

No. 21-1043

IN THE
Supreme Court of the United States

ABITRON AUSTRIA GMBH, ET AL.,
Petitioners,

v.

HETRONIC INTERNATIONAL, INC.,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit**

JOINT APPENDIX

MATTHEW S. HELLMAN
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, D.C. 20001
(202) 639-6000
mhellman@jenner.com

DEBBIE L. BERMAN
WADE A. THOMSON
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654

Counsel for Respondent

JEFFREY A. LAMKEN
Counsel of Record
LUCAS M. WALKER
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioners

(Additional Counsel Listed on Inside Cover)

PETITION FOR CERTIORARI FILED JANUARY 21, 2022
CERTIORARI GRANTED NOVEMBER 4, 2022

LAUREN J. HARTZ
VICTORIA HALL-PALERM
JONATHAN J. MARSHALL*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, D.C. 20001

GIANNI P. SERVODIDIO
RÉMI JAFFRÉ
JENNER & BLOCK LLP
1155 Avenue of the
Americas
New York, NY 10036

SAMUEL R. FULKERSON
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
621 N. Robinson, Suite 400
Oklahoma City, OK 73102

Counsel for Respondent

LAUREN F. DAYTON
RYAN YEH
CATHERINE MARTINEZ
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8160

ELIZABETH CLARKE
MOLOLAMKEN LLP
300 North LaSalle Street
Chicago, IL 60654
(312) 450-6700

Counsel for Petitioners

* Not admitted in the District of Columbia; practicing under direct supervision of members of the D.C. Bar.

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* The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear on the following pages of the Appendix to the Petition for Writ of Certiorari.

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**Affidavit of Reimer Bulling in Support of Defendants'
Motion for Summary Judgment, Mar. 26, 2018**

Received as Offer of Proof at Trial, Mar. 2, 2020

I, Reimer Bulling, state as follows:

1. I am currently IT Manager of ABITRON Germany and ABITRON Austria and I have been IT Manager of HETRONIC Germany and HETRONIC Central Eastern Europe as well. When I started my career, I began as a trainee for an industrial clerk at HETRONIC Steuersysteme in September 2007, which was later renamed to HETRONIC Deutschland GmbH.
2. During my time as trainee, I continuously took over the IT responsibility for HETRONIC Deutschland and later for HETRONIC Germany, where I became IT Manager.
3. In this role, when the company decided to implement SAP Business One as its corporate ERP-System in 2007/2008, I got the key responsibility for this project.
4. After a successful launch, I certified later in 2008/2009 as a SAP Developer.
5. After Mr. Heckl sold HETRONIC Deutschland's Assets to HETRONIC Germany, which was owned by ABI-Holding, it was the intention to improve the cooperation and the efficiency between HETRONIC Germany and HETRONIC Central Eastern Europe.

6. In this spirit, I started to implement SAP Business One as ERP System at HETRONIC Central Eastern Europe. SAP went live at HETRONIC Central Eastern Europe in January 2012. In later efforts to further reduce the administrative costs, we started to connect both databases together, beginning with synchronization of the items.
7. I also implemented SAP at ABITRON Germany and ABITRON Austria.
8. For the purpose of the lawsuit I created several reports showing sales actions in different territories. I have examined the period beginning from January 2012 forward because I understand that the plaintiff claims damages from the period of August or September 2012 forward; by beginning in January 2012, I have been over inclusive.
9. In SAP, we can identify the country of origin of the purchaser, and so I have checked the SAP records to determine the countries these Defendants sell to. The Defendants sold RRCs directly to customers in many countries. ABITRON Germany has sold to customers in 25 different countries, ABITRON Austria in 22 countries, HETRONIC Central Eastern Europe in 13 countries, and HETRONIC Germany in 25 countries. Altogether, Defendants sell or sold directly to customers in 43 different countries. A listing of these countries is attached as Exhibit "A".
10. I also investigated sales to foreign buyers to see if they were marked with a US destination.
 - a. For ABITRON Germany, ABITRON Austria and HETRONIC Germany, the destination information is sometimes, but not always, marked on the Invoice, but it is always marked on a data-sheet-form that is created at the time the customer

orders the RRC. SAP maintains a data-sheet for each radio-remote-control, and this data-sheet has to be filled out for each single RRC. One mandatory field is the destination country (or destination region in case of the EU). The purpose of this field is to ensure, that the RRC is allowed to operate in the specified country (especially to ensure that the frequency is not forbidden). Of course, also to attach the local certifications and operating manuals. Even if the sale was made to a buyer who was not a US customer, we can use these records to identify sales of RRC's that were made to a non-US customer but marked for a destination in the US. Such ultimate destinations were marked for 87 other countries around the world (besides the U.S.) seen in the Exhibits "B", "C" and "D".

- b. For HETRONIC Central Eastern Europe the Destination was marked in the Text of the Invoice, which I used for separating US from non-US Destinations.
11. Plaintiff's claim for \$49,612,443 seems to be based on ALL sales. This does not make sense to me because the great majority of these sales relate to "foreign" sales outside the U.S.
12. First, I have calculated the total values of sales-orders of Radio Remote Controls for the Defendants HETRONIC Germany, ABITRON Germany and ABITRON Austria for the appropriate period, beginning on 01/01/12. Here are the total values of sales orders for these defendants for their appropriate periods, without regard to where the products were used:

- a. HETRONIC Germany GmbH: €21,118,525.27. (This is for the period from 01/01/2012, past termination (06/06/14) and continuing through the “holdover period” including the 08/30/2014 after that Abitron Germany became operational). This is in Exhibit “B”.
 - b. ABITRON Austria GmbH: €5,218,932.56. (This is from 08/15/2014, when it became operational through year-end 12/31/2017). This is in Exhibit “C”.
 - c. ABITRON Germany GmbH: €23,198,589.23. (This is from 09/01/2014, when it became operational, through year-end 12/31/2017). This is in Exhibit “D”.
13. Because the destination-country-information was not available in the data-sheets for HETRONIC Central Eastern Europe, I calculated all Invoices (including RRCs, Parts and Services)
- a. HETRONIC Central Eastern Europe GmbH: €7,072,204.70 (This is for the period from 01/01/2012, past termination (06/06/14) and continuing through the “holdover period” including the 08/15/2014; after that ABITRON Austria GmbH became operational). This is in Exhibit “E”.
14. These amounts total €56,608,254.76.
15. Then, I filtered and checked all Invoices and Credit-Notes in SAP to determine the defendants’ total direct sales to the US (this includes sales of Radio Remote Controls, explosion proof parts and RRCs, parts, K-Parts and KH-Parts as well as services sold from any defendant to a US-customer) and these are the results:
- a. HETRONIC Germany GmbH had €185,463.52 of sales into the US-Territory. All of these sales

were sales to the plaintiff or its affiliates. The sales are attached as Exhibit "F." These sales were made to the following customers:

- i. HETRONIC International: €40,852.17 (the plaintiff)
 - ii. HETRONIC USA: €144,425.35 (to my knowledge an affiliate of the plaintiff)
 - iii. HETRONIC Midwest: €186.00 (according to Bloomberg a Methode affiliate) However, the last sale occurred prior to the termination of the contract on 2nd of June 2014, where ABITRON Germany sold 2 KH Coder-boards to HETRONIC Midwest. The purchase order, showing the two KH-Parts ordered by H-Midwest, is attached hereto as Exhibit "G".
- b. HETRONIC Central Eastern Europe had no sale directly to the US in its SAP-Database
 - c. ABITRON Austria did not have a single sale directly to the US.
 - d. ABITRON Germany had a total amount of €16,670.60 (€18,297.13 Invoices and - €1,626.53 credit notes) sold into US-Territory. The Spreadsheet is attached as Exhibit "H".
 - e. These sales directly to the United States total €202,134.12.
16. Most of the time, when sales are made to one country, but marked with a destination in another country, the sale is to a partner or a manufacturer, not the end-user. For example, a manufacturer of cranes or construction machines buys an RRC, puts it in the crane, and then sells its crane together with a RRC. The RRC would normally not be sold separately – rather the manufacturer would integrate it into its

machine. The manufacturer would often prefer to buy components (if available) locally to avoid customs, tax-issues, shipping costs and/or the language barriers.

17. The end-user customer from the machine manufacturer often would not even notice which RRC is implemented into the machine, neither is the identity of the manufacturer of RRC usually a buying criteria if the intention of the final customer is to buy something like a crane. (I personally would not prefer to buy a Mercedes over a FORD just because Mercedes would use another steering wheel manufacturer or brand – rather I would make my decision based on the car-brand that is fitting my needs). Some of our customers which have indicated a destination in the US, don't even name the brand of the RRC when advertising their products – see for example the products advertised at palfinger.com or bauer.de/bauer_group/.
18. For sales where the customer informed us, that the use of the RRC is US-Destination, ABITRON Germany, ABITRON Austria and HETRONIC Germany used the data-sheets to store that information. Two things need to be understood about these numbers. First, these datasheets probably include parts of the direct RRC sales into US-Territory (¶15 above) because those would also have been marked for a US destination, so parts of those ¶15 are probably counted in both numbers. Second, in some instances the customer placed an order for use in a group of countries, but one of the countries was the US; if so, I added the full value to the US-Sale total below, and so this was almost certainly over-inclusive. Here are the total for sales between a foreign seller (one of these

defendants) and a U.S. or a non-U.S. buyer, but marked for a US destination:

- a. HETRONIC Germany GmbH: €592,591.22. This is for the period from 01/01/2012- 08/30/2014. This number is 2.81% of the total order value for RRCs assigned for all countries. See also Exhibit “B”. A maximum of 185,463.52 € of these can possibly be sold directly to a U.S. buyer leaving €407,127.70 which were for sure not delivered directly to a U.S. buyer
 - b. ABITRON Austria GmbH: €10,792.75. From 08/15/2014-12/31/2017, this number is 0.21% of the total order value for RRCs assigned for all countries. See also Exhibit “C”. None of these sales were made directly to the U.S.
 - c. ABITRON Germany GmbH: €1,026,482.41. From 09/01/2014-12/31/2017, this is 4.42% of the total order value for RRCs assigned for all countries. See also Exhibit “D”. A maximum of 16,670.60€ of these can possibly be sold directly to a U.S. buyer leaving €1,009,811.81 which were for sure not delivered directly to a U.S. buyer
19. For HCEE I used again directly the Invoices and filtered their texts for an indication of a US-Destination:
- a. HETRONIC Central Eastern Europe GmbH: €120,344.97. From 01/01/2012-08/15/2014, this is 1.70% of the total sales. See also Exhibit “E”. None of these sales were made directly to the U.S.
- The total for these sales, which took place in Germany or Austria, and which were between a non-U.S. buyer and a non-U.S. seller, and which were marked for a U.S. destination, is €1,548,077.23

20. Further, there is no record of whether the customer uses the RRC in the specified country or not.
21. The destination-country field in SAP is only required for a sale of a radio remote control – not for spare-parts. To also cover spare-parts, I went back into the delivery-notes and filtered for all delivery-destinations in the United States that had another invoice destination – see Exhibit “I”:
 - a. Hetronic Germany: €584.15.
 - b. Hetronic Central Eastern Europe GmbH: €0.00 €
 - c. Abitron Austria GmbH: €0.00€
 - d. ABITRON Germany GmbH: €4,747.58
 - e. These total €5,331.73
22. To the best of my knowledge, the US territory was touched by all defendants at an absolute maximum of €1,957,677.20:
 - a. € 202,134.12 for direct sales into the US
 - b. € 5,331.73 for direct deliveries of spare parts into the US
 - c. €1,750,211.35 for RRCs indirect deliveries that could have ended up in the US-territory (which certainly could contain RRCs from the 202,134.12 €)

As an example, of a purely foreign sale, I have attached an invoice as Exhibit “J” to Elkem Iceland LTD from NORWAY who purchased a GR-RRC for the destination ICELAND (destination-region EUROPE)

The seller was ABITRON Germany, a German company, the buyer was Elkem Iceland LTD, a Norwegian Company and the product is designed to be used in Iceland.

I personally don't see a way this example or any other non-US-sale would have affected the US through defendants.

Executed on March 26, 2018

[signature]

Reimer Bulling

Abensberg, Germany

NOTARIZED BELOW

* * * * *

Exhibit J to Affidavit of Reimer Bulling (Excerpt)



ABITRON Germany GmbH - Adalbert-Stifter-Straße 2 - 84085 Langquaid

Elkem Iceland LTD
P.O. Box 618
8651 MOSJOEN
NORWAY

Delivery Address
Elkem Iceland LTD
Grundartanga

IS-301 AKRANES
ICELAND

Invoice: 311603050

From 21.04.2016
Customer No. / Contact 21695 / Gunnar Vidarsson
Your order PO #4067452 04.02.2016
Agent Daniela Ottl
Phone 0049(0)9452/189-484
Email daniela.ottl@abitrion.de
Customer advisor Zurth, Sonja
Page 1 / 3

| Item Code | Description | Amount | Price | Total EUR |
|---|---|--------|----------|-----------|
| Based on Delivery 211603372 from 21.04.2016 | | | | |
| Z506223.A-434 | <p>GR Gray-2K 3.6V / RX14+ Profi-FB HS-2 KSP</p> <p>1 Transmitter with</p> <p>protection bar 1 Joystick with deadman (Gray/Gray) 1 Joystick with cross gate and deadman (Gray/Z-0-2) 5 Toggle Switch T-0-T 1 S Toggle Switch 0-R 1 Rotary Switch with 6 steps 3 Pushbutton Keyswitch 0-R (Maintenance) 18 green feedback LED's Low battery indication Pushbutton (Start) 1 external Antenna STOP Keyswitch</p> <p>Labelling on engraved metal plate due to customer's specification</p> <p>1 Receiver with</p> <p>2 STOP-Relays due to cat.3 PLd 5 digital output relays Profibus-Interface feedback line (full duplex) Output wiring onto Spole SUB-D-plug 4pol. Amphenol plug 1 external antenna</p> <p>receiver adjusted to Profibus address 8</p> <p>Voltage supply 12/24 VDC</p> <p>Including: 1 Charger AC 2 Batteries MINI 3,6V 1900mAh 1 Antenna (transmitter) 1 Antenna (receiver) 1 counter plug Amphenol</p> <p>Destination country: Iceland Frequency band: 434 MHz</p> | 1 pcs | 6.282,50 | 6.282,50 |

ABITRON Germany GmbH - Adalbert-Stifter-Straße 2 - 84085 Langquaid - Phone +49 (0)9452 189-0 - Fax +49 (0)9452 189-201 - Info@abitrion.de - www.abitrionremote.com
berbank Altherr - Account No. 8308884 - Bank Code 740 201 00 - IBAN DE71 7402 0100 0008 2088 84 - SWIFT/BIC: BZGODE33
General Management: Frau Daniela Hemmerer | U.M.G. - Registration number: 14310 - VAT-ID: DE815511713

Tim Glandon
Trial Testimony, Feb. 13, 2020
Direct Examination by Plaintiff

[49] Q. Mr. Glandon, are you aware of any differences between Hetronic Germany and HCEE on the one hand and Abitron Germany and Abitron Austria on the other hand?

A. No differences, really. I mean, the products are the same, they appear to be the same on the outside, they look the same, they're using the same product names, the companies are in the same locations with the same people. Really, the only difference is they're using the Abitron name on the product.

Q. Mr. Glandon, what market does Hetronic compete with Abitron?

A. Basically everywhere in the world.

Q. Does Hetronic and Abitron compete for U.S. customers?

A. Sure.

Q. Would you explain how, given that there's no Abitron office in the United States?

A. Yeah. If you look at—if you look at the market for radio remote controls, it's a very global business. So if you—if you sell a radio remote control in Germany, it maybe goes on a piece of equipment in Germany and that piece of equipment is destined for the United States, and that could work in reverse as well, so it's very much a global market.

Q. Mr. Glandon, who is Defendant Albert Fuchs?

A. I understand Mr. Fuchs owns ABI, as well as all the other defendants in this case.

* * * * *

[115] Q. So wouldn't it have helped Hetronic, at least with respect to EX products, if you had terminated after 30 days?

A. It would have been much easier to have, yes.

Q. So why didn't you?

A. We just couldn't take the risk. We were very concerned about a safety problem. We just couldn't take that risk.

Q. Mr. Glandon, what did the defendants do—Hetronic Germany and HCEE—after receiving the termination notices from you?

A. Basically nothing. They continued to sell Hetronic products, they continued to advertise under the Hetronic name. Basically nothing.

Q. Did the defendants change what they were doing at any point in time?

A. Yes, they eventually did. They continued to sell the exact same products—from an appearance standpoint, they look the same as ours today—but they did change their name to Abitron.

Q. How did you know that defendants kept selling but now [116] under the Abitron name?

A. Well, we received a letter from them and we also saw them in the marketplace, trade shows, et cetera.

Q. Mr. Glandon, I'd like to direct your attention to Hetronic Exhibit 165.

What is this?

A. The letter we received.

Q. From whom, I'm sorry?

A. From Abitron.

MS. BERMAN: Your Honor, I request permission to move Hetronic Exhibit 165 into evidence.

MR. RUPERT: No objection.

THE COURT: It will be received.

MS. BERMAN: Your Honor, I also request permission to publish Hetronic Exhibit 165 to the jury.

THE COURT: You may.

MS. BERMAN: Thank you.

Q. (BY MS. BERMAN) You just testified that you received this letter from HCEE, what do you mean that you received it?

A. It was sent to us and we also received it from some other third parties.

Q. And when did you receive it?

A. On or around the same date that it was issued on August 13th.

Q. And if you look at the top of this letter, whose logo is [117] that?

A. It's the Hetronic logo.

Q. Do you know if Hetronic Germany sent out a letter similar to the one that we have here from HCEE?

A. Yes, I saw that letter as well.

Q. What status did Hetronic Germany and HCEE have with Hetronic when they sent this letter out?

A. None; they were no longer our partners.

Q. Did you authorize them to use the Hetronic logo?

A. No, they were specifically told that they couldn't in our June letter.

Q. Directing your attention to the first paragraph, what did Hetronic Germany and HCEE tell you in this letter?

A. "The work of our re-branding team on our new company presentation for what you currently know as Hetronic has now been concluded. In extensive conversations with our customers, partners and staff members the team has extracted the essential foundation for our 30-year-success. Today we would like to present our conclusion to you."

Q. Mr. Glandon, did you know that your partners, Hetronic Germany and HCEE, were exploring rebranding while they were your distributors?

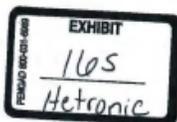
A. No, I did not.

* * * * *

Plaintiff's Trial Exhibit 165

Altheim, August 13th, 2014

Taking big steps into the future!



Dear business partner,

The work of our rebranding-team on our new company presentation for what you currently know as Hetrionic has now been concluded. In extensive conversations with our customers, partners and staff members the team has extracted the essential foundation for our 30-year-success. Today we would like to present our conclusion to you:

Starting August 18th, 2014 our group of companies and our products worldwide will be presented under the new name ABITRON.



In 1982 Max Heckl started to develop the first radio remote controls in a small workshop in Langquaid. In the following 20 years to come the electronics master and his team consistently created innovative radio remote controls, which successfully control your machines, cranes and vehicles up to date. With diligence and commitment he created a globally operating company, in order to be at your service worldwide.

However, in 2008 the group of companies has been split and some of the Hetrionic locations have been sold to an American listed stock corporation. Those respective locations have lately followed a path that leads further and further away from our goals. This includes the coordination of your specific product demands up to a made-to-measure tailoring process.

You are one of the first we would now like to introduce to the new direction under our new company name ABITRON:

ABITRON products: Naturally, we will continue to supply the accustomed, first-class products – just under the new name ABITRON. All your open orders with us will be taken over by ABITRON and handled in the usual way to the usual conditions. By the way, ABITRON radio remote controls also present themselves in the familiar yellow design and are approved and certified in accordance with the latest European and International safety standards!

Customer support: All your usual contact persons are now at your service at ABITRON. We are looking forward to discussing the exciting news with you and to answer all your questions in a personal conversation. You can reach us under the familiar contact data. Also, you can contact us under the following email addresses: firstname.lastname@abitron.at.

Spare parts and accessories: Together with our local partners we will continue to provide you and your customers as fast and reliable with spare parts and accessories as you are used to. All our spare parts and accessories are of course compatible with the products you used to obtain from us.

Worldwide service: What use is the best radio remote control if your customer has questions about the radio remote control and needs support as soon as possible at the other end of the world? To this end, you may in the future take advantage of a worldwide network of authorized ABITRON service partners, which are trained by us on a regular basis in order to assist you and your customers on-site with equal competence and commitment. Our customer support is of course also prepared to assist you with any questions or services – for example modifications or repairs – you may have regarding our current and future products. Warranty and service agreements for all products delivered by our company will of course remain unchanged.

HETRONIC Central Eastern Europe GmbH
Wiesnerstr. 20, 4980 Altheim
Tel.: +43 (0) 7723 44860
Fax: +43 (0) 7723 44860-94

Bankverbindung: Raiffeisenbank
BLZ: 34060
Kto.-Nr.: 8.416.059
IBAN: AT713406000008416059
SWIFT/BIC: RZOOAT2L060

Rechtsform: GmbH
Firmenbuch-Nr. FN 279578 w
Handelsgericht Ried/I.
UID-Nr.: ATU 52638989

CONFIDENTIAL

PLAINTIFF'S
EXHIBIT
165
CIV-14-650-F

HG0009433



ABITRON R&D: Research and Development is a key topic for us. Considering that Germany is a major leader in the technology segment, we decided to re-establish our R&D activities on our central locations in Austria and Germany and to not continue to have it done outside Europe. This will allow us to even better appoint our specialists and our longtime expertise to your full benefit. Moreover, we intend to undertake massive investments in order to accelerate our activities in this area on a long-term basis.

More flexibility: For many years, our locations in Austria and Germany have been defined by a very high level of flexibility and customer orientation. Our long-serving employees will surpass themselves so you may receive your radio remote control even faster. Please take a look at the wide range of possibilities for the design of your radio remote control on our website www.abitronremote.com.

We continue to stand for highest quality, solution-oriented expertise, flexibility and customer orientation and are looking forward to your joining us on our path!

Kind regards from Altheim,

Daniela Hammerer
Deposition Testimony Played at Trial, Feb. 18, 2020
Deposition Taken by Plaintiff

[307] Q. Okay, and in the bottom e-mail Mr Bulling tells you that he has made the re-direct of the Hetronic domains to Abitron inactive. Correct?

A. That's what it says, yes.

Q. And then you respond the next day to Mr Bulling, copying Mr Weithaler. Correct?

A. Correct, yes.

Q. What do you tell Mr Bulling?

A. That he should reverse what he did as described in the e-mail below.

Q. So you tell Mr Bulling that he should make the re-direct from the Hetronic domains to Arbitron active again. Correct?

[308] A. That's what it says, yes.

Q. That's what you did. Correct?

A. That's what I wrote, yes.

* * * * *

[312] Q. Miss Hammerer, Arbitron used the names Nova and Ergo. They were the same names used for the same products sold by Hetronic Germany when it was a licensee of Hetronic. Correct? Yes or no, please?

MR STEINER: Object to the form of the question. You may answer.

* * *

[313] A. Yes.

MS BERMAN: And by using the same product names you wanted to let customers know that they'd be getting the same products they were familiar with. Correct?

A. The same product as they got from Hetronic Germany.

* * *

Q. My question was it was important to you to let customers know that they'd be getting the same products they were familiar with. Yes or no, please?

A. Yes.

* * * * *

[317] Q. Miss Hammerer, there are radio remote controls that perform the same function that come in blue and black, red and black, orange and black. [318] Correct?

A. Of course we also sell those.

* * * * *

[318] MS BERMAN: And Abitron and Hetronic are competitors. Correct?

A. Yes.

Q. And Abitron targets the same consumers as Hetronic. Right?

[319] A. I don't know exactly which current consumer group Hetronic targets, but I would say that the customer segments that we aim at overlap.

* * * * *

[334] Q. Did Abitron Germany reimburse Hetronic Germany for any of the fees it expended in connection with the asset sale between Hetronic Germany and Abitron Germany?

A. Not to my knowledge.

Q. Did ABI reimburse Hetronic Germany for [335] any of the fees it paid in connection with the asset deal between Hetronic Germany and Abitron Germany?

A. To my knowledge there was no payment, no.

Q. Why did Hetronic Germany pay the entire legal fees for the asset purchase agreement between itself and Abitron Germany?

A. I assume it was agreed. I cannot actually recall any details of any discussion about that.

* * * * *

Sonja Zurth
Deposition Testimony Played at Trial, Feb. 19, 2020
Deposition Taken by Plaintiff

[79] Q. So as of 2015 you were telling Mr Coppens he could still use old Hetronic part numbers to order from you. Correct?

A. Yes.

* * *

[80] Did you ever discuss with Mr Coppens any customers being confused as between Abitron and Hetronic?

A. I don't remember, but probably I did.

* * * * *

[88] Q. Okay. I was asking a little bit about the discussion—about KH versus non-KH parts. Were there any internal discussions after the June 2014 termination as to how to address confusion about the relationship—relationship between Abitron and Hetronic?

A. Yes, we had some internal discussions when a customer is asking about Hetronic and Abitron.

Q. Okay, and so would you wait until—so those happened after—after the customer would ask. Correct?

A. (Nods.)

* * *

[88] Q. And so there were instances where customers were confused about the relationship between Abitron and Hetronic. Correct?

[89] A. Yes.

* * * * *

[90] Q. Yes. As you sit here today—

A. Yes.

Q. —you said there were instances where customers were confused.

A. Uh-huh.

Q. Can you recall any of the specific customers who were confused?

MR. RUPERT: I'm going to object to the form to the extent you used the word "confused". Go ahead and answer. Go ahead and answer.

A. Okay. Okay. Okay. It's, for example, on a trade show when a customer is asking what's Abitron and what's the difference between Abitron and Hetronic, or when we inform the customers that we are Abitron or they want to know if we still produce the same systems at the same facility.

Q. And both of those examples happened. Right? That's a "yes"?

A. Yes. I'm sorry. Yes.

* * * * *

[96] Q. Okay. Let me hand you what was previously marked as exhibit 185.

(Previously marked exhibit 185 shown to witness)

Q. And let's go to the last page of 185. The e-mail that starts this whole chain in exhibit 185 it's from a Daniel Batzing from SME group. Do you see that?

A. Uh-huh.

* * *

[97] Q. And he writes: "Please prepare an offer for us on the following position if possible the first week of the

year”, and it says: “Remote control transmitter Nova-XL Hetriconic.” Do you see that?

A. Yes.

* * *

[97] Q. If you look at HG1730821, do you see it—

A. Yes.

Q. —ultimately sent to you? Okay. Right. So this customer by name specifically asked for a Nova-XL Hetriconic. Correct?

A. Yes. In that e-mail he is answer—he’s asking for that.

* * * * *

[98] Q. In exhibit 37 the top e-mail is dated November 19th, 2015. Correct?

A. Yes.

* * *

[99] Q. Okay, and he asks for — that customer asks for a Hetriconic frequency receiver module. Correct?

A. Yes.

Q. And he uses the word “Hetriconic” in that and also asking for the Hetriconic radio power source. Correct?

A. Yes.

Q. Okay, and you write to Dieter Roters—

A. Yes.

Q. —on November 19th: “Can you please inform the customer that it can obtain an Abitron part from us, not Hetriconic?” Do you see that?

A. Yes.

Q. Okay, and you understood at the time that this customer was located in the United States. Correct?

A. Yes.

* * * * *

[100] I'm going to hand you what I'm making as exhibit 479.

(Exhibit 479 marked for identification)

* * *

[100] Okay, and that's from a person named Ivan Sylvania. Do you see that?

A. Uh-huh.

Q. And it's dated January 28, 2015. Correct?

A. Yes.

Q. And it's to chris@abitron.de?

A. Uh-huh.

Q. And it says: "Dear Chris, As per our telephone conversation, I was [101] referred to your company by a sales rep in the USA. They are claiming that this product was provided by your company in 2003." Do you see that?

A. Yes.

Q. And at the bottom of his e-mail the radio transmitter says: "Manufacturer: Hetric USA". and it's a Nova-L, EX. Do you see that?

A. Yes.

* * * * *

[105] Q. Okay. I'm going to hand you what was previously marked as exhibit 38.

(Previously marked exhibit 38 shown to witness)

Q. So, Miss Zurth, in this e-mail the first one at the bottom of exhibit 38 is from Chris Kremer at Mid Country.

A. Uh-huh.

* * *

[105] Q. He writes for—on November 16th, 2015 for help in wiring a new controller to a crusher and he writes the old system is an RX-14 type. Do you see that?

A. Uh-huh.

Q. Okay, and he attaches—or let me put it this way. When you—you write after that—you forward the e-mail to Dieter Roters at All Access Equipment—

A. Uh-huh.

[106] Q. —and you say: “Attached please find enquiry from the USA. Please handle it. Do you see that?”

A. Yes.

* * * * *

[106] Q. And that’s what I was asking. So any enquiry that came into either Abitron Austria or Austria Germany that related to a US customer was your [107] responsibility?

A. Yes.

Q. Okay, and what would you—were there any instructions that were different for you for handling United States companies or customers versus customers in other countries?

A. Not at that moment.

* * * * *

[107] Q. Okay. After cancelling the contract with All Access Equipment what—what instructions were you given about US customers?

A. Not—not to serve US customers anymore.

Q. Who told you that?

A. Jürgen Weithaler.

Q. Did he tell you why not?

A. No.

Q. Okay, and prior to that if you had—if you received enquiries from the United States, you would forward them to Dieter Roters—

[108] A. Yes.

Q. —to handle them on behalf of Abitron within the United States. Correct?

A. Yes.

* * * * *

[117] Did you travel to the United States to train Mr Roters?

A. Yes.

Q. And when you travelled to train Mr Roters, that's when All Access was an Abitron distributor in the United States. Correct?

A. Yes.

* * * * *

Jurgen Weithaler
Deposition Testimony Played at Trial, Feb. 19, 2020
Deposition Taken by Plaintiff

[398] Q. Did you want customers to rely on the statements you were making in this letter in their decision whether or not to conduct business with Abitron?

A. Yes, that's what we wanted.

* * * * *

[403] Q. I just want to confirm, you testified yesterday that the letter went out to your significant customers on Hetronic Germany letterhead. Do you recall that?

A. Yes.

Q. All right. And then it went out to a broader list of customers, other than some customers [404] who you no longer considered current, correct?

A. Yes.

Q. Other than those two groups that we've already testified about, did a copy of this letter also go out, for example, to any of your suppliers?

A. Yes.

* * *

[404] Q. Understood. Did the letter also go out to suppliers of Hetronic?

A. I don't know. We gave the directive out to inform our main suppliers.

* * * * *

[406] Q. Okay. And looking at the first sentence of the letter, you told your customer that you were known previously as Hetronic, correct?

A. Yes.

Q. And at the time you sent this letter the company was known as Hetronic, correct?

A. Yes.

* * * * *

[406] Q. The marketing message you wanted to convey to customers was that the company was changing its name from Hetronic to Abitron, correct?

A. That's what it says here.

* * * * *

[523] Q. (BY MR. SERVODIDIO) Does Abitron also sell to customers products—sell to customers located outside of the United States products that are intended for use within the United States?

A. Yes.

Q. Does Abitron need to make any modifications to those radio remote—to those products that are intended for use in the United States?

A. Yes, there are certain rules that we have to fulfill and comply with.

Q. Can you tell me what those rules are?

A. Primarily it's about frequency permits, the FCC permits.

Q. You have to ensure that the devices you're selling to your customers are intended—that are intended for use in the United States operate on the frequencies allowed by the FCC?

A. Yes.

* * * * *

[525] Q. So, Mr. Weithaler, I handed you a stack of exhibits that we've marked as Exhibit 222. (Exhibit 222 marked for identification.)

A. Yes.

Q. And I don't want to look through every one, so I'll direct your attention to the first exhibit, the first invoice on Exhibit 222.

A. Yes.

Q. And this is an invoice for the sale of some NOVA systems to a customer of Abitron Germany located in Germany named Zagro, is that correct?

A. Yes.

Q. And looking down on the bottom third of the invoice, do you see the entry that says, "Bestimmungsland USA"?

A. Yes.

Q. And does that signify that this product is intended for use by this customer in the U.S.?

A. Yes.

* * * * *

[545] Q. Can you identify the names of the trade shows where Abitron has attended as an exhibitor?

[546] A. Yes.

Q. What are they? BAUMA?

A. BAUMA, SPS in Nuremberg, Hanover Trade Show, Steinexpo, I'm not sure about that, and maybe that was only once, and I'm not sure whether that was already under Abitron or not, but I believe so, where we were, okay.

Q. Okay.

A. That's all what comes to my mind right now.

Q. And are those trade shows which you just identified all located in Germany and Austria?

A. Yes. I think I forgot the one in Austria, which is MAWEV, M-A-W-E-V, like victor.

Q. Do U.S. companies also attend those trade shows?

A. I believe so, yes, of course. BAUMA is a large international trade show.

Q. Does Hetronic International also—does Hetronic also attend the trade shows that you just identified as an exhibitor?

A. That's possible, but I'm not sure about all of them.

Q. Okay. Has Abitron participated as an [547] exhibitor in any trade shows in the U.S.?

A. No, as stated before, only Mr. Rotors did a—had a trade show before.

Q. And when you say Mr. Rotors, do you mean through his relationship with All Access?

A. Yes.

* * *

Q. Tell me about which trade show All Access participated in in the U.S. as an exhibitor on your behalf.

* * * A. I only am aware of one trade show, but I forgot the name of the trade show.

Q. (BY MR. SERVODIDIO) It was located in the U.S.?

A. That, yes.

Q. And All Access was an exhibitor at that trade show?

A. Yes.

Q. And did All Access exhibit or display Abitron products at that trade show?

A. Yes.

Dieter Roters
Deposition Testimony Played at Trial, Feb. 24, 2020
Deposition Taken by Plaintiff

[98] Q. There is also evidence in the documents, and we will go through some of them, where inquiries were forwarded to you from Abitron in Germany. Do you have a recollection of that?

A. Yes, on the website they got some inquiries on the website in the US, and Sonja forwarded these queries to me by email, and I got in [99] contact with the people here, in the US.

Q. So your understanding is that those customers made inquiries on the Abitron website?

A. Yes.

Q. And then they were forwarded to you to deal with because they were located in the United States?

A. Exactly.

* * * * *

[99] Q. I have handed you what we have marked [100] as plaintiff's Exhibit 30, an email from Dennis Barth to you, on January 26, 2015. Do you see that?

A. Yes.

Q. The subject is "Service for radio system." Is that right?

A. Yes.

Q. About halfway down, I guess, in the email it says: "At issue is a system for Mototok. You will find the schematics attached." Then Mr. Barth writes: "The system is currently at Hetronic USA and they are causing problems because of some kind of service." Is that more or less what that says?

A. Yes.

* * *

Q. Tell we what you remember about this system?

A. The system, there was a need, a new Atmoship and the system was not working. Dennis sent me the parts to the US, and he wrote to Mototok that they can send the system to us, I will service it, but we never got the system to service it, and I sent the parts back to Germany.

* * * * *

[101] Q. Did you have an understanding that Mototok had contacted Abitron about this system?

A. I guess, yes.

Q. But you have an understanding that they sent the system to Hetronic USA, not Abitron, correct?

A. Exactly, yes.

* * * * *

Josef Scheuerer
Trial Testimony, Feb. 25, 2020
Direct Examination by Plaintiff

[478] Q. So they continued to conduct business as Hetronic Germany and HCEE?

A. Yes, they did.

Q. And what were the brand names of Hetronic Germany—what was the brand name that Hetronic Germany and HCEE used for radio remote controls that they sold after termination?

A. They used the name “Hetronic.”

Q. And what were the names of the products that Hetronic Germany and HCEE sold after termination?

A. Same names: NOVA L, NOVA XL, GL, TG, GR, ERGO, all the same names.

Q. And what did Hetronic Germany and HCEE’s products that they sold after termination look like?

A. In the beginning, they looked absolutely the same.

Q. And how did they compare to Hetronic’s products?

A. There was no difference; it was same.

Q. So, Mr. Scheuerer, in light of all of this, please describe what was going on in the marketplace with customers after termination.

A. There was a lot of confusion going on, actually.

Q. And how do you know that?

A. I mean, I’m going to see the customers regularly. I’m going to trade shows, I’m phoning with the customers regularly, getting all the e-mails, and we’ve got a lot of feedback that said what’s going on? Who is the correct Hetronic now?

* * * * *

[494] Q. And, Mr. Scheuerer, you mentioned that Bauma is every three years, did you attend Bauma last year, in 2019?

A. Yes.

Q. And did Hetronic exhibit at Bauma in 2019?

A. Yes, we had our own booth there.

Q. Did Abitron exhibit at Bauma in 2019?

A. Yes, they did also.

Q. And how did the Abitron booth compare to the Hetronic booth?

A. Similar. They also had these little black boxes at their booth.

Q. And, Mr. Scheuerer, would you please tell us: Who attends Bauma? Like, where are the customers from?

A. Bauma is international. Bauma is not a local trade show, it's an international trade show. It's a big event every three years in Munich.

If you want to go there and book a hotel, book it two years in advance, because one year in advance is not enough. It's the hugest event for the construction machinery worldwide. And there is attendees from New Zealand to the—Finland, from Japan to Argentina. It's really international.

Q. So, Mr. Scheuerer, are you aware of customers from the United States attending Bauma?

A. Yes.

[495] Q. And are you aware of any Hetronic's U.S. customers who attended Bauma?

A. Yeah, L Tek and Manitowac, for instance.

Q. Can you give us an example of Hetronic U.S.-based customer who you know attended?

A. Yeah, like Manitowac, which I said earlier.

* * *

Q. (BY MS. BERMAN) Mr. Scheuerer, who did you meet with at Bauma in 2019?

A. I've met with 10—10, 12, 15 companies every day.

Q. Did you meet with any suppliers of construction cranes?

A. Yes. There was—despite the show is international, there's also the regional construction companies coming, so all the tower cranes users from south of Germany, Switzerland, Austria, they're all coming to the shows, yes.

Q. And did you—did any customers come—any of these construction crane manufacturers come to the Hetronic booth?

A. Yeah, there was a tower crane user coming and he complained that the quality of the battery charger for the remote control got so bad recently and he would say that it's not really charging the battery very good, it's very [496] intermittent in charging. And me and my colleague, Stefan Mickowski, we couldn't believe that. And Stefan went to our closet and brought the charger and then the gentleman said, no, no, no, that's not the charger what he's using.

And then only—we found out in that discussion that he was referring to the Abitron battery charger and not the Hetronic one, because he thought Abitron and Hetronic is the same product and we had to explain him it's not.

Q. Mr. Scheuerer, in addition to that individual, were there other construction crane manufacturers who stopped by the Hetronic booth?

A. Yes.

Q. And did they say anything to you or ask you any questions about the connection between Hetronic and Abitron?

A. Yes. There was some coming said, ah, Hetronic, you have a very big booth there, we see your logo, we know it for many years, but we thought you didn't exist anymore because Abitron is the official follower of Hetronic.

And I remember one gentleman said he came to the Bauma to look at the new tower cranes, but he also wanted to see Abitron and complain about some things. He wouldn't specify about what. And now that he sees Hetronic, he's happy to know that there is still Hetronic so he can get the genuine parts again.

Q. Mr. Scheuerer, are there any other trade shows that you attend where you interact with customers or potential [497] customers?

A. Yes, several, several others.

Q. What is InnoTrans, I-N-N-O-T-R-A-N-S?

A. InnoTrans is a big trade show which is held every two years in Berlin in Germany and the product it's focusing on, it's for the railway and all the components which are used in railways, locomotives and on.

Q. Mr. Scheuerer, when was the most recent InnoTrans trade show?

A. InnoTrans' last time, September 2018.

Q. And is InnoTrans a local German trade show?

A. No, it's also international. It's also very big.

Q. Are there U.S. customers who attend InnoTrans, to your knowledge?

A. There is American companies, but I don't know specifically which ones.

Q. And did you attend InnoTrans in September of 2018?

A. Yes, I did.

Q. While you were at Innotrans, did you talk to any customers or potential customers?

A. Yeah, several.

Q. Do you remember any specific conversations?

A. Yeah. I've been to the booth of a company called Zwiehoff. They are making hybrid vehicles. That vehicle can go on the rail tracks for shunting carriages and then it can [498] bring down wheels and can also go on the normal roads. And when it is on the rail tracks, it's controlled with a radio control.

Q. Mr. Scheuerer, who did you speak with from Zwiehoff?

A. To the owner of Zwiehoff, Mr. Zwiehoff.

* * *

Q. And what was discussed in this conversation that you had with Mr. Zwiehoff?

A. We asked him why he's not using Hetronic anymore and he said, yeah, when it was becoming Abitron, it was so—so easy-going because it was same phone number, same people, same address, nothing really changed except for the name, so he was using Abitron then, and now going back to Hetronic would mean too much effort for him, so he said, he has nothing against us, it's simply—it's inconvenient to go through the change.

Q. And, Mr. Scheuerer, did Zwiehoff make any purchases from Hetronic after you met with Mr. Zwiehoff?

A. No.

* * * * *

[536] Q. Has RSP bought anything from you?

A. No. They were talking about that they wanted to buy systems, especially for going into the U.S. market, because they found out that, in the midst of all the confusion, since they used Abitron, they—sent the systems to repair for the Hetronic use here in Oklahoma City, they couldn't do that with the Abitron systems anymore.

And so they had to tell the customers, listen, you have to look if it is a Hetronic or an Abitron before you send it in to Hetronic USA for repair.

Q. Mr. Scheuerer—

A. Turns out, they still didn't buy from us.

Q. Sorry, I thought you were finished.

What is the company Atlas?

A. Atlas is a maker of truck-mounted hydraulic cranes.

Q. And is Atlas a current Hetronic customer?

A. At the moment, no.

Q. Did they used to be?

A. Yes, they were.

Q. For how long approximately was Atlas a Hetronic customer, do you know?

A. Since the late nineties. I was there for service training, like, 2004 and they were already a long-time customer by then.

* * * * *

Cross Examination by Defendants

[548] Q. Mr. Scheuerer, if I understand correctly, you are the key account manager at Hetronic?

A. Yes, one of the key account managers.

Q. Should I say "Methode"? What company are you with now, please?

A. Come again?

Q. Yes. What company are you with now?

A. I'm with Methode Electronics International GmbH.

Q. Okay. And key account manager is your position?

A. Yes.

Q. And you're responsible for the territory of Germany?

A. Germany, in part.

Q. And some others, too?

A. And other countries.

Q. Please, help me with others.

A. Finland, Norway, and the company in Northern Ireland and company in Luxembourg.

Q. European countries?

A. Yes.

Q. All right. Who has the U.S.?

[549] A. Hetronic USA.

Q. Now, you mentioned several companies and I want to just go over them with you so I understand them.

Herrenknect is one of the companies you mentioned?

A. Yes.

Q. And are they headquartered in Germany?

A. Yes.

Q. And then you mentioned AST Degen, if I'm pronouncing it right, GmbH?

A. Right.

Q. Are they headquartered in Germany?

A. Yes.

Q. And GmbH, that's how you say "Inc." in Germany; is that right?

A. Yes.

Q. So they're in your area?

A. Yes.

Q. And you mentioned a company called MTS and a Mr. Hurm that you spoke with there?

A. Yes.

Q. Are they located in Germany?

A. Yes.

Q. So they're in your territory, too?

A. Yes.

Q. And we even looked at, I think, their brochure.

[550] MR. RUPERT: If I could have Plaintiff's 895.

Q. (BY MR. RUPERT) This is one of the ones you went over with Ms.—the brochure is actually in German; is that fair?

A. Yes.

Q. That's all I needed. And then you mentioned Manitowak?

A. Yes.

Q. And we heard earlier from the witness right before you about Roger Knecht, the guy in Lyon, France. He's the purchasing person at Manitowak?

A. Might be. I'm not taking care of Manitowak, as such.

Q. Yes.

And you deal with the people at Manitowak in Lyon, I take it?

A. My colleague does.

Q. Okay. And then you mentioned some trade fairs, InnoTrans, and where is that?

A. Berlin, in Germany.

Q. And Bauma?

A. Munich, Germany.

Q. And CMET?

A. Hannover, Germany.

Q. All right. And then you mentioned a company called Zwihehoff, if I'm saying it right?

A. Yes.

[551] Q. Without knowing, it sounds like it must be a German company—

MS. BERMAN: Your Honor, I request a sidebar.

MR. SCHEUERER: It's a German company.

THE COURT: Counsel will approach.

[Transcript continues at Pet. App. 162a]

Plaintiff's Trial Exhibit 777 (Excerpts)

Reverse Palming Off

Abitron Germany, Abitron Austria, ABI Holding, Albert Fuchs

| Defendant | Inventory Transferred | Inventory Sold | Sales (Euros) | Sales (\$US) |
|-----------------|-----------------------|----------------|---------------------|---------------------|
| Abitron Germany | 338,177 | 98,531 | € 756,147.06 | \$859,904.41 |
| Abitron Austria | 27,406 | 3,326 | 45,627.04 | 51,887.92 |
| Total | 365,583 | 101,858 | € 801,774.10 | \$911,792.32 |

Note: Exchange rate for the period of July 2014 – September 2017: 1.137

Hetronic International, Inc. v. Hetronic Germany, GmbH, et al.
Case No. CIV-14-650-F
Expert Report of Bryan M. Van Uden

Summary of Unjust Enrichment: KH Part Sales Prior to Termination of Contracts (September 2012 - June 6, 2014)
(Adjusted for Defendants' profit margin)

| | 2012 | 2013 | 2014 | Total |
|----------------------------------|-------------------|---------------------|---------------------|---------------------|
| HCEE | € 81.00 | € 33,103.73 | € 41,888.27 | € 75,073.00 |
| H-Germany | 8,861.19 | 282,971.66 | 253,165.07 | 544,997.92 |
| Total | € 8,942.19 | € 316,075.39 | € 295,053.34 | € 620,070.92 |
| Less Returns | | | | |
| HCEE | € 0.00 | € 0.00 | € 494.88 | € 494.88 |
| H-Germany | 711.00 | 21,258.70 | 3,845.70 | 25,815.40 |
| Total Returns | € 711.00 | € 21,258.70 | € 4,340.58 | € 26,310.28 |
| Net Revenue | | | | |
| HCEE | € 81.00 | € 33,103.73 | € 41,393.39 | € 74,578.12 |
| H-Germany | 8,150.19 | 261,712.96 | 249,319.37 | 519,182.52 |
| Total Net Revenue | € 8,231.19 | € 294,816.69 | € 290,712.76 | € 593,760.64 |
| Incremental Profit Margin | | | | |
| HCEE | 39.6% | 37.0% | 46.1% | |
| H-Germany | 43.1% | 49.9% | 45.1% | |
| Profits | | | | |
| HCEE | € 32.08 | € 12,248.38 | € 19,082.35 | € 31,362.81 |
| H-Germany | 3,512.73 | 130,594.77 | 112,443.04 | 246,550.53 |
| Total Profits | € 3,544.81 | € 142,843.15 | € 131,525.39 | € 277,913.34 |
| Exchange Rate | 1.2943 | 1.3285 | 1.3292 | |
| HCEE | \$42 | \$16,272 | \$25,364 | \$41,677 |
| H-Germany | 4,547 | 173,491 | 149,455 | 327,492 |
| Total (US) | \$4,588.08 | \$189,762.15 | \$174,818.79 | \$369,169.01 |

Sources and notes:

KH_HCEE.xlsx

KH_HG.xlsx

From <https://www.ofx.com/en-us/forex-news/historical-exchange-rates/>

KH Returns from the filename Invoice_Information_total_withoutQuery.xlsx

HCEE and H-Germany incremental profit margins from Expert Rebuttal Report of Alexander Demuth, German CPA, pp. 17-18

Hetronic International, Inc. v. Hetronic Germany, GmbH, et al.
 Case No. CIV-14-650-F
 Expert Report of Bryan M. Van Uden

**Summary of Unjust Enrichment: System Sales Containing KH Parts
 (Adjusted for Defendants' profit margin)**

| | 2012 | 2013 | 2014 | Total |
|----------------------------------|---------------------|-----------------------|-----------------------|-----------------------|
| HCEE | € 3,309.16 | € 926,408.97 | € 927,864.96 | € 1,857,583.09 |
| H-Germany | 182,695.97 | 3,380,798.60 | 2,147,812.89 | 5,711,307.46 |
| Incremental Profit Margin | | | | |
| HCEE | 39.6% | 37.0% | 46.1% | |
| H-Germany | 43.1% | 49.9% | 45.1% | |
| Profits | | | | |
| HCEE | € 1,310.43 | € 342,771.32 | € 427,745.75 | € 771,827.49 |
| H-Germany | 78,741.96 | 1,687,018.50 | 968,663.61 | 2,734,424.08 |
| Exchange Rate | 1.2943 | 1.3285 | 1.3730 | |
| HCEE | \$1,696.10 | \$455,359.77 | \$587,296.41 | \$1,044,352.28 |
| H-Germany | 101,916.43 | 2,241,145.36 | 1,329,978.55 | 3,673,040.33 |
| Total | \$103,612.52 | \$2,696,505.13 | \$1,917,274.96 | \$4,717,392.61 |

Sources:

See Exhibit 7.2 R

See Exhibit 7.3 R

Exchange rates: <https://www.ofx.com/en-us/forex-news/historical-exchange-rates/>

HCEE and H-Germany incremental profit margins from Expert Rebuttal Report of Alexander Demuth, German CPA, pp. 17-18

1. Sales records through first week of June 2014.

Hetronic International, Inc. v. Hetronic Germany, GmbH, et al.

Case No. CIV-14-650-F

Expert Report of Bryan M. Van Uden

Summary of Accused Sales Between Termination of Contracts and Abitron Rebranding (June 7, 2014 - August 31, 2014)
(Adjusted for Defendants' profit margin)

| | HCEE | H-Germany | Total |
|---------------------------|---------------------|-----------------------|-----------------------|
| ERGO | € 22,010.76 | € 130,660.48 | € 152,671.24 |
| EURO | 3,268.05 | 26,945.42 | 30,213.46 |
| GL | 101,605.52 | 194,903.28 | 296,508.80 |
| GR | | 160,896.37 | 160,896.37 |
| HH | 781.71 | 16,055.45 | 16,837.16 |
| MINI | 940.16 | 22,505.18 | 23,445.34 |
| NOVA | 312,561.14 | 926,913.94 | 1,239,475.08 |
| Pocket | | 13,419.23 | 13,419.23 |
| RX | 26,626.61 | 71,991.36 | 98,617.97 |
| Spareparts | 77,992.01 | 729,896.35 | 807,888.36 |
| TG | 673.04 | 16,041.54 | 16,714.58 |
| unknown | 51,431.81 | 36,054.32 | 87,486.14 |
| Sub Total | € 597,890.81 | € 2,346,282.91 | € 2,944,173.73 |
| Less First Week of June | € 76,310.00 | € 279,800.00 | € 356,110.00 |
| Total Revenue | € 521,580.81 | € 2,066,482.91 | € 2,588,063.73 |
| Incremental Profit Margin | 46.1% | 45.1% | |
| Incremental Profits | € 240,448.75 | € 931,983.79 | € 1,172,432.55 |
| Exchange Rate | 1.3492 | 1.3492 | 1.3492 |
| Total (\$US) | <u>\$324,406.32</u> | <u>\$1,257,404.88</u> | <u>\$1,581,811.20</u> |

Sources and notes:

HCEE.xlsx

HG.xlsx

HCEE's first week of June 2014 sales from HG1293787

H-Germany's first week of June 2014 sales from HG1673957

From <https://www.ofx.com/en-us/forex-news/historical-exchange-rates/>

HCEE and H-Germany incremental profit margins from Expert Rebuttal Report of Alexander Demuth, German CPA, pp. 17-18

Hetronic International, Inc. v. Hetronic Germany, GmbH, et al.
 Case No. CIV-14-650-F
 Expert Report of Bryan M. Van Uden

Summary of Accused Sales After Abitron Rebranding (September 2014 - (month unknown) 2019)
 (Adjusted for Defendants' profit margin)

| | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Total |
|----------------------------------|---------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|------------------------|
| Austria | | | | | | | |
| ERGO | € 1,884.00 | € 6,816.14 | € 2,205.00 | € 0.00 | € 0.00 | € 0.00 | € 10,905.14 |
| GL | 188,868.00 | 364,486.48 | 281,558.28 | 104,542.43 | 168,731.39 | 103,974.54 | 834,912.76 |
| GR | 2,294.00 | 17,416.92 | 2,564.10 | 59,899.99 | 8,526.50 | 38,386.40 | 22,275.02 |
| HH | 3,009.75 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 3,009.75 |
| MINI | 0.00 | 1,150.00 | 0.00 | 0.00 | 2,300.00 | 4,183.80 | 1,150.00 |
| NOVA | 471,857.22 | 1,139,772.76 | 969,473.37 | 1,490,130.55 | 1,449,593.97 | 1,940,881.04 | 2,581,103.35 |
| Pocket | 868.50 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 868.50 |
| RX | 29,854.35 | 47,111.40 | 35,371.50 | 21,578.70 | 24,105.43 | 56,298.39 | 112,337.25 |
| Sparesmart | 175,596.51 | 377,738.49 | 366,510.01 | 429,559.41 | 415,860.81 | 621,871.82 | 919,845.01 |
| TG | 1,126.70 | 10,183.99 | 4,915.10 | 13,303.55 | 2,177.40 | 16,999.71 | 16,225.79 |
| TGA | 0.00 | 88,761.40 | 173,216.27 | 230,538.87 | 258,018.49 | 187,552.66 | 261,977.66 |
| TGB | 0.00 | 17,989.39 | -131.50 | 1,003.20 | 668.80 | 2,052.00 | 17,857.89 |
| Sub Total | € 875,359.03 | € 2,071,426.97 | € 1,835,682.13 | € 2,350,556.70 | € 2,329,982.78 | € 2,972,200.37 | € 12,435,207.98 |
| Incremental Profit Margin | 18.2% | 24.4% | 35.8% | 30.5% | 33.4% | 34.6% | |
| Incremental Profits | € 159,315.34 | € 505,438.18 | € 657,174.20 | € 716,608.39 | € 779,153.22 | € 1,029,410.18 | € 3,847,089.52 |

**Report of Reimer Bulling,
Exhibit 1 to Notice to Court Concerning Injunction,
D. Ct. Dkt. 453-1, May 12, 2020**

Defendants Abitron Germany, GmbH, Abitron Austrian, GmbH, Hetrico Germany, GmbH, Hydronic Steuersysteme, GmbH, ABI Holding, GmbH and Albert Fuchs (collectively “Defendants”) report to the court the following.

1. They have not sold any item to a United States customer since the granting of the Injunction nor will they ever, unless and until the Injunction is lifted. (In this regard, Defendants have not requested, neither in this Court nor in the appellate court, that the Injunction be stayed with regard to sales to U.S. customers).

2. Defendants report that Abitron Germany, GmbH and Abitron Austria, GmbH did reopen the Abitron website as reported by Plaintiff. Defendants sincerely apologize to the Court for this reality.

3. Defendants have geoblocked our websites including www.abitronremote.com website since 8th of May 2020 so that no person (no customers, no vendors, no competitors) identified to access the website from the United States can access it. This means that none of the products that are part of the Injunction can even be seen on the website by a person in the U.S. A screenshot of a search result of www.abitronremote.com created from the United States is attached as Exhibit 1. You will see from the screenshot that a search of the website tells any person in the U.S that Defendants do not offer services or products in the U.S. Further we have removed the U.S. entry from our Partner portion of our website.

4. Defendants have also taken steps to cancel their registrations of the “GR” and “GL” trademarks in the

United States. Attached as Exhibit 2 is the confirmation for the abandonment request for the of “GR” and “GL” U.S. trademarks.

5. Defendants Abitron Germany GmbH and ABITRON Austria GmbH further state, that they are not using the Name HETRONIC in any way or kind for the benefit of their business. The Name HETRONIC has been removed from the abitronremote.com website since years – it does not appear in the Metatags nor in the history of the Homepage and it will not do so in the future.

6. Defendants recognize that the steps that they have taken do not cover every aspect of the Injunction, but they do report that they are obeying these aspects of the Injunction and will remain in obedience to these aspects.

7. The Injunction, if obeyed in Germany and Austria, will result in the immediate end to Defendants’ businesses. As an example, Defendants have ongoing sales in process right now for the NOVA and other products, and these are sales to long-time repeat customers. To tell all those repeat customers that these sales, warranty work and spare part sales are at an immediate end means the death of the businesses. Moreover, if the businesses are shut down, reviving them after the lengthy delay of an appeal is simply not possible.

8. However, Defendants are German and Austrian citizens operating in Germany and Austria. They have sought and obtained counsel in Germany and Austria regarding German and Austrian law, and without revealing that advice, after much reflection and analysis Defendants have concluded, in their best judgment, that the Injunction is not enforceable in Germany until it is declared enforceable by a German court. Concerning

Austrian law, it is our understanding that the Injunction is not enforceable in Austria at all.

9. For better or for worse, Defendants perceive their choices as business suicide or survival. Survival means continuing business in Germany and Austria, knowing that the Injunction is not yet enforceable in Germany and Austria (as explained above in paragraph 8). Suicide means shutting down business in Germany and Austria because of an Injunction that is not yet enforceable in Germany or Austria.

Between those two choices, Defendants have decided to opt for survival.

10. Defendants respectfully believe that the federal court erred in its decisions that led to this judgement and to this injunction and have appealed this decision to the United States Court of Appeals for the Tenth Circuit (and will continue, if necessary, to the United States Supreme Court and to the local courts of Germany and Austria) to correct what they believe was an erroneous extension and exercise of power by a U.S. court to activities of German and Austrian citizens in Germany and Austria.

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

Executed this 12th day of May, 2020.

[signature]

Reimer Bulling

**Order Granting Motion for Order to Show Cause
for Violating the Permanent Injunction,
D. Ct. Dkt. 465, June 2, 2020**

ORDER

On April 29, 2020, plaintiff, Hetric International, Inc., filed a Motion to Require Defendants to Show Cause for Violating the Permanent Injunction (doc. no. 446). The motion has been fully briefed by the parties. Arguments on the motion were heard by the court on May 29, 2020. At the hearing, the court granted plaintiff's motion, found defendants, Abitron Germany GmbH, Abitron Austria GmbH, ABI Holding GmbH and Albert Fuchs, to be in civil contempt of the court's April 22, 2020 permanent injunction order, and imposed, jointly and severally, against those defendants, a coercive penalty, the penalty to cease at such time defendants bring themselves in compliance with the permanent injunction. The court advised that a written order would follow. This order memorializes the court's ruling.

Background

On March 2, 2020, after an eleven-day trial, the jury returned a verdict in plaintiff's favor, finding that defendants had engaged in willful trademark infringement and other wrongful conduct. Doc. no. 420. Thereafter, Hetric filed a motion for permanent injunction. Doc. no. 423. After briefing and argument, the court entered a permanent injunction order on April 22, 2020 permanently enjoining and restraining defendants, among other things, from using plaintiff's "HETRONIC, Product Marks or Trade Dress or any variations or colorable imitations thereof on or in connection with any websites owned or operated directly

or indirectly by defendants (or controlled by them).” Doc. no. 434, ECF p. 5, ¶3.

That same day, defendants filed a motion to stay enforcement of the permanent injunction. Doc. no. 437. Defendants also requested an expedited ruling on their motion, which the court denied. Doc. nos. 438 and 439. Shortly thereafter, defendants filed with the Tenth Circuit an emergency motion to stay the injunction. On April 27, 2020, the Tenth Circuit denied the motion without prejudice to renewing if the court denied their motion. Doc. no. 445.

During the pendency of the emergency motion before the Tenth Circuit, defendants took down the Abitron website on which they had been selling infringing products. The day after the Tenth Circuit’s ruling, plaintiff discovered that defendants had reinstated the prior Abitron website which included selling infringing products. Plaintiff’s counsel contacted defendants’ counsel by email demanding that defendants “cease and desist violating the permanent injunction by offering for sale infringing products” and provide an “explanation why the prior website has been reinstated” no later than noon on April 29, 2020. Doc. no. 446-2. Defense counsel advised they would look into the allegations and get back with plaintiff’s counsel. In the afternoon of April 29th, defense counsel advised that they had no response to the inquiry. *Id.* On that same day, Hetronic filed the instant motion. The court promptly set the motion for hearing. Doc. no. 447.

Subsequently, on May 4, 2020, plaintiff responded to defendants’ motion to stay enforcement of the permanent injunction. Doc. no. 448. That same day, the court entered an order denying defendants’ motion to stay enforcement of the permanent injunction. Doc. no. 449.

Defendants did not renew their stay motion with the Tenth Circuit prior to the court's May 29, 2020 hearing.

On May 12, 2020, defendants filed a notice to the court concerning the permanent injunction order. Doc. no. 453. Along with the notice, defendants submitted the Declaration of Reimer Bulling which reported defendants' activities relating to the injunction. Mr. Bulling reported that defendants had "geoblocked" their websites, since May 8, 2020, so that they were not accessible to any person in the United States, had taken steps to cancel their registrations of the "GR" and "GL" trademarks in the United States and that Abitron entities were not using the "HETRONIC" name in any way or kind for the benefit of their business. He also reported that defendants had sought and obtained counsel in Germany and Austria regarding German and Austrian law and that defendants have concluded that the injunction is not enforceable in Germany until declared so by a German court and is not enforceable in Austria at all. Doc. no. 453-1, ¶8. Further, he reported that "perceiv[ing] their choices as business suicide or survival," defendants have "decided to opt for survival" and "continu[e] business in Germany and Austria." *Id.* at ¶9.

Discussion

I.

"The district court has 'inherent power to enforce compliance with [its] lawful orders through civil contempt.'" *Acosta v. Paragon Contractors Corporation*, 884 F.3d 1225, 1238 (10th Cir. 2018) (quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1966)). "In exercising this power, the court enjoys broad discretion." *Id.* (citing *Rodriguez v. IBP, Inc.*, 243 F.3d 1221, 1231 (10th Cir. 2001)).

The plaintiff, in a civil contempt proceeding, has the initial burden of proving, by clear and convincing evidence, “that a valid order existed, that the defendant had knowledge of the order, and that the defendant disobeyed the order.” *Reliance Ins. Co. v. Mast Const. Co.*, 159 F.3d 1311, 1315 (10th Cir. 1998) (citing *Roe v. Operation Rescue*, 54 F.3d 133, 137 (3d Cir. 1995)). Plaintiff need not show “wilfulness” on defendant’s part. “The absence of wilfulness does not relieve [the defendant] from civil contempt.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Because the purpose of civil contempt is remedial, “it matters not with what intent the defendant did the prohibited act.” *Id.*

The court finds that plaintiff’s proof of contempt as to defendants, Abitron Germany, GmbH, Abitron Austria GmbH, ABI Holding GmbH and Albert Fuchs, is clear and convincing. A valid order exists. The court entered a permanent injunction order on April 22, 2020. As stated, the order enjoined and restrained defendants, in pertinent part, from using plaintiff’s “HETRONIC, Product Marks or Trade Dress or any variations or colorable imitations thereof on or in connection with any websites owned or operated directly or indirectly by defendants (or controlled by them).” Doc. no. 434, ECF p. 5, ¶3. Defendants had knowledge of the injunction and all its requirements. Indeed, they filed motions with both this court and the Tenth Circuit seeking to stay enforcement of the permanent injunction. Further, defendants have disobeyed the order. They concede they are using the Abitron website to sell infringing products in Germany and Austria.

As plaintiff met its initial showing, the burden shifts to defendants to “show that [they] had complied with the order or that [they] could not comply with it.” *United*

States v. Ford, 514 F.3d 1047, 1051 (10th Cir. 2008). Defendants have not shown compliance with the order or that their compliance is impossible. Although defendants opine that it would be “business suicide” to comply with the order in Germany and Austria, the order does not preclude the defendants from conducting their businesses. As relevant to the present motion, it only precludes them from selling their infringing products. Defendants are free to change the color and shape of the infringing products. The injunction does not prohibit the defendants from engaging in the radio remote control business. Thus, defendants have the ability to comply with the court’s order. They simply have opted not to comply.

In sum, the court finds that defendants, Abitron Germany GmbH, Abitron Austria GmbH, ABI Holding GmbH and Albert Fuchs, to be in civil contempt of the court’s April 22, 2020 permanent injunction order. The court does not find defendant, Hetronic Germany GmbH, or defendant, Hydronic-Steuersysteme GmbH, to be in civil contempt.

II.

Sanctions for civil contempt “may only be employed for either or both of two distinct remedial purposes: (1) to compel or coerce obedience to a court order. . .; and (2) to compensate the contemnor’s adversary for injuries resulting from the contemnor’s noncompliance[.]” *O’Connor v. Midwest Pipe Fabrications, Inc.*, 972 F.2d 1204, 1211 (10th Cir. 1992) (quoting *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1147 (9th Cir. 1983), citing *Shillitani*, 384 U.S. at 370-371 and *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 448-449 (1911)). In its motion, plaintiff requests the court to employ sanctions in the form of compensatory damages (disgorgement of

defendants' profits). It also requests an award of attorneys' fees and expenses incurred in prosecuting the civil contempt motion. After consideration of the briefing and argument, the court finds that, at this juncture, sanctions should be only be employed to coerce obedience to the court's permanent injunction order.

"Where the purpose of the sanction is 'coercive,' the court must consider 'the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.'" *O'Connor*, 972 F.2d at 1211 (quoting *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947)). The "court must exercise 'the least possible power adequate to the end proposed.'" *O'Connor*, 972 F.2d at 1211 (quoting *Spallone v. United States*, 493 U.S. 265, 280 (1990)). "To be consistent with these principles, coercive civil sanctions may only continue 'until terminated by compliance.'" *O'Connor*, 972 F.2d at 1211 (quoting *U.S. v. Professional Air Traffic Controllers Organization, Local 504*, 703 F.2d 443, 445 (10th Cir. 1983)). "Thus, the sanctioned party must be able to immediately end the sanction by complying with the court order." *Acosta*, 884 F.3d at 1239.

Upon consideration of the above-stated principles, the court imposes the following coercive penalty for defendants' civil contempt:

\$10,000 per day from May 30, 2020 to June 30, 2020, inclusive.

\$15,000 per day from July 1, 2020 to July 31, 2020, inclusive.

\$20,000 per day from and after August 1, 2020.

Liability for the coercive penalty is joint and several. The accrual of the penalty will cease at such time as the

defendants bring themselves into compliance with the permanent injunction order. If defendants bring themselves into compliance with the permanent injunction order before June 30, 2020, the court will entertain a motion for remission of the accrued and unpaid penalty.

The court's ruling is without prejudice to consideration of other relief, depending on the degree of compliance by the defendants.

III.

In its reply and at the hearing, plaintiff requested the court not only to enter an order of contempt, but also enlarge the permanent injunction order "to add the two sections of [plaintiff's] draft injunction that the Court provisionally denied: (a) prohibiting defendants from using the 'Abitron' name due to the confusion they sowed between the two companies; and (b) requiring defendants to provide corrective [advertising] to their licensees, distributors, suppliers, partners, and customers informing them that defendants are not connected in any way to [plaintiff]." Doc. no. 461, ECF p. 3. The court, however, declines to grant this requested relief. The requested relief was raised for the first time in reply. Further, the court is not persuaded that the requested relief at this time. As the court has previously made clear on more than one occasion in this case, the court is of the opinion that, sitting as a court of equity, it should grant carefully calibrated relief, in the hope that more destructive forms of relief will not become necessary.

Conclusion

Based upon the foregoing, Plaintiff's Motion to Require Defendants to Show Cause for Violating the Permanent Injunction (doc. no. 446) is **GRANTED**.

As stated in the order, the court **FINDS** that the following defendants to be in civil contempt of the court's April 22, 2020 permanent injunction order: Abitron Germany GmbH, Abitron Austria GmbH, ABI Holding GmbH and Albert Fuchs. The court does not find either defendant, Hetricon Germany GmbH, or defendant, Hydronic-Steuersysteme GmbH, to be in civil contempt.

The court **ORDERS** imposition of the following coercive penalty for defendants' civil contempt of the April 22, 2020 permanent injunction order:

\$10,000 per day from May 30, 2020 to June 30, 2020, inclusive.

\$15,000 per day from July 1, 2020 to July 31, 2020, inclusive.

\$20,000 per day from and after August 1, 2020.

The relief imposed against the civil contempt defendants is joint and several. The accrual of the penalty will cease at such time as the defendants bring themselves into compliance with the permanent injunction. If defendants bring themselves into compliance with the injunction before June 30, 2020, the court will entertain a motion for remission of the accrued and unpaid penalty.

The court's ruling is without prejudice to consideration of other relief, depending on the degree of compliance by the defendants.

IT IS SO ORDERED this 2nd day of June, 2020.

[signature]
STEPHEN P. FRIOT
UNITED STATES
DISTRICT JUDGE

**European Union Intellectual Property Office
Boards of Appeal Decision, Dec. 10, 2019**

GLEISS LUTZ HOOTZ HIRSCH
Karl-Scharnagl-Ring 6
D-80539 Munich
GERMANY

Subject: Appeal R0521/2019-4 Nova

Your reference: 80151-15 Wh/MnK ss013

Service of a decision by the Boards of Appeal

Enclosed is the decision by the Fourth Board of Appeal of December 10, 2019 in the appeal R0521/2019-4.

* * * * *

Grounds for the decision

23. The appeal is unfounded. The application for a declaration of nullity is unfounded as regards all asserted grounds for nullity.

Applicant's rights to a "NOVA" trademark acquired by use.

24. The Plaintiff invokes earlier rights to a non-registered "NOVA" trademark as regards both of its cancellation grounds. It must first be established that, although it refers to the provision in section 4 no. 2 Trademark Act, it has not submitted any documents whatsoever showing that the prerequisites for the acquisition of a trademark acquired by use under German law have been met. Even if one were to assume in the Plaintiffs favor that its submission in this regard were substantiated, the very wording of the provision

shows that it concerns a mark that “has acquired public recognition as a trade mark in trade”. Accordingly, one prerequisite is use as a trademark, i.e. the mark must be used by a certain company and, on the basis of this use, be understood as a reference to that company. In this regard, it can be inferred from the provision in section 27(2) Trademark Act submitted by the Trademark Owner that in cases of doubt, the right to a trademark acquired by use associated with a business operation is accessory to the transfer of the business operation. The Plaintiff has not identified any legal bases for an independent transfer of a trademark acquired by use which is separate from the business operation. The decisive question is therefore whether the Hetronic business operation remained with the Plaintiff’s legal predecessors. That is not the case.

25. In the cancellation proceedings, the parties already presented extensive documentation on the complex corporate structure, purchases and sales of companies and contractual agreements between the various companies of Hetronic Group. There is agreement that the “NOVA” mark had already attained market recognition in Germany in the 1990s for Hetronic radio remote controls, was never registered as a trademark in Germany and was not mentioned in any of the agreements presented by the two parties. It is also undisputed that in the broadest sense, both of the parties emerged from the company founded by Max Heckl in 1982 in Germany which, starting in 2000, he gradually relocated to the U.S.
26. Clauses 1.1. and 1.1.5 of the “Asset and Purchase Agreement (ASPA)” of September 30, 2008 (AG 6, Exhibit A), which was concluded between Methode

Electronics Inc., as one of the legal predecessors of the Trademark Owner and the buyer, and Hetronic Holding LLC, some of its affiliated companies and Max Heckl as the seller, show that the assets transferred with this Agreement also comprise all of the intellectual property, “including all Intellectual Property incorporated into the radio remote control products developed, manufactured, marketed or sold by the Sellers, the corporate and trade name ‘Hetronic’, [. . .] including those rights described in Schedule 5.19 hereto”. Schedule 5.19 names 15 market registrations for “Hetronic” worldwide, including the abovementioned German trademarks (margin no. 11).

27. The preamble to the Agreement also states that Hetronic Deutschland is “not included among the Sellers and not selling its assets (*sic*) or properties”. Clause 8.2.8. provides that “Hetronic Deutschland shall have executed and delivered to Methode a Distribution and Assembling Partner Agreement and a License Agreement in the forms attached hereto as Exhibit D”. The “Hetronic Distribution and Assembling Partner Agreement” (AG 6, Exhibit A; AG 9) grants Hetronic Deutschland GmbH the right to distribute and assemble Hetronic radio remote controls in Germany (section 1 in conjunction with section 6 of the Agreement). The License Agreement concluded between Methode H-International Inc. as “Hetronic” and Hetronic Deutschland GmbH as licensee (AG 6, Exhibit A) entitles the licensee to use the name “HETRONIC” in its business activities and on its websites for the purposes of marketing and selling the Trademark Owner’s products. The Agreement expressly stipulated that all rights in the

name shall remain with Methode H-International Inc. (“Title to the name “HETRONIC”, and all rights therein, shall be and remain the sole and exclusive property of Hetronic”, section 1 of the Agreement).

28. Following the acquisition of Hetronic Deutschland GmbH by Hetronic Germany GmbH, the Trademark Owner granted the latter a distribution and assembly right for Hetronic radio remote controls that was essentially the same in terms of content, plus a license to use the name “HETRONIC” in Germany (see License Agreement and from the Distribution and Assembling Partner Agreement of October 31, 2010, AG 11). This fits with the statements by the Plaintiff in its application for cancellation, according to which it “was permitted to distribute NOVA products in Germany”. It also fits with the Plaintiff’s comments in its information letter of April 28, 2010 to the employees on the occasion of the business transfer to Hetronic Germany GmbH (AG 23), which states that “Methode H-International Inc. [. . .] holds all rights in Hetronic products and spare parts and is the licensor for Hetronic Germany GmbH [. . .]”.
29. It is clear from all these agreements that Hetronic Deutschland, as one of the legal predecessors to the Plaintiff, had no rights to the company name and the German “Hetronic” trademarks as early as in 2008. Thus, the submissions by the Plaintiff that the main business of the Hetronic group of companies remained in Germany are entirely without basis. The evidence submitted by the Trademark Owner in respect of section 27(2) Trademark Act (AG 16 - AG 20) shows that in cases of doubt a trademark is transferred with the business operation. Since a trademark acquired by use is accessory to business operations and not

independently transferable, neither the Plaintiff nor its legal predecessors were able to acquire rights to the “NOVA” mark. Thus, the question discussed between the parties as to whether, at the time the business was sold, Max Heckl was aware of the difference between registered and nonregistered trademarks, is of no consequence.

Merits of the application for cancellation.

Article 60(1)(c) EUTMR in conjunction with Article 8(4) EUTMR

30. The cancellation ground of Article 60(1)(c) EUTMR in conjunction with Article 8(4) EUTMR requires that the applicant for cancellation has an earlier right that entitles him to prohibit the use of the contested trademark. As set out above (margin no. 29), the Plaintiff established own rights neither to “Hetronic” nor to “NOVA”, so that the application based on that cancellation ground must be rejected as unfounded for lack of an earlier right.

Article (59)(1)(b) EUTMR

31. Pursuant to Article 59(1)(b) EUTMR, a Community trademark must be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings, where the applicant was acting in bad faith when he filed the application for the trademark. The burden of proving the circumstances indicating bad faith upon filing lies with the Applicant (02/26/2015, T-257/11, *Colourblind*, EU:T:2015:115, para. 63; 07/11/2013, T-321/10, *Gruppo Salini*, EU:T:2013:372, para. 18). Good faith is presumed until proven otherwise (12/13/2012, T-136/11, *Pelikan*, EU:T:2012:689, para. 57).

32. In order to assess whether the applicant acted in bad faith, consideration must be given to all relevant factors specific to the particular case and which exist at the time of filing the application for registration of the mark as a Community trademark, in particular (i) whether the applicant knows or must have known that a third party is using, in at least one Member State, an identical or similar mark for an identical or similar product capable of being confused with the sign for which registration is sought; (ii) the applicant's intention to prevent that third party from continuing to use such a mark, and (iii) the degree of legal protection enjoyed by the third party's mark and by the mark for which registration is sought (06/11/2009, C-529/07, *Goldhase*, EU:C:2009:361, para. 52). There is no exhaustive list of relevant factors (02/26/2015, T-257/11, *Colourblind*, EU:T:2015:115, para. 67; 07/11/2013, T-321/10, *Gruppo Salini*, EU:T:2013:372, para. 22). Numerous factors may be taken into consideration, but they can ultimately be summarized to the effect that a trademark application is not appropriate, e.g. speculative or solely to obtain financial compensation (cf. 07/07/2016, T-82/14, *Luceo*, EU:T:2016:396, para. 145) or where there is conduct which departs from accepted principles of ethical behavior or honest commercial and business practices (*Luceo*, para. 28).
33. The Plaintiff bases its allegation of bad faith on supposedly earlier rights in the mark "NOVA". As already pointed out (see margin no. 29), however, it has no rights to a "NOVA" trademark acquired by use. The objection that at the time the contested trademark was filed, the Trademark Owner knew that the Plaintiff had acquired rights to the "NOVA" mark

as a result of many years of use is essentially wrong, because the issue of whether a mark has acquired market recognition within the meaning of section 4, no. 2 Trademark Act is a question of law that is not accessible to knowledge. In essence, the parties are in dispute about the scope of the company split and the interpretation of the various company purchase agreements, as well as other agreements. This dispute concerns contract law issues only and it cannot immediately constitute bad faith for a contract party to interpret a contract in its own favor.

34. As a result the Cancellation Division thus rightly rejected the application for Cancellation.

Costs

35. The Plaintiff (Appellant) is therefore the unsuccessful party in the nullity proceedings and in the appeal proceedings in accordance with Article 109(1) EUTMR and must bear the costs incurred in both instances.

Determination of costs

36. In accordance with Article 109(7) EUTMR, the Board of Appeal already fixed the amount of the costs, if the costs are limited to the fees paid to the Office and the representation costs. These consist of representation costs for the appeal proceedings in the amount of EUR 550 pursuant to Article 18(1)(c)(iii) EUTMR and the representation costs for the nullity proceedings in the amount of EUR 450 pursuant to Rule 94(7)(d)(iv) CTMIR. The Appellant therefore bears the costs incurred by the Respondent in the nullity and appeal proceedings in the amount of EUR 1,000.

Operative part of the decision

For these reasons

THE BOARD OF APPEAL

decides as follows:

1. **The appeal is dismissed.**
2. **The Appellant is ordered to pay the costs of the nullity and the appeal proceedings.**
3. **The amount of the costs to be reimbursed by the Appellant to the Appellee for the nullity and the appeal proceedings is set at EUR 1,000.**

Signed

D. Schennen

Signed

E. Fink

Signed

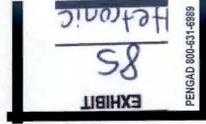
L. Marijnissen

Registrar:

Signed

p.o. P. Nafz

Plaintiff's Trial Exhibit 85 (Excerpt)

**Company structure, constellation**

ABI Holding, Hel-G, HCEE, Hydronic — existing
 Development company Austria, competence center Austria (field office), (sales company Germany — optional)
 In the event of a joint venture: We make the special parts up to 500 units and Methode makes the large OEM larger, 500 units

Name for company and product

Austro Tech, Austro Control, Immo Tech, Inn Control, Inn Tech, Inn Control, Multi Control, AppCon (Application Control), ROC-TEC (Radio Operation Control), CSC (Customer Solution Control), CRC Tech (Custom Remote Control).

EURO Funk, Hard Control, Smart Remote or a combination of ABI with country and purpose, e.g., ABI Österreich Vertrieb und Service GmbH

The name should contain: safety, quality, innovation, flexibility, efficiency, expertise

Tackle planned implementation; an opinion, a statement must exclude a strong shared identity.

-Heltronic is becoming; we will continue to develop and build products in accordance with European requirements.

We have been and still are the leading company/competence center for European safety/security with production facilities in Germany and Austria.

We have the knowledge, the experience, the innovation and the opportunity and will now fully exploit this again as a result of our newly won independence.

-Website - readjust info name, utilize platform.

-Marketing — press will use Heltronic.

-Course of action: Notify top 20 customers from German and Austria in person; notify WV (Germany), LV (Austria) in person; notify OEMs in person; notify rest of customers by mail, e-mail, etc.

Recognize weak points as a result of lost territorial protection early on and work through according to priority plan. What Methode is interested in, which Heltronic partners are borderlands and can easily be included in our territory — secure base (Germany + Austria)

-In the **second step**, attract and secure existing Export customers.

Markets, territorial protection

-Course of action: Notify top 20 customers from German and Austria in person; notify WV (Germany), LV (Austria) in person; notify OEMs in person; notify rest of customers by mail, e-mail, etc.

Utilize core of territory.

Recognize weak points as a result of lost territorial protection early on and work through according to priority plan. What Methode is interested in, which Heltronic partners are borderlands and can easily be included in our territory — **secure base and thus core utilization.**

-Review sales capacities and adjust if necessary. (Take new markets into account)

-In the **second step**, secure existing Export customers or if necessary build up new dealers and bind them contractually

Prepare contracts.

-In the **third step**, attack Methode at their doorstep in the U.S., possibly AMP Control — MH, tackle unstructured markets such as, for now, Italy

visit in person
to secure and bind

Purchasing, stockpiling, parts supply, safeguarding inventory

- Problem suppliers
 - Complete stockpiling (continuous monitoring and updating)
 - Purchasing must be centralized - Austria,
 - Parts supply must be safeguarded for partners.
- Gross price lists must be prepared for OEM, partners, dealers, WV, LV and end customers. LP - %X

Development Austria

Form team, market analyses, documentation, liability, licenses
Close collaboration with Technical Purchasing – JOK
Project plan (roadmap) with priorities

Legal situation

Two paths forward have been prepared. With or without Methode. Note deadlines.
Path 1: a joint venture with Methode possible if freedoms that we need are granted.
We're only interested in name, territorial protection, service, ISO.
We can buy what we need from Methode. Methode can buy from us what we offer.
Path 2: without Methode. See above.
Prepare emergency plan. Define time sequences. Distribute tasks to individual departments. Prepare as soon as possible.

Replacement for international - ABI Competence Center Austria

Development, sales, marketing, trade fairs, administration, QM - ISO, WEB/documentation/information platform. In general, the central staff units. Online documentation

Financial situation

Note liquidity in various situations.
Prepare external possibilities (banks, etc.).
Secure partners in advance – MH



Emergency priorities list

Hydronic and H-CEE executives:

Friedl Mathias
 Koller Daniela
 Mairböck Holger
 Weithaler Jürgen
 Achleitner Armin

TOP Hydronic customers:

Sandvik Mining
 Rubble Master
 Atlas / EBI
 Wimmer Felstechnik
 MFL
 Neuson Ecotec
 EMPL
 ASTAM
 Kässbohrer

Account manager Priority

ACA/WEJ 1
 ACA/WEJ 1
 ACA/WEJ 1
 ACA/WEJ 2
 ACA 2
 ACA 3
 ACA 3
 ACA 3
 ACA 4

Hydronic country representatives:

Dvigalo
 HARUtronic
 C-Safety
 PK d.o.o.
 Palfinger Serbija

Account manager Priority

ACA/FRS 2
 ACA/FRS 3
 ACA/FRS 2
 ACA/WEJ 1
 ACA/WEJ 1

HCEE OEM country representatives

Palfinger Europe
 Palfinger Marine
 Manitowoc
 Hetric Swiss
 Ascotel
 Stimmann

Account manager Priority

ACA/WEJ 1
 ACA/WEJ 1
 ACA/FRS 1
 ACA/FRS 3
 ACA/FRS 1
 ACA/WEJ 1

Problem suppliers**Buyer(s) Priority**

Note loss of OEM Palfinger, OEM Manitowoc, Hetric Swiss
 Remaining: Hydronic, Ascotel, Stimmann, C-Safety, RO, BG, etc.
 Approx. 50% loss in sales – effect on personnel policy
 Note sales capacities
 Consistent statement/appearance regarding new structure
 Marketing possibilities - WEB, e-mail, circulars
 ATEX products and their licenses – location, name, ownership structure
 Licenses in general
 Collect and store Sever - Het-G -HCEE knowledge
 John Hans

Plaintiff's Trial Exhibit 1707

Comparison of Transmitters

| | NOVA-M | NOVA-L | NOVA-XL | GL | GR | Euro | ERGO |
|---|---|---|---|--|---|---|---|
|  |  |  |  |  |  |  |  |
|  |  |  |  |  |  |  |  |

**PLAINTIFF'S
EXHIBIT
1707
CIV-14-650-F**

Tim Glandon
Trial Testimony, Feb. 13, 2020
Direct Examination by Plaintiff

[107] Q. What efforts did Hetronic undertake to verify Mr. Zirngibl's claim that Hetronic Germany was using counterfeit parts?

A. Well, we immediately started trying to find actual Hetronic Germany-assembled products to see if whether his claims were—were valid.

So we looked at products that we had that had been returned for service work. We also bought some parts from [108] third parties.

We inspected those parts and we found that some of the key parts inside the—our products, like the coder board that I talked about earlier, had been replicated and were not our parts and they actually had a different part number on them. Hetronic uses a numeric part number and these parts had a different part—the actual part number itself was the same, but it had a KH prefix in front of the part number.

Q. Mr. Glandon, why did you need to investigate Mr. Zirngibl's claims?

A. Frankly, we didn't know anything about Mr. Zirngibl. We didn't know—we didn't know who he was. We had no reason, prior to this accusation, to think that anything was going on. So we had to investigate it.

Q. Mr. Glandon, you testified that you found some parts with a KH prefix when you began investigating Mr. Zirngibl's claims.

Prior to May of 2014, how many times had you seen a KH prefix on any parts inside a Hetronic-branded system?

A. I hadn't.

Q. Mr. Glandon, prior to May of 2014, what, if anything, had you heard regarding using the KH prefix for parts that were included in Hetronic-branded systems?

A. Nothing.

Q. What concerns did you have after you confirmed Mr. Zirngibl's claims?

[109] A. Well, we had an immediate concern that we had a potential safety issue. I mean, we have—these products are controlling the movement of heavy machinery. We had no idea about the parts that were inside the—inside our products, and if they had been tested appropriately, so we had a serious safety concern and we felt like we had to stop this—stop this immediately.

* * * * *

[111] Q. Would you please look at the last sentence of your letter and read that for us?

A. Sure.

“Therefore, Hetronic Germany-GmbH must immediately stop selling Hetronic's products and components and cease and desist using Hetronic's trademarks and trade names.”

Q. Mr. Glandon, why did you tell Hetronic Germany and HCEE to immediately stop selling Hetronic products?

A. The safety concern that I mentioned a few minutes ago. We wanted to prevent any further products from being in the field [112] that we didn't know anything about the origins of.

Q. What were you referring to when you talk about trademarks in this sentence?

A. The Hetronic name, the name of our products and our trade dress, the way our products look.

Q. Why did you tell Hetronic Germany and HCEE to immediately cease using your trademarks?

A. Because they were only able to under a license.

Q. How could defendant's continued use of Hetronic's name, product names and trade dress affect Hetronic?

A. Well, in what I just mentioned before, it's a big concern to us if products were out there in the field that had components in them that we didn't know the origin of. It would literally put our company name and reputation at risk.

* * * * *

[114] Q. And what could have happened in the marketplace during those 30 days?

A. Further risk of parts being out there that we didn't know the origin of that could possibly have a safety concern.

Q. You've testified that you felt what you learned from Mr. Zirngibl was a safety issue, so what other steps did you take to address your safety concern, in addition to immediately terminating Hetronic Germany and HCEE?

A. One of the things we did was we had them removed from our ISO certification.

Q. What does that mean?

A. So Hetronic is—has a set of processes and procedures that it uses to manage its business with; those processes and procedures are audited by a third party, and that's—those processes are based on an ISO standard.

So Hetronic has that certification and it includes in it certification any of its partners that also assemble products, so Hetronic Germany was included and HCEE were included on that certificate and we wanted to have

them removed from that certificate as quickly as we could because we could no longer vouch for them.

Q. Mr. Glandon, you testified earlier that Hetronic Germany was Hetronic's explosion-proof assembler for all of Europe, so [115] how did Hetronic sell EX systems after termination?

A. It was a major problem. I mean, we could obviously sell in the U.S. because we have certifications in U.S., but in Germany, we essentially didn't have a product we could sell at the moment. Our products were the same products but we didn't own the certification.

[Transcript continues at JA12]

Mathias Friedl

Deposition Testimony Played at Trial, Feb. 14, 2020

Deposition Taken by Plaintiff

[309] Q. Okay. Mr. Friedl, were you aware of any problems with KH RF parts?

A. Internal or external problems?

Q. Any problems with KH RF parts?

A. I think in the beginning there were problems with quality in respect to how the HF parts were soldered on to our base boards, but Quality Assurance noticed.

Q. Mr. Friedl, were there issues with any KH parts that were put into Hetronic-branded systems?

A. Yes. There were problems with one [310] board.

Q. Only one board? Only one KH board that was inserted into Hetronic systems had a problem?

A. That's all I can think of at the moment.

Q. What board was that?

A. RXS-2B.

* * * * *

[317] Mr. Friedl, you testified a little bit earlier about a problem with the RXS-2B board. Do you remember that?

A. Yes.

Q. How many systems that were delivered to customers under the Hetronic brand contain these defective boards?

A. I can't give you an exact figure.

Q. More than 50?

A. I think so, yes.

Q. More than 100?

A. I don't think so.

Q. So somewhere between 50 and 100 systems that were sent to customers under the Hetronic brand [318] contained these defective boards. Correct?

MR STEINER: Object to the form of the question. Speculation. You may answer.

A. That's what I estimate, yes.

Q. MS BERMAN: What types of systems were the defective RXS-2B boards put into?

A. CAN-Bus receivers.

* * * * *

[319] Q. Did you recall any systems that contained this defective board?

A. As far as I know, yes.

Q. Did you tell the customers whose boards you recalled that those were not genuine Hetronic parts?

MR STEINER: Object to the form of the question. You may answer.

A. I don't think so.

MS BERMAN: Did you tell the customers who had defective parts recalled that these were KH parts, not sourced from Hetronic?

A. No, I don't think so.

* * * * *

[327] I'm handing you what's been marked as Hetronic exhibit 427.

(Exhibit 427 marked for identification)

Q. Does this refresh your recollection that there was an issue with joysticks purchased from—KH joysticks purchased from Metallux?

A. Yes, it does.

Q. And were any of these joysticks included in any Hetronic-branded systems?

A. I think so, yes.

Q. How many?

A. I don't know.

Q. Did you tell the customers that those joysticks were not purchased from Hetronic but were instead purchased from a third party supplier?

A. No, I don't think so.

* * * * *

[328] Q. You told me that these joysticks were included, sold in Hetronic-branded systems. So that means that there were some out in the field. That was your prior testimony.

A. I'm not sure if each joystick with that article number has that problem.

Q. Did you inform customers your joystick with this article number might be defective?

A. No.

Q. Do you recall any issues with KH batteries?

A. Yes.

[329] Q. What was the problem?

A. That the contact pins were pressed in.

Q. Do you recall an issue with KH batteries where the connector pins were breaking through the plastic after 12 to 18 months of use?

A. Yes.

* * *

Q. And were these defective batteries included in any Hetronic-branded system?

MR STEINER: Objection. Foundation. Answer if you know.

A. Yes.

Q. MS BERMAN: Did you inform the customers that these defective batteries were not supplied by Hetronic?

A. No.

Q. Did you inform the customers that these were KH batteries that you'd sourced from a third party supplier?

A. No.

Q. How many batteries—how many systems contained these defective batteries?

A. I can't say any longer.

[330] Q. Any order of magnitude? Less than 100? More than 100?

A. More than 100.

Q. More than 1000?

A. Maybe.

Q. More than 5000?

A. Maybe.

* * * * *

Reimer Bulling
Trial Testimony, Feb. 19, 2020
Direct Examination by Plaintiff

[259] Mr. Bulling, now let's talk about key words and meta tags using Hetronic for search engine optimization, okay?

A. Okay.

Q. And search engine optimization is the optimization from a home page to get better rankings in certain searches, right?

A. Yes.

Q. So if you wanted to advertise NOVA, you create a site and use the word "NOVA" very often?

A. Right.

Q. And it was important for Abitron to maintain search rankings for its new websites when it was launched, right?

A. Of course.

Q. And to maintain those search rankings, you consulted with your technical consultant, Mr. Koch?

A. Probably, yes.

Q. And he optimized the metadata for you, correct?

A. I think so, he and Ms. Hafner.

Q. And he told your company to concentrate on certain—on a certain word on a certain page to do that?

A. Yeah.

Q. And one of the steps you took to make sure you maintained search engine optimization was using the Hetronic name on the Abitron website?

A. Yes.

[260] Q. Okay. I'd now like you to turn to Exhibit 261, please. And this is an e-mail chain between you and Ms. Hammerer that you testified about at your deposition, correct?

A. Yes.

MS. BERMAN: Your Honor, I move Hetronic Exhibit 261 into evidence.

MR. RUPERT: No objection.

THE COURT: It will be received.

MS. BERMAN: Your Honor, request that it be published to the jury.

THE COURT: You may.

MS. BERMAN: Thank you.

Q. (BY MS. BERMAN) The first e-mail is an e-mail from you to Ms. Hammerer, managing director of Abitron, on October 5, 2015, correct?

A. Yes.

Q. And you are telling her that you still use the Hetronic—the key word “Hetronic” several times on your home page?

A. Yes.

Q. And Hetronic's use of the key word “Hetronic” was intended to increase your search engine optimization?

A. Of course.

Q. Abitron used the “Hetronic” word in the History of the Company section?

A. Yes.

[261] And you also used the “Hetronic” word in meta tags?

A. Yes.

Q. And meta tags are in the code of the web page, they're not usually visible to the customer, right?

A. Correct.

Q. Instead, the meta tags are used by search engines and rankings to determine if the website should appear in search results for that word, right?

A. Pardon me, I didn't get that one.

Q. Sure.

Meta tags are used by the search engines and rankings to determine if a website should appear in the search results for that particular word.

A. The position of the website, yes.

Q. And you used the word "Hetric" many times as a meta tag on the home page, correct?

A. I guess so, yes.

Q. And the purpose of you using Hetric as a meta tag many times on the Abitron website was so that the Abitron website would appear higher in search rankings if someone typed "Hetric" into Google?

A. That's the result, yes.

Q. In a response to your e-mail that we were just looking at, Ms. Hammerer ordered you to remove all references to Hetric because there might be a legal problem with you continuing to [262] use Hetric meta tags on your website, correct?

A. Correct.

Q. And in response to Ms. Hammerer's order, you raised a concern because Abitron would no longer appear in searches for Hetric, right?

A. Yes, I was worried about our company history and that we wouldn't be found anymore searching for Hetronic. I didn't know that at that time.

Q. And you raised a concern with Ms. Hammerer that Abitron would no longer appear in searches for Hetronic, right?

A. Right.

Q. And you had a concern that removing the word "Hetronic" would affect Abitron's website rankings?

A. Yes.

Q. And you personally thought it would be helpful to have the traffic searching for Hetronic to go to the Abitron website?

A. Yes, I did.

Q. And at least in October of 2015, Abitron's website appeared higher in Google search rankings than the Hetronic website if someone searched the term "Hetronic"?

A. I don't know if it was world-wide, but it was definitely in case if someone would search in Bavaria, for example.

Q. And that was due to Hetronic's use of the word—of—I'm sorry.

And that was due to Abitron's use of the word "Hetronic"?

[263] A. Probably, yes.

Q. Okay. So let's just confirm all the ways that Abitron used the Hetronic name after termination.

If you recall, in your Abitron Germany deposition, you testified that Abitron used domain names incorporating "Hetronic" to redirect traffic to the Abitron website?

A. Yes.

Q. And isn't it a fact that in your deposition, as Abitron Germany's representative, you testified that Abitron used e-mail addresses incorporating "Hetronic" in order to receive e-mails at Abitron?

A. Yes.

Q. And isn't it a fact that you testified at your deposition, as the Abitron Germany representative, that Abitron used the term "Hetronic" as a meta tag to the point where Abitron came up higher ranked than Hetronic in response to Google searches for Hetronic in your territory?

A. Probably, yes.

Q. And when you were doing all of this, the distribution license agreements had been terminated?

A. Yes.

Q. And at your—isn't it a fact, at your deposition, as Hetronic Germany's representative, you testified that Hetronic did not give Abitron permission to use the name "Hetronic" as a meta tag on your website in order to increase your search [264] rankings?

A. That's correct.

Q. And isn't it a fact, at your deposition, as Abitron Germany's representative, you testified that Hetronic did not give Abitron permission to use its trademarks to redirect traffic to Abitron's website?

A. Correct.

Q. And Abitron continued to do all of these things for some time, even after Hetronic had sued Hetronic Germany and HCEE, correct?

A. Yes.

Q. And at your—and isn't it a fact, at your deposition, as Hetronic Germany's representative, you testified that none of these things happened by accident?

A. That's correct.

Q. And isn't it a fact, at your deposition, as Abitron Germany's representative, you testified that they were all intentional to benefit Abitron?

A. Of course.

Q. And it was beneficial for your company to be able to continue to receive e-mails sent to your employees' old Hetronic e-mail addresses?

A. Of course, the customer wanted to reach our employees.

* * * * *

Jurgen Weithaler
Deposition Testimony Played at Trial, Feb. 19, 2020
Deposition Taken by Plaintiff

[514] Q. Before the decision was made to stop selling directly to the United States, is it correct that Abitron did make some sales directly itself to the U.S. market?

A. Yes, I think I saw a couple of examples or instances. I think found three invoices or so.

* * * * *

[539] Q. I see. So the trip occurred in September 2015, based on your review of that e-mail?

A. That's what it says here.

* * * * *

[540] Q. (BY MR. SERVODIDO) 229. Mr. Weithaler, I put in front of you Exhibit 229.

(Exhibit 229 marked for identification.)

A. Yes.

Q. Does this indicate an invoice for repair work performed by Abitron on a system that was located in Beaumont, Texas?

A. I don't see where you see Texas, but I see here on-site in the USA.

Q. Yeah, I couldn't find it either until she just pointed it out to me. It's on the second page, at the bottom it says, "Place of Service."

A. Okay.

[541] Q. So, now, is this another example of Abitron employees traveling to U.S. in order to perform repair work on products that had been sold by Abitron and ended up in the United States?

A. Yes.

Q. Okay. And is there also—have there also been examples where Abitron is performing repair work on products from Germany, which it then ships back into the United States after the repair work is complete?

A. I would think so, for example, the Trager system.

* * * * *

[542] Q. Okay. And Abitron's website is available in the English language version, correct?

A. Yes.

Q. Why is that?

A. In order to be able to inform foreign customers.

Q. Okay. Does Abitron's website identify the [543] location of its partners internationally?

A. Yes, there's a section in regards to that.

Q. And during the time when All Access was your USA partner, is it correct that we were identified on your website as your partner in the U.S.?

A. Yes.

* * * * *

[543] Q. (BY MR. SERVODIDIO) I put in front of you Exhibit 250 [sic], Mr. Weithaler, can you identify what is that?

(Exhibit 230 marked for identification.)

A. Yes, that's the site that we talked about.

Q. And you are identifying here Ms. Zurth as the contact person for inquiries about Abitron products or service from the United States, correct?

A. Yes.

[544] Q. Has Ms. Zurth received inquiries from individuals or entities located in the U.S., based on this website, listing of her name on your website?

A. I believe so, yes.

* * * * *

[544] Q. All right. At the time that All Access was listed on your website, however, you were intending that to—you were intending to sell and service products in the United States, correct?

A. Yes.

Q. And you would agree that the publication on your website of partner information for a U.S. entity is a significant U.S. activity?

A. Yes.

* * * * *

[549] Q. Is it correct that Abitron has filed—owns a U.S. trademark registration for the brand Abitron?

A. Let me think about that.

That's possible.

Q. And why does Abitron hold a U.S. trademark registration for the word Abitron?

A. At the beginning of Abitron we wanted to conduct business in the United States, and if it is doable again, we also want to do business again in the United States. If I say I don't want to do any business right now in the United States, then this [550] is in regards to the litigation. I just don't want to involve anybody at this point and that is the reason why I say, at this moment, I don't want to conduct any business in the United States. I don't want to incur any more problems.

Q. Understood. You want to leave yourself the ability to conduct business here in the future again, if you choose to?

A. Yes.

Q. Does Abitron contract with suppliers to obtain parts for its systems? Does Abitron enter into contracts with suppliers to purchase parts for its systems?

MR. STEINER: Foundation. You may answer.

THE WITNESS: Yes.

* * * * *

Markus Krottenthaler
Deposition Testimony Played at Trial, Feb. 20, 2020
Deposition Taken by Plaintiff

[172] Q. So how often has Abitron needed to return a KH part to a supplier due to technical issues?

A. I think that, within the last three years, or since Abitron, I think it was approximately 500 parts.

[173] Q. 500 parts that had—KH parts that had been returned to a supplier because of some defect?

A. Approximately, yes.

Q. And those KH parts, were those KH parts that were returned to suppliers for defects, were those also used in systems that were made by Hetronic Germany?

A. Yes, but at this point in time, it was roundabout 40 parts.

* * * * *

[175] Q. (BY MR. SERVODIDIO) After you've had a chance to look at 193, skim it, let me know when you're done.

* * *

Q. And is this fair to say this is—this e-mail chain is describing an issue with—you were having with one of the batteries that you used, which was assigned a particular KH part number described in this e-mail?

A. Yes.

Q. Okay. Was this the issue with the battery [176] that you were referencing a few minutes ago?

A. Yes.

Q. And what was the issue with the battery?

A. When there was too strong of a force applied on the contacts, it could happen that those were pressed in.

* * * * *

[177] Q. So—okay. So the customer was the one who was providing you with the batteries and telling you that there was an issue with them?

A. And to come back to your earlier question about C-Safety, it was a customer.

* * *

Q. Do you recall receiving other complaints or concerns raised by customers with respect to this particular battery?

A. For this battery?

Q. Yeah.

A. It could be, but I no longer recall.

Q. Okay. And was this battery a part that was used by H Germany prior to the time it was terminated by Hetricnic?

A. Yes, I think so, yes.

* * * * *

[178] Q. (BY MR. SERVODIDIO) So I've put in front of you Exhibit 194, this is—this was produced to us as a separate document, which is why I've marked it separately. But if you look at the last e-mail, it's the same e-mail that we just talked about, Mr. Achleitner sending the photos to Mr. Friedl, do you see that? Yeah. And in the document that we marked as 194, those are photographs of the battery that we've been testifying about, correct?

* * *

A. Yes.

Q. And you can see from looking at the first photograph, that this battery also had on the face of it the Hetronic logo, correct?

A. Yes.

* * * * *

[680] Do you know what the issue is with the part KH669833461 referred to in this e-mail?

A. It says it in the description in the back what the error was, or the defect was.

Q. And what is it?

A. During the manufacturing of that part by the supplier, most likely the protective coating, apparently, somehow ran into the dip switch as well.

Q. And were six of these parts returned because of customer complaints?

A. It says something here about one customer complaint.

Q. And six pieces were returned?

A. Yes.

* * * * *

[681] Q. So Hydronic—I'm sorry. Hetronic Germany learned about the issue with KH6698343461 because of a customer complaint, correct?

[682] A. Yes, that one part that this problem occurred.

* * * * *

[682] Q. And are you aware if Hetronic Germany informed the customer that the defective part had not

been obtained from Hetronic, but instead Hetronic Germany had sourced it directly from a supplier?

A. No, I don't think so.

Q. Were you aware of a situation with malfunctioning KH decoder boards incorporated into units for Herrenknecht?

* * *

[683] A. Not specifically, but maybe you can jog my memory.

* * * * *

[684] So let's hand you what's been marked as 111 so we can move on.

* * *

Q. (BY MS. BERMAN) Mr. Krottenthaler, this is an e-mail chain from 2013 that starts with an e-mail from Mr. Offenbeck to you and Mr. Korfmann with a copy to Mr. Weithaler.

A. (In English) Yeah.

Q. In that e-mail Mr. Offenbeck tell you that the ADMO chips have been erased for both decoders and he puts in parens, silver contact on a Herrenknecht unit, correct?

A. Yes.

* * * * *

[686] Q. By question is, did you tell Herrenknecht that the part that failed had been sourced directly by Hetronic Germany from a supplier and was not a Hetronic supplied part, yes or no?

A. No, not specifically in this case.

* * * * *

[1082] I'm going to hand you what's been marked as Hetric Exhibit 140 and this is a document that was produced last Friday by your counsel, identified as documents concerning customer complaints. (Exhibit 140 marked for identification.)

A. Yeah.

* * *

Q. Would you explain to us how this list was created?

A. This list was created—one moment. Are we talking about the customer complaints?

Q. Yes.

A. So researching in our system for the customer complaints with the KH numbers and this is the numbers we found for termination.

* * * * *

[1088] Q. If you look at pages 2 and 3, where you see the item code in the subject.

A. Yes.

Q. So the first one, two—seven are for the same part number, right?

A. Yeah.

Q. And what was the issue with that part?

A. The problem was a relay contact, it was not switching correctly every time.

Q. What kind of part is this?

A. ES2P module. What was the question?

Q. What is this part?

A. It's a module with a relay for the output for the E-stop.

Q. So it's a relay?

A. Yes, a relay. Sorry.

Q. That's okay.

And then if you look at the next two are the same parts, but it looks like there are maybe [1089] two different issues with that part, is that correct, the KH5603270103C?

A. It's different issues.

Q. So what are—what were the two issues?

A. One issue is the analog channel is not working and the other issue is the current for the module is too high.

Q. Okay. And then for part KH66706112, there's two of them, and then if you skip the 117s, there's four more—five more. Do you see those?

A. Yes.

Q. What were the issues with KH66706112?

A. The first one, the functionality was okay, no fault.

Q. Okay.

A. The next one the analog channel is not working.

Q. Okay. Then the next five all have the same issue, what's that?

A. The next five? It's also analog channel doesn't work.

Q. Okay. Then if you skip down a few more, there's another entry for 66706112. Do you see that?

[1090] A. One moment.

Q. It's one, two, three, four, five down from where we were just looking.

A. The description is only not function.

Q. Then if you look four from the bottom, there's another entry for this—oh, no, different part, never mind.

A. Yes.

Q. Okay.

A. The coder was not—is not positive to switch on.

Q. The last two entries at the bottom for KH68300990, what was the problem there?

A. The battery was defect.

Q. And how about if you look up at KH67175548, it's about seven from the bottom, I think.

A. 5548?

Q. Yes, please.

A. Okay. The joystick was not switching correctly.

Q. And for any of these parts, did you file a material complaint with the supplier?

A. Yes, I think so.

* * * * *

[1091] Q. Did Hetronic Germany inform any of the customers who returned these parts for repair that these were not Hetronic sourced parts?

A. No.

* * * * *

Dieter Roters

**Deposition Testimony Played at Trial, Feb. 24, 2020
Deposition Taken by Plaintiff**

[8] Q. Who do you currently work for, Mr. Roters?

A. I have my own company called Equipment Service. This company is addressed at the same address where I live right now.

Q. When did you establish your own business called Equipment Service?

A. I established this originally beginning this year, when I came back from the US.

Q. Generally speaking, what do you do through your company, Equipment Service?

A. Equipment Service, I am dealer with a partner in German North for CMC crawler lifts, [9] manufacturer of crawler lifts from Italy. We are the general dealer for Germany with this.

* * * * *

[9] Q. With your business, Equipment Services, are you doing any work with Abitron?

A. Yes.

Q. What is the relationship of Equipment Services with Abitron?

A. I am doing the service for north part of Germany, and maybe a little bit of sale of parts, mostly service for north of Germany.

* * * * *

[11] Q. You became a consultant for All Access Equipment at some time in summer of 2014, is that correct?

A. It was summer 2015, I guess.

Q. We will look at the contract.

I believe it was July 2014.

A. The contract, okay, the contract was for All Access Equipment, yes.

Q. In July 2014?

A. Exactly.

Q. Prior to joining All Access Equipment as a consultant, in July of 2014, who did you work for immediately prior that?

A. I worked for Teupen Machine and Ball in Germany.

Q. And Teupen is T-E-U-P-E-N?

A. Exactly.

Q. How long do you work for Teupen?

A. Around about 23 years.

* * * * *

[93] Q. In terms of servicing of Abitron products in the US, do you have an understanding as to who would service them now?

A. No idea. Only what is related or in the machines, the Teupen machines, that All Access Equipment is still servicing the Teupen machines, including the remote system on the machines.

[94] Q. So your understanding is that All Access is still servicing Teupen machines, and if they have Abitron systems, Teupen will service those in the US?

A. Exactly, and they have to order the parts in Charlotte.

Q. Does Teupen order the parts?

A. No. All Access Equipment has to order the part from Teupen in Charlotte.

* * * * *

[94] Q. Do you have an understanding as to whether you will or you are expected to service Abitron products that are in the United States?

A. Sure, that was one target of the business, to service Abitron remote systems in the US, sure, because, for example, some manufacturer in Germany, machine manufacturer includes a remote system, and if they need some support, help or whatever, that should be our business here in the US.

* * * * *

[95] Q. Did any of the customers that you [96] dealt with when you were working with All Access ever express any confusion at all between Hetronic Germany and Abitron?

A. I told them it is two different companies, a similar product but they are two different companies, so I tried to keep it simple.

Q. Did people ask you about what the difference was?

A. If they ask they say: “Oh, why is two small—same products, why is Abitron, and what is Hetronic?” I explained them they are two different companies right now, one is from Germany.

Q. Which customer asked you that?

A. For example, Mike Ball. I remember because I know Mike Ball since 2004 or 2005.

Q. And so how did it come up in your conversation with Mike Ball?

A. Because we had an Abitron, a Nova Abitron, and he said “Oh, what is that? Why is Abitron and before

Hetronic?" So because he has a machine from 2005 or something.

* * *

Q. When did you have that conversation [97] with Mike Ball?

A. It could be July 2015, June, July, 2015, August.

* * * * *

[106] Q. Okay. In your discussions with customers who were seeking either replacement or servicing, would you discuss where they obtained their original system?

A. No. I asked them what kind of equipment is controlled by the remote, and where this equipment is from, is it from Germany or UK or where is it from, whatever. That was still my questions, sure. Because I know that some manufacturer has a regulation with the customer that they can only buy parts on the manufacturer, not directly.

* * * * *

[120] (Exhibit 36 marked for identification)

In this email I have handed to you, plaintiff's Exhibit 36, there is an exchange at the top, at least on the first page, and it is an exchange between you and Ms. Zurth. Do you see that on December 8, 2015?

A. Yes.

Q. Ms. Zurth says that they have a construction site in Miami, and she asks you to contact them and schedule a meeting. Do you see that?

A. Um hum.

Q. Attached to the email from Ms. Zurth to you is a pdf, and that includes the first page of the attachment, which has a Bates label of HG37173.

* * *

[121] Q. If you see that, that has a logo that says “Hetric Germany”. Do you see that?

A. Yes.

Q. And the customer there is Herrenknecht, correct?

A. Correct, yes.

Q. These are—what do you understand this attachment to be a representation of?

A. This attachment is a system what is in this tunnel, the tunneling machine, what it is controlled with.

Q. Ms. Zurth sent that to you, correct?

A. Exactly, yes.

Q. In the top email from Ms. Zurth, she writes to you: “Please see the emails concerning this below.” Do you see that?

A. Yes.

Q. And there is several emails in the chain. I want to direct your attention to the email that is on about the third or fourth page, on the fourth page, an email dated October 15, 2013. It is from a person named Andrej, . . . last name Weber. Do you see that?

A. Yes.

* * *

[122] Q. In that email, Mr. Weber writes to Ms. Braun: “Please order the following parts from Hetric and/or Abitron.” Do you see that?

A. Yes.

* * * * *

[122] Q. In your discussions with Mr. Offenbeck did you have any discussion as to the difference between Hetronic Germany and Abitron?

A. No.

* * * * *

[126] (Exhibit 38 marked for identification)

I am handing you a document we are marking as plaintiff's Exhibit 38. It is an email.

A. Thank you.

Q. In this document Mr. Roters, at the [127] bottom of the email, there is an email from Chris Kremer, from November 16, 2015, using a Midcountry.com email address. He writes: "I need help in wiring a new controller to a crusher." He writes: "The 'old' system has the following info: Type RX14." Then he lists a product number and system number as well. Do you see that?

A. Yes.

* * * * *

[127] Q. Okay. The attachment that you are flipping through, that actually has "Hetronic" in the bottom right-hand corner in the box. It says "Hetronic CEE", correct?

A. Yes, "Hetronic CEE".

[128] Q. And it has got the Hetronic logo?

A. Um hum.

Q. In the top email in this chain, Zurth writes to you: "Attached please find enquiry from the USA. Please handle it." Do you recall if you ever spoke to the customer?

A. I guess, yes, I spoke with the customer.

* * * * *

[138] Mr. Roters, plaintiff's Exhibit 39 is another printout from the allaccessequipment.com website. This one is dated or was printed out on October 1, 2015. It states: "We off a wide variety of parts for the following manufacturers."

The fourth bullet point down reads "Abitron" and then in parentheses it says "Hetronic". Do you see that?

A. Yes.

Q. Did you participate in providing this content for the website?

A. I was one part of that, yes.

Q. And what was the purpose in putting "Hetronic" in parentheses after the word "Abitron"?

A. It is like before, the answer before, because we want to give the Teupen customer the possibility that they will find parts that belong to [139] a Teupen machine.

Q. So you wanted to make sure someone looking for a part for a Hetronic system would understand that the Abitron parts would work for that system?

A. Yes.

* * * * *

Josef Scheuerer
Trial Testimony, Feb. 25, 2020
Direct Examination by Plaintiff

[534] Q. (BY MS. BERMAN) How often are you in contact with RSP?

A. I was—I was having two meetings with them past couple of years.

Q. And have you been in contact with RSP since Abitron launched in September of 2014?

A. Yes.

Q. And when was the first time that you met with them Abitron launched?

A. May 2015.

Q. And was this a phone call or face-to-face meeting?

A. It was a face-to-face meeting.

Q. Who was present at this meeting, Mr. Scheuerer?

A. There was those responsible—the responsible person for the radio remote controls, gentleman called Mr. Erfruth. Then one more gentleman of the service department, but I forgot the name of this guy. And my colleague back then, Mr. Steffan Hoyer.

* * *

[535] And what happened at this meeting with RSP in 2015?

A. We explained them that we are Hetronic and what they use at the moment, it's not Hetronic, it's Abitron. And that was a little confusing to them because they said, when we asked for a meeting, up till that point—and my colleague, Steffan, he's from that region and he speaks the local language and dialect, so I asked him to arrange the meeting, they thought that we don't exist anymore

because Abitron followed in Hetronic's footsteps and now Abitron is the radio remote control.

So when we talked to them and the spare parts guy said, yeah, but it's nice that we talked to them, but the parts you get to Abitron, they're the same and have the same function that's the Hetronic parts, so for him, he sees no reason to change.

Q. Mr. Scheuerer, did you have any follow-up with RSP after this meeting you just told us about?

A. Yes. That was in 2017. We approached them again in 2017. I was there with my other colleague, Stefan Mickowski.

Q. And what happened at that second meeting in 2017 with RSP?

A. We also talked to the lady of the purchasing, Mrs. Condor (ph.) and we explained them again the situation, that we are Hetronic, we do correct Hetronic parts.

And, again, they said, yes, we already have the radio remote control from Abitron, if we would introduce your radio control, it would look the same, there would be no difference, [536] so they see no reason to change.

[Transcript continues at JA37]

Reimer Bulling
Trial Testimony, Feb. 27, 2020
Direct Examination by Defendants

[814] Q. (BY MR. STEINER) Now, once the new Abitron website is up, I heard you refer to it earlier, there is still at least a Hetronic reference even in the Abitron website; is that right?

A. Yes, there is.

[815] Q. Why is that?

A. We wanted to keep the history of our company in the site, at least, to show the experience to the customer, where we origin, and so we kept the history information in the website.

Q. Just very briefly, what was the history of your company?

A. Our company purchased assets of Hetronic Steuersysteme, that time renamed to Hetronic Deutschland.

Q. Let me slow you down a little bit, because we got a lot of names and a lot of dates.

A. Yeah.

Q. About what period of time was Hetronic Steuersysteme operating?

A. Hetronic Steuersysteme was operating from the 1980s or nineties up until 2007.

And Hetronic Deutschland was operating from 2008, I think, in September. I don't know the exact date from one. Until the 30th of April of 2010, yeah.

Q. Now, have you told us why you kept the name Hetronic in the Abitron website?

A. Yes, I have.

Q. Because of your company's history?

A. Yes.

Q. Is it fair to tell the customers that you had about your company's history?

A. Yes, it is.

[816] All right. Let's talk about just an example.

Do sometimes companies change their names?

A. Yes, they do.

Q. Is it okay if they tell their company's history?

A. Yes, it is.

Q. How about—let's take the example of a salesman, let's take a person that sold Chevy trucks for 30 years and he goes to a Ford dealership, is it okay if he keeps on his resume the experience he had selling Chevy trucks, even though now he's at Ford?

A. Yes.

Q. Why?

A. It's also his experience. I mean, that's what he did and it's probably even relevant for his next job.

Q. Okay. How long had the German company been in operation?

A. The German company has been in operation since the 1980s, so about 30 years.

Q. And so if you're using the word "Hetric" in your company's history section, is it fair to tell your customers the history of its experience on the website?

A. It is.

Q. But also, more importantly, if you're using "Hetric Steuersysteme" in your company's history section, are you telling your customers the truth about your history?

A. Yes, we do.

* * * * *

[826] Q. All right. I remember counsel asking you some questions about redirecting the website; do you remember those?

A. Yeah.

Q. Tell us why you did that.

A. To keep the website like it was so the customers that wanted to reach out to us, our old Hetronic.de website, we wanted to have them on our Abitron.de website—

Q. What is the—I'm sorry to interrupt.

What is a Hetronic.de website?

A. This is the website of Hetronic Germany that we had before.

Q. What is an Abitron.de website?

A. This was—the other website was called abitronremote.com and it was the Internet address where you could find the website.

Q. Okay. So if I've got it straight, the point that you're making—and were you involved in this, by the way?

A. Yes, of course.

Q. Okay. Is trying to get your German customers to get to the new Abitron website?

[827] A. Yes.

* * * * *

[834] (THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH AND OUT OF THE HEARING OF THE JURY.)

MR. STEINER: Your Honor, I believe I'm done with this witness other than an offer of proof.

MS. BERMAN: I can't hear you, Geren.

MR. STEINER: I'm done with the witness other than an [835] offer of proof.

THE COURT: And the offer of proof goes to what?

MR. STEINER: It's going to go to two things: Extraterritory application of the Lanham Act and also ownership of the trademarks, so the ownership issue and the extraterritorial—

MS. BERMAN: He's the IT guy—I know you're going to let him testify the green cheese of the moon, but—

THE COURT: We'll do the offer of proof—those are matters as to which I have definitively ruled.

MR. STEINER: Yes, sir.

THE COURT: And for that reason, I'm very content to do the offer of proof after the jury is in deliberations. I think that's far and away the preferable way to do it.

* * * * *

Redirect Examination by Defendants

[846] Q: Mr. Bulling, you were just asked some questions about [847] redirecting from the website—the old website, Hetronic Germany, to the new one, Abitron Germany?

A. Yes.

Q. Do you remember that?

What is the extension on the website dot-de, what does that mean?

A. That's the German top—it's called top-level domain, which essentially show you in which company the domain is registered.

Q. Does that mean it's a German domain?

A. Yes, it is.

Q. Same thing for dot-at, what is that?

A. That's an Austrian domain.

Q. Okay. Is the redirection that you did, was it designed to reach your German and Austrian customers?

A. With them, yes.

Q. Same questions on the e-mails.

You were talked about—you were asked about continuing to use e-mails with the e-mail extension dot-de and dot-at; do you remember?

A. Yes.

Q. All right. Same answer: That you were trying to get your German and Austrian customers connected to you?

A. Of course, the customers that knew our e-mail addresses and, of course, also the suppliers knew the e-mail addresses of [848] the people.

* * * * *

**Transcript of Trial Proceedings, Excerpt,
Feb. 28, 2020**

[931] MR. RUPERT: The same objection on No. 27 with regard to ownership of trade dress.

THE COURT: That is understood and overruled.

You do have an objection to No. 40, I presume?

MR. RUPERT: I have—before I get there, I have an objection to 37. That’s on the willful element. And because of the Court’s order, I believe it was on February 10th, that we were not allowed to prove our belief in ownership, that prevented us from defending on the willful, and we believe that the defense of ownership that we’ve had in the case until just a week before the trial carried within it the lesser-included innocence of belief in ownership, and the Court specifically instructed us we could not defend this on basis of belief in ownership.

THE COURT: So is—within the four corners of Instruction No. 37, is there a misstatement of the law?

MR. RUPERT: No, sir. But we object to it because we were prevented from putting on a defense of willfulness.

THE COURT: That’s noted and overruled.

MR. RUPERT: Yes, sir.

Instruction No. 38, we object because of the exclusion of Mr. Demuth. He was excluded, we believe, in essence, because he didn’t “audit,” to use that term, the defendants’ books. [932] These damages are shown on financial statements and used across the country. Our expert went deeper, to the general ledger level, and we believe he should have been permitted to testify to the cost of goods sold.

THE COURT: That’s noted and overruled for the reasons I stated yesterday.

What's next?

MR. RUPERT: Yes, sir.

I think I may be done, sir, with the instructions. Let me flip through.

That's all I have, Your Honor.

And, really, formally, for the record, we want to ask the Court to reconsider the rulings on February 6th and February 10th.

THE COURT: That will be noted and overruled.

MR. RUPERT: I'm going to switch now to the verdict form. And there's one common objection, we discussed it yesterday.

THE COURT: I tell you what, can we have an understanding that you can make your record on the verdict form after the jury retires?

MR. RUPERT: Yes, sir.

* * * * *

Jury Instructions, Excerpt, Feb. 28, 2020

INSTRUCTION NO. 32

INFRINGEMENT—ESSENTIAL ELEMENTS—
LIKELIHOOD OF CONFUSION—FACTORS

As I have explained to you, one of the essential elements that plaintiff must prove for its trademark infringement claims is that a defendant used the HETRONIC® mark, the Product Marks, and the Trade Dress in a manner that is likely to cause confusion as to the source, sponsorship or approval of defendant's product.

Plaintiff must prove a likelihood of confusion among an appreciable number of people who buy or use, or consider buying or using, the product or similar products.

In deciding this, you should consider the following:

(1) Whether the overall impression created by defendant's product marks or trade dress is similar to that created by plaintiff's Product Marks and Trade Dress in appearance and meaning;

(2) Whether defendant used the HETRONIC® mark, the Product Marks, or the Trade Dress on the same or related types of products that plaintiff does;

(3) Whether the plaintiff's and defendant's products are likely to be sold in the same or similar channels of trade, or advertised in similar media;

(4) The degree of care that purchasers or potential purchasers are likely to exercise in buying or considering whether to buy the product. This may depend on the level of sophistication of potential buyers of the product or the cost of the product;

(5) The degree to which purchasers or potential purchasers recognize the plaintiff's HETRONIC®

Mark, the Product Marks, or Trade Dress, as an indication of the origin of plaintiff's product. You may consider my previous instructions concerning distinctiveness to help you assess this factor;

(6) Whether defendant's use of the HETRONIC® mark, Product Marks, and Trade Dress has led to instances of actual confusion among purchasers or potential purchasers about the source, sponsorship, approval or affiliation of defendant's product; and

(7) Whether defendant intended to pass off their product as that of plaintiff or intended to confuse customers.

The weight to be given to each of these factors is up to you to determine. No particular factor or number of factors is required to prove likelihood of confusion.

* * * * *

INSTRUCTION NO. 38
TRADEMARK INFRINGEMENT—
DEFENDANT'S PROFITS

If you decide that plaintiff has shown either actual damages or willful action on the part of a defendant, then you may award plaintiff the profits defendant gained from the infringement.

Profit is determined by deducting expenses from gross revenue. Gross revenue is all of the money defendant received due to the use of the HETRONIC® mark, Product Marks, and Trade Dress.

Plaintiff is required only to prove a defendant's gross revenue.

Plaintiff is entitled to recover a defendant's total profits from the use of the HETRONIC® mark, Product Marks,

or the Trade Dress, unless that defendant proves that a portion of the profit is due to factors other than use of those trademarks and trade dress.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|-------------------------------|---|-----------------------|
| HETRONIC INTERNATIONAL, INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. CIV-14-650-F |
| |) | |
| HETRONIC GERMANY GmbH, |) | |
| HYDRONIC-STEUERSYSTEME GmbH, |) | |
| ABI HOLDING GmbH, |) | |
| ABITRON GERMANY GmbH, |) | |
| ABITRON AUSTRIA GmbH, and |) | |
| ALBERT FUCHS, |) | |
| |) | |
| Defendants. |) | |

VERDICT FORM

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find as follows:

* * * * *

Part 3: Plaintiff's Trademark Infringement Claims – the HETRONIC® mark, the Product Marks (for ERGO, EURO, GL, GR, HH, MINI, NOVA®, Pocket, TG and RX), and the Trade Dress (overall appearance of plaintiff's product line)

A. Pre-Termination of the Distribution and License Agreements

1. Has plaintiff proven by the greater weight of the evidence each essential element of its trademark infringement claim for the HETRONIC® mark against the following defendant or defendants (before plaintiff terminated the distribution and license agreements)? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|--------------------------------------|----|
| Hetronic Germany | <input checked="" type="radio"/> Yes | No |
| HCEE | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |

Albert Fuchs

Yes

No

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 2. ONLY ANSWER QUESTION NO. 2 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 1. AFTER YOU HAVE ANSWERED QUESTION NO. 2, PLEASE ANSWER QUESTION NO. 3.

IF YOU HAVE ANSWERED "NO" TO ALL DEFENDANTS, PLEASE ANSWER QUESTION NO. 3.

2. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants willfully or intentionally infringed the HETRONIC® mark? (Circle "Yes" or "No" as to each defendant)

Hetronic Germany

Yes

No

HCEE

Yes

No

ABI Holding

Yes

No

Albert Fuchs

Yes

No

3. Has plaintiff proven by the greater weight of the evidence each essential element of its trademark infringement claim for the Product Marks against the following defendant or defendants (before plaintiff terminated the distribution and license agreements)? (Circle "Yes" or "No" as to each defendant)

Hetronic Germany

Yes

No

HCEE

Yes

No

ABI Holding

Yes

No

Albert Fuchs

Yes

No

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 4. ONLY ANSWER QUESTION NO. 4 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 3. AFTER YOU HAVE ANSWERED QUESTION NO. 4, PLEASE ANSWER QUESTION NO. 5.

IF YOU HAVE ANSWERED "NO" TO ALL DEFENDANTS, PLEASE ANSWER QUESTION NO. 5.

4. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants willfully or intentionally infringed the Product Marks? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|--------------------------------------|----|
| Hetronic Germany | <input checked="" type="radio"/> Yes | No |
| HCEE | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | No |

5. Has plaintiff proven by the greater weight of the evidence each essential element of its trademark infringement claim for the Trade Dress against the following defendant or defendants (before plaintiff terminated the distribution and license agreements)? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|--------------------------------------|----|
| Hetronic Germany | <input checked="" type="radio"/> Yes | No |
| HCEE | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | No |

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 6. ONLY ANSWER QUESTION NO. 6 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 5. AFTER YOU HAVE ANSWERED QUESTION NO. 6, PLEASE PROCEED TO THE INSTRUCTIONS FOR QUESTION NO. 7.

IF YOU HAVE ANSWERED "NO" TO ALL DEFENDANTS, PLEASE DO NOT ANSWER QUESTION NO. 6. PLEASE PROCEED TO THE INSTRUCTIONS FOR QUESTION NO. 7.

6. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants willfully or intentionally infringed the Trade Dress? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|--------------------------------------|----|
| Hetronic Germany | <input checked="" type="radio"/> Yes | No |
| HCEE | <input checked="" type="radio"/> Yes | No |

| | | |
|--------------|------------|----|
| ABI Holding | <u>Yes</u> | No |
| Albert Fuchs | <u>Yes</u> | No |

Instructions for Question 7.

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT ON QUESTION NO. 1, QUESTION NO. 3, OR QUESTION NO. 5, PLEASE ANSWER QUESTION NO. 7.

IF YOU HAVE ANSWERED "NO" AS TO ALL DEFENDANTS ON QUESTION NO. 1, QUESTION NO. 3, AND QUESTION NO. 5, PLEASE DO NOT ANSWER QUESTION NO. 7. PLEASE PROCEED AND ANSWER QUESTIONS UNDER "B. HOLDOVER PERIOD."

7. Has plaintiff proven by the greater weight of the evidence that it is entitled to any of defendant's profits that are the result of the pre-termination infringement? (Check "Yes" or "No")

Yes

No

IF YOU HAVE ANSWERED "YES" TO QUESTION NO. 7, PLEASE ANSWER QUESTION NO. 8. AFTER YOU HAVE ANSWERED QUESTION NO. 8, PLEASE PROCEED AND ANSWER QUESTIONS UNDER "B. HOLDOVER PERIOD."

8. What is the amount of the defendant's profits you find plaintiff is entitled to for pre-termination infringement?

As to defendant Hetronic Germany \$ 8,366,305.00

As to defendant HCEE \$ 2,608,048.00

NOTE: YOU ARE NOT REQUIRED, IN ANSWERING THIS QUESTION (QUESTION NO. 8), TO ALLOCATE PROFITS FOR ABI AND/OR FUCHS, IF YOU HAVE ANSWERED "YES" AS TO EITHER DEFENDANT IN QUESTION NO. 1, QUESTION NO. 3, OR QUESTION NO. 5.

B. Holdover Period

1. Has plaintiff proven by the greater weight of the evidence each essential element of its trademark infringement claim for the HETRONIC®

mark against the following defendant or defendants (after termination on June 6, 2014, and before Abitron Germany and Abitron Austria started doing business on September 1, 2014)? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|--------------------------------------|----|
| Hetronic Germany | <input checked="" type="radio"/> Yes | No |
| HCEE | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | No |

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 2. ONLY ANSWER QUESTION NO. 2 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 1. AFTER YOU HAVE ANSWERED QUESTION NO. 2, PLEASE ANSWER QUESTION NO. 3.

IF YOU HAVE ANSWERED "NO" TO ALL DEFENDANTS, PLEASE ANSWER QUESTION NO. 3.

2. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants willfully or intentionally infringed the HETRONIC® mark? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|--------------------------------------|----|
| Hetronic Germany | <input checked="" type="radio"/> Yes | No |
| HCEE | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | No |

3. Has plaintiff proven by the greater weight of the evidence each essential element of its trademark infringement claim for the Product Marks against the following defendant or defendants (after termination on June 6, 2014, and before Abitron Germany and Abitron Austria started doing business on September 1, 2014)? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|--------------------------------------|----|
| Hetronic Germany | <input checked="" type="radio"/> Yes | No |
| HCEE | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |

Albert Fuchs

Yes

No

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 4. ONLY ANSWER QUESTION NO. 4 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 3. AFTER YOU HAVE ANSWERED QUESTION NO. 4, PLEASE ANSWER QUESTION NO. 5.

IF YOU HAVE ANSWERED "NO" TO ALL DEFENDANTS, PLEASE ANSWER QUESTION NO. 5.

4. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants willfully or intentionally infringed the Product Marks? (Circle "Yes" or "No" as to each defendant)

Hetronic Germany

Yes

No

HCEE

Yes

No

ABI Holding

Yes

No

Albert Fuchs

Yes

No

5. Has plaintiff proven by the greater weight of the evidence each essential element of its trademark infringement claim for the Trade Dress against the following defendant or defendants (after termination on June 6, 2014, and before Abitron Germany and Abitron Austria started doing business on September 1, 2014)? (Circle "Yes" or "No" as to each defendant)

Hetronic Germany

Yes

No

HCEE

Yes

No

ABI Holding

Yes

No

Albert Fuchs

Yes

No

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 6. ONLY ANSWER QUESTION NO. 6 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 5. AFTER YOU HAVE ANSWERED QUESTION NO. 6, PLEASE PROCEED TO THE INSTRUCTIONS FOR QUESTION NO. 7.

IF YOU HAVE ANSWERED "NO" TO ALL DEFENDANTS, PLEASE DO NOT ANSWER QUESTION NO. 6. PLEASE PROCEED TO THE INSTRUCTIONS FOR QUESTION NO. 7.

6. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants willfully or intentionally infringed the Trade Dress? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|--------------------------------------|--------------------------|
| Hetronic Germany | <input checked="" type="radio"/> Yes | <input type="radio"/> No |
| HCEE | <input checked="" type="radio"/> Yes | <input type="radio"/> No |
| ABI Holding | <input checked="" type="radio"/> Yes | <input type="radio"/> No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | <input type="radio"/> No |

Instructions for Question 7.

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT ON QUESTION NO. 1, QUESTION NO. 3, OR QUESTION NO. 5, PLEASE ANSWER QUESTION NO. 7.

IF YOU HAVE ANSWERED "NO" AS TO ALL DEFENDANTS ON QUESTION NO. 1, QUESTION NO. 3, AND QUESTION NO. 5, PLEASE DO NOT ANSWER QUESTION NO. 7. PLEASE PROCEED AND ANSWER QUESTIONS UNDER "C. ABITRON OPERATION."

7. Has plaintiff proven by the greater weight of the evidence that it is entitled to any of defendant's profits that are the result of the infringement after termination on June 6, 2014, and before Abitron Germany and Abitron Austria started doing business on September 1, 2014? (Check "Yes" or "No")

Yes _____
 No _____

IF YOU HAVE ANSWERED "YES" TO QUESTION NO. 7, PLEASE ANSWER QUESTION NO. 8. AFTER YOU HAVE ANSWERED QUESTION NO. 8, PLEASE PROCEED AND ANSWER QUESTIONS UNDER "C. ABITRON OPERATION."

8. What is the amount of the defendant's profits you find plaintiff is entitled to for infringement after termination on June 6, 2014, and before

Abitron Germany and Abitron Austria started doing business on September 1, 2014?

As to defendant Hetricon Germany \$ 2,788,037.00

As to defendant HCEE \$ 703,701.00

NOTE: YOU ARE NOT REQUIRED, IN ANSWERING THIS QUESTION (QUESTION NO. 8), TO ALLOCATE PROFITS FOR ABI AND/OR FUCHS, IF YOU HAVE ANSWERED "YES" AS TO EITHER DEFENDANT IN QUESTION NO. 1, QUESTION NO. 3, OR QUESTION NO. 5.

C. During Abitron Operation

1. Has plaintiff proven by the greater weight of the evidence each essential element of its trademark infringement claim for the HETRONIC® mark against the following defendant or defendants (after Abitron Germany and Abitron Austria started doing business on September 1, 2014)? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|------------|----|
| Abitron Germany | <u>Yes</u> | No |
| Arbitron Austria | <u>Yes</u> | No |
| ABI Holding | <u>Yes</u> | No |
| Albert Fuchs | <u>Yes</u> | No |

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 2. ONLY ANSWER QUESTION NO. 2 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 1. AFTER YOU HAVE ANSWERED QUESTION NO. 2, PLEASE ANSWER QUESTION NO. 3.

IF YOU HAVE ANSWERED "NO" TO ALL DEFENDANTS, PLEASE ANSWER QUESTION NO. 3.

2. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants willfully or intentionally infringed the HETRONIC® mark? (Circle "Yes" or "No" as to each defendant)

| | | |
|-----------------|------------|----|
| Abitron Germany | <u>Yes</u> | No |
| Abitron Austria | <u>Yes</u> | No |

| | | |
|--------------|--------------------------------------|----|
| ABI Holding | <input checked="" type="radio"/> Yes | No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | No |

3. Has plaintiff proven by the greater weight of the evidence each essential element of its trademark infringement claim for the Product Marks as to the following defendant or defendants (after Abitron Germany and Abitron Austria started doing business on September 1, 2014)? (Circle "Yes" or "No" as to each defendant)

| | | |
|-----------------|--------------------------------------|----|
| Abitron Germany | <input checked="" type="radio"/> Yes | No |
| Abitron Austria | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | No |

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 4. ONLY ANSWER QUESTION NO. 4 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 3. AFTER YOU HAVE ANSWERED QUESTION NO. 4, PLEASE ANSWER QUESTION NO. 5.

IF YOU HAVE ANSWERED "NO" TO ALL DEFENDANTS, PLEASE ANSWER QUESTION NO. 5.

4. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants willfully or intentionally infringed the Product Marks? (Circle "Yes" or "No" as to each defendant)

| | | |
|-----------------|--------------------------------------|----|
| Abitron Germany | <input checked="" type="radio"/> Yes | No |
| Abitron Austria | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | No |

5. Has plaintiff proven by the greater weight of the evidence each essential element of its trademark infringement claim for the Trade Dress as to the following defendant or defendants (after Abitron Germany and Abitron Austria started doing business on September 1, 2014)? (Circle "Yes" or "No" as to each defendant)

| | | |
|-----------------|--------------------------------------|----|
| Abitron Germany | <input checked="" type="radio"/> Yes | No |
| Abitron Austria | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | No |

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 6. ONLY ANSWER QUESTION NO. 6 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 5. AFTER YOU HAVE ANSWERED QUESTION NO. 6, PLEASE PROCEED TO THE INSTRUCTIONS FOR QUESTION NO. 7.

IF YOU HAVE ANSWERED "NO" TO ALL DEFENDANTS, PLEASE DO NOT ANSWER QUESTION NO. 6. PLEASE PROCEED TO THE INSTRUCTIONS FOR QUESTION NO. 7.

6. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants willfully or intentionally infringed the Trade Dress? (Circle "Yes" or "No" as to each defendant)

| | | |
|-----------------|--------------------------------------|----|
| Abitron Germany | <input checked="" type="radio"/> Yes | No |
| Abitron Austria | <input checked="" type="radio"/> Yes | No |
| ABI Holding | <input checked="" type="radio"/> Yes | No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | No |

Instructions for Question 7.

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT ON QUESTION NO. 1, QUESTION NO. 3, OR QUESTION NO. 5, PLEASE ANSWER QUESTION NO. 7.

IF YOU HAVE ANSWERED "NO" AS TO ALL DEFENDANTS ON QUESTION NO. 1, QUESTION NO. 3, AND QUESTION NO. 5, PLEASE DO NOT ANSWER QUESTION NO. 7. PLEASE PROCEED TO "D. REVERSE PASSING OFF OR REVERSE PALMING OFF."

7. Has plaintiff proven by the greater weight of the evidence that it is entitled to any of defendant's profits that are the result of the infringement after Abitron Germany and Abitron Austria started doing business on September 1, 2014? (Check "Yes" or "No")

Yes
No

IF YOU HAVE ANSWERED "YES" TO QUESTION NO. 7, PLEASE ANSWER QUESTION NO. 8. AFTER YOU HAVE ANSWERED QUESTION NO. 8, PLEASE PROCEED TO "D. REVERSE PASSING OFF OR REVERSE PALMING OFF."

8. What is the amount of the defendant's profits you find plaintiff is entitled to for infringement after Abitron Germany and Abitron Austria started doing business on September 1, 2014?

As to defendant Abitron Germany \$ 60,560,346.00

As to defendant Abitron Austria \$ 14,205,263.00

NOTE: YOU ARE NOT REQUIRED, IN ANSWERING THIS QUESTION (QUESTION NO. 8), TO ALLOCATE PROFITS FOR ABI AND/OR FUCHS, IF YOU HAVE ANSWERED "YES" AS TO EITHER DEFENDANT IN QUESTION NO. 1, QUESTION NO. 3, OR QUESTION NO. 5.

D. Reverse Passing Off or Reverse Palming Off

1. Has plaintiff proven by the greater weight of the evidence that the following defendant or defendants infringed plaintiff's HETRONIC® mark by reverse passing off or reverse palming off? (Circle "Yes" or "No" as to each defendant)

| | | |
|------------------|--------------------------------------|--------------------------|
| Hetronic Germany | <input checked="" type="radio"/> Yes | <input type="radio"/> No |
| HCEE | <input checked="" type="radio"/> Yes | <input type="radio"/> No |
| ABI Holding | <input checked="" type="radio"/> Yes | <input type="radio"/> No |
| Albert Fuchs | <input checked="" type="radio"/> Yes | <input type="radio"/> No |
| Abitron Germany | <input checked="" type="radio"/> Yes | <input type="radio"/> No |
| Abitron Austria | <input checked="" type="radio"/> Yes | <input type="radio"/> No |

IF YOU HAVE ANSWERED "YES" AS TO ANY DEFENDANT, PLEASE ANSWER QUESTION NO. 2. ONLY ANSWER QUESTION NO. 2 AS TO THE DEFENDANT OR DEFENDANTS YOU HAVE ANSWERED "YES" IN QUESTION NO. 1. AFTER YOU HAVE ANSWERED QUESTION NO. 2, PLEASE PROCEED TO "E. CONTRIBUTORY INFRINGEMENT."

IF YOU HAVE ANSWERED "NO" AS TO ALL DEFENDANTS, PLEASE DO NOT ANSWER QUESTION NO. 2. PLEASE PROCEED TO "E. CONTRIBUTORY INFRINGEMENT."

2. Has plaintiff proven by the greater weight of the evidence that it is entitled to any of defendant's profits as a result of defendant's reverse passing off or reverse palming off? (Check "Yes" or "No")

Yes

No

IF YOU HAVE ANSWERED "YES" TO QUESTION NO. 2, PLEASE ANSWER QUESTION NO. 3. AFTER YOU HAVE ANSWERED QUESTION NO. 3, PLEASE PROCEED TO "E. CONTRIBUTORY INFRINGEMENT."

IF YOU HAVE ANSWERED "NO" TO QUESTION NO. 2, PLEASE DO NOT ANSWER QUESTION NO. 3. PLEASE PROCEED TO "E. CONTRIBUTORY INFRINGEMENT."

3. What is the amount of the defendant's profits you find plaintiff is entitled to for the reverse passing off or reverse palming off infringement?

As to defendants Hetronic Germany and Abitron Germany
\$ 859,904.00.

As to defendants HCEE and Abitron Austria
\$ 51,888.00.

NOTE: YOU ARE NOT REQUIRED, IN ANSWERING THIS QUESTION (QUESTION NO. 3), TO ALLOCATE PROFITS FOR ABI AND/OR FUCHS, IF YOU HAVE ANSWERED "YES" AS TO EITHER DEFENDANT IN QUESTION NO. 1.

* * * * *

**Transcript of Trial Proceedings, Excerpt,
Mar. 2, 2020**

[1048] THE COURT: The jury has retired on the issue of punitive damages and this is an appropriate time for the defendants to make their offer of proof on the issues that we've previously addressed.

MR. RUPERT: Your Honor, I've done the offer of proof in writing, so I have a book of exhibits, they're all exhibits that are already on our exhibit list. There's nothing new in the exhibits.

I've marked them "1301," because our defendants' numbers ended at 1293, so I marked the exhibits "1301."

And then I've taken excerpts of depositions taken in the case and marked those as "1300."

In addition, there's an affidavit. The only thing new in everything I'm offering as an offer of proof is an affidavit of Mr. Bulling on some issues that he could cover.

THE COURT: Very well.

MR. RUPERT: That's all I have.

THE COURT: Does plaintiff's counsel have copies of those?

[1049] MR. THOMSON: Your Honor, we were provided copies by e-mail about half-hour ago, we would object to the lack of notice provided to all of this information and to the affidavit not being in Q&A form.

THE COURT: Okay. Very well.

The objection will be overruled and the offers of proof will be received. And please give those to Lori. They'll become part of the record. * * *

* * * * *