

CERTIFIED COPY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

COURTROOM 34

MICHELE M. CASTILLO, COMMISSIONER

CHARLES SCHWAB & CO., INC,
Plaintiff,

vs.

MICHAEL P. KELLY,
Defendant.

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)
) CASE NO. 56-2013-00433193
) CU-PT-VTA
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, MARCH 6, 2015

APPEARANCES:

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I N D E X

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
BEATTY, Jonathan		2	11	--
THETFORD, Michelle	17	37	51	54
LEWIS, Kevin	58	--	--	--

<u>DEFENDANT'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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(None.)

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I N D E X
(Continued)

EXHIBITS

<u>PEOPLE'S EXHIBITS</u>	<u>FIRST REFERENCE</u>	<u>RECEIVED</u>
1- Document	62	
2- Document	64	
3- Document	66	66
5- Transcript	67	
6- Document	69	
7- Document	74	
8- Document	75	
17-Document	3	33
30-Document	76	77
31-Document	79	withdrawn
41-Document	12	12

<u>DEFENDANT'S EXHIBITS</u>	<u>FIRST REFERENCE</u>	<u>RECEIVED</u>
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(None offered.)

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1 VENTURA, CALIFORNIA; FRIDAY, MARCH 6, 2015

2 P.M. SESSION

3 --o0o--

4
5 THE COURT: My 1:30 matter Charles Schwab & Company
6 versus Michael Kelly.

7 MR. SHAIN: Good afternoon, your Honor.

8 THE COURT: Good afternoon.

9 MR. SHAIN: Your Honor, do you have a copy of the
10 transcript of the testimony that went with --

11 THE COURT: I do not.

12 MR. SHAIN: Okay. I think you should.

13 MS. CROWTHER: I have an extra.

14 Good afternoon, your Honor.

15 THE COURT: Good afternoon, Ms. Crowther.

16 Good afternoon, sir.

17 Looks like all parties are present. Can you make
18 appearances please. I'm sorry.

19 MR. SHAIN: David Shain on behalf of Mr. Kelly.

20 MS. CROWTHER: Robyn Crowther and Amy Pomerantz of
21 Caldwell Leslie & Procter for the moving party Charles
22 Schwab.

23 THE COURT: I'm in receipt of the transcript from
24 January 12, 2015.

25 Are there any preliminary matters to take up
26 before we resume with Mr. Beatty?

27 MS. CROWTHER: Not from my perspective, your Honor.

28 MR. SHAIN: I don't think so, your Honor. Just

1 obviously we want any witnesses to be excused.

2 THE COURT: Sure.

3 If there's any parties present in the courtroom
4 that expect to testify, you need to please wait in the
5 hallway. Thank you. Other than Mr. Beatty, of course.

6 MS. CROWTHER: Thank you, your Honor. Briefly
7 Mr. Lewis was excluded from that order as he's my client
8 contact.

9 THE COURT: Yes. Thank you.

10 Is everybody setup and ready?

11 MS. CROWTHER: Yes.

12 THE COURT: Mr. Shain I believe you had him on cross.

13 MR. SHAIN: I did. And I'm just about finished. I
14 just a few more questions.

15 THE CLERK: If you could please state and spell your
16 name for the record.

17 THE WITNESS: Jonathan Beatty, spelled J-o-n-a-t-h-a-n.
18 Last name is spelled B, as in boy, -e-a-t-t-y.

19 THE COURT: You may begin.

20

21 JONATHAN BEATTY,
22 resumed the stand as a witness by the Plaintiff,
23 was previously sworn and testified as follows:

24

25 CROSS-EXAMINATION(continued.)

26 BY MR. SHAIN:

27 Q Hello again, Mr. Beatty.

28 A Hi. How are you.

1 Q Good. Thank you. Mr. Beatty, last time we were
2 here Ms. Crowther asked you a question about Exhibit 17.
3 Would you turn to that please.

4 A Is there a page?

5 Q Page 9 of that exhibit book. And I believe she
6 had asked you about paragraph 43 whether or not you had made
7 that statement and I believe you indicated that you had;
8 correct?

9 A Paragraph 43?

10 Q Yes. In other words, the statement that was
11 attributed to you in photograph 43 you indicated that you had
12 made. Do you remember saying that?

13 A I'm looking at 43 -- I have to read out
14 because --

15 Q Well, let me -- perhaps we need to get some
16 confirmation here because the testimony reads in the
17 transcript at line 21 -- there's a paragraph number 43, and
18 actually line 43 is paragraph 45. Is that the paragraph that
19 you indicated that you stated?

20 A I think it's line 45.

21 Q Yes.

22 A It's got my name associated with it.

23 Q All right. Where it says: According to
24 Jonathan Beatty, quote, during the compliance resolution
25 process the risk department becomes involved when it looks
26 like the only resolution might be termination. Small AUM
27 IA's pose little or no litigation risk.

28 Is that the statement that you indicated that you

1 made?

2 A I don't remember because you're pointing me to 43
3 and it seems to be confusing some about what was referenced
4 in the prior testimony.

5 Q Well, the confusion is that the transcript speaks
6 of line 21 and references paragraph 43. And as you see at
7 line 21 it's actually paragraph 45.

8 A Correct.

9 Q So let's look at line -- line 21 paragraph 45, do
10 you remember saying that to Mr. Cross on the telephone or
11 some other occasion?

12 A So I remember a conversation in this nature. I
13 don't remember these exact words. And I would not have used
14 small AUM IA's. That's not my vernacular.

15 Q Would you have said words to that effect "that
16 small companies pose little or no litigation risk"?

17 A I don't think they -- no, I don't think I would
18 have said that.

19 Q Are you saying that you didn't say that or you
20 don't recall saying that?

21 A I don't recall saying that.

22 Q And how about what's in paragraph 43 where it
23 says, "The end accountholder is only notified if the IA is
24 terminated and the compliance violation is not revealed"?

25 A I don't remember saying that. And I don't see
26 that that's attributed to me in this document.

27 Q Well, I'm just going to read to you and perhaps
28 you can clarify that from the page 34 of the deposition. And

1 you were being questioned by Ms. Crowther. And starting on
2 page 11, the question was page 9 of Exhibit 17:

3 "Answer: Okay.

4 "Question. And at line 21 there's a
5 paragraph numbered 43. Do you see that?

6 "Answer: Yes.

7 "Question: And there's a reference to a
8 statement made by you, is that -- is the
9 statement that's quoted there something
10 that you said?

11 "Answer: Yes.

12 "Question: Did you say it to Mr. Cross?

13 "Yes.

14 "Have you ever said it to Michael Kelly?

15 "No."

16 Do you remember that colloquy between and you
17 counsel last time we were here?

18 A I do, yes. Can I see what you're reading? Or is
19 that fair?

20 MS. CROWTHER: May I provide the witness with a copy?

21 THE COURT: Yes.

22 THE WITNESS: Where are we on this document?

23 BY MR. SHAIN:

24 Q Page 34.

25 A Okay.

26 Q And starting at line -- I guess, line 11 down to
27 line 23.

28 A Page line of Exhibit 17 and at line 21 there's a

1 paragraph numbered 43.

2 Q Right.

3 A Which is on this document number 45.

4 Q Correct.

5 A Right.

6 Q So I don't know whether the court reporter
7 misheard it or what might have happened but in any event this
8 is what we're presented with today. So I'm asking you when
9 he indicated that you said it to Mr. Cross, were you
10 referring to paragraph 43 or 45?

11 A I can't remember exactly which line I was looking
12 at amongst five weeks ago. Sorry.

13 Q As you sit here today, you don't recall making
14 either of those statements?

15 A I remember making a statement but I don't
16 remember which line I was looking at when I was making the
17 statement.

18 Q Okay. But I'm saying look at it anew right now,
19 do you recall making either of those statements to the person
20 you believed was Craig Cross?

21 A As I said a minute ago I remember having a
22 conversation of this nature. These words are not the words I
23 would have used. So the general nature of the conversation
24 is, yes, but these are not my exact words.

25 Q So, in other words, according to what's set forth
26 in paragraph 45, that represents the general nature of the
27 conversation that you had with the person you thought was
28 Mr. Cross?

1 A That's correct.

2 Q And was that a conversation you had over the
3 phone with Mr. Cross?

4 A Yes, it was.

5 Q Do you remember which of the conversations you
6 had that with Mr. Cross?

7 A I don't remember -- let me rephrase that. I
8 believe it was our last conversation the evening before we
9 met. We were supposed to meet at the restaurant.

10 Q In Long Beach?

11 A In Long Beach, that's correct.

12 Q Let's switch gears. And by the way, the
13 statement in paragraph 45 you said that you made a statement
14 which the gist of what you said is contained in paragraph 45;
15 correct?

16 A The first sentence during the compliance
17 resolution process, the risk department becomes involved when
18 it looks like the only resolution might be termination. That
19 is a process that we have.

20 The nature of the second sentence I would not
21 have used the term AUM IA. I don't use that in my vernacular
22 what I'm talking about clients. And I don't remember
23 specifically how I characterized the risk of litigation was
24 small advisors.

25 Q Would it surprise you to believe that you made a
26 comment to the effect that small companies pose little or no
27 litigation risk?

28 MS. CROWTHER: Objection. Calls for speculation.

1 THE COURT: Overruled.

2 THE WITNESS: What was the question again?

3 MR. SHAIN: Could I ask that the court reporter read it
4 back.

5 (Record read.)

6 THE WITNESS: That would be a surprise.

7 BY MR. SHAIN:

8 Q So when you made the comment on the prior
9 occasion on page 34 where you said that that was something
10 that you would have said, were you not referring to that
11 paragraph? Or were you meaning to say I only refer to a part
12 of it?

13 A I believe I could have been looking at -- I think
14 what we called paragraph 43 as I was directed in the moment.
15 "The end accountholder is only notified if the IA is
16 terminated and the compliance violation is -- and a
17 compliance violation is not revealed."

18 So I can't remember exactly when I answered your
19 question or the questions whether I was looking at 43 or 45
20 at that particular moment.

21 Q So it may have been either one that you were
22 responding to Ms. Crowther's question?

23 A It could have been either one when we were in
24 that moment.

25 Q Let's switch gears for a moment, Mr. Beatty, and
26 talk about the day in Long Beach that we spent some time on
27 the last time that we were here.

28 As you walked across the street from the person

1 in the hat that you had described, you were starting to give
2 some thought to who that person might be; is that a fair
3 statement?

4 A No. As I was walking across -- when I was
5 walking across the street, I was trying to understand why the
6 gentleman that I had been working with, Mr. Cross, had asked
7 me to go across the street to talk to a person. That's what
8 I was trying to figure out.

9 Q And I think you testified that at some point
10 shortly after that you called Mr. Clark, Bernie Clark?

11 A After the interaction with the individual in the
12 white hat, yes.

13 Q And Bernie Clark was your direct supervisor at
14 the time?

15 A Yes.

16 Q And at some point in time shortly thereafter you
17 were furnished a photograph; is that correct?

18 A That's correct.

19 Q Who furnished that photograph to you?

20 A It came from Ardin Miller in our compliance
21 organization.

22 Q Where was Mr. Miller located at the time?

23 A At the time he was in Phoenix.

24 Q So how did it go? You're leaving -- you're
25 walking across the street. You call Mr. Clark. Did you call
26 Mr. Clark on the way to the airport or before you got in the
27 vehicle?

28 A I -- I walked into the restaurant. There was

1 about ten minutes before my car was supposed to arrive to
2 take me to the airport. My first reaction as an employee of
3 the firm is to call my superior and tell him what had
4 happened, which is what I did.

5 Q And did Mr. Clark at that point suggest to you
6 that he thought this might have been Mr. Kelly all along?

7 A No.

8 Q How did it come about that you got that
9 photograph?

10 A As I was talking to Mr. Clark, I was the one that
11 suggested that it was Mr. Kelly. And then Mr. Clark acted on
12 that by notifying our security department. And that's -- I
13 was not aware that Bernie was going to ask Ardin to forward
14 the picture to me.

15 Q And you had -- you knew all about Mr. Kelly well
16 before that Long Beach meeting; correct?

17 MS. CROWTHER: Objection. Vague and ambiguous.

18 THE COURT: Overruled.

19 THE WITNESS: I don't think I knew all about Mr. Kelly.
20 BY MR. SHAIN:

21 Q Well, you knew that Mr. Kelly had been, shall we
22 say, a thorn in the side of Schwab before that Long Beach
23 meeting?

24 A I know that we had a court proceeding with
25 Mr. Kelly and it was a contentious situation.

26 Q And did Mr. Clark say to you on the phone it
27 looks like this may be Kelly?

28 A No. As I talked to Mr. Clark about my belief

1 that it might be Mr. Kelly, he immediately went into, let's
2 get you out of there. Let's get you to the airport. And
3 let's deal with this once you're safely away.

4 Q Okay. And at what point in time was the
5 photograph forwarded to you from Mr. Miller?

6 A When I was in the car heading toward the airport.
7 So that might have been 20 minutes later.

8 Q Was that on a cell phone, an iPad, something like
9 that?

10 A Yes, sir, cell phone.

11 Q What kind of phone did you have?

12 A iPhone.

13 Q And was it just one photograph that was sent to
14 you or were there several for you to look at?

15 A It was one photograph.

16 Q And what did the photograph -- is it the
17 photograph that is the depicted in Exhibit 26?

18 A Yes.

19 Q And did the photograph look like that or was it
20 better quality photograph?

21 A It was a color photo.

22 Q And you looked at that photograph and that's the
23 only photograph you saw; correct?

24 A That's correct.

25 Q And you knew that there had been a contentious
26 litigation with Mr. Kelly that was ongoing at the time you
27 saw the photo; correct?

28 A I was aware of that, yes.

1 MR. SHAIN: That's all I have for the moment, your
2 Honor.

3 THE COURT: Okay.

4 Ms. Crowther.

5

6 REDIRECT EXAMINATION

7 BY MS. CROWTHER:

8 Q Mr. Beatty, you have in front of you a yellow
9 sheet of paper with hash marks on it. Do you recognize it
10 from last time you were here?

11 A Yes, I do.

12 MS. CROWTHER: Your Honor, I'd like to ask that this
13 exhibit be marked number 41 and moved into evidence.

14 THE COURT: Any objection, Mr. Shain.

15 MR. SHAIN: No, your Honor.

16 THE COURT: Okay. It will be marked and admitted.

17 BY MS. CROWTHER:

18 Q And just because it's been a while since we were
19 here, those were hash marks that we made during your direct
20 testimony of contacts between you and Mr. Cross; is that
21 right?

22 A That's correct.

23 Q Now, we also -- we discussed that some of these
24 hash marks were voice mail messages that were left on your
25 iPhone, do you remember that?

26 A Yes.

27 Q Have you listened to those messages again?

28 A Yes, I have.

1 Q Since the last time you were here?

2 A Yes.

3 Q How many of them are there?

4 A There are eight.

5 Q And those are messages that Mr. Cross left for

6 you?

7 A Yes.

8 Q And a moment ago Mr. Shain was asking about the

9 telephone call the night before your meeting in Long Beach.

10 A That's correct.

11 Q Who -- did you receive that call or place that

12 call?

13 A I received that call.

14 Q So it was placed by Mr. Cross?

15 A That's correct.

16 Q Over the course of your interaction with a person

17 who identified themselves as Craig Cross, about how many

18 hours total would you say you spent talking with him?

19 A I'd say two plus hours.

20 Q And was there one call in particular that was

21 longer than the others?

22 A Yes. Our conference call with Michelle Thetford

23 over the compliance topic where Mr. Cross attended with his

24 supposed client's compliance expert lasted an hour.

25 Q And was that conference call conducted via a

26 dial-in?

27 A Yes, it was.

28 Q So Mr. Cross had to call in to that number?

1 A That's right.

2 Q You didn't call him and conference him in?

3 A It was a dial-in, I believe.

4 Q Did you feel that you became familiar with
5 Mr. Cross's voice?

6 A Yes.

7 MR. SHAIN: Objection as to familiar. Speculative and
8 vague and ambiguous.

9 THE COURT: Overruled.

10 BY MS. CROWTHER:

11 Q Your answer was yes?

12 A Yes.

13 Q Now, have you ever spoken, Mr. Beatty, with
14 someone who in the course of your work with Schwab who
15 identified themselves as Michael Kelly?

16 A No.

17 Q Let me play from Mr. Kelly's deposition page 145
18 line 17 through 23.

19 A 145?

20 Q I'm just going to play it for you.

21 A Okay.

22 (Video played.)

23 MR. SHAIN: I have an objection to this. This partial
24 that's being pointed out is obviously for far more than just
25 voice identification. It's to prejudice the Court because of
26 issues that are being stated in this. I think it's valid for
27 there be a discussion of comparison of voices, but not to use
28 prejudicial material on a deposition transcript. I would ask

1 that that be excluded.

2 THE COURT: Ms. Crowther.

3 MS. CROWTHER: It's an admission, your Honor. It's in
4 the deposition. It's only prejudicial because he doesn't
5 like what his client admits. And besides we're not even
6 moving it into evidence. We're offering it for Mr. Beatty's
7 observation. So there's no basis for the objection.

8 MR. SHAIN: It's not an admission in this case. It's
9 an admission in another case and has nothing to do with this
10 case.

11 MS. CROWTHER: Statements made out of court under oath
12 by a party opponent are an admission. It doesn't matter in
13 what proceeding.

14 THE COURT: Anything else, Mr. Shain?

15 MR. SHAIN: It also needs to be weighed by the Court in
16 terms of probative versus prejudicial value. There are three
17 hours of deposition that can be played. This particular
18 section is selected I suspect for purpose that goes beyond
19 just voice identification.

20 THE COURT: Okay.

21 Overruled.

22 (Video played.)

23 MR. SHAIN: I'm also going to renew it on the grounds
24 of relevance. What does that possibly have to do with the
25 issue at stake here which is contacts which my client has
26 alleged to have made with Schwab. This precedes all of those
27 issues by a long shot.

28 THE COURT: Well, correct me if I'm wrong,

1 Ms. Crowther, are you proffering the voice to then ask
2 questions of Mr. Beatty as to whether that's the voice that
3 he heard on the telephone call?

4 MS. CROWTHER: Precisely.

5 THE COURT: So you're not offering factual statements
6 which reference that were used in the actual statements that
7 I just heard.

8 MS. CROWTHER: Correct.

9 THE COURT: Overruled.

10 BY MS. CROWTHER:

11 Q Mr. Beatty, do you recognize the voice of the
12 person who was speaking who wasn't me on the videotape?

13 A Yes, I do.

14 Q Whose voice is it?

15 A That's Mr. Kelly's voice. And on the phone that
16 was being represented as Mr. Cross.

17 MS. CROWTHER: One moment, please.

18 Thank you. Nothing further.

19 THE COURT: Mr. Shain.

20 MR. SHAIN: Nothing further.

21 THE COURT: May Mr. Beatty be excused?

22 THE WITNESS: Should I leave this here?

23 THE COURT: Yes.

24 Your next witness, Ms. Crowther.

25 MS. CROWTHER: We call Michelle Thetford.

26 MR. SHAIN: Your Honor, I ask that Mr. Beatty be
27 excluded. Conceivably be subject to recall.

28 THE COURT: Okay.

1 Mr. Beatty, I'll have to ask you to wait in the
2 hallway, please.

3 THE CLERK: Raise your right hand. You do solemnly
4 swear that the testimony you're about to give in the matter
5 now pending before this Court will be the truth, the whole
6 truth, and nothing but the truth, so help you God?

7 THE WITNESS: I do.

8 THE CLERK: Please take a seat at the witness stand.
9 Please state and spell your name for the record.

10 THE WITNESS: Michelle, M-i-c-h-e-l-l-e. Last name
11 Thetford, T-h-e-t-f-o-r-d.

12 THE COURT: You may begin.

13

14 MICHELLE THETFORD,
15 called as a witness by the Petitioner,
16 was sworn and testified as follows:

17

18 DIRECT EXAMINATION

19 BY MS. CROWTHER:

20 Q Good afternoon, Ms. Thetford.

21 A Good afternoon.

22 Q You're currently employed?

23 A I am.

24 Q Where do you work?

25 A Charles Schwab.

26 Q And what is your title?

27 A I'm the vice president of compliance.

28 Q And how long have you worked for Charles Schwab?

1 A About ten years.

2 Q Can you give just a brief summary of the
3 positions that you held while you've worked for Charles
4 Schwab?

5 A I've always worked in the compliance department
6 at Charles Schwab. And during my career at Schwab, I've been
7 assigned to support the advisor services enterprise. And
8 I've taken on additional responsibility as through my career
9 I started as a senior manager and now lead that team.

10 Q And as you lead that team, give me a summary of
11 your duties.

12 A My team is responsible for providing the
13 compliance program and compliance advice to the advisor
14 services enterprise at Schwab. We're also responsible for
15 administering a surveillance program which surveils activity
16 in client accounts as well as advisors who use that platform.
17 And my team also conducts investigations on advisors using
18 that platform.

19 Q Are you involved in investigations?

20 A I am.

21 Q And what role do you play in investigations?

22 A At this point I supervise them. I have a team of
23 three. It's two investigators and their manager that conduct
24 the investigation. And their manager reports to me.

25 Q Now, in the course of your business with
26 Charles Schwab, have you had an opportunity to speak with
27 someone who identified himself as Craig Cross?

28 A I have.

1 Q How many occasions?

2 A Twice.

3 Q When was the first time?

4 A The first time was the end of August and it was a
5 conference call that I participated in at the request of
6 Mr. Beatty.

7 Q That's August 2014?

8 A Yes.

9 Q And did Mr. Cross participate in that call?

10 A He did. It was myself, John Beatty, Mr. Cross
11 and another individual that Mr. Cross brought to the call
12 from his firm who identified herself as Kelly.

13 Q Her first name you understood to be Kelly?

14 A Correct.

15 Q And did Mr. Cross provide any other identifying
16 information about himself during that call?

17 A He did not. But going into that call when
18 Mr. Beatty asked me to participate, Mr. Beatty gave me the
19 background that we'd be speaking with Craig Cross and the
20 name of his firm. That Mr. Cross worked at that firm, was
21 already an advisor using the advisor services platform. So
22 Mr. Beatty gave me that background.

23 Q What was the name of the firm?

24 A Hargrove something.

25 Q Halbert Hargrove?

26 A Halbert Hargrove. Thank you.

27 Q Before the call did you have a general
28 understanding of what the topic to be discussed was?

1 A I did. Mr. Beatty called me and said that he was
2 working with one of the advisors on the platform, that that
3 advisor was thinking of breaking away from his current firm
4 which is rather common in our business. Mr. Cross said he
5 told Mr. Beatty he was going to leave Hargrove with a number
6 of his partners and form their own firm and that they were
7 considering use advisor services for their custodian
8 services. And that they had concerns about the compliance
9 program and about my team specifically because a friend of
10 theirs had also been on the advisor services platform and was
11 terminated from that platform. And they wanted to talk about
12 the investigations process and the compliance program.

13 Q And during the call itself is that what was
14 discussed?

15 A Yes, it was.

16 Q And about how long did that call last?

17 A The call lasted about 30 to 45 minutes.

18 Q What specific issues relating to compliance were
19 discussed?

20 A Well, we discussed my role. We discussed the
21 compliance program for advisor services. We spent the most
22 time discussing the investigations process that my team
23 conducts on advisors on that platform. We talked some about
24 the friend of Mr. Cross's that had been terminated from the
25 platform and some of the reasons why that was. It was public
26 information we shared with them. But most of the call was
27 around how the investigation process works, how the
28 surveillance process works and how my team interacts with

1 advisors during that process.

2 Q And at the conclusion of the call was there any
3 follow up that you were supposed to provide?

4 A There was. During that call Mr. Cross indicated
5 he was satisfied with the process explanations I had provided
6 him. But he was insistent that Mr. Beatty provide him with
7 what he called three references. And he wanted to speak with
8 three advisors who were using the advisor services platform
9 that had specifically had what we called compliance issues
10 where I had worked with the advisor on those issues.

11 So following that call, Mr. Beatty asked me to
12 provide him a list of some advisors that I had worked with on
13 various issues. And I sent him a list of eight to ten
14 advisors to choose from with the understanding he would
15 select three of those and provide those to Mr. Cross as our
16 references that Mr. Cross would contact separately.

17 Q And after that conference call you had an
18 opportunity to speak with Mr. Cross again?

19 A I did.

20 Q Was that also a telephone call?

21 A It was a telephone call.

22 Q How did that come to pass?

23 A I went on vacation. I left on September 16 for a
24 trip overseas and upon leaving I checked in with Mr. Beatty
25 and we had two things pending on Mr. Cross's deal. One was
26 we knew we was going to want to talk to these references.
27 But Mr. Cross had also talked about in our first call and
28 perhaps an onsite visit to his office in Long Beach that

1 included me and Mr. Beatty. So I told Mr. Beatty I would be
2 out of contact while on vacation but when I got back into the
3 country, I would touch base with him to see where he was at
4 on his deal and see if he needed anything.

5 I returned to the country around September 30th.
6 I contacted Mr. Beatty. He said while we've made progress.
7 Mr. Cross has talked to our references. He decided that we
8 don't need to see him in person so you don't need to book
9 travel. But he does have follow-up questions for you. Can
10 he call you? I said yes. I told Mr. Beatty to give him my
11 cell phone number even though I was back in the country, I
12 was still technically on vacation. Mr. Beatty told me that
13 Mr. Cross would call me on my cell phone the next day.

14 Q Did that happen?

15 A Not the next day but the following day.
16 Mr. Called me on my cell phone.

17 Q And were you still at home at that time?

18 A I was. That was October 1st, I believe.

19 Q And about how long did you talk with Mr. Cross?

20 A An hour.

21 Q And generally speaking what was the substance of
22 the discussion?

23 A It started out Mr. Cross spent some time
24 recalculating the discussions we had had with our three
25 references and he went into quite a bit of detail of those
26 conversations he had with those advisors and one by one
27 explained the issues that they talked about.

28 We then went into some additional questions he

1 said he had about the investigations process and the
2 surveillance program. So, again, we recapped the
3 investigations process. We talked about the surveillance
4 that we do on advisors and on client accounts. We talked
5 about the industry as a whole and how complex it has become
6 from a compliance perspective for advisors. We talked about
7 the closure, the termination process from the AS platform
8 that comes out of the investigations at times. And then we
9 wrapped up the call with Mr. Cross saying he was satisfied
10 that he felt like he had conducted his due diligence. He was
11 pleased with the outcome and that he was going to tell his
12 board of directors they should move forward and was ready to
13 close the deal. And he said he was going to be meeting
14 Mr. Beatty for lunch the following day in Long Beach and that
15 he was ready to go forward and sign the papers.

16 Q Did the topic of assets under management, or AUM,
17 come up during your second call with Mr. Cross?

18 A It did. It came up in several different points
19 of the conversation. It came up when we were talking about
20 the investigations and surveillance process. He asked
21 roughly did all advisors receive the same process. He seemed
22 to think that advisors that had less assets under management
23 with us had a different process than others. And I corrected
24 him and said no. And it was actually very proud of the fact
25 that we had made a decision a long time ago on the platform
26 that all advisors were going to be treated the same when it
27 came to surveillance and investigations. I mean, everybody
28 got full process.

1 And that led into really the discussion of the
2 industry, that's how we got on that topic. Was Mr. Cross
3 asked me, did we have a disproportionate number of smaller
4 advisors that we had investigated and terminated. And I said
5 we did but there was reason behind that. One, being if you
6 look at our platform of 7,000 advisors, over half or what we
7 would call small advisors, so the law of probability that's a
8 very big group.

9 And, second, that as complex as the industry is,
10 it's really tough for smaller advisors to keep current with
11 the regulations and all of the different requirements. And I
12 remember saying something like, you know, I don't know how a
13 small advisors do it, you know, without having all of that
14 infrastructure and support. It would be so difficult.

15 And then we moved into the last part of the
16 conversation we were wrapping up and talking about closures.
17 And Mr. Cross said, well, you know, a firm of my size
18 wouldn't have problems at Schwab. And I said, well, again
19 it's not about your size. You obviously have a large
20 infrastructure in your compliance and risk management
21 platform given your resources but our process is the same for
22 you as it would be anybody else.

23 Q Ms. Thetford, is there a black notebook in front
24 of you there labeled exhibits?

25 A Yes.

26 Q Would you open that and turn to Exhibit 17.

27 A Okay.

28 Q Do you recognize Exhibit 17?

1 A I do.

2 Q And when have you seen it before?

3 A I saw this document -- it was e-mailed to me by
4 Schwab internal counsel in the end of October.

5 Q Of 2014?

6 A Yes.

7 Q And you see it's labeled notice of appeal?

8 A Yes.

9 Q Before you received this from Schwab in-house
10 counsel, were you aware of a dispute between someone named
11 Michael Kelly and Charles Schwab?

12 A Yes.

13 Q And did you have any involvement with that
14 dispute?

15 A Yes.

16 Q How were you involved?

17 A Um, the dispute began shortly after Mr. Kelly was
18 terminated from the AS platform. And I worked with our in-
19 house legal department on Mr. Kelly's complaints around his
20 termination. And that ultimately he filed litigation against
21 us -- arbitration against us and I participated in those
22 arbitration proceedings actually testified at them last year.

23 Q And did you provide information in connection
24 with those proceedings?

25 A Yes.

26 Q Now, have you, to your knowledge, ever spoken
27 with Michael Kelly directly?

28 A No.

1 Q Do you understand the issues generally that he
2 was raising in his arbitration proceedings with Schwab?

3 A I do. I do.

4 Q What do you understand them to be?

5 A My understanding of Mr. Kelly's concerns about
6 the termination, there were several issues. One, he felt he
7 was unfairly treated about the issue itself. When my team
8 conducted an investigation of him in 2011, that investigation
9 stemmed from a call that was received into what we call our
10 alliance service team. It's a service team that is there to
11 take calls from the actual investor client. And that team
12 had received a call from one of Mr. Kelly's clients because
13 we had received a dispersement request which we were
14 rejecting because of so many discrepancies. And we asked to
15 speak directly to the client. So when the call came into
16 alliance, the alliance representative was verifying the
17 identity. That caller turned out to be Mr. Kelly rather than
18 the client. And so that was escalated to my team for
19 investigation.

20 When my team contacted Mr. Kelly to talk about
21 that incident, he was belligerent and hung up on them. There
22 was some FU's thrown around. And that ultimately my team
23 recommended closure of his relationship. So Mr. Kelly -- the
24 first thing Mr. Kelly had concerned about was he felt like
25 the investigation, the issue itself, was blown out of
26 proportion. That he didn't intend to impersonate his client
27 in that phone call. That it was taken out of context. That
28 he was trying to help out his client because his client was

1 very ill at the time. So he was trying to provide a service
2 and Schwab was overreacting to the phone call itself.

3 His other point of contention was that he was
4 singled out as a smaller advisor. He felt having \$15 million
5 in our platform we considered to be too small. And that we
6 singled him out. And that was a practice we had singling out
7 small advisors to steal their clients and take those assets
8 for ourselves.

9 Q Is that a similar issue to what you discussed
10 with Mr. Cross?

11 A It was.

12 Q Did it ever occur to you that Mr. Cross might be
13 Mr. Kelly or working with Mr. Kelly when you spoke to him?

14 A No. Honestly, it never did. I never expected it
15 to be anyone other than Mr. Cross because Mr. Cross was an
16 existing advisor using our platform. It was someone that
17 Mr. Beatty had been talking to and introduced me to that
18 conversation. It never occurred to me it would be anybody
19 else.

20 Q If you would go back to Exhibit 17 and turn to
21 the page that's labeled 17009.

22 A Okay.

23 Q If you look at the line the No. 5, you'll see a
24 number paragraph 40, do you see that?

25 A Yes.

26 Q Would you read that aloud for us please.

27 A "According to Michelle Thetford VP of compliance,
28 there are more investigations of smaller firms in a

1 disproportionate number terminated because Schwab will not
2 commit the same resources to the small firms."

3 Q Is that something that you told Mr. Cross?

4 A No. We had discussions around this but this is
5 inappropriately joined together out of context. These were
6 different parts of the discussion.

7 Q And what -- can you divide the statement into the
8 different parts of the discussion?

9 A Sure. So the part around there are more
10 investigations on smaller firms and a disproportionate number
11 of termination, that was at the part of the discussion where
12 we were talking about the industry. That it's very tough for
13 smaller firms to have the resources to dedicate to compliance
14 and risk management programs and it also during the part of
15 the conversation we were talking about the numbers, how our
16 platform is made up. Because you know over half of the
17 advisors on our platform are smaller advisors. So it's a
18 numbers game.

19 You're going to have a large number of those
20 included in my investigations. And it was during that
21 context, too, where I said even though we do a lot of
22 investigations on smaller advisors because there are so many
23 on our platform, the context is we have seven -- over 7,000
24 advisors on that platform. My team conducts around 200, 235
25 investigations a year out of 7,000. And the recommendations
26 for closure my team makes is 35 to 45, maybe 50 a year.

27 And then the second part of the sentence around
28 doesn't dedicate the same resources, that was really at the

1 tail end of the conversation where Mr. Cross was saying, so a
2 firm my size wouldn't have any trouble with the compliance
3 program. We would have access to, you know, you or we would
4 have access to resources. And I said, you know, again, the
5 process is the same for all advisors regardless of size. You
6 certainly having, you know, \$4 billion under management have
7 a lot of resources for compliance and risk management even
8 though the process is the same for you. But, obviously, we
9 would be strategic around when we could work with an advisor
10 on an issue versus when it didn't make sense to do that. And
11 that was based more on issue. We, obviously, aren't going to
12 be flying people around the country based on every issue.

13 Q So paragraph 40 combines two topics that you
14 discussed with Mr. Cross that you did not combine at the same
15 time?

16 A Correct.

17 Q Take a look at paragraph 41 which starts at line
18 nine there.

19 A Okay.

20 Q Would you read that for us?

21 A "Ms. Thetford said upon the opening of a
22 compliance investigation there are three potential outcomes:
23 A, close the case; B, work out a solution with ongoing
24 monitoring; and, C, terminate."

25 Q Now, that actually looks like it's attributed to
26 a quote to you. Is that something that you said in those
27 words to Mr. Cross?

28 A I don't recall using those words. I mean,

1 that's -- I recall saying something like that as part of the
2 discussing of the investigation process.

3 Q Is it essentially a true statement?

4 A It is essentially a true statement. I mean, when
5 we conduct an investigation, we're either going to work it
6 out, it's going to turn out to be nothing, or we're going to
7 close the relationship. There's not much other choice I
8 could think of.

9 Q And going to line 12 paragraph 42, it says:
10 "Ms. Thetford said IA, quote, of size, unquote, are routinely
11 designated into the work it out category unless there is a
12 directive from a regulatory body such SEC, FINRA, NASD, in
13 which case they may have no choice but to terminate." Is
14 that something that you said to Mr. Cross?

15 A That is not true. That statement is inaccurate.

16 Q Are these topics you discussed with Mr. Cross?

17 A We did discuss these topics.

18 Q And how does -- what's in paragraph 42 differ
19 from what you discussed with Mr. Cross?

20 A This was during the part of the conversation we
21 were talking about the investigations process and the closure
22 process. There just is no such thing as categories, if you
23 will, to divide advisors up into when it comes to these
24 investigations. Everybody gets the same process. So I don't
25 know where that comes from. But there are times when we're
26 working on an investigation that the obvious answer is to
27 terminate that relationship and that's really from regulatory
28 proceedings, and I gave a couple of examples of that.

1 One would be if the advisor passes away and
2 there's no succession plan for that business. We really
3 don't have any choice but to terminate that relationship.
4 And another example I gave is when the regulators who take a
5 really aggressive enforcement action against that advisor,
6 they may deregister the advisor or bar the advisor from the
7 industry. Obviously, in those cases there's not much
8 decision for us to make but to terminate the relationship.

9 Q Is this another situation where there were topics
10 that you had discussed with Mr. Cross that are combined into
11 what becomes an inaccurate single statement?

12 A Correct.

13 Q The paragraph 44 at line 18 reads:
14 "Ms. Thetford, quote, one IA had multiple altered signatures
15 which Schwab discovered and called to their attention. The
16 IA was given time to work out the problem and is still with
17 Schwab."

18 Is that something that you said to Mr. Cross?

19 A I didn't say that to Mr. Cross. Mr. Cross said
20 something like that to me.

21 Q What did he say?

22 A It was in the beginning of the conversation where
23 he was recapping his discussion with the three references
24 that he had provided. And he was speaking about one of the
25 advisors -- that discussion or that discussion Mr. Cross had
26 had and he said that advisor had told him about an issue
27 where they had signature problems in their office and that
28 Schwab had worked with them on those issues. And they had

1 worked through those things and were still on the Schwab
2 platform. He recounted that story to me.

3 Q So that's something you discussed but it is
4 inappropriately attributed to a statement made by you?

5 A Correct.

6 Q Flip back one page to page 8.

7 A Okay.

8 Q Look at paragraph 32 and you'll see a reference
9 to Meghan Pinchuk copresident of Morton Capital, do you see
10 that?

11 A I do.

12 Q Do you know Ms. Pinchuk?

13 A I do.

14 Q And you mentioned earlier that you had provided
15 some potential references to Mr. Beatty. Is Ms. Pinchuk one
16 of those references?

17 A Yes, she was.

18 Q Why did you provide her name?

19 A Well, I provided Morton Capital as the reference
20 and included Meghan in that along with her as copresident of
21 the firm. The reason I provided that as a possible example
22 for Mr. Beatty to consider was because I know Morton Capital
23 folks very well. I've been to their office several times.
24 And I worked with them really closely around their due
25 diligence process and their risk controls related to
26 alternative investments. And we worked on that process with
27 them for about two years.

28 Q Did you think they'd be willing to speak with

1 Mr. Kelly?

2 A I thought so.

3 Q If so would they be doing it as a favor to you or
4 Schwab?

5 A Oh yes.

6 MR. SHAIN: Your Honor, I believe counsel may have
7 misspoken when she said would they be willing to speak to
8 Mr. Kelly.

9 MS. CROWTHER: Mr. Cross. I did.

10 MR. SHAIN: Your Honor, I also question the necessity
11 of going into this. Obviously, it is hearsay. I understand
12 it does have some relevance and other grounds, but it seems
13 to me that the substance and detail of these conversations is
14 probably not relevant to what we know here.

15 MS. CROWTHER: Fortunately, I'm finished.

16 Not with Ms. Thetford. I'm going to move onto a
17 different topic.

18 THE COURT: Okay.

19 MS. CROWTHER: However, at this time, your Honor, I'd
20 like to move Exhibit 17 into evidence.

21 THE COURT: Any objection, Mr. Shain?

22 MR. SHAIN: No objection.

23 THE COURT: It's admitted.

24 BY MS. CROWTHER:

25 Q Now, Ms. Thetford, about how much time would you
26 say that you spent hours wise in telephone conversations with
27 Mr. Cross?

28 A It was just the two times. The first call is in

1 the end of August that was 30 to 45 minutes and then the call
2 we had in October when I got back was an hour.

3 Q And do you feel that you were familiar with the
4 voice that you heard on the other end of the phone?

5 A Yes.

6 Q And I think you told me previously that you
7 haven't spoken to Mr. Kelly?

8 A No. I've never spoken directly to him.

9 Q Let me play a portion of Mr. Kelly's deposition
10 testimony. It's clip 4A. And I'll just ask you to listen to
11 that.

12 (Video played.)

13 BY MS. CROWTHER:

14 Q Do you recognize the male voice, Ms. Thetford?

15 A Yes.

16 Q Whose voice do you recognize it as?

17 A I recognize that voice as Mr. Cross.

18 Q Let me switch gears a little bit. If the
19 information that you provided to Mr. Cross, did you consider
20 it to be sensitive?

21 A I did, yeah.

22 Q Would you have given that information to
23 Mr. Cross if you thought he was Mr. Kelly or was working with
24 Mr. Kelly?

25 A No.

26 Q Why not?

27 A First of all, you know, my company is involved in
28 other open legal matters with Mr. Kelly even to this day. My

1 company had, which I would be included, we have a restraining
2 order against Mr. Kelly. I mean, I would not willingly had
3 any contact with him.

4 Q And since you spoke with Mr. Cross, have you
5 developed any reason to doubt that he is who he said he was?

6 A Yes.

7 Q And how is that?

8 A Um, well, a couple of things. I knew that
9 Mr. Beatty was going to meet Mr. Cross for lunch here in
10 California the day after I spoke to him in October. And
11 Mr. Beatty called me after --

12 MR. SHAIN: Objection. I anticipate a hearsay
13 statement being made.

14 MS. CROWTHER: I'm offering it for her state of mind.
15 My question was: Why do you doubt that Mr. Cross said is who
16 he said he was? And if what Mr. Beatty told her is the
17 foundation for that is just for her state of mind not for
18 whether it's true or false.

19 MR. SHAIN: I disagree, your Honor.

20 If the statement is being made that Ms. Thetford
21 is relying on to form her opinion, it's because that
22 statement is offered for the truth of the matter and it was
23 accepted as such.

24 THE COURT: Sustained.

25 BY MS. CROWTHER:

26 Q Since you've come to doubt that Mr. Cross was who
27 he said he was, has it impacted you personally or
28 professionally?

1 MR. SHAIN: Objection. Relevance.

2 MS. CROWTHER: Your Honor, we're here on a contempt
3 proceeding. And at the end of the day you have to impose a
4 sanction or a punishment if appropriate. I think the impact
5 on the people who were involved is relevant to that
6 evaluation that you'll make.

7 THE COURT: Okay. Sustained.

8 BY MS. CROWTHER:

9 Q Have you telephoned -- have you had any contact
10 with Ms. Pinchuk since you gave her name to Mr. Beatty as a
11 reference?

12 MR. SHAIN: Objection. Relevance.

13 THE COURT: Overruled.

14 THE WITNESS: I have.

15 BY MS. CROWTHER:

16 Q And do you know whether she's spoken to
17 Mr. Cross?

18 A She did.

19 Q Have you had any conversations with her about
20 your doubts that Mr. Cross was who he said he was?

21 A I have.

22 Q Was that embarrassing for you?

23 A It was incredibly embarrassing. Ms. Pinchuk had
24 those conversations with Mr. Cross at our request at Schwab
25 to help us sign up a new client. And, you know, Ms. Pinchuk
26 is someone who I have a lot of respect with, who I've worked
27 with for a long time. The fact that, you know, we asked her
28 to have those conversations because of her work with me were

1 terribly embarrassing. And the fact that, you know, over the
2 years all of this has been going on, I personally have felt
3 unsafe at times. I mean, some of my colleagues have felt
4 unsafe. And now to put Ms. Pinchuk in the middle of that
5 where she may have the same feelings of being unsafe
6 was -- she -- it's incredibly upsetting.

7 Q Thank you, Ms. Thetford.

8 I don't have anything further.

9 THE COURT: Mr. Shain.

10 MR. SHAIN: Thank you, your Honor.

11

12 CROSS-EXAMINATION

13 BY MR. SHAIN:

14 Q Good afternoon, Ms. Thetford.

15 A Good afternoon.

16 Q Ms. Thetford, did you make any notes in the
17 discussion that you had with Craig Cross in September and
18 October?

19 A I did not.

20 Q So everything you've testified today is from your
21 memory of -- independent memory of those days on
22 September 5th and again -- I'm sorry, September 5th and,
23 again, on October 1st; is that right?

24 A I don't know if the first date you quoted is
25 correct but it is -- my testimony is from my memory of those
26 discussions.

27 Q Well, I'm looking at your declaration in which
28 you identify September 5th is the day that you participate in

1 the conference call initially. Does that sound like the
2 correct date to you?

3 A It's right around that time period. I haven't
4 seen that declaration. So I apologize.

5 MS. CROWTHER: Your Honor, I just ask that if Mr. Shain
6 is going to confront the witness with statements that they be
7 given a copy of the statement and an opportunity to review.

8 MR. SHAIN: Well --

9 THE COURT: Go ahead, Mr. Shain.

10 MR. SHAIN: Your Honor, I wasn't confronting. This is
11 obviously a fairly minor detail. If there's something more
12 significant I would certainly be happy to do that. It's --
13 certainly, I have no problem doing that.

14 THE COURT: Okay. I think that would be appropriate if
15 Ms. Thetford needed her recollection refreshed or something
16 of that nature. But for right now I'll deny your request.

17 BY MR. SHAIN:

18 Q In any event you remember the last conversation
19 being on October 1st?

20 A Yes.

21 Q And that's what over five months ago; is that
22 correct?

23 A Correct.

24 Q And you have a pretty detailed recollection of
25 what you said and what was said to you in that conversation
26 five months ago; right?

27 A I do.

28 Q And you just identified the voice that you heard

1 there as being the same as the one person you spoke to again
2 most recently five months ago; is that right?

3 A Correct.

4 Q How many people would you estimate that you've
5 spoken to since October 1st on the telephone? People that
6 are not family members or close friends?

7 A Many.

8 Q Countless? Well, I guess nothing is countless;
9 right?

10 A No.

11 Q Would you say you've spoken to a hundred people
12 in the course of your business day that are not conducted
13 with family or friends?

14 A Certainly.

15 Q Probably even more than that; correct?

16 A More than that.

17 Q All right. And there was something distinctive
18 about the person you spoke to on the phone that made this
19 just jump out at you when you saw this video; is that right?

20 A It is distinctive.

21 Q What's distinctive about it? What would you
22 describe as being distinctive?

23 A The sound of the voice was distinctive when this
24 was after these calls in October happened and it was brought
25 to me that it may not have been Mr. Cross that Mr. Beatty and
26 I were talking to. And recordings of Mr. Kelly were played
27 to me. I recognized them then. So the sound of the voice
28 itself is distinctive to me. And the pace that sometimes

1 that Mr. Cross and Mr. Kelly speak is -- it's a different
2 pace. There's times it's very slow and deliberate. And
3 there's times where it's faster but the pace changes and
4 that's what jumped out at me. I'm not a technical expert but
5 that's what jumped out.

6 Q Wouldn't you agree that people speaking fast or
7 slow are characteristic on most of us depending on the
8 situation, wouldn't you?

9 A I would.

10 Q Obviously, coming here today as you came here a
11 few months ago, you know that Mr. Kelly that this hearing is
12 about trying to hold Mr. Kelly in contempt; correct?

13 A I do.

14 Q And you don't have any doubt, I take it, that he
15 should be held in contempt?

16 MS. CROWTHER: Objection. Relevance.

17 THE COURT: Sustained.

18 MR. SHAIN: It's to motive, your Honor. I'll rephrase.

19 BY MR. SHAIN:

20 Q Before coming here today to testify other than
21 with your attorney, did you have occasion to discuss your
22 testimony with anyone?

23 A I've discussed it with my attorney with in-house
24 and our external counsel.

25 Q So you've spoken to Mr. Lewis about it?

26 A Yes.

27 Q And when did you last speak to him about it?

28 A Today.

1 Q And how about before then?

2 A Um, probably talked to Mr. Lewis a week or so ago
3 about it and that was more logistics about the trip. I live
4 in Phoenix. So the last time I spoke to Mr. Lewis it was
5 more logistical about the trip and schedule and things of
6 that nature.

7 Q How about the substance of your testimony here
8 today, when did you last discuss that with Mr. Lewis?

9 MS. CROWTHER: Objection. And instruct not to answer
10 on the basis of attorney/client privilege.

11 THE COURT: Mr. Shain.

12 MR. SHAIN: Well, your Honor, I don't know that
13 Ms. Crowther can have it both ways. She's the attorney. She
14 has Mr. Lewis sitting by her side as the representative of
15 the company. So my understanding is that he's here and
16 involved in this case in that capacity. I understand that
17 he's an attorney for the company. But I don't believe that
18 the objection is well taken given that situation.

19 THE COURT: I'm going to overrule the objection. The
20 question as I understood it was how many times have you
21 discussed the substance but not actually what was the
22 substance.

23 So I'll overrule it on that basis.

24 So you can answer if you remember the question.

25 THE WITNESS: I don't remember the question.

26 MR. SHAIN: Maybe the court reporter --

27 THE COURT: Do you want it read back?

28 MR. SHAIN: Yes.

1 (Record read.)

2 THE WITNESS: I guess it would be this morning. I
3 mean, we met this morning before coming to the courthouse to
4 prepare for my testimony today. I spoke with Robyn and
5 Mr. Lewis in that meeting together. But Robyn walked me
6 through more of that testimony than Mr. Lewis did.

7 BY MR. SHAIN:

8 Q When did you last speak with Mr. Lewis
9 independently of Ms. Crowther about your testimony here
10 today?

11 A I think it's been months. I don't even recall
12 the last time. We talked about anything more than logistics.

13 Q Do you remember at some point talking to him
14 about what you were going to say and what he was going to say
15 at this hearing?

16 A We've never had a discussion about what he would
17 say at this hearing.

18 Q Just what you would say?

19 A Are you asking when did we have the last
20 conversation where we discussed what I would say?

21 Q That's right.

22 A Again, that would be this morning as part of our
23 preparation. But Mr. Lewis didn't -- I didn't view Mr. Lewis
24 as a lead of being prepared to be here today. It was just
25 more Ms. Crowther and giving her suggestions on things to
26 prep me on rather than did that to me directly.

27 Q Did you do anything or review any documents or
28 look at anything to prepare yourself for testifying today?

1 A I did.

2 Q What did you look at?

3 A This Exhibit 17 that we just walked through.

4 Q And when did you examine that?

5 A This morning. We met around 11:00 o'clock I
6 guess.

7 Q Now, you made a statement in earlier I think
8 that -- characterizing correctly that small investors, small
9 persons who deal with your company are investigated more
10 potentially by virtue of the fact that there are more of them
11 than large companies; is that an accurate statement?

12 A No, I don't think that's exactly what I said. I
13 said that my team certainly does perform investigations on
14 any advisor on our platform. Large, small or in the middle.
15 There ends up being a lot of investigations being conducted
16 on small advisors. And part of that reason I think is
17 twofold, one, being that we just have so many of them. And,
18 two, being the resources they have for compliance and risk
19 programs to manage their business.

20 Q And I think your testimony is that in terms of
21 what your investigation turns out, you would not treat a
22 small investing company any differently than a large one; is
23 that right?

24 A That's correct.

25 Q So, in other words, a company holding \$5 billion
26 would not be treated any differently than one holding \$10- or
27 \$15 billion; is that right?

28 A That is correct. Every advisor regardless of

1 their size gets the same investigation as any of other. It's
2 as simple as that.

3 Q Wouldn't you agree with me that you would be more
4 likely to seek a work out with a \$5 billion company than you
5 would with a \$15 billion company?

6 A From a compliance perspective from my team?

7 Q Yes.

8 A We speak to every advisor on every investigation
9 that we conduct. And if there is something we can work out
10 with the advisor to address the concern, then we do so.

11 Q Now, in talking about Mr. Kelly, I think you
12 indicated before that you've been well aware of the issues
13 involving Mr. Kelly's termination and the aftermath for
14 sometime; correct?

15 A Yes.

16 Q When do you think you first became aware of that?

17 A Well, it would have been after Mr. Kelly's
18 termination that I became aware he had an issue, or I'm not
19 sure to call it an issue or dispute with his termination from
20 our platform.

21 Q Is your understanding that the termination had to
22 do with the issue that you discussed on direct whereby he
23 impersonated, if you will, or spoke to someone at Schwab as
24 his client?

25 A It is my understanding that that was the reason
26 for the termination because that would be recommendation that
27 I made to the advisor services leadership was to terminate
28 Mr. Kelly's relationship from us based on the investigation

1 my team had conducted. And that was the reason we provided
2 was the impersonation of Mr. Kelly's client and then also the
3 reaction to my team when we called to discuss that with him.
4 That was what we cited as the reason.

5 Q I thought you said a moment that you found out
6 about Mr. Kelly situation after the termination. You knew
7 about it before because your group was conducting an
8 investigation?

9 MS. CROWTHER: Objection. Misstates testimony.

10 THE COURT: Overruled.

11 THE WITNESS: I'm sorry. I lost track of your
12 question.

13 BY MR. SHAIN:

14 Q Perhaps I misheard. I thought that you had said
15 a moment ago that you found out about Mr. Kelly and his
16 issues with the company after the termination. But now I
17 understand you said that, in fact, your group is the one that
18 conducted the investigation?

19 A Correct. My group conducted the investigation.
20 My group is the one that reached out to Mr. Kelly to discuss
21 the client impersonation call. And it is my group that made
22 the recommendation to advisor services to terminate the
23 relationship with Mr. Kelly.

24 Q And you did, as you mentioned, learn that
25 Mr. Kelly was acting on behalf of a very sick client; is that
26 correct?

27 A Correct.

28 Q And you understood -- I don't know if you were--

1 did you understand that the client subsequently passed away?

2 A I did know that.

3 Q And did your investigator speak to this
4 particular client at some point.

5 A I don't remember if we did or not.

6 Q Isn't it in the record that there's information
7 that Mr. Kelly's client was in touch with Schwab in some
8 fashion and advised them that, in fact, he had authorized
9 Mr. Kelly to make that call?

10 MS. CROWTHER: Objection. Lacks foundation.

11 THE COURT: Well, it was a little bit unclear, "in the
12 record," what record are you referring to? Essentially I'm
13 going to sustain the objection but on vague and ambiguous.

14 BY MR. SHAIN:

15 Q Is it your understanding that that information
16 was produced during the course of the Triple-A arbitration to
17 the effect that Mr. Kelly's client had authorized him to make
18 that call?

19 MS. CROWTHER: Objection. Lacks foundation. Also may
20 call for attorney/client privilege information to the extent
21 she learned what was produced from the attorney. Also
22 relevance.

23 THE COURT: Overruled.

24 THE WITNESS: I lose track when you guys talk.

25 THE COURT: Do you need it read back?

26 THE WITNESS: Yes.

27 (Record read.)

28 THE WITNESS: Yes. During the Triple-A arbitration

1 proceeding I was aware that Mr. Kelly's client had
2 acknowledged he gave authorization for that dispersement from
3 his account. There were also videos that Mr. Kelly had
4 posted on his website of that client before he passed away
5 saying he was ill and that he authorized Mr. Kelly's action.
6 BY MR. SHAIN:

7 Q How much money was at stake in the withdrawal --
8 strike that.

9 Is it your understanding that the phone call that
10 was in question had to do withdrawing some funds from the
11 client's account?

12 A That's right.

13 Q And do you remember how much -- do you know how
14 much was at stake?

15 A I don't remember but what I do remember it was
16 the establishment of what we call a money link instruction
17 which would have added the ability to disperse funds from the
18 account through the electronic funds transfer process.

19 Q And I gather it's your testimony that if that
20 same, quote unquote, transgression had been performed by
21 someone with a \$5 billion account, he would have been
22 similarly terminated?

23 A I'm not -- is that a question?

24 Q Yeah, it's a question.

25 A Every advisor gets the same process. If a
26 \$5 billion advisor had presented a document to us to disperse
27 money from a client account that we felt was altered, we
28 would not have processed it. We would have reached out to

1 the client and asked for verification. We wouldn't have
2 processed until we felt it was properly authorized. If that
3 advisor had then called in to Schwab impersonating that
4 client regardless of their assets, my team would have
5 investigated it. We would have reached out to the advisor to
6 have a conversation, and based on the facts and
7 circumstances, decided what to do from there.

8 Q So you may have terminated a \$5 billion account
9 under the same circumstances?

10 A We may have.

11 Q Unlikely though; right?

12 A I don't know how to say it's unlikely or likely.
13 I mean, the facts are the facts. If you do those actions
14 regardless of how many dollars you have in our management
15 with us, my goal -- the Schwab culture is to protect client
16 assets.

17 Q By the way, Ms. Thetford, isn't it true that the
18 money link process was already in place prior to this phone
19 call?

20 A I don't know.

21 Q All right. Subsequent to Mr. Kelly's
22 termination -- and by the way is it your department that
23 sends out letters to all of Mr. Kelly's clients telling them
24 that he's been terminated?

25 A That's not my department. That -- my department
26 does not draft or send those letters.

27 Q But some other department at Schwab does that?

28 A Correct.

1 Q And subsequent to the termination, Mr. Kelly
2 initiated litigation against Schwab; correct?

3 A Right.

4 Q And he posted some videos which were critical of
5 Schwab; correct?

6 A Yes.

7 Q And he's -- he's done some interviews in the
8 media which were critical of the way he was treated by
9 Schwab; correct?

10 A Right. Correct.

11 Q And he's made a complaint to the SEC about how he
12 was treated with Schwab, all correct?

13 A Yes.

14 Q Fair to say Schwab has not been happy with
15 Mr. Kelly; correct?

16 MS. CROWTHER: Objection. Lacks foundation. Compound
17 as to the term "Schwab." It's a big company. Who at Schwab
18 is unhappy with Mr. Kelly?

19 THE COURT: Sustained.

20 BY MR. SHAIN:

21 Q You are not happy with Mr. Kelly's activities
22 subsequent to his termination, fair to say?

23 A It's not that I'm unhappy. It's more that I'm
24 just exhausted by it.

25 Q He's been a thorn in your side and in the
26 corporate side of Schwab; hasn't he?

27 MS. CROWTHER: Objection. Compound and lacks
28 foundation as to "corporate side."

1 THE COURT: Overruled.

2 THE WITNESS: Has Mr. Kelly been a thorn in the side
3 of -- I think that's fair to say.

4 BY MR. SHAIN:

5 Q And you would like to see him just go away and
6 not be heard from anymore; true?

7 A I would like to see this end. That is very true.

8 Q And who else have you spoken to other colleagues
9 at Schwab about their feelings that they would like to see
10 Mr. Kelly just go away and not bother them anymore, not
11 bother the company?

12 A Yes.

13 Q Who else have you spoken to about that?

14 A Several colleagues -- Mr. Beatty as we traveled
15 here today, Mr. Miller, Mr. Clark, my manager, Mr. Cook,
16 several people. Those are the ones I recall off the top of
17 my head.

18 Q Mr. Lewis?

19 MS. CROWTHER: Objection. Calls for attorney/client
20 privilege information.

21 THE COURT: Sustained.

22 BY MR. SHAIN:

23 Q What -- as you traveled over with Mr. Beatty
24 today, tell me about the conversation that you had with him?

25 A Well, we rode in separate cars. So it wasn't in
26 the car ride over here. It was this morning when we met
27 Ms. Crowther and Mr. Lewis at the hotel to prepare for our
28 testimony today and we had lunch before coming. You know,

1 Mr. Beatty and I were talking about our various schedules,
2 the different things we're working on and how behind we're
3 going to be after being here all day with these proceedings.
4 And here we are back. It's like Groundhog Day. We're
5 traveling back, coming back to the courthouse. And this
6 isn't something we're familiar with at all. It was that type
7 of conversation to say, wow, here we are back again.

8 Q How about the substance of what you indicated
9 that you talked about wanting to be rid of Mr. Kelly?

10 A Like I said I didn't want to be rid of Mr. Kelly.
11 I would just like these proceedings to come to an end to come
12 to a conclusion.

13 Q Okay. Give me a moment.

14 A May I have water?

15 MR. SHAIN: I have no further questions, your Honor.

16 MS. CROWTHER: I'll be brief.

17

18 REDIRECT EXAMINATION

19 BY MS. CROWTHER:

20 Q Ms. Thetford, a moment ago Mr. Shain asked you if
21 your view was that Mr. Kelly was a thorn in the side of the
22 company and of yourself. He mentioned that had Mr. Kelly had
23 posted videos, criticized the company in the media and
24 complained to the SEC, is there anything else that Mr. Kelly
25 has done that leaves you to view a thorn in the side of
26 Schwab or its employees?

27 A Yes. A few years ago when we were early on in
28 all of this process there were --

1 MR. SHAIN: I'm going to object. Anything that
2 happened a few years ago that absolutely precedes any period
3 of time covered by the contentions in this OSC contempt.

4 THE COURT: Ms. Crowther.

5 MS. CROWTHER: He opened the door.

6 THE COURT: I believe so, too. I'm going to overrule
7 that objection.

8 THE WITNESS: I said I work in our Phoenix office. And
9 Mr. Miller who is one of our in-house attorneys, he sits next
10 door to me. He's been involved in all of these different
11 proceedings as well. There were notes left on Mr. Miller's
12 car in our office parking lot and on his house actually about
13 these proceedings with Mr. Kelly, you know, wanting the
14 information wanting Ardin to give it up. That Mr. Kelly knew
15 he had the info and he intended to give -- to get it. And it
16 was those notes that ultimately led us to, I think, pursue
17 this restraining order.

18 BY MS. CROWTHER:

19 Q Anything else that you're aware of that Mr. Kelly
20 has done that makes him a thorn in the side of the company?

21 A Well, he's contacted a number of -- aside of the
22 three references that Mr. Cross contacted, he's also
23 contacted other advisors that use the AS platform. AS has a
24 conference every year. It's usually in November. It's the
25 grand event. They put a lot of work into it. This last year
26 it was in Denver the year before in Washington DC. Mr. Kelly
27 hired protestors to protest at the conference.

28 MR. SHAIN: I'm going to object. I haven't seen any

1 foundation for the comments and, again, they precede the
2 granting of the protective order that we're here about, and
3 it's not relevant to what we're here to discuss.

4 MS. CROWTHER: Those statements are both false. It's
5 neither -- the foundation is Ms. Thetford's own knowledge
6 which she's explained and they postdate the restraining
7 order.

8 THE COURT: Okay. Overruled.

9 THE WITNESS: So at the Washington DC conference there
10 were protestors there about this matter about the arbitration
11 involving Mr. Kelly. He sends e-mails to other advisors.
12 And then this last November at the conference which was in
13 Denver, he posted to social media that he was on his way to
14 the conference which sent everyone into concern. And then
15 there were deluge of e-mails sent to advisors at that
16 conference suggesting that they look up Mr. Clark and asked
17 Mr. Clark about the arbitration proceeding and basically
18 alleging that he perjured himself. And it was, you know, are
19 you at impact, which is the conference. You should look up
20 Bernie. He's disrupted both conferences in the last two
21 years.

22 BY MS. CROWTHER:

23 Q And in terms of -- are you able to say -- is
24 there any other action in Arizona that you know of that the
25 company has taken as a result of Mr. Kelly acting as a thorn
26 in the company's side?

27 MR. SHAIN: Objection. Relevance.

28 THE COURT: Ms. Crowther.

1 MR. SHAIN: Outside the scope.

2 MS. CROWTHER: It goes to the thorn in the side. This
3 was it testimony that I objected to at the time and it was
4 overruled, and I think I'm entitled to explore it.

5 MR. SHAIN: Your Honor, if I maybe heard.

6 THE COURT: Sure.

7 MR. SHAIN: The objection, as I understood it, was to
8 characterizing the corporation and asking Ms. Thetford
9 questions on behalf of the corporation. I don't believe by
10 asking if a thorn side opens the door to this entire litany
11 of complaints that may be had. The objection went to the
12 corporate nature. The question of Ms. Thetford is for the
13 corporation.

14 THE COURT: Overruled.

15 BY MS. CROWTHER:

16 Q So the question was is there anything else in
17 Arizona that you're aware of that the company has done as a
18 result of Mr. Kelly being a thorn in the side?

19 A We filed the restraining order specifically with
20 Arizona and Mr. Miller went to a court proceeding to get that
21 restraining order for Arizona specifically.

22 Q And was that based on the same conduct or
23 different?

24 A I'm not sure.

25 Q Nothing further.

26 THE COURT: Mr. Shain.

27 //

28 //

RECROSS-EXAMINATION

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BY MR. SHAIN:

Q Ms. Thetford, that restraining order in Arizona covered Mr. Kelly and his agent, did it not?

A I don't know.

Q So all of what you just had to say, let me ask you this, you and your colleagues at Schwab have a real problem with Mr. Kelly and his actions post termination; true?

A No, I would not characterize it as a real problem.

Q You wouldn't?

A No.

Q You indicated that you're afraid of him; is that right?

A That's true.

Q And you've indicated that he's disrupting these conferences and these processes that Schwab is involved in?

A True.

Q He's posting things on the Internet as to his strong feelings about the way he was treated; right?

A Correct.

Q He's gone to the media; correct?

A Correct.

Q He's gone to the SEC; correct?

A Correct.

Q And you don't have a problem with that?

A What problem would I have is that would I prefer

1 that he stop doing these things? Of course.

2 Q And would it be fair to say that Schwab is
3 interested in doing whatever it can to silence Mr. Kelly?

4 MS. CROWTHER: Objection. Argumentative. Compound and
5 irrelevant.

6 MR. SHAIN: It goes to motive, your Honor.

7 MS. CROWTHER: I don't think motive is an element of
8 any cause of action here.

9 THE COURT: Okay.

10 Sustained on argumentative grounds.

11 MR. SHAIN: Pardon me?

12 THE COURT: It was sustained on argumentative grounds.

13 BY MR. SHAIN:

14 Q I'm trying to remember the question.

15 THE COURT: Want it read back?

16 MR. SHAIN: Yes.

17 (Record read.)

18 BY MR. SHAIN:

19 Q Schwab would like Mr. Kelly to go away and be
20 heard from no more; true?

21 A I don't think I can speak for -- I'm not Schwab.
22 I can speak for myself.

23 Q Speak for yourself.

24 A I would like Mr. Kelly to stop this.

25 Q Stop -- stop publicizing his matter and upset in
26 the matter in which he believes he was treated?

27 A I would like Mr. Kelly to stop all of it. The
28 lawsuits, the litigation, the Court hearings, the media, the

1 contacting our clients, to disrupting everything. I would
2 like the whole matter to be settled somehow.

3 MR. SHAIN: Thank you. That's all.

4 THE COURT: Anything less, Ms. Crowther?

5 MS. CROWTHER: No, your Honor.

6 THE COURT: Thank you, Ms. Thetford.

7 THE WITNESS: Thank you.

8 THE COURT: At this time it is 3:40 and the Court needs
9 to take a 15-minute break.

10 (Recess.)

11 THE COURT: Ms. Crowther, your next witness.

12 MS. CROWTHER: Does it make sense to talk about another
13 date first or wait until the end?

14 THE COURT: I'll leave that up to you. If you want do
15 it now, we can do it now when the clerk gets back in.

16 MS. CROWTHER: It might make sense since. We're
17 coordinating so many schedules.

18 THE COURT: I have another case out for mediation. I
19 expect to call that around 4:30, 4:40.

20 MR. SHAIN: The 24th is good for us.

21 THE COURT: April 24th.

22 MS. CROWTHER: Yes.

23 THE COURT: So I'll continue the hearing after further
24 testimony April 24th, 1:30 p.m. and I'll reserve the entire
25 afternoon with the caveat. If I have a lot of ex partes, we
26 won't start until 2:00 o'clock or so.

27 MR. SHAIN: But should we consider to be 1:30.

28 THE COURT: The 1:30 calendar. And that's fine if you

1 don't show up until 2:00.

2 And I'll know you'll probably need access to the
3 courtroom during lunch to setup.

4 MS. CROWTHER: Yes, please.

5 Our next witness will be Mr. Lewis.

6 THE CLERK: Raise your right hand. You do solemnly
7 swear that the testimony you're about to give in the matter
8 now pending before this Court will be the truth, the whole
9 truth, and nothing but the truth, so help you God?

10 THE WITNESS: I do.

11 THE CLERK: Please take a seat at the witness stand.
12 If you could please state and spell your name for the record.

13 THE WITNESS: My name is Kevin Lewis, K-e-v-i-n,
14 L-e-w-i-s.

15
16 KEVIN LEWIS,
17 called as a witness by the Plaintiff,
18 was sworn and testified as follows:

19
20 DIRECT EXAMINATION

21 BY MR. SHAIN:

22 Q Mr. Lewis, who do you work for?

23 A Charles Schwab & Co, Inc.

24 Q What is your job title?

25 A My title is managing director and that is a title
26 within the legal department of Schwab.

27 Q How long have you worked at Schwab?

28 A Three years.

1 Q And you're a lawyer?

2 A I am.

3 Q How long have you been practicing law?

4 A Been practicing law since 1998, 17 years now.

5 Q Can you generally describe your job duties inside
6 the office of Schwab's corporate counsel?

7 A Sure. I'm an in-house lawyer assigned to the
8 litigation and arbitration group at Schwab. We handle
9 disputes that come in from court cases to arbitration.
10 Sometimes complaint letters that clients have written in.
11 Sometimes handle those and respond to those as well. We
12 handle the entire processes. Some cases with do ourselves.
13 And other cases like this one we work with outside lawyers
14 like Ms. Crowther.

15 Q And in your work with Schwab have you had the
16 opportunity to meet someone known as Michael Kelly?

17 A I have.

18 Q When was the first time that you encountered
19 Mr. Kelly?

20 A On the phone or in person?

21 Q In any sense. The very first time.

22 A I -- we had conversations on the phone after he
23 filed his first arbitration complaint with an entity called
24 FINRA. And that would have been somewhere in early 2012. We
25 had phone conversations.

26 Q Was the first time you learned about Mr. Kelly
27 through something he filed with FINRA?

28 A Yes. He had filed an arbitration claim in FINRA

1 against Schwab challenging his termination and the
2 termination of his firm from the advisor services platform.
3 I was assigned the case. That's why I was talking to him.

4 Q Is the FINRA proceeding ongoing?

5 A Not currently, no.

6 Q How did it conclude?

7 A FINRA is a self-regulatory organization in the
8 securities industry. And it has under its rules the ability
9 to essentially refuse to hear cases under certain
10 circumstances.

11 MR. SHAIN: Your Honor, I'm going to object on the
12 grounds of relevance.

13 MS. CROWTHER: Just foundational really.

14 THE COURT: On how it concluded?

15 MS. CROWTHER: Yes.

16 THE COURT: Okay. And you're saying it's not relevant?

17 MR. SHAIN: Well, I think there may be -- I'm
18 anticipating testimony about some of the circumstances of the
19 conclusion of the hearing which I think is not pertinent to
20 the matter before us.

21 THE COURT: Okay. I'm not sure just yet if it's
22 relevant.

23 I'll overrule it.

24 THE WITNESS: So FINRA has a rule that it can cite to
25 if it does not want to hear disputes. And in this case it
26 sent a letter to the parties deciding they did not want to
27 further administer the dispute between Mr. Kelly and Schwab.
28 And that rule has jurisdictional basis. Sometimes there's

1 not a jurisdictional basis for the claim. Here there was one
2 in my view. But the other reason is that if FINRA is
3 concerned for the health and safety of the arbitrator --

4 MR. SHAIN: Objection. Objection as to that
5 characterization. Speculation as to the what the motives of
6 FINRA were relative to the proceeding.

7 MS. CROWTHER: His testimony is just what the rule says
8 so far. He's not actually speculated as to FINRA's
9 reasoning. He's just provided me information about what the
10 rule says since this isn't a FINRA proceeding it's helpful.

11 MR. SHAIN: Well, they're backdoor methods of getting
12 information in, your Honor, and I suspect this is where it's
13 going.

14 THE COURT: Well, I'm going to sustain that objection.
15 BY MS. CROWTHER:

16 Q Was the case dismissed?

17 A From FINRA, yes.

18 Q With prejudice?

19 A Well, technically, I'm not sure if it was with or
20 without prejudice with FINRA. It is no longer administered.

21 Q Was there a determination on the merits?

22 A Not by FINRA.

23 Q During the course of the FINRA proceedings for a
24 time, were the lawyer for the company?

25 A Yes, for half of that period of time.

26 Q And in that capacity did you have any discussions
27 with Mr. Kelly over the telephone?

28 A Several. I'd say somewhere between five and ten

1 phone conversations. Upon the initiation of the complaint we
2 had some and then somewhere between April and May 2012 time
3 period, we had some other conversations after he threatened
4 to issue a press release.

5 Q And at any time while you were representing the
6 company in its proceedings with Mr. Kelly, did you have a
7 discussion with him about recorded telephone calls?

8 A Yes, we did, in fact, have a discussion about
9 that.

10 Q How did that issue arise?

11 A The issue arose because his firm was terminated
12 from our advisor services platform based on actions that
13 flowed from a phone call that he made into Schwab's office.
14 That phone call was recorded on a recorded line. And so we
15 had discussions about that phone call as part of talking
16 about the case.

17 Q Did you have discussions about whether Schwab
18 regularly recorded telephone calls that came in?

19 A Yes, I told Mr. Kelly our practices in that
20 regard.

21 Q What did you tell him about those practices?

22 A That many of our lines and advisor services and
23 elsewhere in the company are recorded lines, and that phone
24 recordings are regularly made by the company.

25 Q Let's change gears a little bit. After the FINRA
26 proceeding was dismissed, when is the next time that you're
27 aware that Schwab heard from Mr. Kelly?

28 A After the FINRA case was dismissed, he then

1 initiated a complaint in Ventura Superior Court raising the
2 same allegations that he raised with FINRA.

3 Q And between those two proceedings, did Schwab
4 take any action against Mr. Kelly?

5 A No, not my knowledge.

6 Q Let me ask you to look at what's in the exhibit
7 binder in front of as what we marked as Exhibit No. 1.

8 A Okay.

9 Q Do you recognize Exhibit No. 1?

10 A I do.

11 Q What is it?

12 A This is a letter that Ardin Miller e-mailed to
13 me. And Mr. Miller is an in-house lawyer in Phoenix. And so
14 it's -- I came to understand later that it was placed on
15 Mr. Miller's door and also on his car at his offices in
16 Phoenix.

17 Q Which door?

18 A The door of his home in Phoenix or outside of it.

19 Q And do you see the date on that document it's
20 February 28th, 2013?

21 A Yes.

22 Q And do you think that Mr. Miller sent you his
23 copy of the letter around that date?

24 A It was the same day.

25 MR. SHAIN: Your Honor, my objection to showing it's
26 exhibit is that again it precedes, as I understand, the
27 restraining order which was issued in April of 2013. So I
28 don't believe it has any relevance other than prejudicial

1 with regard to the matter before us now.

2 THE COURT: Okay.

3 Ms. Crowther.

4 MS. CROWTHER: This letter did lead to the issuance of
5 the restraining order, your Honor. One of the issues that I
6 understand Mr. Kelly is raising is whether the scope of the
7 restraining order that was issued cover actions directed by
8 him but not taken by him. So he had a third party do
9 something or that he could not do directly.

10 I think the circumstances under which the order
11 was issued go to what the terms of the order means. And so
12 I'm just laying the foundation for how the order came to be
13 especially since your Honor was not the commissioner at that
14 time.

15 MR. SHAIN: Of course the order in the Arizona -- the
16 restraining order in Arizona specified Mr. Kelly and agents
17 or words to that effect. So it's a quite different
18 circumstance that we're dealing with here. So I don't think
19 it's probative in terms of the case before this Court.

20 THE COURT: Sustained.

21 BY MR. SHAIN:

22 Q You had conversations with Mr. Miller in February
23 of 2013; is that right?

24 A Yes.

25 Q And in time how close was that to when FINRA
26 proceeding concluded?

27 A It was almost within days of when the FINRA
28 proceeding concluded.

1 Q Would you turn to Exhibit No. 2. Do you
2 recognize Exhibit No. 2?

3 A Exhibit No. 2 is a restraining order petition.
4 Yes, I do recognize it.

5 Q What is it?

6 A It's a restraining order petition that Schwab
7 filed in this court seeking to have the restraining order
8 that we're now seeking to have found Mr. Kelly to have
9 violated.

10 MS. CROWTHER: Your Honor, I'd ask the Court take
11 judicial notice of the petition which is already in the Court
12 record that it be admitted into evidence on that basis.

13 THE COURT: Any objection?

14 MR. SHAIN: No, your Honor.

15 THE COURT: I'll take judicial notice of that. Thank
16 you.

17 BY MS. CROWTHER:

18 Q And, Mr. Lewis, you testified what was it, what
19 were the events that led Schwab to seek a restraining order
20 against Mr. Kelly?

21 A This one in California?

22 MR. SHAIN: Objection. Not relevant. The restraining
23 order is in place. The only issue is here is whether
24 Mr. Kelly violated it.

25 THE COURT: Okay. I'm sorry. I missed the question.

26 MS. CROWTHER: The question is why, why did Schwab seek
27 the restraining order.

28 THE COURT: Okay. Sustained.

1 BY MS. CROWTHER:

2 Q Would you look at, please, Mr. Lewis, Exhibit
3 No. 2?

4 A Number 2.

5 Q If you would turn to page 2006 and do you see
6 paragraph 17?

7 A Yes.

8 Q And it details the orders that Schwab sought?

9 A Yes.

10 Q What orders were those?

11 A The additional orders under paragraph 17.

12 Q Yes.

13 A Well, as the document says we requested that the
14 Court enter an order prohibiting Mr. Kelly from contacting or
15 communicating with any employee or former employee of
16 petitioner, in this case Schwab, and instructing Mr. Kelly
17 that communications be sent to outside counsel, Ms. Crowther
18 and ^Eric Better.

19 Q Would you turn to Exhibit No. 3. Do you
20 recognize Exhibit No. 3.

21 A Yes. This is the response to the petition that
22 Mr. Kelly had filed.

23 MS. CROWTHER: And, your Honor, again this is in the
24 court's records and I'd ask that the Court take judicial
25 notice and admit into evidence on that basis.

26 THE COURT: Mr. Shain.

27 MR. SHAIN: No problem, your Honor.

28 THE COURT: Okay.

1 BY MS. CROWTHER:

2 Q Mr. Lewis, would you turn to page 3004.

3 A Yes.

4 Q And do you see that there's a narrative that's
5 within this document?

6 A Uh-huh, yes.

7 Q And would you read the second to the last
8 paragraph please out loud.

9 A Sure. "I have read Exhibit I to the petition for
10 workplace violence restraining order. It is perfect. I love
11 it. However, I did not write it or deliver it to Ardin
12 Miller. The e-mail address is mine. The cell phone number
13 is mine. I do not know how anyone delivering this letter
14 gained access to that information. In fact, the only logical
15 assumption is that only somebody at Charles Schwab & Co could
16 have pieced all of this information to get it."

17 Q And was there a hearing on Charles Schwab
18 petition?

19 A Yes.

20 Q Did you attend?

21 A I did.

22 Q And would you look at Exhibit No. 5, please.

23 A Yes.

24 Q And tell me if you recognize Exhibit 5?

25 A This is the transcript from the proceedings of
26 the first day of the evidentiary hearing that was held on the
27 restraining order.

28 MS. CROWTHER: And, your Honor, I'd ask that Exhibit 5

1 be moved into evidence.

2 THE COURT: Mr. Shain.

3 MR. SHAIN: Well, I'm not persuaded that there's a
4 reason to do so yet. So I would like to hear what counsel's
5 rationale is for doing so.

6 THE COURT: Okay.

7 Ms. Crowther.

8 MS. CROWTHER: Well, it's records of the court. It's a
9 self-authenticating document because it's a reporter's
10 transcript. And once again we're going to have a dispute
11 about what the scope of the orders mean and the oral
12 statements made by counsel and by Commissioner Baio are
13 relevant to that evaluation.

14 THE COURT: Okay.

15 Mr. Shain.

16 MR. SHAIN: Yes, I would just say that the order that
17 Commissioner Baio, at that time Commissioner Baio, issued
18 speaks for itself. And that's the only document that we are
19 here to determine whether or not there's been a violation of.
20 Not what's written, not colloquy among counsel or even the
21 Court. Just what's in the document. So I believe I would
22 ask that it be excluded on relevance grounds. I don't think
23 it has any probative value.

24 MS. CROWTHER: Your Honor, I think --

25 THE COURT: I think the part that would be probative is
26 specifically what was mentioned in the ruling, therefore,
27 what's in the order. Is there a specific page number you
28 want me to take judicial notice of?

1 MS. CROWTHER: There will be, your Honor. Perhaps I'll
2 set aside this exhibit for the moment until we get to the
3 order itself.

4 THE COURT: We can table that.

5 BY MS. CROWTHER:

6 Q A moment ago, Mr. Lewis, I was having you look at
7 Mr. Kelly's opposition and we saw where he denied having
8 anything to do with placing the letters on Ardin Miller's
9 door and windshield. Has there ever been a time when you
10 believed that statement not to be true?

11 A Yes.

12 MR. SHAIN: Objection. The Court has already ruled --
13 sustained an objection to dealing with this issue as I
14 understood it. So I would renew my objection to any further
15 questions about this which again preceded the issuance of the
16 order of restraint.

17 THE COURT: Okay. I'm inclined to sustain that
18 objection, Ms. Crowther. Do you have further argument?

19 MS. CROWTHER: I do. I do. Part of what's happening
20 here, your Honor, is that Mr. Kelly's position is somebody
21 else did these things regardless of whether it looks like me.
22 Same argument was made in the underlying case. And yet
23 Mr. Kelly has since made admissions indicating he was not
24 being truthful.

25 I think that the evidence of the pattern at this
26 point and his approach towards Schwab and in particular
27 what -- how that led to the order we're trying to enforce is
28 relevant.

1 THE COURT: Okay. Sustained.

2 BY MS. CROWTHER:

3 Q Would you look at Exhibit No. 6, Mr. Lewis.

4 A Yes.

5 Q And do you recognize Exhibit No. 6?

6 A I have seen this before. It's a news article
7 that appeared on publication that publishes on the Internet
8 called RIA Biz. It's directed itself to the registered
9 investment advisor community in investing.

10 Q When did you see this document for the first
11 time?

12 A I think on the day it was published it was
13 brought to my attention.

14 Q And when was it published?

15 A That's a good question.

16 Q I'm not sure that it appears on the document but
17 my question was when did you first see it?

18 A When do I remember seeing it. Let's see
19 somewhere within last six months. I can't remember the
20 precise date.

21 Q So after the restraining order was issued?

22 A Yes.

23 Q And if you would look at the second page of that
24 document.

25 A Yes.

26 Q And the one, two, third paragraph down.

27 A Okay.

28 Q Would you read that, please.

1 A Third.

2 Q I'm sorry under first contact, the third
3 paragraph under first contact on page 2.

4 A Okay.

5 Q I'm sorry.

6 A So, quote, "at some point a frustration on my
7 part end quote, Kelly says in early 2013 he hired a private
8 investigator to find Ardin Miller, the associate general
9 counsel at Schwab who terminated him. In March Miller
10 received two letters from Kelly. One left at the front door
11 of his home, the other on his car's windshield while it was
12 parked at Schwab's Phoenix office. Kelly says he was just
13 looking for answers in a sympathetic year but Miller and
14 Schwab didn't take it that way."

15 Q Now, what happened at the end of the hearing on
16 Schwab's petition for a restraining order?

17 A It was granted.

18 Q And if you go back to Exhibit 5, which is the
19 transcript, and I'll direct you directly to specifically to
20 page 61. And if you start with line 15 -- if you start at
21 line 11 and read the paragraph that runs through
22 line -- actually go through line 23, please.

23 A "So just in the most recent past you had this
24 situation with this other attorney and then about the same
25 time, I guess, you had this situation with Schwab where you
26 don't seem to be able to restrict yourself from crossing
27 certain borders that most people are able to do. Now, I
28 guess it's a long-winded way of saying that I think, as the

1 evidence I have right now, I do find by clear and convincing
2 evidence that Mr. Kelly has done acts of a -- well, he's
3 engaged in a course of conduct anyway which Schwab should not
4 have to deal with so. I'm going to issue the restraining
5 order. But in terms of the parameters of the restraining
6 order, I still need some time to work on that."

7 MS. CROWTHER: And, your Honor, I'd ask that this page
8 of the transcript which is -- we labeled Exhibit 5 page 61 be
9 admitted.

10 THE COURT: Mr. Shain.

11 MR. SHAIN: Your Honor, I just echo my prior comments.
12 The only document that this Court is empowered to see it has
13 been violated is what's in the four corners of the
14 restraining order, not colloquy that the Court had with
15 counsel particularly where he says he still has to work out
16 of the terms of the restraining order before I issue
17 subsequently. This has absolutely no relevance. It's only
18 the terms of the order itself which are relevant.

19 THE COURT: Okay. Sustained in terms of the ruling on
20 my prior -- well, sustained in accordance with the ruling
21 that I just made with regards to the entire transcript.

22 MS. CROWTHER: Your Honor, may I just be heard?

23 THE COURT: Sure.

24 MS. CROWTHER: It's true that we're looking at the
25 terms of the order. But the terms of the order, they're
26 words. And at some point you are going to have to interpret
27 what the words mean. It's not inadmissible for you to
28 consider evidence as to what those words mean. And you may

1 conclude that you may not give no weight to this colloquy.
2 And you may give no weight to that, but we have a dispute as
3 to what this term initiate means. And I think to exclude the
4 evidence on the basis that it's not relevant is not correct
5 because it does construe the order itself.

6 THE COURT: Is there going to be some argument from
7 anybody with regards to the actual order that the actual
8 order is worded incorrectly or vague or ambiguous or
9 something of that nature?

10 MS. CROWTHER: Yes. The order includes the term
11 "initiate contact." And their interpretation, as I
12 understand it anyway, is that that only means that Mr. Kelly
13 himself personally cannot initiate contact. Whereas our
14 interpretation of that is that that term is ambiguous and
15 that if Mr. Kelly set in motion contact, even if done by a
16 third party, that it would violate the order.

17 So there will be a dispute. And I think the term
18 "initiate" may be open to both interpretations. As I mostly
19 do civil work, I think as parol evidence in that it would be
20 consistent with either interpretation. And when you have an
21 ambiguous term and you've got evidence that is consistent
22 with a reasonable interpretation, it's admissible under the
23 parol evidence rule.

24 THE COURT: Mr. Shain, any further argument?

25 MR. SHAIN: Well, unless the Court thinks it's
26 necessary, I would just point out the -- a restraining order
27 by its nature, particularly when a workplace violence, as
28 this is, is very personal in nature. I have seen restraining

1 orders and, in fact, one exists in Arizona where the term
2 Asians or other persons are also included.

3 This order is very specific. The restrained
4 person Michael P. Kelly. And then in the -- under other
5 orders, respondent must stay 100 yards.

6 Counsel may argue that was inartfully drawn and
7 certainly is an arguable point. But we are bound by the
8 interpretation of the document in front of us, not what the
9 Court may have meant. Although, there's no indication that
10 the Court meant anything other this. Restraining orders are
11 typically directed to the person to whom they're directed.

12 THE COURT: Okay. If I recall correctly on the actual
13 restraining order and admittedly I'm not looking at it just
14 right now, isn't there some handwritten words on the actual
15 order?

16 MS. CROWTHER: Yes.

17 THE COURT: Okay. So --

18 MR. SHAIN: Handwritten, your Honor. I mean --

19 THE COURT: Yes.

20 MR. SHAIN: Yes.

21 THE COURT: So with regards to Ms. Crowther's argument
22 I'm going to actually reverse myself and overrule Mr. Shain's
23 objection with regards to the transcript. Not the entire
24 transcript but, in essence, the portion of the transcript
25 dealing with the actual order and particularly the
26 handwritten order, okay.

27 BY MS. CROWTHER:

28 Q Let's move to the order if we could. Mr. Lewis,

1 was there a further hearing on Schwab's request for a
2 permanent restraining order?

3 A Yes.

4 Q And if you would turn to Exhibit 7.

5 A Yes.

6 Q Do you recognize Exhibit 7?

7 A This was the restraining order that was entered
8 following that hearing.

9 MS. CROWTHER: And, your Honor, I offer Exhibit 7 into
10 evidence. It's a court record subject to judicial notice.

11 THE COURT: Mr. Shain.

12 MR. SHAIN: Well, it's obviously the document that
13 we're disputing, so it certainly is relevant to the
14 proceeding.

15 THE COURT: I'll take judicial notice of it.

16 BY MS. CROWTHER:

17 Q And if you turn, Mr. Lewis, back to the page
18 marked 7003. And in particular paragraph 11 other orders.
19 Would you read that for us, please.

20 A Sure. "Respondent must stay at least 100 yards
21 away from any of Schwab's offices. And is prohibited from
22 initiating, contacting or communicating with any current
23 Schwab employee except for peaceful conduct required to
24 conduct a deposition or appear at other legal proceedings
25 involving Schwab employees as allowed in the appropriate
26 form."

27 Q Now, has Schwab ever provided Mr. Kelly with a
28 copy of the order?

1 A Yes.

2 Q Would you turn to Exhibit No. 8. And tell me
3 approximate if you recognize Exhibit No. 8.

4 A Yes. This is the motion that we made to move the
5 litigation that he had initiated in Ventura court to
6 arbitration.

7 MS. CROWTHER: And again, your Honor, this document is
8 filed with the Court, and I'd ask the Court to take judicial
9 notice.

10 THE COURT: Mr. Shain.

11 MR. SHAIN: No objection.

12 THE COURT: Granted.

13 BY MS. CROWTHER:

14 Q Would you go to Exhibit 30.

15 A Exhibit 30. Yes.

16 Q And do you recognize Exhibit 30?

17 A I do. This is a declaration that signed.

18 Q In support of what?

19 A In support of the motion that we were talking
20 about earlier to compel the Ventura court case into
21 arbitration.

22 Q Would you turn to page 31 of that document.

23 A Page 31.

24 Q Yes.

25 A Yes. Exhibit 5?

26 Q And turn the next page to 32.

27 A Yes.

28 Q What is that?

1 A This is the workplace violence restraining order
2 that we were looking at earlier. I think it was Exhibit 7.

3 Q If you return to the last page of this document
4 of Exhibit 30.

5 A Okay.

6 Q And do you recognize that?

7 A Yeah. That's a proof of service typically used
8 by law firms when they sent materials out to opposing parties
9 and they want to document. And this is one here that was
10 done by our law firm on our behalf.

11 MS. CROWTHER: Your Honor, I move Exhibit 30 into
12 evidence.

13 THE COURT: Any objection?

14 MR. SHAIN: No objection.

15 THE COURT: It's admitted.

16 BY MS. CROWTHER:

17 Q Would you go to Exhibit 31?

18 A Yes.

19 Q And tell me if you've seen Exhibit 31 before.

20 A This is a pleading that Mr. Kelly prepared, I
21 believe, and filed. And it was in opposition to the motion
22 to compel that we just looked at earlier.

23 Q And would you turn to page 31-4, fourth page of
24 that document.

25 A Okay.

26 Q And take a look at line 21.

27 A Do you want me to read it?

28 Q Yes. Please read the sentence at line 21.

1 A Sure. "In addition Schwab came into the Hall of
2 Justice Ventura County Superior Court to get a restraining
3 order preventing me from initiating contact with any current
4 Schwab employee."

5 Q And would you please turn to the last page of the
6 document.

7 A The one that says 31-028?

8 Q Correct.

9 A Yes.

10 Q What is that?

11 A That's a proof of service that Mr. Kelly had
12 prepared mailing it to our outside counsel.

13 MS. CROWTHER: Your Honor, I'd move Exhibit 31 into
14 evidence.

15 THE COURT: Mr. Shain.

16 MR. SHAIN: I don't necessarily see the relevance of
17 this exhibit to be -- it's certainly a court record. I guess
18 the Court can take judicial notice of it. But as far as it
19 getting into evidence, I would oppose that.

20 MS. CROWTHER: The relevance, your Honor, is it's my
21 burden to establish that Mr. Kelly had knowledge of the order
22 entered against him. In the portion that I just had
23 Mr. Lewis read, he was acknowledging the restraining order
24 and I think it's relevant to that.

25 THE COURT: Okay.

26 MR. SHAIN: Well, we -- your Honor, we would stipulate
27 to the fact that Mr. Kelly received a copy the order.

28 THE COURT: Okay. Will you accept that stipulation?

1 MS. CROWTHER: Yes. And withdraw 31.

2 THE COURT: Okay. And the stipulation is accepted.

3 MS. CROWTHER: Your Honor, I'm looking and it's 4:31.
4 I'm about to move into a new area. I don't know if it would
5 be better to stop now for the day or to go for a few more
6 minutes. It's your convenience.

7 THE COURT: I think it would be better to end for the
8 day. And we'll adjourn again on April 24th.

9 MS. CROWTHER: Correct.

10 THE COURT: At 1:30.

11 MR. SHAIN: All right. Thank you.

12 THE COURT: Thank you.

13 (Proceedings concluded.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

CHARLES SCHWAB & CO., INC,)
)
Plaintiff,)
)
vs.)
)
MICHAEL P. KELLY,)
)
Defendant.)
_____)

CASE NO. 56-2013-00433193
REPORTER'S
CERTIFICATE

I, CHRISTINA RODRIGUEZ, CSR 13332, Certified
Shorthand Reporter of the State of California, for the County of
Ventura, do hereby certify that the foregoing pages 1 through 79
are a true and correct transcript of the proceedings held on
March 6, 2015, in the above-entitled cause.

Dated at Ventura, California, this 18th day of
March, 2015.


CHRISTINA RODRIGUEZ, CSR 13332
Official Court Reporter