 22 A. NO, IT WOULDN'T SURPRISE ME.

03:04PM 23 Q. AND THOSE WOULD BE FALSE ANSWERS, WOULDN'T THEY?

03:04PM 24 A. I DON'T NECESSARILY JUMP TO FALSE ANSWERS. I CAN CONCEDE

03:04PM 25 THAT SOME ANSWERS ARE IMPLAUSIBLE, OR COULD BE THE RESULT OF

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MISINTERPRETING THE QUESTION.

BUT I'M NOT GOING TO JUMP TO THE CONCLUSION THAT THESE 21  
RESPONDENTS WHO CHECKED ALL OF THE BOXES ARE NECESSARILY LYING.

Q. SO, AGAIN, BECAUSE WE DON'T HAVE ALL DAY, I'M GOING TO  
JUMP TO 19 FITNESS PRODUCTS, AND THERE'S A WHOLE BUNCH OTHERS  
THAT WE CAN GO THROUGH, BUT MR. 77 DID IN FACT CHOOSE THAT HE  
USED 19 FITNESS PRODUCTS; CORRECT?

A. I DON'T KNOW.

Q. WELL, IF YOU'LL ACCEPT MY REPRESENTATION ON THAT, OR CHECK  
IT IF YOU WANT IN THE DATA, HE DID, AND THAT CAN'T POSSIBLY BE  
TRUE, CAN IT?

A. IT'S SEEMINGLY IMPLAUSIBLE THAT SOMEONE WOULD GET UP TO 19  
REGULARLY.

AND SO YOUR INTERPRETATION IS THAT HE'S A LIAR, AND THE  
ALTERNATIVE EXPLANATION IS THAT HE WAS CONFUSED ABOUT THE  
QUESTION.

Q. 36 -- I'LL ASK YOU, DO YOU KNOW HOW MANY OF YOUR  
RESPONDENTS CLAIMED TO HAVE USED REGULARLY, EVERY MONTH, TEN  
DIFFERENT FITNESS PRODUCTS?

A. I'VE SEEN THE NUMBER, I THINK WE WENT THROUGH THIS IN MY  
DEPOSITION, BUT I DON'T KNOW WHAT THE NUMBER IS SITTING HERE.

Q. IT'S 36, ISN'T IT?

A. AT TEN OR MORE?

Q. TEN?

A. I DON'T BE IF THAT IS AN IMPLAUSIBLY A HIGH NUMBER. I

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WOULD SAY WITHIN ANY GIVEN ONE PERSON, IT MIGHT SEEM  
IMPLAUSIBLE. BUT YOU SAID, I'M SORRY, 34?

Q. 36 OUT OF 150 THAT USE TEN?

A. I'VE GOT IT. 36 OUT OF 150 SAID THAT THEY USE TEN  
DIFFERENT?

I CAN'T SEE THAT THAT IS IMPOSSIBLE GIVEN THAT SOME OF OUR  
RESPONDENTS COULD BE WORKING OUT AT GYMS, AND SO IF THEY ARE  
WORKING OUT AT GYMS, THEY COULD BE ROTATING ACROSS MULTIPLE  
PIECES OF EQUIPMENT.

Q. COME ON. YOU ALREADY TOLD US UNDER OATH THAT YOU KNEW  
THIS WAS FAIRLY IMPLAUSIBLE, DIDN'T YOU?

A. DURING MY DEPOSITION, THE QUESTION STARTED AT ALL 27, AND  
I CAN'T REMEMBER HOW MANY OPTIONS WE GAVE PEOPLE, AND I SAID  
THAT THAT SEEMED IMPLAUSIBLE.

AND THEN THERE WAS A QUESTION ABOUT WHETHER OR NOT I  
THOUGHT AT TEN IF IT'S IMPLAUSIBLE, AND I SAID AT TEN, I DON'T  
KNOW. AT TEN THERE COULD BE -- CAN I FINISH THE QUESTION?

Q. NO, BECAUSE I ASKED YOU ABOUT 19. SO PLEASE ANSWER MY  
QUESTION AND STOP WITH THE SPEECHES.

I'M ASKING YOU, 19 --

A. I WAS ANSWERING THE QUESTION.

THE COURT: I'M SORRY. LET'S -- DO WE NEED ANOTHER  
BREAK?

MR. HANSEN: NO, YOUR HONOR. I'M FINE.

THE COURT: LET'S JUST RESET HERE.

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MR. HANSEN: THANK YOU, YOUR HONOR.

THE COURT: WHY DON'T YOU JUST ASK YOUR QUESTION AGAIN.

MR. HANSEN: THANK YOU, YOUR HONOR. I WILL.

Q. DR. SINGER, I'M ASKING YOU ABOUT 19 DIFFERENT FITNESS PRODUCTS, NOT 21 AND NOT 10, AND I'M ASKING YOU WHETHER YOU TESTIFIED UNDER OATH AT YOUR DEPOSITION THAT YOU BELIEVED ANYONE WHO CHECKED 19 FITNESS APPS WAS IMPLAUSIBLE?

A. IF I SAID THAT AT MY DEPOSITION, AND I DO THINK THAT 19 REGULARLY USED FITNESS APPS IS SEEMINGLY HIGH AND IMPLAUSIBLE, I'LL GRANT YOU THAT.

Q. IT'S FAIRLY IMPLAUSIBLE, ISN'T IT?

A. IT SEEMS LIKE AN AWFULLY HIGH NUMBER TO ME, BUT I'M NOT REALLY IN A POSITION TO JUDGE SOMEONE AS BEING UNTRUTHFUL IN MY CAPACITY AS AN ECONOMIST.

WHAT I'M GOING TO DO, AS I TOLD YOU, IS I'M GOING TO DO IT BOTH WAYS. I'M GOING TO BRING EVERYONE IN, AND THEN UPON YOUR CRITICISM, I'M GOING TO TAKE THE 21 OUT AND I'M GOING TO RECALCULATE THE ACTUAL LOSS. THAT'S ALL I CAN DO.

Q. LOOK AT YOUR DEPOSITION, PLEASE, IT WILL BE ON THE SCREEN, PAGE 280, LINES 2 TO 4.

"QUESTION: 19 FITNESS APPS. 19 --

"ANSWER: ANY FITNESS APPS? 19 REGULARLY IS A LOT. I THINK THAT'S FAIRLY IMPLAUSIBLE."

WAS THAT YOUR TRUTHFUL TESTIMONY?

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A. IT WAS, AND IT STILL IS.

Q. AND AS YOU'VE SAID SEVERAL TIMES, MR. 77 WENT ALL OF THE WAY TO 27; RIGHT?

A. I ACTUALLY DON'T KNOW. I JUST ASSUMED THAT THAT'S WHY YOU CHOSE HIM.

Q. WELL, IF HE DID, THAT WOULD MEAN HE SPENT SOMETHING LIKE \$18,000 ON A HOME GYM IF HE BOUGHT THOSE THINGS, AND ALSO SPENDS \$543 A MONTH ON SUBSCRIPTIONS; RIGHT?

A. NO, IT'S NOT. I THINK YOU MISINTERPRET THE QUESTION. THE QUESTION IS, WHICH OF THESE DO YOU REGULARLY USE? IT DOESN'T SAY WHICH ONES DO YOU OWN IN YOUR HOME?

Q. SO WILL YOU AGREE WITH ME AT LEAST, BEFORE WE LEAVE MR. 77, THAT FOR ANYONE CLAIMING REGULAR USE OF ALL 27 OF YOUR LISTED FITNESS PRODUCTS, THAT PERSON IS NOT TELLING THE TRUTH?

A. NO, THAT'S NOT THE INFERENCE. THERE ARE SEVERAL POTENTIAL POSSIBILITIES. ONE I KNOW THAT YOU LIKE IS THAT HE'S A LIAR, BUT THE SECOND ONE IS THAT HE MISUNDERSTOOD THE QUESTION.

Q. IT'S NOT ONLY QUESTION 4 IN WHICH YOU GOT FALSE ANSWERS. LET'S GO TO QUESTION 7. QUESTION 7 HAD FALSE ANSWERS TOO, DIDN'T IT?

A. YOU'LL HAVE TO SHOW ME WHAT YOU THINK IS ANOTHER FALSE ANSWER.

Q. HAPPY TO DO SO. LET'S LOOK AT WHAT QUESTION 7 ASKS OF YOUR RESPONDENTS.

03:09PM 1 A. OKAY.

03:09PM 2 Q. YOU ASKED, "WHICH OF THE FOLLOWING VR OFFERINGS DO YOU

03:09PM 3 REGULARLY USE?"

03:09PM 4 SIMILAR TO QUESTION 4, ISN'T IT?

03:09PM 5 A. RIGHT. BUT THIS IS NARROWING THE LIST DOWN TO JUST VR.

03:09PM 6 Q. YOU SAY THIS IS JUST VR?

03:10PM 7 A. IT SAYS "WHICH OF THE FOLLOWING VR OFFERINGS."

03:10PM 8 Q. RIGHT. SO YOU WERE PROVIDED FOR THESE, ALL OF THESE VR

03:10PM 9 OFFERINGS ARE MADE AVAILABLE ON QUEST; CORRECT?

03:10PM 10 A. I DON'T THINK THAT'S RIGHT. I THINK THAT WE INCLUDED SOME

03:10PM 11 VR OFFERINGS THAT ARE ON QUEST, AS WELL AS OTHER VR PLATFORMS.

03:10PM 12 Q. BY THE WAY, THIS MORNING YOU TESTIFIED ABOUT THE NAME OF

03:10PM 13 THE DEVICE SOLD BY META. YOU CALLED IT AN OCULUS. IS THAT

03:10PM 14 CORRECT?

03:10PM 15 A. NO. OCULUS WAS THE HEADSET MANUFACTURER THAT META

03:10PM 16 ACQUIRED BACK IN 2014, BUT I REALIZE THEY MARKET THEIR PRODUCT

03:10PM 17 UNDER THE NAME QUEST, QUEST 2.

03:10PM 18 Q. THIS MORNING YOU CALLED IT AN OCULUS, DIDN'T YOU?

03:10PM 19 A. WELL, IN MY MIND IT IS MADE BY OCULUS, OR WAS MADE BY

03:10PM 20 OCULUS. WE'RE TALKING ABOUT THE SAME THING.

03:10PM 21 Q. OKAY. YOU WERE PROVIDED USAGE DATA FOR ALL OF THE LISTED

03:10PM 22 PRODUCTS ON QUEST; CORRECT?

03:10PM 23 A. I WAS.

03:10PM 24 Q. AND YOU SAY YOU ACTUALLY LOOKED AT THAT DATA; CORRECT?

03:10PM 25 A. I LOOKED AT IT, AS YOU KNOW, FOR MY HISTORIES, FOR MY

03:17PM 1  
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03:19PM 25

HAVE YOU HAD A CHANCE TO CHECK IT?  
A. WELL, I'VE CHECKED IT IN THE SENSE THAT WE WENT THROUGH THIS IN THE DEPOSITION AND A LOT OF IT TURNS ON YOUR MISUNDERSTANDING, RESPECTFULLY, OF WHAT CONSTITUTES A FALSE ANSWER, WHAT CONSTITUTES A CONTRADICTORY ANSWER.

SO I WOULDN'T AGREE OR STIPULATE TO ANY OF THE RESPONSES HERE.

Q. WELL, SOME OF THESE ARE JUST SIMPLY FACTUAL. DO YOU SEE -- OR DID YOU OR YOUR STAFF GO IN AND SEE ANY FACTUAL INACCURACY IN ANY OF THESE LISTED MATTERS?

A. DO YOU WANT TO GO THROUGH THEM? I DIDN'T CHECK -- I DON'T HAVE A WAY OF MAPPING AN IP ADDRESS INTO A STATE. I DON'T THINK I HAVE THAT CAPABILITY. SO I DIDN'T CONFIRM THIS NUMBER.

Q. WELL, LET'S SEE IF YOU'RE RIGHT. LET'S GO THROUGH THEM ONE BY ONE.

ISN'T IT TRUE, SIR, THAT 61 PERCENT, OR 91 OF YOUR 150 RESPONDENTS, SELECTED A STATE OF RESIDENCE THAT DOES NOT MATCH THEIR IP ADDRESS STATE?

A. I DON'T KNOW.

Q. ISN'T IT TRUE THAT 36 OF YOUR 150 RESPONDENTS, OR 24 PERCENT, CLAIM TO REGULARLY USE BOTH MIRROR AND TONAL DEVICES?

A. I DON'T KNOW. BUT IT DOESN'T MEAN THEY OWN BOTH, BUT THEY COULD OWN BOTH OR THEY COULD BE USING THEM IN CLUBS.

I DON'T KNOW IF THAT ANSWER IS NECESSARILY IMPLAUSIBLE OR

03:19PM 1 MAKES THEM LIARS FOR SAYING THAT THEY USE BOTH.

03:19PM 2 Q. YOU KNOW, WITH ALL RESPECT, DR. SINGER, I'M SIMPLY ASKING

03:19PM 3 ABOUT THE FACTS, NOT CONCLUSIONS TO BE DRAWN FROM THE FACTS.

03:19PM 4 THIS IS A MATTER OF DATA; RIGHT?

03:19PM 5 A. WELL, NO, BECAUSE SOMETIMES YOU USE SOMETHING LIKE

03:19PM 6 IMPOSSIBLE COMBINATIONS. LIKE, YOU'RE ASSERTING YOUR

03:19PM 7 INTERPRETATION OF THE DATA.

03:19PM 8 Q. WELL, WE'RE NOT THERE YET.

03:19PM 9 A. OKAY.

03:19PM 10 Q. STICK WITH ME, OKAY?

03:19PM 11 ISN'T IT TRUE THAT 37 OF YOUR 150 RESPONDENTS CHECKED

03:19PM 12 BOXES CLAIMING REGULAR USE OF THREE CONNECTED FITNESS BIKES?

03:19PM 13 A. I DON'T KNOW IF THEY DID.

03:19PM 14 Q. ISN'T IT TRUE THAT 43 OF YOUR 150 SURVEY RESPONDENTS CLAIM

03:19PM 15 THAT THEY REGULARLY USE TWO CONNECTED ROWING MACHINES?

03:19PM 16 A. IT'S POSSIBLE THEY SAID THAT, AND IT'S ALSO POSSIBLE THAT

03:19PM 17 THEY'RE BEING TRUTHFUL IN THAT.

03:19PM 18 Q. ISN'T IT TRUE THAT 87 OF YOUR RESPONDENTS, OR 58 PERCENT,

03:20PM 19 CLAIMED REGULAR USE OF AT LEAST ONE DISCONTINUED PRODUCT?

03:20PM 20 A. I DON'T KNOW IF THAT'S TRUE BECAUSE I'M NOT SURE THAT

03:20PM 21 THAT'S A DISCONTINUED PRODUCT.

03:20PM 22 Q. ISN'T IT TRUE THAT 48 OF YOUR 150 SURVEY RESPONDENTS

03:20PM 23 CLAIMED REGULAR USE OF THE ICAROS CONNECTED FITNESS DEVICE THAT

03:20PM 24 IS SOLD IN EUROS?

03:20PM 25 A. I DON'T KNOW IF IT'S TRUE.

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03:20PM 4  
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03:20PM 6  
03:20PM 7  
03:20PM 8  
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Q. ISN'T IT TRUE THAT 90, OR 60 PERCENT, OF YOUR RESPONDENTS CLAIM REGULAR USE OF TEN OR MORE FITNESS PRODUCTS?

A. IT'S CONCEIVABLE THEY SAID THAT. IT'S ALSO CONCEIVABLE THAT IT'S TRUE.

Q. ISN'T IT TRUE THAT 36 OF YOUR RESPONDENTS, OR 24 PERCENT, CLAIMED REGULARLY USE OF 19 OR MORE FITNESS PRODUCTS?

A. I THINK WE WENT THROUGH THIS, AND IF THAT'S WHAT THE DATA SHOW, THAT'S WHAT THE DATA SHOW.

Q. ISN'T IT TRUE THAT 21, AND YOU MENTIONED THIS NUMBER MANY TIMES, 21, OR 14 PERCENT, OF YOUR SURVEY RESPONDENTS CLAIM REGULAR USE OF ALL 27 LISTED PRODUCTS?

A. YES.

Q. ISN'T IT TRUE THAT 25, OR 17 PERCENT, OF YOUR RESPONDENTS CLAIMED REGULAR USE OF ALL NINE VR DEDICATED FITNESS APPS?

A. I DON'T RECALL THAT, BUT IT'S POSSIBLE THAT 25 PERCENT SAID YES.

Q. NOW, WE DIDN'T TALK ABOUT THIS ONE BECAUSE I DIDN'T WANT TO TAKE THE FULL AFTERNOON, BUT IN YOUR QUESTION 6, 106 OF YOUR RESPONDENTS CHECKED A BOX INDICATING THAT, HAVING PREVIOUSLY SAID THEY USE SUPERNATURAL, THEY HAD STOPPED USING SUPERNATURAL?

A. OKAY. THIS IS FALSE. YOU ARE MISREPRESENTING WHAT QUESTION 6 SAID, AND YOU DID THIS IN THE DEPOSITION AS WELL. THIS IS IMPORTANT, YOUR HONOR. I MEAN, THEY DIDN'T SAY THAT THEY HAD STOPPED.

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THE QUESTION 6 -- PULL UP QUESTION 6.

Q. WE'LL PUT THE QUESTION UP. WE'LL GET QUESTION 6 FROM YOUR SURVEY.

YOU ASKED, "WHICH OF THE FOLLOWING FITNESS OFFERINGS HAVE YOU CONSIDERED PURCHASING OR HAVE YOU USED IN THE PAST, BUT NO LONGER USE?"

AND MR. 77, OUR SURVEY EXAMPLE, CHECKED THAT HE CONSIDERED PURCHASING SUPERNATURAL OR NO LONGER USED SUPERNATURAL.

THAT CAN'T BE TRUE, CAN IT?

A. NO. YOU COULD CHECK THIS BOX AND THAT WOULD MEAN ONE OF TWO THINGS, EITHER YOU'VE CONSIDERED PURCHASING SUPERNATURAL, OR YOU'VE USED IN THE PAST, BUT NO LONGER USE IT.

Q. HE'S ALREADY PURCHASED IT, SO HE DOESN'T HAVE TO CONSIDER PURCHASING IT, DOES HE?

A. IT IS CONSISTENT THAT SOMEONE COULD INTERPRET THE FIRST HALF OF THAT QUESTION AS THAT HE HAD CONSIDERED IT AND HE HAS USED IT.

THE FACT THAT SOMEONE CHECKS BOTH BOXES ON A PARTICULAR APP IN Q4 AND 6 IS NOT NECESSARILY INCONSISTENT.

THE WAY YOU INTERPRET IT, OF COURSE, IS IN THE PAST. BUT THAT IS ONE PART OF A TWO PART QUESTION. YOU COULD CHECK THE BOX IF IT WAS EITHER OR.

Q. ARE YOU TELLING THIS COURT THAT YOUR PURPOSE IN WRITING THIS QUESTION WAS TO GET PEOPLE TO RESPOND AS TO WHETHER THEY USED SUPERNATURAL EVERY MONTH AND THEY ALSO CONSIDERED

03:23PM 1 PURCHASING SUPERNATURAL, WAS THAT YOUR INTENT IN THIS QUESTION?

03:23PM 2 A. NOT AT ALL. AND ALSO I GAVE THEM AN EITHER OR. IN FACT,

03:23PM 3 WE TOOK THIS QUESTION FROM THE EC'S GUIDANCE.

03:23PM 4 BUT WE WANTED TO KNOW HAD YOU EVER CONSIDERED IT IN THE

03:23PM 5 PAST OR HAVE YOU ACTUALLY SUBSCRIBED AND THEN DISCONTINUED?

03:23PM 6 AND THE FACT THAT SOMEONE CHECKS QUESTION 4, HE SAYS YES

03:23PM 7 TO SUPERNATURAL, AND THEN HE ALSO CHECKS Q6 DOESN'T MEAN THAT

03:23PM 8 HE'S CONTRADICTING HIMSELF. HE COULD HAVE CONSIDERED IT.

03:23PM 9 Q. LET'S GO BACK.

03:23PM 10 A. AND HE ALSO COULD BE A USER.

03:23PM 11 Q. LET'S GO BACK TO THE SUMMARY.

03:23PM 12 ISN'T IT TRUE THAT 103 OF YOUR SURVEY RESPONDENTS

03:23PM 13 REGULARLY USE OR CLAIM REGULAR USE OF THE IMPOSSIBLE

03:23PM 14 COMBINATIONS OF VR APPS THAT WE WENT THROUGH IN YOUR TESTIMONY?

03:23PM 15 A. NO, I DON'T THINK THAT'S TRUE.

03:23PM 16 I THINK THAT YOU ASSERT THAT THEY'RE IMPOSSIBLE BECAUSE

03:23PM 17 YOU ASSUME INCORRECTLY THAT THE QUESTION WAS JUST ON THE QUEST

03:24PM 18 STORE. AND THE QUESTION WAS JUST BROADLY, WHICH ONE RUNS HAVE

03:24PM 19 YOU USED OR WHICH ONES DO YOU REGULARLY USE AMONG VR?

03:24PM 20 AND SO I DON'T THINK THAT ALL 103 OF THOSE WOULD BE

03:24PM 21 IMPOSSIBLE.

03:24PM 22 Q. DO YOU HAVE ANY IDEA HOW MANY OF YOUR 150 RESPONDENTS GAVE

03:24PM 23 ANSWERS THAT WERE DEMONSTRABLY INCORRECT IF NOT OUTRIGHT FALSE?

03:24PM 24 A. NO, AND I THINK THIS IS A PLACE WHERE WE MIGHT

03:24PM 25 RESPECTIVELY DISAGREE.

03:24PM 1  
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03:24PM 8  
03:25PM 9  
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WHEN SOMEONE CHECKS A BOX THAT ALL 21 OR ALL 27 OFFERINGS ON Q4, I DON'T KNOW IF HE IS NECESSARILY BEING FALSE. I THINK THAT IT'S POSSIBLE THAT HE MISUNDERSTOOD THE QUESTION.

IN ANY EVENT, I DON'T USE QUESTION 4 EXCEPT FOR ONE FILTER ON SUPERNATURAL. AND IN ANY EVENT, AS I KEEP REPEATING, WHEN WE REMOVE THESE 21 RESPONDENTS WHO CHECKED ALL THE BOXES, IT DOESN'T CHANGE THE ACTUAL SHARE LOSS.

Q. YOU DIDN'T ACTUALLY GET 150 SUPERNATURAL SUBSCRIBERS, DID YOU?

A. I THINK WE DID.

Q. YOUR DATA HAS A FIELD FOR EMAIL ADDRESSES, DOESN'T IT?

A. I BELIEVE SO. I ACTUALLY DON'T KNOW SITTING HERE.

Q. WELL, YOU NEVER ASKED FOR ANYBODY'S EMAIL ADDRESS AS YOU LOOKED AT THESE WHAT YOU CALL DATA --

A. I ACTUALLY THINK IT WOULD BE A VIOLATION OF SOMEONE'S PRIVACY IF THEY'RE TAKING A SURVEY, FOR US TO GO ASK THEM OR THE PANEL PROVIDER WHAT THEIR EMAIL WAS SO WE COULD CONTACT THEM.

I FEEL LIKE WHEN SOMEONE RESPONDS TO A SURVEY, IT'S IMPLICIT THAT THIS IS ANONYMOUS AND THEIR DATA ISN'T GOING TO BE USED AGAINST THEM.

Q. AFTER THESE QUESTIONS AROSE ABOUT THE LEGITIMACY OF YOUR DATA, YOU NEVER REQUESTED EMAIL ADDRESSES TO CHECK, DID YOU?

A. I DON'T THINK THERE WERE -- I DON'T THINK ANYTHING ROSE TO THE LEVEL OF THE LEGITIMACY OF THE DATA. AND EVEN IF I DID, I

03:25PM 1 DON'T THINK IT WOULD BE APPROPRIATE TO CONTACT SURVEY  
03:25PM 2 RESPONDENTS.  
03:25PM 3 Q. SO THE ANSWER IS THAT YOU DIDN'T ASK FOR THAT INFORMATION?  
03:25PM 4 A. CORRECT.  
03:25PM 5 Q. BUT YOU'RE AWARE THAT WE SUBPOENAED THAT INFORMATION;  
03:26PM 6 CORRECT?  
03:26PM 7 A. I LEARNED, I THINK THIS MORNING, THAT YOU HAVE SUBPOENAED  
03:26PM 8 EMAIL ADDRESSES FROM ONE OF THE PANEL PROVIDERS.  
03:26PM 9 Q. AND WE ACTUALLY GOT SIX EMAIL ADDRESSES FROM A PLACE  
03:26PM 10 CALLED DYNETICS; RIGHT?  
03:26PM 11 A. THAT'S WHAT YOUR DECLARATION SEEMS TO ASSERT, YES.  
03:26PM 12 Q. WELL, IT'S DYNETICS DECLARATION, ISN'T IT?  
03:26PM 13 A. I'VE SEEN THE EMAIL CORRESPONDENCE BETWEEN KELLOGG AND  
03:26PM 14 THESE WITNESSES, AND I RECOGNIZE THAT THEY WERE FED CERTAIN  
03:26PM 15 LINES, YES.  
03:26PM 16 Q. DYNETICS EXECUTED UNDER PENALTY OF PERJURY A SWORN  
03:26PM 17 DECLARATION; CORRECT?  
03:26PM 18 A. YES.  
03:26PM 19 Q. ARE YOU CALLING THEM LIARS, TOO?  
03:26PM 20 A. I DIDN'T CALL ANYONE A LIAR.  
03:26PM 21 Q. ARE THEY NOT THE GOLD STANDARD?  
03:26PM 22 A. I NEVER SAID THAT A PARTICULAR PANEL PROVIDER CHOSEN BY  
03:26PM 23 QUALTRICS IS A GOLD STANDARD, BUT I STAND BY THE NOTION THAT  
03:26PM 24 QUALTRICS IS THE BEST YOU CAN DO IN SURVEYS.  
03:26PM 25 IF WE CAN'T USE QUALTRICS, WE'RE IN TROUBLE.

03:38PM 1 A SMALL LINE.

03:38PM 2 A. IT SAYS, YES, LITEBOXER VR WILL BE FREE TO USER WITH

03:39PM 3 EXISTING LITEBOXER ALL-ACCESS MEMBERSHIPS.

03:39PM 4 Q. AND TO KIND OF WRAP UP, THERE WERE QUESTIONS THAT YOU WERE

03:39PM 5 ASKED ABOUT THE SURVEY WHERE YOU COULD NOT FINISH YOUR ANSWER.

03:39PM 6 WHAT ELSE DID YOU INTEND TO SAY WHEN YOU WERE NOT ALLOWED

03:39PM 7 TO FINISH YOUR ANSWER ON CROSS-EXAMINATION?

03:39PM 8 A. I THINK I EVENTUALLY WAS ABLE TO SAY WHAT I WANTED TO SAY,

03:39PM 9 WHICH IS THAT THE DISPUTE SEEMS TO BE OVER 21 WHO SELECTED ALL

03:39PM 10 APPS ON A BACKGROUND QUESTION.

03:39PM 11 AND THE IMPORTANT TAKEAWAY IS THAT THE LITERATURE TELLS

03:39PM 12 YOU NOT TO THROW THEM OUT. WE GET SEEMINGLY IMPLAUSIBLE

03:39PM 13 ANSWERS IN EVERY ONE WE DO.

03:39PM 14 IN THE JUUL CASE WE HAD PEOPLE WHO SEEMED TO SHOW AN

03:39PM 15 AFFINITY FOR MORE ADDICTION THAN LESS, 15 PERCENT, AND IT JUST

03:39PM 16 HAPPENS.

03:39PM 17 THE QUESTION WE ARE ALWAYS GRAPPLING WITH IS DOES THAT

03:40PM 18 SEEMINGLY INCONCEIVABLE OR IRRATIONAL RESPONSES CAUSE US TO

03:40PM 19 WANT TO THROW THEM OUT? OF COURSE I'M SURE META WOULD SAY

03:40PM 20 THROW OUT THE ENTIRE SURVEY, BUT THAT'S PRETTY MUCH OFF THE

03:40PM 21 BOARD.

03:40PM 22 BUT WHAT WE ARE TRYING TO FIGURE OUT IS WHAT DO YOU DO

03:40PM 23 WITH THESE SEEMINGLY IRRATIONAL RESPONSES? AND MY POINT IS

03:40PM 24 THAT THE BEST PRACTICE IN THE LITERATURE IS TO KEEP THEM IN.

03:40PM 25 MCFADDEN, WHO WON A NOBEL PRIZE AND WHO HAS WRITTEN THE

03:40PM 1 BIBLE ON HOW TO DO SURVEYS, SUGGESTS THAT THE DEFAULT SHOULD BE  
03:40PM 2 LEAVE THEM IN, BUT THERE ARE PEOPLE IN THE WORLD WHO ARE A  
03:40PM 3 LITTLE WEIRD. BUT IN THE ALTERNATIVE THE MOST AGGRESSIVE  
03:40PM 4 INVENTION HERE WOULD BE TO THROW THEM OUT.

03:40PM 5 TO ME, OF ALL OF THE ATTACKS THAT HAVE COME, THE ONE THAT  
03:40PM 6 I THINK HAS THE MOST CREDIBILITY IS ON THESE 21 RESPONDENTS WHO  
03:40PM 7 CHECKED ALL, AND SAY AS AN ALTERNATIVE AS A SENSITIVITY TEST,  
03:41PM 8 WHY DON'T WE JUST REMOVE THEM AND JUST GO BACK AND RECALCULATE  
03:41PM 9 THE ACTUAL LOSS. AND IT TURNS OUT THE ACTUAL LOSS BARELY  
03:41PM 10 MOVES.

03:41PM 11 IN OTHER WORDS, SOMEONE'S PROPENSITY TO CHECK ALL BOXES  
03:41PM 12 THERE FOR WHATEVER REASON, THEY'RE LIARS AS META'S LAWYERS  
03:41PM 13 THINK OR THEY ARE -- WERE CONFUSED BY THE QUESTION, FOR  
03:41PM 14 WHATEVER REASON, THAT PROPENSITY TO CHECK ALL BOXES WAS NOT  
03:41PM 15 CORRELATED AT ALL WITH THE PROPENSITY TO MOVE AWAY OR RESPOND  
03:41PM 16 TO A PRICE INCREASE.

03:41PM 17 AT THE END OF THE DAY, WE'RE JUST INTERESTED IN HOW  
03:41PM 18 SUPERNATURAL CUSTOMERS RESPOND TO A PRICE INCREASE, RIGHT? AND  
03:41PM 19 WOULD ENOUGH OF THEM DEFECT IN ORDER TO RENDER THE PRICE  
03:41PM 20 INCREASE UNPROFITABLE?

03:41PM 21 IT'S MY OPINION THAT THE BEST PRACTICE IS TO LEAVE THEM IN  
03:41PM 22 HOWEVER SEEMINGLY IRRATIONAL THEY MIGHT LOOK, BUT EVEN IF WE  
03:41PM 23 TAKE THEM OUT, THE ACTUAL SHARE BARELY MOVES UP AND NOT BY  
03:41PM 24 ENOUGH TO OVERTAKE THE CRITICAL SHARE LOSS.

03:41PM 25 THE COURT: SO THE CRITICISM OF THE REPORT, AND

03:42PM 1 MR. HANSEN IS POINTING OUT SOMETHING THAT I THINK YOU  
03:42PM 2 ULTIMATELY AGREED WITH, IS IT'S UNUSUAL, TO DESCRIBE IT SOFTLY,  
03:42PM 3 THAT SOMEONE WOULD HAVE ALL OF THESE DIFFERENT FITNESS DEVICES  
03:42PM 4 OR HAVE ACCESS TO THEM AND USE THEM ALL.

03:42PM 5 YOU KNOW, THIS 77, I'D LIKE TO SEE THIS INDIVIDUAL. HE'S  
03:42PM 6 INCREDIBLY FIT BUT IMPLAUSIBLE, I THINK, THAT MR. HANSEN POINTS  
03:42PM 7 OUT, IT'S HIGHLY UNLIKELY.

03:42PM 8 THE WITNESS: AND I AGREE. I AGREE.

03:42PM 9 THE COURT: AND YOU ATTRIBUTE THAT TO IN YOUR  
03:42PM 10 BUSINESS IT IS COMMON THAT INDIVIDUALS WILL CHECK EACH BOX IN  
03:42PM 11 THE HOPES THAT THAT WILL GET THEM THE \$15, THE \$20, WHATEVER IT  
03:42PM 12 IS, THEY MIGHT HAVE THAT DESIRE.

03:42PM 13 THE WITNESS: THAT COULD HAVE BEEN AN EXPLANATION,  
03:42PM 14 YES, FOR HOW THEY GOT THERE. THAT COULD HAVE BEEN.

03:42PM 15 THEY COULD HAVE BEEN CONFUSED ABOUT THE QUESTION. THEY  
03:42PM 16 COULD HAVE BEEN LIARS. THERE ARE ALL SORTS OF STORIES YOU CAN  
03:42PM 17 TELL, YES.

03:42PM 18 THE COURT: ALL OF THOSE THINGS.

03:43PM 19 AND WHAT I HEAR YOU SAYING IS THAT THERE ARE 21 OF THOSE,  
03:43PM 20 WE SHOULD KEEP THEM IN FOR BETTER ANALYSIS, BUT IF I TAKE THEM  
03:43PM 21 OUT, I CAN DO ANOTHER ANALYSIS, AND IT DOESN'T DISTURB THE  
03:43PM 22 FINDINGS.

03:43PM 23 THE WITNESS: EXACTLY. THE SAME ANALYSIS. WE JUST  
03:43PM 24 RECALCULATE THE ACTUAL LOSS BUT NOW WITH A SMALLER DENOMINATOR.

03:43PM 25 THE COURT: AND MY QUESTION IS WHAT IF I JUST TOOK

03:43PM 1 THAT QUESTION OUT OF YOUR SURVEY, WOULD THE VALIDITY OF YOUR  
03:43PM 2 SURVEY, THE INTEGRITY OF IT BE DISTURBED IN ANY WAY?

03:43PM 3 THE WITNESS: NO, AND HERE'S WHY. IT WAS THE FIRST  
03:43PM 4 TIME THAT WE ALLOWED SOMEONE TO ATTEST TO BEING A SUPERNATURAL  
03:43PM 5 USER, BUT WE DID IT OVER AND OVER THROUGHOUT THE SURVEY.

03:43PM 6 WE DIDN'T GET TO SHOW YOU ALL OF THE QUESTIONS, BUT ONE OF  
03:43PM 7 THE QUESTIONS WAS HOW DO YOU SUBSCRIBE TO SUPERNATURAL? ARE  
03:43PM 8 YOU A MONTHLY SUBSCRIBER? ARE YOU ANNUAL SUBSCRIBER? OR DO  
03:43PM 9 YOU NOT SUBSCRIBE AT ALL?

03:43PM 10 SO IF SOMEONE MISTAKENLY JUST CHECKED ALL OF THE BOXES AND  
03:43PM 11 THEN THEY GOT TO THAT QUESTION, THEY'D HAVE AN OPPORTUNITY TO  
03:43PM 12 SAY, WHOOPS, I SHOULDN'T BE IN THE SURVEY ANY LONGER, NOT AT  
03:44PM 13 ALL. AND WE DID IT OVER AND OVER. WE DID FOUR TIMES TO DO A  
03:44PM 14 TEST.

03:44PM 15 AT THE END OF THE DAY, IF SOMEONE TELLS ME THAT THEY'RE A  
03:44PM 16 SUPERNATURAL SUBSCRIBER AND THEY TEST WITH FOUR TIMES, I JUST  
03:44PM 17 HAVE TO ASSUME THAT THEY'RE TELLING THE TRUTH. AND I FEEL LIKE  
03:44PM 18 THAT'S THE BEST THAT WE CAN DO IN SURVEY WORK.

03:44PM 19 THE COURT: AND WHAT ELEMENT, WHAT FACTOR DOES THIS  
03:44PM 20 PART OF YOUR SURVEY GO TO AS FAR AS YOUR ANTITRUST CLAIM, IF  
03:44PM 21 YOU CAN TELL ME THAT.

03:44PM 22 THE WITNESS: YEAH. SO WHAT DOES THE SURVEY REACH?

03:44PM 23 THE COURT: YES.

03:44PM 24 THE WITNESS: REMEMBER, WITHIN MARKET DEFINITION I  
03:44PM 25 DO A QUALITATIVE ANALYSIS AND A QUANTITATIVE, AND WITHIN THE

03:44PM 1 QUANTITATIVE WE DO THIS HYPOTHETICAL MONOPOLY TEST. WE CAN'T  
03:44PM 2 LOOK AT TRANSACTION DATA GIVEN THE LACK OF PRICE VARIATION. SO  
03:44PM 3 THE ONLY WAY THAT WE CAN JUDGE PRICE SENSITIVITY OR  
03:44PM 4 SUPERNATURAL USERS IS TO GO OUT AND FIND SUPERNATURAL USERS AND  
03:44PM 5 ASK HOW THEY RESPOND.

03:44PM 6 WE WENT WITH THE NUMBER ONE SURVEY FIRM.

03:44PM 7 THE COURT: I UNDERSTAND.

03:44PM 8 MY NEXT QUESTION IS -- I'M JUST GOING THROUGH THIS TO FIND  
03:44PM 9 OUT WHAT THE IMPORTANCE OF THIS IS TO YOUR ANALYSIS. AND NOW  
03:45PM 10 -- ALL RIGHT. IF THAT'S WHAT THIS IS DESIGNED TO DO, WHAT IF  
03:45PM 11 WE THROW IT OUT BECAUSE OF THE CRITICISMS OF MR. HANSEN? IF HE  
03:45PM 12 SAYS, JUDGE, YOU CAN'T CONSIDER THIS BECAUSE IT'S JUST  
03:45PM 13 INSECURE, THE INTEGRITY FOR ALL OF THESE DIFFERENT LEVELS,  
03:45PM 14 DON'T CONSIDER IT. WHAT DOES IT DO THEN TO THAT FINDING, THAT  
03:45PM 15 FACT?

03:45PM 16 THE WITNESS: OH, WELL WITH RESPECT TO MY  
03:45PM 17 QUANTITATIVE FINDING, I RELY ON THE SURVEY ANALYSIS TO GET THE  
03:45PM 18 ACTUAL LOSS.

03:45PM 19 THE QUALITATIVE ANALYSIS WHICH I THINK IS PART 1A IS NOT  
03:45PM 20 THE BROWN SHOE FACTORS DOES NOT TURN IN ANY WAY ON, OF COURSE,  
03:45PM 21 THE SSNIP TEST OR THE SURVEY.

03:45PM 22 I DO THINK IT WOULD BE PRETTY HARSH TO THROW OUT THE  
03:45PM 23 ENTIRETY OF THE SURVEY. I THINK THE REMEDY IF YOU'RE GOING TO  
03:45PM 24 INTERVENE AT ALL HERE IS TO ELIMINATE THOSE 21 WHO SAID THAT  
03:45PM 25 THEY DO EVERYTHING.

03:45PM 1 THE COURT: OKAY. THANK YOU. ANY QUESTIONS BASED  
03:45PM 2 ON MY QUESTIONS?

03:45PM 3 MR. ELMORE: NO, YOUR HONOR. THANK YOU.

03:45PM 4 THE COURT: THANK YOU.

03:45PM 5 MR. HANSEN: JUST ONE, YOUR HONOR.

03:45PM 6 **RECROSS-EXAMINATION**

03:45PM 7 BY MR. HANSEN:

03:46PM 8 Q. JUST ONE QUESTION.

03:46PM 9 DR. SINGER, WE WENT THROUGH ALL OF THESE IMPLAUSIBLE AND  
03:46PM 10 YOU HAD ANSWERED THE JUDGE'S QUESTION, IMPLAUSIBLE RESPONSES.

03:46PM 11 IS WHAT YOU'RE TELLING US AT THE END OF THE DAY IS THAT  
03:46PM 12 EVERY ONE OF YOUR SURVEY RESPONDENTS CAN LIE TO YOU ABOUT SOME  
03:46PM 13 QUESTIONS AND AS LONG AS THEY GIVE YOU THE ANSWER THAT YOU WANT  
03:46PM 14 ABOUT A HYPOTHETICAL QUESTION IN TERMS OF WHAT THEY WOULD DO IN  
03:46PM 15 RESPONSE TO A NON-ACTUAL ONE DOLLAR PRICE INCREASE, THAT'S  
03:46PM 16 GOING TO BE VALID INFORMATION?

03:46PM 17 A. I DON'T EVEN KNOW WHERE TO BEGIN WITH THAT, BUT THERE'S SO  
03:46PM 18 MANY PROBLEMS WITH THE QUESTION.

03:46PM 19 I DON'T THINK THAT PEOPLE ARE LYING TO ME. I TOLD YOU  
03:46PM 20 THAT WITH RESPECT TO QUESTION 4 THERE ARE SEVERAL DIFFERENT  
03:46PM 21 STORIES THAT ONE COULD TELL, ONE OF WHICH IS THAT THEY  
03:46PM 22 MISUNDERSTOOD.

03:46PM 23 BUT AT THE END OF THE DAY, QUESTION 4 DOESN'T INFORM THE  
03:46PM 24 ANSWER TO THE KEY QUESTION THAT I'M INTERESTED IN WHICH IS THE  
03:46PM 25 PRICE SENSITIVITY IN RESPONSE TO A PRICE INCREASE. IT'S NOT A

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CERTIFICATE OF REPORTERS

WE, THE UNDERSIGNED OFFICIAL COURT REPORTERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



IRENE RODRIGUEZ, CSR, CRR  
CERTIFICATE NUMBER 8076



LEE-ANNE SHORTRIDGE, CSR, CRR  
CERTIFICATE NUMBER 9595

DATED: DECEMBER 13, 2022

# **Exhibit C**

**Submitted In Camera**

# Exhibit D



## DECLARATION

Pursuant to 28 U.S.C. § 1746, Rachael McChrystal hereby declares as follows:

1. I am over twenty-one years old, mentally competent, and have personal knowledge of the facts contained herein.

2. I am making this declaration to provide context and explain the background and circumstances of the survey project completed by our customer, Econ One, whereby the customer used the Qualtrics platform to conduct a survey, with an internal reference name qual-73546670-0912-vrfitness.

3. Econ One used the Qualtrics platform to conduct a survey in October to November 2022. Econ One currently uses Qualtrics' Core XM product to conduct surveys.

4. Qualtrics typically requests the following from customers who want to leverage panel services: a detailed description of target audience, desired sample size, expected survey length, any applicable quotas, and all screening criteria. These attributes are solely determined by the customer. We received the following instructions from Econ One: 500 responses required from individuals who have played the game Supernatural; survey length 10-12 minutes to complete.

5. Qualtrics does not maintain its own panels of survey respondents but instead subcontracts these services to third parties to fulfil customer requests. For hard-to-reach groups, Qualtrics may use niche panels brought about through specialized recruitment campaigns.

6. Qualtrics engaged three panel firms to conduct Econ One's survey: Cint (also known as Lucid/Federated), Dynata, and Torfac (formerly WiseWorks Canada Inc.). While Qualtrics considers these panel firms to be reputable, we do not consider these panel firms to be niche. A

customer using the Qualtrics platform can add screening questions to ensure only those individuals intended to respond to the survey actually complete it.

7. The Qualtrics platform enables customers to collect the IP address information being used by survey respondents. An IP address is not a location identifier itself, the estimated location is inferred via a third-party database that attempts to track physical location of IP addresses. IP addresses can be modified by the respondent by using various methods/devices such as VPNs, IP diverters etc. so IP addresses are determined using best-efforts.

8. Qualtrics offers a Captcha question option within the platform. Econ One will need to advise as to whether this was used for this survey and for all respondents.

9. Qualtrics provides guidance regarding survey design to help ensure sample quality is high, however the survey design is ultimately the customer's responsibility.

10. The customer determines which questions are presented with randomised answer options. With a randomizer in your survey flow, you can randomly present question blocks, embedded data, and other survey flow elements to your respondents. Econ One will need to advise on whether a randomiser was used, and if so, for which survey elements, and for which respondents, etc. Where a randomizer is not used, the survey will be presented in the same manner to all respondents.

11. Qualtrics offers a product called ExpertReview. This is a digital reviewer that helps a customer collect high-quality data. It measures the data quality of the survey elements (questions, logic, quotas, etc.), recommends how users can improve those elements and provides documentation for research-based explanations on these recommendations, and predicts the

quality of the data that will be collected. Econ One will need to advise Meta if this was used as part of the survey setup.

12. In addition to ExpertReview, Qualtrics offers other survey options for fraud detection. These are options that the customer must select. For example, one option is Prevent Multiple Submissions (formerly Prevent Ballot Box Stuffing) that prevents multiple submissions from a single person. To the best of Qualtrics' knowledge, this option was selected by Econ One when conducting the applicable survey.

13. Another fraud-detection option provided by Qualtrics is Bot Detection that can be used to indicate whether a response is more likely to be a bot or a human. To the best of Qualtrics' knowledge, this option was selected by Econ One. It may appear that this wasn't used for certain responses i.e. showing a blank field, for a number of reasons. There are certain requirements for Recaptcha and Relevant ID (see below) scores to be recorded. Firstly, the respondent must have their browser open for long enough for the relevant scripts to run. Secondly, the browser must not block the relevant script, for example, an ad blocker or firewall could interfere with loading and/or running the scripts. Finally, slower devices or wifi connections may have issues with the script loading time.

14. A third fraud-detection option is RelevantID, which improves fraud detection by assessing respondent metadata to determine the likelihood that the same respondent is answering multiple times. When this feature is enabled, the RelevantIDDuplicate field is marked "true". To the best of Qualtrics' knowledge, this option was selected by Econ One when conducting the applicable survey.

15. The customer using the Qualtrics platform is responsible for reviewing data quality and can use the tools available within the Qualtrics platform to assist with this.

16. Within seven days of survey completion using Qualtrics Research Services i.e., panel services, customers have the opportunity to review the results and come back to the Qualtrics team to request responses that need to be replaced due to quality issues. To the best of Qualtrics’ knowledge, Econ One did not do so here.

17. Qualtrics is not aware of how many survey invitations were issued by each panel provider.

18. To the best of Qualtrics’ knowledge, nineteen (19) responses were passed from Dynata.

18. In the response data, respondents with data in the columns “rid” or “RISN” are sourced from Lucid; respondents with data in column “PID” are sourced from Dynata; and respondents with data in column “wspid” are source from Torfac.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 12<sup>th</sup> day of December, 2022.

DocuSigned by:  
*Rachael McChrystal*  
D21EF8D5F1CA44D...  
\_\_\_\_\_  
Rachael McChrystal

# **Exhibit E**

**Submitted In Camera**