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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re Stratasys Ltd.)	File No. 15-CV-0455
Shareholder Securities)	
Litigation)	(PJS/FLN) (Lead Case)
)	
)	Minneapolis, Minnesota
)	December 11, 2015
)	9:00 a.m.

BEFORE THE HONORABLE PATRICK J. SCHILTZ
UNITED STATES DISTRICT COURT JUDGE
(MOTION HEARING)

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1 MR. FUKUMURA: Sure. Absolutely.

2 THE COURT: Just let me know when you're ready to
3 go there.

4 MR. FUKUMURA: I'm ready. And I've taken the
5 liberty of preparing what to you will look like a long
6 presentation. I'm only going to go through half of it. I
7 have a copy of -- a hard copy of it. May I approach?

8 THE COURT: Yes.

9 MR. FUKUMURA: I've also given a copy to my
10 friends from Robins Geller.

11 THE COURT: Okay. I generally don't like it when
12 attorneys give me Power Point presentations. Invariably
13 they just repeat what I've read in the brief. I've read all
14 the briefs in this case twice. I've taken a lot of notes.
15 I've read some of the cases, not all of them, obviously.
16 And I generally like to use oral argument to have a
17 conversation about what I've read, rather than just -- most
18 Power Point presentations are just reading things back to me
19 that I've already read a couple of times.

20 MR. FUKUMURA: And I think you will find that what
21 I've tried to do is avoid that, Your Honor. So I just have
22 a -- there's going to be a couple of pictures really of
23 things and a timeline.

24 THE COURT: Okay, things like that -- I was just
25 going to say, things like a timeline or if we have a patent

1 case and we're looking at the language of a clause and we're
2 going to spend a lot of time talking about it, I'm happy to
3 have that. But I just don't want you to repeat what's in
4 your briefs because I've already read the briefs.

5 MR. FUKUMURA: I understand. So I'm going to just
6 really -- what my plan is, is to sort of do an introduction
7 and then really talk about scienter. And then the rest of
8 the -- the balance of the argument I'm going to reserve for
9 either rebuttal or for any questions Your Honor may have
10 after you hear the --

11 THE COURT: You don't have to reserve anything
12 because there's no time limits. We'll just talk until we've
13 talked ourselves out.

14 MR. FUKUMURA: I appreciate that.

15 THE COURT: Why don't you go ahead then.

16 MR. FUKUMURA: So I want to first start with my
17 client, Stratasys, Ltd.

18 THE COURT: Pictures are always very, very
19 welcome.

20 MR. FUKUMURA: Right. So at the beginning of the
21 Class Period in January of 2014, this is what sort of
22 high-tech, innovative products that Stratasys Limited
23 offered, really at the cutting edge of 3D technology.
24 Stratasys is the global leader. Its next nearest competitor
25 is a company called 3D Systems Corporation, which I'll talk

1 about in a moment. And, as you can see here, there are a
2 number of 3D printers that serve a variety of industries and
3 also smaller printers, like the Idea Series. The Mojo
4 printer is a desktop printer like the MakerBot printers that
5 we're going to be talking about in a moment.

6 You can see, also, on the right-hand side on the
7 Production Series and in the Design Series there's the Objet
8 350/500 Connex3, which also was introduced in the first
9 quarter of 2014, as well as in the Design Series the same
10 Objet, Connex3, as well as the Fortus Series -- the latest
11 Fortus Series. Those were all introduced in the first
12 quarter of 2014.

13 In June of 2013, the company acquired a company
14 called MakerBot, which was a very exciting technology
15 company based in Brooklyn, New York; a very innovative sort
16 of character in Bre Pettis. The first computers (sic) that
17 they produced -- or printers, rather, that they produced
18 were open source. They would ship a box to people mostly
19 with tech backgrounds, they would assemble them, and then
20 they would give feedback to MakerBot about the printers,
21 about what they liked, didn't like, how to improve them, et
22 cetera. So from that very first box you assemble yourself
23 all the way through the fourth generation series, which are
24 still selling and as I've pictured here, they're -- the
25 second and third images are the Replicator 2 (4th

1 generation) and the Replicator 2X (4th generation).

2 As Your Honor knows, the first thing that happens
3 is on January 6th at the Consumer Electronics Show in Las
4 Vegas, the company announces its fifth generation of
5 computers, the MakerBot Replicator (5th generation), the
6 Replicator Mini, and the Z18. And, ultimately, those
7 products launch on the days that are set forth in the
8 timeline there.

9 You know, one of the really exciting aspects of
10 the fifth generation printer was the Smart Extruder, which
11 the company was very excited about and is still excited
12 about. The extruder is the sort of point of contact where
13 the filament comes out, hits the layer plate and will make
14 the image. And because extruders can become clogged, they
15 had this one removable. And I have a video I could show
16 you. I'm not going to show it to you, but it's very easy to
17 take the extruder in and out. It's connected by four
18 magnets, and it has its own -- once you press a button, the
19 extruder then once it's connected by the magnets comes in.
20 All you do is press that, take the extruder out just like a
21 printer cartridge, and you can pop the next one in. Okay?
22 So it was a very exciting design. The Smart Extruder works
23 on all three of the fifth-generation devices.

24 The Smart Extruder, to be sure, is a very
25 complicated device, as you might imagine. It has a lot of

1 sensors that are built right into it not only for detecting
2 the amount of filament that's coming in, but also how it's
3 laying -- the rate that the filament is moving through the
4 extruder, et cetera. So it's something that they are very,
5 very excited about.

6 The first Replicator ships in March. The second
7 one on my daughter's birthday, the Mini, ships. And then
8 the third on June the 16th; that's the large Z18 model. And
9 that's important because when you look at the performance of
10 the company over the ensuing quarter, you can see why the
11 company justifiably was excited about the launch of these
12 products. In the first quarter, the year-over-year revenue
13 growth for the company is 54 percent. And so that's mostly
14 organic, plus MakerBot. In the second quarter it's 67
15 percent. And, as Your Honor may recall, the second quarter
16 they also acquired (Harvest) and (Solid Concepts), which
17 brought in additional products and services into the
18 Stratasys family. And in the third quarter, again,
19 extremely robust sales growth, 62 percent sales growth
20 there.

21 You know, as David Reis, the CEO of the company,
22 pointed out in Exhibit K, which is the transcript for the
23 conference call in May of 2014, the company, Stratasys
24 Limited, the parent company, was not only excited about
25 MakerBot, which it clearly was, but it was also very excited

1 about the Connex3, which is in the hundred thousand dollar
2 range, and very robust sales of Connex3, as well as Fortus.
3 And what makes Connex3 not only exciting because the device
4 itself -- the printer itself is very expensive, but it is a
5 multi-composite and multi-material 3D printer. So you can
6 use certain types of metals. You can use plastics. You can
7 use all sorts of materials to make the types of materials
8 that aerospace would need, that the medical industry needs,
9 that the defense industry would need. So this is another
10 product that was being launched at the same time that gave
11 the company a very, very sort of buoyant view about the
12 future.

13 Now, let me just pause right here. On January
14 14th, 2014, the company issued guidance for the full year,
15 gives yearly guidance in the range of 660 to 680 million.
16 And you'll see the middle bubble the company raised its
17 guidance in August from what I just previously mentioned to
18 750 million to 770 million. Now, it's right around this
19 time that the bulk of any sort of date-specific allegations
20 from the CWs -- because of the CWs -- there's nine of them
21 named. Seven of them left by September 2014. One of them
22 left in March of 2014. The bulk of them leave right around
23 August and September. So if it was so well-known within the
24 company, if it was so pervasive that there was this gloom
25 and doom about the impact of the problems with the extruder,

1 technical problems with the extruder, why in the world in
2 August would the company so significantly raise guidance
3 from 660 to 750 on the low end and from 680 to 770 on the
4 high end? It sort of flies in the face of reason. And
5 these plaintiffs would say, well, it's because they wanted
6 to do acquisitions. Well, the Solid Concepts and Harvest
7 Technologies, the acquisitions had already occurred. They
8 were announced in April. One closed in June. One closed in
9 July. So it doesn't make sense. They're putting a target
10 on their back by increasing aggressively their year-end
11 guidance, which they ultimately in March announced they met
12 the very low-end range of their own guidance, 750.4 million,
13 but they did miss the low end of analyst consensus guidance,
14 which is what led to the result in stock drop. We're going
15 to talk about that in a moment.

16 So while in our papers we take issue with the
17 complaint on various levels, I think the most significant
18 problem with the complaint, of course, is whether or not
19 it's pled sufficiently scienter under the Reform Act. And
20 it's our contention, as Your Honor knows, that they've
21 missed that by a wide mark. So let me just talk generally.

22 As I said, seven out of the nine confidential
23 witnesses left in the middle bubble period where the company
24 was raising aggressively its year-end guidance and putting a
25 target on its back if it thought it was such a problem. All

1 of the confidential witnesses had this very sort of
2 interesting way that their allegations are pled, which is to
3 say that they skipped -- some will say well before the
4 product was launched everyone knew that this was going to be
5 a complete failure. A software engineer talks about
6 hardware engineering problems. An inside sales executive
7 talks about hardware engineering problems. All these sort
8 of anecdotal, hearsay, secondhand types of allegations,
9 which Your Honor has discounted in the past, and certainly
10 other courts within the District of Minnesota and within the
11 districts --

12 THE COURT: Well, they're not all hearsay
13 allegations. Some of them actually worked on the machines
14 and said they were bad. And some of them worked in consumer
15 relations and said the consumers didn't want them. And, of
16 course, they turned out to be right. The machines were bad.
17 When it was finally announced in February of 2015 that the
18 machines were bad or -- I'm, obviously, using shorthand here
19 -- the stock plummeted. There is some reason to think they
20 might have known what they were talking about.

21 MR. FUKUMURA: So the employees certainly -- as in
22 *Hutchinson*, for instance, when you have the head of the
23 Plymouth plant and the head of the Sioux Falls plant talking
24 about defects within their own entities and, boy, you know,
25 we're seeing product defect rates double, the head of the --

1 the manager of the Plymouth plant said that. The manager of
2 the Sioux Falls plant said, We're getting a million returns
3 a month. Right? So you have -- in those instances, you
4 have specific instances where allegations are made. Your
5 Honor's problem with it is it didn't come together. How did
6 the defendants know that these problems were going to
7 materially affect their year-end guidance?

8 THE COURT: Well, here we have one company,
9 MakerBot, that is responsible for the product, and the
10 people who are alleged to be giving false statements are
11 people who are personally -- say that they have been
12 personally involved in developing the very products. There
13 would be some reason to believe if the products were as bad
14 as the CW said that these people would know about it. Their
15 own statements reflect that they have been intimately
16 involved in developing the product.

17 MR. FUKUMURA: Right.

18 THE COURT: They didn't have that -- you remember
19 *Hutchinson* better than I do, but I don't remember anything
20 like that in *Hutchinson*.

21 MR. FUKUMURA: Well, in fact, there were
22 significant defects throughout the period. And a lot of it
23 had to do with the capacity of the plants to be able to ramp
24 up as quickly as they did. And the inability -- as capacity
25 ramped up for this product, the defect errors doubled. And

1 Your Honor said, Well, look, that's all well and good, but
2 give -- contextualize it for me. So the problem here --

3 THE COURT: Well, the context here is that the CWs
4 are saying that these things didn't work period, not that
5 there was a high error rate, but that these things were
6 lemons, they were essentially inoperable. And that the plan
7 of the executives was apparently to try to repair the
8 airplane while it was in the air and it didn't work, and
9 that's why it crashed in February and then in April of 2015.

10 MR. FUKUMURA: So when you say the product is a
11 "lemon," it's a product with a lot of parts. So we're
12 really -- the extruder --

13 THE COURT: The extruder, right. The human body
14 has a lot of parts, but if the heart doesn't work, it
15 doesn't really make any difference how well the rest of it
16 is working.

17 MR. FUKUMURA: That's right. So the question is
18 when Your Honor goes back and looks at the complaint, if you
19 focus on the fact that there's no time periods that are
20 really given --

21 THE COURT: Yeah, I think one of your better
22 arguments is -- you make the point, and I'll be asking
23 Mr. Astley about this -- I mean, you make the point that it
24 isn't enough just to show that the product had a lot of
25 problems with it. You have to show when the product had

1 problems, when the executives knew of the problems. And, in
2 particular, it's got to not just be problems, but problems
3 that are so significant and unfixable that they're going to
4 materially impact the financials. Your brief is fair in
5 saying there's a lot of adjectives in the complaint that --
6 you know, "massive avalanche," it would be nice to have it
7 be a little more specific. I mean, I need to know that this
8 particular person was lying on this particular date when
9 they made this particular statement. Part of it is the
10 complaint is 120 pages long. I suspect some poor law clerk,
11 who may be present in this room, is going to have to map all
12 this together for me as to -- we're going to need multiple
13 timelines of who is it alleged to have made the false
14 statement on what date, and what is that person alleged to
15 know on that date, and what is the source of that person's
16 knowledge on that date, and is that source reliable enough.
17 It needs a lot of mapping.

18 MR. FUKUMURA: It does. I'm going to make it
19 easier for you right now.

20 THE COURT: Well, that's good.

21 MR. FUKUMURA: There's only two date-specific
22 allegations as to any defendant. I'm going to say that
23 again. There's lots of allegations about what employees
24 were talking about at the water cooler. And I'm going to
25 talk about *NVE* in a moment, which is very important case, as

1 well as the A123 case. These cases are cited in our brief,
2 so I'm not going to belabor the point. There are only two
3 date-specific allegations where the confidential witness
4 said I talked to somebody and I told them in this case in
5 Brazil the inside director, the inside director whose job
6 responsibility (and who left by August of 2014 by the way)
7 appeared when they had 67 percent year-over-year increase in
8 sales; this inside sales director, who according to the
9 complaint, was responsible for re-sell arrangements in
10 Europe, Asia, and Latin America and so that's the sort of
11 scope of his responsibility. And in Brazil he had in
12 February a conversation allegedly with David Reis, the CEO
13 of the company, and he said, Hey, there's problems, problems
14 with the device. I'm not exactly sure what "problems" mean.
15 Is it with the flywheel within the extruder? Is it on the
16 extruder sensor device? Is it on the hot plate? What is
17 the problem? They don't say. They just say there's
18 problems. So you have an inside sales director, who's not
19 an engineer, who's not anyone technical at least as set
20 forth in the complaint, having a conversation with David
21 Reis --

22 THE COURT: But you also have Reis himself saying
23 at some point that he'd been closely involved in the
24 development of the 5G printers.

25 MR. FUKUMURA: I don't know that he says that. I

1 think --

2 THE COURT: That's my memory. But, believe me,
3 I'm going to -- there's a lot that -- I usually have a
4 pretty good memory in the short term. This was -- 120 pages
5 is a lot for any judge to remember everything there. But I
6 thought there was some statement where Reis said that he and
7 Pettis had both been personally involved in the development
8 of the product and following it closely or something like
9 that. I can't quote it.

10 MR. FUKUMURA: Right, probably in the conceptual
11 level.

12 In driving the program forward, looking at the
13 markets, you will see that one big change in the market that
14 happens in the second half of 2014 as they go from a direct
15 re-seller model, where you have people who really know about
16 the product, selling it into a completely different sales
17 channel, selling into Home Depot, and Costco, and Best Buy,
18 and Office Depot where instead of people who are these
19 re-sellers that have the knowledge to be able to sell the
20 product, you have the sort of Costco salesperson selling the
21 product. I think the impact of that, certainly the company
22 talks about that in February and March and April of 2015,
23 that that contributed, in addition to an overall downward
24 decline in the 3D industry, which I'm also going to point
25 out.

1 So this statement about problems is precisely the
2 type of statement that courts in the District of Minnesota
3 and district courts in the Eighth Circuit --

4 THE COURT: Yeah, I mean, if this is all you had
5 on Reis, it wouldn't be enough to establish scienter.

6 MR. FUKUMURA: That's right.

7 THE COURT: My impression is, as a general matter,
8 the scienter allegations are better against the MakerBot
9 people than Pettis and Lawton than they are against the
10 Stratasys people.

11 MR. FUKUMURA: Right. So let's talk about that.
12 So around in July/August, according to the complaint at
13 paragraph 75, the customer support confidential witness
14 makes a presentation to Mr. Pettis in which he advises Mr.
15 Pettis that the Google forums should be shut down because
16 it's just complaints, and Pettis says okay.

17 THE COURT: Right. If that was all they had on
18 Pettis, that wouldn't be enough. But Pettis is the guy --
19 and I'm pretty sure I remember this correctly -- who said I
20 basically spent four of my past five years working on these
21 devices. He made a point of talking about how he personally
22 had been involved in developing these 5G printers. So I
23 think that's a plausible allegation, that if they are as bad
24 as plaintiffs allege, he would've known of that.

25 MR. FUKUMURA: Your Honor, just on the forums

1 point, if Your Honor just Googles the iPhone community
2 forum, the Microsoft Word community forum, the only thing
3 that will be on there are complaints.

4 THE COURT: Anybody you talk to who's in the
5 public eye at all is well aware of being lynched on the
6 internet. It happens to every person. It happens to every
7 restaurant. It happens to every product. I completely get
8 that. And if that's all there was, I wouldn't worry about
9 that, but that's not all there was.

10 Pettis isn't just your typical CEO sitting on top
11 of a big corporation. At least his own statements say, I'm
12 the hands-on guy, this is my baby, this is my technology,
13 this is my work. So he's not the typical CEO who's being
14 held responsible for everything going on in the company.

15 MR. FUKUMURA: And, Your Honor, I don't disagree
16 with that at all. The question is -- so in *NVE*, which is a
17 District of Minnesota case, you have two individual
18 defendants sitting in these weekly meetings. And I'm going
19 to butcher his name. It's Kazabinsky (ph), and Daughton,
20 and Baker. All three of them would sit in these engineering
21 meetings every week in which engineers lamented all the
22 problems with development, all of the issues that they're
23 confronting. And you have these people complaining,
24 according to the confidential witnesses in that case, over
25 and over and over again. The Court said look, that's just

1 not enough that -- and these are people that they're direct
2 allegations, actually sitting in meetings hearing all this
3 stuff. The court says, look, the question is whether those
4 problems were insurmountable or so significant that they
5 would materially impact, that they would materially impact
6 the financial condition and operating results of the
7 company.

8 THE COURT: Right.

9 MR. FUKUMURA: This is a big company.

10 THE COURT: Right.

11 MR. FUKUMURA: As I said --

12 THE COURT: Well, it is a big company, but the
13 allegations here are that the MakerBot acquisition was
14 extremely important for the company. It spent a half a
15 billion dollars for this company. Stratasy's itself touted
16 the importance of the acquisition of MakerBot. MakerBot
17 ended up being responsible for two-thirds of the units sold.
18 I completely understand the point that units doesn't
19 necessarily equate, but still it's your visibility. I mean,
20 it still means something. I understand.

21 MR. FUKUMURA: It does. Your Honor, we're
22 transparent --

23 THE COURT: And the market obviously thought both
24 the acquisition of MakerBot and then the failure of the 5G
25 printer series were very important because stock went way up

1 after the acquisition and went way down after it became
2 apparent that the 5G printers weren't working very well.

3 MR. FUKUMURA: Well, Your Honor, it's not only 5G
4 sales that slowed, but it was sales of other products as
5 well.

6 THE COURT: I understand, but that was a big part
7 of it. I went and read the press on this just out of
8 curiosity yesterday, and the press on it largely attributed
9 the declines to the failure of the 5G series. Now, the
10 press mentioned the industry generally was in bad shape and
11 so on, and I understand there's more to it than that, but
12 clearly the failure of the 5G network -- or series of
13 printers clearly was an important factor in that stock drop.

14 MR. FUKUMURA: I'm not disagreeing with you.

15 THE COURT: Stratasys itself has said that. I'm
16 not saying anything the company didn't say.

17 MR. FUKUMURA: The reason why I bring that up, and
18 now I'm coming to your point -- if you look at the screen
19 now, Pettis does talk about it. We're not running from the
20 fact that Pettis knew about issues with the extruder. They
21 were continually trying to fix it. The question was, is it
22 insurmountable, was it so significant that it wasn't going
23 to work? The extruder clearly works. There are problems
24 with it. And during the course of it they try to fix it,
25 which is what happens with any new product.

1 So in September he says, look -- he says this
2 publicly -- we're on our third iteration of the extruder.
3 We have the software fixes and hardware fixes that you can
4 download on our MakerBot website. And this is something
5 that we're absolutely focused on to --

6 THE COURT: Yeah, I read these statements. I have
7 some sympathy for the plaintiffs' response, which is, you
8 know -- these statements sound like -- you know when you
9 update the apps on your iPhone and it says what's new and it
10 says bug fixes? These are like bug fixes. Yeah, we have
11 some bugs; we're working them out. Clearly there was
12 something not being told to the market because when the
13 market was told that in February, down went the stock.

14 Now, if these were interpreted by the market to be
15 the kind of disclosures that you portray these to be, one
16 wouldn't think that there would've been a plunge in February
17 and then in April.

18 MR. FUKUMURA: I have two responses to that. The
19 first response is he didn't say that they were bug fixes.
20 He says we're on the third iteration of our extruder. The
21 third iteration of our extruder, that's not a bug fix.

22 THE COURT: We're on the 40th iteration of
23 Firefox, and all of them work just fine. The fact that
24 there are 40 iterations doesn't mean any of them were bad.

25 So there's a difference between saying our third

1 set of improvements are out and saying these things aren't
2 working and consumers are returning them in droves.

3 MR. FUKUMURA: And that's my second point, which
4 is there are no facts, no specific facts, that hit what Your
5 Honor found so important in *Hutchinson*, which is when did --
6 when, where in the complaint is it quantified that this was
7 going to impact a particular quarter? It certainly didn't
8 impact the third quarter.

9 THE COURT: Let me ask you about that. It's a
10 good point you're making, and I'm struggling to -- I just
11 had breakfast with some of the other judges. We have
12 breakfast on Friday, and I was saying this is one of these
13 cases where I'm going into oral argument really struggling
14 with what to do. I usually have a pretty good sense of what
15 I'm going to do.

16 I think you make a legitimate point that, you
17 know, can I tell from reading this complaint at what point
18 did these insiders know that the problems were such that
19 they were not going to be fixed quickly and that they were
20 going to have a really serious impact on the financial
21 results? I can't tell from the complaint. I can't tell
22 whether it was February or June or October; I can't. But in
23 this kind of thing you're never going to be able to pinpoint
24 the date. It isn't like a bell goes off inside the workroom
25 and we all know that now we're in trouble. I mean,

1 inherently you can't nail it to a specific date. In theory
2 you could. You could have a meeting with the CEO and the
3 development team could announce, Chief, things have gotten
4 to the point that they're disastrous. You can say, well,
5 the CEO, that's the day he knows. But when you've got a CEO
6 like Pettis who is essentially rolling up his sleeves and
7 part of the team that's working on this, how do you say this
8 is the date Pettis should have realized that these aren't
9 fixable problems but these are problems that are going to
10 have a material impact on the finances?

11 MR. FUKUMURA: One way, of course, is that there's
12 confidential witness allegations that say we got weekly
13 sales reports. Right? Not they have one confidential
14 witness who is international who says that Lawton got some
15 reports without defining --

16 THE COURT: He talks about metrics, and there's no
17 specifics. I understand.

18 MR. FUKUMURA: Whereas, in the *Hutchinson* case the
19 weekly reports that these defendants got showed error rates,
20 defect rates. It showed returns. It showed in one case a
21 very substantial half million dollar a week return.

22 THE COURT: Yeah, we have more specifics here.

23 MR. FUKUMURA: Right, a lot more specifics. What
24 Your Honor said is, Look, it doesn't tell me when they knew
25 they were going to miss. We know David Reis says when they

1 knew. On February the 2nd, he says it wasn't until the end
2 of the fourth quarter/the beginning of the first quarter
3 that we actually knew that sales were hurt. So it's not
4 that there are sort of an iterative process to work out bugs
5 in the extruder. And remember there are specific problems
6 with the extruder, very specific problems about the sensor
7 detection, about hot plate extrusion, very specific problems
8 that someone can look at and say fix it. It's not that the
9 whole device -- it's tempting me now to show you --

10 THE COURT: As the plaintiffs have it, the company
11 knew all along that the extruders weren't going to work,
12 that they wouldn't work for more than a day or so without
13 failing, that they pushed the product out there
14 notwithstanding that. So it would've been perfectly
15 predictable that there would've been a period of a few
16 months when people would have been buying these things up
17 and then people would've realized that they don't work and
18 people would've stopped buying them, and the distribution
19 channel would've gotten clogged because nobody would buy
20 them and that what we see -- explosive growth in 2014 and
21 then sales stopping in the fourth quarter -- is exactly what
22 you could have predicted back in January or February when
23 you released the things knowing that the extruders don't
24 work and that customers are going to be very unhappy with
25 them.

1 MR. FUKUMURA: Your Honor, I have two responses to
2 that.

3 THE COURT: Yes. You have two responses to a lot
4 of things.

5 MR. FUKUMURA: First is please look at who is
6 saying the extruders weren't going to work, software
7 engineers.

8 THE COURT: As I told you, I'm giving you gestalts
9 here. And I realize the whole point of the PSLRA is we
10 don't do things at a 30,000-foot level, we do them at a
11 100-foot level. And I have to see if we can put everything
12 together, but that's the gist of the plaintiffs' allegation.

13 MR. FUKUMURA: So you have software engineers
14 saying it's not going to work. You have sales people saying
15 it's not going to work. There's no one that says on March
16 11th when this product shipped it wasn't working, not a
17 single person.

18 THE COURT: Well, there are people -- well, again,
19 I can't promise I know that a particular person said this.
20 The gist of what's in the complaint is it never worked. It
21 never worked, and they knew it wasn't going to work, and
22 they pushed out a product they knew was going to fail hoping
23 that somehow they would find a fix when the customers
24 started complaining.

25 MR. FUKUMURA: That's just not supported by any

1 well-pled factual allegations, Your Honor, first of all. As
2 problems arose during the course of the Class Period, did
3 they try to fix them? Absolutely. Were they working hard
4 on it? Absolutely. Was the customer support experience not
5 up to snuff? I think that's fair to say. The company
6 announced that one of the things it's doing is really
7 ramping up in customer support.

8 THE COURT: What sort of bothers me -- and, again,
9 I recognize I'm talking at the 30,000-foot level and that's
10 not how the case has to be decided -- but this isn't just
11 some little buggy product. Your client bought BotMaker for
12 \$5 million in August of 2013 and by April of 2015 it had
13 taken \$300 million in -- what do you call them -- impairment
14 charges against it. That's a pretty remarkable turnaround
15 for a company. That suggests something quite extraordinary
16 went wrong within that company.

17 MR. FUKUMURA: So the way impairment charges work,
18 Your Honor, and under GAAP is that it's not an assessment of
19 historical revenues. That's a component of it. What it is
20 really is an assessment of what the current value of that
21 entity is, that operating unit.

22 THE COURT: Right.

23 MR. FUKUMURA: And that's built largely on --

24 THE COURT: With an assessment that the goodwill
25 of this company you bought for \$500 million had decreased by

1 \$300 million in a year and a half.

2 MR. FUKUMURA: Given the current environment,
3 which --

4 THE COURT: Yeah. I'm not claiming that it's all
5 100 percent on the 5G. Boy, you and I, let's hope that some
6 day we had a half billion dollars to buy a company, but if
7 you bought a company for a half billion dollars in August of
8 2013 and you watched 60 percent of its value disappear in a
9 year and a half, that would get your attention.

10 MR. FUKUMURA: It certainly got people's
11 attention, Your Honor, absolutely. And the question is, was
12 there fraud? And when did anyone know that these cascade of
13 problems or these problems were going to impact materially
14 --

15 THE COURT: I realize you don't have to tell the
16 story. We're here as to whether they have adequately pled
17 their story, so I understand that. But as you tell the
18 story, what happens in February or January that hadn't
19 happened in August, September, October? Why was what was
20 said in February not said before February?

21 MR. FUKUMURA: Because they didn't know the
22 financial impact. They didn't know that sales were going to
23 decrease. Everything they had seen quarter over quarter
24 were these -- this massive increase in sales. And, again,
25 remember this product, you can -- if you have to mail the

1 extruder, you can mail it and get another one. If it's a
2 software glitch, you can just download it on your computer.
3 If it's a hardware glitch, you can download it on your
4 computer, put it the thumb drive and back it up into the
5 MakerBot. When was it really going to impact sales? It's
6 silent. There's nothing in this complaint that says that.
7 They talk about warranty returns. Well, when did warranty
8 returns increase so significantly that they would impact net
9 income? The complaint is silent.

10 I can tell you that in the third quarter of
11 2014 -- and you'll find this in the 10K if you look at it --
12 their net income went up in the second quarter very
13 substantially. In the third quarter it was even higher.

14 THE COURT: Let's just say hypothetically that the
15 executives knew that these products that were selling were
16 lemons and that the day of reckoning was going to come on
17 them. I'm just asking hypothetically. Okay? I'm not
18 asking you to admit anything. But you have executives in
19 the company who know that these 5G printers were selling
20 well and a lot of people are buying them, but we happen to
21 know these are lemons and that a lot of them are going to
22 come back and we're going to have a lot of problems with
23 them. If that, in fact, was the knowledge of these people,
24 would any of their statements be fraudulent in your view?

25 MR. FUKUMURA: No. The question --

1 THE COURT: Even if they knew they were lemons and
2 even if they knew that they were going to be coming back,
3 that there were going to be a lot of warranty claims and
4 that sales were going to dry up as soon as the market caught
5 up with them -- the knowledge of the market caught up with
6 the quality of the product?

7 MR. FUKUMURA: So, again, I would look back to
8 *NVE*. I would look at the *A123* case that we cited. *A123* is
9 a company that makes the batteries that are in the Fisker
10 Karma cars. There's a great example of where the defects
11 were very significant, known. There were detailed
12 allegations of how the senior most executives of the
13 company -- the speakers, the individual defendants -- were
14 aware of these defects and that they were significant. When
15 the court granted the motion to dismiss in that case, it
16 said, look, it has to be insurmountable. And there's
17 nothing in this complaint --

18 THE COURT: That can't be -- I mean, with all
19 respect, I don't know which of my colleagues had that case,
20 but that can't be the standard. Insurmountability can't be
21 the standard.

22 Suppose you have some defect that you know is
23 going to have a devastating -- it's not insurmountable, but
24 it's extraordinarily expensive to fix and it's going to have
25 an extraordinary impact on your company. It can't be that

1 you don't have to disclose that, even though the defect is
2 not insurmountable. Insurmountable is an awfully high
3 standard.

4 MR. FUKUMURA: Or the other phrase that the court
5 used, so that's clear, is "significant."

6 THE COURT: "Significant."

7 MR. FUKUMURA: It's a significant material impact
8 on the company's financial results.

9 THE COURT: That seems like a more reasonable
10 standard.

11 MR. FUKUMURA: Right. And the whole point is,
12 look, you can --

13 THE COURT: So why isn't that -- in my
14 hypothetical to you -- so let's just say the world is as
15 they portray, which is Pettis knows as these things are
16 being shipped in February, March, April that these things
17 are lemons, and that they're going to be rejected by
18 customers, and there's going to be a ton of warranty claims,
19 and things are going to get really bad for the company as
20 soon as the consumers out there realize what a lemon this
21 product is. I realize you violently deny that that's the
22 case, but suppose that were true hypothetically. Would the
23 statements he made over the course of 2014 be fraudulent?

24 MR. FUKUMURA: Only if they couldn't fix it. If
25 it's something -- like the extruder, while it's a very novel

1 piece of technology, there are -- I can show you a video --
2 there are about eight real big parts.

3 THE COURT: I will actually have you show me the
4 video by the end of the day here because I want to see what
5 one of these things look like.

6 MR. FUKUMURA: May I really quickly?

7 THE COURT: I hadn't heard of this before. I had
8 an employment case involving Stratasys, which is the first
9 I've heard of it. Yeah, if you want to show me, I'd
10 actually like to see it.

11 MR. FUKUMURA: It will take a second. All right.
12 I'm going to jump out of this.

13 THE COURT: All right. I guess you're not going
14 to show me. It's not a big deal. I don't want you to have
15 to go through a lot --

16 MR. FUKUMURA: You won't. I'll keep talking while
17 I wait for this.

18 THE COURT: So we were talking about -- I was
19 giving you a hypothetical, and the hypothetical is that
20 Pettis knows that the product is a lemon, and that he knows
21 as they're going out the doors that they're lemons, and that
22 eventually most of them are going to get returned or
23 consumers are going to make warranty claims because they're
24 lemons. And your view was he's still not making fraudulent
25 statements unless he knows that some time between now and

1 then he's not going to be able to find a fix.

2 MR. FUKUMURA: Yeah. When Microsoft issues its
3 new version of Word, they know that there's bugs in there
4 and that there's going to be patches that from time to time
5 they put out. It really depends. Your Honor has chosen the
6 word "lemon" to mean that --

7 THE COURT: Essentially non-operable, you can't
8 use the thing.

9 MR. FUKUMURA: -- it's non-operable. That's just
10 not even close to the case here. There were, as it turns
11 out, components of the extruder that from time to time would
12 cause clogging. The microfilament wasn't lining up
13 correctly. And so they were tweaking this thing a little
14 bit and tweaking that thing a little bit, which I will show
15 you.

16 THE COURT: Okay. Go ahead. I just finished a
17 jury trial and we had, like, five computer experts on the
18 jury, so we were in good shape whenever anything went wrong
19 with the computers. There you go.

20 MR. FUKUMURA: So that's what it looks like.

21 (Video played.)

22 MR. FUKUMURA: So there's not -- you know, the
23 problems, what are we talking about? Are we talking about
24 the hot plate or are we talking about the encoder wheel? So
25 I really take issue with the word "lemon" because, at least

1 according to Bre, the statements that are in there, hey,
2 this is what we're looking at; You know, we're getting
3 clogging, we're getting this, and we're working on that.
4 We're working on the sensor. We're working on the hot
5 plate, trying to fix the jam. So I don't think there's any
6 evidence here -- certainly by someone who was in a position
7 to make the statement, an actual hardware engineer, someone
8 who worked on the encoder or worked on the sensor -- that
9 said this is never going to work. It's all water cooler
10 talk.

11 THE COURT: So your position then is even if
12 Pettis knows it's a lemon as these things are being shipped,
13 he doesn't know that it's going to have a material impact on
14 the financials at that point because it's possible they'll
15 be able to fix any problems before it has a significant
16 impact on the financials. It's only by the fourth quarter
17 that it becomes clear that the problems with the 5G printers
18 are not going to be fixed in time to spare the financials
19 from a material hit and at that point they disclose. Is
20 that a fair summary?

21 MR. FUKUMURA: I think that's right, Your Honor.

22 THE COURT: Okay.

23 MR. FUKUMURA: So let me -- because it's not just
24 -- and Your Honor has said -- and I know that some pressure
25 ports have focused on MakerBot. In the complaint this is

1 the peer group that the plaintiffs use. The top line is
2 MKS. They don't even sell 3D printers, Your Honor. The
3 sort of brownish/goldish line is FARO. They don't sell 3D
4 printers either. They're in 3D imaging, medical imaging.
5 The red line on the bottom is absolutely one of the
6 company's biggest competitors. It's 3D Corporation who, as
7 you can see, as the market is declining for 3D printers --
8 and I'm going to show you the next picture, which is the
9 true peers -- all of these companies are 3D printing
10 companies. And you can see there's overall this downward
11 trend against 3D printers. And there are a number of
12 reasons for that. There's questions about whether HP is
13 going to come in with a completely different type of
14 printer. That certainly has impacted the market. You have
15 some gigantic companies -- like Hewlett-Packard, like
16 Northrop -- that are talking about entering into the space
17 in a big way because it is a lucrative space, particularly
18 on the high end.

19 And you'll note -- I'll show you the next picture
20 -- that this very same law firm, the Robbins Geller firm,
21 filed I don't want to say identical -- I'll let Your Honor
22 look at it. I have a copy of it. Your Honor, may I
23 approach?

24 THE COURT: Just give it to my law clerk and
25 she'll bring it back.

1 I was going to ask whether somebody sued 3D
2 Systems and the answer is yes, apparently.

3 MR. FUKUMURA: The same law firm sued 3D Systems
4 making, essentially, the same complaints; that 3D Systems
5 was a leader in the market. It wanted to maintain its
6 market share. It wanted to maintain the public perception
7 of it as a leader in the 3D space. And they knew that there
8 were all sorts of defects in the computers that they were
9 putting out. And the market was shocked on April the 25th
10 (sic) in this case -- April the 23rd when they announced
11 that their sales had dropped off.

12 I only point that out to illustrate the fact that
13 there were broader market forces working against the 3D
14 industry generally. And certainly David Reis and others
15 talked about the impact not only on MakerBot sales, but on
16 Stratasys' sales themselves, and not only about MakerBot --
17 remember they sold five printers. They also sold the
18 digital scanner, which is a \$1,000 unit, almost as much as
19 the 5G Replicator and very quickly -- it's a very cool
20 device. It's a turntable that you can put an object on and
21 it spins around, scans it, digitizes it, pops it into your
22 computer. And you can print from it, you can redesign;
23 really a cool device that has many applications. There was
24 slow-down in sales across the Stratasys platform. For
25 sure -- and they say this, they are very up front about

1 it -- Stratasys' MakerBot sales of these 5G printers were
2 down. They were very disappointing. They were
3 disappointing because of the extruder problems. They were
4 very upfront about them in saying that now that we look back
5 on it, when these things first became evident to us
6 impacting sales at the end of the fourth quarter beginning
7 of the first quarter, they were surprised and disappointed.

8 I'm not going to go through the puffing. I will,
9 actually, look at one thing, which is context. So when we
10 look at -- and I've already talked about this, but
11 defendants -- this is from the plaintiffs' opposition -- or
12 the amended complaint, that MakerBot was the sort of sole
13 issue that was driving the growth of the company. If you
14 look at the earnings call, David Reis talks about releasing
15 nine revolutionary systems in the last 18 months, five in
16 the first quarter, talks glowingly about the Connex3 color
17 multi-material 3D printer. He talks about the Fortus and
18 PolyJet printers. These were all things that they were
19 excited about that were going to drive growth and which led
20 them, among other things, to raise materially their view --
21 their outlook on the full year. Again, if they knew -- at
22 the time that seven of these nine confidential witnesses
23 left the company in August, if they knew that there was
24 lemons, that the sky was falling, why in the world would
25 they have raised guidance so significantly and only to wind

1 up in this courtroom here today, which most certainly would
2 have happened if their stock took a big hit? Their stock
3 did take a big hit. It's not just because of MakerBot,
4 although that certainly contributed. As I showed Your
5 Honor, there were other forces at work. And that this
6 lawsuit as pled fails to plead adequately scienter or a
7 false statement. I'll rest on the papers on our false
8 statement arguments.

9 THE COURT: Okay. Is there anything more you
10 wanted to show me?

11 MR. FUKUMURA: No.

12 THE COURT: Okay. Let me just ask you about some
13 of the specific statements then. Some of these you may have
14 already talked about. But I just picked a couple of the
15 statements out of the complaint that struck me as among the
16 most problematic for you.

17 Let me start with the statement -- this is during
18 an August 7th, 2014 conference call. This is Mr. Reis. And
19 he refers to -- with respect to the 5G printers he says, "We
20 are observing strong demand across the entire product line."
21 And this, according to plaintiffs, was after the sales had
22 dried up, after it became apparent -- consumers understood
23 that these 5G printers weren't working very well and the
24 sales dried up. I mean, that's what the allegations are. I
25 have to assume that they are true for our purposes today.

1 So why would not Mr. Reis saying in August that you are
2 seeing strong demand for the 5G printers when, according to
3 the complaint, at this time the sales were drying up and the
4 distribution lines were getting clogged because nobody
5 wanted to buy them anymore, why would that not be a false
6 statement?

7 MR. FUKUMURA: There are a couple of things about
8 that. David Reis -- the company has two headquarters. One
9 is in Minneapolis, and the other is in Rehovot, Israel,
10 which is right outside Tel Aviv. It's sort of the tech
11 center of Israel. That's where David Reis resides. Okay?

12 So the question is what evidence is there at all
13 that David Reis or, frankly, anyone else was aware that
14 sales had dried up? It's certainly not evident by the sales
15 themselves that are reported for this very quarter, which
16 had a 60 percent increase year over year. And, by the way,
17 the increase from a hard dollar number over -- for the
18 second quarter, I have that number. It's significant. I
19 think it went from, I think, 200 million to 217 million from
20 the second to third quarter. So there's no evidence that
21 any of the statements that they make are borne out by the
22 actual facts.

23 THE COURT: So your view is there's no evidence
24 that in fact the sales had dried up by August or that if
25 they had that Reis was aware of that?

1 MR. FUKUMURA: Your Honor, there is evidence and
2 it points to the opposite completely.

3 THE COURT: Okay. A month later, September 8th,
4 we have the Analyst Day Conference and Mr. Pettis saying
5 that -- I'm just picking this. There's many, many
6 reliability statements that are cited. This is one of the
7 later ones. This is September of 2014 where he's talking
8 about the unmatched reliability of these printers.
9 According to the complaint, by this time there had been a
10 very large number of warranty claims and it was quite
11 apparent to everybody that these weren't reliable. Even you
12 started the argument today talking about how they kept
13 fixing things. It was pretty clear that these were not of
14 unmatched reliability, that there were a lot of problems
15 with them that the company was scrambling to fix.

16 Why isn't telling the analysts in September that
17 these were of unmatched reliability -- he also I think -- in
18 November there was a conference call where he talked again
19 about unmatched speed, reliability, and quality. Even on
20 your telling of the story, by November they knew that these
21 things were far from reliable or quality, that there was a
22 lot of problems with them.

23 MR. FUKUMURA: Your Honor, that's not true. What
24 I said in September was that they had come out with three
25 iterations of the extruder by that time.

1 THE COURT: You said by the fourth quarter --
2 Stratasys said by the fourth quarter they were seeing the
3 sales dry up. If the sales are drying up in the fourth
4 quarter, it's because of problems that consumers are
5 experiencing before the fourth quarter. And Mr. Pettis in
6 November is talking about the reliability and quality of
7 these printers that he knows not to be reliable or of very
8 good quality.

9 MR. FUKUMURA: Your Honor, that's where the
10 disconnect is. When in September he talks about having
11 three iterations of extruders in software and hardware
12 fixes, it's quite plausible -- there's an equally opposing
13 inference that he thought it fixed it, that in fact they had
14 an issue with the filament sensor, they fixed the issue with
15 the filament sensor. Guys, is it fixed? Gals, is it fixed?
16 Yeah, it's fixed. There's nothing that says, you know,
17 after -- in September the 8th we knew that there was still
18 problems with the filament sensor because it was doing X, Y,
19 and Z, 1, 2, 3 and not being said by the customer support
20 person but by an engineer, by someone who is working on it
21 who says, I was in a meeting with Bre -- I was in a meeting
22 with Bre where we talked about the fact that this wasn't
23 working anymore. There's nothing like that. There is
24 absolutely no evidence that on September the 8th Bre Pettis
25 had any idea that things that they worked on to fix weren't

1 fixed.

2 And Your Honor is right that ultimately what David
3 Reis says is at the end of the fourth quarter when they
4 looked at sales, right, because you roll up -- Stratasys
5 gets the MakerBot financial statements at the end and rolls
6 them up into a consolidated financial statement because it's
7 the parent company. And even when Stratasys is rolling up
8 -- MakerBot is rolling up its financials, at the end of the
9 quarter 12-31-14 and saying where are we, where are we on
10 sales, where are we on warranty claims, where are we on
11 returns, where are we on our reserves allowance that impact
12 the bottom line, that's when it becomes apparent -- that's
13 the only facts we have, is what David Reis says in February.
14 It wasn't until the end of the fourth quarter, the beginning
15 of the first quarter that it really sort of became apparent.

16 There's lots of vague statements during the Class
17 Period by these nine confidential witnesses, seven of whom
18 had left well before November, six of them whom had left
19 before -- seven of them who left before -- six of them who
20 had left before September saying -- there's the ones that
21 are sort of complaining the loudest. Well, we don't see
22 that impacting the financials during that quarter. In fact,
23 that quarter, the third quarter, was the best quarter in
24 terms of overall revenue. After I stand back up, I'll give
25 you the exact number for the third quarter. I'll give you

1 -- an important number is the EPS number, because that's
2 going to take into account any increase in the reserves
3 allowance, right, and it's going to take in any costs, so
4 warranty costs, et cetera. They were actually having a
5 substantial increase in net income year over year in the
6 third quarter.

7 Now, the fourth quarter -- at the end of the
8 fourth quarter, they are looking at the numbers and saying
9 wow, right, not only for MakerBot but across the platform.
10 There was a lot of softness.

11 THE COURT: So when in November Mr. Reis says that
12 the Z18 is being very well-received and we know it wasn't
13 being very well-received, your view was he didn't know that
14 until the end-of-quarter numbers came in?

15 MR. FUKUMURA: Your Honor, whether the Z18 was
16 well received or not received is not pled with particularity
17 as to November at all. So when Your Honor goes back and
18 looks at who's saying it, whether it's a customer support
19 person who left in August -- you know, the only people left
20 are the junior intern. I don't know what the intern does,
21 but the intern says --

22 THE COURT: It was a junior data person or junior
23 finance --

24 MR. FUKUMURA: The junior data person left --

25 THE COURT: It would be really sad if there were

1 junior interns and senior interns. Being a junior intern
2 would be about as low as it goes.

3 MR. FUKUMURA: I don't quite know what the --

4 THE COURT: You have to get coffee for the senior
5 intern.

6 MR. FUKUMURA: I don't quite know what the interns
7 --

8 THE COURT: You make a good point, though -- I
9 don't mean to dismiss the point -- which is I need to look
10 hard as to who knows what the situation is in November. If
11 there isn't anybody around in November, then that's a
12 problem for them.

13 MR. FUKUMURA: So here's what you have: The
14 director of sales, this person who was in charge of re-sell
15 arrangements -- starting re-sell arrangements in Europe, in
16 Latin America, and Asia leaves in August 2014. The inside
17 sales executive leaves in August of 2014. The junior data
18 analyst, who says he gave some reports back to Lawton, he or
19 she leaves in August of 2014. The MakerBot customer support
20 person leaves in September of 2014. The regulatory
21 compliance engineer, September 2014. The operating field --
22 operations field analyst, September of 2014. The intern is
23 there until January 2014 -- '15. The software engineer
24 leaves in March of 2014. How that person would know
25 anything is remarkable. So all of the people, other than

1 the 3D printing specialist and the intern, are gone well
2 before November, months before November. And so it's really
3 --

4 THE COURT: So November the only one still there
5 is the intern?

6 MR. FUKUMURA: The intern and the 3D printing
7 specialist.

8 THE COURT: So two people are still there in
9 November?

10 MR. FUKUMURA: That's right. Seven out of the
11 nine, and I said one was the "junior" intern, but, as you
12 point out, he was just an intern.

13 THE COURT: Okay. Let me just look at my notes
14 for a second here. Okay. I don't think, at this point, I
15 have any more questions for you; I may after I talk to
16 Mr. Astley.

17 MR. FUKUMURA: I appreciate your time.

18 THE COURT: All right. Thank you.

19 MR. ASTLEY: Good morning, sir. How are you?

20 THE COURT: Good morning, Mr. Astley. How are
21 you?

22 MR. ASTLEY: I'm doing very well. Thank you.
23 It's nice to appear before you.

24 THE COURT: Thank you.

25 So here's what I'm struggling with, and it's a

1 struggle in just about every securities fraud case, it's the
2 same struggle, which is the complaints always sound great at
3 30,000 feet, and then they start falling apart when I get
4 down to 100 feet. The overall story you tell when I read
5 the 120-page complaint on Sunday afternoon, it seems like a
6 nice story, but then when I start getting to the granular
7 level, how do I -- where is the statement by this person on
8 this date where I have sufficient -- I'm going to call it
9 evidence, but I realize we're talking about a complaint
10 here -- sufficient evidence? Like, I was given the November
11 statements. Well, all your CWs are gone by November, save
12 the intern and the 3D printing specialist. I'm just trying
13 to give you a 30,000-foot introduction where I'm struggling
14 with you.

15 I think Mr. Fukumura is correct, as you've heard
16 me say to him, companies put out crappy products all the
17 time, and companies get hurt by crappy products being put
18 out all the time. And we can all cite examples from our own
19 lives where a company was riding high and then they're gone.
20 What we're looking for here is lies. We're looking for
21 fraud. We're looking for the individual who said something
22 on this date that the individual knew was false. And that's
23 what I'm struggling with.

24 And Mr. Fukumura is also correct that what I need
25 to focus here on is not how bad the products were or the

1 problems but when did these people know that they were so
2 bad, so unfixable, so unacceptable to consumers that they
3 were going to materially impact finances, because that's
4 what the market cares about, that's what investors care
5 about. And it's hard for me -- I read the story and I get
6 the story, but where is it -- I don't mean you have to show
7 me the time and the day, but where is it that we go from the
8 kind of problems that new products, especially high-tech
9 products, especially high-tech products in emergent
10 industries have that get fixed usually to this isn't going
11 to get fixed, this is going to really create a big problem
12 for us financially? When does that happen?

13 MR. ASTLEY: Let me answer this --

14 THE COURT: It's kind of a lousy question.

15 MR. ASTLEY: There's a lot there, but it's
16 precisely what I think we're going to drill down on, and so
17 I don't want to be too obtuse in my response. I will
18 definitely hit all of the points that Your Honor is
19 inquiring about.

20 I think, from the plaintiffs' vantage point,
21 imagine walking into the Best Buy and you're trying to
22 discern whether you want to buy the new iPhone or the
23 Samsung Galaxy, both seemingly spectacular pieces of
24 equipment. Unbeknownst to you, let's just say
25 hypothetically, the call feature, the keypad of the iPhone

1 doesn't work. Maybe it works for a day or two and then
2 stops working. But, for whatever reason, you're caught up
3 in the swell of the market's view about Apple and how
4 exciting their products are. Steve Jobs is on the stage
5 making the big presentation with the headphone and this sort
6 of stuff so you go with the iPhone. You bring it home, you
7 start to dial, and the screen blinks out on you. It just
8 doesn't work, and it doesn't work for months. iPhone has a
9 fix, what they call a second iteration. Screen still
10 doesn't work. So there you are. You can't make a call on
11 your phone. You spent hundreds of dollars. You get to a
12 third iteration. It doesn't work. And at the end of the
13 year, the very company basically is written off and the
14 whole thing is a lemon. I think as a consumer you would
15 feel duped, because you would have gone with the Samsung
16 that didn't have any of those problems.

17 Now, of course, this is not a consumer fraud case.
18 It's a securities fraud case. But from the vantage point of
19 the market, the market is trying to discern what the
20 consumer's appetite is going to be for the product. It's
21 the demand. And that's going to drive their valuation of
22 the stock price. And the market is not told or informed
23 that there's an inherent defect. So because of that they
24 are not able to accurately appreciate the risk of the
25 market's ultimate acceptance of the very product that's

1 being sold. And, of course, the defect goes to the core
2 operability of the product. It's not simply a bug. The
3 thing doesn't work after a day or two.

4 So I think, to answer Your Honor's question, which
5 distinguishes our particular case from Your Honor's earlier
6 *Hutchinson* case, is it really is beyond dispute that there
7 was a problem. We'll deal with whether it was a known
8 problem in one second. But fundamentally the defendants
9 admit -- there are party admissions that there were
10 problems, they say, with the early extruders. They admit
11 they had three iterations. And even after the third, they
12 took a 76 percent write-down of MakerBot.

13 So we know, and I think it's conclusively
14 demonstrated, that there was a problem and not just a
15 general problem. There was a problem with the Smart
16 Extruder, and not just a general problem with the Smart
17 Extruder. Defendant Lawton admits that the problem was
18 clogging. So you have clogging with the Smart Extruder.
19 And we know it's not just some of the extruders. The
20 company told us in the conference call in March of 2014 it's
21 the same extruder in all three printers. So you have a
22 fundamental underlying clogging defect across the entire 5G
23 platform. And the company admits that they know about that
24 and they've been working to iteratively fix it.

25 So to answer Your Honor's question then ultimately

1 in my obtuse way is when do they know about that? Well, if
2 you take a step back --

3 THE COURT: It's not when -- I mean, I think it's
4 clearly adequately pled that they knew at the time they
5 released this product that the extruder had a clogging
6 problem. What Mr. Fukumura is pushing on is when do they
7 know it was a problem that was significant enough, unfixable
8 enough, and offensive enough to the consumer that this thing
9 was going to impact the financials. You and I both bought
10 tech stuff. And everybody grumbles and then the fix comes.
11 The new version of iTunes comes out and it works badly and
12 we all grumble and two weeks later, Apple pushes through the
13 update and it's taken care of. So when do they know we
14 don't have a little problem here, we have a big problem here
15 that's going to impact our financials?

16 MR. ASTLEY: Well, I think you know that from the
17 first day that they make the announcement at CES that
18 fundamentally the Smart Extruder doesn't operate. I mean,
19 Mr. Reis characterizes it himself in February of '15
20 "quality was a major issue." And so, again, it's not a
21 small problem. It's in a certain percentage of extruders
22 that fail. Across the line there is a design defect. So
23 you have the defendants admitting that there are major
24 quality problems that they knew about since the early
25 extruders.

1 THE COURT: So Mr. Fukumura then points out so
2 they go on to three quarters of record-breaking growth and
3 tons of sales of these things. Your view is that this is
4 all on -- what's the expression -- built on sand? Sure,
5 they can see all the sales going out the door, but they know
6 these are boomerangs that they've -- lots and lots of
7 boomerangs are being bought, but they're all going to come
8 right back.

9 MR. ASTLEY: Yeah. I have two responses to that,
10 Your Honor.

11 THE COURT: That seems to be the number today.

12 MR. ASTLEY: The first is there's a difference and
13 the securities laws cover, it would seem reasonably enough,
14 both qualitative misstatements and quantitative. Counsel
15 sort of really wants to drill down on quantitative
16 statements, which are certainly present here as well. And
17 there's a whole host of financial manifestations. But
18 qualitatively there is all sorts of very material
19 information that any reasonable investor would've wanted to
20 know about the fundamental operability of the Smart
21 Extruder.

22 So, again, when the -- and unlike *NVE* or even
23 *Hutchinson*, it's not simply the sort of case where the
24 defendants are coming to the market and saying, hey, we
25 value quality or, you know, even we have great quality or

1 we're an industry leader in quality, like NVE. If you look,
2 even the CES statements, they drill down and they
3 specifically say the Mini 3D Replicator is unmatched in
4 speed, quality, and reliability. They specifically tout the
5 Smart Extruder itself in the very first CES presentation for
6 the Replicator 3D (the other product that was announced in
7 CES) that it will have unmatched speed. And so they qualify
8 quality to a specific product, a product within the product
9 (the Smart Extruder) and they label it unmatched. Well, I
10 know I'm going to be able to take discovery and look at
11 testing validation results, consumer complaints, and the
12 like and we will be able to objectively verify whether it
13 was unmatched against even MakerBot's own other products,
14 like the Replicator 2.

15 So unlike some of the other quality cases where
16 the courts have held, hey, that's sort of like puffing -- we
17 love quality, we're great -- fair enough. But in this
18 context where they are making a big splash in front of a
19 national audience -- they acquired MakerBot for half a
20 billion dollars solely to acquire the 5G technology that
21 they're issuing just months later -- and they are touting
22 those specific products and the extruder component of it,
23 well, that's hardly fair full disclosure if we are able to
24 show a strong indicia that they knew that those things were
25 defective at the time they made those statements.

1 So from a timing standpoint, I think that's
2 established with great particularity in this complaint,
3 because if you accept that the defendants admit that there
4 are problems with the extruders and then you reconcile the
5 defendant's own admissions to the nine former
6 employees/cooperating witnesses, every single one of them
7 says there are extruder problems, problems with clogging.
8 So 90 percent of what the former employees are providing in
9 terms of "anecdotal" accounts or evidence, if you will, are
10 mirrored by the defendants themselves. So it's not a
11 tremendous inferential leap when the cooperating witnesses
12 then say, And those problems were present prior to CES. And
13 we have testers. We have consumers. We have financial
14 analysts. We have different people within the company all
15 to a tee saying the clogging problem was fundamental to the
16 extruder's operability and it existed prior to CES.

17 THE COURT: I think one of the things Mr. Fukumura
18 was taking advantage of is your witnesses are strongest at
19 the beginning of the Class Period when they're working
20 there, but the beginning of the Class Period is also where
21 the defendant can make the strongest argument that, yeah,
22 there were problems. Like, one of the witnesses leaves in
23 March. Yeah, there were problems in March. That doesn't
24 mean that the people didn't think that Pettis didn't think
25 he could get this thing fixed. Your statements get less

1 defensible late, but then you also have your witnesses
2 disappearing.

3 So when one of the defendants says something in
4 November, who do I tie it to that it wasn't that there was
5 problems with the extruder in March, it was that it still
6 hadn't been fixed as of November? You see what I mean? He
7 kind of has it coming and going. He's dismissing when
8 you've got the best evidence as being early and when you've
9 got the best statements as having the worst evidence.

10 MR. ASTLEY: I think that's an unfair
11 characterization because, again, the admitted problem was
12 fundamental to the operability of the Smart Extruder, which
13 was contained in all three units and so, in effect, each one
14 of these 3D printers was a ticking time bomb. It has to go
15 to Home Depot or Dell or to Best Buy to be sold. There's a
16 lag there. Then it's got to be sold to the consumer. The
17 consumer has to use it a day or two before the thing breaks
18 on them, which is what the witness accounts are with
19 firsthand experience, whether on the consumer support side
20 or on the engineer side. And then, of course, the
21 warranties have to work their way back. And as the company
22 disclosed, the warranties worked their way back through Home
23 Depot or through Dell or through Best Buy. So you have a
24 tremendous lag that I think the defendants are trying to
25 take advantage of. But, in effect, it's not *if* these things

1 are going to stop working, it's just a question of when the
2 chickens are going to come home to roost.

3 THE COURT: But Mr. Fukumura says the other thing
4 that's going on in these months is they're making repairs,
5 they're trying to fix it. For these later statements to be
6 false you have to show that the people making the statements
7 knew that the repairs hadn't fixed it. Well, when your
8 witnesses are quitting in June, July, August, whenever, they
9 can't talk about whether Mr. Pettis in November sincerely
10 believes that he's fixed the problem or not. Don't take me
11 too literally. I can't remember which name is associated
12 with which statement on which date. So that's his response.
13 You know, they're also repairing it while this thing is
14 going on.

15 So if you are going to say that Mr. Reis or
16 Mr. Pettis is lying in November, where's the confidential
17 (sic) witness that can tell us -- or the cooperating witness
18 that can tell us that they didn't believe they had the
19 problem fixed by November?

20 MR. ASTLEY: Yeah, Your Honor, on that point it's
21 simply no defense to securities fraud that you're entitled
22 to lie or omit recklessly to material facts at one point
23 because you intend to fix the problem later on. When you
24 say to the market that this particular product and the Smart
25 Extruder within that product is unmatched in its speed, its

1 quality, its ease of use, that has to be true at that
2 moment, not because you intend to have a second or third
3 iteration because as a businessman you want to get ahead.

4 THE COURT: Mr. Fukumura says in November when
5 they said that, that was after they'd repaired it and they
6 thought they had taken care of the problem. They didn't
7 realize until later -- November, too, there is this
8 statement about it being very well-received. He says, well,
9 they didn't know -- that was the Z18 -- they didn't know the
10 Z18 hadn't been well-received until the end of the quarter
11 when they got the results, which is after November.

12 MR. ASTLEY: Well, they say that in January, as
13 well. They say that the MakerBot 5G is exceeding their
14 expectations. In March, they say it's an impressive
15 contribution for MakerBots, precisely what Mr. Fukumura is
16 saying. Look at the sales growth. I mean, the revenues are
17 exploding quarter after quarter. But, of course, it's only
18 the positive side of the ledger. It's not the boomerang, as
19 Your Honor said, where these things are a time bomb. You're
20 booking the sales as you ship to Home Depot, but you're not
21 telling the market that to a tee you're going to have
22 associated expenses.

23 You know from a valuation standpoint if you're
24 spending hypothetically \$2 to fix \$1 of sales, that's not a
25 good investment. You know, if it's going to cost you more

1 on the back-end, or a lot on the back-end, to deal with the
2 front-end, it's not really fair or informative to tout look
3 at our great revenue growth, because ultimately what
4 materializes within a one-year time frame is you spend a
5 half a billion dollars for particular technology. You sell
6 gangbusters because you're touting it and marketing it.
7 It's an exciting new product. And then, lo and behold, once
8 these things run roll out -- and remember, one rolls out in
9 March, another rolls out at the end of June, one rolls out
10 in the beginning of August -- once you work your way through
11 the lags of through Home Depot and then the warranties
12 coming back, the house of cards comes crashing down in the
13 fourth quarter and they take a warranty reserve from 63,000
14 on an enterprise basis for all of Stratasync, they have a
15 \$63,000 reserve, and in the fourth quarter alone they go up
16 to \$400,000. They have a six-fold increase in warranty
17 reserves related to one single issue; that's 5G.

18 So on an enterprise basis this thing is huge.
19 And, of course, you get to the first quarter when they're
20 taking significant impairments and it turns out to be \$380
21 million because they took another one this past October. So
22 literally in a year time frame they tout the heck out of
23 this very exciting product that doesn't work and it comes
24 right back home because consumers don't want it. And the
25 stock goes from \$85 at CES to \$135 by the end of that year

1 when they're selling these things gangbusters, and now it's
2 trading at \$25.

3 THE COURT: If I asked you to pick me the
4 statement or two that is your best, your best statement or
5 two where the statement is most clearly false, the scienter
6 is most clearly present, the support in the complaint is
7 most obvious, what would the statement or two that you would
8 cite for me be?

9 MR. ASTLEY: The first would be at CES itself,
10 which was January of '14, January 6 of 2014, where they
11 specifically say that the two printers and the Smart
12 Extruder are "unmatched" in quality and reliability because
13 that's objectively verifiable. So that's the first
14 statement. They reiterate that at various points throughout
15 the Class Period.

16 The second, I think, very damning, if you will,
17 false statement would be in March of '14 during their fiscal
18 year -- their press release, paragraph 141, when they say
19 they are seeing a significant contribution from 5G and that
20 it's a highly-functional desktop 3D printing platform.

21 So those two categories. And then the final one I
22 would say is the quantitative ones where they disclose the
23 current and anticipated growth from MakerBots from the 5G
24 products. They say it's going to exceed 25 percent.
25 They're projecting their growth based on these things, as

1 well as reporting their then contemporaneous results from
2 the existing quarter. We think quantitatively, like many
3 courts have said -- Judge Montgomery, Judge Riley, a number
4 of judges even in this district have said, you know, even
5 historically accurate financial results can be misleading if
6 you fail to provide, you know, other known material facts to
7 the investors. You're not giving them the full story. Here
8 the full story certainly wasn't revealed. It's obvious why
9 it wasn't revealed. Could you imagine going to CES and
10 having Bre Pettis up there talking with his headset and
11 everything talking about this very innovative problem that,
12 you know what, there's some clogging issues, but we're
13 working hard on it, guys. We're going to solve it quickly.
14 But this is the best. Had they made that sort of
15 presentation, it would never have gotten off the ground.
16 But by the same token, the stock price wouldn't have flown
17 through the roof and it wouldn't have collapsed once the
18 Smart Extruder problems were revealed.

19 So it's pretty clear from a business perspective
20 what they did. They had problems knowingly. They got the
21 thing out to market to stay in front of 3D Systems, who at
22 the very same CES show was also announcing its desktop
23 competitor (like Apple versus Samsung) and it did
24 gangbusters. It's an exciting product. But, lo and behold,
25 behind the scenes they're working feverishly to fix the

1 darned thing because it doesn't work. And so they're just
2 not allowed to do that under the law.

3 THE COURT: Let me ask you about a couple of kind
4 of big picture things that Mr. Fukumura mentioned. He came
5 back to the point several times: Why in August of 2014 do
6 they raise their guidance if they know this is all going to
7 come crashing down on them? At that point, the acquisitions
8 had been made. If the motive here is to have inflated stock
9 to use to purchase companies, they've purchased them. The
10 acquisitions are done. It's August. If you believe that
11 this is all going to come crashing down, why are you raising
12 your guidance in August?

13 MR. ASTLEY: The response to that is if you look
14 at the conference call on August 7 of '14 where they're
15 discussing the raising of guidance, they specifically say at
16 pages 5 and the top of page 6 that the guidance was being
17 raised due to the acquisitions of Harvest Technology and
18 Solid Concept and the organic operations and growth that
19 those companies bring now to the total pie. So it had
20 nothing to do with MakerBot. And so it's sort of an apples
21 and oranges defense to say, well, we raised it.

22 Secondly, you also have to keep in mind in August
23 -- it was end of June when the Replicator was first shipped,
24 and it was the beginning of August, according to the
25 November conference, where the Z18 was first available

1 commercially. And so just through the natural course of
2 distribution through Home Depot and then the lag to come
3 back, it wasn't until the fourth quarter that oh, my god,
4 now you see the Mini, the Replicator, and the Z18 all with
5 the same extruder all being shipped now all coming back
6 home. And if you reconcile that against the witnesses, they
7 all say the same thing: In the summer and the fall, we were
8 just getting mad complaints, warranty reserves galore. And,
9 in fact, one of the issues that we saw in the -- it's in the
10 August conference call, Mr. Pettis was explaining that they
11 changed the warranty. They declared it now a wear part, is
12 how they characterized. They came up with their third
13 iteration and they characterize that as a wear part.

14 THE COURT: Which is not warrantied?

15 MR. ASTLEY: They changed their warranty to only
16 warranty it for 90 days from the six months that it had been
17 warrantied before. And previously, like our witnesses said,
18 you couldn't fix it yourself. It would void the warranty.
19 These warranties are available online. So they shipped it
20 out January, February, March, April with a six-month
21 warranty, but you had to send the printer back to MakerBot
22 otherwise you voided the warranty.

23 Come August -- they're now in their third
24 iteration extruder -- they shorten the warranty to 90 days
25 and they call it a wear part. Hey, guys, you have to buy

1 two or three of them because sometimes they're prone to
2 clogging. Why didn't they say that back in January? These
3 are the same problems. The problem fundamentally hasn't
4 changed. They're trying to fix it.

5 We see the whiteboard at MakerBots. You know, you
6 have this news article where this anonymous employee
7 literally has photographs of the director of quality and
8 senior engineer has whiteboards like fundamental problem,
9 "clogging," the very things the witnesses are saying. So
10 it's an unfair characterization to say, hey, these witnesses
11 are low level or they shouldn't be believed or they're kind
12 of vague when you can literally confirm "clogging" problems
13 from the earliest extruders and corroborate that against the
14 defendant's own admissions, as well as photographs of the
15 MakerBot engineering space where they're trying to fix these
16 problems, but at the same time they're out there telling the
17 market the extruder is the next industrial revolution.

18 THE COURT: Let me ask you another big picture
19 thing. Mr. Fukumura displayed for me the chart of the stock
20 prices of all the 3D printing companies and they all
21 collapsed. They all ended up going from quite high to quite
22 low in the same period of time. Is it your theory that all
23 of them were fraudsters, that the whole industry was --
24 sometimes you get industries that are basically all built --
25 they're all houses of cards. People understand that

1 eventually the product doesn't work. Is that happening with
2 all of them, that some were more honest about it than others
3 or why is it that Stratasys' plunge at least was put off at
4 times by fraud; whereas, other people were plunging for
5 industry reasons or whatever?

6 MR. ASTLEY: I think there's --

7 THE COURT: You sued 3D as well, he says, so I
8 assume you've studied the industry. Was it basically the
9 whole industry misleading the public about the reliability
10 of the technologies?

11 MR. ASTLEY: No, that wouldn't be a fair
12 characterization.

13 THE COURT: Would or would not?

14 MR. ASTLEY: Would not be. But I think you have
15 to disaggregate loss causation from a damages analysis,
16 which Your Honor's question touches on most.

17 THE COURT: Yeah. This is more out of curiosity.

18 MR. ASTLEY: As a matter of loss causation, you
19 can see the chart -- I'm sorry it's not pulled up, but it's
20 in our complaint or whatever -- you can see on or about
21 August 13 when the acquisition happens, MakerBots or
22 Stratasys jumps above the line, is what we say. There's a
23 divergence, a delta between Stratasys and its peers. And
24 that remains higher, although trending down, until like the
25 February 15 time frame when you see Stratasys fall,

1 relatively speaking, back in line with its peer group.

2 So from a loss causation perspective, talking
3 about a Rule 8 standard, one of the significant contributing
4 factors, the legal standard, for the demise in the stock
5 price was the revelation about the 5G inoperability and so
6 from a loss causation standpoint. And so when you do that
7 analysis, Your Honor, which is in our complaint -- it's
8 paragraphs 223 and 224 -- in order to assess whether the
9 changes in the stock price are related to company-specific
10 information versus macro economic factors (whether industry
11 or interest rates or world events) those are factored out.
12 We've pled that in those paragraphs. Of course, we assume
13 that stuff to be true, but we've worked with our experts.
14 And so you can factor out the industry trends. You can
15 factor out the macro economic environment. And you're
16 really drilling down to company-specific news, what was
17 revealed on that day.

18 Now, that being said, if they want to advance
19 their affirmative defense -- whether it be loss causation --
20 or try to diminish the damages that come from that
21 particular date, well, they can do that at trial. And it
22 may be entirely true -- I'm not conceding, but I just don't
23 know -- that not one hundred percent of that stock price
24 drop is related to 5G. Maybe a portion of it's related to
25 5G and the inoperability revelations of the Smart Extruder.

1 And maybe it's events related to some other company-specific
2 information. But that's not the same thing as saying there
3 is no loss causation, because certainly a significant
4 contributing factor to the drop in the stock price was
5 MakerBots. And that's not the same thing as saying there's
6 damages. I just don't know what that damage number per
7 share will be.

8 THE COURT: Okay.

9 MR. ASTLEY: But both those things are pled
10 adequately under the law.

11 THE COURT: Okay. My court reporter has been
12 going for an hour-and-a-half now, so I just want to take a
13 short break. You talk fast enough that I'm guessing her
14 fingers are sore by now, as do I. So let's just take a
15 10-minute break. I'll come back and then invite you to say
16 anything else that you haven't had a chance to say yet.

17 And then, Mr. Fukumura, I'll have you back up
18 then, as well.

19 We'll just take a 10-minute break.

20 THE LAW CLERK: All rise.

21 (A brief recess was taken.)

22 THE LAW CLERK: All rise. This court is now in
23 session.

24 THE COURT: All right. Mr. Astley.

25 MR. ASTLEY: Yes, Your Honor. I'll just briefly

1 have a few points and conclude. Fundamentally, Your Honor,
2 this is my word -- I know it's not your characterization --
3 but the 5G platform was a lemon.

4 THE COURT: That was my word, too, but I don't
5 have any firsthand knowledge. That's how I characterized
6 your accusations at least.

7 MR. ASTLEY: It assuredly was and is a lemon. In
8 fact, the company's ultimate solution was not to fix the
9 problem but to label it a wear part and tell people to buy
10 more of them so you could take it out, clean it, and then
11 use the other one while the first one is being cleaned. So
12 that's hardly a solution.

13 And the fact that the defendants from the earliest
14 days in January of '14 couldn't precisely quantify the
15 financial impact from sending out a time bomb into the
16 marketplace doesn't absolve their liability for at the very
17 same moment telling the market that that Smart Extruder was
18 the next industrial revolution, that it was unmatched in
19 quality and reliability. And, in fact, we can see when
20 everything works its way through the normal distribution
21 process and comes back to the company, which was an
22 inevitable and foreseeable consequence by putting a
23 defective product to market, you can see a tremendous
24 financial impact. So quantitatively, even though it
25 couldn't be calculated, it's still present in this case. So

1 it really is not a fair defense to say, well, because we
2 didn't know the math in Q1 -- we know it in Q4 -- in Q1
3 there's no liability all the while we're telling the market
4 how wonderful the specific Smart Extruder product is.

5 I wanted to go back and also just close a loop.
6 You had inquired as to whether Mr. Reis and Bre Pettis --
7 how involved they were. I would just identify paragraphs
8 145 for you and 98, which is the fiscal year '13 conference
9 call where Mr. Reis with Mr. Pettis said they were
10 "extremely" involved with the development of 5G. So it's
11 not just Bre Pettis. I mean, it's obviously Mr. Reis as
12 well, who just spent \$500 million of the company's money to
13 acquire MakerBots.

14 So I think if you take a step back and you look at
15 the totality of the allegations and accept that the products
16 with the defect began to ship in March, and June, and
17 August, all of our cooperating witnesses (our former
18 employees) were present and have personal accounts at
19 different levels of the company when the products with the
20 defective components were shipped, so they would have
21 personal knowledge. And you can see that from the support
22 side or the engineering side or the financial analyst side,
23 even the intern who is testing these products prior to
24 shipment. They're there, and they're being shipped with the
25 defective extruders in them. So it really is of no moment

1 come November, if you will, or February that they're not
2 there because that's just the fall-out from having shipped
3 the defective products to begin with.

4 THE COURT: What's the motive for the defendants
5 to continue to mislead after the acquisitions in the summer
6 of 2014? Why continue to lie in November or December?

7 MR. ASTLEY: The acquisitions of Harvest
8 Technology and Solid Concepts?

9 THE COURT: Yeah. The motive you posit is that
10 they wanted to keep the stock price inflated because they
11 were going to use the stock to buy these companies. Once
12 they buy the companies, what's the motive to keep lying in
13 November?

14 MR. ASTLEY: Well, at that point, I think, it
15 slightly shifts because that's when you start seeing
16 revelations. You have a news article in December of '14
17 that talks about the extruders. Jennifer Howard, who's the
18 PR person for the company, essentially concedes that there
19 were problems but pushes back, hey, they're fixed now. So I
20 think at that point, the competitive motive which existed in
21 January at CES to stay ahead of 3D Systems and get these
22 things to market in order to build momentum and excitement
23 changes, and now it's sort of a save face motive. Yeah,
24 there were problems; we admit that. There were problems
25 with early extruders; we admit that. We've tried to change

1 them three times. It's a much better experience now. So
2 I'm not so sure that it's a "motive" to lie anymore. The
3 house of cards is falling.

4 So what they're doing now, and if you look at
5 their statements closely, is conceding the problem, but
6 trying to put the best spin on it. We've worked hard to fix
7 it. It's a much better experience. It's now a wear part,
8 so just buy more of them. And we're taking these huge
9 financial charges to earnings. So sales are not -- top line
10 revenue is still high because you're selling a lot of units
11 or other aspects of the company, but earnings -- they reduce
12 their net income guidance because of all the charges, the
13 negatives that have to be taken into consideration with the
14 revenue. So I think that that's what begins to happen post
15 Harvest and post Solid Concepts when the market begins
16 slowly to learn that there are fundamental defects.

17 Also, keep in mind these products aren't shipping
18 in January. They're announced in January, but they're not
19 rolling out. The market is not getting the full flavor and
20 seeing all of the defects with the Smart Extruder until
21 months after these things ship. And the Z18 didn't even
22 ship until the beginning of August.

23 So the timing at that point -- when they are
24 getting tremendous pushback from consumers and complaint
25 calls and the article from 3DPrint.com comes out in December

1 of '14, they're conceding the problem but saying they're
2 working to make it a better experience. So that's what
3 happened in December, again in February, and then ultimately
4 in April when they actually miss for the year the guidance,
5 the earnings guidance.

6 THE COURT: Okay. Anything else you wanted to
7 say?

8 MR. ASTLEY: My final comment would be, you know,
9 Counsel to one of Your Honor's earlier questions said there
10 would only be fraud here if the problem could not be fixed.
11 And we would simply submit that that is not the standard for
12 securities fraud, not for recklessness. And the defendants
13 have no license to tout and bolster with specificity these
14 things while they are "trying" to fix it. It's not just a
15 typical bug. This is not a case where we're claiming it
16 should have been problem-free. We're talking about a defect
17 that's supported by every witness that's fundamental to the
18 operability of the very unit being sold. And they put these
19 things out there, and with perfect foresight you could see
20 what was going to happen. And so even though you couldn't
21 calculate to a cent the warranty expense or the SG&A expense
22 that was going to be associated, you knew that it was
23 coming. So that's really no defense at all, and that is
24 strong reason enough to allow this complaint to proceed to
25 discovery.

1 THE COURT: All right. Thank you, Mr. Astley.

2 MR. ASTLEY: Thank you.

3 THE COURT: Mr. Fukumura.

4 MR. FUKUMURA: Thank you, Your Honor. I'll be
5 very brief.

6 We're still talking at maybe not a 30,000-foot
7 level but a 10,000-foot level about lemons, and
8 inoperability, and these sort of conclusory statements about
9 a sophisticated, high-technology piece of equipment. And so
10 when you go back and look at the confidential witness
11 statements and look at the reliability of the witnesses,
12 which under the Eighth Circuit law the Court in assessing
13 confidential witnesses must look at reliability -- and I'll
14 cite for Your Honor two cases: The *Cornelia* case, 519 F.3d
15 at 783, in which the Eighth Circuit held that the plaintiff
16 failed to provide any information regarding how employees at
17 this level of the company would have access to this
18 particular information. And the *Horizon Asset Management v.*
19 *H&R Block* case, 580 F.3d 755 at 763, another Eighth Circuit
20 case, where the court discounted confidential witness
21 allegations that relied -- or allegations that relied on
22 witnesses whose information comes only second or thirdhand.
23 In the case of the anonymous witness, we don't even know if
24 that's fourthhand. We don't know the anonymous witness who
25 talked to the reporter. We have a reporter talking to an

1 anonymous witness. We don't know who he or she is, when
2 they worked at the company, what their job description was.
3 Were they in catering and that's why they were in that room?
4 We simply have no idea. I know Your Honor will go back and
5 look at all the confidential witnesses. And what you will
6 see is people are talking outside their lane. They're just
7 talking about -- the software engineer is talking about
8 hardware engineering problems. Inside sales executive is
9 talking about engineering problems and that there was
10 clogging. Again, if you put yourself in Bre Pettis' shoes,
11 if someone said, hey, we've got a problem with the extruder,
12 whenever someone said that to him, his natural response
13 would be what's the problem? What's clogging? Why is it
14 clogging? Well, it's because the sensor is not working.
15 Well, what are we going to do to fix that? Well, we've got
16 a work-around. Great. Do it. Get it done. And then a
17 complaint comes in later, well, you know, the sort of
18 flywheel is not working. Well, what are we going to do?
19 Well, we have this work-around. Great. Get it done.

20 On March 11th when they launch Replicator, there
21 is no evidence whatever, an allegation -- except for this
22 sort of hysteria that confidential witnesses generally talk
23 about pre CES, pre launch, but there is nothing at that time
24 period that says at launch, at launch they knew there was
25 that problem. At CES they knew there was a problem. Lawton

1 is talking about before CES. And what is the reliability of
2 those witnesses? Is this water cooler talk? Is this
3 anecdotes? What is it? Who's talking about it?

4 Your Honor asked him to identify a number of
5 statements, and he chose two very early statements about
6 unmatched reliability, quality. Let me just turn your
7 attention to one of the cases that they cite, which is
8 *Medtronic*. *Medtronic*, at a time when the court found a
9 false statement and the false statement was a statement by
10 the company that its increase in sales were essentially due
11 to on-label marketing of its product, Infuse, right,
12 on-label, they're saying for the FDA-regulated purpose of
13 this drug -- the label, here's our sales. The court found
14 that that was sufficient to get beyond a motion to dismiss.
15 In that very same opinion here's what the court found was
16 mere puffery: "Compliance with the law and with the highest
17 ethical standards is critical to Medtronic's continued
18 collaborations with physician customers." We know what the
19 court already found. They said, look, that's puffery. This
20 is the type of broad statement that you're going to have at
21 a rah-rah session at, like, CES on a stage. It's precisely
22 -- in fact, this is much worse, in many respects, than
23 anything that is actual at the sort of probative value as an
24 allegation in this case. Another example -- and that's on
25 page 20 of the opinion they cite, on pages 20 and 21 --

1 "Medtronic was fully compliant with the law and industry
2 standards." Puffery. 22 and 23, "Continued growth in our
3 Legacy business," and that's on the on-label business, not
4 the off-label business; that's puffery. The law on
5 puffery -- I didn't go through all of the puffery slides.
6 We're going to rely on our papers on that, but I did want to
7 make that point because it was one of the sort of key
8 features.

9 Again, Your Honor asked him a question about
10 November and what evidence they had, and one of the things
11 that he followed up with is in December this public
12 relations person from the company saying, We got it fixed.
13 Well, you were focused on November. How do we know in
14 November that's exactly what the company thought? Yeah,
15 there was an issue. It was the sensor. The reason why,
16 there was some software bug that we had to put in and fix
17 it. You know, they want to pull back and say the whole
18 thing is a lemon. Well, this is a complex thing. There's a
19 lot of gadgets in it. What part of it is broken? Oh, well,
20 it's this. Well, we fixed it. We fixed it. And he sort of
21 makes a big deal about the change in the warranty. That was
22 actually done to help consumers so that they could swap out
23 the extruder. They could fix it themselves. And the
24 company actually online -- I could show you that video --
25 showed how to fix one of the main problems with the

1 extruders, which was the level plate. I don't want to get
2 too technical, but a lot of -- and pejoratively you'll see
3 the people online saying, Well, it's because you're not a
4 techie, and you guys are fossils and you don't know how to
5 level a plate. But there's something called a level plate
6 that has to be level when you begin to make your mold, and a
7 lot of people were not leveling correctly so the sensors
8 weren't reading it correctly, et cetera. So, I mean, this
9 is a very complicated thing.

10 It's easy to talk at a 10,000-foot level and say,
11 It's a lemon and they knew from the beginning it was a lemon
12 because our confidential witnesses all said it was a lemon.
13 You've got to get down -- and I know Your Honor will do
14 it -- get down, look at the confidential witness statements,
15 look at what their job descriptions are, what their lane is
16 and whether they're speaking in their lane or hearing things
17 second and thirdhand around the water cooler.

18 I would urge Your Honor to look at *A123*, *NVIDIA*,
19 *Siebel* for cases where there are striking problems in
20 defects. In *NVIDIA* I think this ended up being an actual
21 cash hit of about 150 million. He talked about raising the
22 goodwill -- sorry, the warranty expense from 40,000 to
23 600,000. This is on 217 million in sales. Okay. Okay. Is
24 that material? I don't know. When did they know about
25 that? When did they know about the \$600,000 warranty

1 increase? Was it in November or was it on January the 7th
2 when MakerBot closed its books? There's nothing that says
3 that in the complaint. We don't know from this complaint
4 when any person who's making a public statement in
5 September, in November what they actually knew at that time
6 or whether it was fixed. We made them in April -- if there
7 was an April meeting -- sit down and figure out why this
8 sensor wasn't working and, by golly, on May the 1st they
9 fixed it. We don't know that. It's this long, sort of
10 vague there was all these problems, all these problems, all
11 these problems. When? When? When did it become so
12 significant that it was going to impair, as Your Honor
13 pointed out, the financial condition and operating results
14 of the company, which is what the market cares about. This
15 is not a consumer case, as he pointed out. This is a
16 securities fraud case.

17 I believe when I talked about the increase in
18 guidance, when I was showing you the bubble, that it
19 coincided with and was related to Harvest and Solid
20 Concepts. If I didn't say that, I apologize. One important
21 thing to note is if they thought the sky was falling, if
22 they thought that this boomerang was going to come back and
23 the whole house of cards was going to fall, then why did
24 they raise guidance? They didn't have to. They could've
25 said, hey, we've got this boomerang coming back. It's going

1 to be the worst thing ever. Let's just not raise guidance.
2 They raised guidance substantially. And in the end, they
3 met the bottom range of that guidance. When you see the
4 first press release in February, they say they come in just
5 under at 748.5 million, but when they finally close the
6 books -- and you'll see in the March 3rd, 2015 Form 20-F,
7 which is the equivalent -- foreign filer equivalent of the
8 10K, revenue comes in at 700.5 million.

9 I have no other points, unless Your Honor has any
10 questions.

11 THE COURT: I don't. Thank you, Mr. Fukumura.

12 MR. FUKUMURA: Thank you very much for your time.

13 THE COURT: Thank you, both of you, for your help
14 with this case. There's a lot here for us to look at. I
15 think it will be a while before I will be able to get an
16 order out, but we'll do the best we can. Have a good
17 weekend.

18 THE LAW CLERK: All rise.

19 (Court adjourned at 11:10 a.m.)

20 * * *

21 I, Debra Beauvais, certify that the foregoing is a
22 correct transcript from the record of proceedings in the
23 above-entitled matter.

24 Certified by: s/Debra Beauvais
25 Debra Beauvais, RPR-CRR