

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

C. Victor Pyle, Jr., Circuit Court Judge

Case No. 2012-CP-23-3501

RECEIVED

FEB 24 2016

SC Court of Appeals

McKinley, Cooper and Company, LLC,.....Respondent,

v.

J. Todd Highsmith, Shane Highsmith, and Highsmith, LLC, ...Appellants.

**RECORD ON APPEAL
VOLUME I**

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

McKinley, Cooper & Company, LLC

vs.

Highsmith and Highsmith, LLC et al.

Plaintiff,

Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-23-4179

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
2014 DEC 23 PM 12 51

Plaintiff's Attorney: Knox L. Haynsworth, III, Bar No. _____ Address: 106 Williams Street Greenville, SC 29601 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: R. Mills Ariail, Jr., Bar No. 15584 Address: 11 N. Irvine Street, Suite 11 Greenville, SC 29601 Phone: 864-232-9390 Fax 864-232-9392 E-mail: denise@rmalawoffice.com Other: _____

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Defendants' Motion for JNOV and Motion for Attorney Fees
Estimated Time Needed: 15 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

12/23/2014
Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$**

☐ **EXEMPT:**

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

- ☐ **MOTION FEE COLLECTED: \$** _____
☐ **CONTESTED - AMOUNT DUE: \$** _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
McKinley, Cooper and)
Company, LLC)
Plaintiff,)
vs.)
J. Todd Highsmith, Shane)
Highsmith, and Highsmith, LLC,)
Defendants.)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2012-CP-23-4179

**DEFENDANTS' MOTION FOR
JUDGMENT NOTWITHSTANDING
THE VERDICT AND MOTION
FOR ATTORNEY FEES**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. MCKENNA
2012 DEC 23 PM 12 51

Pursuant to Rule 50, SCRCP, the Defendants J. Todd Highsmith, Shane Highsmith, and Highsmith, LLC, move the Court to enter judgment in favor of the Defendants, and against the Plaintiff, McKinley, Cooper and Company, notwithstanding the jury verdict for the Plaintiff on: (1) the verdict awarding punitive damages to the Plaintiff on the Conversion count; and (2) the verdicts in favor of the Plaintiff on the Trade Secrets count and the Conversion count. Pursuant to S.C. Code Ann. § 39-8-80, the Defendants further move the Court to award the Defendants' attorney fees. The grounds and authorities that compel that both motions should be granted are hereinafter set forth.

ARGUMENT

I. THE COURT SHOULD ENTER JUDGMENT FOR THE DEFENDANTS ON THE SPECIFIED CLAIMS

The jury returned a verdict form that purported to find for the Plaintiff on all three causes of action. With respect to the Trade Secrets count, the jury nonetheless found that the Plaintiff had suffered no actual damages, and that no willful violation had occurred.

With respect to the Breach of Fiduciary Duty count, the jury awarded the Plaintiff actual damages of \$5000. With respect to the Conversion count, the jury awarded no actual damages but purported to award the Plaintiff punitive damages of \$60,000.

Upon review of the jury verdict form (Attachment A), Defense Counsel immediately objected. With respect to the Conversion verdict, Defense Counsel explained that, under South Carolina law, punitive damages may not be awarded in the absence of actual damages. Defense Counsel asked the Court to enter judgment for the Defendants on this claim. Plaintiff's counsel, by contrast, raised no objection to the verdicts. Under these circumstances, as will be seen, South Carolina law *requires* the Court to enter judgment in favor of the Defendants, notwithstanding the verdict, on the punitive damages award, and on the Trade Secrets and Conversion verdicts.¹

A. Because the jury awarded no actual damages on the Conversion claim, the award of punitive damages must be vacated and judgment entered for the Defendants on the punitive damages claim

The South Carolina Supreme Court has repeatedly ruled that punitive damages *may not be recovered in the absence of proof of actual damages*. Dykema v. Carolina Emergency Physicians, 348 S.C. 549, 553, 560 S.E.2d 894 (2002) ("punitive damages generally are not recoverable in the absence of proof of actual damages"); Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) ("punitive damages may be awarded only upon a finding of actual damages"); Limehouse v. Southern Ry. Co., 216 S.C. 424, 58 S.E.2d 685 (1950) *quoting* Cook v. A.C.L. Railway Co., 183 S.C. 279, 190 S.E. 923, 924 (1937) ("[i]f the injured party has no cause of action independent of a supposed right to recover exemplary damages, then he has no cause of action at all;

¹ The Court denied the Defendants' motion for a directed verdict at the close of the Plaintiff's evidence, and again at the close of all evidence.

consequently, there must be allegations of actual or nominal damages in the pleadings and a proof thereof in a trial of the cause in order to support a verdict for punitive damages alone").

Where an award of punitive damages on a claim is made but no actual damages are awarded, the court must reverse the punitive damages award and enter judgment for the defendant. Thus, in a case where the jury awarded punitive damages on a bad faith cause of action but awarded no actual damages, the South Carolina Supreme Court reversed the award of punitive damages and remanded the case to the trial court to enter judgment for the defendant on the bad faith claim:

Punitive damages may be awarded only upon a finding of actual damages. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991). The trial judge gave a prepared verdict form to the jury that allowed separate entries of actual damages on both causes of action and punitive damages on the bad faith cause of action. Further, the trial judge instructed the jury that they should not be concerned with awarding damages twice because he would reform the verdict to prevent double recovery, if necessary. The jury returned its verdict with a slash drawn through the space where it could have awarded actual damages on the bad faith cause of action. We interpret that action, in light of the instructions given by the trial judge, as an indication that the jury found no actual damages on the bad faith cause of action. Therefore, we reverse the award of punitive damages and remand the case for entry of judgment in accordance with this opinion.

Dowling v. Home Buyers Warranty Corp., II, 311 S.C. 233, 237, 428 S.E.2d 709 (1993).

See also *Moore v. Benson*, 390 S.C. 153, 700 S.E.2d 273 (Ct.App. 2010)(where no actual damages could be recovered against defendant, award of punitive damages would be reversed).

Plaintiff's counsel could have avoided this result by objecting to the jury verdict and requesting that it be resubmitted to the jury with appropriate instructions. Plaintiff's counsel, however, failed to object to the jury verdict, or otherwise to request

resubmission of the verdict form to the jury. The jury has now been discharged and it is too late to make this objection. As a matter of law, the Plaintiff waived the inconsistency in the jury verdict. Consequently, the only recourse left to correct the error is to enter judgment for the Defendants, and against the Plaintiff, on the punitive damages award.

B. The Court should enter judgment in favor of the Defendants, and against the Plaintiff, on the Trade Secret and Conversion counts

Under South Carolina law

A verdict assessing liability against the defendant but awarding the plaintiff zero damages is inconsistent and contrary to South Carolina law. *We hold that, if a jury finds the plaintiff has failed to prove damages proximately caused by the defendant's negligence, then its verdict should be for the defendant.*

Stevens v. Allen, 342 S.C. 47, 53, 563 S.E.2d 663 (2000)(emphasis added).

When a jury purports to find for a plaintiff but returns zero damages, the verdict is inconsistent and the plaintiff's remedy is to object and to request that the verdict form be resubmitted to the jury with appropriate instructions:

We agree with the Court of Appeals' conclusion that, under South Carolina law, the proper and most consistent approach of treating such verdicts is to require, upon request, the trial court to re-submit the-matter to the jury. If the jury cannot reach a consistent verdict, the trial court may then order a new trial nisi or a new trial absolute.

342 S.C. at 53.

In this case, however, the Plaintiff's counsel failed to object to the inconsistent verdicts on the Trade Secrets count and the Conversion count. The jury has been discharged and it is too late to do so now. The Plaintiff accordingly has waived not only its right for resubmission of the verdict form to the jury but also its right to a new trial. The Court accordingly must enter judgment notwithstanding the verdict in favor of the Defendants on the Trade Secrets count and the Conversion count.

C. Because the punitive damages award must be reversed, the Court need not perform a post-trial review of the award

Because the award of punitive damages must be reversed and judgment entered for the Defendants on the Conversion count, the Court need not perform the post-trial review of the punitive damages mandated by Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) to determine if the award violates the Defendants' due process rights and /or is excessive. The Defendants respectfully submit, however, that the award violates the Defendants' due process rights and is excessive. There was zero evidence of willful or wanton conduct presented in this case and the other Gamble factors also clearly militate against upholding the award. The amount of damages awarded - \$60,000 - is 60,000 times the actual damages awarded and is grossly excessive by this measure.

In the unlikely event that the Court disagrees with the Defendants that the punitive damages award must be reversed solely because no actual damages were awarded, the Defendants request an opportunity to file an additional post-trial brief where each of the Gamble factors will be discussed in detail.

II. DEFENDANTS ARE ENTITLED TO AN AWARD OF ATTORNEY FEES

The South Carolina Trade Secrets Act, S.C. Code Ann. § 39-8-10 et seq., provides in pertinent part:

If (1) a claim of misappropriation is made in bad faith, (2) a motion to terminate an injunction is made or resisted in bad faith, or (3) willful misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

S.C. Code Ann. § 39-8-80.

Once the Court grants the motion for judgment notwithstanding the verdict on the Plaintiff's Trade Secrets claim, the Defendants will be the prevailing party and entitled to attorney fees if the Defendants can show that the Plaintiff made the claim of misappropriation in "bad faith."

The Trade Secrets Act does not contain a definition of "bad faith," see S.C. Code Ann. § 39-8-20, and the South Carolina Supreme Court has not yet defined "bad faith" for purposes of the Trade Secrets Act. South Carolina courts, however, have adopted the following definition of "bad faith" as a matter of common law:

Furthermore, our supreme court has defined bad faith as:

The opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

State v. Griffin, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915) (quoting Black's Law Dictionary).

Estate of Carr v. Circle S Ent., 379 S.C. 31, 42-43, 664 S.E.2d 83 (Ct.App. 2008).

Courts in other jurisdictions which have adopted the Uniform Trade Secrets Act (UTSA), which contains an attorney fee statute identical to S.C. Code Ann. § 39-8-80, require a party seeking attorney fees for bad faith conduct to show that the opposing party acted in both objective and subjective bad faith:

Gemini challenges the propriety of the attorney fees award to CCS. The court relied on section 3426.4, a provision of the Uniform Trade Secrets Act (UTSA) (§ 3426 et seq.), which provides: "If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party."

The UTSA does not define "bad faith" as used in section 3426.4, and apparently there is no reported California case interpreting the term. In *Stilwell Development, Inc. v. Chen* (C.D.Cal. Apr. 25, 1989, No. CV86 4487 GHK) 1989 U.S. Dist. Lexis 5971 (Stilwell), a federal court noted the legislative history of section 3426.4 shows it is intended to "'allow a court to award reasonable attorney fees to a prevailing party in specified circumstances as a deterrent to specious claims of misappropriation. . . .' [Citation.]" (Stilwell, *supra*, 1989 U.S. Dist. Lexis 5971 at p.*9, italics added.) The court concluded that "[a]s to deterrence, . . . it requires conduct more culpable than mere negligence. To be deterrable, conduct must be at least reckless or grossly negligent, if not intentional and willful. Webster's defines specious as, among other things, 'apparently right or proper: superficially fair, just, or correct but not so in reality. . . .' [Citation.] Thus, the claim must have been without substance in reality, if not frivolous." (Id. at p. *9, citing Webster's 3d New Internat. Dict. (1986) p. 1287.)

The Stilwell court interpreted "bad faith" under section 3426.4 to require objective speciousness of the plaintiff's claim and its subjective misconduct in bringing or maintaining a claim for misappropriation of trade secrets.

We find Stilwell persuasive and conclude that "bad faith" for purposes of section 3426.4 requires objective speciousness of the plaintiff's claim, as opposed to frivolousness, and its subjective bad faith in bringing or maintaining the claim.

Gemini Aluminum Corp. v. California Custom Shapes, Inc., 95 Cal.App. 4th 1249, 1261-62, 116 Cal. Rptr. 368 (2002).

The Court need not decide whether to adopt the South Carolina common law definition of bad faith, or the UTSA definition, because the conduct of the Plaintiff easily satisfies both standards. Specifically, the evidence shows that the Trade Secrets claim was both asserted fraudulently *and* that the claim was objectively specious and maintained in subjective bad faith.

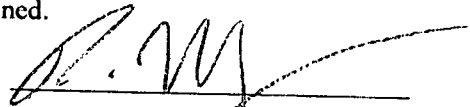
Here, Plaintiff unquestionably brought this claim in bad faith claim for the purpose of preventing Defendants from lawfully practicing their trade as certified public

accountants and from lawfully competing with her firm. At no point during the Defendants' multi-year employment with Plaintiff's firm were Defendants subject to any nondisclosure agreement, confidentiality agreement, or more importantly, any non-compete agreement. Instead, Plaintiff filed its original complaint alleging misappropriation of trade secrets because Plaintiff was using the Trade Secrets Act as a means of preventing competition. The jury found the Trade Secrets claim to be without merit and baseless. It is the Defendant's position that Plaintiff's improper use of the Trade Secrets Act in this matter to prevent competition is exactly why the South Carolina legislature provided for attorney fees to be awarded for bad faith. The Plaintiff should be punished for this behavior and the only means allowed to punish this behavior is through the award of attorney fees.

Once the Court grants this motion, the Defendants will submit an invoice and affidavit detailing the reasonable attorney fees the Defendants incurred in defending against the Trade Secrets claim.

CONCLUSION

For the reasons stated, the Defendants' motion for judgment notwithstanding the verdict must be granted. The Defendants' motion for an award of attorney fees must also be granted in an amount to be subsequently determined.



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(864) 232-9390

ATTORNEY FOR DEFENDANTS

ATTACHMENT A

STATE OF SOUTH CAROLINA

)
) IN THE COURT OF COMMON PLEAS
)

COUNTY OF GREENVILLE)

McKinley, Cooper and
Company

Plaintiff,

VERDICT

2012-CP-23-4179

vs.

J. Todd Highsmith, Shane
Highsmith and Highsmith LLC

Defendants.

I. WE, THE JURY, FIND FOR THE PLAINTIFF:

~~ACTUAL DAMAGES~~

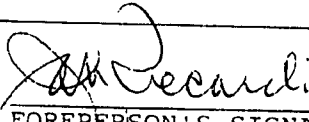
~~(\$) DOLLARS~~

~~PUNITIVE DAMAGES~~

~~(\$) DOLLARS~~

II. WE, THE JURY, FIND FOR THE DEFENDANTS.

~~If your verdict is for the Plaintiff, please state on what grounds:~~


FOREPERSON'S SIGNATURE

DATED: 12/12/14

WE THE JURY FIND FOR PLAINTIFF

1) Trade Secret Act

A) Actual damages \$ ~~0~~

Do you find a wilful violation?

Yes

No

2) Breach of fiduciary duty

A) Actual damages \$ 5,000⁰²

3) Conversion

A) Actual damages \$ ~~0~~

B) Punitive damages \$ 60,000⁰²

Is violation wilful?

Yes

No

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

)
) IN THE COURT OF COMMON PLEAS
)
)

J. Todd Highsmith

Third Party Plaintiff,

vs.

Toni McKinley & *McKinley*
Cooper + Company
Defendant.

VERDICT

2012CP-23-4179

THIRD PARTY COMPLAINT

1. WE, THE JURY, FIND FOR THE PLAINTIFF:

Zero 0 (\$) DOLLARS
ACTUAL DAMAGES

2. WE, THE JURY, FIND FOR THE DEFENDANT.

DATED:

12/12/14

John P. ...
FOREPERSON'S SIGNATURE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
McKinley, Cooper and	)	
Company,	)	
	)	DEFENDANTS' OPPOSITION TO
Plaintiff,	)	PLAINTIFF'S REQUEST FOR PUNITIVE
	)	DAMAGES AND REPLY TO PLAINTIFF'S
	)	MEMORANDUM
	)	
vs.	)	
	)	
J. Todd Highsmith, Shane	)	
Highsmith, and Highsmith, LLC,	)	
	)	
Defendants.	)	

FILED-COURT OF COMMON PLEAS
GREENVILLE CO. S.C.
PAUL E. WOODENSHED
2015 JUN 9 PM 8:53

The Plaintiff has filed a Memorandum in Support of Recovery of Punitive Damages and in Opposition to Defendants' Motion for JNOV and Attorney Fees. In this Memorandum, the Plaintiff asks the Court to enter judgment in favor of the Plaintiff for \$60,000 in punitive damages on the conversion jury verdict. The Plaintiff also asks the Court to deny the Defendants' motions for judgment notwithstanding the verdict, and their motion for attorney fees. The Defendants respectfully oppose all of these requests and renew their request that their motions be granted.

ARGUMENT

I. THE PUNITIVE DAMAGES AWARD MAY NOT BE UPHELD ON GROUNDS THAT, IN THE PLAINTIFF'S VIEW, THE JURY "INTENDED" TO AWARD BOTH ACTUAL AND PUNITIVE DAMAGES ON THE SAME COUNT

The Plaintiff initially contends that the punitive damages award on the conversion count should be upheld because, in the Plaintiff's view, the jury "intended" to award the Plaintiff both actual and punitive damages. This contention is meritless. Although the jury did award actual

damages on the breach of fiduciary duty count, the jury *as a matter of law* did not intend to award the Plaintiff actual damages on the conversion count. To the contrary, the jury expressly found that the Plaintiff did *not* sustain any actual damages as a result of the conversion:

3. Conversion

A) Actual damages \$ 0

B) Punitive Damages \$ 60,000

(Defs. Ex. 1)(Verdict Form). As a matter of law, this is fatal to the punitive damages verdict returned, since punitive damages on a cause of action may not be awarded in the absence of an award of actual damages on the same cause of action. *E.g., Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (“punitive damages may be awarded only upon a finding of actual damages”).

The Plaintiff nonetheless claims that the verdicts are somehow “ambiguous” and that the Court should uphold the punitive damages award either because the jury “intended” to award punitive damages on the breach of fiduciary duty count, or “intended” to award actual damages on the conversion count. There is, however, nothing ambiguous about the verdicts returned on either count. Rather, the problem is that the unambiguous award of punitive damages for conversion is legally impermissible given the unambiguous finding that the Plaintiff sustained no actual damages as a result of the conversion. Nor can the Court presume the jury “intended” something other than what they actually said on the verdict form. The Plaintiff ignores that the jury confirmed in open court that the verdict returned was the verdict of each member of the jury. (Defs. Ex. 2) (T. at 4, lines 6-9) (“if you agree these are the verdicts you reached in your deliberation room, would you please raise your right hand” ... (WHEREUPON, all jurors raised their right hand”). This ends the discussion as to what the jury “intended.”

The Plaintiff alternatively argues that, if a blank for punitive damages had been included under the breach of fiduciary duty count, the jury could have awarded the punitive damages on this count. Because there was no blank, the Plaintiff argues, the jury instead inserted the punitive damages in the only place available -- under the conversion count. The Plaintiff, however, failed to object to the verdict form. Moreover, the Plaintiff's counsel was a co-drafter of the verdict form along with the Defendants' counsel and consented to a verdict form with no blank for punitive damages under the breach of fiduciary duty count. (Defs. Ex. 3)(Affidavit of R. Mills Ariail, Jr.). The Plaintiff accordingly has waived any complaint about the verdict form.

The Court accordingly may not uphold the punitive damage award on grounds that the jury "intended" to award both punitive and actual damages on the same count but failed to do so.

II. THE DEFENDANTS DID NOT WAIVE THEIR RIGHT TO CHALLENGE THE IMPROPER PUNITIVE DAMAGES AWARD

Recognizing that punitive damages cannot be awarded on a cause of action unless actual damages are also awarded on that cause of action, the Plaintiff contends that the Defendants "have waived their right to challenge the punitive damage verdict in the present action." (Memorandum at 3). In this regard, the Plaintiff claims that the Defendants failed to object to the punitive damages award. The transcript, however, shows that defense counsel *did* in fact object to the punitive damages award at the earliest possible opportunity. (T. at 5). Following the reading of the verdict, the Court directed the jury to "report downstairs to the jury room" to pick up their checks. (T. at 5, lines 10-11). After the jury exited the courtroom into the secure hallway behind the courtroom, the Court then asked the Plaintiff's and Defendant's attorneys if they had any motions. Defense counsel asked to see the verdict form and, immediately upon looking at it, objected to the award of punitive damages for conversion without an award of actual damages:

THE COURT: Any motions, gentlemen?

MR. ARIAIL [sic]: Your Honor, I didn't understand the verdict. If I could see the verdict form?

...

MR ARIAIL [sic]:

...

Your Honor, my first question, and I need to research this, and I would ask for- first off, I'll renew my motions. But if they found a conversion of zero actual damages but punitive of sixty thousand dollars, I don't know if they can have the sixty thousand on the punitives if-

THE COURT: How about that Mr. Haynsworth?

(T. at 5, lines 15-25, 6, lines 1-2).

Research confirmed that, under South Carolina law, punitive damages on a cause of action may not be recovered in the absence of an award of actual damages on that cause of action. The Defendants thereafter filed a combined motion and brief with authority that supported this position and formally asked the Court to enter judgment notwithstanding the verdict in favor of the Defendants on the punitive damages claim.

Under these circumstances, the Plaintiff's claim that the Defendants waived their right to object to the punitive damages award is meritless. The Plaintiff's reliance on Dykema v. Carolina Emergency Physicians, 348 S.C. 549, 553, 560 S.E.2d 894 (2002) is obviously misplaced. There, despite an award of zero actual damages and an award of punitive damages on the same cause of action, the defendant failed to object to a punitive damages award until after the jury had been discharged. On appeal to the South Carolina Supreme Court, the court affirmed the punitive damages award notwithstanding the absence of an award of actual damages because the defendant had failed to object *before* the jury was discharged. The court rightly expressed concern that a party who fails to object following an obviously defective verdict cannot later complain after the jury has been discharged:

We decline to hold that a party may allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury, in the hopes of gaining a reversal on appeal. Accordingly, we find Companion waited too late to voice its objection to the verdict.

This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.

348 S.C. at 553-54.

Any notion that the jury in the instant case had been finally discharged before the time defense counsel made this objection is meritless. Under South Carolina law, a jury may be reassembled notwithstanding a "formal discharge," so long as they have not been subjected to any outside influences between the discharge and the reassembly. This is particularly true when, as in the instant case, the very case for which the jury was impaneled is still under discussion by the court when the objection is made:

Although Dawkins comports with the general rule that a jury may not be reassembled to amend its verdict after discharge, a number of courts permit the jury to be recalled if, for example, they are still in the courtroom, or, in certain limited circumstances, still under the court's control. 23A C.J.S. Criminal Law § 1414 (1989); 75B Am.Jur.2d Trial § 1896 (1992). Notwithstanding a "formal discharge," several courts recognize that the jury may be reassembled so long as it remains an essentially undispersed unit, and has not been subjected to any outside influence in between the "discharge" and the reassembly. See generally Annotation 14 ALR.5th 89 §§5, 6, 7, 9 (1993); Webber v. State, 652 S.W.2d 781 (Tex.1983); Masters v. State, 344 So.2d 616 (Fla. 1977). The Fourth Circuit Court of Appeals has stated,

It is not so much what is said in passing as what is actually done and acted upon that determines the question of discharge. Without specific announcement, a jury may tacitly be permitted to retire and mingle with the bystanders after rendering its verdict, and thereby become irrevocably discharged. On the other hand, it may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the

very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business.

Summers v. United States, 11 F.2d 583, 586 (1926).

We concur with the reasoning of Summers.

(emphasis added); State v. Myers, 318 S.C. 549, 551-52, 459 S.E.2d 304 (1955). As stated in the Affidavit of R. Mills Ariail, Jr., the jury had exited the courtroom and was standing in the secure hallway behind the courtroom at the time he made his objection to the punitive damages award. The Court can take judicial notice that this hallway and the stairs leading to the clerk's office are secure areas where members of the public are not permitted. Consequently, the jury was not subjected to questions from reporters or other members of the public. The jury remained an undispersed unit with no opportunity to discuss the case with others. Under these circumstances, the jury was not discharged at the time of the Defendants' objection.

The burden was on Plaintiff's counsel to object and to ask for the jury to be reassembled and sent back to the jury room with instructions to render a new verdict. Plaintiff's counsel *failed to make any objection* and did not request that the jury be reassembled and asked to re-deliberate the case. Thus, as a matter of law, Plaintiff's counsel waived any objection to the verdict. The Court is left with the Defendant's proper, timely objection that the punitive damages award could not stand absent an award of actual damages.

The Plaintiff fares no better with his alternative argument that nominal actual damages should be presumed on the conversion count and, therefore, the punitive damages award must be upheld. This argument borders on being frivolous for any and all of four different reasons. First, as previously noted, the jury in this case expressly found that the Plaintiff had sustained "zero actual damages" for conversion:

3. Conversion

A) Actual damages \$ 0

B) Punitive Damages \$ 60,000

(Verdict Form). Given this express finding by the jury of no actual damages, no credible argument can be made that nominal actual damages may still be inferred, or that the jury somehow intended to award actual damages on the conversion count. The express finding of no actual damages ends the inquiry into what the jury intended. The Plaintiff's reliance on Hinson v. A.T. Sistare Const. Co., 236 S.C. 125, 113 S.E.2d 341 (1960) is obviously misplaced. There, the jury in a trespass action expressly returned a verdict finding that the plaintiff *had* suffered nominal damages from the trespass. Although the trial court ruled that this verdict was improper, the court on appeal concluded that under the circumstances of this case nominal damages could be presumed and affirmed the jury verdict as to punitive damages. In the instant case, of course, the jury made the opposite finding – they found that no actual damages had been caused by the conversion.

Second, absent express jury findings to the contrary, South Carolina law does presume damages in trespass and certain defamation actions. The Plaintiff, however, has presented no authority that damages are *ever* presumed in conversion actions. And even if this were so, the express finding of zero actual damages would rebut the presumption as a matter of law.

Third, the Defendants respectfully submit that Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350, 354 (1991) impliedly overrules any South Carolina cases holding that a punitive damages award may be upheld on grounds that nominal damages may be presumed. There the court stated “punitive damages may be awarded *only* upon a finding of actual damages.” 305 S.C. at 111 (emphasis added). The court made no exception for nominal damages. And by using

the word “only,” the Gamble court left no room for argument that a nominal damages exception should be recognized.¹

Fourth, any attempt to award punitive damages based on implied nominal damages would be unconstitutional. Under the due process analysis mandated by BMW of North America v. Gore, 517 U.S. 559 (1996), Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991), and Mitchell v. Fortis, 385 S.C. 570, 686 S.E.2d 176 (2009), a trial court is required to make a post-trial review of all punitive damages to insure that the award does not violate the defendant’s due process rights. One of the critical factors the court must consider in this review is the ratio between the punitive damages awarded and the actual or potential harm suffered by the plaintiff. 385 S.C. at 588. Where no actual damages have been awarded and instead nominal damages are presumed, it is not possible to even identify the ratio. Even assuming *arguendo* that the court has discretion to presume nominal damages of one dollar, or two dollars, the resulting ratios would still be staggering. If “nominal damages” in this case are \$1.00, then the ratio is 60,000 to 1. If “nominal damages” are \$2, then the ratio would be 30,000 to 1.

Either ratio would be unconstitutional on its face. The United States Supreme Court has ruled that few awards exceeding a single digit ratio between actual and compensatory damages will satisfy due process:

We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

¹ To the extent the Plaintiff relies on Liberty Mut. Fire Ins. V. JT Walker Indus., 554 Fed. 176 (4th Cir. 2014) for the continued viability of the nominal damages cases, this unpublished decision is not precedent in South Carolina and, indeed, is not even precedent in the Fourth Circuit because it was not published.

State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

In Campbell the Court held that a 145 to 1 punitive to compensatory damages ratio violated due process. In Mitchell v. Fortis, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court held that a 13.9 to 1 ratio "exceeds due process limits." In Hollis v. Stonington Dev., LLC, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011), the court found a punitive actual ratio of 8.75 to 1 was excessive. Thus, there can be no doubt that, whatever amount is chosen to represent nominal damages, the resulting ratio would greatly exceed ratios that the United States Supreme Court, the South Carolina Supreme Court, and the Court of Appeals have already found to be excessive and violative of due process. Consequently, for the foregoing reasons, all South Carolina cases upholding punitive damages awards on grounds that nominal damages can be implied have been overruled by Gamble, Mitchell, and the United States Supreme Court decisions. The punitive damages awarded on the conversion count accordingly may not be upheld either on grounds that the Defendants waived their right to challenge the award, or that nominal damages may be implied.

III. THE DEFENSE MOTIONS WERE ALL TIMELY FILED

Incredibly, the Plaintiff contends that the Defendants' motion for judgment withstanding the verdict is untimely because the Defendant filed the written motion and brief on December 23, 2014, more than ten days from the December 12, 2014 jury verdict. This contention is meritless. First, defense counsel orally expressly renewed his prior directed verdict motions on December 12, 2014 following the jury verdict and added to the prior motions his new objection that punitive damages could not be awarded in the absence of actual damages on the conversion count. A motion for a directed verdict after the jury has returned a verdict is functionally a

motion for judgment notwithstanding the verdict. Hence the motion for judgment nov was timely made orally.

Second, while it is true that the written motion/brief was filed more than 10 days from the verdict, the Court expressly granted both parties permission to file post-trial briefs within 15 days of the verdict. Moreover, Plaintiff's counsel was the one who suggested a 15 day period:

THE COURT: Well, how much time-you know- I'm not...

MR. HAYNSWORTH: Fifteen days from now?

MR. ARIAIL: How about we say on or before December 31?

(T. at 7, lines 14-18). For the Plaintiff's counsel to propose a 15 day period to file briefs and then claim the Defendants' filing within this period was untimely is outrageous. The Plaintiff misled both defense counsel and the Court. The Plaintiff should be judicially estopped from even making this argument. Thus, there can be no credible argument that the motion for judgment notwithstanding the verdict was not timely filed.

Equally meritless is the Plaintiff's claim that the motion for attorney fees was not timely filed. The motion for attorney fees was likewise made within the time period expressly granted by the Court. Moreover, S.C. Code Ann. § 39-8-80 permits attorney fees to be awarded only to the prevailing party. Until the Court enters judgment notwithstanding the verdict for the Defendants on the trade secret claim, the Defendants are not the prevailing party, since the jury found for the Plaintiff on this count but awarded no damages. Hence, any argument that the motion for attorney fees was untimely is nonsense.

The punitive damages award accordingly cannot be upheld on grounds that the Defendants failed to timely file their motion for judgment notwithstanding the verdict. Nor may the other defense motions may denied on timeliness grounds.

IV. THE PUNITIVE DAMAGES AWARD MUST BE VACATED BECAUSE IT VIOLATES THE DEFENDANTS' DUE PROCESS RIGHTS

Because the punitive damages award on the conversion count must be vacated, the Court need not make the normal post-trial due process review of the award. Assuming *arguendo* that the jury had returned a small award of actual damages on the conversion count as well as the award of punitive damages, the punitive damages award would still have to be vacated because it is in flagrant violation of the Defendant's Due Process rights as guaranteed by the United States Constitution. In Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350, 354 (1991), the South Carolina Supreme Court directed trial courts to conduct a post-trial review of all punitive damages awards to insure that they comply with the Due Process Clause. The Gamble court identified the following eight factors that trial courts should consider in conducting this review:

Hereafter, to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in Haslip, "other factors" deemed appropriate.

305 S.C. at 111-12.

In BMW of North America v. Gore, 517 U.S. 559 (1996), the United States Supreme Court refined the due process analysis for reviewing punitive damages awards. Other Supreme Court decisions also addressed various aspects of this review. In 2009, in Mitchell v. Fortis, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court "updated" Gamble to incorporate these Supreme Court decisions. Gamble remains relevant "only insofar as it add

substance to the Gore guide-posts." 385 S.C. at 588. In this regard, however, the first four Gamble factors are included in the Gore reprehensibility analysis and need not be separately considered. 385 S.C. at 587 note 7.

Under Mitchell, a trial court reviewing a punitive damage award must first consider the degree of reprehensibility of the defendant's conduct:

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." Gore, 517 U.S. at 565, 116 S.Ct. 1589. "This principle reflects the view that some wrongs are more blame-worthy than others." Id. In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

385 S.C. at 587.

Second, as discussed above, the court must consider the ratio between the amount of punitive damages awarded and the actual or potential harm suffered by the plaintiff:

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." Gore, 517 U.S. at 580, 116 S.Ct. 1589. Although the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 538 U.S. at 425, 123 S.Ct. 1513. Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." Id. at 425-26, 123 S.Ct. 1513. With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive

damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay.... Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

385 S.C. at 587-88.

Third, the court must consider the difference between the punitive damages awarded by the jury and comparable civil penalties available:

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

385 S.C. at 588-89.

Applying the foregoing factors, the conclusion is inescapable that any award of punitive damages in this case is unsupported by the evidence and would violate the Defendants' right to due process.

The jury's verdict clearly establishes that the Defendants in no way are culpable because there was an award of \$0 actual damages. During their presentation of evidence, the Plaintiff solely based its conversion claim on the taking of CLE documents and 8 or 9 other documents submitted as exhibits for clients that Defendants did not do business for. The jury clearly decided that no damages should be awarded and in essence said that no documents were taken.

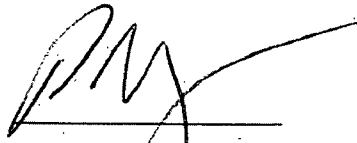
At trial, Defendants clearly showed and testified that they had no knowledge of the documents on their computers and Plaintiff's own expert testified that the files were hidden and in fact never accessed by Plaintiff. Therefore, Plaintiff's arguments regarding duration of the conduct and Defendants' concealment fail.

The jury clearly showed in their verdict form that they did not believe improper conduct took place or that there had been similar past conduct. The Plaintiff alleges that there was similar past conduct of misappropriation but no evidence at trial was presented showing any type of conduct of past misappropriation. In fact, the Plaintiff did not even show that the Defendants had in their possession the customer lists, letterhead templates, pricing information or other items which they improperly alleged were trade secrets.

It is important for the Court to note that the Defendants are a 2 person accounting firm. Plaintiff initiated this action out of malice toward Defendants and she brought these claims in an effort to run the Defendants out of business. The Court should take note that this whole litigation was an attempt to use the Trade Secrets Act in order to permanently enjoin the Defendants and it is clearly evident that there are no trade secrets in this case. Based upon Plaintiff's illegal and meritless behavior, Defendants have struggled to stay in business and they are still paying for all the expenses incurred to defend themselves from this baseless lawsuit. Clearly, Plaintiff's claim that affirming the punitive damages award will deter future conduct is inapplicable in this case because there is no conduct that warrants this type of action. Furthermore, Defendants have no ability to pay the punitive damages award because Plaintiff has used this action to run up their expenses and costs and to try to run them out of business.

CONCLUSION

For the reasons stated, the Defendants' motions for judgment notwithstanding the verdict must be granted. The Defendants' motion for an award of attorney fees must also be granted in an amount to be subsequently determined. The Plaintiff's request that judgment for the Plaintiff be entered on the punitive damages verdict must be denied.



R. Mills Ariail, Jr.
Law Office of R. Mills Ariail, Jr.
11 North Irvine St. Suite 11
Greenville, SC 29601
(864) 232-9390

ATTORNEY FOR DEFENDANTS

7

EXHIBIT 1

STATE OF SOUTH CAROLINA

)
) IN THE COURT OF COMMON PLEAS
)

COUNTY OF GREENVILLE)

McKinley, Cooper and
Company

Plaintiff,

vs.

J. Todd Highsmith, Shane
Highsmith and Highsmith LLC

Defendants.

VERDICT

2012-CP-23-4179

I. WE, THE JURY, FIND FOR THE PLAINTIFF:

~~ACTUAL DAMAGES~~

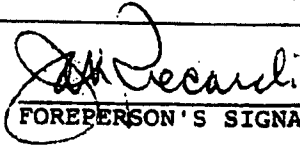
~~(\$) DOLLARS~~

~~PUNITIVE DAMAGES~~

~~(\$) DOLLARS~~

II. WE, THE JURY, FIND FOR THE DEFENDANTS.

~~If your verdict is for the Plaintiff, please state on what grounds:~~


FOREPERSON'S SIGNATURE

DATED:

12/12/14

WE THE JURY FIND FOR PLAINTIFF

1) Trade Secret Act

A) Actual damages \$ 0

Do you find a wilful violation?

Yes

No

2) Breach of fiduciary duty

A) Actual damages \$ 5,000⁰⁰

3) Conversion

A) Actual damages \$ 0

B) Punitive damages \$ 60,000⁰⁰

Is violation wilful?

Yes

No

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

)
) IN THE COURT OF COMMON PLEAS
)
)

J. Todd Highsmith

Third Party Plaintiff,

vs.

Toni McKinley & *McKinley*
Cooper + Company
Defendant.

VERDICT

2012CP-23-4179

THIRD PARTY COMPLAINT

1. WE, THE JURY, FIND FOR THE PLAINTIFF:

Zero 0 (\$) DOLLARS
ACTUAL DAMAGES

2. WE, THE JURY, FIND FOR THE DEFENDANT.

DATED: 12/12/14

[Signature]
FOREPERSON'S SIGNATURE

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

MCKINLEY, COOPER & COMPANY,
LLC,

PLAINTIFF,

-VS-

J. TODD HIGHSMITH, SHANE
HIGHSMITH AND HIGHSMITH &
HIGHSMITH, LLC,

DEFENDANTS.

)
)
)
)
)
)
)
)
)
)

2012-CP-23-4179

DECEMBER 12, 2014

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE C. VICTOR PYLE, JR., JUDGE

APPEARANCES:

KNOX HAYNSWORTH, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

MILLS ARIAIL, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

DANETTE P. HANKS
CIRCUIT COURT REPORTER

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1 **DECEMBER 12, 2014**

2 (WHEREUPON, court convened with all parties present
3 and the following proceedings were had.)

4 THE COURT: All right, gentlemen, I understand
5 we've got a verdict. Anything before I bring the jury?

6 MR. HAYNSWORTH: Nothing from the plaintiff,
7 Your Honor.

8 MR. ARIAIL: No, Your Honor.

9 THE COURT: Bring them on, please.

10 (WHEREUPON, the jury entered the open court at
11 approximately 2:28 p.m.)

12 THE COURT: Madam Foreman, have you reached a
13 verdict?

14 MADAM FOREMAN: Yes, we have.

15 THE COURT: Would you hand it to the bailiff,
16 please, ma'am.

17 All right. Please publish the verdicts.

18 THE CLERK: Your Honor, in the case of 2012-CP-
19 23-4179, McKinley, Cooper & Company versus J. Todd
20 Highsmith, Shane Highsmith, and Highsmith & Highsmith,
21 LLC. We, the jury, find for the defendants. We the jury
22 find for the plaintiff in the trade secret act. Do you
23 find this a wilful violation? No. Zero amount damages.
24 Number two, breach of fiduciary duty, actual damages
25 five thousand dollars.

1 Number three, conversion, punitive damages sixty
2 thousand dollars. Is this a wilful violation? Yes.

3 We the jury find for the plaintiff, zero damages, in
4 the third-party complaint.

5 All right. These are signed by, Ms. Riccardi, our
6 foreperson. Ladies and gentlemen, if you agree these are
7 the verdicts you reached in your deliberation room, would
8 you please raise your right hand. Thank you.

9 (WHEREUPON, all jurors raised their right hand.)

10 THE COURT: Anything further from the jury,
11 gentlemen?

12 MR. HAYNSWORTH: No, sir, Your Honor.

13 MR. ARIAIL: No, Your Honor.

14 THE COURT: Ms. Segars, you can come back and
15 take your place with the jury now.

16 Ladies and gentlemen, this, of course, will conclude
17 your service, not only on this case but for the week.
18 And I want to take this opportunity to thank you for
19 coming and serving. I know that it's a burden to you to
20 take time off from your jobs and families and spend it
21 with us on jury duty. But I do hope you understand the
22 importance of being here this week and working on this
23 case. I know one thing for sure, and that is that if you
24 found yourselves in this courtroom involved in some type
25 case, surely you would want a fair and impartial jury to

1 serve on your case. And I believe you have been a good,
2 fair jury this week. And I thank you very much for your
3 service. I think if you'll report downstairs to the jury
4 room, Judy will have a check for your service this week.

5 You know, I have one thing that I want to say before
6 dismissing you. In most cases that I try, I always learn
7 something. And I have learned something from this case.
8 From the testimony of the two expert witnesses, I now
9 know what a Geek really is.

10 All right. If you'll report downstairs to the jury
11 room, they'll take care of you. Thank you so much. I
12 enjoyed working with you.

13 (WHEREUPON, the jury exited the open court at
14 approximately 2:33 p.m.)

15 THE COURT: All right. Any motions, gentlemen?

16 MR. ARIAIL: Your Honor, I didn't understand
17 the verdict. If I could see the verdict form?

18 THE COURT: Yes, you can look at it. Sure.

19 MR. ARIAIL: I thought they said we found for
20 ...

21 Your Honor, my first question, and I need to
22 research this, and I would ask for -- first off, I'll
23 renew my motions. But if they found a conversion of zero
24 actual damages, but punitive of sixty thousand dollars, I
25 don't know if they can have the sixty thousand on the

1 punitives if ---

2 THE COURT: How about that, Mr. Haynsworth?

3 MR. HAYNSWORTH: Well, Your Honor, I think
4 they've got a finding of actual damages on ...

5 MR. ARIAIL: Actual damages of zero for the
6 conversion claim, which is directly related to that.
7 That's why you put the punitive provision in there just
8 for that claim.

9 MR. HAYNSWORTH: Yeah, Judge, I think finding a
10 recovery of actual damages in a case supports a recovery
11 of punitive damages.

12 THE COURT: Well, I'll give you ten days to do
13 some research. But it's a civil action with a finding of
14 punitive damages, which I'm not sure can stand. Had it
15 been on the conversion or on the trade secret, clearly,
16 but on a contract case, I'm not sure that you're
17 entitled. But on a breach of contract case accompanied
18 by a fraudulent act -- but I don't know in this case
19 there was a fraudulent act -- punitive damages are
20 recoverable.

21 MR. ARIAIL: I think it would be your standard
22 contract ---

23 THE COURT: But anyway, I'll give you ten days
24 to see what you can come up with.

25 MR. ARIAIL: Okay. Your Honor, can I get a

1 copy of those?

2 THE COURT: Sure.

3 MR. ARIAIL: Thank you.

4 MR. HAYNSWORTH: Just submit briefs to you,

5 Judge, on ---

6 THE COURT: That'll be fine.

7 MR. ARIAIL: Ten days, I'm going to calculate

8 it to ---

9 MR. HAYNSWORTH: Why don't we start that on

10 Monday?

11 THE COURT: That's fine.

12 MR. ARIAIL: If you don't mind? How about we

13 agree -- well, then we run into Christmas Eve.

14 THE COURT: Well, how much time -- you know,

15 I'm not ...

16 MR. HAYNSWORTH: Fifteen days from now?

17 MR. ARIAIL: How about we say on or before

18 December 31st? That'll give me a date that I can put in

19 my mind.

20 THE COURT: That's fine.

21 MR. ARIAIL: Because I've got a full week of

22 court next week and the next week is going to be

23 Christmas, so let's say December 31st.

24 THE COURT: That's fine.

25 MR. HAYNSWORTH: And I'm trying to think here,

1 let's see, I ...

2 THE COURT: Mary, give them both copies of both
3 verdicts.

4 THE CLERK: Yes, sir, I am.

5 MR. HAYNSWORTH: I'm just trying to remember
6 now, Your Honor. I know the claim for attorneys' fees on
7 a trade secret theft statute won't fly because they found
8 it was not wilful. I'm trying to recall whether I
9 claimed or am entitled to attorneys' fees on the other
10 two. I don't know ---

11 MR. ARIAIL: There were no attorney fees that
12 are eligible under those two.

13 THE COURT: Well, you can give it some thought
14 and see what you can come up with.

15 MR. ARIAIL: I appreciate it. Thank you. Had
16 a wonderful time trying the case with you, Judge.

17 MR. HAYNSWORTH: Yeah. Thank you, Your Honor.

18 THE COURT: All right. Gentlemen, I'm going to
19 say, and for both parties involved in this case, it's not
20 often that I try a case where I have two lawyers who have
21 done a better job. I mean, they have -- all the research
22 they've done. They both did beautiful jobs trying the
23 case. And I commend both of you for your trial in this
24 case. I think you're outstanding -- I consider young
25 lawyers.

1 MR. ARIAIL: Thank you, Judge.

2 MR. HAYNSWORTH: Thank you, Your Honor.

3 MR. ARIAIL: I'm only here because you helped
4 me get in law school, I can tell you that.

5

6 (END OF REQUESTED TRANSCRIPT OF RECORD)

CERTIFICATE OF REPORTER

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I, the undersigned Danette P. Hanks, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 8th day of December, 2014.

11

12

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

13

14

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

15

16

17

18

19

20

December 18, 2014

Circuit Court Reporter

EXHIBIT 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
McKinley, Cooper and	)	
Company,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	AFFIDAVIT OF R. MILLS ARIAIL, JR.
	)	
J. Todd Highsmith, Shane	)	
Highsmith, and Highsmith, LLC,	)	
	)	
Defendants.	)	

1. I am over the age of 21 and am competent to be a witness in this action.
2. I make this affidavit in support of the Defendants' Opposition to Plaintiff's Request for Punitive Damages and Reply to Plaintiff's Memorandum.
3. I am the attorney of record for the Defendants in this action and was present in Courtroom 2 when the jury returned the verdict in this case. I am also familiar with the layout of the courthouse and, particularly, the secure hallway and stairway behind this courtroom which houses includes the Judge offices.
4. At the request of the Honorable C. Victor Pyle, I co-drafted in conjunction with Plaintiff's counsel page 2 of the Verdict Form submitted to the jury. We both agreed to the layout for page 2 of the verdict form submitted to the jury. Plaintiff's counsel did not object to page 2 of the verdict form and, in particular, did not object to the absence of a blank for punitive damages under the breach of fiduciary duty count. In fact, during our discussion of the verdict form, he acknowledged that a blank for punitive damages for the breach of fiduciary duty count should not be included.

5. After the verdict, the jury had exited the courtroom and was standing in the secure hallway behind the courtroom on the 2nd floor of the courthouse at the time I made my objection to the punitive damages award. I began making my objection as soon as the last member of the jury left the courtroom and as soon as the door to the secure hallway had closed. This hallway and the stairs are on the 2nd floor of the courthouse and the jury must walk down the hallway and take the stairs to the jury room on the 1st floor of the courthouse. The 2nd floor hallway and the stairs are secure areas where members of the public are not permitted. Consequently, the jury could not have been subjected to questions from reporters or other members of the public. While in the hallway and the stairs, the jury remained an undispersed unit with no opportunity to discuss the case with others.

6. I relied on the 15 day extension proposed by Plaintiff's counsel and ordered by the Court with respect to the filing of the Defendants' written post-trial motion and brief. Had counsel not proposed for 15 days to file briefs, I would have filed the brief within 10 days of the verdict.

I solemnly affirm on personal knowledge and under penalties of perjury that the foregoing statements are true.



R. Mills Ariail, Jr.
Law Office of R. Mills Ariail, Jr.
11 North Irvine St. Suite 11
Greenville, SC 29601
(864) 232-9390

ATTORNEY FOR DEFENDANTS

Date: January 9, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
McKinley, Cooper and	)	
Company,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	AFFIDAVIT OF R. MILLS ARIAIL, JR.
	)	
J. Todd Highsmith, Shane	)	
Highsmith, and Highsmith, LLC,	)	
	)	
Defendants.	)	

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2. I make this affidavit in support of the Defendants' Opposition to Plaintiff's Request for Punitive Damages and Reply to Plaintiff's Memorandum.
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6. I relied on the 15 day extension proposed by Plaintiff's counsel and ordered by the Court with respect to the filing of the Defendants' written post-trial motion and brief. Had counsel not proposed for 15 days to file briefs, I would have filed the brief within 10 days of the verdict.

I solemnly affirm on personal knowledge and under penalties of perjury that the foregoing statements are true.



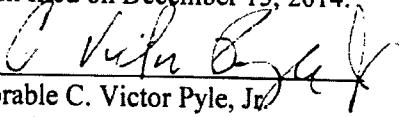
R. Mills Ariail, Jr.
Law Office of R. Mills Ariail, Jr.
11 North Irvine St. Suite 11
Greenville, SC 29601
(864) 232-9390

ATTORNEY FOR DEFENDANTS

Date: January 9, 2015

Through this Motion and Consent Order, the Parties request that the Verdict Form attached as Exhibit A be substituted for and replace the certified verdict form because it is a true and accurate copy of the jury's verdict.

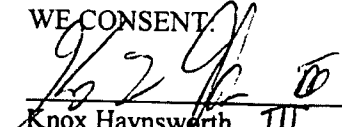
Based upon this Motion and Consent Order, this Honorable Court Orders that the attached verdict form is a true and accurate copy of the jury's verdict in this matter and that it be substituted for and replace the certified verdict form filed on December 15, 2014.


Honorable C. Victor Pyle, Jr.
Judge of the Thirteenth Judicial Circuit

Greenville, SC

Date: 12/1/15

WE CONSENT.


Knox Haynsworth III
Attorney for Plaintiff
and Third Party Defendant

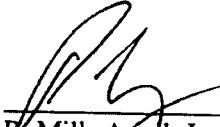

R. Mills Ariall, Jr.
Attorney for Defendants
And Third Party Plaintiff

Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE)

McKinley, Cooper and
Company

Plaintiff,

vs.

J. Todd Highsmith, Shane
Highsmith and Highsmith LLC

Defendants.

) IN THE COURT OF COMMON PLEAS
)

VERDICT

2012-CP-23-4179

I. WE, THE JURY, FIND FOR THE PLAINTIFF:

~~ACTUAL DAMAGES~~

~~(\$~~

~~) DOLLARS~~

~~PUNITIVE DAMAGES~~

~~(\$~~

~~) DOLLARS~~

II. WE, THE JURY, FIND FOR THE DEFENDANTS.

~~If your verdict is for the Plaintiff, please state on what grounds:~~

DATED:

12/12/14

John Pecardi
FOREPERSON'S SIGNATURE

WE THE JURY FIND FOR PLAINTIFF

1) Trade Secret Act

A) Actual damages \$ 0

Do you find a wilful violation?

Yes

No

2) Breach of fiduciary duty

A) Actual damages \$ 5,000⁰⁰

3) Conversion

A) Actual damages \$ 0

B) Punitive damages \$ 60,000⁰⁰

Is violation wilful?

Yes

No

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

J. Todd Highsmith

Third Party Plaintiff,

vs.

Toni McKinley + McKinley,
Casper + Company
Defendant.

IN THE COURT OF COMMON PLEAS

VERDICT

2012CP-23-4179

THIRD PARTY COMPLAINT

1. WE, THE JURY, FIND FOR THE PLAINTIFF:

Zero (S) DOLLARS

2. WE, THE JURY, FIND FOR THE DEFENDANT.

DATED:

12/12/14

[Signature]
FOREPERSON'S SIGNATURE

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2015 JAN 21 PM 4 04

CASE NO.: 2012-CP-23-4179

McKinley, Cooper & Company, LLC

Plaintiff,

vs.

J. Todd Highsmith, et. al.

Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Knox L. Haynsworth, III, Bar No. _____

Address:

106 Williams Street
Greenville, SC 29601

Phone: _____ Fax _____

E-mail: _____ Other: _____

Defendant's Attorney:

R. Mills Ariail, Jr., Bar No. 15584

Address:

11 N. Irvine Street, Suite 11
Greenville, SC 29601

Phone: 864-232-9390 Fax 864-232-9392

E-mail: denise@rmalawoffice.com Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: N/A

Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

1/21/2015
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: CUN

Date Filed: _____

☐ MOTION FEE COLLECTED: \$ N/A

☐ CONTESTED - AMOUNT DUE: \$ _____

FILED-CLERK OF COURT

GREENVILLE CO. S.C.

STATE OF SOUTH CAROLINA **JUDGMENT IN A CIVIL CASE**

COUNTY OF GREENVILLE 2015 JAN 21 PM 4 04 CASE NO: 2012CP2304179

IN THE COURT OF COMMON PLEAS

McKinley Cooper & Company LLC vs. J Todd Highsmith

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

NOTICE

This is a notice to you that a Consent Motion and Order to Substitute and Replace the Certified Verdict Form in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to cnoblitt@greenvillecounty.org. If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this 21st day of January, 2015.

Court Reporter:

Knox L. Haynsworth III Brown Massey Evans
McLeod & Haynsworth P.O. Box 2464 Greenville,
SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

PRESIDING JUDGE -

GAVE HARD COPY AT COUNTER:
R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA - CLERK OF COURT
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2012CP2304179

2015 FEB 25 AM 11 07

McKinley Cooper & Company LLC vs. J Todd Highsmith

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Sealed); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court;

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 25th day of February, 2015, and a copy mailed first class this 25th day of February, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Knox L. Haynsworth III Brown Massey Evans
McLeod & Haynsworth P.O. Box 2464 Greenville,
SC 29602

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

CPFORM4M
SCCA SCRPC Form 4 Revised 06/2008

No. 0131 P. 11

Feb. 25, 2015 1:48PM GREENVILLE CO CLERK OF COURTS

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

IN THE COURT OF COMMON PLEAS

Mckinley Cooper & Co., LLC, 2015 FEB 25 AM 11 07A. No. 2012-CP-23-4179

Plaintiff,

v.

J. Todd Highsmith, Shane Highsmith,
and Highsmith, LLC,
Defendants.

ORDER

This matter comes before the Court on Defendant's post-trial Motion for Judgment Notwithstanding the Verdict made pursuant to Rule 50(b), SCRPC. This civil action was tried to a jury verdict on December 12, 2014 before the Honorable C. Victor Pyle, Jr. The jury awarded Plaintiff \$5,000.00 in actual damages and \$60,000.00 in punitive damages. Both parties were permitted to file written briefs and additional motions. Defendant renewed its Motion for Judgment Notwithstanding the Verdict and additionally submitted a Motion for Attorney's Fees.

Knox L. Haynsworth, III, Esquire represented the Plaintiff, and R. Mills Ariail, Jr., Esquire represented all Defendants. For the following reasons, this Court denies Defendant's Motions; reforms the jury verdict form to reflect the jury's clearly manifested intent; and conducts a punitive damages review in accordance with Mitchell v. Fortis Ins. Co., 385 S.C. 466, 686 S.E.2d 176 (2009). Upon review, this Court reduces the jury's punitive damages award to \$30,000.00.

Law and Analysis

I. Motion for Judgment Notwithstanding the Verdict.

In ruling on a motion for judgment notwithstanding the verdict (JNOV), the trial court must view the evidence, and all inferences that can reasonably be drawn from the evidence, in a

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GREENVILLE CO. CLERK OF COURTS

FEB. 25, 2015 1:47PM

light most favorable to the non-moving party. Cody P. v. Bank of America, N.A., 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011). A motion for judgment notwithstanding the verdict may be granted only if no reasonable jury could have reached the challenged verdict. Gause v. Smithers, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013).

In South Carolina, a court must uphold a jury verdict if it is possible to reconcile its various features and achieve the jury's intent. Camden v. Hilton, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004); see also Sapp v. Wheeler, 402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013). In order to achieve this objective, the trial judge may, in exceptional circumstances, reform a jury's verdict to carry into effect the jury's clear intention. Vinson v. Hartley, 324 S.C. 389, 406-07, 477 S.E.2d 715, 724 (Ct. App. 1996).

The court's power to reform extends only to changes in form, rather than changes in substance. Id. See also 89 C.J.S. Trial § 1074 (West, 2015). The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs. Vinson, 324 S.C. at 406, 477 S.E.2d at 724. After the reformation is complete, the verdict must reflect the jury's clear and definitely manifested intention. Id.

In this case, the jury found that Defendants did not violate the South Carolina Trade Secret Act. The jury further found that Defendants breached their fiduciary duty to Plaintiff and that Defendants had unlawfully converted Plaintiff's property to their own use.

However, the jury was provided with a verdict form that did not clearly address the question of damages.¹ There are multiple places where an award of actual damages might be placed. Furthermore, while there were two claims brought by the Plaintiff which could have permitted an award of punitive damages, only one place was provided on the verdict form for such an award.

¹ The completed verdict form used in this case is attached to this Order.

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In spite of these complexities, the jury clearly used one of the spaces to enter an actual damages award of \$5,000.00. The jury further used another space to enter an punitive damages award of \$60,000.00. This Court finds that these two figures are compelling proof of the jury's clear intent to return a total award of \$65,000.00.

Therefore, this Court orders that the jury verdict form be reformed in the following manner. First, the jury's findings as to whether Plaintiff successfully met its burden of proving its causes of actions shall read as follows:

WE, THE JURY, FIND FOR PLAINTIFF AS FOLLOWS:

1. Trade Secret Act:

a. Did Plaintiff prove a cause of action for violation of the South Carolina Trade Secret Act?

b. Did Plaintiff prove a willful violation?

2. Breach of Fiduciary Duty:

a. Did Plaintiff prove a cause of action for breach of fiduciary duty?

3. Conversion:

a. Did Plaintiff prove a cause of action for conversion?

b. Did Plaintiff prove a willful violation?

Jury Response:

No

No

Yes

Yes

Yes

Additionally, the jury's findings on damages shall be moved to a separate and additional section on the verdict form, and shall read as follows:

4. Damages:

a. Actual Damages:

\$5,000.00

b. Punitive Damages:

\$60,000.00

This Court finds that such a reformation is necessary and appropriate; such that the jury's clearly manifested intent may be achieved.

II. Judicial Review of the Jury's Punitive Damage Award.

Where punitive damages are awarded, the Court must conduct a post-trial review of the award to ensure that the Due Process Clause has not been violated. Mitchell v. Fortis Inc. Co.,

#301
Feb. 25, 2015 1:47PM GREENVILLE CO CLERK OF COURTS

No. 0131 P. 4

385 S.C. 570, 587–88, 686 S.E.2d 176, 185–86 (2009) (discussing U.S. Const. amend. XIV). To conduct this review a trial court must consider (1) the reprehensibility of the conduct, (2) the ratio of punitive to actual damages, and (3) the existence and amounts of comparative penalty awards. *Id.* These three considerations encompass all of the factors articulated by the United States Supreme Court and the South Carolina Supreme Court for consideration in the due process review. *Id.* (categorizing on all factors articulated in BMW of N. Am. V. Gore, 517 U.S. 559 (1996) and Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 727 (1991) within the required three-part punitive damage review). There must be an award of actual or nominal damages for a verdict of punitive damages to be supported. McGee v. Bruce Hosp. System, 344 S.C. 466, 471, 545 S.E.2d 286, 288 (2001).

A. Reprehensibility.

When evaluating the reprehensibility of a defendant's conduct, the court should consider the following factors:

- (1) Whether the harm caused was physical as opposed to economic;
- (2) Whether the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others;
- (3) Whether the target of the conduct had financial vulnerability;
- (4) Whether the conduct involved repeated actions or was an isolated incident; and
- (5) Whether the harm was the result of intentional malice, trickery, or deceit, rather than a mere accident.

Mitchell, 385 S.C. at 587–88, 686 S.E.2d at 185–86. Reprehensibility is “perhaps the most important indicium of the reasonableness of a punitive damages award. Gore, 517 U.S. at 565.

Each case, when considered under the factors listed above, can lead to a different conclusion about the reprehensibility of particular conduct. For example, in Austin v. Stokes-Craven Holding Corp., the Supreme Court of South Carolina found an extremely high degree of reprehensibility, even though the plaintiff's harm was purely economic, because the plaintiff

#4
C.M.

demonstrated a variety of dishonest business practices and a pattern of non-disclosures in the defendant's dealings with financially vulnerable customers. 387 S.C. 22, 53, 691 S.E.2d 135, 151 (2010).

In this case, the Court finds that the reprehensibility of Defendants' conduct merits an award of punitive damages. Defendants used Plaintiff's forms, templates, proposals, documents, educational materials, and resources to form their own competing business. The Highsmiths relied on Plaintiff's technology to generate a business plan. The Highsmiths used Plaintiff's CPA registration number on invoices billed to Highsmith, LLC. Most reprehensible is the fact that Plaintiff's owner was often times absent and undergoing chemotherapy treatment during the times when Defendants began to conduct these activities. While the harm experienced in this case was economic, it was caused by repeated actions resulting from Defendants' trickery and deceit. Therefore, the award of punitive damages was properly made.

B. Ratio.

Courts have been reluctant to set firm numerical requirements for awards of punitive damages—rather, review of punitive damage awards has been conducted on a case-by-case basis.

In this analysis, courts may consider:

- (1) The likelihood that the award will deter the defendant from like conduct;
- (2) Whether the award is reasonably related to the harm likely to result from such conduct; and
- (3) The defendant's ability to pay.

Mitchell, 385 S.C. at 587–88, 686 S.E.2d at 185–86. In addition to these factors, it has been noted several times that permissible ratios of damages will rarely exceed the single digits. See Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 170, 604 S.E.2d 385, 392–93 (2004). However, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, where a highly egregious act has only resulted in minimal actual damages.

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E.g., BMW of N. America v. Gore, 517 U.S. 559, 582 (1996). Conversely, substantial awards of actual damages can lead to a lesser ratio for acceptable punitive damage awards. State Farm v. Campbell, 538 U.S. 408, 425 (2003). Finally, it is appropriate to consider the amount of potential or future harm that could be suffered from particular conduct when establishing a ratio for consideration. E.g., Mitchell, 385 S.C. at 587-88, 686 S.E.2d at 185-86.

In this case, the reformed verdict provides for \$5,000.00 in actual damages and \$60,000.00 in punitive damages—a ratio of 1:12. Under McGee, this Court finds that such an award of punitive damages exceeds constitutionally permissible boundaries. A ratio of 1:6 would more appropriately punish the behavior at issue and comply with constitutional protections. Therefore, this Court hereby reduces the jury's punitive damage award from \$60,000.00 to \$30,000.00, in order for the award to comply with the Due Process Clause.

C. Comparative Penalty Awards.

The Court should consider comparative penalty awards in the form of comparable cases and potential civil penalties imposed. Mitchell, 385 S.C. at 588-89, 686 S.E.2d at 186. Comparable cases include those which involve a similar type of harm suffered, a similar degree of reprehensible conduct, the ratio of punitive to actual damage awards, the size of the award, and any other factors the court may deem relevant. Id. For example, in Cody P. v. Bank of America, the jury returned a verdict of actual and punitive damages where the defendant failed to properly safeguard the plaintiff's money. The ratio of actual and punitive damages was 1:6.23, and the harm was purely economic. 395 S.C. at 620, 720 S.E.2d at 478. Where juries award punitive damages based on a claim for conversion, South Carolina courts have upheld a punitive damage award with ratios close to 1:6 or 1:7. See Harris v. Burnside, 261 S.C. 190, 197, 199 S.E.2d 65, 69 (1973).

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CMA

Plaintiff argues that the Court consider potential civil penalties which may be imposed through state regulatory agencies. Such a comparison has been used in past cases reviewing punitive damage awards. See Hollis v. Stonington Dev., LLC, 394 S.C. 383, 403 714 S.E.2d 904, 914 (Ct. App. 2011). In this case, the appropriate state authority is the South Carolina Board of Accountancy pursuant to S.C. Code Ann. § 40-2-10 (2014). In addition to revoking a CPA license, the Board is also authorized to impose a fine not exceeding \$10,000.00 per violation on a licensee. Unlike Cody P., where no civil penalties were authorized, this Court finds that the Board of Accountancy's penalties are relevant considerations in this third prong of punitive damages review. At trial, Plaintiff proved that Defendants had wrongfully used Plaintiff's CPA registration number at least three times during the course of their illicit conduct. Therefore, the Court considers that the Board of Accountancy could, if it so chose, impose a fine of at least \$30,000.00 upon Defendants.

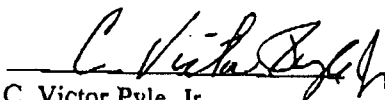
In light of these considerations, this Court finds that an award of punitive damages in the amount of \$30,000.00 appropriately penalizes the Defendants' reprehensible conduct in this case.

Conclusion

Therefore, this Court denies Defendant's Motions; reforms the jury verdict form to reflect the jury's clearly manifested intent; and reduces the jury's punitive damages award to \$30,000.00.

IT IS SO ORDERED.

February 25, 2015
Greenville, SC


C. Victor Pyle, Jr.
Circuit Court Judge

#7

STATE OF SOUTH CAROLINA

)
) IN THE COURT OF COMMON PLEAS
)

COUNTY OF GREENVILLE)

McKinley, Cooper and
Company

)
)
) Plaintiff,
)

VERDICT

2012-CP-23-4179

)
) vs.
)

) J. Todd Highsmith, Shane
) Highsmith and Highsmith LLC
)

)
) Defendants.
)
)

I. WE, THE JURY, FIND FOR THE PLAINTIFF:

~~ACTUAL DAMAGES~~ _____ (\$ _____) DOLLARS

~~PUNITIVE DAMAGES~~ _____ (\$ _____) DOLLARS

II. WE, THE JURY, FIND FOR THE DEFENDANTS.

~~If your verdict is for the Plaintiff, please state on what grounds:~~

John Recanti
FOREPERSON'S SIGNATURE

DATED: 12/12/14

8
CPL

WE THE JURY FIND FOR PLAINTIFF

1) Trade Secret Act

A) Actual damages \$ 0

Do you find a wilful violation?

Yes

No

2) Breach of fiduciary duty

A) Actual damages \$ 5,000⁰⁰

3) Conversion

A) Actual damages \$ 0

B) Punitive damages \$ 60,000⁰⁰

Is violation wilful?

Yes

No

9
CPL

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-23-4179

McKinley, Cooper & Company, LLC

Plaintiff,

vs.

J. Todd Highsmith, et. al.

Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Knox L. Haynsworth, III, Bar No. _____ Address: 106 Williams Street Greenville, SC 29601 Phone: _____ Fax _____ E-mail: _____ Other: _____		Defendant's Attorney: R. Mills Ariall, Jr., Bar No. 15584 Address: 11 N. Irvine Street, Suite 11 Greenville, SC 29601 Phone: 864-232-9390 Fax 864-232-9392 E-mail: denise@rmalawoffice.com Other: _____	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: _____		Estimated Time Needed: _____	
		Court Reporter Needed: ☐ YES / ☐ NO	
SECTION II: Motion/Order Type			
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff / ☒ Defendant		Date submitted	
<i>Mills Ariall</i>		<i>3/3/15</i>	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ _____			
☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
McKinley, Cooper and)
Company,)
Plaintiff,)
vs.)
J. Todd Highsmith, Shane)
Highsmith, and Highsmith, LLC,)
Defendants.)

IN THE COURT OF COMMON PLEAS

**NOTICE OF MOTION AND
MOTION TO RECONSIDER
ORDER OF FEBRUARY 25, 2015**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 FEB 4 PM 4:45

TO: KNOX HAYNSWORTH, ESQUIRE, ATTORNEY FOR PLAINTIFF,

PLEASE TAKE NOTICE that the Defendants by and through their undersigned attorney and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure move this Honorable Court for an Order to reconsider, alter and amend and/or withdraw the Court's Order February 25, 2015. Defendants received a copy of the Order on February 25, 2015. This motion is based on the laws, statutes and Rules of Civil Procedure of this State and on the following grounds:

1. A party seeking amendment of a verdict must lay a proper foundation by a motion for a new trial. *Anderson v. Aetna Casualty & Sur. Co.*, 175 S.C. 254, 178 S.E. 819 (1934). An objection that damages are inadequate must be raised in a motion for a new trial or the objection is waived and cannot be argued on appeal. *Id.* Although the court may amend a verdict, the amendment must be accompanied with an option of a new trial nisi to the party against whom the amendment militates. *Id.* The trial court's authority to correct, modify, or interfere with the jury's verdict is embraced in and limited to the power to grant

new trials. *Id.* The court may grant or refuse a new trial or, in a proper case, may grant a new trial nisi, but should do one thing or the other. *Id.* For the court to amend a verdict without an accompanying option of a new trial nisi to the party against whom the amendment operates adversely amounts to an invasion of the province of the jury. *Id.* "The law rather forbids this court assuming to take upon itself the powers, duties, rights, and privileges of a jury." *Id.* at 282, 178 S.E. at 829-30. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). There was no motion for a new trial and this Honorable Court did not give the Defendants an option of electing a new trial.

2. The Order as drafted does not link the damages to either the conversion or breach of fiduciary duty cause of action. Rather, the verdict says the Plaintiff prevailed on both causes of action but the damages are apparently the same for both. This is not consistent with what the jury decided in this matter and creates a potential problem on appeal because there has been no determination as which cause of action the jury found for the Plaintiff.

3. The jury expressly returned zero damages on the conversion cause of action. The Order has completely changed the verdict and the jury's decision by now saying that the jury intended to award \$5000.00. This is clearly a substantive change to the verdict, not merely a change in form.

Furthermore, the Court's reformation of the verdict and conclusion that the jury found that there was a "willful violation" in regards to the conversion claim is unfounded. In fact, Defendants' counsel informed the Court prior to the submission of the verdict form to the jury that the verdict form was incorrect and the notation "Is violation willful? Yes No" at the bottom of Page 2 of the Verdict form should have been included on the 3rd page

of the Verdict form under Defendant's Wage Payment Claim against Plaintiff and Toni McKinley. This Honorable Court denied Defendants' request to correct the verdict form before submission to the jury.

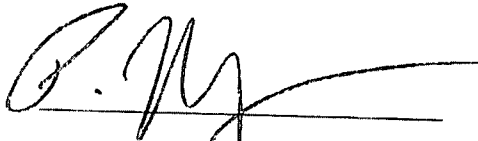
4. The Order as drafted conducts a post trial review of punitive damages without identifying the cause of action on which compensatory damages was awarded. The court mentioned only conversion in its opinion and gave no comparable damages for breach of fiduciary duty.

5. The Order as drafted fails to incorporate that Plaintiff did not object to the verdict form at trial. There was no objection to the verdict form by the Plaintiff so this should not be a basis or grounds in the Order. Therefore, it was improper to conclude that that jury used the blank underneath the conversion cause of action because there was no blank under the breach of fiduciary duty cause of action. Plaintiff's counsel had no objection to the Verdict form and also helped draft it before submission to the jury.

6. The Order as drafted contains factual findings which were not a part of the evidence or record at trial. No evidence was submitted by Plaintiff to show that Defendants wrongfully "used Plaintiff's CPA registration number on invoices billed to Highsmith, LLC" and did it "during the course of their illicit conduct." The Court also states that "Plaintiff proved that Defendants had wrongfully used Plaintiff's CPA registration number at least three times during the course of their illicit conduct." There was no evidence submitted by Plaintiff showing that Plaintiff's CPA registration was used by any of the Defendants on the invoices. In fact, none of the invoices submitted by Plaintiff during trial contained any of this information.

7. The Order as drafted contains factual findings regarding the Board of Accountancy being able to impose a fine which were not submitted as evidence during the trial and should not be included in the Order.

This motion is supported by the laws, statutes, and Rules of Civil Procedure of this State, and by such further legal memoranda or supporting materials as may be accepted by the Court. Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, no consultation with opposing counsel is required prior to the filing of the instant motion and/or would serve no useful purpose.



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OF COUNSEL
C. Vincent Brown

December 31, 2014

Via Hand Delivery

The Honorable Paul B. Wickensimer
Greenville County Clerk of Court
Greenville County Courthouse
305 E. North Street
Greenville, SC 29601

Re: *McKinley, Cooper & Company, LLC vs. J. Todd Highsmith, Shane Highsmith and Highsmith & Highsmith, LLC and J. Todd Highsmith, Third Party Plaintiff vs. Toni McKinley, individually, Third Party Defendant*
C.A. No.: 2012-CP-23-4179

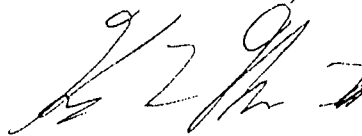
Dear Mr. Wickensimer:

Enclosed please find the original and one copy of Plaintiff's Memorandum in Support of Recovery of Punitive Damages and in Opposition to Defendants' Motion for JNOV and Motion for Attorney's fees in the above matter. I would appreciate your filing the original of our motion and returning a clocked copy via our courier. By copy of this letter, I am serving a copy of our memo on Mills Ariail as attorney for Defendants as well as providing a copy directly to Judge Pyle for his consideration.

Thank you for your assistance in this regard.

Sincerely,

**BROWN, MASSEY, EVANS, McLEOD
& HAYNSWORTH, LLC**



Knox L. Haynsworth, III

KLH/lab
Enclosure

cc: The Honorable C. Victor Pyle, Jr. via email and U.S. Mail
Robert Mills Ariail, Jr., Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2012-CP-23-4179
	)	
McKinley, Cooper & Company, LLC	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	PLAINTIFF'S MEMORANDUM IN SUPPORT
J. Todd Highsmith, Shane Highsmith	)	OF RECOVERY OF PUNITIVE DAMAGES
and Highsmith & Highsmith, LLC	)	AND IN OPPOSITION TO DEFENDANTS'
	)	MOTION FOR JNOV AND ATTORNEY FEES
Defendants,	)	
	)	
And	)	
	)	
J. Todd Highsmith ,	)	
	)	
Third Party Plaintiff,	)	
	)	
vs.	)	
	)	
Toni McKinley, individually,	)	
	)	
Third Party Defendant.	)	

I. INTENTION OF THE JURY

After a week long trial, a unanimous jury awarded Plaintiff both actual and punitive damages against Defendants, such jury having been fully charged by the trial judge relative to the applicable law regarding punitive damages, actual damages, proximate cause, and the like. Of paramount importance in the analysis is to determine the jury's intent regarding their verdict and Plaintiff respectfully submits the evidence adduced at trial is clear, crystal clear, that the jury intended to award McKinley, Cooper damages, both actual and punitive, against Defendants based upon the totality of evidence presented at trial.

To determine the jury's intent in an ambiguous verdict, the court should consider the entire proceedings, focusing on the events and circumstances that reasonably indicate what the jury intended.

See Durst v. S. Ry. Co., 161 S.C. 498, 506, 159 S.E. 844, 848 (1931) (stating "the construction of a verdict should, and can, depend upon, not only the language used by the jury, but other things occurring in the trial may be, and should be, properly regarded in determining what a jury intended to find"); *Howard v. Kirton*, 144 S.C. 89, 101, 142 S.E. 39, 43 (1928) (stating it is "the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it was his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial"); *see also* 75B Am.Jur.2d *Trial* § 1545 (2007) ("In the interpretation of an ambiguous verdict, the court may make use of anything in the proceedings that serves to show with certainty what the jury intended, and, for this purpose, reference may be had, for example, to the pleadings, the evidence, the admissions of the parties, the instructions, or the forms of verdict submitted.")

"It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct.App.2003). In fulfilling this duty, the Court may not substitute its judgment for that of the jury. *See Lorick*, 153 S.C. at 319, 150 S.E. at 792 (stating the court has a right to give "effect to what the jury unmistakably found" but cannot "invade the province of the jury").

In *Bethea v. Western Union Telegraph Co.*, 97 S.C. 385, 81 S.E. 675, 676, which was an action to recover actual and punitive damages for delay in the delivery of a telegram informing plaintiff of the serious illness of his brother, the jury returned a verdict for punitive damages only in the sum of \$250.00. Defendant made a motion for a new trial on the ground that the verdict showed that no actual damages had been sustained. The motion was overruled by the trial Judge. On appeal to this Court, the judgment was sustained upon two grounds: (1) That the verdict contained an implied finding of actual damages nominal in amount and not so substantial as to require expression in the verdict. It was stated,

however, that if there had been no testimony tending to prove some actual damages, even though nominal, the verdict for punitive damages alone would not have been proper.

It is abundantly clear on the record in the present case that the jury received testimony that McKinley, Cooper sustained damage by virtue of the conduct of the Defendants. With regard to the verdict form, the jury attempted to follow the trial judge's instructions and, to the extent they could, applied those instructions to the verdict form provided to them. A review of the verdict form indicates that the jury ruled in Plaintiff's favor and awarded actual damages in the amount of \$5,000.00 for Defendants' breach of fiduciary duty owed to Plaintiff. The jury, having been advised that they must find actual damages in order to award punitive damages and that punitive damages could not be awarded unless Plaintiff proved by clear and convincing evidence that the Defendants' conduct showed a willful, wanton and reckless disregard of the rights of the Plaintiff, awarded punitive damages in the only place on the verdict form they could. Had the verdict form had a blank for the assessment of punitive damages under the heading Breach of Fiduciary Duty, the jury may well have inserted the \$60,000.00 punitive damages number in that blank, however, analyzing the form as presented to them, the only option was to insert the punitive damages figure on the only line on the verdict form available. In this regard as a matter of law, punitive damages are available for breach of fiduciary duty. See *Jordan v. Holt*, 362 S.C. 201, 608 S.E. 2d 129 (2005).

II. DEFENDANTS HAVE WAIVED THEIR RIGHT TO CHALLENGE THE PUNITIVE DAMAGE VERDICT IN THE PRESENT ACTION

In *Dykema vs. Carolina Emergency Physicians* 348 S.C. 549, 560 S.E. 2d 894 (2002) the South Carolina Supreme Court was called upon to address the granting by the trial court of Companion Health Care Corporation's motion for judgment notwithstanding the verdict on the grounds that the jury's failure to award actual damages against it precluded an award of punitive damages. The trial court held the jury's failure to award actual damages against Companion mandated the grant of JNOV

to Companion. The South Carolina Supreme Court disagreed and found Companion's failure to object prior to discharge of the jury resulted in a waiver of the right to challenge the verdict.

The trial court correctly held punitive damages generally are not recoverable in the absence of proof of actual damages. *Limehouse v. Southern Ry. Co.*, 216 S.C. 424, 58 S.E.2d 685 (1950). However, the trial court erred in setting aside the verdict absent a timely objection. We decline to hold that a party may allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury, in the hopes of gaining a reversal on appeal. Accordingly, we find Companion waited too late to voice its objection to the verdict.

The courts of our state have repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence. *See Deese v. Williams*, 237 S.C. 560, 118 S.E.2d 330 (1961). *See also Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1995) (holding that party may not wait until JNOV to object to punitive damage award as this Court does not recognize a "plain error" rule); *Limehouse v. Southern Ry.*, 216 S.C. 424, 58 S.E.2d 685 (1950) (where verdict is objectionable as to form, party who desires to complain should call that fact to the Court's attention when the verdict is published. Otherwise, the right to do so is waived); *McAlister v. Thomas and Howard Co.*, 116 S.C. 319, 108 S.E. 94 (1921) (defect in the form of a verdict must be presented at the time it is published, and failure to do so waives the right to raise that matter later); *Bethea v. Western Union Telegraph*, 97 S.C. 385, 81 S.E. 675(1914) (irregularity of jury verdict awarding punitive but no actual damages must be called to the attention of the court at the earliest opportunity; otherwise it will be deemed to have been waived; waiting until jury separates and then urging irregularity as ground for new trial is too late).

These cases are consistent with the Supreme Court's opinion in *Stevens v. Allen*, 342 S.C. 47, 536 S.E.2d 663 (2000), in which the court held a verdict finding the defendant liable but awarding zero damages is inconsistent or incomplete and that, when the issue is raised, the matter should be resubmitted to the jury with instructions to either enter a verdict for the defendant or award some amount of damages. Accordingly, consistent with the wealth of authority in this state, the Supreme Court found Companion's failure to challenge the verdict upon being given an opportunity to do so results in a waiver. Therefore, the grant of JNOV to Companion was reversed, and the \$500,000 punitive damage award was reinstated.

**III. DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT
AND MOTION FOR ATTORNEY'S FEES IS UNTIMELY AND MAY NOT BE
CONSIDERED BY THE COURT**

On December 23, 2014 Defendants filed, pursuant to Rule 50 of the South Carolina Rules of Civil Procedure, a motion for judgment notwithstanding the verdict and further moved pursuant to S.C. Code Ann. §39-8-80 for an award of attorney's fees. Both motions are untimely and cannot be considered by the trial court.

As noted in *Elam vs. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E. 2d 772 (2004), the South Carolina Supreme Court confirmed "post-trial motions such as JNOV or new trial motion shall be made promptly after the jury is discharged; or in the discretion of the Court not later than ten days thereafter." In the case at bar, Defendants' motion is untimely and cannot be considered by the Court.

Following a week long trial, on Friday December 12, 2014 a unanimous jury returned a verdict in favor of the Plaintiff for actual and punitive damages. Following the publishing of the verdict and after the jury had been dismissed by the trial judge, counsel for Defendants requested he be allowed ten

days to file any applicable post-trial motions. Counsel then indicated to the trial judge that ten days thereafter would essentially be Christmas Eve and requested additional time until December 31, 2014 within which to file post-trial motions. It is a specific requirement of Rule 50(e) that any motion for JNOV be made promptly after the jury is discharged or in the discretion of the Court **not later than** ten days thereafter. (Emphasis added) In this case, no motion of any type was made by Defendants, to include a motion for JNOV, until well beyond the ten day limit provided by the Rule. The only "motion" made by Defendants was the filing of Defendants' Motion for Judgment Notwithstanding the verdict and motion for attorney's fees filed on December 23, 2014. Not only is Defendants' motion untimely as being more than ten days after the jury verdict rendered on December 12, 2014 it is likewise untimely as to the jury verdict entered by the court on December 15, 2014, and likewise, untimely in connection with Defendants' attorney's receipt of written notice of the verdict which, upon information and belief, was received by counsel for Defendants on December 17, 2014.

**IV. EVEN IF NO WAIVER BY DEFENDANTS TO CHALLENGE THE JURY VERDICT,
THE VERDICT MUST NONETHELESS STAND**

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. *Crossley v. State Farm Mutual Automobile Insurance Co.*, 307 S.C. 354, 414 S.E. 2d 393 (1992). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E. 2d 682 (Ct. App. 2000); *Hunter v. Staples*, 335 S.C. 93 515 S.E. 2d 261 (Ct. App. 1999). In *International Wood Processors vs. Powerdry, Inc.*, 593 F. Supp. 710 (D.S.C. 1984), the United States District Court for the District of South Carolina, Greenville Division, was called upon to address a contention made by Defendants that there was insufficient evidence of malice to award punitive damages and that the verdicts were inconsistent and noted in its opinion the following:

In *Aquachem Co. v. Olin Corp.*, 699 F.2d 516, 521 (11th Cir.1983), the court stated:

[T]he Seventh Amendment demands that, if there is a view of the case which makes the jury's answers consistent, this Court must adopt that view. *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973). It does not matter whether Aquachem can suggest equally plausible reasons for the verdict that would require reversal. *Miller v. Royal Netherlands, supra*, 508 F.2d at 1108. The test to be applied in reconciling apparent conflicts between the jury's answers is "whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted...."

While an unpublished opinion, the decision of the United States Court of Appeals for the Fourth Circuit in the matter of *Liberty Mutual Fire Insurance Company vs. J.T. Walker's Industries, Inc.* (NOS. 12-2256, 12-2350) (4th. Cir. 2014) is instructive. In *Liberty Mutual*, a jury found both Defendants liable for contract damages and also found Liberty liable for actual and punitive damages on MI's bad faith claim. The district court set aside the bad faith damages finding that MI failed to prove actual damages and, as a result, was not entitled to punitive damages. On appeal, the Fourth Circuit vacated the ruling on punitive damages and noted the following: We reverse the district court's ruling that absent actual or consequential damages, MI cannot receive punitive damages. An absence of ascertainable damages does not necessarily preclude nominal or punitive damages where, as here, the jury finds a party liable for punitive damages. A court may award punitive damages in bad faith tort actions for conduct that is willful, wanton, or reckless in disregarding a plaintiff's rights. *Nichols*, 306 S.E.2d at 619. Generally, punitive damages are only awarded where a court also awards actual or nominal damages. *McGee v. Bruce Hosp. Sys.*, 545 S.E.2d 286, 288 (S.C. 2001) (citing *Cook v. Atl. Coast Line. R.R. Co.*, 190 S.E. 923 (S.C. 1937)). Nominal damages need not be specifically pleaded where a party alleges a claim for general damages; the general damage allegation sufficiently encompasses nominal damages. *Ins. Servs. of Beaufort, Inc. v. Aetna Cas. & Sur. Co.*, 966 F.2d 847, 853 (4th Cir. 1992). Furthermore, where pleadings allege and evidence proves a willful invasion or

infringement of a right, courts presume nominal damages, even if exact measurement of actual damages is not possible. *Cook*, 190 S.E. at 924.

The rule requiring actual or nominal damages as a prerequisite to punitive damages "is premised on the fact that liability must be established before a plaintiff can seek punitive damages." *McGee*, 545 S.E.2d at 288. Thus, a plaintiff is entitled to a jury determination on punitive damages liability even in the absence of ascertainable loss. *Id.* at 288-89; cf. *Aetna*, 966 F.2d at 853 ("The recovery of nominal damages is particularly appropriate to vindicate the violation of a right . . . where injury is shown but damages cannot be proven."). Where a jury finds a willful or reckless invasion of a legal right, a court presumes that nominal actual damages are merged into a punitive damage award. *Hinson v. A. T. Sistare Constr. Co.*, 113 S.E.2d 341, 345 (S.C. 1960) (citing *Cook*, 190 S.E. at 924).

Despite its inability to demonstrate direct or indirect damages, MI was entitled to, and did receive, the opportunity to have the jury consider punitive damages liability. The court properly instructed the jury as to the punitive damages standard. In awarding punitive damages, the jury found Liberty's actions willful, wanton, or reckless. As a result, MI is not prohibited from receiving punitive damages. See *McGee*, 545 S.E.2d at 288-89.

V. GAMBLE AND PUNITIVE DAMAGES REVIEW UNDER SOUTH CAROLINA LAW

South Carolina's jurisprudence has largely tracked the Supreme Court's constitutional pronouncements, beginning with the *Gamble* opinion. In *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E. 2d 727 (1991) the South Carolina Supreme Court identified eight considerations that trial courts should apply in conducting a post-judgment due process review of any punitive damages award. These considerations are: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the

award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. *Gamble*, 305 S.C. at 111-12, 406 S.E.2d at 354.

In the case at bar, the Defendants degree of culpability is without question. They were found to have engaged in willful, wanton and reckless conduct by the jury and their culpability is based on no one's conduct other than their own. With regard to the duration of the conduct, based on the evidence adduced at trial, it appears the Defendants' conduct took place as long as two and a half years prior to their departure from the employ of McKinley, Cooper and, arguably, continued thereafter. With regard to the Defendants' awareness or concealment, it is undisputed that Defendants undertook efforts to conceal their improper conduct. For instance, both Todd Highsmith and Shane Highsmith deleted all emails from their McKinley, Cooper computers thus clearly violating the McKinley, Cooper IT policy of which Defendants were aware. Further, with regard to Todd Highsmith's "moonlighting" it is undisputed that Mr. Highsmith, while hiding this fact from his employer McKinley, Cooper, was invoicing McKinley, Cooper's clients directly from his house and receiving payment from such invoices directly. With regard to the existence of similar past conduct, it appears over the course of the two and a half years prior to the end of their employment, that the Highsmiths engaged in a pattern to misappropriate McKinley, Cooper's forms, templates, customer lists, customer pricing and the like. With regard to the likelihood the award will deter the Defendants or others from like conduct, the punitive damages awarded in the amount of \$60,000.00 will provide the laudable goal of deterring like conduct and, significantly, if such punitive damages are not upheld, there will be no deterrent effect.

The evidence at trial confirms that award of \$60,000.00 in punitive damages is reasonably related to the harm likely to result from such conduct given the fact that the jury is provided great latitude in assessing the damages caused and what would be considered reasonable with regard to the

harm caused by the Defendants. With regard to Defendants' ability to pay, the jury was presented with the Defendants' tax returns as trial exhibits and was clearly able to consider the Defendants' ability to pay when assessing their award of \$60,000.00 in punitive damages.

Additionally, trial courts must consider both the *Gamble* and the *Gore* factors. (*BMW of North America vs. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)) *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 195, 638 S.E.2d 667, 671 (2006) ("Although we find the punitive damages award was reasonable under the *Gamble* factors, we must also review the trial court's ruling on punitive damages under *Gore*"). With these considerations in mind, in *Mitchell v. Fortis Insurance Company* S.C. , 686 S.E. 2d 176 (2009) the South Carolina Supreme Court articulated the following test for our courts in conducting a post-judgment review of punitive damages awards:

1. Reprehensibility

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 565, 116 S. Ct. 1589. "This principle reflects the view that some wrongs are more blameworthy than others." *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Campbell v. State Farm* 538 U.S. at 419, 123 S. Ct. 1513.

2. Ratio

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." *Gore*, 517 U.S. at 580, 116 S.Ct. 1589. Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." *Campbell*, 538 at 425-26, 123 S.Ct. 1513. A court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay.

3. Comparative Penalty Awards

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

As with the United States Supreme Court, the South Carolina Supreme Court has consistently rejected challenges to punitive damages award based merely on the ratio of actual to punitives. For instance, in *Elder v. Gaffney Ledger, Inc.*, 333 S.C. 651, 511 S.E. 2d 383 (1999) the South Carolina Court of Appeals affirmed a \$300,000.00 punitive damages verdict even though the actual damages awarded amounted to only \$10,000.00. The amount of the punitive damage award is thirty times the actual damage award. We cannot say this ratio is unreasonable under the facts of this case. *Pacific Mut.*

Life Ins. Co. v. Haslip, 499 U.S. 1, 18, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." (quoted in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996))); *Lister v. NationsBank of Del.*, 329 S.C. 133, 152, 494 S.E.2d 449, 459 (1997) (finding a ratio of 23.24 times the actual damage within the constitutionally accepted range).

Applying the applicable analysis relative to punitive damages to the facts of the present case, it is clear the jury's verdict of \$60,000.00 in punitive damages should be upheld. As noted by *Gore*, reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damages award. In this case it is clear the conduct by Shane and Todd Highsmith towards McKinley, Cooper & Co., LLC was reprehensible. During the trial undisputed evidence was submitted indicating that McKinley, Cooper's forms, templates, proposals, bank confirmation forms, test to transaction work papers, CPE educational materials and the like were all removed by the Highsmiths from the offices of McKinley, Cooper & Co. Almost three months before resigning their employment, the Highsmiths began to create the Highsmith & Highsmith business plan on their McKinley, Cooper issued laptop and were even so bold as to utilize McKinley, Cooper's copy machine to print off their business plan prior to their employment ending. While being paid a significant salary by McKinley, Cooper and while working under McKinley, Cooper's CPA registration number, Todd Highsmith was billing McKinley, Cooper's clients on invoices generated from his home address and made payable to him and admitted during his testimony that in addition to the three invoices presented at trial, there most likely were additional invoices of the same type. Perhaps most reprehensible is the fact that during the time they were engaging in their nefarious conduct, McKinley, Cooper's owner, Toni McKinley, was often times absent from the office undergoing chemotherapy treatment for Hepatitis C. The Highsmith's conduct

did not involve an isolated incident but involved a series of repeated actions and far from being a mere accident, the harm caused was a result of the Highsmiths' intentional malice, trickery and deceit.

With regard to the ratio of actuals to punitives, as noted, there is no bright line test nor rigid bench marks that a punitive damage award may not surpass. When determining the reasonableness of a particular ratio of actual or potential harm to punitive damages, courts consider the likelihood that the award will deter the Defendant from like conduct, whether the award is reasonably related to the harm likely to result from such conduct and the Defendants' ability to pay. In the present case, were the \$60,000.00 in punitive damages awarded against the Highsmiths not be allowed to stand, there would be no deterrent effect on the Defendants' conduct. Rather, Defendants such as the Highsmiths would be encouraged to engage in conduct that while grossly reprehensible, may not be of the type to establish significant compensatory damages.

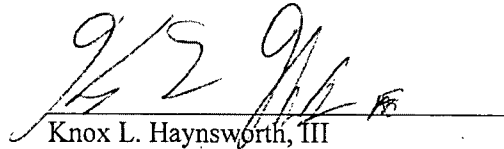
With regard to comparative penalty awards, in South Carolina CPAs are governed by the South Carolina Board of Accountancy created pursuant to S.C. Code Ann. §40-2-10 (1976), as amended. Pursuant to S.C. Code Ann. §40-2-70 (1976), as amended, the Board has the authority to adopt a code of professional ethics appropriate to the profession, to conduct hearings on alleged violations and regulations and to discipline licensees, among other powers. Pursuant to S.C. Code Ann. §40-2-110 (1976), as amended, the Board has the authority after notice and a hearing pursuant to the Administrative Procedures Act to revoke or suspend a CPA's license, among other remedies. Additionally the Board has the authority to impose an administrative fine not exceeding \$10,000.00 per violation on a licensee for a number of reasons including, but not limited to, (2) conduct reflecting adversely upon the licensee's fitness to perform services as a licensee;...(4) intentional use of a false or fraudulent statement in a document connected with the practice of the individuals profession or occupation; (5) obtaining fees or assistance in obtaining fees under fraudulent circumstances; (6)

failure to comply with established professional standards, including standards set by federal or state law or regulations; (7) a violation of the code of professional ethics adopted by the Board of the AICPA Professional Standards: Code of Professional Conduct.

During the trial of this case evidence was presented indicated that Todd Highsmith had sent three separate invoices to McKinley, Cooper clients, while Mr. Highsmith was employed by and working under McKinley, Cooper's CPA registration number, such invoices being generated from and payable to Mr. Highsmith at his home address. Those three violations alone could result in civil penalties of \$10,000.00 per violation and given the fact that Mr. Highsmith admitted at trial that there were most likely additional similar invoices, the administrative fines alone may well exceed the \$60,000.00 in punitive damages assessed by the jury. In a related matter, both Todd and Shane Highsmith deleted all emails from their McKinley, Cooper issued computers to include emails to and from MCC clients containing client information. This violation of the applicable AICPA professional standards likewise could result in a \$10,000.00 per violation fine and, significantly, the revocation of Shane and Todd Highsmith's licenses as CPAs.

In light of the foregoing, Plaintiff is entitled to recover from Defendants the sum of \$60,000.00 in punitive damages along with the previously awarded amount of \$5,000.00 for actual damages and respectfully submits to this Court that such an award clearly reflects the intention of the jury in this case.

**BROWN, MASSEY, EVANS, McLEOD &
HAYNSWORTH, LLC**

A handwritten signature in black ink, appearing to read "Knox L. Haynsworth, III", is written over a horizontal line.

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Greenville, South Carolina
December 31, 2014

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

MCKINLEY COOPER AND
COMPANY, LLC,

PLAINTIFF,

-VS-

TODD HIGHSMITH, SHANE
HIGHSMITH AND HIGHSMITH AND
HIGHSMITH, LLC,

DEFENDANT.

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2012-CP-23-04179

DECEMBER 8-12, 2014

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE VICTOR PYLE, JUDGE

APPEARANCES:

KNOX L. HAYNSWORTH, III, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

R. MILLS ARIAIL, JR., ESQUIRE
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS
CIRCUIT COURT REPORTER

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JURY VOIR DIRE

Juror #	Name	Race	Sex	Strikes			Accept
				Court	Plaintiff	Def.	
93	Rice, Laurie Taylor	W	F				x
95	Rizo, Remarque D	W	M				x
47	Greenwood, Rachelle L	W	F				x
71	Meagher, Kristina B	W	F				x
137	Franseen, Allie H	W	F		x		
55	Holland, Holly H	W	F			x	
68	Marino, Susanna L	W	F				x
86	Peterson, Charles H	W	M				x
2	Addis, Gwendolyn	W	F			x	
111	Sowders, Shane R	W	M				x
139	Woods, Nicholas E	W	M				x
36	Durham, Lytosia M	B	F		x		
9	Barnes, Jeanne L	W	F			x	
136	Brookie, James B	W	M		x		
92	Riccardi, Janine	W	F				x
122	Turner, Michael D	W	M		x		
56	Holman, Brian R	W	M				x
100	Sarracino, Jeri F	W	F				x
115	Tate, Syrantha D	B	F				x
138	Gray, Vernicia A	W	F			x	
102	Segars, Julie P	W	F				x
101	Schmidt, Brandy L	W	F			x	
60	Johnson, Donald J	B	M		x		

1 **December 8, 2014,**

2 (WHEREUPON, court convened with all parties present
3 and the following proceedings were had.)

4 THE COURT: All right. Now, what motions do
5 you have?

6 MR. ARIAIL: My motions, Your Honor, and I
7 have -- here's your copy. I think I've got enough. Did
8 you already get a copy of that? I might need to make
9 another. I thought I'd made two. Here's mine. I don't
10 know if it's a part of the file.

11 THE COURT: No.

12 MR. ARIAIL: I've got a variety of motions and
13 they kind of go off -- I've got to give you a little bit
14 of background in regards to the case. He's alleging
15 trade secrets, breach of fiduciary duty and conversion.
16 Throughout this process we've -- it took us a while to
17 get down to what the trade secrets were. And in this
18 case, in the beginning when I took Ms. McKinley's
19 deposition, we had -- she said everything was a trade
20 secret within -- or anything that's a part of the
21 business was a trade secret. I finally got it culled
22 down. What I'm -- you know, my main, I guess, argument
23 is, I want to stick with the items -- and what I'm
24 making sure is that we have -- they're limited to the
25 items that they have produced in discovery of their

1 documents. Knox had a letter that he sent to me that
2 he's alleging are the trade secrets. In addition, I
3 don't know if she's going to allege, but there's some
4 proposals, letterhead, invoices. She at one time said
5 email addresses for the clients were trade secrets,
6 Rolodex. I'm just limiting what she's going into in
7 regards to that and I can show you -- here's the
8 original right there.

9 MR. HAYNSWORTH: To address that, Your Honor,
10 there are sort of three distinct items that are kind of
11 inter-alleged. We have alleged conversion and that
12 covers -- let me back up. We believe the evidence is
13 going to show that they, in hard copy form and in
14 computerized form, took essentially everything she had
15 that you would need to create a CPA firm. For instance,
16 she developed, over thirty years, a proposal that would
17 go out to an audit client. You know, it's a sales pitch
18 with thirty years worth of effort. Instead of going and
19 getting that -- even if they wanted to copy her
20 proposal, we do not believe they went out and got a copy
21 of one and manually retyped it. We think they simply
22 took the template off the computer and now they're
23 proposal was essentially her proposal with their name on
24 it. That is not a trade secret. That document does not
25 meet the definition under the statute of a trade secret.

1 Those documents fall under my conversion cause of
2 action. There are these proposal. There'll be evidence
3 that their letterhead is simply a copy of her
4 letterhead. There's a little CPA logo that's on both
5 letterheads. Their testimony will be they got that off
6 the AICPA, that's an accounting regulatory organization,
7 that they got that logo from the AICPA. We're going to
8 present evidence that that's impossible. That the only
9 way they could have gotten is to take ours. Again, our
10 letterhead is not a trade secret. But we believe those
11 items were converted and it gave them a competitive
12 advantage. They didn't have to start from scratch.
13 They just slapper their name on our stuff.

14 In the universal trade secret documents, there are
15 documents that we do believe meet the definition of
16 that. And Mills is right. He has asked me, show me
17 what you claim is a trade secret. I've got to have my
18 computer guy, you know, handle it. What are you
19 claiming as a trade secret. So I gave him a long
20 laundry list. And I can pull out the correspondence if
21 I need to. But I also made clear to Mills, I can't give
22 you what I don't have. It is not my contention that
23 your clients only stole these fifteen documents I say
24 are trade secrets. I think they stole all our stuff. I
25 think they stole our customer list, our pricing

1 information. If they didn't give it back to me, the
2 only way I can prove they took it is circumstantial
3 evidence by the ones I have caught them taking. But it
4 is not my contention that the actual documents you will
5 see during this trial are the only trade secrets I think
6 they took. We believe they took our current customer
7 list. If they didn't produce it back to me, I can't
8 turn around and give to Mills, here's the customer list
9 trade secret document your client stole. So there's
10 going to be a lot of testimony about specific documents.
11 You'll hear about work papers. It's sort of like work
12 product for a lawyer. It's how CPAs, you know, decide
13 this is what we're going to analyze to make sure our
14 transactions are correct. And everyone does it a little
15 differently. You'll hear testimony that work papers
16 qualify as a trade secret. I've got a specific work
17 paper that we found in their computer that shouldn't
18 have been there. I believe that they took all the other
19 work papers, but I don't have copies of it. I can only
20 prove it by the circumstantial evidence that -- we found
21 some bread crumbs -- or excuse me. Better analogy. We
22 found the bank bag and we found five dollars in it that
23 had red dye. Not saying they only took five dollars.
24 I'm saying that's all we found. And by its very nature,
25 trade secret is you're trying to keep from getting

1 caught. So I just want to be clear with the Court that
2 I am not and have not told Mills, trade secret is only
3 these eight documents. I simply told him, these are the
4 only documents I found in your guys' computer that I can
5 give back to you and say, I think this is a trade
6 secret.

7 MR. ARIAIL: And, Your Honor, my response to
8 that is, I have requested repeatedly to identify what a
9 trade secret is. I don't think there's -- and I'm going
10 to argue, there's no way he can come into court and say,
11 hey, here's what we found, here's what we didn't find
12 and then force me to now try to prove some document that
13 we don't know if it's been taken or not. We've hired
14 forensic experts. We've got experts that are coming in
15 here to testify. For him to now say, well, they've
16 taken everything, that's total speculation. I mean,
17 she's got five -- four clients that she went to to find
18 out why they went. Those are the only ones she's talked
19 to. So for him to now bring up, well, they've taken all
20 these files. They've copied all this information; they
21 have this. We've gone through this for two and a half
22 years trying to find out what the documents are. I
23 can't defend that. And that's not a way I'm supposed to
24 under the -- you've got to specifically identify the
25 trade secret, which one, how it was used. And that's

1 what we're asking for.

2 MR. HAYNSWORTH: I agree with you, Mills, but
3 I have been telling you -- you know, again, I've got a
4 customer list with a date on it of 2009 that was found
5 in your client's desk that shouldn't have been there. I
6 didn't find the one, the current one he took in 2011,
7 but I certainly believe he took an updated customer list
8 in 2011, but I can't prove it if your guys won't give it
9 to us.

10 MR. ARIAIL: Right. So that right there, I
11 think, speaks volumes about this case. I can't give it
12 to you if your guys won't give it to us. Well, they
13 don't have it. That's the whole theory of the case.
14 But he's going to get in front of this jury, which is
15 highly prejudicial to them, and say, there was a
16 document in 2009 we found, which they were asked to put
17 together by their clients, but there's this updated copy
18 in 2011, which we don't know where it is. We don't know
19 if they took it. We don't know if they used it. And I
20 don't think there's any way I can defend them on that
21 when he's just going to toss out that information. That
22 is not what the trade secrets -- my view of the act was
23 meant to do and to be able to say this trade secret was
24 used. This process, whatever it is, was used. And here
25 it is -- for them to say we've got some random trade

1 secret that they don't even know we have; they can't do
2 that.

3 MR. HAYNSWORTH: Judge, all I can tell you is
4 I've got off Todd Highsmith's computer documents that
5 absolutely, positively, should not be on his -- this is
6 a computer after he left. His explanation was -- and he
7 knew that I knew about four specific ones when I took
8 his deposition. So knowing I've caught him before, the
9 explanation was, oh, oh, oh, I inadvertently -- I had a
10 personal flash drive with some of that information from
11 McKinley Cooper. And after I was gone, I went out to a
12 customer and I plugged it into their machine. And then
13 when I plugged it into my Highsmith & Highsmith laptop,
14 I inadvertently downloaded these four McKinley Cooper
15 documents that I can see that I shouldn't have. Our
16 computer forensics guy is going to offer testimony that
17 from McKinley Cooper on a thumb drive or some other
18 computerized media, a number of documents were copied.
19 Some of those documents are still on their computer.. My
20 expert will also tell you that it appears to him that a
21 lot of documents that went on the computer got deleted.
22 Now, again, if Mills' clients maintain we didn't take
23 anything, and my position is you took everything and you
24 deleted most of it, but you weren't smart enough to
25 delete all of it, and that's how we found the breadcrumb

1 trail to the theft, I don't think I'm limited just to
2 the specific breadcrumbs I found. If the evidence
3 suggest that they took more trade secrets than I've got
4 an actual document to say here it is, I think that's
5 appropriate under the statute or law generally.

6 MR. ARIAIL: And let me just go into -- first
7 of all, I have a motion to exclude his expert. His
8 expert is not an expert. His expert is an IT
9 professional that has no background in regards to
10 forensic investigations. He's done -- and the other
11 part of my exclusion, motion to exclude, is when these
12 documents -- there was a mirror image that was done.
13 They have had the mirror image. They had a professional
14 within their company go in, take it home, and overwrite
15 it and basically destroy the evidence. We had to go
16 back to court, get another mirror image, which they now
17 have done. They have hired individuals in Connecticut
18 and another individual that is no longer with them to do
19 searches. And what they did is, he did the searches to
20 find the documents under the parameters that we set
21 forth. This guy got the documents and then put them
22 into a folder for his -- for Gaetan Hemond, and Mr.
23 Hemond, to review. My problem is Mr. Hemond cannot come
24 in here and testify as to the documents until we have a
25 proper authentication as to where they came from, how he

1 found them, where they were on the hard drives; all of
2 this background information because I'm entitled to get
3 that. Because one of the key aspects of the case what
4 he's alleging is, is that my clients have taken MCC
5 authored documents on this hard drive. So someone needs
6 to come in and testify as to where they were found, what
7 the author date is, access date, all these different
8 things. His gentleman cannot testify to that
9 information. He can testify what was in a folder that
10 he was given, but he can't testify to where he found it
11 directly on the laptop. That prevents me from being
12 able to say, okay, wait, hold on, they're in this
13 subfolder on this file path in this area. Give me the
14 information about it. Or how did you find them? Or
15 where were they; any of that information.

16 I'm going to object to anything coming in -- any of
17 these documents coming in or any information about them
18 until they lay a proper foundation, chain of custody,
19 authentication in regards to them.

20 MR. HAYNSWORTH: Object away. And I intend to
21 lay a proper foundation when I present my expert.

22 MR. ARIAIL: Okay.

23 MR. HAYNSWORTH: And Mills has got an expert.
24 I've deposed him. He's deposed my guy. They talk the
25 same lingo.

1 MR. ARIAIL: There's some other information he
2 mentioned in his statement I want to make sure. This is
3 -- one key fact about this is, I put as part of my
4 motion, motion to exclude evidence about any deletion,
5 mass downloading, any items of that. This case, what
6 they've alleged from the beginning is, they took
7 documents; okay? So we've got documents that are on the
8 computer. Whether or not they lay a proper foundation
9 to get them in, that's yet to be seen. But to say we've
10 deleted documents. Their own experts says he didn't do
11 a review as to what was deleted. So I don't know why
12 we're getting into deletion. There are emails that were
13 deleted before. I understand that. But anything
14 deleted on the hard drive to say they have had the files
15 on there and then deleted them, he can't testify to
16 that. And I'm going to ask for that to be excluded.
17 Also, any mass downloads, I think -- I don't know how
18 Knox is going to do it. There's clearly a flash drive
19 that my client plugged into his computer that had
20 personal documents on it. And his expert will even say,
21 there were documents that were in a hidden folder that
22 were never accessed by my client. All of these
23 documents, and we'll put up testimony, Your Honor,
24 there's only five documents, I think, out of the fifty-
25 seven they say that were ever opened up. So we've got

1 five documents out of fifty-seven, fifty-eight, that
2 he's going to say and his expert's going to say, well,
3 those are the only ones that I can prove that were
4 opened up.

5 So what we're doing is we're putting out all this
6 information in front of the jury, which I believe is
7 going to be extremely prejudicial for my client, and
8 then I've got to get up and put up all these witnesses
9 to be able to say, hold on, no, no; it wasn't because of
10 that. It was because we lied to you. Or here's a
11 letter that says we didn't go with McKinley Cooper
12 because our national board told us we had to rotate
13 auditors every three years. So it forces me to go into
14 defense mode when he hasn't established the improper
15 means or misappropriation.

16 MR. HAYNSWORTH: I think Mills' contention is
17 there are documents that his client stole, but they
18 never used them so it's okay. Because under the trade
19 secret sub-statute, you have to use them. And that's
20 fine. And that may be prejudicial. I, as a juror would
21 think, well, you stole it and your excuse is you didn't
22 use it? Sounds a little weird to me.

23 But, again, Judge, I intend to lay the proper
24 foundation, as I'm sure Mills does to his expert, for
25 the documents that were in the mirrored hard drives,

1 that weren't in the mirrored hard drives, the stuff
2 about the downloading. Both experts, both computer
3 experts agree that on July 12th or 30th of 2012, seven
4 minutes worth of information went off a thumb drive and
5 onto his laptop. And both experts agree that within
6 that seven minutes worth of stuff going on the computer,
7 there are documents that came from my company's
8 computer. Both experts agree with that. Now, the
9 inference of were there other documents that they
10 downloaded and then deleted? If the evidence shows that
11 or suggests that, it's not speculative. You know, if an
12 expert says I've analyzed it and it appears to me, based
13 on my expertise, that documents came in and then some
14 were deleted, you know, that's proper testimony.

15 MR. ARIAIL: And once again, we've gone back
16 to -- he says he hasn't reviewed this, now he has. That
17 was never -- and I think that would be extremely
18 prejudicial to my clients to be able to face that when
19 all we're talking about is did they take the documents?
20 And has anybody confirmed how these clients went with
21 these individuals? I mean, this is a very ---

22 THE COURT: Gentlemen, you know, I'm sitting
23 here listening to both of you, what you're going to
24 prove or try to prove and whether or not it's
25 admissible. And until I get some feeling about this,

1 you know, I don't think I'm going to be prepared to make
2 a ruling at this time. I've got to hear some testimony
3 and then you object at the proper time and then we'll
4 pass on that to them.

5 MR. ARIAIL: My only question, there's a
6 couple of motions that I made in there, I think, that
7 were sequestering of the witnesses. Clearly, no
8 references to the preliminary injunction order, any -- I
9 think there was also ---

10 THE COURT: What are you talking about?

11 MR. ARIAIL: Let me make sure. Number one was
12 -- excuse me number two was the preliminary injunction
13 order and any testimony regarding it, that that would be
14 excluded.

15 MR. HAYNSWORTH: I have -- I would not be
16 agreeable to that, Judge. Obviously, if you rule that
17 way it's a different story.

18 MR. ARIAIL: You know, I mean, I haven't
19 pulled the case. I can do it at lunch. But I think
20 there's a case on point that says putting that in there
21 was highly prejudicial to my clients. And that the
22 order even says, if I go back and pull it, that this was
23 not -- I guess was ---

24 THE COURT: What now?

25 MR. HAYNSWORTH: Mills doesn't want me to make

1 any reference to the ---

2 THE COURT: To a preliminary injunction order

3 ---

4 MR. HAYNSWORTH: That was issued.

5 THE COURT: --- or testimony regarding the
6 order. Well, why would that be admissible? I mean, a
7 ruling by another judge, I can't see why that would ---

8 MR. HAYNSWORTH: Well, it may not be, Judge.

9 THE COURT: Well, sir.

10 MR. HAYNSWORTH: But I wasn't going to concede
11 the point.

12 THE COURT: All right. I would grant you to
13 that. And ---

14 MR. HAYNSWORTH: All right.

15 MR. ARIAIL: The next one -- I know a lot of
16 these are the ones we kind of went over that said we've
17 got to get some evidence beforehand. The last one is
18 sequestering of the witnesses. Clearly, we've got two
19 experts or at least ---

20 THE COURT: Number twelve?

21 MR. ARIAIL: Number twelve. No, number
22 eleven, Your Honor. All lay witnesses be precluded from
23 the courtroom prior to testimony. Is that ---

24 THE COURT: Sure.

1 MR. ARIAIL: Okay.

2 THE COURT: I grant that.

3 MR. ARIAIL: Okay.

4 MR. HAYNSWORTH: And just for Your Honor's
5 edification, I have two clients. I have McKinley Cooper
6 and Co., LLC, Marcy Loucks is a principal, the blond-
7 headed gal there, she's my representative for that one
8 of my clients. Ms. McKinley has been has been sued
9 individually. She is my other client.

10 THE COURT: Okay.

11 MR. HAYNSWORTH: I'm fine if Mills wants to
12 exclude my lay witnesses as long as his are also?

13 MR. ARIAIL: My understanding was the
14 principal was Ms. McKinley. Now Ms. Loucks is now the
15 principal for the company. It's our position Ms. Loucks
16 should be excluded. She's a key witness in this and I
17 don't -- this is the first I've heard now she's changing
18 in for Ms. McKinley.

19 MR. HAYNSWORTH: She owns twenty-five percent
20 of the company as you discussed with Charlie Alford.
21 She's my corporate representative. Toni is my
22 individual defendant.

23 MR. ARIAIL: Okay.

24 THE COURT: All right. Well, I'll allow her

1 to stay.

2 MR. ARIAIL: Okay. That should be the two
3 right there. And then I guess the others we'll bring up
4 during the time when ... And just for my clarification
5 and Knox's too, clearly some of these -- I want to tread
6 lightly on these during opening. And I clearly don't
7 want things to come up that I don't know if I can close
8 the door after the fact on these. So I know -- I'm not
9 going to get into a lot of this stuff ---

10 THE COURT: Well, in your opening statements,
11 gentlemen, now all I want you to do is tell the jury
12 what this case is about, not argue any of your facts.
13 Just a very simple, brief statement about what this case
14 is about.

15 MR. ARIAIL: Sounds good to me.

16 MR. HAYNSWORTH: And we would, I presume, tell
17 them what we believe the evidence we're going to present
18 -- or what we believe the evidence that we'll present,
19 you know, for instance, ladies and gentlemen, I believe
20 the evidence in this case will show you that documents
21 were found in their computer that originated in my
22 client's computer. I mean, I do believe ---

23 THE COURT: Now, I don't see anything wrong
24 with that.

1 MR. HAYNSWORTH: But don't turn it into
2 closing argument?

3 THE COURT: Exactly.

4 MR. HAYNSWORTH: And just, you know, so Mills
5 is clear. I mean, I'm going to say in the opening,
6 unless you tell me not to, that I believe the evidence
7 will show that documents were taken from my client's
8 computer and hard copy. The evidence will show it was
9 put on their computer. And the evidence will show
10 thereafter it was deleted.

11 THE COURT: You can do that. And then if you
12 don't prove it, then ---

13 MR. HAYNSWORTH: Mills will beat me up.

14 THE COURT: --- Mills can just beat you up
15 with it, sure.

16 MR. ARIAIL: That's right.

17 THE COURT: Okay.

18 MR. ARIAIL: I'm going to be taking good notes
19 over here too.

20 THE COURT: All right. Now, it's quarter
21 'till twelve. It's going to take a while to get a jury
22 with all the questions I've got to ask. I suppose what
23 we'd better do is to get the jury and then recess and
24 pick back up with the testimony after lunch. Is that
25 ...

1 MR. ARIAIL: That'll be fine with me to start
2 after lunch.

3 MR. HAYNSWORTH: Go ahead and pick them and
4 you can do the voir dire and then break for lunch and
5 then do opening and start?

6 THE COURT: Yeah.

7 MR. HAYNSWORTH: That makes sense.

8 MR. ARIAIL: That would be good for me.

9 THE COURT: Now, how long do you think you
10 need to do your opening? I don't want any argument in
11 the opening.

12 MR. HAYNSWORTH: Notwithstanding my senior
13 superlative of most talkative, I think fifteen, twenty
14 minutes, maybe less.

15 THE COURT: Well, I think less than fifteen
16 would be enough.

17 MR. ARIAIL: I think that would be ---

18 MR. HAYNSWORTH: How about twelve and a half.

19 THE COURT: Well ---

20 MR. HAYNSWORTH: No, I'll ---

21 THE COURT: All right.

22 MR. HAYNSWORTH: I'll try to be extremely
23 brief, Your Honor.

24 THE COURT: Okay.

25 MR. ARIAIL: Thank you.

1 THE COURT: All right. Let's bring the panel
2 up.

3 (WHEREUPON, the jury panel entered the open court
4 at approximately 11:58 a.m.)

5 THE COURT: Ladies and gentlemen, if I can
6 have your attention. At this time we will select a jury
7 in the case of McKinley, Cooper and Company, LLC against
8 J. Todd Highsmith, Shane Highsmith, and Highsmith &
9 Highsmith, LLC. This is an action wherein plaintiff
10 alleges that it is a limited liability company providing
11 certified public accounting services. That the
12 defendants, Todd Highsmith and Shane Highsmith, were
13 employees. That several attempts were made to contract
14 or settle by the defendants coming into the company or
15 leaving. They left. And the plaintiff now claims that
16 they have violated the South Carolina Trade Secrets Act,
17 which I will tell you more about during the course of
18 the trial. That while employed they breached their
19 fiduciary duty to the corporation. And while they were
20 there that they converted certain information from the
21 corporation.

22 The defendants deny all allegations of the
23 complaint. And they have filed a counterclaim and a
24 cross-claim against the plaintiff alleging breach of
25 contract, violation of the South Carolina Wage Payment

1 Statute and unjust enrichment and quantum meruit. I
2 will explain all of this to you during the course of the
3 trial.

4 Now, potential witnesses in this case will be --
5 and please give me your close attention because it's a
6 long list -- Toni McKinley, J. Todd Highsmith, Shane
7 Highsmith, Rosa Chapman, Matt Phillips, Marcy Loucks, L-
8 O-U-C-K-S, Gaetan Hemond, Charles Alford, Sherry Nestor,
9 Sherry McCoy, Sheryl Medders, C. Allan Ward, Lauren
10 Watterson, West Partin, Brad Schneider, Marlene Owens,
11 Chris Stone, Danny Woznick, Evelyn D. Hargette, H-A-R-G-
12 E-T-T-E, Matt Snoddy, Richard Livingston, who is with
13 Dixon Hughes Goodman Accounting Firm, Paul Savas, Ginny
14 Waller, Charlotte Cheatham, Roger Deluc, Kate Franch,
15 Steve Wilson, Brad Powers, Sandra Gowen, Caroline
16 Robertson, Betsy Littlejohn, Tara Glenn, Joy Rainey,
17 Marvin Short, Patrick Jackson, Kelly Pitts, Hope
18 Tedards, Joy Moody, Vanessa Arnold, Bruce Vollnogle, V-
19 O-L-L-N-O-G-L-E, Francis Stuart, Joy Cutter, Tony
20 Bright, Tom Cole, Priscilla Woznick, Dean Whisnant,
21 Christopher and Sara Segrest, S-E-G-R-E-S-T, Randy
22 Hawkins, Vickie Hawkins, Woody and Jane Woods, Nate
23 Crabtree, Jeremiah Johnson, Doris Cubits, Skip Taylor,
24 Groover Woods and Gaetan Hemond. I think we've already
25 called his name.

1 Now, I would inquire at this time if any member of
2 the jury panel is related by blood or marriage or
3 connected by employment to any potential witness in the
4 case? If so, would you please stand and give me your
5 name?

6 THE JUROR: Susan Reynolds.

7 THE COURT: Yes, ma'am.

8 THE JUROR: I don't know if the Chris Stone
9 that's on your list is with CVB, the Convention and
10 Visitors Bureau, but we do have -- I'm on city council.
11 We have a relationship with him.

12 THE COURT: Is that correct?

13 MR. ARIAIL: Yes, Your Honor, that is correct.

14 THE COURT: All right. My question to you
15 then is due to that fact would you have any problem
16 being a fair potential juror in this case?

17 THE JUROR: No, sir.

18 THE COURT: Thank you, ma'am.

19 I have some questions that I need to ask you at
20 this time. And if you would respond to any of the
21 questions, I'll ask you later to stand up and give me
22 that information.

23 Do I have any member of the panel or any member of
24 your immediate family who has ever been employed by an
25 accountant or a certified public accountant?

1 Has any member of the jury panel, which was
2 employed by an accountant or certified public accountant
3 left their prior employment and obtained employment with
4 a new accounting firm?

5 Does any member of the panel or their family work
6 for or are affiliated with the following companies?
7 South Carolina Rural Water Association, The Warehouse
8 Theater, Neighborhood Housing Corporation of Greenville,
9 Inc., Sexual Trauma Services of the Midlands, Town of
10 Edgefield, Junior League of Greenville, Inc., United
11 Ministries, Blue Ridge Rural Water Company, Greer Relief
12 and Resource Agency, United Way of Laurens County, Low
13 Country Council of Governments, Piedmont Community
14 Actions, Inc., James Island Public Service District,
15 McCormick Senior Center, Senior Services, Inc. of
16 Chester County, Waccamaw Regional Council of
17 Governments, Spartanburg Housing Authority, Tiger River
18 Fire Service Area, Inc., Town of Springdale, Town of Six
19 Mile, Town of Moncks Corner, Town of Saluda, Town of
20 Johnston, Town of Irmo, Town of Gaston, Powdersville
21 Water District, Greenville Chamber of Commerce, City of
22 Travelers Rest, Cherokee Springs Fire District, Greer
23 Relief, Avalonia, Hampton Avenue, Venice, Excaliber
24 Youth, Neighborhood Housing Corporation, Spartanburg

1 Ballet, Girl Scouts of South Carolina. Would anyone
2 reply to that?

3 Yes, ma'am. Your name, please?

4 THE JUROR: Suzanna Marino.

5 THE COURT: All right.

6 THE JUROR: I have worked as an accountant for
7 most of my work career. So I haven't really worked
8 directly for an accounting firm.

9 THE COURT: All right. Would that fact in any
10 way interfere with your ability to be a fair and
11 impartial juror on this case?

12 THE JUROR: No.

13 THE COURT: Thank you, ma'am. Yes, sir?

14 THE JUROR: Kenneth Ringenberg. I worked for
15 a public accounting firm.

16 THE COURT: And what firm is that?

17 THE JUROR: Ernst and Young.

18 THE COURT: And would that fact in any way
19 interfere with your ability to be a fair and impartial
20 juror on this case?

21 THE JUROR: It would not.

22 THE COURT: Thank you.

23 Do I have any member of the jury panel who has
24 started their own business? All right. Stand up.

1 Please give me your name.

2 THE JUROR: Chris Bailey.

3 THE COURT: Would that fact in any way
4 interfere with your ability to be a fair juror on this
5 case?

6 THE JUROR: No.

7 THE COURT: Thank you. Your name?

8 THE JUROR: William Edwards.

9 THE COURT: Mr. Edwards, I'll ask you the same
10 question.

11 THE JUROR: No, sir.

12 THE COURT: Thank you.

13 THE JUROR: Rachelle Greenwood.

14 THE COURT: Yes, ma'am.

15 THE JUROR: No, sir.

16 THE COURT: No? Okay. Thank you.

17 THE JUROR: Jeri Sarracino.

18 THE COURT: All right. Your name, please,
19 ma'am?

20 THE JUROR: Jeri Sarracino.

21 THE COURT: All right.

22 THE JUROR: No, sir.

23 THE COURT: Thank you. Yes, sir.

24 THE JUROR: Michael Williams.

25 THE COURT: Mr. Williams, would that fact

1 interfere with your ability to be a fair juror?

2 THE JUROR: Yes, it would.

3 THE COURT: It would?

4 THE JUROR: Yes?

5 THE COURT: All right. We will not put you on
6 this jury. Thank you. Yes, sir?

7 THE JUROR: Charles Peterson.

8 THE COURT: Stevenson?

9 THE JUROR: Peterson.

10 THE COURT: Peterson. Mr. Peterson.

11 THE JUROR: No, sir.

12 THE COURT: It wouldn't? Thank you.

13 THE JUROR: Holly Holland?

14 THE COURT: Yes?

15 THE JUROR: No.

16 THE COURT: Thank you.

17 THE JUROR: Gina McCardy; and no, sir.

18 THE COURT: Yes, ma'am. Your Name.

19 THE JUROR: Gina McCardy.

20 THE COURT: All right. Would not?

21 THE JUROR: Right.

22 THE COURT: Thank you.

23 Do I have any member of the panel who has signed or
24 entered into a non-compete, non-disclosure,
25 confidentiality, non-solicitation or employment

1 agreement? If so, would you please -- all right. Stand
2 up.

3 THE JUROR: Chris Bailey. Yes, it would.

4 THE COURT: It would?

5 THE JUROR: It would.

6 THE COURT: All right. Thank you, Mr. Bailey.

7 I appreciate your telling me that. Anyone else? Yes,
8 sir?

9 THE JUROR: Jim Brookie. It would not
10 interfere.

11 THE COURT: Thank you. Yes, ma'am.

12 THE JUROR: Kristina Walker. No, it would
13 not.

14 THE COURT: Thank you, ma'am.

15 THE JUROR: Rachelle Greenwood. No, it would
16 not.

17 THE COURT: Thank you.

18 THE JUROR: Pier DeJong. No, it would not.

19 THE COURT: Thank you.

20 THE JUROR: Jeb McEachern. No, it wouldn't.

21 THE COURT: Thank you. All right.

22 MR. ARIAIL: Everybody's going a little
23 faster. I'm trying to keep up.

24 THE COURT: All right. Slow down a little
25 bit. Did you get it?

1 MR. ARIAIL: I didn't get ---

2 THE COURT: All right. The last one.

3 THE JUROR: Jeb McEachern.

4 THE COURT: All right. Thank you, sir. And
5 your name in the back?

6 THE JUROR: Janine Riccardi. No.

7 THE COURT: Thank you.

8 THE JUROR: Susanna Marino. No.

9 THE COURT: Thank you.

10 THE JUROR: Gretchen Jenkins, no.

11 THE COURT: Give me your name one more ---

12 THE JUROR: Gretchen Jenkins.

13 THE COURT: And the answer is no?

14 THE JUROR: Yes.

15 THE COURT: Thank you.

16 And finally, has any member of the jury panel been
17 involved in a lawsuit with a former employer? All
18 right, sir.

19 THE JUROR: Chris Bailey.

20 THE COURT: Would that interfere?

21 THE JUROR: Yes, sir.

22 THE COURT: You've already said that.

23 THE JUROR: Yes, sir.

24 THE COURT: All right, sir.

25 THE JUROR: Sir?

1 THE COURT: Yes, ma'am.

2 THE JUROR: Susan Reynolds and it would not
3 interfere.

4 THE COURT: Thank you, Ms. Reynolds.

5 THE JUROR: Uh-huh (affirmative).

6 (WHEREUPON, the Court held off record discussion
7 with clerk of court.)

8 THE JUROR: Your Honor?

9 THE COURT: Yes, ma'am.

10 THE JUROR: I'm retired now, but I have signed
11 confidentiality ---

12 THE COURT: And your name?

13 THE JUROR: --- previously, but it would not
14 interfere.

15 THE COURT: And your name?

16 THE JUROR: Gwendolyn Addis.

17 THE COURT: And that would not give you any
18 problem?

19 THE JUROR: No, sir.

20 THE COURT: Thank you, ma'am.

21 MR. HAYNSWORTH: Your Honor, may we approach?

22 THE COURT: Sure.

23 (WHEREUPON, a bench conference was held off the
24 record.)

25 THE COURT: All right. The plaintiff strikes

1 first using the numbers on the left.

2 MR. HAYNSWORTH: Yes, sir, Your Honor.

3 Plaintiff strikes number 13.

4 THE CLERK: Plaintiff strikes 13.

5 MR. ARIAIL: Defendant strikes 6.

6 THE COURT: 6?

7 MR. ARIAIL: 6, Your Honor.

8 THE CLERK: Defendant strikes 6.

9 MR. HAYNSWORTH: Plaintiff strikes 17.

10 THE CLERK: Plaintiff strikes 17.

11 MR. ARIAIL: Defendant strikes 9.

12 THE CLERK: Defendant strikes 9.

13 MR. HAYNSWORTH: Plaintiff strikes 5.

14 THE CLERK: Plaintiff strikes 5.

15 MR. ARIAIL: Defendant strikes 14.

16 THE CLERK: Defendant strike 14.

17 MR. HAYNSWORTH: Plaintiff strikes 25.

18 THE COURT: No, come from the first ---

19 MR. HAYNSWORTH: I thought our alternate

20 rolled over.

21 THE COURT: I think ---

22 MR. HAYNSWORTH: Oh, I'm sorry, Judge.

23 THE COURT: You have one more. Each of you

24 have one more.

25 MR. HAYNSWORTH: My apologies, Your Honor.

1 Plaintiff strikes 15.

2 THE COURT: What number?

3 MR. HAYNSWORTH: 15.

4 THE COURT: 15?

5 MR. HAYNSWORTH: Yes, sir.

6 THE CLERK: Plaintiff strikes 15.

7 MR. ARIAIL: Defendant strikes 21.

8 THE CLERK: Defendant strikes 21.

9 THE COURT: Okay. Now, your alternate.

10 MR. HAYNSWORTH: Let's try this again.

11 Plaintiff strikes 25.

12 THE CLERK: Plaintiff strikes ---

13 THE COURT: Wait, wait ---

14 MR. ARIAIL: Defendant strikes ---

15 THE COURT: Wait, wait, the first alternate

16 will come from 22, 24, or 25. All right. You struck

17 25?

18 MR. HAYNSWORTH: Yes, sir.

19 THE COURT: All right.

20 MR. ARIAIL: Defendant strikes 24.

21 THE CLERK: Defendant strikes 24. Okay.

22 Gentlemen, I'll read these back to you. Plaintiff

23 strikes 5, 13, 15, 17 and 25.

24 MR. HAYNSWORTH: Yes, ma'am.

25 THE CLERK: Defendant strikes 6, 9, 14, 21 and

1 24?

2 MR. ARIAIL: Yes, ma'am.

3 THE CLERK: As I call your name if you will
4 please bring your things and come up and have a seat in
5 our jury box, please?

6 Laurie Rice, Remarque Rizo, Rachelle Greenwood,
7 Kristina Meagher, Susanna Marino, Charles Peterson,
8 Shane Sowders, Nicholas Woods, Janine Riccardi, Brian
9 Holman, Jeri Sarracino, Syrantha Tate, and Julie Segars.

10 THE COURT: Ms. Riccardi.

11 THE JUROR: Riccardi?

12 THE COURT: Yes. Thank you. Are you
13 Riccardi?

14 THE JUROR: I'm Marino.

15 THE BAILIFF: Who's Riccardi; you?

16 THE JUROR: I'm Riccardi, Your Honor.

17 THE COURT: Okay. Ms. Riccardi, would you
18 come take the first seat and serve as foreperson on this
19 case?

20 THE JUROR: Certainly.

21 THE COURT: Okay. Would you swear the jury,
22 please?

23 The balance of the panel, at this time please
24 report back downstairs to the jury assembly room. Thank
25 you very much.

1 (WHEREUPON, the jury panel exited the open court at
2 approximately 12:25 p.m.)

3 THE COURT: Okay. Now, swear the jury,
4 please.

5 THE CLERK: Ladies and gentlemen, if you would
6 please rise and raise your right hand for the oath in
7 this case. Your response should be I will.

8 You shall well and truly try case number 2014-CP-
9 23-4179, in the matter of McKinley, Cooper & Company,
10 LLC, Plaintiff, versus J. Todd Highsmith, Shane
11 Highsmith and Highsmith & Highsmith, LLC, Defendants,
12 and J. Todd Highsmith, Third-Party Plaintiff versus Toni
13 McKinley, individually, as Third-Party Defendant, and a
14 true verdict render according to the law and the
15 evidence, so help you God?

16 (WHEREUPON, all jurors answered I will and the jury
17 was duly sworn.)

18 THE COURT: Okay. Now, ladies and gentlemen,
19 we are going to start this case after lunch today. Now,
20 while you're on recess do not talk about this case among
21 yourselves or with anyone else. If anybody contacts you
22 and tries to talk to you about this case, get their
23 names and addresses and report that to me. Please keep
24 your badges on during the lunch recess. I ask that you
25 do that so that everyone involved with this case will

1 know that you are a juror and it would be highly
2 improper for them to talk about or discuss this case in
3 your presence. So I'd ask that you be back in your
4 juror room at two p.m. Two p.m. And the bailiff will
5 show you the room to report to at two p.m. Thank you.

6 (WHEREUPON, the jury exited the open court at
7 approximately 12:27 p.m.)

8 THE COURT: All right. Please be back at two.

9 MR. HAYNSWORTH: Thank you, Your Honor.

10 MR. ARIAIL: Thank you, Judge.

11 (WHEREUPON, court stood at recess for a lunch
12 break.)

13 THE COURT: Be seated, please. Be seated.
14 All right. Are you ready to make your opening
15 arguments, statements?

16 MR. HAYNSWORTH: Yes, sir, Your Honor.

17 MR. ARIAIL: Yes, Your Honor.

18 THE COURT: All right. No arguing, just ---

19 MR. HAYNSWORTH: Just statements.

20 THE COURT: --- give them what the facts are.

21 MR. ARIAIL: Just one thing. I don't know if
22 we ever put on the record a motion that we had had. I
23 wanted to verify it. I don't know if it was on the
24 record or if you knew I'd made a motion to basically not
25 allow a preliminary injunction order coming in and then

1 sequestering the witnesses. And I don't know if that's
2 -- we ever got it in the record. I just want to make
3 that official.

4 THE COURT: All right. You understand that,
5 Mr. Haynsworth?

6 MR. HAYNSWORTH: Yes, sir.

7 THE COURT: Nothing about the TRO order can
8 come in.

9 MR. HAYNSWORTH: Right.

10 THE COURT: And lay witnesses are sequestered.
11 All right. Bring the jury.

12 (WHEREUPON, the jury entered the open court at
13 approximately 2:04 p.m.)

14 THE COURT: All right. Brief opening
15 statement, Mr. Haynsworth.

16 MR. HAYNSWORTH: May it please the Court.

17 **OPENING STATEMENT**

18 **BY MR. HAYNSWORTH:**

19 Madam Forelady, ladies and gentlemen of the jury,
20 my name is Knox Haynsworth and I represent McKinley,
21 Cooper & Company, which is a CPA firm, as well as Toni
22 McKinley individually. This is Toni's daughter Marcy
23 seated next to her. I want to tell you briefly what we
24 believe the evidence in this case will establish.

25 In 2000, Shane Highsmith, the gentleman seated

1 there went to work with McKinley Cooper, I believe fresh
2 out of Clemson. In 2009 his brother, who had been out
3 in private industry, also went to work with McKinley
4 Cooper. We believe the evidence will show you, ladies
5 and gentlemen, at the beginning of 1989, Shane and his
6 brother Todd began to assemble confidential information
7 from McKinley Cooper with the goal of ultimately leaving
8 with it and starting their own competing CPA firm. The
9 evidence we'll present will show you that computer
10 experts did a mirror image of the hard drive of their
11 computers that they have at their current business
12 Highsmith & Highsmith. The evidence will show that on
13 the hard drive of those computers were a number of
14 documents that came from McKinley Cooper's computers.
15 The evidence will show you that McKinley Cooper had
16 internal policies dealing with computerized information,
17 acknowledged that computerized information is
18 confidential. The evidence will also show you, ladies
19 and gentlemen, that as CPAs, my clients and those
20 gentlemen, are governed by rules and regulations that
21 govern CPAs. And those rules and regulations provide
22 that the CPA firm owns the client information, that it
23 is confidential to the CPA firm and it cannot be taken
24 from that CPA firm without the client authorizing it.
25 The evidence will also show you, ladies and

1 gentlemen, that after they left McKinley Cooper they
2 printed off both in hard copy and computerized form a
3 number of templates and proposals and forms, that were
4 forms that Ms. McKinley had developed over thirty years,
5 refined the language and that sort of thing. And
6 instead of doing their own forms, the evidence will show
7 you that their forms are simply our forms with their
8 name on it.

9 And most importantly, ladies and gentlemen, the
10 evidence will show you that after they left McKinley
11 Cooper, they deleted all their emails off McKinley
12 Cooper computers. They kept some, don't know if all,
13 but you'll hear evidence that they're in possession of
14 old emails that they deleted from our machines.

15 The evidence will further show you, ladies and
16 gentlemen, that they were able to utilize the
17 documentation that they took and stole to go underbid
18 McKinley Cooper for its clients. The evidence will show
19 you that for many, many years clients were either on a
20 one-year contract, two-year contract, three-year
21 contract. And for years and years those clients would
22 roll over and were perfectly content for McKinley Cooper
23 to continue doing their work.

24 However, by taking the information from McKinley
25 Cooper, it was much cheaper to go compete for that

1 business. And the evidence will show you that they used
2 their knowledge of what the client was charged in prior
3 years, when the client's contract was up for renewal and
4 other information about the client to in essence steal
5 the client, unfairly, using our confidential
6 information. Thank you very much.

7 THE COURT: Mr. Ariail.

8 MR. ARIAIL: Thank you, Your Honor, may it
9 please the Court.

10 **OPENING STATEMENT**

11 **BY MR. ARIAIL:**

12 Ladies and gentlemen, I hope y'all are doing well
13 today. My name is Mills Ariail. I'm an attorney here
14 in Greenville. I represent the Highsmiths, Todd, who is
15 seated at the end on the right, and Shane on the left
16 there, with Highsmith & Highsmith. We appreciate your
17 time and attention to this matter. It is a very
18 important case for them. They've waited to have this
19 heard.

20 And what you're going to hear throughout this, what
21 I want to make sure you listen to it. This is a trade
22 secret, breach of fiduciary duty, and a conversion case.

23 Now, in this case the main issue, and the way I
24 summarize it is, trade secrets must be owned by the
25 individual company. They must be the owner of it. If a

1 trade secret is made public, and the Judge will give you
2 the law on this, and it's been disclosed, it no longer
3 maintains that trade secret protection.

4 Now, in this case, what you're going to see is we
5 don't believe there are any trade secrets. And we've
6 put together a list of witnesses to come in that will
7 testify as to what trade secrets are in the accounting
8 industry. As to what was, you know -- what is deemed to
9 be that way. What is deemed to be confidential in the
10 accounting industry. We're going to go through and
11 we're going to be able to show you that the information
12 in this case, what is being alleged, is not a trade
13 secret. And what you're going to see -- the main thrust
14 of this case is what is the information they're saying
15 is a trade secret? And we're going to show you that
16 it's been made public. The information they're claiming
17 has been made public and sent out. You can get it.
18 It's sent to different public entities, governmental
19 entities, non-profits. That information which is
20 readily ascertainable by the public. We're also going
21 to show you that they did not protect this information.
22 They didn't stamp it confidential. They didn't stamp it
23 trade secret. They didn't do anything to protect it, no
24 passwords; none of that to be able to secure it. They
25 also let people have access to it, others outside their

1 office. There are no trade secrets in this case is our
2 position.

3 And we're also going to show you that my client,
4 like others that are in the same situation, worked,
5 built their way up at McKinley Cooper. My clients will
6 show you that they wanted an ownership interest in this
7 company. They wanted to buy in. They wanted something
8 that would be a lasting investment for them. They
9 wanted to be a part of this system. And they asked to
10 buy in and they negotiated. What you're going to see is
11 that those negotiations, doing them for three, four,
12 five months, they failed. And the reason they failed is
13 because Ms. McKinley wanted them to sign a non-compete
14 agreement. They will testify and they will show you,
15 they were willing to sign a non-disclosure
16 confidentiality agreement, which would keep the
17 information protected that she was saying was there.
18 They were willing to do whatever needed to be done to be
19 able to buy into the company. That wasn't enough.

20 And as a result, they said, we're not going to be
21 able to do this. The buy-in or agreement to try to
22 purchase McKinley Cooper failed; and they left. They
23 opened their own business up. And what we're going to
24 show you through their work over the years with these
25 clients, who they've been doing all the audits for,

1 they've been doing all the filing of the 990 tax returns
2 and all the audits. We're going to show you the reason
3 they got these clients because the clients liked them,
4 they trusted them, they wanted to work with them. Just
5 like any individual that leaves and goes out on their
6 own, these individuals, these companies have the right
7 to choose who they want to go with. We're going to show
8 you that.

9 My client has not taken trade secrets and we'll
10 show you that. They haven't breached any duties that
11 they had. And we want to be able to show you that. And
12 it's not our burden to do this. Not their burden to put
13 up evidence. They have to show by the preponderance of
14 the evidence, the tipping of the scales. It can't be
15 fifty percent. It's got to be fifty-one. They've got
16 to show you that we've done something, breach the Trade
17 Secret Act, breach of fiduciary duty, something of that
18 nature.

19 I don't want to take a lot of time in regards to
20 this. We have a counterclaim, Mr. Highsmith does, for
21 failure to pay a commission that he was owed. Ms.
22 McKinley told him he was owed thirty percent of his tax
23 clients that he brought in. First year she paid it.
24 After that, she did not pay the thirty percent. She
25 paid fifteen percent. He is requesting compensation for

1 that under the wage payment and would like to be paid
2 that amount based upon his hard work.

3 I thank you for your time and attention to this. I
4 look forward to working with you over the week. Thank
5 you.

6 THE COURT: Okay. Mr. Haynsworth.

7 MR. HAYNSWORTH: Your Honor, I'd call Toni
8 McKinley.

9 THE CLERK: If you'll please place your left
10 hand on the bible and raise your right hand.

11 You do solemnly swear that the testimony you're
12 about to give in this case will be the truth, the whole
13 truth and nothing but the truth, so help you God?

14 THE WITNESS: I do.

15 THE CLERK: Please state your name for the
16 record.

17 THE WITNESS: Toni McKinley.

18 THE CLERK: Thank you. You may be seated.

19 **TONI MCKINLEY,**

20 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

21 **DIRECT EXAMINATION**

22 **BY MR. HAYNSWORTH:**

23 Q. Ms. McKinley, for the jury's benefit can you give
24 us just a little background about what McKinley, Cooper
25 & Company does. Generally, if there are any specific

1 areas from a CPA standpoint that your company focuses
2 on, if you can just give me a little bit of background
3 about the company?

4 A. Well, we're a CPA firm and we do a lot of audit
5 work. I would say our practice consists of about sixty
6 percent audit work, about forty percent tax work; that's
7 sort of the division. And then a small percentage of
8 peer review work.

9 Q. I think I understand when you say tax work. What
10 is audit?

11 A. Audit work is where we go into a client and perform
12 certain procedures, tracing activity through their books
13 and records. And we render an opinion on the financial
14 statements that are prepared. Those are usually large
15 engagements, audit work is.

16 Q. How long have you been doing audit work?

17 A. Thirty-nine years.

18 Q. And are there particular types of clients that you
19 do audit work -- bad question. They are non-profits,
20 they're governmental entities, they're companies,
21 they're individuals. Does your firm specialize in any
22 particular type of audit work for any particular type of
23 client?

24 A. I started my career doing governmental audit work,
25 school districts and municipalities; that type of

1 government. And then over the years I became heavily
2 involved in non-profit work. And so I would say today
3 we probably do more non-profit than governmental. And
4 then we also do audits of commercial companies also.

5 Q. As part of what you do to do an audit, I presume
6 you go out, get information from your client. What sort
7 of, what sort of information does the CPA firm create?
8 As opposed to getting documentation from the client,
9 what sort of information does the CPA firm create when
10 doing these audits?

11 A. Well, our audit plan is our audit program, which
12 spells out the scope of the work we're going to perform.
13 And then all of our work now has to be documented. And
14 that work is documented in the form of work papers. For
15 instance, if we're going to trace transactions through a
16 company's system we would have a tester transactions
17 work paper where we select a sample of checks. We trace
18 the checks to being cleared at the bank. We look at the
19 endorsements on the check. We do work papers to
20 document check numbers, payee, who signed it, trace to
21 the paid invoice and who approved the invoice for
22 payment. Throughout the system where it was posted to
23 the general ledge, you know, what account
24 classification. It goes on and on. Every firm has
25 their own way of setting up their work papers. But now

1 all of our work has to be documented so that an
2 independent person, like a peer reviewer, can look at
3 that work and see that sufficient work was done to be
4 able to render an opinion on the financial statements.

5 Q. In the CPA world, who owns the work paper, the
6 client or the CPA firm?

7 A. It set law that the CPA firm owns the work papers.
8 There's no doubt. You learn that in accounting 101.
9 The CPA firm owns the work papers; not the client, not
10 the third-party folks, strictly the CPA firm. It's our
11 work product.

12 Q. And are CPAs regulated by any licensing body?

13 A. We're regulated by -- the LLR has the Board of
14 Accountancy. And then we're also regulated by the -- we
15 also have the two associations, the State Association of
16 CPAs and the American Institute of Certified Public
17 Accountants. Those are two associations. But the LLR,
18 Board of Accountancy, is the only one that really
19 licenses CPAs to enable us to operate as CPAs.

20 Q. The AICPA and you just said -- American ...

21 A. American Institute of Certified Public Accountants.

22 Q. And that's something that you are a member of?

23 A. I am.

24 Q. Are all CPAs members of that?

25 A. No. You can not be a member of the AICPA. But, of

1 course, AICPA writes all the rules and regulations along
2 with FASB AND GASB, but AICPA is pretty much a rule
3 maker, so ...

4 Q. And if you choose to join AICPA, are you agreeing
5 to abide by their rules?

6 A. Yes.

7 Q. All right. And those rules are published, I
8 gather?

9 A. Yes.

10 Q. And does AICPA conduct seminars that you and other
11 CPAs go to to get updated on various things, including
12 the rules and regulations?

13 A. Yes.

14 Q. All right. Your company, McKinley Cooper, do you
15 have any policies or did you have any policies when
16 these guys worked for you, dealing with y'all's computer
17 system?

18 A. We had an IT policy dealing with the computer
19 systems. And in there it addresses trade secrets, that
20 trade secrets are not to be shared with the public or
21 taken outside the firm in any way. But those were
22 signed by each individual employee at the firm.

23 Q. Ms. McKinley, let me give you two documents and ask
24 you if you can identify them for us?

25 A. Those are the two IT policies that were -- one

1 signed by Shane and one signed by Todd Highsmith.

2 Q. All right. And those are documents that your
3 company prepared, submitted to them, and they signed?

4 A. We have everyone sign one at least once a year.

5 Q. Okay. Could you read us real quick the dates that
6 the two Highsmiths signed their respective IT policies?

7 A. Todd signed his on February 4th, 2011, and Shane
8 signed his on January 28th, 2011.

9 MR. HAYNSWORTH: Your Honor, I'd ask that the
10 IT policies be admitted collectively as Exhibit 1?

11 THE COURT: Any objection?

12 MR. ARIAIL: No objection, Your Honor.

13 THE COURT: Without objection.

14 (WHEREUPON, Plaintiff's Exhibit Number 1 was marked
15 and admitted into evidence.)

16 Q. Does your company prepare and actively require its
17 employees to sign employment agreements?

18 A. We do now, but we did not at the time that they
19 left the company.

20 Q. Okay. Bad question on my part. Does your company
21 have an employee manual?

22 A. We do.

23 Q. Let me get you to take a look at that document, Ms.
24 McKinley, and tell us what it is if you don't mind?

25 A. It's the employee manual and it's dated July 12th,

1 2011.

2 Q. And were both the Highsmiths provided copies of
3 McKinley Cooper's employee manual?

4 A. Yes.

5 Q. All right.

6 MR. HAYNSWORTH: Your Honor, I'd ask that the
7 employee manual ---

8 THE COURT: Any objection?

9 MR. ARIAIL: No objection, Your Honor.

10 MR. HAYNSWORTH: --- be admitted as Exhibit 2.

11 (WHEREUPON, Plaintiff's Exhibit Number 2 was marked
12 and admitted into evidence.)

13 Q. Ms. McKinley, Exhibit 1 is the IT policy for you
14 company; correct?

15 A. Correct.

16 Q. Does it address computer email and internet type
17 data?

18 A. It does.

19 Q. Okay. What does the IT policy provide as far as
20 computer or internet data and who it belongs to?

21 A. It says all internet data that is composed,
22 transmitted and/or received by the company's computer
23 system is considered to belong to the company and
24 recognized as part of its official data. It is,
25 therefore, subject to disclosure for only legal reasons

1 or to other appropriate third parties.

2 Q. I note at the top it says, please review for
3 Friday, it looks like?

4 A. That's my note. In other words, I wanted feedback
5 if there were any -- prior to the signatures required,
6 I wanted to see whether there was any comments or
7 suggestions to improve it.

8 Q. All right. When you presented the IT policy to the
9 Highsmith brothers before they signed it, did they have
10 any questions or any concerns or do you recall any ---

11 A. No. No.

12 Q. --- expressions of confusion as to what the policy
13 meant?

14 A. There were none from anybody.

15 Q. All right. If you look over on page two, does your
16 policy deal with things such as downloading electronic
17 files or confidential information, proprietary
18 information, things of that nature?

19 A. It does.

20 Q. What does it provide?

21 A. It says downloading, copying, or pirating software
22 and electronic files that are copyrighted are without
23 authorization. And the key words being without
24 authorization.

25 Q. And at the top it says unacceptable use of the

1 internet by employees includes but is not limited to?

2 A. Right.

3 Q. And one of the prohibited things is downloading
4 electronic files without authorization?

5 A. That's right.

6 Q. Okay. And does it also prohibit the sharing of
7 confidential materials, trade secrets or proprietary
8 information outside of McKinley Cooper?

9 A. That's the next bullet point, yes.

10 Q. Did the Highsmith brothers ever ask your permission
11 to download electronic files from your computer system
12 before they left, to take with them when they left?

13 A. No.

14 Q. You were mentioning earlier work papers. And I
15 think you said, did you not, that one of the types of
16 work papers in the auditing of these clients is a test
17 of transactions?

18 A. That's what we called them.

19 Q. All right. Would that be the same thing as a test
20 of disbursements?

21 A. Right. Test of transactions would cover test of
22 disbursements, test of receipts, payroll testing, that
23 sort of thing.

24 Q. Let me hand you this document, Ms. McKinley, and
25 see if you can tell us what that is?

1 A. This is Appalachian Council of Governments Test of
2 Disbursements, June 30th, 2011. And this is the way we
3 formatted this work paper to document the work that we
4 performed on disbursements, writing the checks, and
5 tracing it all throughout the system.

6 Q. And is that document something that McKinley Cooper
7 created or something that the Appalachian Council of
8 Governments created?

9 A. No, this is strictly our work, the firm.

10 Q. All right.

11 MR. HAYNSWORTH: Your Honor, I'd ask that the
12 Test of Disbursements work paper be admitted as an
13 exhibit 3?

14 THE COURT: Any objection?

15 MR. ARIAIL: No objection, Your Honor.

16 (WHEREUPON, Plaintiff's Exhibit Number 3 was marked
17 and admitted into evidence.)

18 Q. We've now marked the work paper, the Test of
19 Disbursements for the Appalachian Council of
20 Governments, as Exhibit 3, Ms. McKinley. A number of
21 McKinley Cooper audit clients are now Highsmith &
22 Highsmith audit clients; correct?

23 A. Yes.

24 Q. American (verbatim) Council of Governments have
25 they ever Highsmith & Highsmith clients?

1 MR. ARIAIL: Objection.

2 A. No.

3 THE COURT: Hold on?

4 MR. ARIAIL: It's not -- I just want to --
5 it's not American Council. I think it's Appalachian
6 Council from what I understand.

7 MR. HAYNSWORTH: I'm sorry. Bad on my part.

8 Q. Was the Appalachian Council of Governments ever an
9 audit client of Highsmith & Highsmith?

10 A. No.

11 Q. Is there any reason you can think of, Ms. McKinley,
12 why your test of transactions for this audit client of
13 yours would be in the computers of Highsmith &
14 Highsmith?

15 MR. ARIAIL: Objection, Your Honor.

16 THE COURT: What's your objection.

17 MR. ARIAIL: Well, first, can we approach,
18 Your Honor.

19 THE COURT: Well, take the jury out, please.

20 (WHEREUPON, the jury exited the open court at
21 approximately 2:31 p.m.)

22 THE COURT: All right. Now, what's your
23 objection to that question.

24 MR. ARIAIL: I'm not sure if it's going to
25 lead into speculative testimony in regards to -- but

1 what I'm concerned about is, is that she leads in and
2 says, no. And then goes into what her belief is as to
3 why it's on there or anything of that nature. If she'd
4 simply answer the question -- the problem I've had
5 before during her deposition was that it would be a
6 continued response to that. I don't think the problem I
7 had was not with the question itself, but if she
8 continues on with it; does any speculative guesswork.

9 THE COURT: Mr. Haynsworth.

10 MR. HAYNSWORTH: I'm confused because I've now
11 forgot exactly the question that I asked, Your Honor. I
12 think it was can you think of any reason why this
13 McKinley Cooper document would be in their Highsmith &
14 Highsmith computer. And I think she was getting ready
15 to say no. And I guess Mills was concerned ---

16 THE COURT: Is that going to end it?

17 MR. HAYNSWORTH: Yes, sir. And I guess Mills'
18 concern was, no, but it probably got there because the
19 stole it.

20 THE COURT: All right.

21 MR. HAYNSWORTH: So no, is ---

22 MR. ARIAIL: And that's my concern is, is I
23 don't want to get into these -- if he's simply going to
24 limit it to that, and no speculative comments on the end
25 of it.

1 THE COURT: Is that right, Mr. Haynsworth?

2 MR. HAYNSWORTH: Although in frankness, if my
3 expert told her I found it in their computer, I think
4 that would be legitimate.

5 THE COURT: All right. Bring the jury in.

6 MR. HAYNSWORTH: Madam Court Reporter, maybe
7 could I get you to read back my question when they come
8 back?

9 THE COURT: Re-ask the question.

10 MR. HAYNSWORTH: Well, because I'm going to
11 ask her can you think of any reason ---

12 THE COURT: Oh, I'm sorry.

13 MR. HAYNSWORTH: I'll come close enough, I
14 think.

15 (WHEREUPON, the jury entered the open court at
16 approximately 2:33 p.m.)

17 THE COURT: All right. Proceed.

18 Q. Ms. McKinley, before we took a break, I think you
19 told me that the Appalachian Council of Governments was
20 never a Highsmith & Highsmith client; is that correct?

21 A. That's right.

22 Q. And I believe my follow-up question prior to the
23 objection was, do you know why your Appalachian Council
24 of Government Test of Disbursements was in their
25 Highsmith & Highsmith computers?

1 MR. ARIAIL: Objection, Your Honor.

2 THE COURT: All right. No, I'll allow that.

3 Go ahead. You can answer.

4 A. Do I know how it got there? Well, it's information
5 that would only belong to our firm and it's confidential
6 information. Appalachian Council of Governments would
7 not want to know that anyone other than the audit firm
8 had that information. So, it went from our computer to
9 their computer.

10 Q. Test of disbursements is a type of work paper.

11 What are some other types of work papers?

12 A. We have audit programs, which is the audit plan,
13 what -- the whole universe of our work. We have
14 internal control work papers where we study a client,
15 document the internal controls. We test the internal
16 controls. We have risk assessment work papers where we
17 assess how much risk there's going to be in auditing a
18 certain client. And then we -- from that assessment we
19 determine how much work we need to do. All that's
20 documented. We document -- we read the minutes of the
21 board of directors, documentation of that. We document
22 any adjusting journal entries that we make that the
23 books need to be adjusted or if they need to be
24 adjusted. Sometimes we have compliance work papers that
25 have to do with eligibility of certain grants. We test

1 revenue cycle. We test the expenditure cycle. The
2 revenue cycle, we're -- you know, if there's utility
3 bills, we look at the rates charged to customers, the
4 usage of the customers, recalculate, how much was
5 billed, how much was collected. Trace it into the
6 books. Trace the collections to the bank. That would
7 be revenue cycle, disbursement cycle. I think I talked
8 somewhat about that. We look at the checks, trace to
9 the bank, look at endorsement, proper classification of
10 the expense, approvals, etcetera. I mean, our work
11 paper documentation is like a banker box full of paper
12 for each client. Of course, nowadays we have partially
13 only on the computer that we don't really print out. So
14 we're sort of not fully paperless, but we're like half
15 paperless and half paper.

16 Q. Yes, ma'am.

17 A. It's voluminous.

18 Q. When you first land an audit client and you're
19 beginning this process of coming up with all these
20 various work papers you've told us about to ultimately
21 come up with the final audit, logistically, what
22 information do you have to find out in order to do all
23 these different work papers?

24 Q. Well, we have to learn about the organization. We
25 have to learn who does what within the organization to

1 determine separation of duties. Like, so and so opens
2 the mail, gives the mail to the next person, next person
3 makes a list of all the money that's come in, and
4 somebody else makes the deposit for the bank. And who
5 does what within all the different cycles. Payroll, who
6 does what? Who gets the time sheets, who approves
7 payroll, who signs the checks; you know, the whole
8 system. And when I said internal control study, we have
9 to learn how everything works. And everybody's
10 different. Every client is different makeup, different
11 numbers of people, you know, they all do things
12 different ways. Just like going to work for a new
13 company, it's always something different.

14 Q. Given the same client, audit them for the very
15 first time, and then audit the next year, and perhaps
16 the third year and years thereafter, is there any
17 difference in the amount of work that goes into the very
18 first year versus subsequent years?

19 A. It's a whole lot more work the first year because
20 you have to learn the systems. You have to document the
21 systems. And then when you go in the next year, you've
22 got all of that set up, all of your templates set up.
23 You've got all that information documented. Suzy takes
24 the deposit to the bank. The next person records it on
25 the books; that sort of thing. So if you've got all of

1 that work done the first year, you simply add -- well,
2 what the changes -- did y'all change your methods? You
3 lose any employees? You update it only the next year.
4 So, yeah, when we bid on an audit, we usually say do a
5 three-year bid. Some firms -- most firms charge a lot
6 more in the first year and less the second and third
7 year. We sort of do the -- it's simpler for me to just
8 charge the same fee for each of the three years, knowing
9 that I'm going to spread the costs, the initial costs
10 throughout the three years.

11 Q. And would years two and three, your example, be
12 less expensive and more profitable for you because you
13 didn't have to spend the time reinventing the wheel ---

14 A. That's right. That's right. Most of it's already
15 set up..

16 Q. And would one of the things that you would have as
17 part of the various work papers to do an audit be bank
18 account information for a given client?

19 A. Right. We send bank confirmation requests out to
20 the banks and the responses come directly back to the
21 auditor. And certainly we have to determine all the
22 bank account numbers, where to mail the bank
23 confirmation requests because so many banks may have
24 headquarters in Charlotte. You've got to know
25 specifically who gets the bank confirmation. And it's

1 some up-front work to set that all up.

2 Q. Okay. Bear with me one second. Ms. McKinley, I'm
3 going to hand you -- it's three pages I've clipped
4 together. If you could just look at it briefly and let
5 me know if you recognize that document?

6 A. This is a standard bank confirmation form for
7 Phyllis Wheatley Association for the year ended December
8 31st, 2010. And it's being sent to Wachovia in
9 Charlotte, North Carolina, at an address there. And we
10 say the account names, the account numbers of which
11 accounts we're asking them to confirm.

12 Q. Okay. And the first page is the information
13 regarding Phyllis Wheatley's account at Wachovia in
14 December of 2010; correct?

15 A. Correct.

16 Q. Then the second page is Phyllis Wheatley, again,
17 Wachovia, but for December of '09?

18 A. Correct.

19 Q. And then the third page is again Phyllis Wheatley,
20 but that one is bank information regarding an account at
21 SunTrust; is that correct?

22 A. That's right. It's a different account number.

23 Q. And is this a document that McKinley Cooper
24 created?

25 A. Yes.

1 Q. All right. And did someone at McKinley Cooper plug
2 in the account number information and the bank and the
3 address and the customer?

4 A. Yes.

5 MR. HAYNSWORTH: Your Honor, I'd ask that the
6 bank confirmation be admitted as Exhibit ---

7 THE COURT: Any objection?

8 MR. ARIAIL: No objection, Your Honor.

9 MR. HAYNSWORTH: --- 4.

10 THE COURT: Without objection.

11 (WHEREUPON, Plaintiff's Exhibit Number 4 was marked
12 and admitted into evidence.)

13 Q. Ms. McKinley, let me show you another bank
14 confirmation and see if you can identify it for me?

15 A. This is for the Golden Strip Family and Child
16 Development Center, dated for the year ended December
17 31, 2011. And it's being sent to Bank of America in
18 Tampa, Florida. And it's got the account number.

19 Q. Was Golden Strip Family and Child Development
20 Center an audit client of McKinley Cooper's?

21 A. It was.

22 Q. Did they become an audit client of Highsmith &
23 Highsmith?

24 A. Yes.

25 Q. What's the accounting firm name at the bottom of

1 that bank confirmation?

2 A. It says Highsmith & Highsmith.

3 Q. Do you know where this bank confirmation marked
4 Highsmith & Highsmith at the bottom, where the actual
5 underlying form originated?

6 MR. ARIAIL: Objection, Your Honor.

7 THE COURT: What's your objection. If she
8 knows.

9 MR. ARIAIL: Well -- okay, Your Honor.

10 THE COURT: All right. Go ahead. If she
11 knows.

12 A. The question was ---

13 Q. Right. This one says Highsmith on the bottom, but
14 it appears very similar to the prior ones that said
15 McKinley Cooper. Do you know where this actual form
16 that has Highsmith's name on it originated?

17 A. It originated in a -- McKinley Cooper computers.

18 Q. All right.

19 MR. HAYNSWORTH: Your Honor, I'd ask that the
20 bank confirmation with Highsmith & Highsmith at the
21 bottom be entered into evidence as Exhibit 5.

22 THE COURT: Any objection?

23 MR. ARIAIL: No objection, Your Honor.

24 (WHEREUPON, Plaintiff's Exhibit Number 5 was marked
25 and admitted into evidence.)

1 Q. Ms. McKinley, let me ask you this. Sort of like
2 with the work papers, when you first go do an audit and
3 amongst the documents you're preparing are these bank
4 confirmations that has the name of the bank, the account
5 number, and I presume some audit clients may have one or
6 two banks. Some may have a lot of banks. When you
7 first set about to get this information, does someone
8 from McKinley Cooper have to go get in touch with the
9 client, find out who they bank with, what the account
10 numbers are, those sort of things?

11 A. Yes.

12 Q. And so like the prior discussion about year two is
13 much more efficient because you've already got all the
14 information from year one. The same thing on these bank
15 confirmations, when you go to do year two and you're
16 doing bank confirmations, I presume it doesn't take you
17 as long in year two because you've already got all the
18 information on the form from year one?

19 A. That's right. And also in year one, the client may
20 give you two or three bank accounts. And then during
21 the course of the audit you find out that there are
22 actually more bank accounts, and so you would have a
23 much more thorough record of what bank accounts are in
24 the name of that client.

25 Q. If a subsequent accounting firm had your -- have an

1 audit for whatever client for however many years, new
2 accounting firm gets that account for the very first
3 time, if they had the information from the prior year
4 from y'all's audit in their possession, how would that
5 help them if they set about to do their audit with what
6 used to be your client?

7 A. Well, it would save them a tremendous amount of
8 time, which is ---

9 Q. How so?

10 A. Because the initial legwork would be cut down
11 tremendously.

12 Q. For instance, if the exhibits we've looked at, if
13 the Highsmiths had your McKinley Cooper bank
14 confirmation firm for your client, and they snagged that
15 client as a client, but they've got your prior
16 information from your system, you're not going to have
17 to go back to the client and find out the name of the
18 bank account and find out the account number or do all
19 of that legwork; are you?

20 A. No. It gives them an economic advantage.

21 Q. When a client switches accounting firms, as I
22 understand it, some type of letter is written, perhaps
23 from the client or new accounting firm, but basically
24 we'd like you to give our new auditors some of our
25 information. Is that a standard thing when one

1 accounting firm replaces a prior accounting firm?

2 A. Yes.

3 Q. All right. And when the Highsmiths obtained your
4 audit clients, were you given a request, either by Shane
5 or Todd, or by the client to provide them with certain
6 information?

7 A. By the client, yes.

8 Q. And would Shane or Todd request, you know, with the
9 client's permission, hey, Toni, we need to get certain
10 information about XYZ client?

11 A. Yes.

12 Q. And you would provide that information to the
13 Highsmiths?

14 A. Certain information.

15 Q. All right. What information would you typically
16 not be required to provide to the successor auditing
17 firm?

18 A. We would not provide work papers such as audit
19 programs, internal control documentation, test to
20 transactions work, bank confirmations. There's only
21 certain -- the work papers we are required
22 professionally to provide to a successor auditor are
23 things like depreciation schedules. Work papers that we
24 have, maybe we prepared them, maybe the client gave them
25 to us that area an integral part of their accounting

1 system, that they would need to know. The depreciation
2 schedule is an example. That's usually the main thing.
3 The other thing is what makes up some substantive
4 balances in their books. For instance, accounts
5 receivable, they need the detail what makes up that
6 number. Accounts payable, sometimes we find additional
7 accounts payable as part of our audit procedures. We
8 have to supply the client and the successor auditor what
9 detail amounts make up the accounts payable. So certain
10 balances on their balance sheet we have to provide
11 because they really don't have a full set of books
12 unless they get that information from us. And that's
13 it.

14 Q. To the extent that the Highsmiths snagged audit
15 clients that used to be your audit clients and they
16 requested certain information be provided from you to
17 them, because they're the new auditors, would you
18 provide that information in electronic form? For
19 instance, an Excel spreadsheet or Word document as
20 opposed to a hard copy?

21 A. We strictly limit it to hard copies, whether it's
22 Highsmiths or any other successor auditors. We only
23 give them hard paper copies.

24 Q. So it would be fair to say that if any, you know,
25 an electronic form information, any of McKinley Coopers

1 information involving a prior audit client, that that
2 would not be transmitted electronically, even if you
3 gave Shane and Todd the information. It would be hard
4 copy?

5 A. Only hard copy.

6 Q. Let me show you a document, Ms. McKinley, and see
7 if you can identify that for us?

8 A. This is the audit and review list. This is a
9 client listing that shows the type of services we
10 perform for the clients. It's three pages long, very
11 small print. And it shows the billed amount. It shows
12 the year end of the client and it shows the contract
13 term of the client.

14 Q. And all those clients and the amount billed and the
15 year end and length of contract, those at the time this
16 document was dated were all McKinley Cooper clients?

17 A. That's our client list for audit engagements and
18 review engagements.

19 MR. HAYNSWORTH: Your Honor, I'd ask that the
20 client list be admitted into evidence ---

21 THE COURT: Any objection?

22 MR. HAYNSWORTH: --- as Exhibit 6.

23 MR. ARIAIL: Yes, Your Honor. I just don't
24 know if she knows where this came from, how it was put
25 together, where it was found, all that information.

1 MR. HAYNSWORTH: I'm going to ask her right
2 here directly, Your Honor.

3 THE COURT: All right. Go ahead.

4 (WHEREUPON, Plaintiff's Exhibit Number 6 was marked
5 for identification.)

6 Q. All right, Ms. McKinley, the document we're
7 discussing, the client list, where was that found?

8 A. After Shane and Todd Highsmith left, Allan Ward,
9 another CPA in the firm, was moved into Shane
10 Highsmith's office. And he found this in Shane
11 Highsmith's desk. They were switching offices. And he
12 immediately came and presented this to me.

13 Q. Did you ever give Shane Highsmith permission while
14 he was working for McKinley Cooper to assemble a list of
15 your clients, the services your provided to them, how
16 much you had billed them, when their year end was or how
17 long their contract term was?

18 A. Never.

19 Q. Okay.

20 MR. HAYNSWORTH: Your Honor, I'd again ask
21 that the document be admitted into evidence.

22 THE COURT: All right. Any objection.

23 MR. ARIAIL: No objection, Your Honor.

24 THE COURT: Hold on a minute. Has she marked
25 it?

1 MR. HAYNSWORTH: Yes, sir. It's marked. It's
2 in as Exhibit 6.

3 THE COURT: All right. It's into evidence.

4 (WHEREUPON, Plaintiff's Exhibit Number 6 was
5 admitted into evidence.)

6 Q. We talked some about hard copy and electronic and
7 so forth and so on. Where were the -- the information
8 about your clients, the length of their contract term
9 and what they charged, were there hard copies of that
10 information in your office?

11 A. Yes.

12 Q. Where were those hard copies maintained?

13 A. There's a credenza behind my -- I have my desk
14 here, chair here, and a credenza behind me. And I keep
15 all my contracts in a lateral file drawer behind my
16 desk.

17 Q. And at McKinley, Cooper & Company for purposes of
18 what you may decide to charge for a given audit, who
19 makes that decision?

20 A. I do.

21 Q. Does anyone else make that decision?

22 A. No.

23 Q. Is anyone else made aware of how much you decided
24 to charge a client?

25 A. No.

1 Q. Did you ever give Shane Highsmith or Todd Highsmith
2 permission to go into your credenza and look at that
3 information?

4 A. Shane Highsmith requested permission, and I told
5 him no.

6 Q. What was the context of him asking your permission
7 to look at that information?

8 A. During the negotiations to buy the company he said
9 that he wanted to access my files and my contracts to
10 see the length of the contracts and the amounts and all
11 of that to determine the purchase price to better -- and
12 I told him, no, that the negotiations were not far
13 enough along for him to have access. There were three
14 other parties, and I would not give him total access to
15 the whole kitchen sink before negotiations were further
16 along.

17 Q. And did you request he sign some sort of
18 documentation before you were going to give him access?

19 A. I told him we needed to come up with some letter of
20 intent or some sort of confidentiality agreement to sign
21 by the three parties that were planning to buy in -- or
22 the four parties, excuse me, planning to buy in before I
23 would disclose all that information to just one party.
24 It wouldn't be fair to the other three.

25 Q. And neither Shane Highsmith nor Todd Highsmith ever

1 signed a document giving them -- where you gave them
2 authorization to see that information; is that correct?

3 A. No.

4 Q. All right. Ms. McKinley, let me hand you two
5 documents and see if you can tell me what they are?

6 A. Okay. The first one is an audit proposal addressed
7 to Blue Ridge Rural Water Company by the Highsmith &
8 Highsmith Company. And the second one is a proposal for
9 audit services for United Ministries prepared by
10 McKinley, Cooper & Company.

11 MR. HAYNSWORTH: Your Honor, I would ask that
12 the proposals be admitted into evidence. The Highsmith
13 proposal as Exhibit 7 and the McKinley Cooper proposal
14 as Exhibit 8?

15 THE COURT: Any objection.

16 MR. ARIAIL: Exhibit 7, I don't know -- I
17 wasn't listening to how she got it or a little
18 background in regards to that. Exhibit 8, I don't have
19 an issue with because that's her own ---

20 THE COURT: And you object to the other one?

21 MR. ARIAIL: I object to 7 until I get a
22 little bit more -- I'm just trying to figure out some
23 questions in regard to it.

24 MR. HAYNSWORTH: Well, that's all right, Your
25 Honor. Why don't we do this, why don't we mark the

1 McKinley Cooper one 7 that there is no objection to.

2 THE COURT: All right.

3 MR. HAYNSWORTH: And I will simply ask her
4 some additional questions about the Highsmith proposal
5 that is not in evidence.

6 THE COURT: All right.

7 (WHEREUPON, Plaintiff's Exhibit Number 7 was marked
8 and admitted into evidence.)

9 Q. Now, Ms. McKinley, these proposals -- and I presume
10 I could go on the internet or a CPA could go on the
11 internet and get a form proposal?

12 A. No.

13 Q. So there's not a proposal form book in the CPA
14 universe where I could go get your proposal?

15 A. No.

16 Q. All right. Tell me how your proposal came to be in
17 the form that it's in?

18 A. Well, of course, I started in the profession in the
19 '70s. And back then we could not competitively bid.
20 And then the rules of ethics changed over the years.
21 And about 1980 is when firms were able to competitively
22 bid. And so my task about 1980 was to develop some of
23 the first bid proposals for the firm. I think I was
24 sent to some seminars on bidding. Anyway, that was my
25 task. And over the years I've developed and refined my

1 templates and packaged bid proposal.

2 Q. Where do you believe the template for the Highsmith
3 proposal came from?

4 MR. ARIAIL: Objection, Your Honor. I don't
5 know what she's going to say in speculation on this.

6 THE COURT: Well, what's the question, again,
7 Mr. Haynsworth?

8 MR. HAYNSWORTH: She made reference to her
9 template for her proposal.

10 THE COURT: All right. Then what's your
11 question?

12 MR. HAYNSWORTH: My question was, where does
13 she believe the template for the Highsmith proposal came
14 from?

15 THE COURT: No. I sustain the objection to
16 that question.

17 Q. Ms. McKinley, are there similarities between the
18 Highsmith proposal and the McKinley Cooper proposal?

19 A. They're exact replicas.

20 Q. Tell us what you mean by that?

21 A. That means that they took it straight off our
22 computer system, didn't retype or reformat anything.
23 They just changed the names on it, and client names,
24 etcetera. But it's my proposal.

25 Q. Can you walk us through just briefly why you think

1 their proposal is actually your proposal?

2 A. I can. We use covers. Instead of typing the
3 covers for these proposals, we get a custom cutout with
4 just our name, McKinley Cooper, at the bottom. And then
5 that way our secretary doesn't have to type every cover
6 with the name of the client, the date, etcetera. So we
7 get these cutout covers. And these covers fit so that
8 our formatting is exactly so the name of the client
9 comes right through. We took their Highsmith &
10 Highsmith's proposal; the McKinley Cooper cover fits
11 exactly over it. It's not reformatted or anything. It
12 just couldn't even be coincidental that it fits exactly.
13 The wording is exact. I always start my -- you know,
14 the transmittal, the letter of transmittal, the letter,
15 the table of contents, exact same border, exact same
16 wording, exact same titles. I start my letters off --
17 you can match the letters, you can see the letterhead is
18 our letterhead with our trademark symbols at the top;
19 the exact same letterhead. Same spacing; everything.
20 All they did was change it to Highsmith. This little
21 tag line, it was obsolete when they left our company.
22 They could not obtain it at that date. This is from the
23 1990s. And they copied it onto their letterhead.
24 Basically, it just came off our computer. And their
25 wording is exactly the same. We appreciate the

1 opportunity to present a proposal to the board of
2 directors for the -- it starts out the exact same
3 wording. Next paragraph is in that exact same wording.
4 The next paragraph, the exact same wording. The final
5 paragraph, exact same wording. Thank you for allowing
6 us the opportunity to submit this proposal. Thank you
7 for allowing us the opportunity to submit this proposal.
8 Throughout here, you'll see it's the exact same.

9 Q. Now, Ms. McKinley, if you had a proposal from
10 Greene, Finney and Horton or Dixon Hughes or other
11 accounting firms, isn't it going to look essentially
12 like yours and the Highsmiths?

13 A. No. We've got one as an example. And this
14 certainly doesn't fit over theirs. The wording, the way
15 I open the letters, my closing of paragraphs, the way I
16 word things are totally different. The formatting, the
17 set-up, the order of things is totally different.

18 Q. And have you, over your thirty-eight or so -- I
19 forget how many years exactly -- but has this been a
20 work in progress as it were, is your proposal and how
21 you phrase it and what you chose to ---

22 A. Some of the -- the basic components have not
23 changed. Of course, the client and year end and the
24 dollar amounts change with each client. But the basic
25 wording stays pretty much the same with some

1 customization. You know, one might be governmental and
2 one might be non-profit; some of that. But the gist of
3 it has pretty much stayed the same.

4 Q. And you made reference to their letterhead being
5 your letterhead and there's a little CPA with a
6 trademark symbol that says, the CPA never underestimate
7 ---

8 A. Never underestimate the value. This was a little
9 trademark that the AICPA came out with that was
10 available on their website that we could use. Certain
11 periods of time when they had a big advertising
12 campaign, they would come out with this. Well, this
13 came out in the early '90s. And it became obsolete at
14 some point and they changed it to -- America Counts on
15 CPAs is the current one. I mean, that would have been
16 in effect when they went into business. So they
17 couldn't even get this off the website. All they could
18 do is copy ours. It wasn't available.

19 Q. So in 2011 when they left, the same tag line you
20 have on your letterhead, you couldn't get ---

21 A. No, you couldn't it.

22 Q. Ms. McKinley, I'm going to hand you two other
23 documents and get you to just look through them and tell
24 me what they are, if you may?

25 A. Okay. One is a time sheet for Todd Highsmith. And

1 one is a time sheet for Shane Highsmith. And it's for
2 the -- we do a two-week time sheet. So it's for the two
3 week period ended October 21st, 2011, for those two
4 weeks.

5 Q. And that time sheet says at the top McKinley,
6 Cooper & Co., CPAs?

7 A. That's right.

8 Q. And is that your company's time sheet record?

9 A. That's right.

10 Q. All right.

11 MR. HAYNSWORTH: Your Honor, I'd ask that the
12 time sheet be entered and admitted into evidence as
13 Exhibit 8.

14 THE COURT: Any objection?

15 MR. ARIAIL: No, Your Honor.

16 (WHEREUPON, Plaintiff's Exhibit Number 8 was marked
17 and admitted into evidence.)

18 Q. And then the other document, Ms. McKinley, you say
19 that's a copier log?

20 A. That's a copy -- we have a copier printer and this
21 is the log that comes off the copier printer.

22 Q. And that's the log from your printer or copier
23 there at McKinley Cooper?

24 A. That's right.

25 Q. All right.

1 MR. HAYNSWORTH: Your Honor, I'd ask that the
2 copier log be admitted as Exhibit 9.

3 THE COURT: Any objection?

4 MR. ARIAIL: No objection, Your Honor.

5 (WHEREUPON, Plaintiff's Exhibit Number 9 was marked
6 and admitted into evidence.)

7 Q. Ms. McKinley, with regard to Exhibits 8 and 9,
8 which are your company's copier machine log and your
9 company's time records for Shane and Todd Highsmith for
10 the two-week period ending October 21st, tell us the
11 significance of those two documents?

12 A. The significance is that these time sheets can be
13 matched to these computer copier logs, where they were
14 coming in on weekends and spending hours on end printing
15 and copying. We have identified the user. You put in
16 your user code. So it says Todd copying from, say, one
17 forty in the afternoon until seven twenty p.m.; solid.
18 And it's showing what he's copying in some instances.
19 Some instances we just know he's copying, but we don't
20 know exactly what. But from those logs we were able to
21 determine that he was doing tax returns for clients that
22 were not clients of McKinley Cooper, that were printed
23 and copied on our machines.

24 Q. So some of the names where it's got to the right,
25 The Basket Tree, Heartwood, Vollnogle, those sort of

1 things, you're saying that some of the stuff that Todd
2 copied was tax information of clients that weren't even
3 your clients?

4 A. That's right. There were a lot of unidentified
5 people on here that were not clients of ours.

6 Q. Around October or so, wouldn't that be the time, if
7 you're a CPA that you'd need to make copies of peoples'
8 tax returns and tax related documents?

9 A. October 15th is the due date, the final extension
10 due date for individual returns. Well, of course, a lot
11 of these are corporate returns, partnership returns, and
12 there are some individuals. So that could be a
13 possibility. But that would only account for a few of
14 these. But corporations and other due dates are 9/15
15 and earlier. But `...

16 Q. And typically at McKinley Cooper, do the CPAs
17 actually stand at the copy machine and make copies of
18 peoples' tax returns? How does that typically work?

19 A. The way it works in our firm is Todd and Shane as
20 employees would be preparing tax returns on the
21 computer.

22 Q. Yes, ma'am.

23 A. And then I review and check everything, have them
24 make changes on the computer to correct whatever needed
25 to be corrected. And at the point of printing, Amanda,

1 our person up front, clerical person, administrative
2 person, actually makes the -- she prints and copies.
3 She's by the printer/copier. She prints a taxpayer copy
4 to give to the taxpayer. She prints a copy for the
5 government, state and federal tax returns, and she
6 prints a copy for our file. And so all the copying and
7 printing is done by Amanda. The staff are away from
8 that printer/copier. And they just do incidental work
9 papers or things to go in the file is mostly their use.
10 They don't do the bulk copies of any tax returns.
11 That's her job.

12 Q. And did you indicate that this -- that the printer
13 log was on a weekend. Did I hear that correctly?

14 A. Saturdays and Sundays, afternoons when I was not in
15 the office, but -- and all of this time they turned in,
16 they were paid salary for all of that time because on
17 Saturdays and Sundays when they were at the office doing
18 this, their time is also on their time sheet to get paid
19 salary because we pay by the hour. So they were paid
20 for all of this time that they were doing this. Now,
21 the other thing I did in conjunction with this, is I've
22 got the specs on that copier/printer. It prints fifty
23 pages per minute, black and white paper. So one Sunday
24 in particular Todd copied from one something in the
25 afternoon to seven something solid. You could see the

1 minute by minute. And so I calculated the hours and the
2 minutes times fifty pages per minute.

3 Q. Yes, ma'am.

4 A. That came out to be fifteen thousand pages that one
5 Sunday afternoon. That's just an example. And I
6 thought how in the world did they do fifteen thousand
7 pages? That's two giant boxes of -- three boxes of
8 paper. They would have had to change the toner in the
9 copier. How in the world did they know how to do that?
10 But then it was pointed out to me by Amanda, who is the
11 copier person, that there's flash drive input.

12 MR. ARIAIL: Objection, Your Honor.

13 A. So what they probably did was ---

14 THE COURT: Hold on.

15 A. --- print ---

16 THE COURT: Hold on. Hold on.

17 MR. ARIAIL: She's testifying to what Amanda
18 has told her, then I would just let Amanda come in and
19 do that, not get into that.

20 THE COURT: All right. Don't tell us anything
21 that Amanda said.

22 THE WITNESS: Okay. Okay.

23 A. But the way that could be accomplished without
24 doing paper copies, there's a flash drive input into the
25 front of the machine. So they printed to flash drives.

1 Q. So not necessarily fifteen thousand sheets of
2 paper, but the equivalent on a flash drive or thumb
3 drive?

4 A. Right. Either way. Either way. I can't say
5 positively they did it electronically onto a flash drive
6 or papers, but we do have proof that they did it.

7 Q. Let me ask you this, Ms. McKinley. We know that
8 some of the audit clients you used to have became
9 Highsmith & Highsmith audit clients. And we know that
10 many of the tax clients Todd brought with him when he
11 arrived -- bad question. When you hired Todd, did he
12 bring some tax clients with him?

13 A. He did.

14 Q. Okay. Did he bring a number of tax clients with
15 him?

16 A. Yes.

17 Q. All right. Are a number of those tax clients
18 showing up on this copier log as far as the name at the
19 far right?

20 A. Yes.

21 Q. All right. And this coping was done October ---

22 A. October 11th is the first page.

23 Q. October 11th. As of October 11th, had you received
24 any word from Mr. Woznick, TimberTech, Inc., Money Tree,
25 Inc., Basket Tree Holdings, Heartwood Constructors,

1 Bruce and Karen Manigault, James D. and Rebecca Woznick,
2 Vickie Hawkins, or any of the -- American Fab; any of
3 the names on this list, had you received any word from
4 any of those MCC tax clients that they wanted their
5 materials copied and taken elsewhere?

6 A. No.

7 Q. Were you ever told in this period in October by
8 Shane or Todd Highsmith that they were leaving and had
9 been given permission by these folks to take their
10 records?

11 A. No.

12 Q. Ms. McKinley, let me hand you another document or
13 documents and see if you can tell us what that is?

14 A. These are work papers for Girl Scouts who is a
15 client of McKinley Cooper's.

16 Q. Okay. And thumb through -- I don't know, maybe
17 halfway in the middle of it, see if you see some other
18 documents?

19 A. There's an audit plan, the risk analysis, which I
20 said are work papers of ours, their amortization
21 schedules, all for the Girl Scouts.

22 Q. And the City of Laurens documents contained within
23 the Girl Scout document, was the City of Laurens an
24 audit client of McKinley Cooper?

25 A. They are not a client.

1 Q. Has City of Laurens, to your knowledge, ever been
2 an audit client of Highsmith & Highsmith?

3 A. No.

4 Q. Do you know why City of Laurens documents -- well,
5 let me back up. The Girl Scout document, Girl Scout is
6 a McKinley Cooper client?

7 A. Yes.

8 Q. Girl Scout ever been a Highsmith & Highsmith
9 client?

10 A. No.

11 Q. The Girl Scout document and the City of Laurens
12 documents contained in it, are those McKinley Cooper
13 related documents?

14 A. Yes.

15 Q. Okay.

16 MR. HAYNSWORTH: Your Honor, I'd ask that what
17 we're calling the Girl Scout document be admitted into
18 evidence as Exhibit 10.

19 THE COURT: Any objection?

20 MR. ARIAIL: No objection, Your Honor.

21 (WHEREUPON, Plaintiff's Exhibit Number 10 was
22 marked and admitted into evidence.)

23 Q. We have now marked the Girl Scout document as
24 Exhibit 10, containing within it documents relative to
25 the City of Laurens. Can you think of any reason, Ms.

1 McKinley, why your Girl Scout Document and your City of
2 Laurens documents would be in the Highsmith's computer
3 given that neither of those clients was ever a Highsmith
4 client?

5 A. They should not be in the computer.

6 Q. You never gave them permission to take Girl Scout
7 documents or City of Laurens documents when they left
8 McKinley Cooper?

9 A. No, those are confidential records.

10 Q. Was it okay while working at McKinley Cooper, Ms.
11 McKinley, for a CPA or staff accountant, while you're
12 paying them and they're working for you, was it okay or
13 acceptable for them to do moonlighting work, to do work
14 on the side?

15 A. No.

16 Q. That was not allowed by you as far as your company
17 policy; correct?

18 A. Well, it's not allowed under the AICPA code of
19 ethics or the LLR if they're CPAs and they're doing CPA
20 work outside of the firm.

21 Q. With LLR does McKinley Cooper have a registration
22 number?

23 A. Yes.

24 Q. And if employees of McKinley Cooper are working for
25 McKinley Cooper as CPAS, would they be working under

1 McKinley Cooper's registration number?

2 A. Yes.

3 Q. And am I understanding you that if a CPA is working
4 under your registration number, they cannot be off doing
5 work for someone else other than your clients?

6 A. That's right.

7 MR. ARIAIL: Your Honor, may we approach?

8 THE COURT: Sure.

9 (WHEREUPON, a bench conference was held off the
10 record.)

11 THE COURT: Let's give the jury a recess at
12 this time. Take the jury out, please.

13 (WHEREUPON, the jury exited the open court at
14 approximately 3:25 p.m.)

15 THE COURT: You can step down for a few
16 minutes.

17 THE WITNESS: Okay.

18 THE COURT: Don't talk to your lawyer.

19 THE WITNESS: Okay.

20 THE COURT: Okay. Let's take a little break.

21 MR. HAYNSWORTH: How long you want to take,
22 Judge?

23 THE COURT: About ten minutes.

24 (WHEREUPON, court stood at recess for a short
25 break.)

1 THE COURT: All right. Is the jury ready?

2 Are they ready?

3 THE BAILIFF: Yes, sir.

4 THE COURT: Okay. Bring them in.

5 (WHEREUPON, the jury entered the open court at
6 approximately 3:39 p.m.)

7 THE COURT: All right. You may continue.

8 Q. Ms. McKinley, you made reference to the amount of
9 time invested over your thirty-eight years in refining
10 and modifying your proposals. Did you have an
11 opportunity to calculate roughly what you have spent in
12 time over the years to come up with a proposal in the
13 current format it's in?

14 A. I did. I came up with a time for Charlie Alford.

15 Q. Okay. Do you recall roughly what you calculated
16 the time invested in coming up with the proposal, what
17 that dollar amount was?

18 A. I don't. I hope you have that document, though.

19 Q. Did you do a similar calculation for Mr. Alford's
20 purposes for your letterhead?

21 A. I did.

22 Q. Did you do a similar calculation for test of
23 transaction work papers?

24 A. I did.

25 Q. Roughly, when did -- you made mention that the

1 Highsmiths and two others, your daughter and I believe a
2 gal named Sherry Medders were talking to you about
3 potentially buying out your interest in McKinley Cooper.
4 Roughly, when did those discussions first begin?

5 A. I would say the first part of 2011.

6 Q. And then those discussions continued off and on and
7 ultimately the Highsmiths left and they did not buy into
8 the company?

9 A. They left the first of November.

10 Q. At the time they left in the first of November, had
11 you been given any indication by either of them that
12 they intended to leave?

13 A. No.

14 Q. Before they left, were you contacted by any client,
15 audit or tax, indicating that they wanted to go with the
16 Highsmiths?

17 MR. ARIAIL: Objection, Your Honor. I let him
18 go a little bit, but he's leading here.

19 THE COURT: Well, he can ask to answer that
20 yes or no, if she can.

21 Q. Yes, ma'am. Before they left in November of 2011,
22 were you contacted by any tax or audit clients who
23 indicated they wanted to go with the Highsmiths?

24 A. No.

25 Q. Okay. Under the rules that govern y'all, before

1 any clients' records left, the client would have to
2 authorize that; is that right?

3 A. That's right.

4 Q. And you got no authorization or no requests before
5 they left?

6 A. That's right.

7 Q. A number of the tax clients that Todd brought when
8 he came to you, do you recall if after they left you got
9 written confirmation from all those tax clients that
10 they wanted their files to leave your office and go to
11 the Highsmiths?

12 A. They sent authorization to me.

13 Q. And that was after the Highsmiths were gone?

14 A. After they were gone.

15 Q. And that was after that information was copied in
16 October on your copy log; is that right?

17 A. Oh, yes.

18 Q. Let's back up a bit. Shane Highsmith went to work
19 for you fresh out of Clemson, is my recollection. And
20 Todd followed and come to work for you in 2009?

21 A. Right.

22 Q. Sort of walk me through your discussions with Todd
23 when you were considering hiring him. What was the
24 benefit to you to hire Todd Highsmith?

25 A. Well, his brother was an employee. And his brother

1 said that he was interested in getting his -- his
2 brother was interested in getting back into public
3 accounting. And he was currently working in industry.
4 And would I be interested in talking to him, that they
5 had always wanted to work together, both being CPAs.

6 Q. Yes, ma'am.

7 A. And so I told him I would be willing to talk to
8 Todd. Todd came in and interviewed with me.

9 Q. Okay. And did Todd indicate during the interview
10 process that he was going to be able to bring any work
11 into the firm when he came?

12 A. He did. He said he had a number of tax clients
13 that he would be bringing with him. And my
14 understanding was that he was earning a high salary in
15 industry and that he was currently employed and that he
16 was going to be giving up a high salary. And my
17 discussion with him was, well, you know, you've not been
18 in public accounting. You've got very little -- he had
19 started off in public accounting for a short period of
20 time and then went into industry. I said, you're going
21 to have a very steep learning curve. And we're not
22 going to be able to bill you out very high.

23 Q. Yes, ma'am.

24 A. And our billing rates are tied into your salary.
25 And so in talking to him, I was trying to come up with a

1 salary or compensation package that would work due to
2 the fact that we were not going to be able to bill his
3 time out to clients for quite some time. And so I told
4 Todd and them, and I said, we can start you out at
5 seventy-five thousand salary.

6 Q. That was his starting salary?

7 A. That was his starting salary. I understood he was
8 making a whole lot more than that and that this was
9 going to be a step down for him. That was my
10 understanding. And so I came up with the idea, I said,
11 Todd, we pay a fifteen percent commission for first year
12 business that any of our staff bring in. And we've
13 always done that. But I said, due to the situation that
14 you say you're bringing in a lot of clients, I said,
15 what we can do is for the first year we can bump that up
16 to thirty percent due to the unique situation. And then
17 we can keep it at the lower seventy-five thousand
18 salary. And I just documented that as my notes,
19 seventy-five thousand plus thirty percent for the first
20 year. That's exactly what my documentation is of the
21 agreement. And so I thought that was being very
22 generous and creative trying to come up with a -- and
23 then the next year, of course, he goes back to being
24 treated like all other staff.

25 Q. And let me make sure I understand on the bringing

1 clients in for the first year. So if someone comes to
2 work for you as a CPA and they bring six clients that
3 you didn't otherwise have, normally you give them
4 fifteen percent commission ---

5 A. Fifteen percent times the first year collection ---

6 Q. Times the first year's collection?

7 A. --- is the policy.

8 Q. Okay.

9 MR. ARIAIL: Your Honor, is he just going to
10 continue leading, testifying, I'm not sure what we're
11 ---

12 THE COURT: Overruled. Go ahead.

13 Q. So a little different deal with Todd. His first
14 year is going to be thirty percent?

15 A. That first year, right.

16 Q. Then year two -- now, the thirty percent, using my
17 example, he brings in six clients, he gets thirty
18 percent commission off that year's collection. Those
19 same six clients, does he get fifteen percent the next
20 year?

21 A. No. It's first year collections; period. The
22 first year that you're a client, the amount collected
23 from that client times fifteen percent is what you get
24 paid and never again another dollar of commission.

25 Q. So you don't get -- after you bring them in the

1 door, you don't keep getting fifteen percent?

2 A. No, no, no. Just an initial commission.

3 Q. All right. And everyone else except Todd in the
4 first year he was there, it was fifteen percent; is that
5 right?

6 A. For first year collections, yeah.

7 Q. All right. So ---

8 A. The thirty percent was strictly because he was
9 bringing in a group of clients. And I felt that that
10 would be a way to get him over the hurdle of giving up a
11 huge salary. I found out later that he was not even
12 employed when he came with us; ---

13 Q. Really?

14 A. --- that he was searching for a job. So I felt
15 like I had been mislead. But that was the agreement
16 that I came up with.

17 Q. All right. When year two rolls around, will there
18 be calculation of the commission? Using Todd as an
19 example, his first year he's getting thirty percent.
20 Who actually prepared the commission statement that had
21 the clients and what the commission would be?

22 A. He did.

23 Q. All right. And so did he come to you in year one
24 with his commission prepared showing thirty percent?

25 A. Yes.

1 Q. Okay. Year two rolls around, what happens?

2 A. Amanda, who does payroll, came to me and says,
3 Toni, you really need to check this one out. He
4 presented it for her to pay. She writes the checks, of
5 course, and I sign them. And he had thirty percent ---

6 THE COURT: Hold on. Hold on ---

7 A. --- for all of the same clients.

8 THE COURT: Hold on. Hold on. Wait, wait,
9 wait.

10 MR. ARIAIL: Just testifying in regards to
11 what Amanda is saying. I don't want her to get into
12 that.

13 THE COURT: Yes, sir. Don't tell us what she
14 said.

15 A. Okay. Well, she ---

16 THE COURT: As a result, what did you do?

17 A. I was just presented the document and it had all
18 the same clients at another thirty percent for their
19 second year collections. And I immediately called Todd
20 in and said, Todd, this is incorrect. The agreement is
21 thirty percent for the first year and you repeated these
22 clients for the second year. And, you know, he got all
23 red faced and contrite and said, well, I've already
24 spent the money. You know, I just don't know what I'm
25 going to do. I just don't know what I'm going to do.

1 And I said, okay, let's just split the difference. Go
2 in there and recalculate it. This is definitely not the
3 agreement. And so he went in there and redid the
4 worksheet and had only the new clients. But we split
5 the difference. I really overpaid him because he had
6 some of the same clients on there at fifteen percent,
7 which he really wasn't entitled to any. But due to the
8 fact of -- the sob story, I said, let's just split the
9 difference, but don't do this again.

10 Q. In year three did he come again to present you with
11 a commission statement?

12 A. Well, he wasn't there for three years, but it's
13 really like the third request.

14 Q. Okay. The third request?

15 A. Right. He did again, just put the fifteen, the
16 correct fifteen percent on there. But still he has the
17 same clients listed. So he really wasn't entitled to
18 it, but I didn't argue with him again. So we really
19 overpaid him for the repeat clients.

20 Q. When he came to you in year two with another thirty
21 percent and you said, no, no, Todd, it's only thirty
22 percent for the first year; new clients, year two is
23 fifteen percent. Did he go back and recalculate and
24 actually present you with a sheet that had the fifteen
25 percent on it?

1 A. He did. He did.

2 Q. And you gave him a check for fifteen percent?

3 A. That's right.

4 Q. Did he at any point in time, Ms. McKinley, tell you
5 this is wrong; you've breached my contract. Did he send
6 you an email complaining that he was entitled to thirty
7 percent, anything of that nature?

8 A. No. He was red-faced and contrite.

9 Q. He presented you with a revised fifteen percent?

10 A. Right.

11 Q. And you gave him a check?

12 A. He knew better. Yes.

13 Q. As far as you know he cashed the check?

14 A. I know he cashed the check.

15 Q. And that would have been in -- sometime in 2011?
16 Or the end of 2010?

17 A. That would have been 2010, probably started.

18 Q. Okay. From 2010 until after they were sued, did
19 you ever hear a contention from Todd Highsmith that you
20 owed him additional commissions beyond the fifteen
21 percent that you ---

22 A. Never, no.

23 Q. Ms. McKinley, the audit clients that you have, if
24 you can put a figure on it, what's the average length of
25 time you would have had an audit client? Or does it

1 vary from client to client?

2 A. Well, most of our audit clients, I mean, we retain
3 them forever. I mean, some -- we've got some audit
4 clients that are with us from the day I started. You
5 know, ---

6 Q. So you ---

7 A. --- we had school districts from the day they
8 became school districts, you know. You know, just a
9 really long a time, but I'd say ten, twenty years.

10 Q. And over the ten or twenty years, whatever the
11 period of time may be for a given client, were those
12 clients on either a one or a two or a three year
13 contract?

14 A. Some of them.

15 Q. Some are year to year, I gather?

16 A. Some are not on contract. We're just their
17 auditors, period. And we've always been their auditors.

18 Q. Okay.

19 A. There is no requirement to go out for bid for
20 professional services, no more than attorney's services,
21 architectural services. There's no bid requirement.
22 It's just a preference they -- now that there is
23 bidding, some of them decide to go out for bid, try to
24 get a lower price.

25 Q. All right. The going out for bid, are there

1 certain types of clients that go out for bid and others
2 that don't? Is there any, you know, rhyme or reason as
3 to ---

4 A. No rhyme or reason, really isn't.

5 Q. Okay. If I understood it, Shane Highsmith left
6 November 1st, 2011 and Todd resigned the 2nd but stayed
7 on two more days to do some additional work. Is that
8 the time line?

9 A. Yes.

10 Q. All right. Using November 4th as our date, when do
11 you recall the first contact you had from an audit
12 client about them having been contacted by the
13 Highsmiths?

14 A. Immediately.

15 MR. ARIAIL: Objection. Objection, Your
16 Honor.

17 THE COURT: What?

18 MR. ARIAIL: I think this is going to be going
19 into hearsay if we're testifying to what she received
20 from any of these clients.

21 MR. HAYNSWORTH: I believe I asked her, Your
22 Honor, time line-wise if she knew the first date using
23 November 4th as the date they left?

24 THE COURT: If she knows the date.

25 MR. HAYNSWORTH: If she know the date?

1 THE COURT: All right. Go ahead.

2 Q. Do you recall the date you would have been first
3 contacted by an audit client of yours about the
4 Highsmiths contacting them?

5 A. It was -- it all started up the following week.
6 You know, immediately. I don't recall the day of the
7 week that Todd left, but it was immediately after that
8 that I became bombarded by telephone calls saying now
9 who are these Highsmiths, you know.

10 MR. ARIAIL: Objection, Your Honor. Getting
11 into hearsay.

12 THE COURT: Yeah. I sustain the objection.

13 Q. And some of these clients who contacted you, did
14 some of them then go out for bid, as it were?

15 MR. ARIAIL: Objection, Your Honor.

16 THE COURT: What's your question?

17 MR. HAYNSWORTH: If some of the audit clients
18 went out for bid? In other words, hey, we want McKinley
19 Cooper, Highsmith, whoever, bid on our work?

20 THE COURT: No, I sustain the objection to
21 that question.

22 MR. HAYNSWORTH: Okay. Fair enough.

23 Q. Ms. McKinley, Highsmith & Highsmith is smaller than
24 your firm; aren't they?

25 A. Yes.

1 Q. Okay. Well, wouldn't they be able to underbid you
2 all the time because they're a smaller outfit and have
3 lower overhead?

4 A. No. The bid price, when you calculate what you
5 might bid, and it's very much a guesstimate of what a
6 bid price should be, you're going to go number of hours
7 that something might take times your hourly rate. Now,
8 if they want to work for nothing, you know -- they
9 pretty much have to put the same number of hours in. So
10 if their hourly rates are a whole lot less, then that
11 would equate to a lower bid. But the hours should be
12 about the same.

13 Q. Well, I think if I understood you earlier, the
14 hours invested to do an audit would be less if you had
15 all the prior audit information?

16 A. That's right.

17 Q. You talked about the copy machine log and on
18 Saturdays and Sundays. Around the mid-2011 time frame,
19 as it were, were you in the office the normal amount of
20 time you would be there?

21 MR. ARIAIL: Objection, Your Honor.

22 THE COURT: What's your objection?

23 MR. ARIAIL: If I can approach, I just have
24 one -- I can tell you real quick.

25 THE COURT: All right.

1 (WHEREUPON, a bench conference was held off the
2 record.)

3 Q. I'll try and ask the same question again. I think
4 my question, Ms. McKinley, was, around the first quarter
5 of November time frame -- leading up towards November
6 time frame in 2011 were you in the office the same
7 amount of time as you typically would be?

8 A. I was out of the office quite a bit from June 15th
9 to December 15th of 2011 because I was undergoing
10 chemotherapy for hepatitis C. I was going back and
11 forth to Duke in Raleigh, and I was working a lot from
12 home, rest a while, work a while, rest a while, that
13 kind of thing.

14 Q. Okay. And absent the chemotherapy that was going
15 on that time in 2011, you know, in years past would you
16 have been in the office much more than you were during
17 that period of time?

18 A. Oh, yeah, definitely. In the office and at
19 clients' a lot more.

20 Q. Okay. Ms. McKinley, you told me about work papers
21 and we've talked about proposals. We've talked about
22 your letterhead. And we've talked about other
23 templates, I think was the phrase you used. Did
24 McKinley, Cooper & Company prepare any quarterly control
25 documents? Does that ring a bell at all?

1 A. (No verbal response.)

2 Q. I may be messing up the name. Excuse me. Quality
3 control documents, not quarterly control documents?

4 A. Internal quality control documents?

5 Q. Yes, ma'am?

6 A. (No verbal response.)

7 Q. Oh, I'm sorry. For your audit clients? Quality
8 control documents, is that one of the things that you
9 all would do as part of ---

10 A. Are you talking about internal control documents?

11 Q. Obviously, I don't know what I'm talking about.
12 Yes, ma'am, I think it is internal control documents?

13 A. Yes. You know, I mentioned that we study their
14 internal controls and then we have to document those
15 controls.

16 Q. Right.

17 A. Their system.

18 Q. Okay. If another accountant, you know, XYZ
19 Accounting Firm came in to do an audit of a client,
20 aren't they going to do the same type of work papers and
21 control documents? Aren't they going to use the same,
22 let's go look at these checks and match them up with
23 whether they paid this. Wouldn't that be one plus one
24 equals two kind of thing? All accounting firms would do
25 it the same way?

1 MR. ARIAIL: Objection, Your Honor.

2 THE COURT: You're going to have to rephrase
3 that question in the form of a question not -- if you
4 can.

5 MR. HAYNSWORTH: I will try, Your Honor.

6 Q. Would all accounting firms approach the audit and
7 the preparation of the work papers in an identical
8 fashion?

9 A. No. The quality control documentation that you're
10 talking about is -- every firm is different. We can do
11 -- some firms do flow charts of, you know, so and so
12 does this, this. And then the approval is this way.
13 Some do narratives, ---

14 Q. Right.

15 A. --- you know, just narrative papers, work papers
16 that just describe the processes. Some do checklists.
17 Every firm's work papers look totally different. I peer
18 review a great number of CPA firms. And everybody's
19 formats, presentations, are totally different. That's
20 why when you go work at one firm and then you switch and
21 go to another firm, you've got to be totally reeducated
22 in how they do their work papers. So they're all
23 totally different.

24 Q. While Todd and Shane Highsmith were working for you
25 did you pay to send them to any type of continuing

1 education and seminars?

2 A. Paid for all of their continuing education seminars
3 to meet all their requirements.

4 Q. All right. Do you -- and would others beyond Shane
5 and Todd, other employees with McKinley Cooper go to
6 these seminars?

7 A. Yes.

8 Q. What sort of things, if any, if you know, would you
9 get when you went to one of these seminars McKinley
10 Cooper was paying for?

11 A. Well, you always get some very helpful materials.
12 Some in like big workbooks, things like that, paper
13 printed. And nowadays, you will usually get the big
14 workbooks plus the CDs to use electronically, in
15 addition to the paper study materials. And really good
16 reference materials.

17 Q. Okay. When you would send someone to a seminar and
18 they would come back with a workbook or a CD or
19 whatever, in your opinion, who owns that workbook or
20 that CD?

21 A. The firm owns the materials.

22 Q. McKinley Cooper?

23 A. Yes.

24 Q. Do you recall some of the seminars you sent Shane
25 and Todd Highsmith to while they were working for you?

1 A. Every year we'd go to the Clemson Income Tax
2 Workshop. It's like a two-day seminar every year.
3 That's one. And we do a lot of self-study seminars.
4 And I don't recall specifically. They need governmental
5 CPE. I do recall specifically Marcy Loucks and Todd
6 Highsmith went to an AICPA Conference in Baltimore that
7 I thought would be really good education. It was
8 preparing to become partners in a firm. So they went on
9 that trip. But overall they've each got to have forty
10 hours CPE each year at a minimum.

11 Q. The AICPA Seminar that you just mentioned that
12 Marcy went to, and I think you said Shane went to it, as
13 well. Do you remember roughly when that seminar was
14 held?

15 A. It would have been about July or so of 2011.

16 Q. While they were still working for you?

17 A. Yeah. In contemplation of buying me out.

18 Q. Okay. And do you know roughly what it cost you
19 send -- let's leave Marcy aside. Do you know roughly
20 what it cost you to send Shane to that AIPCI (verbatim)
21 Seminar in July of 2011?

22 A. Well, those are pretty expensive because they're
23 big AICPA conferences. And, of course, we had air fare,
24 hotels and all that. I'd say about sixteen hundred
25 each.

1 Q. Like the Clemson Seminars, would there be seminar
2 materials that you'd get as part of that, a workbook or
3 CD?

4 A. Yeah. The Clemson ones, especially, we go to those
5 because of the seminar materials. They send -- they
6 provide an actual annual master's tax guide in addition
7 to all their materials. So the big advantage of that
8 one in particular are the materials you get,
9 references.

10 Q. And roughly, what do those Clemson Seminars cost,
11 if you remember?

12 A. Two fifty for each person, I would say.

13 Q. Okay. And I gather they went multiple years?

14 A. Every year. We do that every year.

15 Q. All right. So Shane would have gone every year
16 since he went to work for you in 2000 and Todd would
17 have gone every since he came to work in 2009?

18 A. I assume so.

19 Q. Okay. After they left, were y'all able to locate
20 any of the seminar materials in their offices?

21 A. No.

22 Q. After they left did McKinley Cooper have occasion
23 to go look at their computers to see if anything had
24 been deleted?

25 MR. ARIAIL: Objection, Your Honor.

1 THE COURT: She can answer that yes or no but
2 not go beyond that.

3 A. Say the question again.

4 THE COURT: Just if you know.

5 Q. Yes, ma'am. After they left on November 1st and
6 November 4th of 2011, respectively, did McKinley Cooper
7 have occasion to go look at their McKinley Cooper
8 computers to see if anything had been deleted?

9 A. Yes.

10 Q. What did you find?

11 MR. ARIAIL: Objection, Your Honor.

12 THE COURT: No, no. Sustain the objection to
13 that.

14 MR. HAYNSWORTH: Fair enough, Your Honor.

15 Q. The McKinley computer that Todd Highsmith used to
16 have, was that a -- at the time he left, was that a
17 desktop or a laptop?

18 A. Laptop.

19 Q. Okay. And that laptop still lives at McKinley
20 Cooper?

21 A. It does.

22 Q. Does anyone now use that laptop?

23 A. Yes.

24 Q. What's his name?

25 A. Matt Phillips.

1 Q. How about Shane; when Shane was with McKinley

2 Cooper, did he have a desktop or a laptop?

3 A. I think he had a desktop.

4 Q. All right. Is it allowed in the policies of
5 McKinley Cooper for an employee who leaves to alter in
6 any fashion anything on your company-owned computer?

7 A. No. It's not allowed.

8 Q. Have you had occasion in the course of this
9 litigation and the documents that the two sides have
10 produced to one another to review the Highsmith &
11 Highsmith tax returns?

12 A. Yes.

13 Q. Were you able to glean from a review of those tax
14 returns any information about the percentage of audit
15 clients they had that used to be audit clients of
16 McKinley Cooper?

17 A. Yes.

18 Q. Do you recall, based on your analysis, roughly what
19 percent of their audit clients from your review of their
20 tax returns used to be your audit clients?

21 MR. ARIAIL: Objection, Your Honor.

22 THE COURT: No, I'll allow that.

23 A. Well, it wasn't just audit clients. What we got
24 were copies of their tax returns. And we got copies of
25 their invoices that had been previously been our ---

1 THE COURT: Now, hold on. That's not an
2 answer to his question. Ask the question again.

3 Q. Based on your review of their tax returns, I think
4 you told me you had come up -- I think you're correct in
5 that it was just audit clients ---

6 A. Tax and audit clients.

7 Q. But my question was, do you recall what percentage
8 of H&H clients used to be McKinley Cooper clients?

9 A. I've documented that. I think it was -- for the
10 two months it was something like, I want to say fifty-
11 one percent for the November and December 2011. For
12 2012, it was like seventy percent. And then it dropped
13 in 2013 because they bought another practice. It
14 dropped to fifty or sixty percent. But I've got the
15 exact percentages calculated.

16 Q. Based on your review of their records in 2012 you
17 said seventy what percent?

18 THE COURT: Hold on. Hold on.

19 MR. ARIAIL: I want to make sure we're basing
20 this off of the tax returns. The question has gotten
21 convoluted here. And I still don't think we know what
22 she's reviewed and whether or not reviewing the tax
23 records has given her that information.

24 THE COURT: Well, you can do that on cross.

25 MR. ARIAIL: Okay.

1 THE COURT: All right. Go ahead, Mr.

2 Haynsworth.

3 Q. I'm sorry. Did you say seventy-seven percent, I
4 just was ---

5 A. Seventy-one.

6 Q. Seventy-one, okay. So that would have been in
7 2012.

8 A. That would have been the real year.

9 Q. The first full year?

10 A. Yeah. That would have been the full year, yeah.

11 Q. Okay. Did you reach any opinions as to why the
12 ratio was so high?

13 MR. ARIAIL: Objection, Your Honor.

14 THE COURT: I sustain the objection to the
15 form of that question.

16 Q. Do you lose clients to other CPA firms beyond
17 Highsmith & Highsmith?

18 A. Yes.

19 Q. Any particular percentage you could put your arms
20 around?

21 A. Percentage that I lose to other firms ---

22 Q. Right.

23 A. --- per year? I'd say a half percent. But then we
24 gain a larger percentage from other CPA firms.

25 Q. Yes, ma'am. Was it allowed at McKinley Cooper for

1 the CPAs who work there to do an occasional tax return
2 for friends or family?

3 A. (No verbal response.)

4 Q. Like, could an accountant do their father-in-law's
5 return?

6 A. Yes. Yes.

7 Q. Was there any set number of -- was that sort of use
8 your own discretion or was there a specific number they
9 could do?

10 A. Well, don't take advantage. But, you know, we have
11 very sophisticated software so it is an advantage for
12 them to be able to utilize our software. Do their own
13 personal tax returns plus maybe mama's or dad's or
14 something like that.

15 Q. Was it allowed to do other people's tax returns ---

16 A. No.

17 Q. --- beyond friends or family?

18 A. Well, friends is sort of iffy. I mean, I would say
19 mom or dad or you and that's it.

20 Q. Okay. And the tax software y'all use is called
21 what?

22 A. Ultratax.

23 Q. Are you familiar with something called TurboTax?

24 A. Yes.

25 Q. Does McKinley Cooper use TurboTax?

1 A. No.

2 Q. Ms. McKinley, thank you. That's all the questions
3 I've got. Please answer any questions Mr. Ariail may
4 ask.

5 THE COURT: All right. Mr. Ariail.

6 MR. ARIAIL: Thank you, Your Honor. I've got
7 a presentation machine. If I could bring it out ---

8 THE COURT: Sure.

9 MR. ARIAIL: --- if you want a short break or
10 if I could just pull it out. Whatever's easiest.

11 THE COURT: Yeah. Go ahead.

12 **CROSS-EXAMINATION**

13 **BY MR. Ariail:**

14 Q. Ms. McKinley, how you doing today? How are you
15 doing?

16 A. Okay.

17 Q. Good.

18 A. I'm okay.

19 Q. Let me go back a little bit and ask you some
20 questions in regards to Todd and Shane. Now, from my
21 understanding Todd and Shane -- Shane had been there
22 since 1999; correct? 2000?

23 A. About 2000, yeah.

24 Q. 2000?

25 A. Yeah.

1 Q. And he did a great job for you; correct?

2 A. That's right.

3 Q. A great employee?

4 A. That's right.

5 Q. Never had any issues with him?

6 A. No.

7 Q. Never had any writeups or any disciplinaries; no
8 issues like that?

9 A. No disciplinary, no.

10 Q. And, in fact, you were so happy with him or liked
11 him so much, you hired his brother along with him;
12 correct?

13 A. Well, I hired his brother on his own merits, I
14 would say.

15 Q. Right. But you wouldn't have hired someone's
16 brother if you weren't happy with their employment;
17 correct?

18 A. I presume not.

19 Q. And when they came in, they did -- Todd primarily
20 was doing tax, but he helped out on the audits too;
21 correct?

22 A. He did.

23 Q. Okay. And Shane did primarily audits, that was his
24 business; right?

25 A. He did both.

1 Q. He did both? But his expertise was in audits;
2 right?

3 A. Not particularly. I mean, it was just across the
4 board.

5 Q. Okay. And over this time, they were employees that
6 went out and did work with, I guess, your clients;
7 correct?

8 A. Sure.

9 Q. And they had to interface with those clients and
10 they, you know, met them and talked to them and all of
11 that; correct?

12 A. Yes.

13 Q. They did the audits; right?

14 A. They, along with the team. We go out in audit
15 teams.

16 Q. Okay. And I want to understand a little bit of
17 background?

18 A. Okay.

19 Q. You have a team and in your practice you would
20 send, I guess, four individuals out; is that right?

21 A. Usually four. A carload.

22 Q. Okay. A carload?

23 A. Yeah.

24 Q. Okay?

25 A. Yeah.

1 Q. So you have four people that would go out and would
2 do the work for a client?

3 A. On site. Yes, on site. Yeah.

4 Q. Okay. And you would bill for four people to do
5 that audit; right?

6 A. True.

7 Q. Okay. Even if that audit could cost less with two
8 people, you were still billing out four people; right?

9 A. Well, all four people were working the full day so
10 it was all of their time. Two people couldn't do what
11 the four could do.

12 Q. Okay. So you ---

13 A. Is that -- I mean, I don't understand your
14 question.

15 Q. There are not firms out there that do two-man
16 audits on governmental entities or non-profits?

17 A. But they'll stay on-site longer.

18 Q. Okay.

19 A. It's like four man days, equals four man days.

20 Q. But it can be done; right?

21 A. No. No, I wouldn't say that.

22 Q. All right. So what the Highsmiths are doing,
23 they're doing audits now with two people; correct?

24 A. They are. I assume they are.

25 Q. They're doing that.

1 A. Okay.

2 Q. So it's being done and you would agree with that;
3 correct?

4 A. Well, I don't know. I don't know if they have
5 other people working with them or not.

6 Q. Okay. Now, I want to take you through -- and the
7 first thing I want to bring up is the IT policy that you
8 put in as an exhibit.

9 A. Okay.

10 Q. That IT policy -- and if I can put it up on the
11 board. I hope this will work. I'm sorry. I don't mean
12 to hit you in the eye with it.

13 A. Am I in the way?

14 Q. No, I'm going to try -- I just don't want to hit
15 you -- is that in your eyes? Are you good?

16 A. I'm good.

17 Q. Okay.

18 THE COURT: Ms. McKinley, you back over this
19 way a little bit. That light's mighty bright.

20 A. Do you want me to look at the screen too?

21 Q. Move it over. Let me see if I can get the Exhibit
22 Number 1 out of these.

23 A. Oh, okay.

24 Q. Now, what's your understanding of what an IT policy
25 is or what IT stands for?

1 A. Well, it was all our electronics and computer
2 policies, having to do with IT.

3 Q. I think my specific question was, what does IT
4 stand for?

5 A. I don't know. I'm so used to saying IT.

6 Q. Does it stand for information technology or
7 internet technology.

8 A. Okay. You're correct. Right. Right.

9 Q. Something along those lines?

10 A. Uh-huh (affirmative).

11 Q. Now, you've cited in here that this is a policy to
12 govern your -- I guess it was a policy to govern what
13 the employees were supposed to do; is that correct,
14 about the internet, documents?

15 A. They are some rules we came up with governing the
16 use of the computers.

17 Q. Okay. The use of the computer?

18 A. Right.

19 Q. And this, specifically right here, says internet
20 usage policy; right?

21 A. It does.

22 Q. Okay. Now, the internet is -- when I think of the
23 internet, I think of Google, Yahoo websites, of that
24 nature. Is that what you think of?

25 A. Uh-huh (affirmative).

1 Q. Okay. So this document right here says applies to
2 all employees of the company who have access to the
3 computers and the internet to be used in the performance
4 of their work. Use of the internet by employees of the
5 company is permitted and encouraged where such use
6 supports the goals and objectives of the business; is
7 that right?

8 A. Uh-huh (affirmative).

9 Q. Now, it doesn't say anything in that part about
10 downloaded computer documents or anything of that
11 nature; correct?

12 A. In that part.

13 Q. Right.

14 A. In that sentence.

15 Q. Right. That part that you're saying is the
16 internet usage policies that govern; is that right?

17 A. Right. Right. That sentence does.

18 Q. Okay. And that specifically is talking about
19 internet use?

20 A. Uh-huh (affirmative). That sentence does.

21 Q. Now, the documents -- well, let me go back. The
22 other policy -- and take you through. There are only
23 two policies that were in place, from my understanding;
24 the IT policy and the employee manual, I think that
25 we've put up here, and I've put as part of this stack

1 too. Is that correct?

2 A. Those are the only written policies at that point.

3 Q. And that's -- you were the one in charge of -- you
4 own the company; right?

5 A. That's right.

6 Q. And you had the ability to type up any documents
7 you wanted to?

8 A. I could.

9 Q. You could have made anything confidential, stamped
10 it with a confidential stamp; right?

11 A. Could have.

12 Q. Could have marked anything as a trade secret;
13 correct?

14 A. I could have.

15 Q. Could have put a policy in place that governed all
16 of that; right?

17 A. Uh-huh (affirmative).

18 Q. But these are the two documents you have ---

19 A. We have lots of verbal policies.

20 Q. And when we're sitting here, what I'm asking you
21 about is the written policies.

22 A. You're talking only about the two written ones.

23 Q. And these are the two written policies; right?

24 A. Right.

25 Q. Okay. And as long as I'm sitting here, what I'm

1 understanding is these are the two that govern; correct,
2 the written policies.

3 A. The two written policies.

4 Q. Okay. Now, this is your employee manual that's
5 been submitted, the document; okay? Now, I'm going to
6 go through and just kind of look at some of these items.
7 Where in this document does it reference or talk about
8 trade secrets? And, in fact, I'll just ---

9 MR. HAYNSWORTH: Your Honor, I'd ask that she
10 be given the document. Instead of being asked where in
11 the document ---

12 MR. ARIAIL: Thank you. I was doing that.
13 Sorry, Your Honor.

14 A. Okay.

15 Q. If you can tell me that, where it says trade
16 secrets on that document?

17 A. Well, it references the IT policy in item three.
18 And the IT policy reference talks about trade secrets.
19 So, let's see.

20 Q. Okay. And I'm just asking. In that document tell
21 me if there's anything that says trade secret,
22 confidential, anything of that nature?

23 A. I'm just saying that in item three it says see IT
24 policy. Okay. So by reference it's incorporated.
25 You'll have to give me a minute because ... I can't see

1 any other references to ---

2 Q. No reference in that document; is that right?

3 A. This has mostly to do with vacation policies, sick
4 time, office hours, different fringe benefits. It's not
5 a document meant to address trade secrets.

6 Q. And it's not in there, and at a later date you've
7 gotten other employees to sign employment agreements;
8 correct?

9 A. We do now.

10 Q. Okay. You do now. And that was, in fact, what you
11 tried to get my clients to sign. And that included a
12 non-compete; right?

13 A. At the time I didn't realize -- we didn't intend it
14 to be non-compete. We took that part out. It's
15 strictly a confidentiality type of a document at
16 present. And it's more of an employment contract.

17 Q. Okay. Well, that's interesting.

18 A. We sort of changed it over time.

19 Q. Okay. And let's go through that a little bit.
20 You've made your -- I mean, you sent my clients an
21 employment agreement asking them to sign a non-compete,
22 which would prohibit them from competing against you
23 from sixty miles in diameter, before they signed or
24 before they were going to get the information for the
25 buy-in; correct?

1 A. My intention was that they review the document and
2 give me feedback, which they refused to do.

3 Q. I'm not trying to ask a difficult question here.
4 I'm just simply trying to say whether or not you gave
5 them a document and asked them to sign it, which
6 included a non-compete, which said they would not be
7 able to do work or compete with you within sixty miles
8 of this location?

9 A. I wasn't totally aware that it included that. I
10 asked for feedback from them. They refused to give me
11 feedback on the document. We were trying to develop a
12 document.

13 Q. Okay.

14 A. And they refused to discuss it.

15 Q. And we'll get into that.

16 A. Okay.

17 Q. But did it include a non-compete agreement?

18 A. In hindsight I see that it did, and we changed
19 that.

20 Q. All right. And I'm not going to ask you what
21 conversations you had with an attorney, but you saw an
22 attorney to discuss this agreement?

23 A. I was too sick to do that.

24 Q. Okay. You didn't meet with David Massey?

25 A. No. I sent Marcy Loucks to do it.

1 Q. Okay. So then Marcy would have had those
2 conversations. I'm not asking what those conversations
3 were. She would be the one that would know that;
4 correct?

5 A. True.

6 Q. Okay. So my understanding is you were concerned
7 and wanted them not now -- not to sign a non-compete but
8 simply a confidentiality ---

9 A. Because that was what I wanted. That's what I
10 wanted before I disclosed all the contracts and
11 everything to the parties involved.

12 Q. And did my clients tell you they were willing to
13 sign a confidentiality agreement?

14 A. No.

15 Q. Okay. Did they ever request documents from you,
16 send you a document?

17 A. What type of document?

18 Q. A document asking what kind of information they
19 would want?

20 A. Did they send me a document?

21 Q. Uh-huh (affirmative).

22 A. Not that I'm aware of.

23 Q. When Shane came into your office on November 1st,
24 2011 to meet with you about his annual review, and y'all
25 discussed that, and he said he was not going to sign a

1 non-compete but he would sign a non-disclosure, a
2 confidentiality provision, did you tell him to pack his
3 bags and leave?

4 A. He told me he would not sign the document. And I
5 said, Shane, let's discuss it. What are your issues
6 with the document? And he refused to discuss anything.
7 And he said he's not going to sign it. And I said okay.
8 Well, goodbye.

9 Q. Okay. And at any time did my clients inform you
10 from June to November 1st, in that area, that they were
11 willing to sign a confidentiality agreement, non-
12 disclosure?

13 A. No.

14 Q. Okay. So sitting here today you're saying that the
15 reason this fell apart is, is because they wouldn't sign
16 a non-disclosure?

17 A. Say that again?

18 Q. Okay. It initially was, I'm understanding was,
19 that they wouldn't sign a non-compete. Now you've told
20 me today because they will not sign a non-disclosure; is
21 that right?

22 A. The discussion was not in those terms. We were
23 coming up with a document to cover confidentiality of
24 those records before I would give them access. They
25 refused to discuss the document that Marcy and David

1 Massey had produced. You know, any issues, additions,
2 deletions, what have you. And they refused to discuss
3 that. And so we could go no further. And then they
4 refused to sign the document that was in place that had
5 gotten feedback from others on. But they just refused
6 to talk, period.

7 Q. Okay. And you're saying they refused to talk after
8 they'd been talking for six months to try to buy the
9 business?

10 A. They were not talking to me. At some point they
11 just started avoiding me.

12 Q. Okay. Did you have any discussions -- and I'm not
13 going to ask you what you said -- with Marcy in regards
14 to this?

15 A. In regards to what?

16 Q. In regards to the buy-in or what they were doing in
17 regards to trying to deal with the buy-in?

18 A. Did I have any discussions with her?

19 Q. Uh-huh (affirmative)?

20 A. I had discussions with Marcy about going to see
21 David Massey.

22 Q. Okay. But Marcy was one of the four that was going
23 to buy the company; correct?

24 A. Yes. Yes.

25 Q. Okay. So Marcy is -- if I'm understanding

1 correctly was going in with Todd, Shane, Sheryl Medders,
2 and Marcy to buy your business?

3 A. True.

4 Q. So they were partners together or attempting to
5 become partners together to do this?

6 A. Yes.

7 Q. Okay. So Marcy -- did you have any conversations
8 with her about what they were doing with this buy-in or
9 where the status was or any of that information?

10 A. I don't know particularly what you're asking?

11 Q. About financing, about their position in regards to
12 the non-compete?

13 A. I had very little conversation with Marcy about
14 that. I was mainly talking with Todd and Shane.

15 Q. But Marcy was a part of that, she was going to be
16 an owner in that new firm; correct?

17 A. She was.

18 Q. Now, I'm going through a little bit of the
19 background, what I'm understanding, to give the jury a
20 little better understanding about your firm and the
21 methods you have used over the years. You have been in
22 business for thirty ---

23 A. Thirty-nine.

24 Q. Thirty-nine years. Congratulations. I guess
25 that's congratulations. But you've built this practice

1 over time; right?

2 A. True.

3 Q. Okay. And you, I guess, have learned a lot through
4 the years about the practice of accounting. And clearly
5 understand that there are policies and ways to do things
6 that can safeguard documents; right?

7 A. True.

8 Q. And especially in your line of work because this
9 is, you know, information that we want to make sure is
10 maintained correctly; right?

11 A. Confidentially.

12 Q. Okay. I haven't seen -- tell me if you've got one
13 -- an internal document control or some type of policy
14 that governs how you receive documents, send documents,
15 protect documents; any of that. Do you have a document
16 like that?

17 A. Not a written document. We certainly have policies
18 though.

19 Q. Okay. And when you say policies, there's no
20 written policies; right?

21 A. Not in writing.

22 Q. Okay. And, in fact, there's no -- I think we went
23 over this earlier -- you haven't marked any of these
24 documents when they come in as confidential, when they
25 go out as confidential; right?

1 A. That'd take up our full eight hours a day if we did
2 that. We're deluged with paper.

3 Q. Okay.

4 A. So we don't -- no, we don't mark it -- each piece
5 of paper confidential.

6 Q. Okay. And there's no password protection or at
7 least there wasn't on your computers when Todd and Shane
8 were there?

9 A. There were password protections?

10 Q. There were? And where were these password
11 protection?

12 A. Everything. You know, to get on the computer I've
13 got to enter a password. I mean, everything has a
14 password.

15 Q. Okay. But when I go in and I try to find something
16 on your computer, do I have to enter it to get into your
17 profile or a part of the computer for proposals or
18 letters or any of that?

19 A. That would be under Amanda's password. I do
20 certain things on my computer that I need passwords for.
21 Different people do different things, different tasks
22 with different passwords. We all have passwords.

23 Q. And from my understanding, your office, it's open
24 and has a file room that's in there; correct?

25 A. Right.

1 Q. Okay. There's a file room. It's not locked. Is
2 that my understanding?

3 A. Well, we're in and out of that room all the time.
4 It's a huge file room.

5 Q. I understand. But it's not locked?

6 A. No. We're all using it constantly.

7 Q. Okay. And the documents that are in it, if someone
8 comes into the office they can go into that file room;
9 correct?

10 A. Only if they're employees.

11 Q. Okay. You have a cleaning crew; right?

12 A. Most businesses have cleaning crews.

13 Q. Okay. Well, you're not there when the cleaning
14 crew is there; correct?

15 A. They come after we leave.

16 Q. Okay. So if that file room is not locked, that
17 cleaning crew has access.

18 A. The cleaning crew has access to the entire office.

19 Q. Okay. Now, from my understanding, too, you kept
20 the proposals -- the proposals were on the server;
21 correct, on your computer server?

22 A. The only one involved with proposals are me and
23 Amanda types them.

24 Q. Okay. Were they placed on the server that were
25 accessible to all other employees?

1 A. She has it on her computer. So no one else should
2 ever access them. If they did, they should not have.

3 Q. And maybe I'm ---

4 A. Just me and Amanda.

5 Q. Maybe I'm asking the wrong way. You have a server
6 which allows others to ---

7 A. Use the server.

8 Q. Correct.

9 A. We all use the server.

10 Q. They can go on and get those documents. Are the
11 proposals on the server?

12 A. I don't know whether she has it on the server or
13 not. She has it on her computer.

14 Q. Okay. But if they're on the server, they're
15 accessible to all other employees; right?

16 A. No other employee would access that. They would
17 have no reason to access that.

18 Q. I'm not trying to -- I'm just trying to figure out
19 if you go on the server, are you able to get documents
20 -- any employee can get them if they're on the server;
21 right?

22 A. Well, I don't know whether that's on the server or
23 not. The proposals, I don't know.

24 Q. Okay. But if they are, then employees can get
25 them; correct?

1 A. If they have the correct passwords.

2 Q. Now, I think we went into a little bit with -- you
3 and Mr. Haynsworth went into sending out records, as you
4 send out some of your records to, I guess, when they're
5 asked -- if the client ask, sends in and says, hey, send
6 me information. I've gotten a new accountant. I need
7 their, you know, information to forward to them. That'd
8 be a letter they send you releasing that information; is
9 that right?

10 A. Oh, they're switching accountants?

11 Q. Switching accountants. Sorry if I didn't say that
12 the right way.

13 A. Yeah. They would send me a letter authorizing me
14 to release some confidential information.

15 Q. And you would do what, I guess, that client has
16 asked for in sending that information; right?

17 A. Depending on whether they have the right to that
18 information, depending on what they're asking for.

19 Q. Okay. And if the client says, hey, send me some
20 documents or send them directly to me, you would send
21 them to them; right?

22 A. Yes. Yes.

23 Q. Okay. And if they say send them to a different
24 accounting firm, you would do that, too?

25 A. Not necessarily.

1 Q. Okay. When you say not necessarily ...

2 A. We don't -- we have a problem with transmitting
3 information to third parties. We usually like to send
4 it directly to the client, no one else.

5 Q. Okay.

6 A. Whether it's audits or whatever, we say we're
7 sending it direct to you. And if it needs to go the
8 state or if it needs to go somewhere else, that's your
9 responsibility. We don't want to be in charge of
10 distribution of your documents.

11 Q. I think at one point you said during your testimony
12 that -- I'll have to go back, but you keep these clients
13 and have had some of these clients for thirty years or
14 so?

15 A. Some I've had since I started.

16 Q. And in your industry, and what I'm trying to
17 understand were these governmental entities, non-
18 profits, do they switch auditors at times to, you know,
19 make sure they maintain independence or that there's no
20 -- just to make sure they have a fresh set of eyes on
21 things?

22 A. There's not a requirement. But occasionally a
23 board member may want to, you know, go out for bid or
24 change auditors.

25 Q. Right.

1 A. Or they have a good friend that's an auditor so
2 they want that friend to do the audit.

3 Q. Okay. So they could have a friend that they say
4 we've worked with for years; we want to use that
5 individual?

6 A. Yeah. They have to convince the whole board.

7 Q. All right. So the board would then put it up and
8 they would make a decision. So ---

9 A. On occasion.

10 Q. I'm sorry?

11 A. On occasion.

12 Q. On occasion. But the way they do that is they
13 would go out for a bid; right?

14 A. They do it different ways.

15 Q. Okay. So if they out for a bid then that board or
16 that company will determine who they want to bid it out
17 to; right?

18 A. Yes.

19 Q. That's normally the way it is?

20 A. (No verbal response.)

21 Q. And it's up to them as to who they use?

22 A. Select, yeah.

23 Q. Okay. Now, we've gone through some of the
24 documents you've put in. And I want to make sure I went
25 through these. First, you put in -- you say my clients,

1 I think, have taken your proposal and copied it
2 verbatim; is that right?

3 A. I don't think they copied it. I think they took it
4 direct -- a computerized proposal and just changed the
5 names on it.

6 Q. Okay. So they've taken it. And so everything is
7 the same; right?

8 A. It's the same.

9 Q. Okay.

10 A. Except for some customization like change the name
11 of the client, the year-end, that kind of thing.

12 Q. All right. Okay. So this is, from my
13 understanding is your -- this would be your ---

14 A. That's mine.

15 Q. --- document that you sent to United Ministries?

16 A. Right.

17 Q. Is that right?

18 A. That's right.

19 Q. Okay. And that's part of that. And that would be
20 -- is this the one you're saying -- I think when I go
21 back that they reference or that you reference saying
22 they have taken this document and copied it verbatim?

23 A. Not the 2012. They've taken the template from my
24 proposals. This I did after they left, this particular
25 one.

1 Q. Okay.

2 A. This is just an example to show that -- I had not
3 even created this until after they left. See, the dates
4 are 11, 12 and 13. I'm just saying this is my template.
5 This is on my computer system.

6 Q. I've got a document here. I think your attorney
7 tried to put this in. Do you recognize this document?

8 A. I do.

9 Q. Okay. And what is that document?

10 A. This is a proposal to Blue Ridge Rural Water
11 Company, the year ended June 30th, 2012, '13, and '14,
12 prepared by Highsmith.

13 Q. And that's the one you're saying they ---

14 A. We did this to demonstrate the fact that our cover
15 fits perfectly over their document.

16 Q. And why I want to go back and to make sure is,
17 you've said this document is verbatim with the document
18 that was for United Ministries?

19 A. No, I didn't say verbatim. I said it's my
20 template. My words. They've just changed certain
21 things on it like from our computer system.

22 Q. I'll let the jury go back and make a decision about
23 that and what you said. But my question now is, is this
24 document -- this is the one you've said, United
25 Ministries, if I'm not mistaken, was the one they used,

1 took, to be able to make their own template; right? Is
2 that correct?

3 A. Uh-huh (affirmative).

4 Q. Okay. Now, let's go through this document real
5 quick if we can.

6 A. Okay.

7 Q. I might have to -- okay, if I can put them side by
8 side, I'm going to try to do this. Now, this right here
9 is the cover page; correct?

10 A. Cover page, right.

11 MR. HAYNSWORTH: The focus is off.

12 MR. ARIAIL: Yeah.

13 Q. I'm going to have to go like that. I'll have to do
14 them -- so we're going to say these two pages right
15 here, you're saying they're virtually identical; is that
16 right?

17 A. That's right.

18 Q. Okay. Now, the next page you're saying is the
19 table of contents right here; is that right?

20 A. Uh-huh (affirmative).

21 MR. HAYNSWORTH: It's cutting off the line.

22 MR. ARIAIL: I'm sorry. I'm going to try to
23 keep these side by side as best we can.

24 Q. Okay. So we should have everything is the exact
25 same way. On the right hand side we've got letter of

1 transmittal, profile, mandatory criteria?

2 A. It's the same types of sections that I ---

3 Q. But mandatory criteria is not over here?

4 A. Well, they just combined that with that summary
5 qualification. But you see they're all the same -- my
6 wording.

7 Q. All right. So I'm going back and I'm looking.

8 We've got down at the bottom, see approach to the audit?

9 A. Uh-huh (affirmative).

10 Q. I don't see anything about your approach to the
11 audit. You've got it over here.

12 A. Well, you sort of -- you have to customize them
13 somewhat to go along with what the client asks for in
14 the proposal. But the format, if you compare these
15 proposals to a proposal of Greene, Finney & Company,
16 which we have available, it's totally different. The
17 way it's set up, formatted, table of contents of the
18 different sections, are totally different. It in no way
19 looks like ours.

20 Q. I just want to go back and find your exact wording
21 that you said earlier to make sure I'm correct on this.

22 A. Okay.

23 Q. Because I believe you said that it was the
24 identical proposal? Is that wrong?

25 A. Well, I'm saying it's customized. I mean, it's the

1 same identical template, but, you know, all the names

2 ---

3 Q. Identical is identical.

4 A. The names are changed. It's not identical, but the
5 formatting -- that cover page identically fits under our
6 cover sheet. That's one example. But the headings, the
7 way I start my letters, the wording, the way I end the
8 letters, the wording, the paragraphs in between that
9 cover the different sections, those are my words that
10 they're repeating. The fact that I put an appendix at
11 the end. Other people don't do it that way.

12 Q. Okay.

13 A. I put the approach to the audit section. Every one
14 of those sections are sections that I put in and
15 developed.

16 Q. Right. And you can obtain this document from an
17 agency through the Freedom of Information Act; correct?

18 A. If it's a governmental organization.

19 Q. Right.

20 A. If the Freedom of Information Act applies. You can
21 obtain it, but you wouldn't have it already typed on
22 your computer.

23 Q. Let me just ask you this. Do you have a copy in
24 your office right now of a Greene Finney proposal?

25 A. Knox has one.

- 1 Q. Okay. So you've got one?
- 2 A. Yeah. To show you.
- 3 Q. Okay. You've got their proposal?
- 4 A. Yeah. And it's totally different. That's it right
- 5 there.
- 6 Q. Do you have a copy of Elliott Davis's proposal?
- 7 A. No, I haven't gotten one of theirs.
- 8 Q. Do you have one in your office?
- 9 A. I don't think so.
- 10 Q. Okay. Never requested one, never got one?
- 11 A. I don't think so.
- 12 Q. Okay. So this document, and when we go back now I
- 13 think you were saying, if I'm not mistaken, and there's
- 14 your first page right here. Here's yours; okay?
- 15 A. Right.
- 16 Q. And here's theirs. To me, we can go through each
- 17 in order ---
- 18 A. Okay.
- 19 Q. --- but now I think you would have to agreed,
- 20 they're not identical; are they?
- 21 A. Well, they are. Those are my words. They've used
- 22 my template. It says we understand that the bid should
- 23 represent -- look at the last sentence in the second to
- 24 last paragraph where I say I'm the person -- you know,
- 25 all those paragraphs are the same thing.

1 Q. Right. And -- let's see. I'm looking in here.

2 Scope of services. You didn't put -- and you can tell
3 me if I'm right. I'll let you take a look at it. You
4 didn't put how many hours or what it was going to take
5 you to do this United Ministries one; correct?

6 A. Some proposals they want the number of hours, some
7 don't want the number of hours, so it just depends on
8 the organization.

9 Q. But you'd agree in this one that you're looking at
10 that Highsmith has, they included their hours and all
11 that?

12 A. That was for a different organization; true.

13 Q. But that's different from what you do; right?

14 A. I would do it the same way if I were doing a
15 proposal that wanted the number of hours. That's my
16 template.

17 Q. I guess my answer or the answer to the question is
18 you didn't do it in this one, but they did it; right?

19 A. Well, those are two different organizations.

20 Q. Now, we discussed these bank confirmations and
21 notes to be up there. The bank confirmations that you
22 are indicating -- these are them right here; aren't
23 they? Phyllis Wheatley, -- I'm going to let you take a
24 look at those. Okay. Those are documents you put into
25 evidence?

1 A. That's right.

2 Q. That information and correct me if I'm wrong on
3 this, but that's only valid for the year that the audit
4 was done; right? I mean, it could change the next year?

5 A. Well, what we do is the next year we will change
6 the date up here. And we'll ask them if they've had any
7 new bank accounts. But we've got all the existing.

8 Q. Okay. So if you go in next year and they've
9 changed all of their bank accounts and they've opened up
10 new accounts, that document's not going to help you?

11 A. Well, they usually have the same main checking
12 accounts, the same main accounts. It usually stays the
13 same.

14 Q. Okay. And if they haven't maintained those
15 accounts and they've got new ones, you've got to change
16 all of these documents; right?

17 A. Well, you just change the account numbers.

18 Q. And these are sent to you. You send these to the
19 client, and the client sends them back to you; right?

20 A. Signed, yeah. We send the -- we need their
21 signature on their. And then we mail them to the bank
22 or email.

23 Q. And this document, this document, this is a
24 standard bank confirmation used in the CPA field that is
25 printed off, I believe, ---

1 A. That's right.

2 Q. --- correct me if I'm wrong, is checkpoint; is that
3 it?

4 A. It's an AICPA form.

5 Q. Right. So a generic form that all CPAs use; right?

6 A. A standard form. Standard form.

7 Q. Okay. But all CPAs use it; right?

8 A. Not all, but it's a standard form.

9 Q. Okay. But this is -- is the document that a client
10 would send back once they've confirmed that this is
11 their checking accounts or banking accounts?

12 A. The client just signs it to authorize the bank.

13 Q. You filed this action, I think, back in 2012, July;
14 correct?

15 A. Yes.

16 Q. Okay. And as part of -- you've put in Exhibit
17 Number 6 as an exhibit to your testimony today; right?

18 A. Right.

19 Q. You made that a part of the court record and filed
20 it as part of your, I guess, court documents back at
21 that time; right?

22 A. I assume so.

23 Q. And this document is back in 2009; is that right?

24 A. That was the version that was found in Shane's
25 desk. He would have been updating it on the computer.

1 Q. My question is, and I'm asking a specific question.

2 Is it 2009?

3 A. That's the date of that document.

4 Q. Okay. So this document, from my understanding,
5 contains information as of that date; is that right?

6 A. That's right.

7 Q. Okay.

8 A. Well, I take that back. I don't know whether it
9 had been updated. I think that was the date it began.
10 I don't know whether those were updated since that date.

11 Q. I understand.

12 A. Yeah. Okay.

13 Q. I'm just asking you what the date of the document
14 was?

15 A. Okay.

16 Q. And you've testified, Appalachian Council of
17 Governments, that's not an H&H client; right?

18 A. Correct.

19 Q. The copier log, and I want to understand this. I
20 heard your testimony and I'm trying to figure out, these
21 individuals on this copy log, and you didn't go through
22 it in detail. You just said they printed off fifteen
23 thousand copies is what I'm understanding. But ---

24 A. Pages.

25 Q. Pages, yeah.

1 A. Yeah.

2 Q. But they didn't print it off. You can't say that;
3 right?

4 A. I can't say whether they printed it to paper or
5 printed it to flash drive. It was one or the other.

6 Q. Okay. So if they print it to flash drive and save
7 it on your server?

8 A. No, I imagine they kept the flash drive.

9 Q. Well, once again we're into speculation. You don't
10 know that; okay? So let's don't get into that.

11 A. Well, we don't have it. We don't have it.

12 MR. ARIAIL: Your Honor, if I can -- she's
13 getting into speculation in my answers.

14 Q. I want to know and what my simple question is, I'm
15 going to work through them with you. These documents
16 you're saying, I think I understand now, could have been
17 scanned in and put onto your server; correct?

18 A. I don't think so.

19 Q. Did you or did you not send to Bruce Vollnogle and
20 Danny Woznick and Money Tree and -- let me go through --
21 TimberTech and Heartwood, a copy of their tax returns
22 for 2009 or 2010?

23 A. I didn't. If the tax returns were sent, they were
24 copied by Amanda and sent in paper copy.

25 Q. Do you recognize that document?

1 A. Well, no, I don't recognize it because this would
2 have been sent by Amanda.

3 Q. Okay. Tell me what that document is?

4 A. It says it's from me.

5 Q. Email address; right, is you?

6 A. But Amanda does my email. I don't do my own email.

7 She screens all of my email and does one hundred

8 percent. So I've never seen this before, but it says,

9 Danny, an electronic copy of your 2010 tax return is

10 attached. This is dated January 10, 2012. So this

11 would have been when he requested it after they had

12 left, that Amanda would have sent them copies of their

13 tax returns.

14 Q. My point is ---

15 A. In January of 2012.

16 Q. My point of this is, you have scanned in documents

17 that you'd sent to Danny Woznick; right? You just said

18 you didn't.

19 A. No, those are not scanned in documents. If Amanda

20 sent them their tax return, that was straight from

21 Ultratax to them. Nothing's scanned in.

22 Q. Okay.

23 MR. ARIAIL: Your Honor, I'd move this in as

24 Defendant's 1.

25 THE COURT: Any objection? Mr. Haynsworth,

1 any objection?

2 MR. HAYNSWORTH: No, Your Honor.

3 THE COURT: Without objection.

4 (WHEREUPON, Defendant's Exhibit Number 1 was marked
5 and admitted into evidence.)

6 Q. And I want to get through this and understand
7 exactly. You're saying that you had no knowledge of
8 this email and them sending tax returns ---

9 A. Amanda ---

10 Q. Can I finish?

11 A. Okay.

12 Q. --- and sending tax returns to Danny Woznick?

13 A. If a client calls and wants a copy of their
14 previous tax returns that we prepared for them, if they
15 request that, Amanda takes care of it. So Amanda would
16 have sent them an electronic copy directly from the
17 system, the Ultratax tax system. She would have emailed
18 it to them. I've never seen this email because she
19 handles my email. So this was in January, long after
20 they left. And the taxpayer called and wanted a copy of
21 a prior tax return. Sometimes taxpayers will call and
22 say, could you please send a copy of my 2013 return to
23 the bank? Amanda takes care of that. She will email
24 directly to the bank. But it's nothing scanned in, it's
25 just strictly from the tax system to the third party.

1 Q. My question, and I think where we're going with all
2 of this is, these documents on here are for tax clients;
3 correct?

4 A. That email? Those were tax clients.

5 Q. And the copier list?

6 A. Oh, that Todd was copying?

7 Q. Correct; yes, ma'am?

8 A. Well, some of the documents were tax return
9 clients. Some of them was the H&H business plan. Some
10 of them were work papers. Some of them were unknown
11 clients that were not clients of ours. You know, to
12 copy for that length of time, that's a lot of clients.

13 Q. Let me go through those real quick.

14 A. Okay.

15 Q. Let me show you. These documents, and I can show
16 them to the jury, we're going to put them up here.
17 Let's go through it. We just had an email from Danny
18 indicating -- Mr. Woznick -- that you had sent him his
19 TimberTech information. Money Tree information. I
20 think Basket Tree was a part of that. Heartwood's down
21 here. So these items -- and tell me if I'm correct on
22 this. You, as part of your policy when you had someone
23 do a personal tax return, you copied the K-1 and the
24 other corporate returns and put them in the file
25 together; is that right? That was your policy?

1 A. We keep a copy of the K-1. Yeah.

2 Q. Okay. So the K-1's a part of the statement; right?

3 A. We make a record of it for our files. We make a
4 copy of the K-1.

5 Q. So in this case they're doing the personal tax
6 returns, let's just say they're doing personal tax
7 returns for these individuals, they'd be copying these
8 documents ---

9 A. These are not individuals.

10 Q. --- these individuals on these ---

11 A. These are not individuals.

12 Q. --- own these companies; correct?

13 A. These are Inc., Inc., Inc., ---

14 Q. Bruce Vollnogle.

15 A. --- LLC, LLC, LLC.

16 THE COURT: Wait a minute. She can't take
17 down both of you talking at the same time. Ask the
18 question. Let her answer it.

19 Q. Is Bruce Vollnogle an individual?

20 A. He's an individual.

21 Q. Is Karen an individual?

22 A. Yes.

23 Q. Okay. In this do you agree that Bruce Vollnogle
24 owns Money Tree?

25 A. I don't know.

1 Q. Do you know if Bruce has any interest in
2 TimberTech?

3 A. I don't know.

4 Q. Heartwood Constructors?

5 A. I don't know.

6 Q. But if they do, then it wouldn't be out of the
7 ordinary for them to be copying these documents along
8 with the personal tax returns; right?

9 A. They'd have no reason to be copying for this length
10 of time. And they don't prepare a tax return in two
11 minutes.

12 Q. And I want to go back and I know we keep throwing
13 the word copying out, but I like to say it this way, as
14 I say, there's copying, there's printing, and then
15 there's scanning. So in this case you can't tell what
16 they're doing on any of this; right? You can't tell if
17 they're scanning them in, printing them or copying them;
18 right?

19 A. I don't know whether I'm technically able to
20 interpret the -- you know, whether someone else could
21 tell and not me.

22 Q. But, I mean, I'm just saying right now you don't
23 know; is that correct?

24 A. I know they were printing or copying.

25 Q. Or scanning; right?

1 A. And printing and copying to a flash drive or paper.

2 Q. Okay.

3 THE COURT: All right. Let's move on.

4 MR. ARIAIL: Okay.

5 Q. Now, the time sheet that I want to understand. And
6 you say he's copying on a date; I think it was -- what
7 was it? Let me make sure I'm correct. 10/11; is that
8 right?

9 A. (No verbal response.)

10 Q. And we'll go back and look at this real quick.
11 Okay. They're copying all of these documents on
12 10/11/2011, if I'm correct on that? All right. Tell me
13 if the date is correct. That says 10/11/2011?

14 A. 10/11/2011.

15 Q. Okay. So 10/11/2011 is a Tuesday?

16 A. Yeah. That's not -- you're looking for that Sunday
17 that we talked about?

18 Q. I'm just asking this. You said these documents
19 right here ---

20 A. Yeah. That's a Tuesday. Yeah. Yeah.

21 Q. --- say 10/11. And correct me if I'm wrong. I'm
22 going through all these documents. They're all on
23 10/11?

24 A. Okay. That is a -- yeah, that is a Tuesday.

25 Q. Okay. And we've got some on 10/13, which would be

1 a Friday; right? Or is that Thursday, excuse me?

2 A. Thursday is the 13th.

3 Q. Okay. And then, let's see. Okay. So we've got
4 10/11, 10/13. So those documents right there, he's
5 billed time on 10/11 and 10/13; correct?

6 A. Eleven and a half hour days; yeah.

7 Q. Eleven and a half hour days. And that's pretty
8 standard during tax season; right?

9 A. Not for us it isn't?

10 Q. Not for you to work eleven and a half hour days
11 during tax season?

12 A. Uh-uh (negative). Uh-uh (negative). Most of our
13 staff doesn't work overtime.

14 Q. Okay. Let me take those back. Now, you said Todd
15 came back and you acknowledged that he was taking a
16 lower paying job to be able to come work with you; is
17 that right?

18 A. That's what I understood at the time.

19 Q. Okay. And wasn't it true that Todd was coming in
20 because he wanted to be an owner of the business?

21 A. He wanted to work with his brother.

22 Q. Okay. Did he ever tell you that one of his primary
23 goals was to be an owner of the business and to have an
24 ownership interest?

25 A. I don't recall him saying that up front.

1 Q. And you never had any issues with Todd either;
2 correct? No disciplinary issues, no ---

3 A. The main issue was that commission thing.

4 Q. All right. We'll get into the commission in a
5 second.

6 A. Yeah.

7 THE COURT: How much longer you got?

8 MR. ARIAIL: Fifteen, twenty minutes. I can
9 cut it right now. This would be a good point if you
10 want to. And I can finish up or try to organize it to
11 get it quicker.

12 THE COURT: Okay. Ladies and gentlemen, we're
13 going to suspend now for the day. And we'll pick back
14 up at nine o'clock tomorrow morning. Now, when you
15 leave do not talk about this case with anyone. This
16 includes members of your own family. If anybody
17 contacts you and tries to talk to you about the case,
18 get their names and addresses and report that to me.
19 You can step down, ma'am. You can step around.

20 THE WITNESS: Oh, okay. Thank you. .

21 THE COURT: Before you go I need to read to
22 you an order, which has been signed by our Chief Justice
23 back in 2009. And if you'll give me your attention. It
24 says, the use of personal communication devices has
25 continued to increase dramatically. Accordingly, I find

1 it necessary to supplement my order of August 25, 2000,
2 related to the use of pagers, cellphones and other
3 personal communication devices in the courtrooms to
4 include the following direction of the Court. This is a
5 direction by the Supreme Court. The Court, that's this
6 Court, shall instruct jurors selected to serve on a jury
7 that until their jury service is concluded, they shall
8 not (a) discuss the case with others including other
9 jurors, except as otherwise authorized by the Court; (b)
10 listen or read any news reports about the case; (c) use
11 a computer, cellular phone or other electronic device
12 with communication capabilities while in attendance at
13 trial or during deliberation. These devices may be used
14 during lunch breaks, but may not be used to obtain or
15 disclose information prohibited in subsection (d) below.
16 And subsection (d) reads, use a computer, cellular phone
17 or other electronic device with communication
18 capabilities or any other method to obtain or disclose
19 information about the case when they're not in court.

20 Information about the case includes but is not
21 limited to the following: Information about a party,
22 witness, attorney or court officer; news accounts of the
23 case; information collected through juror research on
24 any topics raised or testimony offered by any witness;
25 information collected through juror research on any

1 other topic the juror might think would be helpful in
2 deciding the case.

3 Notice of the contents of this order shall be given
4 to jurors.

5 So that will -- we'll stop and we'll pick back up
6 at nine o'clock in the morning. Please keep your badges
7 on. Have them on when you come back in the morning so
8 that everyone involved with this case will know that you
9 are a juror and it would be highly improper for them to
10 talk about or discuss the case in your presence. Please
11 be back promptly at nine o'clock in the morning. Thank
12 you.

13 (WHEREUPON, Court's Exhibit Number 1 was marked for
14 identification.)

15 (WHEREUPON, the jury exited the open court at
16 approximately 5:16 p.m.)

17 THE COURT: All right. See you back in the
18 morning.

19 MR. ARIAIL: All right, Judge.

20 MR. HAYNSWORTH: See you in the morning,
21 Judge.

22 (WHEREUPON, court stood at recess for the day at
23 approximately 5:24 p.m.)

24 **December 9, 2014**

25 (WHEREUPON, court convened with all parties present

1 and the following proceedings were had.)

2 THE COURT: Good morning. Be seated. Be
3 seated. Okay. Come back around, please.

4 (WHEREUPON, the witness retakes the stand.)

5 THE COURT: You're still under oath, Ms.
6 McKinley.

7 THE WITNESS: Thank you.

8 THE COURT: All right. Bring our jury.

9 (WHEREUPON, the jury entered the open court at
10 approximately 9:05 a.m.)

11 THE COURT: Good morning.

12 THE JURY: Good morning.

13 THE COURT: All right, sir. You may proceed.

14 MR. ARIAIL: Thank you, Your Honor, may it
15 please Court?

16 **CROSS-EXAMINATION CONTINUED**

17 **BY MR. ARIAIL:**

18 Q. Ms. McKinley, how are you doing this morning?

19 A. I'm doing fine. Thanks.

20 Q. I'm sorry we didn't finish up yesterday, but I'm
21 going to try to expedite as much as I can.

22 A. Okay.

23 Q. I want to go back through a little bit in regards
24 to some questions you were asked by your proposal. I
25 understand, and if I'm correct, you're saying -- I think

1 you said they sucked off the computer a copy of the
2 proposal, verbatim, and they have used it with the exact
3 words; is that correct?

4 A. Exact words with some customization depending on
5 the different clients and what the client requested in
6 the proposal.

7 Q. Now, I think we've said you've gotten copies of
8 their proposals; right?

9 A. One copy.

10 Q. And you got it from Blue Ridge Rural Water?

11 A. Yeah. That was the only one. I think so.

12 Q. So at that time you could have taken that, used it,
13 done what you wanted to do with it at that time too; is
14 that right?

15 A. Well, I could have used some of the sections maybe
16 and retyped it. The difference being the fact that
17 theirs didn't have to be retyped or anything. They just
18 took the template and had it on the computer already.

19 Q. Right. And I know you're saying they took it off
20 the computer and we'll get to that later on. But if
21 it's public and it's been disclosed, which apparently
22 their proposal is disclosed at Blue Ridge Rural Water
23 just like yours is disclosed to these entities, then
24 that's -- if they get a copy of it they can do what they
25 want to with it; right?

1 A. It's not public. Blue Ridge Rural Water Company is
2 a not for profit organization. They had no -- they did
3 not have to legally send me a copy of it. This was
4 after the -- after they were the successful bidder, I
5 just telephoned the client and requested a copy. It was
6 not under Freedom of Information Act because they're not
7 subject to that as a non-profit organization. Only
8 governmental entities who are public bodies are subject
9 to the Freedom of Information Act.

10 Q. And you got a copy; correct?

11 A. They sent me a copy.

12 Q. You asked for a copy?

13 A. That's right.

14 Q. They disclosed a copy to you? And you can do with
15 it what you want to; correct?

16 A. I assume so.

17 Q. Okay. Now, we've gone through, and I want to
18 understand. I know there's some causes of action in
19 front of this jury. You're not saying that your
20 proposal is a trade secret; are you?

21 A. I'm saying that it's a document that I've developed
22 over thirty-nine years -- well, not thirty-nine -- I'd
23 say about thirty-five years. And it is a trade secret
24 in terms of portions of it contain confidential
25 information like the client listing. That's

1 confidential information that's never sent out. Even
2 under Freedom of Information Act, there's some
3 confidential sections in there. But it's a trade secret
4 in terms of the fact that we've developed it over the
5 years and everybody uses their own. It's not just
6 plagiarism; it goes beyond that.

7 Q. Okay. And it's ascertainable by the public like we
8 just said; correct? They can get it through a Freedom
9 of Information Act?

10 A. Not Blue Ridge Rural Water?

11 Q. Blue Ridge Rural Water gave it to you; correct?

12 A. Right.

13 Q. Okay. You're the public; correct?

14 A. They would not send it out wholesale to just
15 anybody.

16 Q. Okay. And what I'm getting at is, and the jury's
17 got to evaluate certain things in regards to a trade
18 secret, one of which is this has been disclosed. It
19 hasn't been protected from what we understand. You
20 didn't keep it under lock and key. You didn't have it
21 in a file drawer or protected; correct? It's not the
22 Coca-Cola secret; right?

23 A. I submitted our proposal to Blue Ridge Rural Water
24 Company to their board of directors. They're the only
25 ones that have it. They're not subject to public

1 disclosure of that proposal. They -- I requested it,
2 and they sent it to me. Now, if they -- if other -- if
3 the general public, anyone requests it and they want to
4 give it, they're able to. But they're not required to.

5 Q. Now, do you agree or not that if you receive a
6 document legitimately and through proper means, that
7 that document is not a trade secret?

8 A. It's a trade secret if it's our developed product.

9 Q. Do you remember taking your deposition with me?

10 A. I do.

11 Q. Do you remember what you stated in your deposition
12 about what you believed in regards to legitimate and
13 proper -- obtaining these documents through legitimate
14 and proper means?

15 A. I'm not sure what you're ---

16 MR. ARIAIL: Your Honor, may I approach the
17 witness?

18 THE COURT: Sure.

19 MR. ARIAIL: If I can open her deposition.
20 Actually, I'll have you do it.

21 Q. And is this your deposition that you took -- I
22 guess we took on May 2nd, 2014?

23 A. It appears to be.

24 Q. Okay. And this was taken at my office; correct?

25 A. Correct.

1 Q. And you were placed under oath?

2 A. That's right.

3 Q. And the statements you made in here you told me
4 were the truth; correct?

5 A. That's right.

6 Q. Okay. Now, if you can turn your attention to page
7 44.

8 A. Okay.

9 Q. And start on line 9; okay? And I'm going to read
10 it and you tell me if this is what your testimony was at
11 that time?

12 A. Okay.

13 Q. My question was, so if somebody gets your proposal
14 under Freedom of Information, it's not a trade secret;
15 is that what you're saying? Your answer was, if someone
16 who's not entitled to it does. Okay. My question was,
17 someone who is not entitled. So the public is entitled
18 to it. They're allowed to under the ... And then your
19 answer was, under certain circumstances. Question, but
20 you got it, part of the Freedom of Information. And
21 then your answer was, I got it legally and ethically.
22 And my question was, okay, okay. So if they got it
23 legally and ethically, if someone gets it legally and
24 ethically then that's allowed. Your answer was, that's
25 allowed. Is that right?

1 A. It's allowed to obtain a copy of a proposal if the
2 client agrees to give it to you.

3 Q. Okay.

4 A. That's pretty much what I said.

5 Q. Now, Ms. McKinley, we talked a little bit about my
6 clients and the work they did for you. You said they
7 did a great job; correct?

8 A. I don't know that I said they did a great job. I
9 think I said I had no complaints against them.

10 Q. Let's make it real simple. They made you a lot of
11 money; right?

12 A. I don't think so.

13 Q. You don't think they did?

14 A. No.

15 Q. So tell me this. They're the ones going out to do
16 the audits; correct?

17 A. Well, they're doing some of the audit work; of
18 course.

19 Q. So when you bill out four thousand dollars to an
20 audit client, they do the audits; right? They bill that
21 work?

22 A. They along with twelve other -- with twelve staff
23 members.

24 Q. Right. And you're not doing that work; right?

25 A. I'm involved in supervision and review of that

1 work.

2 Q. Okay. So out of the four -- let's say it's a four
3 thousand dollar fee. And we can go back and look at
4 your proposals and the amount of time they spent, they
5 are the ones that are doing the substantial amount of
6 work on the audit; correct?

7 A. They're doing some of the work on the audit.

8 Q. Okay. So they're doing some of the work, but
9 you're getting a lot of the payment; correct?

10 A. I'm paying them to do the work. And certainly I
11 have to charge the client for the work since I pay them
12 to do it.

13 Q. Tell me if you recognize this document, please,
14 ma'am. I'm sorry if that's in your eyes. If I move it
15 right up here, good?

16 THE COURT: If you can move this way.

17 Q. I don't mean to blind you.

18 A. Oh, okay. Okay.

19 Q. I'm sorry.

20 MR. ARIAIL: Can you pull that down a little
21 bit?

22 A. Okay.

23 Q. Do you recognize that document?

24 A. That's our 2011 corporate tax return.

25 Q. It's McKinley Cooper's -- McKinley Cooper &

1 Company, LLC.

2 A. McKinley Cooper. That's right.

3 Q. That's your company?

4 A. That's right.

5 Q. And at this time, 2011, you were the sole owner;
6 correct?

7 A. That's right.

8 Q. And your gross receipts, from my understanding of
9 reviewing this tax record, show that you made or the
10 company made, one million one hundred seventy-one
11 thousand eight hundred fifteen dollars; is that correct?

12 A. That's right. That's right.

13 Q. Okay. As part of that -- actually, the total
14 income, excuse me, was one million one hundred sixty-
15 seven thousand one hundred eighty-nine dollars; is that
16 right?

17 A. That's right.

18 Q. Out of that amount you're -- and for the jury's
19 information, you're an employee of the company; correct?

20 A. That's right.

21 Q. So you get a W-2?

22 A. That's right.

23 Q. And then you also get what we call a K-1, which is
24 basically -- that shows how much other income you've
25 gotten off of the company, in laymen terms; is that

1 correct?

2 A. That's right.

3 Q. Okay. So out of this statement, I want to show if
4 I can get -- is that document -- is that something you
5 put together? Did you file this with the ...

6 A. I prepared the tax returns.

7 Q. Okay. And you filed this with the IRS?

8 A. That's right.

9 Q. Okay. Tell me if this is a -- on this -- well, let
10 me make sure we've got it close enough. At the top it
11 says McKinley Cooper Company, LLC. And then we go down
12 here. And is this part -- and I want to make sure -- I
13 don't know if I can come out a little bit. This line
14 right here, line 21. That shows two hundred and
15 seventy-seven thousand one hundred and forty-two dollars
16 of ordinary business income; is that right?

17 A. That is correct.

18 Q. How much in -- my understanding is, that's income
19 that passes through to the individuals that own the
20 company; right?

21 A. Shareholders, yes.

22 Q. Okay. The shareholders. So you're a shareholder.
23 And as a result of that, you would have filed a K-1,
24 which shows the amount of money you get off of the
25 company; correct?

1 A. That's right.

2 Q. And this is your K-1; is that right?

3 A. That's right.

4 Q. So you showed at that time you made two hundred and
5 seventy-seven thousand one hundred and forty-two
6 dollars; correct?

7 A. That's right.

8 Q. Okay. And in addition to that you would have also
9 gotten, if I'm correct on this -- tell me if I'm right
10 -- this line right here says compensation of officers,
11 shows seventy-thousand dollars?

12 A. That's correct.

13 Q. So that's your compensation?

14 A. That's correct.

15 Q. So if I'm correct -- and I'm not good with math --
16 that would be somewhere close to three hundred and forty
17 thousand dollars you made that year?

18 A. That's correct.

19 Q. Okay.

20 MR. ARIAIL: Your Honor, if I may move this
21 into evidence?

22 THE COURT: Any objection?

23 MR. HAYNSWORTH: No objection.

24 MR. ARIAIL: Plaintiff's 2, correct?

25 MADAM COURT REPORTER: Defendant's 2.

1 MR. ARIAIL: Defendant's 2. Thank you.

2 (WHEREUPON, Defendant's Exhibit Number 2 was marked
3 and admitted into evidence.)

4 Q. Now my understanding ---

5 A. Can I point out something else out on this ---

6 Q. I'm going to ask you a couple of questions and we
7 can go through it?

8 A. Okay.

9 Q. But that document you have right there was the last
10 year that they were with you; correct?

11 A. They were with us for ten months.

12 Q. Okay. Ten months of that year. So ten months of
13 that year they were doing the work. They were driving
14 in the income. They were helping to build the business;
15 correct?

16 A. They were also being paid. The salary as shown on
17 this is six hundred and twenty-six thousand one thirty-
18 four is what I paid staff to do the work in addition to
19 all the fringes, health insurance, payroll taxes,
20 etcetera. So most of our expenses have to do with
21 salaries that we pay the staff. We've got a staff of --
22 total of about twelve members.

23 Q. Right. And you made three hundred and forty-
24 thousand that year; is that correct?

25 A. Roughly.

1 Q. Roughly. Okay. Now, this is 2012. If you can
2 take a look at that?

3 A. (Witness complied.)

4 Q. Is this the document you filed in 2012 with the
5 Internal Revenue Service regarding McKinley Cooper &
6 Company?

7 A. Yes.

8 Q. Okay. And this document would have happened in
9 2012 after they left; correct?

10 A. That's right.

11 Q. Okay. And this is an accurate true statement
12 because you submitted it to the Internal Revenue
13 Service?

14 A. That's right.

15 Q. All right. And tell me -- we've got -- well, if I
16 can refer -- and I think -- let me make sure I'm right
17 on this. This says 2012 at the top. And then I'm
18 trying to make sure I get it all on there. It says
19 gross receipts of one million one hundred ninety-five
20 thousand; is that correct?

21 A. That's correct.

22 Q. Okay. So that's actually showing, and if I can go
23 back and put beside it -- let me make sure right here --
24 we see that one million one hundred and seventy-one
25 thousand was made in 2011. One million one hundred

1 ninety-five thousand was made in 2012; correct?

2 A. Correct.

3 Q. Okay. So despite my clients leaving and being out
4 in their own practice, you actually made more money
5 based on the gross receipts; correct?

6 A. We're continually adding new clients.

7 Q. Okay.

8 MR. ARIAIL: Your Honor, if I may move this in
9 as exhibit -- Defendant's Exhibit 3.

10 THE COURT: Any objection?

11 MR. HAYNSWORTH: No objection.

12 Q. And not only did you add clients ---

13 THE COURT: Let her mark it.

14 MR. ARIAIL: I'm sorry.

15 (WHEREUPON, Defendant's Exhibit Number 3 was marked
16 and admitted into evidence.)

17 Q. Not only did you add clients, Ms. McKinley, but you
18 added to your bank account; correct, too?

19 A. (No verbal response.)

20 Q. And this statement right here ---

21 A. What was the question?

22 Q. Well, the question is, you added to your bank
23 account because you added three hundred and sixty-four
24 thousand dollars of K-1 income; that's what you made;
25 correct?

1 A. Yes, that's my K-1.

2 Q. Okay. So your K-1 went -- so we were three forty-
3 four last year, we're three sixty-four this year. We've
4 got a twenty thousand dollar increase; right? Oh, I
5 forgot. You've got to add back in. You also, on this
6 first page have two hundred -- see this line right here
7 -- two hundred and seventy-five thousand for
8 compensation of officers. So you're at ---

9 A. That was three officers.

10 Q. You have three officers?

11 A. Three people.

12 Q. But you own fifty percent; right?

13 A. At this point it's fifty percent.

14 Q. Okay. So that's a hundred and thirty-seven
15 thousand ---

16 A. That doesn't mean -- no, that was not my salary.

17 Q. But it says somebody got two hundred and seventy-
18 five thousand dollars or else we're lying to the
19 Internal Revenue Service?

20 A. No, we're not.

21 Q. Okay. So which is it?

22 A. My salary on that line seven, my portion is a
23 hundred and four thousand minus my simple contribution.
24 So it would have been, what, ninety-something thousand.

25 Q. Okay. So a hundred and four, a hundred and thirty-

1 seven, you add that to three sixty-four ---

2 A. More like ninety-something.

3 Q. --- we're getting close to four hundred and seventy
4 thousand dollars if I'm not mistaken?

5 A. That's correct.

6 Q. Okay. So we've gone from three forty-four to four
7 hundred and seventy -- excuse me. Is that right? Four
8 hundred and seventy thousand dollars in the year after
9 they left?

10 A. For thirty-nine years work.

11 Q. The year after they left; correct?

12 A. That's correct.

13 Q. All right.

14 A. So that must show that I was losing money on them.

15 Q. Oh, so actually now it's a benefit for them to have
16 left?

17 A. No, you were asking if they created income for me.
18 I'm saying they were not adding greatly to our profit,
19 bottom line.

20 Q. Okay. Well, then that would mean ---

21 A. Because they were being paid high salaries ---

22 Q. But ---

23 A. They were being paid high salaries and high fringe
24 benefits and all of that. And the reduction of all of
25 that, lost production where they were benefitting

1 themselves instead of the firm, led to better bottom-
2 line profits in the subsequent years.

3 Q. Now, we're going to say it is now beneficial for
4 them to have left, is what you're saying? It is a
5 better thing for you that they are now no longer with
6 you ---

7 A. It has reduced our overhead. It's reduced our
8 overhead

9 Q. And it's increased the amount of money that went in
10 your pocket; correct?

11 A. That had nothing to do with them. That was
12 subsequent, new clients.

13 Q. Okay. So now we're not -- I'm trying to figure
14 this out.

15 A. It's a two-prong.

16 Q. You're claiming ---

17 A. It's increased income, reduced overhead.

18 Q. So you're claiming you lost clients, but we're
19 seeing a substantial amount of increase in money?

20 A. Absolutely.

21 Q. Okay. Now, Shane didn't go to that CPE Conference
22 in Baltimore; did he?

23 A. He had some sort of conflict. I offered all four
24 of them to go to the conference. And he and Sheryl
25 Medders had conflicts and it ended up just being Marcy

1 and Todd Highsmith that were able to attend.

2 Q. Correct me if I'm wrong. I thought I sat here and
3 listened. You said that both of them went to this
4 conference and each of them at sixteen hundred dollars a
5 piece; is that not ---

6 A. That was the cost.

7 Q. Well, you just said Shane didn't go. So it can't
8 be ---

9 A. Todd went.

10 Q. Well, you told the jury it was sixteen hundred
11 dollars for both of them; right?

12 A. No. I said sixteen hundred dollars for Marcy,
13 sixteen hundred dollars for Todd.

14 Q. You forgot that Shane didn't go; didn't you?

15 A. No. I remembered Shane didn't go. Shane didn't
16 go, Sheryl didn't go. Marcy went, Todd went. It cost
17 sixteen hundred dollars for Marcy, sixteen hundred
18 dollars for Todd.

19 Q. Okay. We've talked about bids, proposals, clients
20 -- you said over the years you keep these clients for
21 ten to twenty years under these sometimes; right?

22 A. You said average.

23 Q. Okay.

24 A. Right.

25 Q. Now, do you have clients and is it normal for

1 clients to say, look, we've got to get another auditor
2 to be able to do our work because we want to make sure
3 our checks and balances are in place or we're not having
4 someone that has gotten too comfortable with our system.
5 Do you have that?

6 A. Not specifically that in that way.

7 Q. Okay. But they do say that they have to rotate off
8 and get new auditors; correct?

9 A. Sometimes a board member will think that that would
10 be a good thing. There are pros and cons to having a
11 long-term auditor. We make a practice of having new
12 staff members involved with audits that we've done long
13 term to get some fresh eyes on things and fresh ideas.
14 But it's quite a cost to the organization to spend time
15 with new auditors, indoctrinating them into their
16 systems and how they do things. So it's a pros and cons
17 situation.

18 Q. But that's their choice. That depends on what they
19 want to do. If they're comfortable with that, they can
20 make that decision; right?

21 A. The board of directors makes that decisions.

22 Q. Correct. And that's ultimately their decision as
23 to what they do?

24 A. That is.

25 Q. Okay. And as long as you don't have a contract

1 with them or they don't have a contract with you, then
2 they're allowed to do what they want to. This is a free
3 society; correct?

4 A. Absolutely.

5 Q. Okay. So tell me if you recognize this letter
6 right here?

7 A. It's a letter from South Carolina Rural Water
8 Association directed to me.

9 Q. Right. Sent to you by South Carolina Rural Water;
10 correct?

11 A. That's right.

12 Q. It's actually sent to you by Bobby Bryant the
13 President of South Carolina Rural Water; right?

14 A. That's right.

15 Q. Did you receive this on January 10, 2012? Do you
16 remember receiving a copy of this?

17 A. Not particularly, but it looks like I received it.

18 Q. Okay.

19 MR. ARIAIL: Your Honor, I'll go ahead and
20 move this into evidence as Defendant's ---

21 THE COURT: Any objection?

22 MR. HAYNSWORTH: No objection, Your Honor.

23 THE COURT: Let her mark it.

24 (WHEREUPON, Defendant's Exhibit Number 4 was marked
25 and admitted into evidence.)

1 Q. Now, you had done South Carolina Rural Water's, I
2 guess, audit for how many years?

3 A. Oh, gosh, I -- you know, it's hard to know. I
4 would say fifteen, twenty years. Now, that's a
5 guesstimate.

6 Q. Fifteen, twenty years. And they notified you that
7 they weren't going to use your services anymore; right?

8 A. That's right.

9 Q. In this letter was their reason for why they were
10 not going to use you anymore; is that correct?

11 A. They said that they're going to use Highsmith &
12 Highsmith and that their national affiliate has
13 suggested that they not use the same firm for a long
14 period of time.

15 Q. Okay. So they made a decision to go with someone
16 else because their national affiliate told them, hey,
17 this is the best course to do this; is that right?

18 A. It's not required, but it was up to them.

19 Q. Okay. So they made their decision?

20 A. That's what they say.

21 Q. And they also said, which is very interesting to me
22 and I caught this as part of it, they look forward to
23 you preparing an audit in the future. So there is a
24 possibility that you could get this audit back; right?

25 A. Slim possibility. Because they don't normally go

1 out for bid.

2 Q. Well, and, that issue about bids, what I don't
3 understand, that's their decision to make; correct?

4 A. That is.

5 Q. And I think you said yesterday, which I found to be
6 an enlightening comment was, it's okay for others -- for
7 you to take other's clients. It's just not okay when
8 people take your clients; is that right?

9 A. I didn't say it wasn't okay.

10 Q. Okay. But you don't have a problem taking someone
11 else's clients; do you?

12 A. Well, I don't go out and pursue other firms'
13 clients.

14 Q. But you don't have a problem taking them if they
15 come to you; right?

16 A. If I get a phone call out of the blue and ask for
17 us to do the audit, certainly, I don't have a problem
18 with it.

19 Q. And it's not uncommon -- I mean, like in the legal
20 practice, Knox and I have competing firms -- not
21 competing. We don't compete. We have clients that come
22 to us that we -- and yet some go to him, some come to
23 me because we have different things that we offer. In
24 your line of work, there are numerous CPA firms out
25 there; correct?

1 A. There are.

2 Q. There's Elliott Davis, there's Dixon Hughes, there
3 are large firms, there's middle firms, there's small
4 firms; correct?

5 A. That's right.

6 Q. I would call your firm a middle of the road firm,
7 kind of a -- I mean you've got twelve employees, twelve,
8 thirteen employees?

9 A. Yes.

10 Q. And then there's small, I guess we can call them
11 mom and pop, smaller ones that are two and one CPAs;
12 correct?

13 A. That's right.

14 Q. And everybody's competing against everybody else;
15 correct? That's what happens when we're trying to get
16 our business; right?

17 A. I assume so.

18 Q. Okay And it's not against the law to compete and
19 to try to get business; right?

20 A. That's right.

21 Q. Okay. Now, what I don't understand in this case,
22 and I think you've gone through it in detail. The
23 clients are the ones that make the decision about where
24 they go?

25 A. That's right.

26 Q. Okay. And in this case, and I heard you testify in

1 your direct, I want to make sure of this because I think
2 this is one of the key points in this case. Sitting
3 here today after two and a half years of litigation and
4 all the stuff we've done, and all the things that we've
5 gone through, coming to court today, there's not one tax
6 client that H&H has that you formally had that you've
7 talked to; correct?

8 A. No, that's not true.

9 Q. You have talked to how many tax clients?

10 A. I know specifically that I've talked to one that I
11 recall in particular.

12 Q. So one. How many clients are you alleging that
13 they took?

14 A. Tax clients?

15 Q. Right. Isn't it thirty-four, thirty-five?

16 A. That sounds reasonable. I haven't counted them.

17 Q. Thirty-five clients and you've talked to one. And
18 please tell me who that one client is?

19 A. I talked to Woody Woods who was a client of mine.

20 It came time for his due date and I called him and asked
21 him if he wanted us to prepare an extension.

22 Q. And I'm not going to ask you what they say. I'm
23 sorry we got into that right there. Out of the other
24 thirty-three, thirty-two, thirty-four, whatever the
25 number is, you haven't talked to any other tax clients;

1 correct?

2 A. Those were -- the other tax clients were those that
3 Todd Highsmith had originally brought with him, that we
4 paid him the thirty percent commission on. When he
5 initially came with the firm, he brought this group of
6 clients and those he handled directly. I don't think --
7 well, I've met a few of them, but I didn't directly
8 handle their tax accounts. I only checked their returns
9 and signed their returns and finalized their returns.

10 Q. These are his clients that he brought to your firm;
11 correct?

12 A. These are the clients we bought when he came to the
13 firm for thirty percent commission?

14 Q. Where's the contract that says you're buying this
15 book of business?

16 A. We had a verbal agreement by telephone where I
17 agreed to pay him double the normal fifteen percent rate
18 because I understood that he was bringing in a group of
19 tax clients and we were paying him a commission for
20 these clients.

21 Q. So -- hold on. Let me try to figure this one out.
22 Okay. I'm a tax client. I have Todd Highsmith is my --
23 the guy that does my taxes. He goes with you to a firm
24 and he's preparing my taxes there. So next year when I
25 say, well, Todd and I -- I don't want to use him

1 anymore. Then Todd is responsible for paying or saying
2 he owes you money even though I've left; is that what
3 you're saying? It's my choice to where I go; right?

4 A. I don't understand your question.

5 Q. Well, basically what I'm trying to say is how can
6 you say that he owes you money or there's money that
7 you're owed off of this when you have no contracts with
8 the tax clients, with the person that makes the decision
9 of where to go?

10 A. Well, we don't have -- the individual tax client
11 can make its own -- his or her own decision. But it's
12 very common in the CPA world that we buy practices. We
13 buy a group of tax clients as a business. They bought a
14 tax practice, paid a hundred and seventy-five thousand
15 dollars for a tax practice. So they may not retain a
16 hundred percent of those tax clients that they've
17 bought, but they assume they're paying good money for
18 those clients to become clients of their firm. And that
19 was the same scenario with Todd. He represented to me
20 that he was going to bring in this group of tax clients.
21 And I paid him thirty percent of the fees as a purchase
22 price. So I purchased those clients.

23 Q. There's no document -- nothing in writing. There's
24 nothing that says, hey, I'm going to pay you thirty
25 percent for your book of business that's coming in. Do

1 you have anything in writing?

2 A. It was a verbal contract.

3 Q. Okay. So nothing in writing. Nothing that you can
4 present to this jury. And now you're telling me that
5 even though I'm a tax client and want to be able to go
6 where I want to go, I'm stuck to Todd and I've got to
7 keep going with you; is that right?

8 A. What do you mean stuck with Todd?

9 Q. Well, I mean, what you're saying is Todd's brought
10 a book of business to you, and you've paid him for that
11 book of business?

12 A. That's right.

13 Q. Okay. So what I'm understanding is Todd has a
14 contract with you for all of his business to stay with
15 you. Well, that business can go wherever it wants to;
16 right?

17 A. We expect to retain that business for the most
18 part. There's going to be some attrition. Naturally,
19 when you buy a tax practice you're going to lose some of
20 those clients due to the fact that they're not happy
21 with everyone in the firm. But the purchase price takes
22 that into consideration. And you're considering that
23 you're going to keep the bulk of those clients.

24 Q. And you paid him a commission ---

25 THE COURT: Let's move on to something else,

1 please, Mr. Ariail.

2 MR. ARIAIL: And I'm trying to conclude as
3 fast as I can.

4 A. Okay.

5 Q. I want to ask you, these clients, you've spoken to
6 one. The audit clients, isn't it true that there are
7 sixteen or seventeen, somewhere around there that you're
8 saying are gone. And you've only spoken with four of
9 them; is that correct?

10 A. The audit clients?

11 Q. Right. Four clients?

12 A. Well, I was bombarded with phone calls after they
13 left from the audit clients. Some ---

14 Q. I'm not getting into what they said.

15 A. --- went with them. Some did not.

16 MR. HAYNSWORTH: Your Honor, I'd ask that Mr.
17 Ariail allow the witness to answer.

18 THE COURT: Go ahead.

19 A. Some -- you know, I was receiving phone calls daily
20 from audit clients wanting to know what was going on
21 with the Highsmiths, that they were receiving emails and
22 telephone calls from the Highsmiths. And there were
23 some clients that they successfully took and some that
24 they did not.

25 Q. And do you remember telling me previously that you

1 had only talked to four clients?

2 A. I don't know what you're talking about.

3 Q. Okay. And it's a very straightforward question
4 because I think it comes into play as to what this
5 jury's got to consider. You've talked to only four out
6 of sixteen audit clients; correct?

7 A. I don't know.

8 Q. Okay. Then tell me this. Just give me the
9 individuals you've talked to that are audit clients that
10 you are saying left?

11 A. I would have to look back. I could tell you some
12 of them.

13 Q. Okay. You're going to ask this jury for damages.
14 You're going to ask them based on damages for them
15 leaving and going with these people. I just simply want
16 to know who you talked to to find out why the Highsmiths
17 left?

18 A. Talked to by telephone or by letter or what?

19 Q. I just want to know who you have communicated with
20 to determine why the Highsmiths left; that's it?

21 A. (No verbal response.)

22 Q. If you can't answer, just say none.

23 A. To determine why the Highsmiths left?

24 Q. Right.

25 A. I don't know if anyone asked me why the Highsmiths

1 left.

2 Q. I think we got the answer. Isn't it true the real
3 reason you brought this lawsuit is you're upset that
4 they've gone out and started their practice and these
5 clients have gone out with them and like them and are
6 using them? It's really about non-compete?

7 A. Well, I'm upset because they stole our client list
8 and they substantially undercut our prices; having our
9 prices. One hundred percent of the clients they took
10 are substantially for lower fees. And there is no way
11 they would know what our fees were to substantially
12 undercut us unless they had our price list.

13 Q. And you've had an increase in income of a hundred
14 and thirty thousand dollars ---

15 THE COURT: That's been asked and answered,
16 Mr. Ariail.

17 MR. ARIAIL: Thank you, Your Honor. No
18 further questions.

19 THE COURT: All right. Any redirect?

20 MR. HAYNSWORTH: Briefly, Your Honor.

21 **REDIRECT EXAMINATION**

22 **BY MR. HAYNSWORTH:**

23 Q. Ms. McKinley, Mr. Ariail asked you some questions
24 about fairness and competition and reciting all of that.
25 Is it fair for the Highsmiths to take your pricing

1 information and your templates and essentially your
2 business and use that to compete with you?

3 A. That's unfair competition.

4 Q. All right. You reviewed, with regard to the audit
5 clients, the clients that used to be yours that were
6 theirs in 2011; is that right?

7 A. Yes.

8 Q. And seventy-seven percent of all their audit
9 clients in 2011 had been your clients?

10 A. They are. As a small firm going out on their own,
11 they would not have gotten the first audit client,
12 except from us and their method of doing it by
13 undercutting us with our inside information. Because to
14 obtain an audit client you have to really show
15 background experience. You can't go in as a brand new
16 firm and become an audit firm off the bat. And so they
17 used the price lists to undercut us on one hundred
18 percent of those clients.

19 Q. Mr. Ariail also asked you some questions about
20 proposals and he put the two proposals up side by side
21 and did some comparisons. And he asked you questions
22 about whether this was a trade secret or was
23 confidential. Now, in fact, you could go get a copy of
24 your proposal -- if I wanted to go get this from
25 someone, I could go get it; could I not?

1 A. Not if it's a private non-profit. Only if they
2 wanted to give it to you. If they decided to give it to
3 you. Otherwise, you know, you may or may not be able to
4 get it. That's addressed to the board or the director
5 and that's who gets it, period.

6 Q. And Mr. Ariail also made a reference to -- oh, I
7 forgot where I was going and I remembered. Mr. Ariail
8 made a reference to we've been in litigation for roughly
9 two and a half years. I think that's right, give or
10 take. In the two and a half years we've been in this
11 lawsuit, have you ever seen from the Highsmiths the hard
12 copy proposal of yours that they went and retyped?

13 A. No.

14 Q. The documents that comprise your work papers, those
15 are a different type of document than your proposals;
16 correct?

17 A. That's right.

18 Q. With proposals perhaps a client that you sent it to
19 may provide it to me if asked?

20 A. That's right.

21 Q. With your work papers, particularly your test to
22 transaction work papers and those types of documents,
23 those are yours and not your client's; is that right?

24 A. We have legal ownership of all work papers.

25 Q. Okay. And Mr. Ariail asked you about your IT

1 policy and your employee manual and that speaks to some
2 confidential information and what you own versus what
3 the client may own; you remember that discussion with
4 him?

5 A. Yes.

6 Q. And he also, I think, said, well, this is the only
7 written agreement you've got dealing with trade secrets
8 or confidential information. But, in fact, there are
9 written regulations that govern your profession; aren't
10 they?

11 A. That's right. We have a very strong code of ethics
12 that every CPA individually has to abide by. It's not a
13 firm-wide ethics code. It's an individual licensing
14 code as a CPA. So anybody we hire that's a CPA is bound
15 by that. I don't go in there and quote them Bible and
16 verse of what their legal responsibilities are. No need
17 to.

18 Q. These are grown men. You expect them to abide by
19 the regulations that govern CPAs?

20 A. To maintain their own license.

21 Q. And, in fact, is it not true that based on the
22 evidence that's been introduced in this lawsuit thus
23 far, they have violated those rules; have they not?

24 A. On several, several different matters they violated
25 directly.

1 Q. Which ones?

2 A. They violated the -- one of them is practicing
3 under our firm registration. They were practicing as a
4 CPA.

5 MR. ARIAIL: Objection, Your Honor.

6 THE COURT: What?

7 MR. ARIAIL: I didn't go into this in my
8 cross.

9 THE COURT: Yeah. I sustain the objection to
10 anything further.

11 MR. HAYNSWORTH: All right, Your Honor.

12 Q. Ms. McKinley, you were also asked questions by Mr.
13 Ariail about a proposal from Greene, Finney and Horton,
14 I believe. Do you recall that?

15 A. Yes.

16 Q. Take a look at that, if you would, ma'am, and just
17 -- Mr. Ariail put your proposal and their proposal up
18 and did a comparison. Would you just discuss very
19 briefly the differences in the Highsmith proposal and
20 your proposal versus another accounting firm's proposal?

21 A. This is a school district proposal. It is covered
22 under the Freedom of Information Act because a school
23 district is a public body. Their officers are public
24 officials, superintendent of the school. Their meetings
25 are open to the public. They have to advertise their

1 meetings. So they're subject to Freedom of Information
2 as a governmental entity. We obtained this proposal.
3 We had to submit in writing a request for it. And we
4 did that after we had gone through the bid process and
5 we were unsuccessful. They were successful in obtaining
6 this audit. And we were quite curious as to why we
7 lost. And this was going to be helpful for -- you know,
8 we wanted to know what price they had bid primarily. So
9 we obtained a copy of their proposal. Alternatively,
10 they may have, at some time, obtained a copy of our
11 proposals as a governmental entity. We discussed this
12 because the thing is to show the vast difference in what
13 they submit as a proposal versus what we historically
14 have submitted as our -- that I have submitted as my
15 proposal. This, when you look at it, you will see that
16 it totally looks different. The sections are different.
17 They may have several sections on one page. What they
18 discuss is totally different. The only thing similar
19 would be that they all have a price in there. But it
20 looks nothing like our proposal. The interesting fact
21 is our cover sheet, which exactly matches their -- the
22 Highsmiths proposal, in no way fits over their Greene
23 Finney proposal. There's no way that they would have
24 been using our fonts, our spacing to match our custom
25 covers. They have their own covers and it would be

1 something like this, and with a wider -- however they do
2 it because we all use covers, CPA firms do. But that
3 doesn't match. I mean, that shows you that this is
4 their proposal. It's not mine. Conversely, the
5 Highsmith proposal is mine and it's exact fit. It's --
6 my words are throughout the proposal. Some
7 customization. They changed a few words as though you
8 would if you were plagiarizing something, you would
9 change a few words. But for the most part they didn't
10 even bother to change. So this shows you what another
11 firm does when they don't have things sucked out of our
12 computer.

13 MR. HAYNSWORTH: Your Honor, I'd ask that the
14 proposal be admitted as Plaintiff's ---

15 THE COURT: Any objection?

16 MR. ARIAIL: No objection, Your Honor.

17 MADAM COURT REPORTER: 11.

18 MR. HAYNSWORTH: 11. And I'm going to clip it
19 together, if I could.

20 (WHEREUPON, Plaintiff's Exhibit Number 11 was
21 marked and admitted into evidence.)

22 A. Did you want this too?

23 (WHEREUPON, off record discussion were held between
24 counsel.)

25 Q. That's all right. I think we've got your covers to

1 illustrate your point on the other documents.

2 A. Okay.

3 MR. HAYNSWORTH: So that's Number 11.

4 THE COURT: 11.

5 Q. Ms. McKinley, it appears your firm made more money
6 the year after the Highsmiths were gone than the last
7 year they were there. Notwithstanding you making
8 overall more money that year, did you, in fact, lose
9 money because of the customers they took?

10 A. Absolutely. Another reason I made more money the
11 second year was I worked more the second year. My
12 treatment was over and my health was improving.

13 Q. That's right.

14 A. That would be another issue. I mean, there's
15 always lots of things going on. But they were being
16 paid hefty salaries, hefty fringe benefits. And they
17 were not producing for the firm. They were doing things
18 on their own for themselves. And that tells in the
19 bottom line.

20 Q. If you remember, what was -- and I don't know if
21 you remember that. What was Todd being paid at the time
22 he left?

23 A. Todd made like a hundred and eight thousand,
24 something like that. And Shane was eighty something
25 thousand. And that's not including their health

1 insurance and we pay a hundred percent of that and other
2 fringe; retirement, etcetera, that we paid on their
3 behalf.

4 Q. And I may be wrong but Shane actually made more,
5 right, because he'd been there longer or did Todd ---

6 A. No, Todd made more because he brought in those tax
7 clients and he had more overall experience. It was not
8 apples and oranges. Shane had more hands-on experience,
9 but Todd had more years as a CPA and we understood that
10 he was very highly paid in industry and we were trying
11 to get him at some sort of workable salary.

12 Q. That's right. Because when y'all met he said he
13 was going to have to take a pay cut if he came?

14 A. Right. And we talked about the fact that he had a
15 huge learning curve because he had not been in public
16 accounting for many, many years. And even so had
17 minimal beginning public experience.

18 Q. All right. Thank you, ma'am.

19 A. Okay.

20 THE COURT: Thank you. You can step down.

21 THE WITNESS: Thank you.

22 MR. HAYNSWORTH: Your Honor, I've got to go
23 check in the hall.

24 THE COURT: All right.

25 MR. HAYNSWORTH: My next witness is Mr. Matt

1 Phillips. If you'll just let me pop right out.

2 THE COURT: Sure.

3 THE CLERK: If you'll please place your left
4 hand on the bible and raise your right hand.

5 You do solemnly swear or affirm to tell the truth,
6 the whole truth and nothing but the truth, so help you
7 God?

8 THE WITNESS: Yes, ma'am.

9 THE CLERK: Please be seated. Would you
10 please state your name for the record.

11 THE WITNESS: Matthew Phillips.

12 THE CLERK: Thank you.

13 **MATTHEW PHILLIPS,**

14 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

15 **DIRECT EXAMINATION**

16 **BY MR. HAYNSWORTH:**

17 Q. Mr. Phillips, good morning.

18 A. Good morning.

19 Q. Could you tell the ladies and gentlemen of the jury
20 who you work for and what you do?

21 A. McKinley Cooper & Company. I'm a CPA.

22 Q. All right. I've learned over the last couple of
23 years more about CPAs than I used to know, but I still
24 don't know very much. Is there a specific type of CPA
25 work you do? And let me get more specific. As I

1 understand it CPAs may do bookkeeping work. They may
2 prepare individuals' tax returns. They may prepare
3 corporations' tax returns. They may do auditing work
4 for private companies or -- it seems like there's a lot
5 of different things that CPAs do generally. Is there
6 something specifically that you do or that McKinley
7 Cooper does in the CPA universe?

8 A. All of those things actually.

9 Q. Okay. All right. With regard to audits ---

10 A. Yes, sir.

11 Q. --- what sort of papers are generated by a CPA firm
12 with regard to an audit?

13 A. Lots. Checklists, work papers, letters, lots of
14 paper.

15 Q. All right. Within the universe of work papers are
16 there various types of work papers?

17 A. Yes, sir.

18 Q. Could you list for us some of the various types of
19 work papers that a CPA firm generates?

20 A. We have work papers on asset accounts, liability
21 accounts, tests of transaction work papers, financial
22 statement preparation work papers, making checklists,
23 things like that.

24 Q. Okay. Would a test of disbursements be within the
25 universe of test of transaction work papers?

1 A. Yes, sir.

2 Q. I'm going to show you what we've marked as
3 Plaintiff's Exhibit 3 and ask you if you can tell us
4 what that is?

5 A. That would be a test of disbursements.

6 Q. And who is it a test of disbursements for?

7 A. Appalachian Council of Governments.

8 Q. Is the Appalachian Council of Governments a
9 McKinley Cooper client?

10 A. Yes, sir.

11 Q. To your knowledge, has Appalachian Council of
12 Governments ever been a Highsmith & Highsmith client?

13 A. Not to my knowledge, no, sir.

14 Q. As we sit here today can you think of any reason
15 why a test of transaction work paper of a McKinley
16 Cooper client was in the computers of Highsmith &
17 Highsmith?

18 A. No, sir.

19 Q. I've set a couple of other exhibits up there that
20 are bank confirmations?

21 A. Yes, sir.

22 Q. If you could look at those and sort of walk me
23 through what that is as far as a CPA and work papers and
24 that sort of thing?

25 A. This would be a form that we would send out to

1 verify a bank balance on a certain day for a bank
2 account for an audit or engagement.

3 Q. All right. And I assume that the information on
4 it; the bank account, the name of the bank, the address
5 of the bank, that sort of thing, is something that you
6 would initially get from your client when you first do
7 their audit?

8 A. Yes, sir.

9 Q. And when year two rolls around to do the audit, or
10 year three or year four, do you have to go start over
11 again fresh and prepare all these work papers or do you
12 utilize the ones you've already done from the prior
13 years?

14 A. What we would normally do is update them if you had
15 to change a bank account, add a bank, take off a bank
16 account.

17 Q. The test of transaction work papers and the other
18 work papers that the accounting firm generates, are
19 those likewise just updated in subsequent years as
20 opposed to started over from scratch?

21 A. Typically, they're updated. You would use the
22 format that you have and add the new information for the
23 next year.

24 Q. All right. If you had a prior accounting firm's
25 work papers, all their work papers for a specific audit

1 client, would that save you time and money as far as
2 doing their audit if you had all the prior information?

3 A. I would assume it would.

4 Q. Because you wouldn't have to start from scratch, as
5 it were; right?

6 A. Yes, sir.

7 Q. All right. With regard to McKinley Cooper
8 internally, what is your understanding as to what is
9 considered confidential information?

10 A. In our office, everything is confidential as far as
11 in our office.

12 Q. And is that some written policy? Did somebody
13 explain that to you? How is it that you know everything
14 in your office is confidential?

15 A. We're told, or I was told when I first started
16 working there, that everything is confidential. And
17 just, you know, and the ethics and everything like that,
18 that, you know, everything would be confidential client
19 information.

20 Q. Because I imagine y'all have some pretty sensitive
21 stuff, Social Security numbers, income figures?

22 A. Yes, sir.

23 Q. Stuff that a customer would not want getting out?

24 A. Yes, sir.

25 Q. Okay. Are there also, beyond what you were told at

1 McKinley Cooper, or any written documents specific to
2 McKinley Cooper, are there rules or regulations that
3 govern CPAs generally as far as confidential information
4 and what can be done with it?

5 A. Yes, sir. I mean, we're under the state laws and
6 the AICPA laws.

7 Q. Okay. Is it allowed under AICPA or under state law
8 to remove any information from an accounting firm when
9 you leave?

10 A. No.

11 Q. When you do your work out at a client's, an audit
12 client as an example, ---

13 A. Yes, sir.

14 Q. --- do you have a computer -- well, let me back up.
15 Do you have a computer there at work?

16 A. Yes, sir.

17 Q. Is it a desktop or a laptop?

18 A. It is a laptop.

19 Q. All right. Do you use that laptop in doing
20 auditing work?

21 A. Yes, sir.

22 Q. All right. If you go out to a client and need to
23 access their information, how do you go about getting
24 their information?

25 A. Several ways. You use the client's computer

1 sometimes. They give you documents sometimes. You also
2 use your computer. So you can get it various different
3 ways from a client.

4 Q. All right. Do you ever use what's called a flash
5 drive?

6 A. Yes, sir.

7 Q. Do you have a flash drive there at work that you
8 use?

9 A. Yes, sir.

10 Q. Is that your own personal flash drive?

11 A. No, sir.

12 Q. Is it McKinley Cooper's flash drive?

13 A. Yes, sir.

14 Q. Okay. Is it acceptable at McKinley Cooper to ever
15 use a personal flash drive on a client's business?

16 A. No, sir.

17 Q. Is it acceptable at McKinley Cooper to ever plug a
18 personal flash drive into McKinley Cooper's computer
19 system?

20 A. No, sir.

21 Q. Have you ever used a personal flash drive in
22 connection with the work at McKinley Cooper?

23 A. No, sir.

24 Q. Okay. Does McKinley Cooper ever send you to
25 continuing education seminars?

1 A. Yes, sir.

2 Q. Are you familiar with one that's put on, I think at
3 Clemson University, by the Land Grant University Tax
4 Education Foundation?

5 A. Yes, sir.

6 Q. Have you attended that before?

7 A. Yes, sir.

8 Q. Okay. And McKinley paid for you to go?

9 A. Yes, sir.

10 Q. Did you receive materials from that seminar?

11 A. Yes, sir.

12 Q. Okay. Hard copies, CD, both?

13 A. A book and a CD, yes, sir.

14 Q. Okay. Who owns that material that you got at the
15 seminar?

16 A. McKinley Cooper.

17 Q. If you decided you were going to leave McKinley
18 Cooper would it be appropriate for you to take that
19 information?

20 A. I would assume not, no, sir.

21 Q. If you decided you were going to leave McKinley
22 Cooper would it be appropriate for you to delete the
23 emails off your work computer before you left?

24 A. No, sir.

25 Q. Why not?

1 A. They're client emails and company emails.

2 Q. I mean, it's a company computer; right?

3 A. Yes, sir.

4 Q. And you're familiar -- it's an Exhibit. I won't go
5 over it with you, but are you familiar with the IT
6 policy at McKinley Cooper?

7 A. Familiar with it, yes, sir.

8 Q. And that's an actual written policy that details
9 what you can and cannot do with the computer system?

10 A. Yes, sir.

11 Q. All right. Thanks, Mr. Phillips. Please answer
12 any questions Mr. Ariail may have.

13 A. Yes, sir.

14 THE COURT: All right. Mr. Ariail.

15 MR. ARIAIL: Thank you, Your Honor. May it
16 please the Court.

17 **CROSS-EXAMINATION**

18 **BY MR. ARIAIL:**

19 Q. Matt, how you doing today?

20 A. Doing well, sir. How are you?

21 Q. Good. I'm going to try to make this as brief as I
22 can.

23 A. Yes, sir.

24 Q. Let me understand real quick, you have not -- I
25 guess you don't send out proposals; is that right?

1 A. Send out?

2 Q. Proposals?

3 A. No, sir.

4 Q. And you've never been told while you were at
5 McKinley Cooper that proposals are trade secrets;
6 correct?

7 A. No, sir.

8 Q. Now, also, nothing in the office, from my
9 understanding, is locked up. The file room is open?

10 A. Some things might be locked up. I'm not sure.

11 Q. Is the file room open?

12 A. Yes, sir, it is.

13 Q. Okay. Now, as part of your work there, you were at
14 one time asked by Ms. McKinley to go get a proposal from
15 the Town of Johnston; correct?

16 A. Yes, sir.

17 Q. Okay. And she asked you to go get that proposal to
18 see what the winning proposal was?

19 A. Yes, sir.

20 Q. Okay. And did you do that?

21 A. I did. In my deposition actually, I mixed my
22 clients up. So it was the Town of Edgefield, not the
23 Town of Johnston.

24 Q. Okay. Thank you. Now, you've worked with Shane
25 and Todd a long time while you were there; right?

- 1 A. Shane specifically, yes, sir.
- 2 Q. Shane specifically. And you did audits with Shane
- 3 for years; correct?
- 4 A. Yes, sir.
- 5 Q. How long have you been at McKinley Cooper?
- 6 A. Eleven years now.
- 7 Q. Okay. And Shane I guess was there the majority of
- 8 that time; right?
- 9 A. Yes, sir.
- 10 Q. And how many audits do y'all think y'all did
- 11 together during that time?
- 12 A. I would not even want to put a number on it. I'm
- 13 not sure. A lot.
- 14 Q. A lot?
- 15 A. Yes, sir.
- 16 Q. How many do you usually do a year?
- 17 A. Twenty, thirty maybe.
- 18 Q. So thirty, ten years; three hundred audits y'all
- 19 have done together maybe, somewhere in that range?
- 20 A. Sure.
- 21 Q. Okay. And has he worked -- y'all worked hand in
- 22 hand with each other during that time?
- 23 A. Yes, sir.
- 24 Q. Has he done a good job?
- 25 A. Yes, sir.

1 Q. Is he a good employee, easy to work with?

2 A. As far as I know, yes, sir.

3 Q. Okay. You haven't had any problems with him?

4 A. We've butted heads once in a while, but that
5 happens.

6 Q. Right. But y'all are friends, good, worked
7 together fine?

8 A. Sure.

9 Q. Okay.

10 MR. ARIAIL: Thank you. I have no further
11 questions.

12 THE COURT: Thank you. Step down.

13 THE WITNESS: Thank you.

14 MR. HAYNSWORTH: May I get the next witness,
15 Your Honor, or do you want to ---

16 THE COURT: Do you want this witness to be
17 excused?

18 MR. HAYNSWORTH: Oh, yes, sir.

19 THE COURT: Any objection?

20 MR. ARIAIL: No objection, Your Honor.

21 THE COURT: Thank you. You're excused.

22 THE WITNESS: Thank you.

23 MR. HAYNSWORTH: Your Honor, do you want me to
24 call the next one break?

25 THE COURT: Do you need a break yet?

1 THE JURY: (Unanimous negative response.)

2 THE COURT: Okay. Next witness.

3 MR. HAYNSWORTH: Okay.

4 THE CLERK: Ma'am, if you'll please come
5 forward. If you'll pause at the end of the bench.
6 Please place your left hand on the bible and raise your
7 right hand.

8 You do solemnly swear or affirm to tell the truth,
9 the whole truth and nothing but the truth, so help you
10 God?

11 THE WITNESS: Yes.

12 THE CLERK: Thank you. Please be seated.
13 Would you please state your name for the record.

14 THE WITNESS: Sheryl Medders.

15 THE CLERK: Thank you.

16 **SHERYL MEDDERS,**

17 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

18 **DIRECT EXAMINATION**

19 **BY MR. HAYNSWORTH:**

20 Q. Good morning, Sheryl?

21 A. Good morning.

22 Q. Could you tell the ladies and gentlemen of the jury
23 who you work for and what you do?

24 A. I work for McKinley Cooper and I am an audit
25 partner.

1 Q. Okay. You're a certified public accountant?

2 A. Yes.

3 Q. How long have you been a CPA?

4 A. About twenty-seven years, approximately. Maybe
5 twenty-five.

6 Q. Twenty-five to twenty-seven? Did you start your
7 career at McKinley Cooper?

8 A. I started my career at Harris, McMillan, Hudgens
9 right out of college and that was a predecessor firm to
10 McKinley Cooper. And I was there two years before I
11 moved out of town.

12 Q. Okay. And after you left the predecessor firm of
13 McKinley Cooper that you worked for in college and went
14 out of town, did you work for another CPA?

15 A. Yes.

16 Q. Who was that?

17 A. I have worked for Price Waterhouse and then I
18 worked for Kraft Cohen CPAs in Nashville, Tennessee.
19 And then I worked for Smith & Radigan CPAs in Atlanta,
20 Georgia. Then I worked for Ernst and Young CPAs in
21 Greenville. Then I worked for Carter and Company CPAs
22 out of Atlanta, Georgia. And then McKinley Cooper.

23 Q. I should have been counting. I wasn't. So that's,
24 give or take, six other CPA firms beyond McKinley
25 Cooper?

1 A. Yes.

2 Q. Are you familiar in the accounting arena of the
3 term work papers?

4 A. Yes.

5 Q. What are those?

6 A. They are papers in your client file for an audit
7 that you would document your testing for the financial
8 statements to decide whether you believe those account
9 balances are fairly stated.

10 Q. Okay. And if I understood it within the universe
11 of work papers, there are lots of different kinds.
12 There's a test to transaction?

13 A. Correct.

14 Q. And what are some of the other -- beyond a test to
15 transaction, what are some of the other specific work
16 papers?

17 A. There would be account balance work papers, like a
18 cash account balance, and you might obtain a bank
19 confirmation to confirm that account balance. There
20 might be a test of accounts receivable account balances
21 where you might confirm the accounts receivable. Or you
22 might test what was received on those accounts
23 receivable. Those are called substantive test work
24 papers.

25 Q. Okay. Is there a work paper form book you go to,

1 CPA work papers and everyone just goes and uses those
2 forms?

3 A. No. There's audit -- there's an audit program and
4 audit procedures. And then you come up with your own
5 work paper typically.

6 Q. Okay. So using your six other accounting firms as
7 an example, are the work papers that McKinley Cooper
8 prepares different than the work papers that Price
9 Waterhouse prepares or Ernst and Young?

10 A. Everybody's work papers are a little bit different.
11 But you still have to come up with the conclusion on
12 what you're testing. But they're all a little different
13 and the way you test might be a little different.

14 Q. So we both want to get to one plus one equals two;
15 ---

16 A. Right.

17 Q. --- my approach may be different than your
18 approach, but the goal is to get to two?

19 A. Right. There's some audit procedures that are
20 required under the standards, but you might do that
21 procedure in a little different way.

22 Q. Okay. In the accounting field, who owns the work
23 papers?

24 A. The accounting firm.

25 Q. Okay. Is it proper in the accounting field to ever

1 remove work papers when you leave an accounting firm?

2 A. No.

3 Q. Client information -- or excuse me -- information
4 beyond work papers, whether it be a proposal, whether it
5 be a tax return, whatever it may be, is it ever
6 appropriate when one CPA leaves a firm for he or she to
7 take any of the documentation from the firm they are
8 leaving?

9 A. No.

10 Q. And is that because of some written policy specific
11 to McKinley Cooper or why is that improper in the
12 accounting field?

13 A. Well, it's client confidential information. It's -
14 - and why is it improper? Well, our professional ethics
15 say that you are, that that's confidential.

16 Q. And the professional ethics, that would be the
17 ethics which govern all CPAs; correct?

18 A. Right.

19 Q. All right. Talking about differences from
20 accounting firm to accounting firm, are you familiar
21 with proposals?

22 A. Yes.

23 Q. Have you ever seen a McKinley Cooper proposal?

24 A. Yes.

25 Q. Here in Exhibit 7, does that appear to be a

1 McKinley Cooper proposal?

2 A. Yes.

3 Q. At McKinley Cooper who generates the proposals?

4 A. Toni McKinley.

5 Q. Okay. Do you ever generate proposals at McKinley
6 Cooper?

7 A. I have not in the past. I am starting to as a new
8 partner to come up with some information for the
9 proposals but I have not generated an entire proposal,
10 no.

11 Q. And you worked for McKinley Cooper during the time
12 that Shane Highsmith and Todd Highsmith worked there;
13 correct?

14 A. Yes.

15 Q. Did they ever generate proposals?

16 A. I do not know.

17 Q. All right. Pricing information with regard to an
18 audit client, a proposal's going to be made to them and
19 a price is going to be offered to do their work. At
20 McKinley Cooper who comes up with the pricing?

21 A. Toni does.

22 Q. If you're going to be involved with a client or
23 trying to get other staff members, are they not involved
24 in the pricing of that client?

25 A. After I became a partner Toni starts -- Toni has

1 started to come to me and say what do you think about
2 this? How much time do you think it will take us to do
3 this. This client is similar to this one. What do you
4 think.

5 Q. But ultimately, it's Toni who determines the price
6 charged?

7 A. Yes.

8 Q. Do you know where in McKinley Cooper's offices the
9 pricing information is kept or the proposals are kept?

10 A. Yes.

11 Q. Where is that?

12 A. The proposals are kept, a hard copy in Toni's
13 credenza. And an electronic copy on McKinley Cooper's
14 server.

15 Q. When you go out to do audit work for a customer --
16 well, I'm sorry. Let me backup for one second. I was
17 asking you about McKinley Cooper proposals. Have you --
18 are proposals like work papers in a sense that they are
19 CPA specific or is a proposal just a standard, generic
20 form you go get off, out of a form book?

21 A. It is -- they're specific to each firm. I suppose
22 that you could buy, you know, we buy, we buy standard
23 audit programs. And then rework them for our specific
24 client. So you could probably buy standard proposals
25 and rework those for your specific client.

1 Q. So sort of like the work papers, your goal is to
2 get to two but each one's going to be different
3 depending on the firm?

4 A. Right.

5 Q. All right. Do you use a flash drive in connection
6 with your work at McKinley Cooper?

7 A. Yes.

8 Q. Is that a personal flash drive?

9 A. Yes.

10 Q. Were you reimbursed for it?

11 A. I do not think that -- no, I have not requested
12 reimbursement.

13 Q. And so I gather you may take that flash drive out
14 when you go do some client work and use it to obtain
15 information off the client's computers?

16 A. Yes.

17 Q. All right. Is it allowable to take that client
18 information on that flash drive, to take it home?

19 A. Yes, if you are working on that client you can take
20 it home.

21 Q. Is it allowable to take that client information and
22 put it on your home computer as opposed to your work
23 computer?

24 A. Is it allowable? I suppose it is. I don't know
25 that we have a specific policy to say it's allowable.

1 Q. Well, did you take client information and put it on
2 your personal computer?

3 A. No.

4 Q. Would that be against any ethics rules that govern
5 you CPAs to take client information and put it on a home
6 computer?

7 A. I suppose some people would do that so they won't
8 have to take their computer back and forth, but I do not
9 do that. I use my work computer on if I'm working on a
10 client. I do not use my home computer.

11 Q. Do you ever commingle that flash drive client
12 information with your personal information?

13 A. No, I have -- the orange one is for clients and my
14 black one is for personal, so I have two.

15 Q. So you keep the client stuff ---

16 A. Yes.

17 Q. --- separate from your personal?

18 A. Yes.

19 Q. Okay. And I gather if you go to one client and get
20 their information on the orange one, if you go get
21 somebody else's information you're going to clean off
22 the first client's ---

23 A. Yes. Yes.

24 Q. --- so you don't accidentally mix ---

25 A. Yes.

1 Q. Give one client the confidential information of
2 another client?

3 A. Yes.

4 Q. Okay. And I assume the same holds true if you've
5 got McKinley Cooper confidential information on your
6 orange one and you're going to go somewhere else, you
7 would make sure that McKinley Cooper stuff has been
8 deleted before you ---

9 A. Correct.

10 Q. Tell me a little bit about the discussions with
11 Toni McKinley over buying her interest in McKinley
12 Cooper? Just sort of -- as I understand it you and
13 Marcy and Shane and Todd were having some discussions to
14 potentially buy out Toni; is that right?

15 A. Yes.

16 Q. Sort of walk me through briefly what you recall,
17 particularly with regard to discussions with Shane and
18 Todd, what you recall about the buying -- or buyout?

19 A. Can you be more specific?

20 Q. Well, yeah. When do you recall you and Shane and
21 Todd and Marcy first started discussing that y'all might
22 want to buy out Ms. McKinley?

23 A. I think Marcy and Shane and Todd and I went out to
24 lunch in December, right before Christmas. And I guess
25 that was in 2010 and we first started talking about Toni

1 -- Toni's retirement. And that would we all want to
2 work together and buy her shares. And then not a lot
3 more was discussed with that, because tax season came
4 up, until the summer of 2011.

5 Q. Okay. So y'all get busy doing other things and
6 then start having another earnest discussion about it in
7 the summer of 2011?

8 A. Correct.

9 Q. All right. Do you recall -- how were y'all going
10 to determine what you'd be willing to pay to buy out
11 Toni's interest in the firm?

12 A. How we were going to determine the price or what we
13 would be willing to pay?

14 Q. Right.

15 A. By looking at the billings.

16 Q. Just see what the firm was billing to get an idea
17 about how much revenue and that sort of thing?

18 A. Correct.

19 Q. Do you recall if Shane and Todd discussed with you
20 their desire to get a look at not only the billings but
21 the customer contract amounts, the contract length for
22 the customers, those sort of things?

23 A. Yes. We made a list, Marcy and Shane and Todd and
24 I had a meeting in the conference room and we just made
25 a list of things that we might want to know before

1 buying in. So, you know, the billings was on there and
2 the client list was on there and things like that.

3 Q. Things that y'all felt like it would be important
4 for you to see ---

5 A. Right.

6 Q. --- to make an informed decision about what you
7 might be willing to pay?

8 A. Right.

9 Q. All right. And that information that y'all wanted
10 to see, who was the keeper of that information? Who
11 would you need to go get it from to see it?

12 A. Toni.

13 Q. And did Toni ask y'all to sign some documentation
14 before she was going to let you see that sort of
15 information?

16 A. Yes.

17 Q. Okay. To your knowledge did Shane and Todd sign
18 the documentation?

19 A. Not to my knowledge.

20 Q. Okay. What do you recall -- back up. Before they
21 left November 1st -- November 4th of 2011, did you know
22 they were planning on leaving?

23 A. No.

24 Q. Did they discuss -- when the four of y'all were
25 discussing potentially buying Toni out, did they ever

1 share with you that they had already decided to start
2 their own accounting firm?

3 A. No.

4 Q. Were you aware there was an H&H business plan that
5 was prepared two and half months before they left?

6 A. No.

7 Q. Is it appropriate in the accounting arena, Ms.
8 Medders, to moonlight?

9 A. (No verbal response.)

10 Q. Let me ask a better question. Is it appropriate in
11 the accounting profession while you're working for a
12 specific accounting firm, under their registration
13 number, for you to go do accounting work for someone
14 else and bill them outside of the firm?

15 A. I guess that is firm specific. I do not think that
16 is normally allowed by firms. But I guess it is firm
17 specific.

18 Q. Well, doesn't the AICPA regulations prohibit you
19 from billing outside of a firm if you're under that
20 firm's registration number?

21 A. I think you have to -- I'm not sure. I think you
22 have to have your own firm ID if you bill outside. I
23 mean, if you're billing -- if you represent yourself as
24 your own firm, you have to be registered as a firm.
25 That's what I think.

1 Q. And conversely you can't, while working under a
2 firm's registration number, go out and bill on your own
3 because you don't have your own number; right?

4 A. If you represent yourself to be a CPA and you're
5 going to do work as a CPA, you have to be -- in South
6 Carolina you need to be -- have your own firm license.

7 Q. When y'all started discussing more in earnest in
8 the summer of 2011, tax season's behind you. Y'all are
9 coming up with this is the stuff we needed to know from
10 Toni, during the summer of 2011, continuing into the
11 fall, was Toni in the office as much as she normally had
12 been in the past?

13 A. No.

14 Q. Do you know why?

15 A. Yes.

16 Q. Why?

17 A. Because she was taking -- she had some medical
18 problems and she was taking treatments that made her
19 feel ill and weak. And so she worked fewer than forty
20 hours.

21 Q. Okay. Have you ever gone without permission into
22 Toni's credenza and looked at proposals?

23 A. No.

24 Q. Have you gone without Toni's permission and looked
25 at customer pricing information?

1 A. Customer pricing? No, I've never needed to.

2 Q. And would I be correct that before you would go
3 look up customer pricing information you would ask
4 Toni's permission?

5 A. Well, if I needed to know an audit fee, I would
6 just go ask Toni.

7 Q. Right. Okay. Go ask her. Got you.

8 A. Right.

9 Q. Did Shane and Todd's interaction with you and Marcy
10 change at any point in time? I know y'all started late
11 2010 to discuss it and get busy, the tax season, you
12 pick it back up in earnest in the summer of 2011. Were
13 y'all all sort of -- I'm doing a bad job of asking my
14 question. Did the relationship change at all with these
15 two guys, vis-a-vis, you two, over the course of
16 discussing buying Toni out?

17 A. Can you be more specific?

18 Q. Right? Was there any friction?

19 A. Friction? I think we all wanted to buy in and
20 there was some disagreement on how we might finance it.
21 In other words, you know, maybe by Toni finance it or
22 get a loan. So there was just discussion on that end.
23 And there was some concern from the Highsmiths that we
24 were not getting the information that we needed to make
25 a decision.

1 Q. Okay. Did y'all actually go talk to a bank about
2 borrowing money to buy it?

3 A. Yes.

4 Q. And who all went and talked with the bank?

5 A. Who went? Me and Shane and Todd Highsmith.

6 Q. And did y'all get far enough along in the
7 discussions with the bank to discuss what y'all might
8 have to put up as collateral for the loan?

9 A. Yes.

10 Q. What is your recollection that y'all were going to
11 use as collateral for the loan?

12 A. We were looking at maybe a small business loan.
13 And the small business loan, I think, if I understand
14 correctly, we would have to put up the billings of the
15 firm as collateral and possibly our own collateral, our
16 own personal.

17 Q. So y'all would somehow personally guarantee the
18 loan?

19 A. (Nods head affirmatively.)

20 Q. Did Shane and Todd share with you at all their
21 financial situation in late 2010, early 2011?

22 MR. ARIAIL: Objection.

23 A. No.

24 THE COURT: Hold on.

25 MR. ARIAIL: Relevance, Your Honor.

1 THE COURT: What's the purpose of this
2 question now, Mr. Haynsworth?

3 MR. HAYNSWORTH: The purpose of it is we
4 believe their financial condition during that period of
5 time is relevant to the case, Your Honor. And my
6 question was simply did they share with her their
7 financial conditions during that period of time.

8 THE COURT: All right. Overruled.

9 A. No.

10 Q. Thank you, ma'am. Please answer any questions Mr.
11 Ariail may have for you.

12 THE COURT: All right. Mr. Ariail.

13 MR. ARIAIL: Yes, thank you, Your Honor. May
14 it please the Court.

15 **CROSS-EXAMINATION**

16 **BY MR. ARIAIL:**

17 Q. Ms. Medders, how you doing today?

18 A. Fine.

19 Q. Good. Good to see you again. I'll go through one
20 thing, these proposals, I want to make sure, you've
21 never been told they're trade secrets; correct, by Ms.
22 McKinley?

23 A. No. No.

24 Q. Okay. And ---

25 A. No. I've never been told that -- I've never heard

1 -- that term was not used, no.

2 Q. And, in fact, these proposals are on the server --
3 or at the time the Highsmiths were there on the server
4 and they're not protected; correct?

5 A. Correct.

6 Q. There's no password protection or any of that
7 nature?

8 A. Correct. There is now.

9 Q. Okay. There is now?

10 A. It has not been.

11 Q. And you, at the time the Highsmiths were there,
12 could go in and get invoices from Amanda Williams;
13 correct?

14 A. Correct.

15 Q. Okay. You could see all the prices and all of
16 that?

17 A. Correct.

18 Q. As far as former clients -- and you did audits with
19 my clients during this time; is that right?

20 A. Correct.

21 Q. Okay. And they -- how many audits did you work
22 with them on?

23 A. I have no idea. Twenty a year maybe.

24 Q. Okay. That's about the same response I think Matt
25 said right there. But twenty a year. And you've been

1 there -- they've been there ten, twelve years?

2 A. I wasn't there the whole time that Shane was there.

3 Q. Okay. But you worked twenty a year with him. And
4 the work you would do with him, did he do a good job?

5 A. I think so.

6 Q. When you go out and do these audits, you go out and
7 you review the information. Y'all work together and
8 would develop this information; correct?

9 A. Correct.

10 Q. Okay. And Toni was not on these audits; was she?

11 A. At the beginning of the time period that I worked
12 with McKinley Cooper, she went out a lot on field work.
13 And then she went out less and less as the staff got
14 more and more experienced.

15 Q. Right. So I guess MCC grew?

16 A. Correct.

17 Q. So you got -- you started out with less employees
18 and then went into more and then she could stay in the
19 office more; is that correct?

20 A. Right. And the staff got more experienced. So, I
21 mean, you could still have the same number of staff but
22 if they're more experienced then they can be on their
23 own, so to speak.

24 Q. Correct. Correct. Okay. And when you go out and
25 do these audits, and I'm trying to understand, I know

1 there's some work papers and there are things that you
2 get or look at and propose. Explain, if an entity
3 decides to change hands and go, say, for instance, this
4 year they're using McKinley Cooper and the next year
5 they want to use Elliot Davis, the client can request
6 that all the work papers and all the information be
7 released directly to that new CPA firm; correct?

8 A. They could request that. That's not the normal
9 procedure. The normal procedure when you change
10 auditors is for you to hear from the client and the
11 client would say we're going with a new auditor. Please
12 answer questions and allow the auditor, the new auditor,
13 to look at the work papers. And then that new auditor
14 would come to McKinley Cooper office and sit in our
15 conference room and look through the work papers that we
16 decided to show them and ask us questions. As far as
17 providing any work papers, we wouldn't necessarily
18 provide any work papers. We might provide a fixed asset
19 schedule, which is a listing of all your property and
20 equipment. But we would not send them our work papers,
21 no.

22 Q. Okay. Have you provided work papers directly to a
23 successor CPA?

24 A. Yes.

25 Q. And in this case, and I want to make sure, there

1 are certain clients that have left MCC and gone with
2 Highsmith & Highsmith. Have you talked with any of
3 those clients -- I'm not going to ask you what they said
4 -- have you talked with any of those clients about why
5 they left and went with Highsmith & Highsmith?

6 A. No.

7 Q. Okay. As part of the flash drives, my
8 understanding is you said you purchased your own
9 personal flash drive; is that correct?

10 A. Yes.

11 Q. Okay. And you use that at work?

12 A. Yes.

13 Q. Okay. Can you take -- and I don't know -- are you
14 aware of any other employees taking work home on these
15 flash drives and using it on their work computer?

16 A. (No verbal response.)

17 Q. Excuse me. That was a bad question. Are you aware
18 of any employees taking home work, work papers,
19 documents, and working with them on their home computer?

20 A. I do not know. I mean, typically, the rule is --
21 well, it is a rule stated that you do not take work home
22 unless it is approved. And then if it is approved, then
23 you can take work home. And at that point, I don't know
24 if they use their personal computer or take their work
25 computer. I do not know.

1 Q. Okay. And as a partner, owner of this company, you
2 have audit clients and clients that you have that you
3 deal with on a daily basis; correct?

4 A. Correct.

5 Q. It's their choice where they go to do their
6 business; correct?

7 A. Correct.

8 Q. Okay. Now, and it's clearly their choice. If they
9 have a contract they have to stay with you. They can
10 chose after their contract is up to go wherever they
11 want to?

12 A. Correct.

13 Q. Now, I want to understand. Shane and Todd had been
14 there and y'all were trying to buy into the business,
15 basically purchase it; correct?

16 A. Correct.

17 Q. You wanted to be owners?

18 A. Correct.

19 Q. Were you envisioning -- I guess it was the four of
20 you, Sheryl, Marcy, that would be Toni's daughter, and
21 then Todd and Shane, y'all all buying in together;
22 correct?

23 A. Correct.

24 Q. And y'all went through and you started putting
25 together a list of information that you wanted to

1 receive to be able to understand the background about
2 the company and all of that?

3 A. Correct.

4 Q. Okay. So you needed -- this is basically what we
5 call a due diligence is what you were doing?

6 A. (Nods head affirmatively.)

7 Q. So you didn't have a lot of this information;
8 right?

9 A. No.

10 Q. Now, I want to take a look, if you recognize this
11 document right here?

12 A. Yes.

13 Q. Okay. Is that the document that you, Todd, Shane,
14 and Marcy put together to request information from Toni
15 McKinley?

16 A. The four of us did not put together this
17 information. I do remember sitting in a conference room
18 discussing this list, but it was put together by, I
19 think, I think Todd put this together. I think he put
20 this together and then we discussed it at a meeting of
21 the four of us.

22 Q. And you sent that document, or one of y'all did, to
23 Toni McKinley; correct?

24 A. I think so. Yes. I think we asked for these
25 things. I think -- right.

1 Q. Okay.

2 MR. ARIAIL: Your Honor, I'm going to put --
3 Your Honor, I'm going to move this into evidence as
4 Defendant's 5.

5 THE COURT: Any objection?

6 MR. HAYNSWORTH: No objection.

7 THE COURT: Without objection.

8 (WHEREUPON, Defendant's Exhibit Number 5 was marked
9 and admitted into evidence.)

10 MR. ARIAIL: I don't want to blind you. I'm
11 going to put this up on the...

12 THE COURT: If you want to slip over this way.
13 That's a mighty bright light.

14 Q. Now, this document, if I'm correct, was drafted --
15 looks like it was drafted on July -- excuse me -- June
16 23rd, 2011. And it's for items needed for the review.
17 And that was in regards to your buy-in; correct?

18 A. I think that when we met that summer we talked
19 about the things that we wanted to have. And it was the
20 four of us. And we said, well, Todd you make a -- or
21 Todd offered. He said, why don't I make the list of all
22 the things we need? And he did. So I did not -- I
23 don't know if I've ever seen this in writing. I just
24 cannot say, but I do know that those were some of the
25 things he mentioned verbally saying, well, this is on

1 the list and this on the list and this is on the list.

2 So I'm not positive if I've seen it in writing, but I
3 know that we discussed needing those things.

4 Q. And you needed these things because you didn't have
5 these things; correct?

6 A. Correct.

7 Q Okay. And as part of this document down here at
8 the bottom -- and let me try to get it on here -- it
9 says that a non-disclosure/confidentiality agreement
10 will need to be signed before the above items are
11 released for review. So that shows that y'all have
12 drafted this together and Todd's put it together, that
13 they were willing to sign a non-disclosure/
14 confidentiality agreement; correct?

15 A. I don't know. Like I said I haven't -- I never saw
16 that in writing. I just know that we discussed these
17 things around the table and that he was going to make a
18 list and that we were going to give the list to Toni
19 and/or Marcy and find out about these things. I don't
20 recall ever seeing this written as a list, but I do
21 recall talking about the list.

22 Q. Right. And my question, what I'm getting at -- and
23 I know the items on the list, Todd and Shane were
24 willing to sign a confidentiality non-disclosure
25 agreement; correct?

1 A. I do not know.

2 Q. Okay. Do you remember this?

3 A. Yes.

4 Q. Is this emails that you were a part of that detail
5 what Todd and Shane were willing to do to be able to
6 obtain the information? This was around June 22nd --
7 June 26th, 2011; is that right?

8 A. Correct. June 26, 2011 and the June 27, 2011.

9 MR. ARIAIL: If I could move this into
10 evidence, Your Honor.

11 THE COURT: Any objection?

12 MR. HAYNSWORTH: No objection.

13 THE COURT: Without objection.

14 (WHEREUPON, Defendant's Exhibit Number 6 was marked
15 and admitted into evidence.)

16 Q. I'm going to try to make this as easy as I can. If
17 I can get to the bottom. Down here at the bottom --
18 this is an email that you were a part of where Shane
19 Highsmith, Todd Highsmith, Marcy Loucks, and your name
20 right there. It's on June 26. Does it indicate that at
21 that time, after this document on June 23rd, the buy-in
22 list, that he was willing to, Shane was, to sign a non-
23 disclosure confidentiality agreement?

24 A. You're asking me that?

25 Q. Yes?

1 A. Yes, that's what it says.

2 Q. Okay. And I thought you had previously indicted
3 that you didn't know if he was willing to sign that?

4 A. Right.

5 Q. Well, this shows he is; correct?

6 A. Correct.

7 Q. Okay. And it also shows right here, if I'm not
8 mistaken, that Todd responds and says he agrees. We do
9 not have adequate information at this point to determine
10 price. We need to sign a non-disclosure and
11 confidentiality agreement to review the financial
12 information and proceed from there; is that correct?

13 A. That's correct. You read it correctly.

14 Q. All right. And then Marcy Loucks says that is what
15 I was going to draw up a non-disclosure not a non-
16 compete; right?

17 A. Correct.

18 Q. Okay. So was that document ever drawn up?

19 A. A non-disclosure?

20 Q. Right?

21 A. Not a non-compete?

22 Q. Yeah. Was there just a simple non-disclosure
23 confidentiality agreement?

24 A. I don't think so.

25 Q. Okay. Now, y'all proceed on. And I think one of

1 the items in this case we've talked about is buying
2 continues on for some time. Y'all are trying to get
3 financing, trying to figure out a way to buy in to the
4 company to be able to do that. Did y'all ever discuss
5 owner-financing with Toni?

6 A. I did not discuss that with Toni. I discussed it
7 with Marcy because I think Marcy told the four of us
8 that Toni would be willing to finance it. But I'm not
9 positive if the discussion happened before they were
10 gone or after they were gone. I don't know.

11 Q. As you proceed on -- and what I'm trying to make
12 sure is, this whole process lasts until the beginning of
13 October, sometime in that range; is that correct?

14 A. Yes.

15 Q. So y'all are still negotiating?

16 A. Correct.

17 Q. Okay. And then in October, from my understanding,
18 Toni won't give a non-disclosure. She wants a non-
19 compete; is that correct?

20 A. She had an agreement drawn up and it did have some
21 -- it did have a non-compete clause about taking
22 McKinley Cooper clients; correct, about working on
23 McKinley Cooper clients.

24 Q. And Todd and Shane said we don't want that
25 document. We'll be willing to sign a non-disclosure

1 agreement; correct?

2 A. Correct.

3 Q. Okay.

4 THE COURT: How much more you got?

5 MR. ARIAIL: Probably five minutes, if that.

6 Maybe a couple of questions if I can, Your Honor.

7 Q. You have no problems with my clients; do you?

8 A. Problems?

9 Q. Do you have any issues? They were good to work
10 with; correct?

11 A. I work well with everybody.

12 Q. You agree that if you are a CPA in your firm right
13 now without a non-compete that you can go out and be
14 able to legitimately earn a business as a CPA in
15 Greenville, South Carolina?

16 A. Can you ask that question ---

17 Q. Can you go out and run your CPA firm if you don't
18 have a non-compete?

19 A. Can I go out and start another CPA firm? Yes.

20 Q. Thank you.

21 MR. ARIAIL: Your Honor, I have no further
22 questions.

23 THE COURT: Any redirect?

24 MR. HAYNSWORTH: Very briefly, Your Honor.

25 **REDIRECT EXAMINATION**

1 **BY MR. HAYNSWORTH:**

2 Q. If you went out and started another CPA firm would
3 it be proper for you take information from McKinley
4 Cooper, either in hard copy or work from their computer
5 system and use it in your new CPA firm?

6 A. No.

7 Q. Thank you, ma'am.

8 THE COURT: Thank you, step down.

9 MR. HAYNSWORTH: May this witness be excused,
10 Your Honor. May this witness be excused?

11 THE COURT: Can she be excused?

12 MR. ARIAIL: No objection, Your Honor.

13 THE COURT: Without objection you're excused.
14 Thank you. All right. We'll take a recess at this
15 time. Take the jury out.

16 (WHEREUPON, the jury exited the open court at
17 approximately 10:46 a.m.)

18 (WHEREUPON, court stood at recess for a short
19 break)

20 MR. HAYNSWORTH: Your Honor, may we approach
21 real quick?

22 THE COURT: Sure.

23 (WHEREUPON, a bench conference was held off the
24 record.)

25 THE COURT: Okay. Bring our jury.

1 (WHEREUPON, the jury entered the open court at
2 approximately 11:09 a.m.)

3 THE COURT: All right. You may proceed.

4 MR. HAYNSWORTH: Thank you, Your Honor. May
5 it please the Court. At this time I would call Marcy
6 Loucks.

7 THE CLERK: Ma'am, if you will please place
8 your left hand on the bible and raise your right hand.

9 You do solemnly swear or affirm to tell the truth,
10 the whole truth and nothing but the truth, so help you
11 God?

12 THE WITNESS: I do.

13 THE CLERK: Thank you. Please be seated.
14 Would you please state your name for the record?

15 THE WITNESS: My name is Marcy Loucks.

16 **MARCY LOUCKS,**

17 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

18 **DIRECT EXAMINATION**

19 **BY MR. HAYNSWORTH:**

20 Q. Marcy, good morning.

21 A. Good morning.

22 Q. I won't bore the jury with telling them you're
23 Toni's daughter and you work for McKinley Cooper. I
24 think we all know that. Tell me briefly what sort of
25 things you do for McKinley Cooper?

1 A. It's all-inclusive. I do audits, tax returns,
2 bookkeeping, consultation, everything.

3 Q. Okay. How long have you been with your mom's firm?

4 A. Eighteen years.

5 Q. And did you -- I know there's an accountant. I
6 know there's a CPA. Did you start as an accountant and
7 then become a CPA?

8 A. I did. I passed the exam during employment there.

9 Q. As a CPA are you regulated by anyone?

10 A. We are regulated by the State LLR, Licensing, Labor
11 and Review Board. And then they require that we also
12 follow the AICPA rules of ethics and everything.

13 Q. And that's the Association of Independent ---

14 A. American Institute of Certified Public Accountants.

15 Q. Okay. American Institute of Certified Public
16 Accountants. And that's a regulatory body that provides
17 various rules that CPAs have to follow?

18 A. Correct. That's a national board.

19 Q. Let me show you a document if I could and take a
20 second to look through it. It's a number of pages. And
21 tell me if you recognize that document?

22 A. I do.

23 Q. What is that document?

24 A. It is part of the AICPA ethics section.

25 Q. Okay. And then is there a section, three or four

1 pages into it, called acts discreditable?

2 A. There is.

3 Q. Okay. And then there is a section further on
4 dealing with the AICPA's rules on confidential
5 information obtained from being employed by a CPA firm?

6 I think it's section .10 501-9. It would be one, two

7 ---

8 A. I see it now. Yes.

9 Q. --- three, four, five, six pages in?

10 A. Uh-huh (affirmative). Confidential information
11 obtained from employment or volunteer activities?

12 Q. And you're familiar with those rules; correct?

13 A. I am.

14 Q. And you're required to follow those as a CPA;
15 correct?

16 A. Correct.

17 MR. HAYNSWORTH: Your Honor, I'd ask that the
18 AICPA Rules be admitted as Plaintiff's Exhibit ---

19 THE COURT: Any objection?

20 MR. ARIAIL: Yes, Your Honor. I'm going to
21 object because I don't where this document came from.
22 It's got a variety of things on here that are hearsay.
23 I don't know that he's -- I just object to the document
24 based on authentication.

25 MR. HAYNSWORTH: Your Honor, it's the rules

1 she's testified she's familiar with and govern her as a
2 licensed CPA.

3 MR. ARIAIL: I've just got -- the part I have
4 -- and I'm not sure where this is coming out of. That's
5 what I'm trying to figure out. I've got a document
6 that's been printed out that says AICPA under it. It
7 looks like it's -- I don't have the full understanding
8 of the document. I don't know who published this.

9 MR. HAYNSWORTH: It's sections of the APCI
10 (verbatim) regulation.

11 MR. ARIAIL: AICPA?

12 MR. HAYNSWORTH: AICPA.

13 THE COURT: All right. Are you certifying
14 that that is where you got it from?

15 MR. HAYNSWORTH: Yes, sir.

16 MR. ARIAIL: Okay.

17 THE COURT: All right. Subject to objection,
18 put it in.

19 Q. I'm just going to have her put a sticker on it.
20 I'm going to give it right back to you.

21 (WHEREUPON, Plaintiff's Exhibit Number 12 was
22 marked and admitted into evidence.)

23 Q. Marcy, if you would, would you take a look under
24 the page that starts at the top .01 rule 501, acts
25 discreditable? And then on -- not the back of that same

1 page but the next page, do you see the section marked
2 confidential information obtained from employment or
3 volunteer activities?

4 A. Do you want me to start reading that?

5 Q. No, no, no. I'm sorry.

6 A. Or do you want me to read just that 501 -- that
7 501-9?

8 Q. Yeah. The confidential information obtained from
9 employment or volunteer activities. Do you have that
10 section handy?

11 A. I do.

12 Q. Would you read out loud what that section says?

13 A. It says a member should maintain confidentiality of
14 his or her employer's or firm's confidential information
15 and should not use or disclose any confidential employer
16 information obtained as a result of an employment
17 relationship. For example, discussions with the
18 employer's vendors, customers or lenders. This includes
19 but is not limited to any confidential information
20 pertaining to a current or previous employer,
21 subsidiary, affiliate or parent thereof, as well as
22 entities for which the member is working in a volunteer
23 capacity. For purposes of this interpretation,
24 confidential employer information is any proprietary
25 information pertaining to the employer or an

1 organization for whom the member may work in a volunteer
2 capacity that is not known to be available to the public
3 and is obtained as a result of such relationships.

4 Q. All right. And could you then take a look at -- I
5 guess that's section .07 501-6, solicitation or
6 disclosure of CPA examination questions and answers.
7 Not that section, but over on the next page, the
8 paragraph beginning on when member changes employment.
9 Do you see that?

10 THE COURT: Does it have a page number?

11 MR. HAYNSWORTH: It does not, Your Honor. It
12 would be the third page from the back.

13 A. And just start at the paragraph when a member
14 changes employment?

15 Q. Right. Would you read that out loud for us,
16 please?

17 A. When a member changes employment, a member should
18 not use confidential employer information acquired as a
19 result of a prior employment relationship to his or her
20 personal advantage or the advantage of a third party,
21 such as a current or prospective employer. The
22 requirements to maintain confidentiality of an
23 employer's confidential information continues even after
24 the end of the relationship between a member and the
25 employer. However, the member is entitled to use the

1 experience and expertise gained through prior employment
2 relationships.

3 Q. All right. I'm sorry. Go ahead.

4 A. Do you want me to keep reading?

5 Q. Yes, ma'am. That next paragraph.

6 A. A member would be considered to have committed an
7 act discreditable to the profession if the member
8 discloses or uses any confidential employer information
9 acquired as a result of employment or volunteer
10 relationships without the proper authority or specific
11 consent of the employer or organization for whom the
12 member -- for whom the member may work in a volunteer
13 capacity unless there is a legal or professional
14 responsibility to use or disclose such information.

15 Q. Okay. And in South Carolina -- is it the South
16 Carolina Accountancy Board or Board of Accountancy?

17 A. Well, the South Carolina LLR has a board of
18 accountancy. So it's like in that, you know, under
19 there.

20 Q. And am I correct that the LLR regulations
21 incorporate by reference to AICPA regs?

22 A. They say that we should follow the AICPA code of
23 ethics.

24 Q. Okay. We have heard testimony from a number of
25 witnesses about the various types of things that CPA

1 firms generate when they're doing, for example, an
2 audit. What sort of things, in your experience, having
3 done audits, do you generate as a CPA?

4 A. Of course, work papers, checklists, assessments,
5 analytical ratios, I mean, it's a lot.

6 Q. Are there -- when you say work papers, is that one
7 specific thing or is that various types of work papers?

8 A. There are various types of work papers.

9 Q. Okay. Who owns a CPAs work papers?

10 A. The firm.

11 Q. Okay. Are the work papers owned by the client
12 you're doing the work for?

13 A. No.

14 Q. I'd like to show you what's been previously marked
15 as Plaintiff's Exhibits 3, 4, and 5. With regard to
16 Exhibit 3, can you tell us what that is?

17 A. It is an Appalachian Council of Governments test of
18 disbursements.

19 Q. And what's a test of disbursements?

20 A. It's where we go in and pull a sample of their
21 check disbursements, what's going out and make sure --
22 we determine our sample size based on other analytical
23 things we've done. We assess risks and then we
24 determine how we want to pull our sample and then we
25 make sure -- it's just our way to support our opinion on

1 the financial -- it's part of us supporting our opinion
2 on the financial statements as a whole.

3 Q. Okay. Plaintiff's Exhibit 3, the Appalachian
4 Council of Governments, is that a McKinley Cooper audit
5 client?

6 A. It is.

7 Q. To your knowledge, was the Appalachian Council of
8 Governments ever an audit client of Highsmith &
9 Highsmith?

10 A. No, it was not.

11 Q. Do you know how the Appalachian Council of
12 Governments' test to transaction work paper from
13 McKinley Cooper got into the computers of Highsmith &
14 Highsmith?

15 MR. ARIAIL: Objection, Your Honor.

16 THE COURT: What's your question?

17 MR. HAYNSWORTH: If she knows how the McKinley
18 Cooper test to transaction work paper for the
19 Appalachian Council of Governments got into the
20 Highsmith & Highsmith computer?

21 THE COURT: If she knows.

22 MR. HAYNSWORTH: If she knows.

23 A. I can assume how it got on there, but I can't ---

24 Q. Well, I don't think the Judge wants you to assume.
25 Let me ask a better question. Did McKinley Cooper ever

1 provide its Appalachian Council of Governments test to
2 transaction work papers to Highsmith & Highsmith?

3 A. Well, they were -- we would have never released
4 anything that is not a client of theirs. There's no
5 reason for them to have anything that is not a client of
6 theirs.

7 Q. How about clients that were McKinley Cooper's and
8 now are Highsmith & Highsmith clients? Would y'all's
9 work papers for that client be released to Highsmith &
10 Highsmith if they were the successor of audit?

11 A. Released? We may permit them to review certain --
12 we would, of course, we would -- they would have never
13 reviewed our test work. They may request to review some
14 and they may request copies, but it's -- I mean,
15 normally, they just come in and ask questions and don't
16 even want a copy of it. But we would definitely never
17 -- I would never let them see my test work. They
18 wouldn't ask for it.

19 Q. If you were to leave and go start your own
20 accounting firm or go to work for someone else and you
21 had the work papers for an audit client, as an example
22 -- if you had the old CPA firms work papers for a given
23 audit client and you're now doing their audit, would
24 that benefit you in any fashion to have the stuff from
25 the prior CPA firm?

1 A. Oh, yeah. It would save me a lot of time.

2 Q. How so?

3 A. I mean, I wouldn't have to create anything. It's
4 already in there. I just have to update and change the
5 dates and put it the way I guess I like it. But if it's
6 already in there and I don't have to set it up. I mean,
7 that's -- a lot of our time is just in setting up our
8 procedures and policies and determining how we choose
9 our samples and assessment of risks. And if they've
10 already done it, it'll save us a ton of time.

11 Q. Okay. If it saves you a ton of time could you
12 price the audit less than you otherwise would?

13 A. Absolutely.

14 Q. Okay. Same question as to proposals. If you had a
15 prior auditing firm's proposal and went to propose for
16 your new firm that prior client, would that help you any
17 fashion at your new firm?

18 A. Well, yes, it would. I mean, then I would know
19 what price I needed to beat to get the client.

20 Q. The two other plaintiff's exhibits in front of you
21 are what have been referred to as bank confirmations?

22 A. Correct.

23 Q. What are those in the accounting arena or would
24 that be a type of work paper?

25 A. We confirm -- it helps support our cash account --

1 cash and investment account work papers.

2 Q. Okay. And is one of the work papers in front of
3 you the bank confirmation work papers for the Phyllis
4 Wheatley Center?

5 A. It is.

6 Q. Was the Phyllis Wheatley Center ever a client of
7 Highsmith & Highsmith after they left and started
8 Highsmith & Highsmith?

9 A. I honestly am not sure.

10 Q. If Phyllis Wheatley is not an H&H client, can you
11 think of any reason why an MCC bank confirmation for
12 Phyllis Wheatley would be in their computers?

13 A. No.

14 Q. We've heard some testimony that, I think starting
15 towards the end of 2010, you and Shane Highsmith and
16 Todd Highsmith and Sheryl got together and were
17 proposing to buy out your mom's interest in the
18 business. Is that time line generally consistent with
19 your recollection?

20 A. With Sheryl, correct.

21 Q. Well, did you and Sheryl start discussing it and
22 then ---

23 A. Shane and I had discussed it prior to even Todd and
24 Sheryl, so ...

25 Q. Okay. So you and Shane start discussing it and

1 then later on the discussion expands to two more people?

2 A. Correct.

3 Q. Were y'all going to each own twenty-five percent?

4 I mean, is that what you envisioned when you were
5 discussing it?

6 A. I don't think -- we never -- I mean, I know there
7 was discussions about it being split twenty-five
8 percent, but I don't think we ever decided on --
9 honestly, I don't even know -- I don't ever remember it
10 being set on twenty-five. I know there were discussions
11 about it being split equally. And I just -- until we
12 got to the end, I wasn't going to be set on a number.

13 Q. Okay. Fair enough. Did you go to a meeting with
14 Shane or Todd and any bankers with regard to ---

15 A. I did not.

16 Q. Do you know if Shane and Todd met with any bankers
17 about financing for a potential buy-in?

18 A. They did. And Sheryl also went.

19 Q. Okay. And did Shane or Todd share with you
20 anything that the banker shared with them when they had
21 their meeting?

22 A. Just, you know, maybe the options of maybe getting
23 an SBA loan to help for collateral. And I mean,
24 really, if they did I didn't pay much attention to it.

25 Q. Before they left in early November of 2011, did

1 either of the Highsmiths share with you that they
2 intended to leave?

3 A. No, sir.

4 Q. Do you know -- strike that. How did you find out
5 that Shane and Todd left?

6 A. From what I recall, somebody texted me and said
7 that Shane had left.

8 Q. At work do you have a company-provided desktop or
9 laptop?

10 A. I have a laptop currently.

11 Q. And is that a company-provided laptop?

12 A. It is.

13 Q. Do you use a flash drive in connection with your
14 job at McKinley Cooper?

15 A. I do.

16 Q. Who provides the flash drive?

17 A. McKinley Cooper.

18 Q. Is information ever taken -- strike that. Do you
19 ever use the McKinley Cooper flash drive and take client
20 information home and put it on your home computer?

21 A. I do not.

22 Q. When you use your flash drive -- well, let me back
23 up. You're going out to do an audit, as an example.

24 A. Uh-huh (affirmative).

25 Q. Would you take your flash drive to obtain

1 information from the client's computer system?

2 A. Yeah. If necessary, absolutely.

3 Q. If you then go to a different client and take that
4 same flash drive to get that client's information, do
5 you ensure the first client's information is off the
6 flash drive before ---

7 A. I do.

8 Q. Okay. And is the reason you do that so you don't
9 accidentally take one client's information and it goes
10 to another client?

11 A. Absolutely.

12 Q. After Shane and Todd left, do you recall the first
13 time you heard of contact by them with an audit client
14 of y'all's?

15 A. I heard -- from what I recall, I heard it was the
16 very next day.

17 Q. And do you know roughly how many audit clients that
18 used to be y'all's audit clients are now their audit
19 clients?

20 A. Roughly, I'd say ten to twenty.

21 Q. Is there any sort of commission structure at
22 McKinley Cooper?

23 A. There is.

24 Q. Okay. Tell us about that?

25 A. If you bring in a new client, you get fifteen

1 percent of the first year collections.

2 Q. And if the same client's there year two, you don't
3 get a second fifteen percent for the same client?

4 A. You don't get anything. I'd make a lot of money if
5 I did that.

6 Q. But if you brought in a brand new client in year
7 two, for that client you'd get the fifteen percent?

8 A. Correct.

9 Q. And to your knowledge is it fifteen percent for
10 everyone?

11 A. To my knowledge.

12 Q. Okay. In fact, I think -- did you get or are you
13 familiar with the McKinley Cooper Employment Manual --
14 Employee Manual? Are you familiar with that document?

15 A. I've see it before.

16 Q. All right. And if I could -- and under
17 compensation and advancement, it specifically lists the
18 fifteen percent for all the new clients -- excuse me --
19 fifteen percent commission on first-year new clients;
20 does it not?

21 A. Correct.

22 Q. Who keeps the proposals at McKinley Cooper?

23 A. Toni.

24 Q. The information about what a McKinley Cooper client
25 has been billed or how long a contract is and when their

1 contract's up for renewal, who keeps that information?

2 A. Toni.

3 Q. Where is it kept?

4 A. In her credenza behind her desk.

5 Q. Okay. At McKinley Cooper is it appropriate for the
6 CPAs who work there to access Toni's credenza and look
7 for that information ---

8 A. No, it is not.

9 Q. --- without her specific permission?

10 A. No, it is not.

11 Q. All right. When y'all four were discussing
12 potentially buying your mother out, did Shane and Todd
13 share with you that they wanted to know the customer
14 contract lengths?

15 A. Yes.

16 Q. Did they share with you that they would like to
17 know the amount the customer was charged?

18 A. Yes.

19 Q. Did they share with you they would like to know
20 when the customer was up for renewal?

21 A. Yes.

22 Q. Did your mother provide any of that information to
23 them?

24 A. No, she did not, that I'm aware of.

25 Q. Were you involved in meeting with an attorney to

1 get a document drawn up that y'all were going to sign in
2 connection with the buyout?

3 A. I was.

4 Q. Was that document ever signed by Shane and Todd?

5 A. It was not.

6 Q. Since Shane and Todd left, have y'all been able to
7 obtain new clients that you didn't have in November of
8 2011?

9 A. We have.

10 Q. Obtaining new clients hasn't stopped the loss of
11 the revenue from the old clients; has it?

12 A. Has not.

13 Q. The document that you saw the lawyer about, was an
14 initial draft presented to Shane, Todd and Sheryl?

15 A. An initial draft was presented to the whole firm.

16 Q. And for the four of y'all that were looking to buy
17 in, was feedback sought between you, the three others
18 and your mom as far as this document that you were
19 involved in?

20 A. Right. As far as I'm aware they never gave
21 feedback.

22 Q. Did others?

23 A. Others did, yes.

24 Q. But ultimately, at the time they left, they had
25 never signed the document?

1 A. They had never signed.

2 Q. Thank you, ma'am. Please answer any questions Mr.
3 Ariail might have.

4 THE COURT: Mr. Ariail.

5 MR. ARIAIL: Thank you, Your Honor. May it
6 please the Court.

7 **CROSS-EXAMINATION**

8 **BY MR. ARIAIL:**

9 Q. Marcy, excuse me. How are you doing today?

10 A. I'm doing well.

11 Q. I hope you're doing well today. Now, just to start
12 out, I think there was some discussion in regards to
13 proposals and I want to make sure I understand it. The
14 proposals were on the server; correct, at MCC?

15 A. They are now. Before, I never sought them out.

16 Q. Okay.

17 A. I can't testify if they were or not.

18 Q. Okay. They're in a folder and they weren't
19 password protected; correct?

20 A. If they were, I never saw them.

21 Q. Okay. Now, let me go through real quick. Nothing
22 in the office has been, to your understanding, stamped
23 trade secret or stamped confidential?

24 A. It would be -- I mean, you can't stamp every piece
25 of paper.

1 Q. Okay. So that's a no. And you're an owner;
2 correct?

3 A. Currently, yes.

4 Q. Okay. And there's no agreements that you have with
5 clients to say, hey, keep this information confidential
6 or proprietary once it's sent out? No written
7 agreements that I've seen; correct?

8 A. As far as like what -- I mean, like as in what, I
9 guess?

10 Q. When you send a document out to a client you don't
11 have a written agreement that says please keep this
12 confidential. This is a trade secret of our firm?

13 A. Well, I wouldn't be sending a lot of documents out
14 to clients, I guess -- like their tax returns or what do
15 you mean?

16 Q. I'm talking any document you send out?

17 A. Well, their tax return, I don't think I would have
18 to tell them it's confidential; would I?

19 Q. Proposals, none of that information is in there?

20 A. I don't send anything out. I don't send proposals.

21 Q. Okay. So there's nothing you know of, any written
22 agreements with clients that say, keep this
23 documentation confidential?

24 A. Well, I think if it's their information they -- I
25 wouldn't need a confidentiality.

1 Q. Okay.

2 A. Like their audits, it's up to them to decide if
3 they want it confidential.

4 Q. Okay. And you can go in and get all the invoices
5 at Amanda's desk; correct?

6 A. I can.

7 Q. Okay. And you can go through and find out what the
8 prices are and all that information?

9 A. If I would like to, I could.

10 Q. Okay. Now, when you were doing this buy-in, from
11 my understanding, y'all were trying to buy into the
12 company and understand the financials; right?

13 A. Trying to. We were talking about buying in
14 together, yes.

15 Q. Right. Right. And the key thing is y'all put
16 together a list, and I want to make sure I've got it.
17 You saw this list, I think you were sitting here?

18 A. Yeah. That's the first time I'd ever seen it.

19 Q. But y'all had a list that you put together
20 basically to get information; is that right?

21 A. I didn't put a list together.

22 Q. Okay. Somebody put a list together out of your
23 group?

24 A. We discussed about items we may need. So they put
25 a list together. I can't vouch for what they did.

1 Q. Right. And you discussed, and if I can find it
2 right here, basically discussed -- we can go through it.
3 Let me pull that down real quick. Here's the list. And
4 it's my understanding you're trying to get a better
5 understanding of what, I guess, McKinley Cooper is
6 worth; is that right?

7 A. I would think so.

8 Q. Okay. So one of the things you need, it looks like
9 in number one right there, contract status?

10 A. Uh-huh (affirmative).

11 Q. Okay. Billings, collections?

12 A. Uh-huh (affirmative).

13 Q. Those are items that you are looking for to get;
14 correct?

15 A. Correct.

16 Q. Okay. So if you already had it, you didn't need to
17 go ask for it; correct?

18 A. I didn't have any of that.

19 Q. Okay. So that's why you needed to go get it?

20 A. Well, that was the -- I mean, if we're going to buy
21 something, we would ask for the contracts. I mean, I
22 don't even know ---

23 Q. Right. But, I mean, what I'm trying to figure out
24 is there's an allegation that Shane and Todd have taken
25 all of this information. Why would they be asking for

1 it if they had it? I mean, they're asking for it right
2 here; correct?

3 A. Did they do this? I mean, I don't -- who did the
4 list?

5 Q. Now, this flash drive -- and I know we've talked
6 about these confidentiality agreements and you've read
7 into us what the standards are?

8 A. Uh-huh (affirmative).

9 Q. And how you're supposed to take confidential
10 information, what you're not supposed to do with it.
11 You've taken a flash drive home, company flash drive,
12 and used it on your home computer with company
13 documentation; right?

14 A. Well, back when, before I had a laptop, I would go
15 home on and work on it but then take it back off.

16 Q. I thought your testimony was you never did that?

17 A. Now that I have a laptop I don't do that.

18 Q. Okay. So you have taken confidential client
19 information home to your computer on a flash drive and
20 put it on there; is that right?

21 A. Sure. I've used it to do work.

22 Q. All right. You've actually let your child use your
23 laptop too?

24 A. For PowerPoint one time, yes. I did say that.

25 Q. So documents are on there?

1 A. Now, I don't keep documents on there all the time.

2 Q. But you put a flash drive in there and documents
3 are on there; right?

4 A. But PowerPoint isn't on my flash drive.

5 Q. Okay. Now, we've heard these questions in regards
6 to, I think it was sixteen hundred dollars they're
7 claiming that Shane went to a seminar in Baltimore.
8 Todd didn't go on that -- or excuse me -- Shane didn't
9 go; Todd went?

10 A. Correct. Shane was in Disney World.

11 Q. Okay. Now, Sheryl ---

12 A. Sheryl went.

13 Q. Sheryl went on that?

14 A. Uh-huh (affirmative).

15 Q. Okay. So she went on that to Baltimore. And both
16 of you, you went on that too?

17 A. It was Todd, Sheryl and myself.

18 Q. Okay. So you've got the materials from that
19 seminar; correct?

20 A. Sure.

21 Q. Okay. So you kept everything?

22 A. I would assume so if I got it. I honestly don't
23 recall what I got from that seminar.

24 Q. Now, has McKinley Cooper ever sued another employee
25 for taking their CPE materials before?

1 A. I don't think we have employees that ever stole
2 anything before.

3 Q. No employees have ever taken their materials?

4 A. That I'm aware of.

5 Q. Now, the audits in this case, and I want to make
6 sure I understand this, how many of the audit or tax
7 clients have you talked to in this case that you're
8 alleging that have been taken by Highsmith & Highsmith?

9 A. That I personally know?

10 Q. Yes?

11 A. I'm talking to none of them.

12 Q. None, okay. And, in fact, you haven't been on any
13 of the audits on these clients in a long time either;
14 right?

15 A. Not the ones they took, no.

16 Q. Okay. Okay. So the clients that they have are the
17 ones that they were working on audits with for years;
18 right?

19 A. I'm sorry. Repeat that.

20 Q. What I'm saying is the clients that you're alleging
21 they have taken are clients that they have worked on for
22 years?

23 A. Clients that they have?

24 Q. Uh-huh (affirmative)?

25 A. I don't have that documentation of how long they

1 worked on those clients.

2 Q. And it's up to the client who goes -- who they use
3 for their audits, tax?

4 A. I would think so.

5 Q. Okay. Now, we've discussed this non-compete and we
6 go back and forth. You were part of an email chain that
7 had information about my clients were willing to sign a
8 non-disclosure?

9 A. Correct.

10 Q. Okay. And actually you were the one negotiating,
11 talking with the attorney ---

12 A. I had not spoken to an attorney at that point.

13 Q. Okay.

14 A. I didn't meet with the attorney until later.

15 Q. Okay. So at some point in time you talked to an
16 attorney?

17 A. After that, correct.

18 Q. Okay. And did you let that attorney know that they
19 were willing to sign a non-disclosure?

20 A. Well, it wasn't a -- that wasn't a discussion. Can
21 I say what I talked to the attorney about.

22 Q. I don't hear what the attorney -- that's
23 attorney/client privilege. I just want to know if you
24 talked to him about that?

25 A. I did not speak to him about what they were willing

1 to sign. No, I did not.

2 Q. Okay. And they informed you through this email
3 they were willing to sign a non-disclosure?

4 A. Right.

5 Q. And, in fact, your response was, that is what he's
6 going to draw up, a non-disclosure not a non-compete?

7 A. At that point in time; correct. I hadn't met with
8 him yet so I didn't know what -- I mean, that was --
9 yeah, that's what I told them, but I have yet to meet
10 with him.

11 Q. Okay. And that document was never drawn up, a non-
12 disclosure; right?

13 A. It was part -- isn't it all inclusive?

14 Q. The document you're referencing contains a non-
15 compete; correct?

16 A. Well, and a non-disclosure.

17 Q. Right. But this one right here says a non-
18 disclosure, not a ---

19 A. I hadn't met with him yet so nothing had been drawn
20 up at that point. And it wasn't between me and them, so
21 ...

22 Q. It's your group that's trying to buy in ---

23 A. I was not a shareholder then. I was an employee
24 then.

25 Q. But you were trying to buy into the firm?

1 A. We were. But it wouldn't have been a non-compete
2 with me. I didn't own anything.

3 Q. It would be a non-compete with your mother?

4 A. Correct, but not with me.

5 Q. Now, you have provided work papers to successor
6 CPAs; correct?

7 A. Myself personally, I've not provided them. Maybe
8 -- I probably give them depreciation schedules.

9 Q. Okay. So that's a work paper?

10 A. A copy of it; correct.

11 Q. Okay. So we made this -- and I want to understand
12 this ---

13 A. Right.

14 Q. --- because this is a big point. You understand
15 they've got work papers or there's one work paper. You
16 have divulged work papers before to successor CPAs;
17 right?

18 A. Well, you've got to be more -- there's -- work
19 papers is a very broad ---

20 Q. Well, you can do as broad as you want. Because
21 what I'm asking is, if you divulge one work paper then
22 that satisfies my question. Have you divulged ---

23 A. I've divulged a depreciation schedule, I'm sure, at
24 some point to somebody; correct?

25 Q. Okay. Correct.

1 A. Uh-huh (affirmative).

2 Q. So sitting here now based on your testimony, you
3 have acknowledged that you have violated the AICPA; is
4 that correct?

5 A. Not when it's a -- when I'm the predecessor
6 auditor, by -- out of courtesy the client gives me
7 permission to let them review my work papers. It
8 doesn't mean I'm going to give them a copy of it.
9 Doesn't mean I'm going to let them see all of it. It's
10 when the AICPA says if I use -- take my employer's
11 information and use it to help another employer or
12 myself. It has nothing to do with ...

13 Q. And it's standard too, and I want to make sure -- I
14 just had it right here. Let me -- do you see this
15 provision? This is what you read; correct? And it
16 starts right here. And this says -- and tell me if this
17 is your understanding. However, the member is entitled
18 to use experience and expertise gained through prior
19 employment relationships; correct?

20 A. Experience and expertise; correct. That's what it
21 says.

22 Q. Okay. So they can take their experience out. They
23 can take their knowledge that they have and they can use
24 it; correct?

25 A. Their knowledge, correct.

1 MR. ARIAIL: Your Honor, I have no further
2 questions. Thank you.

3 THE COURT: You may step down.

4 MR. HAYNSWORTH: One very brief, Your Honor.

5 THE COURT: All right.

6 **REDIRECT EXAMINATION**

7 **BY MR. HAYNSWORTH:**

8 Q. Marcy, there would be absolutely no reason in the
9 world to have to stamp all the papers in the office
10 confidential when the AICPA makes it confidential;
11 right?

12 A. Correct.

13 Q. Thank you.

14 MR. HAYNSWORTH: No further questions.

15 THE COURT: Step down. All right. Ladies and
16 gentlemen, I think we will break at this time for lunch.
17 And I'll ask that you be back at one fifteen. Now,
18 during the lunch recess, please remember, don't talk
19 about this with anyone including your fellow jurors or
20 anyone else. Keep your badges on. So please be back at
21 one fifteen. Thank you.

22 (WHEREUPON, the jury exited the open court at
23 approximately 11:51 a.m.)

24 THE COURT: All right. See you back after
25 lunch.

1 MR. HAYNSWORTH: Thank you, Judge.

2 (WHEREUPON, the court stood at recess for a lunch
3 break.)

4 THE COURT: All right. Anything before I
5 bring the jury.

6 MR. ARIAIL: Yes, Your Honor. I do have one
7 to clarify some items. I know Knox is potentially going
8 to call my client to the stand, Todd. There's some
9 issues within his testimony -- I don't want to keep
10 jumping up. I filed the motion. As part of it I've got
11 a motion that regards deletion of emails or any type of
12 deleting of things. There's a mass download of
13 documents that were done or alleged. And I don't want
14 to get into that or what I'm asking is until he puts a
15 foundation in for that -- I mean, I think if he starts
16 bringing it up and going in my client about it, that
17 already plants a seed in the jury's mind about that
18 before he's even put a foundation down for it.

19 There's also -- I think I had another, one other
20 item. I can't remember what it is. He's got some --
21 and I think there's going to be some issues in regards
22 to financial problems that my client was having. And
23 I'm not sure how those are relevant to whether or not he
24 took the document. And right here we're looking about
25 if documents were taken. And I think the way he's going

1 to try to play it is that my client was experiencing
2 difficulties and as a result was going out, taking these
3 documents to try to use them to make money. I think
4 that's more prejudicial than probative.

5 THE COURT: Well, why is that not
6 circumstantial evidence?

7 MR. ARIAIL: Well, I guess the issue -- well,
8 my problem is that is more prejudicial to me. I don't
9 know if I can -- I mean, clearly he can explain this
10 wasn't an issue. This wasn't something -- you know,
11 explained his background. But I think it plants a seed
12 in their mind that I don't know if I can recover from.
13 That's would be my, I guess, my position on it.

14 THE COURT: Mr. Haynsworth?

15 MR. HAYNSWORTH: I can address the second
16 thing Mills said. I was a little unclear on the first
17 thing. But as to the second thing, Your Honor, yes,
18 absolutely. I will tell you what I think a fair reading
19 of the facts I am going to present is. He was in dire
20 financial straights in 2009. 2009 is the date of the
21 first customer list we have. 2009, Mr. Highsmith set up
22 Highsmith & Associates, LLC; we believe planning to
23 leave years before either one of them announced they
24 were going to leaving. Being in financial difficulty is
25 what Mills' own expert is going to say is one of the key

1 indicators of when an employee will steal from an
2 employer. It's one of the big red flags. And so I
3 think his financial circumstance is relevant to my
4 overall theory of why they did what they did.

5 But beyond that, Your Honor, in his deposition I
6 asked Mr. Highsmith specifically if he had ever done tax
7 work for clients other than McKinley Cooper for
8 compensation. His original answer was for friends and
9 family. That wasn't my question, Mr. Highsmith. For
10 compensation, have you ever done work for people other
11 than McKinley Cooper clients? Because as Your Honor's
12 heard, if he's under their license number, he can't be
13 caught moonlighting. Under oath in his deposition he
14 said, no. I then presented him with these emails that
15 Mills is talking about. It's an email between Mr.
16 Highsmith and his business partner. They bought a lake
17 house together. Todd was upside down to the tune of
18 about thirty-five, forty grand with his partner. And
19 they're kind of cross-ways in this series of emails.
20 And in the email the friend says to Todd, why don't you
21 take some of that money that you got paid for doing tax
22 returns to apply to the loan. His email back says most
23 of that I did for friends and family for free. For
24 those who did pay me, I used a portion of that money to
25 pay X.

1 So those emails is my impeachment that he lied
2 under oath originally about whether he had ever done it
3 for compensation. I then showed him his very own emails
4 -- which by the way, Your Honor, the emails were from
5 McKinley Cooper's email system. Todd is going to tell
6 you that he deleted emails from his McKinley Cooper
7 computer. Well, he obviously kept some or I wouldn't
8 have them and know about this email exchange. So I --
9 you know, I don't see any reason why emails between he
10 and another guy where he's admitting to violating the
11 rules that govern them -- I agree, it's prejudicial, but
12 I think it's certainly very probative to my case.

13 MR. ARIAIL: Well, my issue, and he's gone off
14 on a variety of tangents, that I think -- I mean,
15 clearly there are emails that are out there. What I'm
16 trying to prevent is him playing in regarding to his
17 financial condition. I mean, he can ask him about -- I
18 mean, you know, if he's done moonlighting like we've
19 asked before. But then to bring in that he's having
20 financial difficulties. He was only there -- you know,
21 2009 that was when all this was going on. He'd been
22 there since February 2009. To say he's already leaving
23 six months, seven months into it, you know, the jury can
24 figure that -- but I don't want to get into this, you
25 know, he's claiming he's filing bankruptcy. He's got

1 all these problems with his business partner, those
2 issues.

3 Also, the mass deletion of emails. I'm just
4 concerned. The whole theory of their case is that we've
5 taken stuff. Now we're deleting stuff. And I just
6 think that gets into a confusion. There's other issues
7 that come about and I think the main thrust of his case
8 is we took this proposal, letterhead and these documents
9 and we went out and started competing against and using
10 it. I just see a lot of issues in regards to that. And
11 I know he's going to bring some of these things up. I
12 can object during the time or I just thought it would be
13 easier to discuss it beforehand.

14 MR. HAYNSWORTH: Question, because you deleted
15 the emails; right? Answer, I deleted the emails. I
16 did. And there's not any issue as to whether there was
17 a deletion by him of the emails from his McKinley Cooper
18 computer. He admitted it. But he obviously kept some
19 because Mills produced them to me. And those are the
20 ones where he's -- and I can show you the emails about
21 the financial stuff, Judge, if you want to see them and
22 make a call. But I just don't -- I don't see how you
23 can exclude emails where he's admitting to violating the
24 rules that govern him. Emails where he's admitting that
25 he's ---

1 MR. ARIAIL: It's not a violation to delete
2 your email. I mean, we don't have a policy in place
3 that says it's illegal to delete your emails. I mean, I
4 don't have a problem with him going into the emails that
5 specifically reference -- for instance, he says, are you
6 doing moonlighting, those issues and getting paid. I
7 don't want him to go into and be able to say, well,
8 you're moonlighting -- or you're filing bankruptcy.
9 You've got issues in regards to your financial
10 background. Or, hey, you've deleted all of these and
11 now you've given us copies of them. Well, he's given
12 him copies of them. He can use them.

13 MR. HAYNSWORTH: Well, that's my point. I
14 want to use the emails you gave me.

15 MR. ARIAIL: But I don't want you to mention
16 that you've been -- hey, they're deleted. Now here they
17 are.

18 MR. HAYNSWORTH: But he said in his deposition
19 ---

20 THE COURT: I'm going to let him do it, Mr.
21 Ariail. I think it's relevant.

22 MR. ARIAIL: Okay.

23 THE COURT: All right. Anything before I
24 bring the jury.

25 MR. HAYNSWORTH: What was your first -- I ---

1 MR. ARIAIL: My other issue was, is there's a
2 mass download, or he's alleging, mass download that my
3 client put on his computer on July 30, 2012. The issue
4 with that download, and which we're going to argue about
5 later on when his expert gets here, is those documents
6 were never accessed. They were never utilized. His
7 expert will say that. What he's trying -- and I'm
8 concerned he's going to start asking questions in
9 regards to this and try to get into these documents from
10 this what we call the data folder that is on his
11 computer. And I think until he lays a foundation about
12 that, until we figure out if those documents are even
13 going to come in, to ask that and to go into that at
14 this point in time is premature. And I think going to
15 be extremely prejudicial because I can't -- if they
16 don't come in, I'm not going to be able to dispute them
17 at a later date.

18 MR. HAYNSWORTH: Judge, I'm still a little
19 unclear what we're arguing about, this mass deletion of
20 -- excuse me -- this mass downloading of data. I
21 believe Mills' expert described it as a sweeping
22 download. But in any event, yeah, my computer expert's
23 going to testify that Todd, from his McKinley Cooper
24 computer -- you know, you have a profile. Maybe it's
25 Charlie at or Charlie Pyle at -- his profile on the

1 McKinley Cooper computer was different than the profile
2 on his Highsmith computer. We found documents in the
3 Highsmith computer that got there from the profile of
4 the McKinley Cooper computer. Mr. Highsmith, himself,
5 again in his deposition, has admitted to inadvertently
6 downloading some McKinley Cooper computer information.
7 Before I took his deposition, Mills was aware, I had
8 four documents out of his computer that should not be
9 there. And so his explanation when asked in his
10 deposition, why is a Girl Scout of SC document in your
11 H&H laptop, since the Girl Scouts have never been an H&H
12 client. His explanation was, I had that information on
13 my personal flash driver after I left McKinley Cooper.
14 I went out to XYZ audit client, got some of their
15 information on the flash drive. I plugged it into my
16 H&H laptop. And I inadvertently downloaded, because it
17 was still on the flash drive, these four McKinley Cooper
18 documents that I should not have. So we've already had
19 a discussion and he's already admitted to having ---

20 MR. ARIAIL: That's not the ones I'm worried
21 about.

22 MR. HAYNSWORTH: Well, what ones ---

23 MR. ARIAIL: You're going to get in here and
24 you're going to say that you mass downloaded documents
25 on July 30th. And that's ---

1 MR. HAYNSWORTH: And he can say, no, I didn't
2 if he so chooses.

3 MR. ARIAIL: Okay. But I'm just saying -- the
4 problem I'm having with that is you start going into
5 that before we even have found out if your expert is
6 even going to be able to -- excuse me. He's not an
7 expert -- an IT professional is going to be even able to
8 testify to that. And I don't think that's, you know,
9 the way to do that. I mean, if you lay the foundation
10 before my argument is, they're in; you can ask him about
11 it.

12 MR. HAYNSWORTH: Well, why can't -- I'll give
13 you an example, Judge. Again, the documents we found in
14 his computer; Phyllis Wheatley Center, one of those bank
15 confirmations, never been an H&H client. Phyllis
16 Wheatley Center was not one of the four documents he
17 admitted he inadvertently downloaded. I want to ask him
18 is this Phyllis Wheatley document in your laptop. If he
19 says, no, then my expert -- his expert is going to say,
20 yeah, that's where it came from. But if he says, yes, I
21 want to say, Mr. Highsmith, how in the world then?
22 You've limited yourself to four inadvertently. And then
23 you told me your flash drive stopped working. So how in
24 the world did our Phyllis Wheatley bank confirmation get
25 in your computer when Phyllis Wheatley has never been

1 one of your clients. I don't think me -- if he says
2 it's not in my computer; I don't know or whatever, but I
3 don't think I should be prohibited from asking him the
4 question.

5 MR. ARIAIL: The problem I have, Your Honor,
6 is he's put in a document, Phyllis Wheatley bank
7 confirmation. I don't know which computer it's come off
8 of. We've got two computers. For him to then to say
9 that and get in front of the jury and say, well, here it
10 is. I told you we didn't have it. I don't think that's
11 -- he's got to lay a foundation for that document being
12 on the computer before he can get in here and start
13 alleging that's on my client's computer.

14 MR. HAYNSWORTH: If he says it's not on my
15 computer, if that's what he's going to say, fine.

16 MR. ARIAIL: But then ---

17 MR. HAYNSWORTH: I presume he's going to admit
18 it came from his computer when your expert's going to
19 say it came from his computer.

20 MR. ARIAIL: Well, there's one on Shane's.
21 You're talking about a bank confirmation that's on
22 Shane's. To get up in front of Todd and then do that
23 and get it in front of the jury again and say, well,
24 this document came off -- I think the foundation has to
25 be laid for whose computer that was on before you do

1 that.

2 MR. HAYNSWORTH: If Shane says it's not in his
3 -- excuse me -- if Todd says it's not on his computer,
4 fine. My understanding is the -- because they then
5 started -- I mean, Shane's explanation for how the
6 documents got on his computer, oh, you know, my brother
7 inadvertently had them on a flash drive and that's how
8 those McKinley Cooper documents got on Shane's computer,
9 the inadvertent flash drive. The evidence is the
10 documents were on bother computers.

11 MR. ARIAIL: You're not going to make any
12 reference as to a July 30th mass download of documents
13 with him is what you're saying?

14 MR. HAYNSWORTH: I may well ask him on July
15 30th if he plugged a flash drive into his computer and
16 downloaded documents that originated with McKinley
17 Cooper.

18 THE COURT: Now when do you plan to do this?
19 I see you've listed them as your witnesses?

20 MR. ARIAIL: He's going to do that right now,
21 I think.

22 MR. HAYNSWORTH: Yes, sir. I'm calling Todd
23 as an adverse witness and so Mills is wanting you to
24 rule I can't go into certain things with Todd like these
25 emails he's mentioned and that sort of thing.

1 MR. ARIAIL: And my problem is I don't -- I
2 mean, until we have the proper foundation -- my issues
3 is, I have a motion to exclude Gaetan Hemond from
4 testifying about any documents, first and foremost,
5 because you have not given me the file path for the MCC
6 computer. I've asked repeated for that, so I'm going to
7 ask to exclude that. I'm also asking that all his
8 information be excluded because you don't have anybody
9 that can testify here today or put on the witness list
10 as to the searches that were done, which are the
11 critical aspect of this case of finding where those
12 documents are on the computers. If you can't tell me
13 where they are on the computers and the search where
14 they were found and all that information, you can't get
15 the step of him getting on the stand and saying, well, I
16 found this on the document. Well, he didn't find it.
17 The guy in Connecticut who's remoting in, is the one
18 that found it. So my argument is, we don't even get to
19 this discussion about these emails if your client -- if
20 your so-called expert is excluded. That's my dilemma
21 with this argument.

22 MR. HAYNSWORTH: Judge, again, my computer
23 expert will address where the documents were found,
24 whose computer, where they came from, that sort of
25 thing. Mills' expert is going to address the same

1 thing. We're not talking about that. We're simply
2 talking about me being able to question this gentleman
3 who has admittedly told me under oath once before, I've
4 got four documents that I inadvertently took from
5 McKinley Cooper's computer. I also have him, Your Honor
6 -- and that's the laptop. I also have him under oath
7 saying he took that same flash drive and plugged it in
8 to McKinley Cooper's server. If he wants to deny that
9 he had certain documents and admit he had other ones,
10 that's fine. But I don't think, you know, on the front-
11 end would prohibit me from asking about him about
12 documents, particularly when he's got some he admits
13 came from McKinley Cooper and he shouldn't have.

14 MR. ARIAIL: The problem I have, Your Honor,
15 is -- and I know it is going to happen here. If he says
16 do you or have you downloaded documents on July 30th?
17 Okay, well, there's two different ones. Have you done
18 MCC documents? Have you done -- I don't know what
19 you're alleging he has downloaded until I hear your
20 expert testify. Hey, these are the things he's done.
21 He's got to get on the stand and say, these are MCC
22 altered documents. They were prior to when your guys
23 left. They were clients that they didn't have. They
24 were clients they do have. I mean, I've got to know the
25 specifics before we start getting into that and put him

1 into a position where he can't answer the questions.

2 MR. HAYNSWORTH: Well, Mills, if he can't
3 answer the question, he can't answer the question. But
4 he -- I mean, why are we even talking about an expert?
5 Todd has admitted that the documents I showed him as an
6 exhibit to his deposition to include this document
7 that's already in -- we don't need an expert. Todd
8 admitted ---

9 MR. ARIAIL: I'm not arguing about that
10 document. I'm arguing about you talking about the July
11 30th so that when he says he doesn't know, you get up in
12 front of the jury in closing and you raise up, hey, he
13 told you he didn't know about. Now, here's this
14 information. Well, the problem he can't testify to it
15 because he doesn't know what you're -- I mean, what
16 you're asking about. I mean, what -- the document
17 specifically you're going to ask about. Until we find
18 out if it's been in, if it's authenticated, if it's a
19 proper foundation is laid for it.

20 MR. HAYNSWORTH: If I ask him on July 12th of
21 2012 did you take a thumb drive or portable media and
22 download a number of documents onto your H&H laptop?
23 He's either going to say, yes, I did. No, I didn't. Or
24 I don't know. If he says I think I did, then I'm going
25 to say, is that when you inadvertently downloaded this

1 McKinley Cooper document? Is that when you
2 inadvertently downloaded that McKinley Cooper document?

3 MR. ARIAIL: But here's the problem with that.
4 If you're doing that, you haven't proven that document
5 went on the computer yet or if it's even coming -- I
6 mean, your expert's got to come in here and say that
7 document ---

8 MR. HAYNSWORTH: I'm going to ask him when it
9 went on. It's in his computer. He's already identified
10 that ---

11 MR. ARIAIL: And if he says, okay, well, I
12 don't know when it was downloaded in this amount of
13 time. Then you're going to get up in your closing and
14 say, well, hey, you know, he said the wrong date.
15 Here's the reason. Here's another ---

16 THE COURT: Okay. I'm going to allow it, Mr.
17 Ariail.

18 MR. ARIAIL: Okay. Thank you, Your Honor.

19 THE COURT: Okay. Bring in our jury.

20 (WHEREUPON, the jury entered the open court at
21 approximately 1:38 p.m.)

22 THE COURT: All right. Mr. Haynsworth, you
23 may proceed.

24 MR. HAYNSWORTH: May it please the Court.
25 Thank you, Your Honor. Your Honor, at this time, the

1 plaintiff calls Todd Highsmith.

2 THE CLERK: Sir, if you'll please place your
3 left hand on the bible and raise your right hand.

4 You do solemnly swear or affirm to tell the truth,
5 the whole truth and nothing but the truth, so help you
6 God?

7 THE WITNESS: Yes.

8 THE CLERK: Thank you. Please be seated.
9 Would you please state your name for the record.

10 THE WITNESS: Todd Highsmith.

11 TODD HIGHSMITH,

12 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

13 DIRECT EXAMINATION

14 BY MR. HAYNSWORTH:

15 Q. Good afternoon, Mr. Highsmith. You went to work
16 for McKinley Cooper in 2009?

17 A. The first of February 2009, yes, sir.

18 Q. February of '09. What job did you come from to
19 then join McKinley Cooper?

20 A. I came from a family-owned business. It was a
21 group of companies.

22 Q. Well, did they have a name?

23 A. The company I was working for at that time was VIS,
24 LLC.

25 Q. Okay. And were you -- did you quit VIS, LLC to

1 then join McKinley Cooper or was it a transition, stop
2 one job, start the other?

3 A. No. I quit VIS, LLC to join McKinley Cooper. I
4 took a two-week break in between jobs, just kind of to
5 download and recharge.

6 Q. Okay. And what was your starting salary if you
7 recall from McKinley Cooper?

8 A. Seventy-five thousand dollars a year.

9 Q. And did you have any other benefits beyond just the
10 salary? For instance, did you have health insurance
11 through the firm?

12 A. Yes, I did have health insurance through the firm
13 for me and I paid for my family's.

14 Q. Okay. And to the extent you are required as a CPA
15 to go to continuing educational courses, those sort of
16 things, did McKinley Cooper pay for you to attend those?

17 A. Yes, sir, they did.

18 Q. Did you have to take a -- was McKinley Cooper a pay
19 cut? Was the seventy-five you started to work for them
20 less than you had been making before?

21 A. Yes, sir, it was.

22 Q. Okay. Do you mind roughly letting me know how much
23 of a pay cut you had to take?

24 A. Roughly forty-five thousand dollars or so.

25 Q. And at the time, your brother, Shane, had been

1 employed with McKinley Cooper?

2 A. He had.

3 Q. Okay. When do you recall you and Shane first
4 discussing wanting to work together?

5 A. Oh, goodness. That was probably back when he was
6 in college.

7 Q. So y'all envisioned one day working together?

8 A. Not necessarily. It depended on what the facts of
9 life presented to us along the way.

10 Q. In '09 when you started with McKinley Cooper, were
11 you in a business venture called Future Five Consulting
12 Group, LLC?

13 A. Yes, sir, I was.

14 Q. And what was that?

15 A. In 2007 a friend of mine and I started Future Five
16 as a real estate investment company. And that was
17 sometime middle to late 2007. I don't remember the
18 exact dates.

19 Q. Okay. Well, as of '09 -- and it was still in
20 existence in '09; wasn't it?

21 A. Yes, sir.

22 Q. And what did Future Five Consulting own?

23 A. We had purchased property and was building a condo
24 on Lake Keowee to resale.

25 Q. Okay. And was your partner in Future Five

1 Consulting a fellow named Dan Seecord?

2 A. Yes, sir, he was.

3 Q. And did you and Mr. Seecord have some email
4 conversations about the Future Five Consulting and where
5 things were with the investment property y'all had,
6 those sort of things?

7 A. Yes, sir.

8 Q. Okay. Let me get you to take a brief look at, if I
9 could, and just take a second if you would and just kind
10 of flip through those. I think those are emails between
11 you and Mr. Seecord. But let me know if you recognize
12 what it is?

13 A. Okay.

14 Q. And, there again, just so in fairness, it's not
15 just between you and Mr. Seecord, there's some emails
16 between you, Seecord and a gal named Donna Patterson at
17 Capital Bank; do you agree with that?

18 A. Yes, sir, that is correct.

19 Q. And those are emails that came from your email at
20 the -- on your McKinley Cooper provided laptop back when
21 you were with McKinley Cooper; correct?

22 A. I think at this time I was on the desktop in 2009.

23 Q. Okay. But this email exchange took place ---

24 A. Yep.

25 Q. --- while you were working for McKinley Cooper from

1 your McKinley Cooper computer?

2 A. That is correct.

3 Q. Hence the T. Highsmith at McKinley Cooper dot com?

4 A. Yes, sir.

5 MR. HAYNSWORTH: Your Honor, at that time --

6 excuse me -- at this time I would ask that Mr.

7 Highsmith's emails be admitted into evidence as

8 Plaintiff's 13.

9 MR. ARIAIL: Subject to my previous objection.

10 THE COURT: Subject to your objection, put

11 them in.

12 MR. HAYNSWORTH: If you'll let me borrow that

13 for just a second.

14 (WHEREUPON, Plaintiff's Exhibit Number 13 was

15 marked and admitted into evidence.)

16 Q. Mr. Highsmith, at the time that you left McKinley

17 Cooper on November 4th of 2011, you were using a

18 McKinley Cooper provided laptop; correct?

19 A. Yes, sir, at that time I was.

20 Q. Is it true or not that you deleted the emails from

21 your McKinley Cooper laptop when you left?

22 MR. ARIAIL: Objection, Your Honor, subject to

23 my previous objection.

24 THE COURT: What was your question?

25 MR. HAYNSWORTH: Is it true or not that he

1 deleted ---

2 THE COURT: Overruled.

3 MR. HAYNSWORTH: --- his McKinley emails from
4 his McKinley Cooper computer before he left.

5 A. I made sure all the necessary client work papers
6 were out of the emails into the client files and I
7 cleaned off my emails to get it ready for the next
8 employee because MCC reused computers.

9 Q. Did you ask anyone's permission, to include Toni
10 McKinley, if you could delete the emails off of the
11 McKinley Cooper computer?

12 A. No, sir, I did not.

13 Q. Are you familiar with the IT policy at McKinley
14 Cooper?

15 A. Yes, I am.

16 Q. Are you familiar with the employee manual of
17 McKinley Cooper?

18 A. I received a copy of the employee manual on July
19 2011.

20 Q. So that would be a yes?

21 A. That's the first time I had seen it, was in July
22 2011. So I did have a copy.

23 Q. Right. And the deleting that you did would have
24 been when in 2011?

25 A. November 2nd or 3rd, 4th, something in that date

1 range.

2 Q. Okay. The emails that we've marked as an exhibit,
3 they're McKinley Cooper emails, so I presume you kept
4 some emails?

5 A. Yes, sir, I kept some emails, my personal emails.

6 Q. You just printed off in hard copy what you
7 considered to be personal emails and then deleted the
8 rest?

9 A. As far as I remember, yes, sir.

10 Q. And deleted even the personal emails. All email
11 got deleted off the computer?

12 A. Yes, sir, all the email got deleted. I cleaned up
13 for the next person.

14 Q. So, as an example, if a client of McKinley Cooper
15 had emailed to you something of significance when you
16 were working with McKinley Cooper, and two years after
17 you're gone McKinley Cooper needs to see that email that
18 the client sent you, it wasn't going to be available to
19 see; was it?

20 A. I printed off all pertinent information that was
21 required to go in client files and put them there.

22 Q. Did you print off the emails that you got from
23 clients before you deleted them and give a copy to Ms.
24 McKinley?

25 A. I did not give a copy to Ms. McKinley. I would

1 have put it in the client files.

2 Q. Okay. You and Mr. Seecord here on this first page,
3 it looks like it's February 8 and 9 of 2011?

4 A. Yes, sir.

5 Q. Were y'all getting along well as business partners
6 regarding this lake house at this period in time?

7 A. There was disagreements as far as what we should do
8 with the property.

9 Q. And would I be correct that Mr. Seecord was
10 carrying a lot of your share of the obligations for that
11 property, such as paying your share of the property tax,
12 your share of the loan, those sort of things?

13 A. He was covering the majority of the expenses.

14 Q. Okay. And what was your general financial
15 situation in February of 2011?

16 A. February of 2011, I just did not have the money to
17 continue with Future Five and I wanted to sell the
18 property even before then.

19 Q. Other than not having the money to feed the lake
20 house, were you doing okay otherwise?

21 A. We were doing okay. I mean, we were struggling
22 here and there. My wife had started looking for some
23 part-time work. Even though she was doing some previous
24 to that, she had started looking for more. And that's
25 where we were.

1 Q. Okay. Could you read for us, Mr. Highsmith, the
2 second page -- it has page three at the bottom. If you
3 could flip over to the top of page four, it appears to
4 be your response to Mr. Seecord discussing with you some
5 sort of bill. It begins, I agree with the credit issue.
6 Do you see where I'm looking?

7 A. Yes, sir, I do.

8 Q. Could you read that out loud, please?

9 A. It says, I agree with the credit issue. For me, it
10 is probably too late to save mine -- talking about the
11 lake house -- I'm sure to the point where I will
12 probably end up losing my house and everything else.
13 I'll have to start over in seven years. I'm sure my in-
14 laws will love us moving in with them. I put the little
15 smiley face emoticon there.

16 Q. Now, do you recall you and I discussing these
17 emails in your deposition that was taken, I think, last
18 summer, maybe this summer.

19 A. This summer, I believe.

20 Q. Do you recall me and you going over this?

21 A. We went over one or two of them, yes, sir.

22 Q. Okay. Let me ask you this. You've heard some
23 discussion about regulations that govern CPAs?

24 A. Yes, sir, I have.

25 Q. Is there anything you've heard that you disagree

1 with as far as what the witnesses have said the rules
2 require y'all to do and not do; that sort of thing?

3 A. The rules are open to interpretation and every CPA
4 has a little bit different interpretation of the rules.
5 And it's up to that governing body to enforce their
6 interpretation of it.

7 Q. So it's not a set of rules that just -- it's each
8 CPA can sort of view the rules and interpret them as
9 they see fit, I guess?

10 A. They are interpreted different by different CPAs.

11 Q. All right. According to your interpretation ---

12 A. Yes.

13 Q. --- is it kosher, given the rules that govern
14 y'all, for you to receive -- excuse me. Let me back up.
15 While you're working for McKinley Cooper and operating
16 under their license -- excuse me -- their registration
17 number, your interpretation of the rules that govern
18 you, is it acceptable for you to receive compensation
19 for doing tax work for people other than McKinley Cooper
20 clients?

21 A. I still think that's up to interpretation as far as
22 that rule. I think we've already heard testimony this
23 morning that said it depends on the firm policy.

24 Q. Okay. Have you ever, for compensation while you
25 were with McKinley Cooper, done work for other than

1 McKinley Cooper's clients?

2 A. I did some tax returns for friends and family,
3 approximately twelve to fourteen of them, that were
4 close friends of mine, and a lot of family members out
5 of that group.

6 Q. Okay. Did you receive compensation for that?

7 A. Some of them did give me money. I didn't ask for
8 any, but some of them did give me money. How much, I
9 don't know. I can't say. I remember one or two of them
10 I think gave me a gift card to take my wife out to eat.

11 Q. Okay. Do you recall in your deposition me asking
12 you essentially that same question?

13 A. Yes, sir.

14 Q. Do you recall what you said in your deposition?

15 A. At that time I didn't remember, and I said, no.

16 Q. Okay. So when you told me in your deposition when
17 you were under oath that you did not receive
18 compensation, you simply didn't remember?

19 A. I didn't remember all the facts two years ago.

20 Q. Okay. And then, Mr. Highsmith, isn't it true in
21 your deposition I handed you this very email we're
22 talking about?

23 A. Yes, I believe so. I believe this is the one.

24 Q. Okay. And let me get you to do today as I got you
25 to do in your deposition when this issue came up, would

1 you please read the paragraph on the page you're looking
2 at beginning, the tax clients I work with?

3 A. Okay. The tax clients I work with on the side are
4 mainly friends and family who just need a 1040 done but
5 cannot afford to pay anyone for it. So I assist them in
6 preparing their return. I used the monies from the ones
7 that did pay me to pay a small part of the twenty-five
8 hundred principal payment last June. Unfortunately, new
9 IRS regs for tax preparers will not allow this long so I
10 may not be able to help them this year.

11 Q. And after I showed you more McKinley Cooper email
12 where you admitted you received compensation, you then
13 told me, oh, yes, well some did pay me?

14 A. Yes. Some did.

15 Q. And I think you said some gave you some gift cards.
16 I assume this money you're talking about you used to go
17 towards the loan payment wasn't gift card money, that
18 was actually ---

19 A. Yes. That was a few hundred dollars that they had
20 given me.

21 Q. Okay. And did you then go on to tell me, as you've
22 just told us, that some people just paid you but you
23 didn't invoice them. You just received the payment?

24 A. Talking about these clients, yes.

25 Q. And did I not ask you in your deposition when we

1 were having this discussion about you being compensated
2 if you had sent a bill to clients, as opposed to some
3 just decided to pay me?

4 A. I think then you were talking about clients other
5 that MCC clients.

6 Q. Okay. Well, Mr. Highsmith, let me show you a
7 document and see if you can tell me what it is?

8 A. Let's see. These are invoices to a company called
9 Prolite of South Carolina, LLC, which was an MCC client.
10 An Invoice to Pacific Equipment, which was an MCC
11 client, and another invoice to Pacific Equipment, which
12 was an MCC client.

13 Q. Did you generate those invoices?

14 A. Yes, sir, I did.

15 Q. All right.

16 MR. HAYNSWORTH: Your Honor, I'd ask that Mr.
17 Highsmith's invoices be admitted into evidence.

18 THE COURT: Any objection?

19 MR. ARIAIL: Subject to my previous objection.

20 THE COURT: All right.

21 (WHEREUPON, Plaintiff's Exhibit Number 14 was
22 marked and admitted into evidence.)

23 Q. We've just marked as Exhibit 14, Mr. Highsmith,
24 invoices we were discussing. Now, you were working for
25 McKinley Cooper at the time these invoices were done;

1 right?

2 A. Yes, sir.

3 Q. And Prolite of South Carolina, LLC and Pacific
4 Equipment were, as of February and May of 2011, McKinley
5 Cooper clients; correct?

6 A. That is correct.

7 Q. And those were clients that you had brought in and
8 gotten a commission on; correct?

9 A. At some point, yes.

10 Q Okay. Now, I'm intrigued. What computer was this
11 invoice prepared on?

12 A. I don't remember.

13 Q. Do you believe this invoice was prepared on your
14 McKinley Cooper computer?

15 A. I am not sure.

16 Q. Was there another computer that you were doing work
17 on while with McKinley Cooper, other than your McKinley
18 Cooper computer?

19 A. I could have used a client's computer; Prolite's or
20 Pacific's computer to create these invoices. I don't
21 remember.

22 Q. Okay. These invoices for these McKinley Cooper
23 clients weren't generated by McKinley Cooper nor sent by
24 McKinley Copper, nor was McKinley Cooper paid the money
25 on the invoices; was it?

1 A. No, sir. It was not.

2 Q. Okay. Is it proper in your interpretation of the
3 regulations that govern CPAs for you to be billing
4 outside McKinley Cooper, while they're paying you
5 salary, clients that are their clients?

6 A. I don't know. I think it depends on the firm.

7 Q. Okay. So you think it's okay while working -- you
8 thought it was okay while working for McKinley Cooper to
9 send them -- their clients invoices to your home
10 address?

11 MR. ARIAIL: Objection, Your Honor. He's
12 leading. And I mean, I just -- this is a ---

13 MR. HAYNSWORTH: He's a party opponent, Your
14 Honor. I believe I'm entitled to lead.

15 MR. ARIAIL: Well, he hasn't been deemed to be
16 hostile yet.

17 THE COURT: Go ahead. Overrule.

18 A. Can you repeat the question, Mr. Haynsworth?

19 Q. I'll try. I think my question was, so you think
20 it's acceptable while you were with McKinley Cooper for
21 you to be generating invoices to their clients from your
22 -- showing your home address, to send the money to you?

23 A. Once again, I think it depends on the firm. I do
24 believe there were employees of McKinley Cooper doing
25 the same thing to their clients.

1 Q. All right. Well, we've been in this lawsuit for
2 roughly two and a half years. Can you show me any
3 invoice that any McKinley Cooper CPA sent to one of
4 their clients where they're getting the money to their
5 home address?

6 A. We have not been provided any.

7 Q. Have you seen any? I mean, what are you talking --
8 I mean, you're telling me other people were billing
9 outside the firm?

10 A. Bob Cooper was an employee of McKinley Cooper and
11 Company, LLC and he had his own side business set up and
12 was billing clients using McKinley Cooper property.

13 Q. Mr. Cooper?

14 A. Yes, sir.

15 Q. The Cooper in McKinley Cooper? Same guy?

16 A. The same guy who doesn't own any of McKinley
17 Cooper, yes.

18 Q. Okay. Mr. Highsmith, did you receive four hundred
19 ninety dollars from this invoice you sent to Prolite
20 LLC?

21 A. Yes, sir, I'm sure I did.

22 Q. In May of 2011. And did you receive three hundred
23 and eighty-five dollars from Pacific Equipment for an
24 invoice date May 4, 2011?

25 A. Yes, sir, I did.

1 Q. And did you receive a hundred and twenty-two fifty
2 from Pacific Equipment for an invoice dated 2/18/2011?

3 A. Yes, sir, I'm sure I did.

4 Q. These aren't the only invoices you sent outside the
5 firm; are they, Mr. Highsmith?

6 A. There may have been some other invoices, but I do
7 not have a record or copy of them.

8 Q. Well, why would you not have a copy of them?

9 A. I didn't keep a copy.

10 Q. Well, where did these come from?

11 A. I'm not sure.

12 Q. Were these invoices on the hard drive of your H&H
13 laptop?

14 A. I'm not sure.

15 Q. So you think there were other invoices you billed
16 outside the firm, but you just don't know where they are
17 or what happened to them?

18 A. Yes, sir. And I can explain or elaborate. And I
19 was looking for a part-time job. December 2010, January
20 2011, looking for weekend work to help support the
21 family. Someone I've know -- I've known these clients
22 for twenty-plus years. They approached me originally to
23 do some warehouse work because they knew I had warehouse
24 distribution in my past experience and it led into some
25 of these other invoices. The total that I received was

1 between thirty-five hundred and four thousand dollars

2 for the total work that I had done.

3 Q. Wouldn't you need copies of all those invoices for
4 your tax return?

5 A. No, sir. Not necessarily. We're not required to
6 keep invoices for the tax returns.

7 Q. Well, what if you got audited and the auditors need
8 to see the proof that you showed that invoice amount of
9 your tax return?

10 A. I'm sure I would have a 1099 from these clients to
11 give to the IRS agent.

12 Q. Okay. You've told us -- I think you just said in
13 December of 2011, January 2012, you were looking for a
14 part-time job?

15 A. No, sir. I said December 2010, January 2011?

16 Q. I'm sorry.

17 A. Yes, sir.

18 Q. Okay. So let me get this straight. You go to work
19 for McKinley Cooper in '09 and you take about a forty
20 thousand dollar pay cut; right?

21 A. Yes, sir.

22 Q. And you're making seventy-five grand plus benefits.
23 And by December '10, you're looking for a part-time job?

24 A. I'm looking for a part-time job, yes, sir, because
25 of the investment with Dan Seecord.

1 Q. Okay. Because you were getting further and further
2 behind with Mr. Seecord and the bank on that lake
3 property?

4 A. Well, I was getting further behind as it says in
5 the emails that I read.

6 Q. Okay. Now, I'll represent to you I think the
7 circling is mine. But leaving that aside, can you tell
8 me what that is?

9 A. It looks like something from the South Carolina
10 Secretary of State, Mark Hammond's office, for
11 registering a company called Highsmith & Associates,
12 LLC.

13 Q. Okay. And is that a company that you registered
14 with the South Carolina Secretary of State?

15 A. I did not register it. I just reserved the name.

16 Q. Okay. But you did the paperwork so when you go on
17 the internet it now spits out that from the Secretary of
18 State's website?

19 A. Yes, sir. I'm sure it does.

20 Q. All right. And that was something you did, I
21 presume, on or about November of 2009?

22 A. The circled date is November 2nd, 2009; yes, sir.

23 MR. HAYNSWORTH: Your Honor, I'd ask that the
24 Highsmith Associates LLC information be admitted.

25 THE COURT: Any objection.

1 MR. ARIAIL: No objection, Your Honor.

2 (WHEREUPON, Plaintiff's Exhibit Number 15 was
3 marked and admitted into evidence.)

4 Q. All right. We've now marked that document as
5 Plaintiff's Exhibit 15, Mr. Highsmith.

6 A. Okay.

7 Q. So you go to work for McKinley in February of '09;
8 right?

9 A. Yes, sir.

10 Q. And then in November of '09 you reserve a name with
11 the South Carolina Secretary of State; Highsmith &
12 Associates; correct?

13 A. That is correct.

14 Q. Okay. Oh, I'm sorry, Mr. Highsmith. I meant to do
15 this as a matter of housekeeping.

16 (WHEREUPON, off record discussion were held between
17 counsel.)

18 Q. Sorry, Mr. Highsmith. All right. So February of
19 '09 you have taken a big pay cut, go to work for Ms.
20 McKinley making seventy-five grand. November of '09 you
21 register Highsmith & Associates with the Secretary of
22 State's Office. It is true, is it now, Mr. Highsmith,
23 that roughly two and a half to three months before you
24 left McKinley Cooper, you had prepared what is called an
25 H&H business plan?

1 A. Yes, that is correct. After a conversation I had
2 with Ms. McKinley.

3 Q. Is that the H&H business plan?

4 A. Yes, that looks like it.

5 Q. All right.

6 MR. HAYNSWORTH: Your Honor, I would ask that
7 the Highsmith & Highsmith, LLC Certified Public
8 Accountants and Advisors Business Plan be admitted into
9 evidence.

10 THE COURT: Any objection?

11 MR. ARIAIL: No objection, Your Honor.

12 (WHEREUPON, Plaintiff's Exhibit Number 16 was
13 marked and admitted into evidence.)

14 Q. Thank you, Mr. Highsmith. We've now marked the
15 business plan as Exhibit 16. On what computer was that
16 business plan prepared?

17 A. I don't remember.

18 Q. Do you deny that you prepared that business plan in
19 August of 2011 on your McKinley Cooper provided laptop?

20 A. I think it was in August 2011 or September 2011 and
21 I may have used MCC's laptop. I just don't remember.

22 Q. Well, maybe I can refresh your recollection. Do
23 you recall copying various documents or printing various
24 documents on McKinley Cooper copy machine in the October
25 2011 time frame?

1 A. I did a lot of -- I mean, I did copying and stuff
2 for working there, yes. We used the copier everyday.

3 Q. Well, let me get -- and I apologize; the print is
4 small. But take a look at that and see if that appears
5 to be to you the McKinley Cooper printer log. If you
6 need to take it out, that's -- that'll be easier.

7 A. Yes, sir.

8 Q. Sure.

9 A. Let's see. It looks like it says view job log,
10 MXM503N, some kind of log from there.

11 Q. Have you ever seen -- when you were with McKinley
12 Cooper, did you ever see the printer log?

13 A. No, sir, I did not.

14 Q. Okay. Do you recall being in the office -- and I
15 don't have strong enough glasses. There's a date at the
16 top. I don't know if I can read it adequately. I think
17 it's October, but maybe you can help me out on that?

18 A. This isn't the same one I have seen in the past, as
19 we're going this for two years. There's other stuff on
20 here now.

21 Q. Well, it does indicate the person's name on the
22 log; does it not?

23 A. It does have a person's name on the log. It has a
24 date. And it has a file description, it looks like.

25 Q. Does the name Todd show up on the printout?

1 A. It does.

2 Q. Okay. And, you know, I'm not trying to trick you.

3 I mean, do you deny that you were doing this printing on
4 the dates indicated on the log?

5 A. I'm sure I was there working and printing and
6 working on clients of McKinley Cooper.

7 Q. Okay. Well -- and, again, I'm going to have to
8 borrow it.

9 A. Okay.

10 Q. Heartwood Constructors, Inc. ---

11 A. Yes.

12 Q. --- would that have been a McKinley Cooper client
13 that you brought into the fold when you joined?

14 A. That is a McKinley Cooper client that my brother, I
15 believe, had brought to McKinley Cooper many years
16 earlier.

17 Q. Okay. Timbertech?

18 A. Timbertech is, yes, sir. Same thing. My brother
19 went to high school with the owner of Timbertech and of
20 Heartwood. And they came over to McKinley Cooper when
21 they needed accounting work done.

22 Q. Okay. Money Tree, Basket Tree?

23 A. Same thing. My brother went to high school with
24 those owners.

25 Q. Bruce and Karen Vollnogle?

1 A. They're owners in those companies you just
2 mentioned; yes, sir.

3 Q. Okay. And your brother brought them in, but it
4 appears that on the left of these all the printing is
5 Todd. Do you recall printing off stuff for those
6 customers back in October of 2011?

7 A. That was three years ago. I'm not sure. I know I
8 was working on their tax returns then.

9 Q. How about Mr. Woznick?

10 A. Mr. Woznick is a owner/shareholder in those
11 companies you mentioned earlier, yes, sir.

12 Q. Okay. Randy Hawkins and Catherine Hawkins?

13 A. Randy Hawkins and Catherine Hawkins were friends of
14 mine for twenty-plus years, and they were a tax client
15 of MCC.

16 Q. Okay. Silver Hawk?

17 A. Silver Hawk is one of Randy Hawkins' companies.
18 He's a member in that company.

19 Q. AmPro Racing, Inc.?

20 A. AmPro Racing, Inc. is a Randy Hawkins company.

21 Q. Prolite, Inc.?

22 A. Prolite, Inc. was Randy Hawkins' company. He was a
23 shareholder in that one.

24 Q. Okay. And would that be the same Prolite that you
25 sent the invoice with your home address to?

1 A. No, sir. That was a different Prolite.

2 Q. Oh, okay. So McKinley Cooper in October 2011 had
3 two different clients called Prolite?

4 A. Yes, sir, they did.

5 Q. Okay. I wanted to ask you if I could, Mr.
6 Highsmith, let me find it. See that entry there?

7 A. Oh, I'm sorry.

8 Q. There you go?

9 A. The one you have circled, yes.

10 Q. H&H Business Plan?

11 A. Yes, sir.

12 Q. Do you recall -- and can you tell the date of that
13 particular ---

14 A. I may have to borrow your glasses.

15 Q. I don't know if they'll help you, but you're
16 welcome to them.

17 A. It looks like October of 2011.

18 Q. Okay. Do you recall October of 2011 printing off
19 from the McKinley Cooper printer the H&H business plan?

20 A. I'm sure I did.

21 Q. And would that be this document we've marked as
22 Exhibit 16?

23 A. Yes, sir. That came about from my meeting with Ms.
24 McKinley in August of 2011, I believe it was.

25 Q. And I think you didn't recall whether you had

1 prepared that document on your McKinley Cooper computer.

2 Given that you're printing off a copy of it in October
3 at McKinley Cooper's office, do you now believe that the
4 document lived on the McKinley Cooper computer?

5 A. No, sir, I don't. I do recall it was on a flash
6 drive, on my flash drive.

7 Q. Yes, sir. Okay. Well, when you printed it in
8 October off the McKinley Cooper machine, were you
9 printing it from a flash drive?

10 A. I don't recall. I can't remember if I printed it
11 from the flash drive or if the flash drive was plugged
12 into the computer and it just went through the computer
13 to the printer.

14 Q. All right. Can I see that back for just a second?

15 A. Yes, sir.

16 Q. There's another one at the top right, looks like
17 startup cash and checklist dot xls. Do you see that?

18 A. Yes, I see that.

19 Q. What is startup cash and checklist dot xls?

20 A. That is an addendum to the business plan that you
21 would have attached to it, to let people know what items
22 you needed your startup capital for.

23 Q. Okay. I'm going to put the paperclip back on it.

24 A. Okay.

25 MR. ARIAIL: Your Honor, if I could just ask,

1 I'm trying to locate the documents on here, and I don't
2 see -- I think we're referring to Exhibit 9. Is that
3 right, Knox?

4 MR. HAYNSWORTH: No, this isn't an exhibit. I
5 was just asking him about this ---

6 MR. ARIAIL: Oh, okay. I didn't know if it
7 was off the printer log?

8 MR. HAYNSWORTH: No, it's not that same
9 printer log. It's this one for this date in October
10 when the business plan was printed off and these ...

11 Q. Mr. Highsmith, the flash drive you were telling me
12 about, is that a personal flash drive or a McKinley
13 Cooper provided flash drive?

14 A. It was a personal flash drive that I'd used for two
15 years or so at McKinley Cooper. Because when I first
16 started with McKinley Cooper, the firm had two flash
17 drives that eight or nine CPAs, maybe ten CPAs, used out
18 in the field. I think it was approximately three or
19 four months in one of them died so we were down to one
20 flash drive. So me, along with a couple of other staff
21 members, we started using our personal flash drives to
22 transport files from clients off this to McKinley
23 Cooper.

24 Q. And you recall you and I have a discussion in your
25 deposition, and I want to say it was this past June.

1 Excuse me. May of this year. Do you recall you and I
2 discussing that personal flash drive?

3 A. Yes, sir. We discussed it.

4 Q. Okay. And do you recall us discussing documents
5 that came from McKinley Cooper's computer system and
6 wound up on your H&H laptop?

7 A. Yes, sir. We talked about some documents, yes,
8 sir.

9 Q. Okay. So as we sit here today you do not deny, do
10 you, that on your backup -- when did you buy your H&H
11 laptop?

12 A. November 1st or 2nd, right after my brother
13 resigned, I believe -- or actually was asked to leave
14 the office on November 1st. I was going in the next
15 morning to pack up my office, November 2nd, because I
16 didn't think I could stay there with him being gone
17 because I was in the same situation where I wouldn't
18 sign the non-compete. So we went that evening and
19 bought laptops with the intention of me leaving that
20 Tuesday morning.

21 Q. Okay. So you buy what -- and for ease of all our
22 reference -- the laptop you had at McKinley Cooper, I'm
23 going to call the MCC laptop. And the laptop you bought
24 November 2nd for Highsmith & Highsmith, I'm going to
25 call the H&H laptop?

1 A. Okay. That sounds good to me.

2 Q. All right. It is true, is it not, that on your
3 Highsmith & Highsmith laptop that wasn't purchased until
4 after you left McKinley Cooper, there were some internal
5 McKinley Cooper documents from their computers?

6 A. There were a few documents on there that we have
7 discussed, South Carolina Rural Water, United Way of
8 Anderson County, Tri-Balance, the Girl Scouts, and I
9 can't remember the last one, Mr. Haynsworth.

10 Q. And the Girl Scouts you mentioned, would that be
11 this document that was previously marked as Plaintiff's
12 Exhibit 10?

13 A. Yes, sir. That was an audit plan that Alan Ward
14 and I did for that client in September/October 2011.

15 Q. Okay. And so this is a McKinley Cooper created
16 document that lived in their computer system?

17 A. I created it at McKinley Cooper along with Alan
18 Ward. We shared it back and forth.

19 Q. And you would agree with me, it belongs to them;
20 wouldn't you?

21 A. It is. It's an audit plan, so I don't know if that
22 qualifies as a work paper or not. But I did do it at
23 McKinley Cooper, yes, sir.

24 Q. Okay. And this very document wound up on the
25 laptop that you didn't buy until after you left McKinley

1 Cooper?

2 A. Yes, sir.

3 Q. And there was, I believe -- Vollnogle or Woznick
4 might have been the other document you and I discussed
5 in the deposition?

6 A. I believe you're right. I believe it was Woznick;
7 not Vollnogle. I think you're right.

8 Q. And you were clear, were you not, back when I was
9 asking about this in May that the documents that I have
10 there in May to show you, the Girl Scout document, the
11 Woznick document and the two others you mentioned --
12 well strike that. My mouth's overrun my brain. I have
13 no idea what I was getting ready to ask. Oh, I know. I
14 know. When we had that discussion about how those
15 documents got on your computer, you told me that they
16 inadvertently got on your H&H computer from your
17 personal flash drive; right?

18 A. Yes, that's what I said.

19 Q. And your testimony in May was that your personal
20 flash drive then stopped working; correct?

21 A. That is correct.

22 Q. Okay. And because your personal flash drive
23 stopped working, at least back in May, there were only
24 four documents that you agree were inadvertently put on
25 your H&H laptop; is that correct?

1 A. Yes, sir, that's what I said.

2 Q. And there couldn't be more than the four that you
3 knew I knew about because the flash drive stopped. So
4 there couldn't have been?

5 A. I don't know. I don't know.

6 Q. Okay. Well, what we didn't discuss at the time, I
7 don't think, Mr. Highsmith, but I'd like to ask you
8 about now, is this information. The City of Laurens --
9 well, first of all, what would that -- it's a
10 transaction document. I forget the name of it up at the
11 top.

12 A. It says transactions by account.

13 Q. I mean, is that a CPA kind of document? Is that
14 something you ---

15 A. This is a QuickBooks document.

16 Q. Okay. And is that something you would have -- a
17 similar type thing you would have seen while you were
18 working for MCC?

19 A. We saw a lot of different documents when I was
20 working at MCC. So, it may have been something, yes.

21 Q. Okay. The City of Laurens, Mr. Highsmith, they
22 have never been a Highsmith & Highsmith client?

23 A. No, sir, they have not.

24 Q. Okay. And do you deny that the City of Laurens
25 documentation you're looking at is on your Highsmith &

1 Highsmith computer?

2 A. I don't know.

3 Q. You don't know?

4 A. I don't know.

5 Q. Okay. Well, if it is on there it shouldn't be on
6 there; should it?

7 A. I don't know.

8 Q. Well, what other documents of McKinley Cooper
9 customers that have never been Highsmith customers are
10 on your computer?

11 A. I don't know.

12 Q. All right. In 2011, roughly what percentage of
13 Highsmith & Highsmith audit clients had been McKinley
14 Cooper audit clients?

15 A. I don't recall. We didn't keep up with that and we
16 were only in business for two months that year -- or not
17 even quite two months.

18 Q. All right. If Ms. McKinley calculated that
19 seventy-seven percent of y'all's audit clients in 2011
20 had been her audit clients, would you have any reason to
21 dispute that figure?

22 A. I don't know. I'd have to look at the numbers.

23 Q. What would you look at to come up with the numbers?

24 A. I don't know. Just ---

25 Q. Okay. Mr. Highsmith, you've told us, I think, that

1 with regard to these invoices, the three that were
2 generated with your home address, you said you believe
3 there to be more but there would be no way to figure it
4 out; is that right?

5 A. I didn't keep records, no, sir.

6 Q. Would you typically -- would those be prepared on a
7 computer?

8 A. Yes. I think we've already discussed that.

9 Q. Okay. Don't remember which computer?

10 A. Right. That's correct.

11 Q. Do you know if whatever computer these invoices
12 were created on and perhaps these other invoices, if it
13 would still be available, if you could go find whether
14 there were other invoices or is that information simply
15 not available?

16 A. That was three or four years ago. I don't know if
17 it's available or not.

18 Q. The documents that came from McKinley Cooper, the
19 Girl Scout document and the Woznick document and the
20 other two we discussed, from where in McKinley Cooper's
21 system did you obtain the copies that wound up on your
22 H&H computer?

23 A. When we do audit work for clients, we take our --
24 the flash drive, plug it into our laptops or desktops we
25 had at McKinley Cooper. We would then go out to the

1 server and pull information from that client file onto
2 the flash drive to take with us out into the field. So
3 the server wasn't password protected, and it was a
4 standard practice in McKinley Cooper to do that.

5 Q. So the documents that wound up on your H&H laptop
6 that are McKinley Cooper documents came from their
7 server?

8 A. That is correct.

9 Q. All right. And I am more illiterate in computers
10 than I am in accounting. So I may be saying this wrong.
11 But when I say profile, like on a computer, I have one
12 that may be Knox or Knox Haynsworth or Knox L.
13 Haynsworth, do you have a profile on your H&H computer?

14 A. I don't know. I'm not a computer guy either.

15 Q. Okay. And would you know if you had a profile on
16 your McKinley Cooper?

17 A. I don't know. I'm not a computer guy.

18 Q. Okay. All right. So the documents that came from
19 McKinley Cooper that were found on your H&H laptop, you
20 say you got them from the McKinley Cooper server with
21 our personal flash drive?

22 A. Yes, sir. Those were client files that I had
23 transported to the client from their server.

24 Q. Okay. And we went over some AICPA regulations
25 earlier today that dealt with -- hold on a minute and

1 I'll see if we can find the section.

2 MR. HAYNSWORTH: I beg the Court's indulgence,
3 Your Honor. I'll find it because there are not that
4 many exhibits.

5 Q. Let me hand you what we've marked as Plaintiff's
6 Exhibit 12, Mr. Highsmith, and get you to turn over --
7 it's -- roughly halfway through the stack there is a
8 section that is entitled confidential information
9 obtained from employment or volunteer activities.

10 A. Which page?

11 Q. Well, I'm not sure because it doesn't have page
12 numbers at the bottom. If I could come up ---

13 A. Okay.

14 Q. --- I'll see if I can find it.

15 A. Yes, sir.

16 Q. Yeah. Here we go. That section right there.
17 Confidential information obtained from employment or
18 volunteer activities.

19 A. Okay.

20 Q. You with me?

21 A. I see it now. Yes, sir. Thank you.

22 Q. Now, you don't dispute that you're governed by the
23 AICPA regulations; do you?

24 A. They're disputing?

25 Q. No?

1 A. There's different interpretations of these rules by
2 various CPAs, yes.

3 Q. But you don't dispute ---

4 A. This is our governing board; the AICPA is the
5 national governing board.

6 Q. Okay. And the SC Department of Labor incorporates
7 by reference in their regs the AICPA regs; is that
8 correct?

9 A. I believe they do, yes, sir.

10 Q. And would you agree with me that, according to the
11 AICPA regs, a member should maintain confidentiality of
12 his or her employers or firms confidential information
13 and should not use or disclose any confidential employer
14 information obtained as a result of an employment
15 relationship?

16 A. That's what it reads.

17 Q. Okay. Do you agree or disagree with that
18 statement?

19 A. I would tend to agree with it.

20 Q. Okay. Reading on a little further, this includes
21 but is not limited to any confidential information
22 pertaining to a current or previous employer,
23 subsidiary, affiliate or parent thereof, as well as any
24 entities for which the member is working in a volunteer
25 capacity. Do you agree with that generally?

1 A. Yes, that's what the regs say.

2 Q. Okay. For purposes of this interpretation,
3 confidential employer information is any proprietary
4 information pertaining to the employer or any
5 organization for whom the member may work in a volunteer
6 capacity that is not known to be available to the public
7 and is obtained as a result of such relationship. Do
8 you generally agree with that statement?

9 A. That's what it reads, yes, sir.

10 Q. If you'd flip over to the next page?

11 A. Okay.

12 Q. And you see the section beginning when a member
13 changes employment?

14 A. No. My next section is engagements for audits of
15 government grants.

16 Q. Yeah. I'm sorry.

17 A. Oh, okay.

18 Q. I am sorry, I went to it front to back.

19 A. Oh, okay.

20 Q. See that when a member changes employment?

21 A. Yes.

22 Q. All right. The AICPA regs provide when a member
23 changes employment -- and when it says member, it's
24 talking about a member of the AICPA?

25 A. Yes, sir, I believe so.

1 Q. And you are, in fact, and were back at the time you
2 were with McKinley Cooper, you were a member of the
3 AICPA?

4 A. Yes. I am a member of the AICPA.

5 Q. And your brother is, likewise, a member of the
6 AICPA?

7 A. As far as I know, yes, sir.

8 Q. Okay. When a member changes employment, a member
9 should not use confidential employer information
10 acquired as a result of the prior employment
11 relationship to his or her personal advantage or the
12 advantage of a third party, such as a current or
13 prospective employer. Do you generally agree with that
14 statement?

15 A. It depends on the information they're calling
16 confidential. I don't -- no, I think that's where the
17 interpretations by various CPAs tend to differ.

18 Q. Okay. Well, it defines what's confidential
19 information; doesn't it?

20 A. Broadly, it does. Broadly, it does.

21 Q. And it says for purposes of this interpretation
22 confidential employer information is any proprietary
23 information pertaining to the employee. That's how they
24 define it; correct?

25 A. Correct.

1 Q. Okay. But you say that's still subject to some
2 sort of ---

3 A. I think you could argue proprietary information.

4 Q. Okay. Reading on further, the requirement to
5 maintain confidentiality of an employer's confidential
6 information continues even after the end of the
7 relationship between a member and the employer. Do you
8 agree generally with that statement?

9 A. That's what it reads, yes, sir.

10 Q. And skipping down to the next paragraph, a member
11 would be considered to have committed an act
12 discreditable to the profession if the member discloses
13 or uses any confidential employer information acquired
14 as a result of employment or voluntary relationships
15 without the proper authority or specific consent of the
16 employer. Do you generally agree with that statement?

17 A. That's what it reads, yes.

18 Q. Did you ever get Ms. McKinley's consent to take the
19 documents from her McKinley Cooper server and put them
20 on your H&H laptop?

21 A. No, sir, I did not. But I have not used those
22 either. And that's part of -- I kept them confidential
23 and haven't disclosed them to any third parties. That's
24 part of this requirement. Is if you do have it, you
25 can't use it. You can't disclose it to third parties.

1 You've got to keep it confidential; and I have.

2 Q. Let me get this straight, Mr. Highsmith. You're
3 telling us that you took information off her computer
4 system involving her clients, some of whom are now your
5 clients, but you haven't used it?

6 A. I did not use those two work papers or whatever
7 work paper it is from South Carolina Rural Water, no.

8 Q. You took it but you didn't use it?

9 A. Didn't even know I had it.

10 Q. Okay. You just found out you had it after I sued
11 you and we got your laptops' mirror image?

12 A. Yes, sir, that's correct.

13 Q Amongst the -- well, let me back up. We're square;
14 aren't we, there are only four?

15 A. No, I said I don't know how many documents there
16 were.

17 Q. Well, we went over this past summer. That flash
18 drive that you accidentally inadvertently took some of
19 their stuff on and that's how we come up with the
20 computer.

21 MR. ARIAIL: Your Honor.

22 Q. It quit working; right?

23 MR. ARIAIL: He's asked and answered this.

24 He's said the only document he knows on there ---

25 MR. HAYNSWORTH: He's answered it in a

1 different way just now.

2 THE COURT: Overruled. Go ahead.

3 A. I'm sorry. What was the question again?

4 Q. Mr. Highsmith, you and I were square back in May
5 that the only documents you could possibly have from
6 McKinley Cooper were the four that I knew of and
7 specifically asked you about in May.

8 A. Yes.

9 Q. Because you told me the flash drive stopped working
10 and you discarded it. Didn't you tell me that under
11 oath?

12 A. Yes. That's what we discussed.

13 Q. Okay. So there could only be the four because it
14 stopped working after four and you discarded it?

15 A. I'm not sure when it stopped working. But, yes,
16 that's what we discussed.

17 Q. Okay. Let me show you what's been marked as
18 Plaintiff's Exhibit 3, Mr. Highsmith, and ask if you can
19 tell us what that is?

20 A. The title on the report says Appalachian Council of
21 Governments test of disbursements.

22 Q. All right. And what is a test of disbursements?
23 Is it some specific type of thing in the accounting
24 arena?

25 A. It is a work paper that's created by, I believe,

1 every CPA firm out there.

2 Q. And work papers are, broadly speaking -- excuse me.

3 Would you agree with me that included within the

4 universe of work papers are the logic and rationale for

5 how a given CPA is going to test various things to see

6 if their conclusions are properly supported?

7 A. The work papers support your conclusions. On every

8 work paper you should write a conclusion on that work

9 paper, whether the balance is reasonably stated and if

10 there's any further work you need to do to it to attest

11 to that balance or if it's okay as it is.

12 Q. Okay. And it's sort of -- the particular CPAs

13 logical justification for how they did what they did and

14 why they did it; is that fair?

15 A. It presents a logical trail so that peer reviewers

16 can know how you came to your conclusions.

17 Q. Okay. And within the universe of work papers,

18 would that test of transactions be one such work paper?

19 A. It is one such work paper.

20 Q. Okay. The Appalachian Council of Governments work

21 paper that you have there in your hand, Appalachian

22 Council of Governments has never been a Highsmith &

23 Highsmith client; have they?

24 A. No, sir, it has not.

25 Q. All right. And since we know that only four

1 documents you inadvertently took from McKinley Cooper,
2 as you sit here today can you tell me how it is that
3 that document is on your laptop?

4 A. I don't know if it is.

5 Q. Do you deny that it is, sir?

6 A. I don't know.

7 Q. Okay. Let me ask you about a couple more briefly.

8 Mr. Highsmith, let me get you to take a look at
9 Plaintiff's Exhibits 4 and 5. Can you tell me what
10 Exhibit 5 is?

11 A. Exhibit 5 is a standard form to confirm account
12 balance information with the financial institutions that
13 was approved in 1990 by the American Banker's
14 Association, American Institute of Certified Public
15 Accountants, and the Bank Administration Institute.

16 Q. Okay. Does the exhibit have the name of an
17 accounting firm on it anywhere?

18 A. It does.

19 Q. What's the name of the firm?

20 A. In the bottom right-hand corner it says Highsmith &
21 Highsmith, LLC.

22 Q. Okay. The other exhibit, it is actually three bank
23 confirmations for three different banks, I believe.

24 Does it have a name of an accounting firm on the bottom?

25 A. It does.

1 Q. And what's the name of that firm?

2 A. It says McKinley Cooper and Company, LLC on all
3 three of them.

4 Q. And those bank confirmation forms generically have
5 the bank name and the address; right?

6 A. Yes.

7 Q. Not necessarily the ones you're looking at ---

8 A. Right.

9 Q. --- but just as a general matter?

10 A. It has a bank name and address that you send them
11 to.

12 Q. Okay. And it would have the -- it may be multiple
13 accounts at one bank. Or it will have the account
14 numbers of the specific customer on the form; right?

15 A. It depends on the bank and the numbers, yes. How
16 many accounts the client has and what they put on here.

17 Q. Okay. And when you first land a client to audit
18 their work, out of the gate very first time I've done an
19 audit for them, are you going to need to get bank
20 confirmations as part of the process of doing their
21 audit?

22 A. The way I do it is I sit down with a client with a
23 standard form to confirm ---

24 Q. Right?

25 A. --- the account balance information, the bank

1 confirmation, as we call it in the CPA world. And we
2 sit down and fill it out. We put the client's
3 information on here. I have an authorized signature
4 sign it, who is authorized to sign on that account, with
5 a date. We have to mail them off individually as a CPA
6 firm to the bank because it's part of our independence
7 and control procedures and evidentiary regulations, if
8 you will.

9 Q. Okay. So you're doing XYZ Company initial audit,
10 you go meet with them and sit down and say, all right,
11 what banks do you use? What's the address? What are
12 your account numbers of these various banks? Those are
13 the sort of questions you ask out of the gate?

14 A. Yes, sir, I do.

15 Q. Okay. And the other information, like if you're
16 initially doing an audit for someone, you would need to
17 know who's the keeper of the checkbook and who -- and
18 you need to know sort of how they are set up because
19 every company may be a little different and you've got
20 to get that preliminary info from them; right?

21 A. There's internal control procedures we have to do.
22 Most of our clients only have one to two people in the
23 accounting department. So it's pretty easy to go in and
24 ascertain who's doing what. There's always segregation
25 of duty issues with a small client.

1 Q. And sort of define small client. Like, would the
2 Appalachian Council of Governments, I know they're not
3 -- they never have been your client. But when you were
4 at McKinley Cooper was that a small client?

5 A. I don't know. You would have to ask Ms. McKinley.

6 Q. Okay. Did you ever work on the Appalachian Council
7 of Governments?

8 A. I think I went over there for one day.

9 Q. A little closet of an office, big office? I don't
10 know where they are.

11 A. I don't know where they're located now.

12 Q. Okay. All right. But in any event, would you
13 agree with me that when you're very first doing an
14 audit, because you don't know anything about the
15 organization, you're going to have to devote more time
16 and effort when you first pick up an audit, than you
17 would have if you audited them in the second year or the
18 third year or the fourth year. You would gain some
19 efficiencies because you already know the stuff from the
20 initial audit?

21 A. Not necessarily because clients change employees,
22 they change procedures, they change processes, they
23 change bank accounts. They change executive directors
24 sometimes. They just -- clients change from year to
25 year and you have to go in and assess it all over again.

1 Our regulations require us to do so.

2 Q. So to the extent that Highsmith & Highsmith has had
3 an audit client, and audited them for more than one
4 year, it took you just as much time and effort and cost
5 you just as much money for the second year audit as the
6 first?

7 A. It's just the two of us, so it's just our labor, so
8 ...

9 Q. But my point is, are you saying that y'all have to
10 expend the same number of hours in year two -- you got
11 all the information in year one. I know you may need to
12 update some things. But you're telling me you've got to
13 invest the same amount of time in the second year and
14 the third year and the fourth year? You don't gain any
15 efficiencies by being familiar with their work?

16 A. Pretty much everything has to be updated from year
17 to year. You may gain some small efficiencies.

18 Q. Is there any way to quantify that?

19 A. No, sir, there's not.

20 Q. Okay. When you were preparing the Highsmith &
21 Highsmith Business Plan in August of 2011, that is the
22 date you first started doing it?

23 A. I think it was toward the end of August 2011, yes.

24 Q. Okay. What was your brother's input into this
25 business plan?

1 A. None.

2 Q. Okay. So even though it talks about you two
3 starting this business, you're saying he had absolutely
4 no input to it at all?

5 A. He had no input into at all. I did the business
6 plan myself.

7 Q. Okay. And you just don't remember whether you did
8 it on her computer?

9 A. Right. I don't remember which computer I did it
10 on. That was three years ago. I don't remember.

11 Q. Agree with me from the printer log you used her
12 printer to print off your business plan?

13 A. I printed it off. Yes, sir. I've already said
14 that.

15 Q. All the other records you would not dispute, the
16 printer log, all that stuff we looked at, I went through
17 a list of companies and you explained that, you know,
18 that's owned by a friend of Shane's for twenty years and
19 all of that. What were you doing all that printing for?

20 A. To prepare the tax returns for 2010, which were
21 due, I believe, Monday October 17th, because the 15th
22 fell on the weekend.

23 Q. Do you remember roughly how many hours in a row you
24 stood there copying stuff?

25 A. I didn't stand there hours in a row. I was at my

1 computer working on the tax returns. I would print
2 forms that Ms. McKinley required to go in the client tax
3 file, whether it be the K-1s from their business returns
4 or input sheets that we had to handwrite and put in the
5 client tax file.

6 Q. And, again, the writing is extremely small, Mr.
7 Highsmith, and I apologize, but how long -- we've got
8 Todd, Todd, Todd, Todd, Todd, Todd, Todd, Todd, Todd,
9 Todd, Todd, Todd, Todd, Todd, Todd, Todd, Todd, Todd,
10 Todd, Todd, Todd, Todd, Todd, Todd, Todd? I mean, ---

11 A. Can I see it?

12 Q. Yeah? I mean, Ms. McKinley says she added it up
13 and you were there something like seven straight hours
14 wearing out the copy machine? Are you now telling me
15 you weren't there for that period of time?

16 A. No, I don't remember standing at the copy machine
17 seven hours.

18 MR. ARIAIL: I'm just trying to find the date
19 that he's talking about, Your Honor.

20 MR. HAYNSWORTH: It's October ---

21 A. He didn't give me the date.

22 Q. I believe it's October 2nd, 2011.

23 (WHEREUPON, off record discussion held between
24 counsel.)

25 Q. So, sir, what now -- you disagree with Ms. McKinley

1 saying how long she added up you were standing there?

2 A. I've got to find that October date you're talking
3 about to see what I was doing. To see what it says.

4 Q. Well, in any -- and those may be multiple days.
5 How many hours are you going to admit you were copying
6 stuff on their copy machine in October of 2011?

7 A. The report, it's got a -- and I'm not sure how the
8 copy report works. But it's got a call, then a file.
9 Then a call, then a file. I think the call is when you
10 call it up to print and then it prints the file. So I
11 think some of these things are duplicates as far as the
12 transactions that were going through the copier log.
13 I'm not sure. I'm not a copier expert. But I was there
14 doing the tax returns for these clients that were due on
15 October 17th.

16 Q. And did Ms. McKinley ask you to go in on that
17 weekend and do that specific work for those specific
18 clients?

19 A. She never asked you to do any specific work. She
20 says you're a professional. You work how many hours it
21 takes to get the job done.

22 Q. Were you charging her overtime when you were in
23 there doing that?

24 A. They didn't have what they call overtime. They had
25 what they called bank time.

1 Q. Same thing?

2 A. No, sir. Not the same thing because over time you
3 get time and a half for it.

4 Q. All right. Did you get paid extra for the weekend
5 work beyond your normal seventy-five thousand dollar
6 salary?

7 A. It was called bank time and we could take it as
8 time off.

9 Q. Okay. Paid time off?

10 A. Paid time off, yes, sir.

11 Q. Like paid vacation?

12 A. It's PTO, if you will.

13 Q. Okay. Ms. McKinley -- all those tax clients that
14 you mentioned, you said you were there printing off this
15 stuff to give to the client; is that right?

16 A. Not give to the client, to put in the client tax
17 file. So that's what I was there doing. I was printing
18 the input sheets, the forms, whatever was necessary to
19 build the tax file for her work papers.

20 Q. And all those documents, however many hours it was,
21 all those documents you were printing off, what did you
22 do with them?

23 A. I left them at McKinley Cooper in their tax client
24 file.

25 Q. When you printed off your business plan during the

1 same time, did you leave that at McKinley Cooper, as
2 well?

3 A. No, sir, I didn't leave that.

4 Q. What other documents didn't you leave?

5 A. This is the -- where I did the family and friends
6 tax returns on TurboTax and I printed it from the flash
7 drive to her printer and I took those with me to give to
8 those individuals.

9 Q. To give to the individual friends?

10 A. The family and friends, yes, sir.

11 Q. And you were using her UltraTax system to do those
12 peoples' returns and then you took the raw data from
13 UltraTax and you plugged it into TurboTax?

14 A. No, sir. I did everything in TurboTax, I believe.

15 Q. Did McKinley Cooper have TurboTax?

16 A. No, sir, they didn't.

17 Q. All right. So where was the TurboTax that you were
18 doing the work on from McKinley -- the work you're
19 printing off on that Sunday ---

20 A. Right.

21 Q. --- some of that work was TurboTax?

22 A. Yes.

23 Q. On what machine did the TurboTax live?

24 A. It may have been on one of my friend's machines. I
25 don't remember.

1 Q. Did you have a friend whose computer you were using
2 to do other friends' and family's taxes?

3 A. Yes, sir.

4 Q. What friend was that?

5 A. I don't recall which friend it was. I just know I
6 used a friend of mine's laptop to do this.

7 Q. And then took the thumb drive, took the information
8 from your friend's laptop, plugged it into her printer
9 and printed it all out?

10 A. Yes.

11 Q. Okay. Did Ms. McKinley pay for you to go to
12 various educational seminars while you were employed at
13 McKinley Cooper?

14 A. Yes, she paid for me to go to the Clemson Tax
15 Course every year and to an AICPA partner development
16 CPE.

17 Q. All right. Is the one put on by Clemson at
18 Clemson?

19 A. It's not at Clemson. It's at various locations
20 throughout the State.

21 Q. How about one sponsored by the Land Grant
22 University Tax Education Foundation?

23 A. That's the Clemson tax course.

24 Q. Okay. All right. Would that, for instance, be --
25 and that's just a couple of pages?

1 A. Yes. I can't see that far. You've got to bring it
2 closer.

3 Q. Would that be the sort of thing you would get at
4 the Clemson, at the Clemson course?

5 A. This one was from 2007, so I don't know if it's
6 changed any. But we get a tax workbook every year.

7 Q. And the workbook's published by this land grant
8 university place?

9 A. Yes, it is.

10 Q. Okay. Would you also get a CD when you would go to
11 these educational seminars?

12 A. Some people picked up CDs, some people didn't. It
13 was optional. They'd just have them sitting out on the
14 table?

15 Q. Did you?

16 A. I don't remember if I did or not.

17 Q. Okay. When you left McKinley Cooper on November 4
18 of 2011, did you take all the materials from all the
19 continuing education seminars that McKinley Cooper paid
20 for?

21 A. The only one I remember taking was the AICPA
22 Partner Development, because it was -- I can't even
23 remember where it was.

24 Q. Was that in Baltimore?

25 A. Yes, that was the one in Baltimore we've been

1 discussing.

2 Q. And when you left McKinley Cooper, you took that
3 stuff with you?

4 A. Yes, sir.

5 Q. Okay. Did it not belong to McKinley Cooper?

6 A. I have a little bit of different interpretation on
7 that, in that I have to support my CPE records with the
8 state every year. If I get audited, I've got to have
9 some kind of documentation and the materials to support
10 that I went and attended that conference.

11 Q. Well, if you come to get audited, all you've got to
12 do is call McKinley Cooper up and get them to show the
13 paperwork where they paid for you to attend it; right?

14 A. I'm not sure they would have done that. I don't
15 know.

16 Q. Oh, so you took the information from the seminar
17 with you to H&H, not to use but just in case someone
18 wanted to go investigate whether you had all your
19 necessary hours?

20 A. Yes, sir. I don't even know if I've ever opened
21 that up. I don't know. I don't remember.

22 Q. Would that be another category of documents that
23 you took from McKinley Cooper but you never used?

24 A. I don't know.

25 Q. This Land Grant sponsored, Land Grant University

1 sponsored seminar, do you recall roughly how many years
2 while you were with McKinley Cooper you attended those?

3 A. I went to the 2009 and 2010.

4 Q. And as we sit here today, can you think of any
5 explanation why some of those, to include the 2007,
6 would live in the hard drive of your laptop?

7 A. When I attended the class in 2011, I took the book
8 from Clemson Tax Department. I took a Master Tax Guide
9 they were giving away. And I took the CD that they were
10 giving away. There's -- well, along with the South
11 Carolina Department of Revenue work papers they had
12 there as well. On that CD there were ten years worth of
13 tax books on that CD. So that's the only way that 2007
14 could have ended up on my computer.

15 Q. In 2009 did they have ten years going back?

16 A. I don't know.

17 Q. In 2010 did they have ten years going back?

18 A. Don't know.

19 Q. You went other than just 2011?

20 A. I've been to the 2011, and 2012, 2013, 2014. We go
21 every year. It's a ---

22 Q. And McKinley Cooper sent you in '09 and 2010?

23 A. Yes, sir.

24 Q. And my question is, you're telling me that the
25 reason this is on your computer is you've got ten years

1 worth when you attended the seminar once you were
2 Highsmith & Highsmith?

3 A. That is correct.

4 Q. Okay. My question is, in 2009 or 2010 when
5 McKinley Cooper paid for you to go, did they likewise
6 have ten years going back?

7 A. I don't know. I don't remember picking up a CD
8 then.

9 Q. Do you have any idea what it cost McKinley Cooper
10 to send you to the one in Baltimore, the AICPA?

11 A. No, sir. I have no clue.

12 Q. Mr. Highsmith, we've talked about the bank
13 confirmations. And one of them up there has Phyllis
14 Wheatley on it.

15 A. Okay.

16 Q. Are you familiar with Phyllis Wheatley?

17 A. Yes.

18 Q. Was that an audit client of McKinley Cooper's?

19 A. Yes, that was an audit client of McKinley Cooper
20 who had a going concern. And we didn't know if they'd
21 be there from one year to the next.

22 Q. Okay. Has Phyllis Wheatley ever been an audit
23 client of Highsmith & Highsmith?

24 A. No, sir. It has not.

25 Q. Okay. Well, given that we know that only four

1 possible documents you accidentally took from McKinley
2 Cooper on your flash drive, do you have any explanation
3 as to how a Phyllis Wheatley bank confirmation was in
4 the hard drive of your computer?

5 A. I don't know.

6 Q. Spartanburg Ballet. Is that a audit client of
7 McKinley Cooper's?

8 A. I don't know. It was when I worked there for the
9 two years I worked there.

10 Q. Has the Ballet of Spartanburg ever been an audit
11 client of Highsmith & Highsmith?

12 A. No, sir. It has not.

13 Q. There would be no reason then, would there, for any
14 Ballet of Spartanburg document to be on your Highsmith &
15 Highsmith laptop; would it?

16 A. I don't know.

17 Q. There would be no reason -- well, when you say you
18 don't know, if they've never been a client of
19 Highsmiths, how could their document have possibly been
20 in Highsmith's computer?

21 MR. ARIAIL: Objection, Your Honor. I think
22 he's already said he doesn't know how it could be on
23 there. And there are a lot of different ways it could
24 be on there. I mean, I ---

25 THE COURT: He's got a right to examine him.

1 Go ahead.

2 A. I'm sorry. Repeat that question one more time.

3 Q. Yeah. I think I asked you how the Phyllis Wheatley
4 document could possibly be on your H&H computer. And
5 you said you didn't know.

6 A. I don't know.

7 Q. It shouldn't be; should it?

8 A. I don't know. I don't -- I don't know.

9 Q. Okay. Did you take Phyllis Wheatley related client
10 documents when you left McKinley Cooper?

11 A. I don't know.

12 Q. All right. Same question for the Town of Gray
13 Court. They were an audit client of McKinley Cooper's
14 when you were there; right?

15 A. Yes.

16 Q. Never been an audit client of Highsmith &
17 Highsmith?

18 A. No, they haven't.

19 Q. Did you take Town of Gray Court documents of
20 McKinley Cooper's when you left McKinley Cooper?

21 A. I don't know.

22 Q. So you don't know what you took of theirs?

23 A. I don't remember anything. I mean, I honestly
24 don't. I remember those four documents; that's it.

25 Q. And you told me clearly in the summer that that was

1 it, the flash drive quit working?

2 A. I don't know.

3 Q. And you discarded the flash drive?

4 A. Yes.

5 Q. So there would be no way for any of us now to know
6 exactly what was on your flash drive that had the four
7 documents you ---

8 A. I'm not a computer guy. I don't know.

9 Q. Did you throw it away? Did you send it to someone
10 to try and retrieve the data?

11 A. No. I took a look at it. I asked a computer guy.
12 He said, yep, it's dead. And we tossed it.

13 Q. Okay. Commissions; you and Toni McKinley, when you
14 went to work there, she was going to pay you thirty
15 percent of the billing -- the first year billings on
16 clients you brought to the firm; right?

17 A. That's not what she told me. She told me my base
18 salary was seventy-five thousand. And that my
19 commission structure was thirty percent.

20 Q. And so year one -- who actually creates the
21 commission sheet to present to Ms. McKinley to get paid
22 commission?

23 A. I went to Ms. McKinley at the end of the first year
24 and said, you can pay me my commissions whenever you get
25 ready to. She told me they're your clients. You go

1 look at them in the invoice book. It's up front next to
2 Amanda. Pull it out, build me a worksheet, spreadsheet,
3 or a paper. And I will pay you then.

4 Q. All right. You presented her with a sheet of paper
5 that had a list of clients; right?

6 A. Yes.

7 Q. And it had an amount of commission; right?

8 A. Yes, it did.

9 Q. You're the one who entered the information and came
10 up with what the amount the commission would be?

11 A. Yes, I did.

12 Q. And you gave it to Ms. McKinley to pay you the
13 commission that was reflected on the document you handed
14 her; right?

15 A. Yes. On her request.

16 Q. Okay. Year two, you come back and you originally
17 give her a commission sheet that reflects thirty
18 percent; correct?

19 A. I believe that's correct.

20 Q. Okay. And Ms. McKinley told you at that time it
21 was only thirty percent for year one, Todd. You're only
22 entitled to fifteen percent like everyone else for new
23 clients you bring in year two going forward?

24 A. That's not what she told me when I was originally
25 hired.

1 Q. You're saying she told you thirty percent ---
2 A. Thirty percent.
3 Q. --- each and every year?
4 A. Yes, sir. That's what she implied to me.
5 Q. She implied to you?
6 A. She never gave me anything in writing. The phone
7 call when she hired me was a twenty second phone call.
8 Here's your salary. Here's your commission. When can
9 you start?
10 Q. Right. And you came to learn that her recollection
11 and your recollection of the conversation and the amount
12 of the commission was different?
13 A. In year two, I did, yes, sir.
14 Q. Okay. You came wanting thirty she said, no, no,
15 fifteen?
16 A. That is correct.
17 Q. Okay. And she also told you it's not thirty
18 forever. It's not fifteen forever. It's on the new
19 business you bring?
20 A. That is the first time she told me that and I was
21 rather upset.
22 Q. And then after y'all had this discussion that it's
23 fifteen not thirty, you went back, did you not and you
24 prepared a new commission statement that had an amount
25 -- I want to say it was eighty-five hundred dollars.

1 You and I talked about it in your deposition.

2 A. Yeah. I don't remember the exact amount. I
3 remember that conversation with Ms. McKinley and I was
4 rather upset. I told her she's the owner of the
5 company. She's going to write the check for whatever
6 she wants to. I didn't agree with it. But I'd do
7 whatever she asked me to.

8 Q. Okay. So you went back and created a new
9 commission sheet, had an amount that represented a
10 fifteen percent rate and you gave it to her; correct?

11 A. That is correct.

12 Q. And she scratched you a check for the amount of
13 money you had listed on the commission sheet you gave
14 her?

15 A. She wrote me a check, yes, sir.

16 Q. And you cashed the check; right?

17 A. Yes, I cashed the check.

18 Q. And there is not a single email, no letter,
19 anything from you to her claiming that you were owed
20 anything other than fifteen percent from the day you
21 went and recalculated that until you countersued her
22 after we sued y'all; correct?

23 A. There's nothing in writing with Ms. McKinley from
24 her when I was hired or from me to her, there's nothing
25 in writing.

1 Q. Other than the commission statement you gave her
2 reflecting fifteen percent that she paid you?

3 A. That is correct.

4 Q. Real quick, Mr. Highsmith, on the printer log you
5 talked about, I know there's some individuals in there
6 and there's some entities, Prolite and Silver Hawk and
7 those sort of things. Do you remember discussing that a
8 bit ago?

9 A. Yes, sir, we did.

10 Q. And did you say you were in there in October
11 printing all that stuff because the tax returns were
12 coming up to be due on the 15th?

13 A. The corporate tax returns were due to be filed with
14 the IRS by September 15th. But Ms. McKinley's
15 requirements in the office to support the tax records
16 for the individuals, you had to print off certain
17 information from the corporate return to include in the
18 individuals' return that was due October 17th.

19 Q. All right. So all that printing, leaving aside the
20 H&H business plan, all the other printing you're telling
21 me basically Ms. McKinley required you to do?

22 A. Except for those friends and family's tax returns
23 that show up on that copier log.

24 Q. I mean, no doubt you were doing the printing that's
25 reflected on the copy log; is there?

1 A. No, sir. If it has my name it must have been -- at
2 least it was my work station that was doing it.

3 Q. All right. Mr. Highsmith, thank you very much. I
4 have no further questions.

5 THE COURT: Okay. Take the jury out for a
6 recess. Thank you, you can step down, Mr. Highsmith.

7 THE WITNESS: Thank you, Judge.

8 THE COURT: Don't talk to your lawyer during
9 recess.

10 THE WITNESS: Oh, no, sir.

11 (WHEREUPON, the jury exited the open court at
12 approximately 2:59 p.m.)

13 THE COURT: All right. Take a short recess.

14 MR. HAYNSWORTH: Ten or fifteen, Judge?

15 THE COURT: Yeah.

16 (WHEREUPON, the court stood at recess for a short
17 break.)

18 (WHEREUPON, the jury entered the open court at
19 approximately 3:17 p.m.)

20 THE COURT: All right. Mr. Ariail.

21 MR. ARIAIL: Thank you, Your Honor. May it
22 please the Court?

23 **CROSS-EXAMINATION**

24 **BY MR. ARIAIL:**

25 Q. Todd, how are you doing today?

1 A. Good. How are you?

2 Q. Good. I'm doing good. I just want to go through a
3 little bit of the background I think we got into. Tell
4 me a little bit about yourself. Where did you go to
5 school?

6 A. I went to Bob Jones University, graduated in 1991.

7 Q. Okay. And where did you go to high school before
8 that?

9 A. I went to Hampton Park Christian School on State
10 Park Road and graduated in 1987.

11 Q. Okay. Where -- after Bob Jones, did you go
12 anywhere else for any degrees?

13 A. No, sir. I just started studying for the CPA exam.

14 Q. Okay. And when did you pass the CPA exam?

15 A. I believe it was in 1995 when I was with a firm
16 called Cherry, Bekaert and Holland.

17 Q. Okay. And how long were you with Cherry, Bekaert
18 and Holland?

19 A. I was with Cherry, Bekaert and Holland from 1991
20 until, I think it was 1996.

21 Q. Okay. And after that, where did you go?

22 A. I went to the group of family owned businesses
23 where I was working during that time that I started
24 seeking employment with McKinley Cooper.

25 Q. Okay. And you worked as -- and tell me what you

1 did what that -- VIS; is that correct?

2 A. My first job with that family-owned group of
3 companies was Sonics International. It was a tool
4 business. We imported tools from Japan, Taiwan, China,
5 South Korea, India, Vietnam to sell to customers like
6 Mako Tools. The NAPA stores, Mac Tools, Cornwell Tools,
7 Snap-on Tools, those were the big-names of customers
8 that we had.

9 Q. Okay. Maybe you can explain a little bit. That's
10 different than what you are doing today; correct?

11 A. Yes. That's what we call industry. And I went to
12 work in industry or corporate accounting, if you will.
13 I joined them in 1996 as their controller.

14 Q. Okay. Tell me a little bit about -- you're
15 married; is that correct?

16 A. Married, four kids.

17 Q. Okay. And you live in Greenville, I guess?

18 A. Live in Greenville, yes, sir.

19 Q. Okay. And after, I guess your time in VIS, you
20 went and began to work with McKinley Cooper; is that
21 correct?

22 A. That is correct.

23 Q. And we talked about there was -- I guess you take a
24 two-week period off. Is that correct?

25 A. Yes, sir, I did. I took a two-week period just to

1 kind of download, regroup, recharge, if you will,
2 between jobs.

3 Q. Okay. And explain to me why you made the transfer
4 from an industry practice into McKinley Cooper?

5 A. I wanted to be my own boss. I wanted to be a
6 business owner. That had always been a desire of mine
7 and I knew working for a corporate family-owned business
8 where the owner has four kids, it was going to be
9 extremely difficult for me to break in and become a
10 business owner. So I started looking for other avenues.
11 I interviewed with two other companies in town who were
12 offering me a position with equity or ownership there..
13 And then I talked with Ms. McKinley, I believe it was
14 January of 2009, about coming to work for her and buying
15 in one day.

16 Q. Okay. And the connection I guess you had with
17 McKinley Cooper, Ms. McKinley, was your brother was
18 there; is that right?

19 A. That's right. That's right. Shane was my
20 connection there.

21 Q. Okay. And was the interest in that -- was there an
22 opportunity, were you looking to buy-in to something or
23 from the owner of the practice?

24 A. Yes. When I interviewed with Ms. McKinley in
25 January, we talked about business ownership. I don't

1 remember how old Ms. McKinley was at that time, but she
2 had mentioned to me that she was looking to retire in
3 the next few years. And she was looking at selling her
4 practice to Marcy and Shane and possibly Sheryl. And
5 that I would be a potential candidate to buy in as well.

6 Q. Okay. And so you come from an industry practice, I
7 guess, as a controller?

8 A. That's correct.

9 Q. In that situation, you don't have clients at that
10 time; do you? I mean, do you have clients specifically
11 that you're working for?

12 A. They're not really clients. It was an
13 employer/employee relationship. That group of family-
14 owned businesses were not my clients.

15 Q. Okay. When you say group of family-owned
16 businesses were they particular names or were they ---

17 A. Yes, there were probably nine or ten what we call
18 operating companies there. And many, many other
19 partnerships and trusts. As I mentioned, the owner had
20 four children. There was a company called Sonics Tools,
21 who I originally went to work for. A company called
22 Professional Tool Products, which sold into the private
23 branded market, such as Mac Tools, Mako Tools, Cornwell
24 Tools, Snap-on, and Balkamp NAPA Stores. There was a
25 company called International Speciality Services, which

1 sold to the NAPA stores as well in a different marketing
2 group. There was a company called Liquid Combustion
3 Technologies, which was an engine company. And we had
4 started importing engines from China in 2003 to sell to
5 the Husqvarnas and Minards and Northern Tools of the
6 World. There was a company called Atlantic Tools
7 Company, which was a specialty company. They brought in
8 industrial kits for industrial manufacturers to use in
9 their processing and building of their industrial
10 equipment, such as generators, pressure washers, air
11 compressors, trash pumps, stuff that you would see on
12 construction sites and in the farm use. There was VIS,
13 LLC, which was what we called the back-office company.
14 That housed all of the accounting, administration that
15 provided services to the other group of family-owned
16 companies, those -- what I call the sales and marketing
17 companies. And then I believe there was one other, but
18 I can't -- Power Station. Power Station, LLC, I don't
19 know if -- at Costo/Sam's, the jump starts were you
20 don't have to have battery cables, you just pull the
21 jumpstart out of your car, hook it up to your battery
22 and you can jump your car off if your battery dies that
23 way. We sold those into the Costo/Sam's stores. And
24 then there was a company called ARCAN, Inc. Which,
25 ARCAN was a manufacturer of the big presses that you

1 would see in a lot of the mechanics shops. So all the
2 companies were in the tool business industry in some
3 form or fashion.

4 Q. Okay. I guess why I'm asking all of this, I know
5 you went into that in detail, when we hear this book of
6 business or what you were bringing in, were these
7 clients coming with you when you went to McKinley
8 Cooper?

9 A. When I was at VIS we had requested a proposal be
10 sent to us from McKinley Cooper to do the review, audit
11 and compilation services of our group of family-owned
12 businesses. That was late 2008. And we committed to go
13 with McKinley Cooper, and then I ended up joining
14 McKinley Cooper in February 2009. So those were really
15 the only clients that I knew for sure that I was going
16 to be able to call mine, if you will, bringing them to
17 the firm.

18 Q. So when you began with McKinley Cooper and came
19 over, those are the only clients you brought; is that
20 correct?

21 A. As far as I remember, yes. I was working toward
22 others, who other CPAs were doing.

23 Q. You've heard the testimony in regards to you were
24 buying this book of business that you were bringing.

25 That -- you know, was there ever an agreement or

1 anything about buying this book of business?

2 A. No, the first I heard of buying the book of
3 business was just a few days ago, I guess, as part of
4 this trial.

5 Q. And your understanding, I guess what happened was,
6 she hired you to be an employee at McKinley Cooper and
7 Company, Toni McKinley; right?

8 A. Yes. She thought I could bring an aspect to the
9 corporate accounting side of her practice that she
10 didn't have.

11 Q. And you were hired, you came in -- correct me if
12 I'm wrong. I think you said you began at seventy-five
13 thousand dollars?

14 A. That is correct. That was my starting salary.

15 Q. And I know in a lot of these industries they give
16 signing bonuses or they give a bonus for, you know,
17 bringing in a bunch of clients, of that nature. You
18 didn't get any of that; did you?

19 A. No, sir, I did not.

20 Q. You didn't have a written agreement you entered
21 into that basically said, hey, this is a compensation
22 package of some sort, but you're going to get money for
23 this?

24 A. No, sir. The only thing I was told was my starting
25 salary would be seventy-five thousand. I would get

1 commissions for thirty percent.

2 Q. Okay. And my understanding, you don't have
3 agreements or contracts with the group that you were --
4 those clients you were bringing over. They could go
5 anywhere they wanted to; right?

6 A. That's right. If I was leaving, they could have
7 switched then to go anywhere they wanted to. And I
8 think subsequently they switched over to another CPA
9 firm here in town.

10 Q. Okay. And when you began -- you came in as a staff
11 accountant or what was your title?

12 A. There really weren't titles. I think we were
13 considered staff accountants, accountants for the firm.
14 So that's what I considered myself was a staff
15 accountant.

16 Q. And tell me -- we haven't gone through ages and I
17 don't like to do that, but I've got to. You're the
18 older brother; correct?

19 A. Yes. I'm forty-five years old.

20 Q. Between you and Shane; okay. And how old -- what's
21 the difference in age between you two?

22 A. Approximately eight years.

23 Q. So you had been in, I guess, the accounting
24 industry longer than he had?

25 A. I started in the accounting industry in 1991.

1 Q. Okay. And when you came in was there any issue
2 with -- I don't know, but I think there was some
3 testimony you might be making more than he was; is that
4 correct?

5 A. Yeah. There was some discussion there as far as me
6 making more than Shane. Ms. McKinley was concerned
7 about that fact, that I would come in making more than
8 Shane. And Shane said he did not have a problem with it
9 at all.

10 Q. When you came in, was your goal with Shane to be
11 able to buy or to own McKinley Cooper?

12 A. My goal was to own a piece of McKinley Cooper, yes,
13 sir.

14 Q. And when you came in -- and tell me how it works,
15 you do a lot of tax. And you have tax clients, you have
16 audit clients?

17 A. You've got bookkeeping clients, tax clients, audit
18 clients, you have litigation support clients. Just
19 whatever the client needs, you can be kind of a full-
20 service CPA for them.

21 Q. Are you specializing in tax or are you doing tax
22 and audit?

23 A. I'm doing tax and audit in our firm, yes, sir.

24 Q. Okay. Is that standard to do that or ---

25 A. Yes. When I was at Cherry, Bekaert and Holland, I

1 did audit work, preparing work papers for audits of some
2 really big clients. I also did a lot of tax work. When
3 I was at Cherry, Bekaert and Holland, I did a lot of
4 litigation support work during my time there.

5 Q. Now, coming in and I know we've gotten into it, and
6 I don't want to hash it back up, but you were in a real
7 estate investment business that was not doing good; is
8 that correct?

9 A. In 2007 Dan Seecord and I decided to form Future
10 Five. We bought a lake property down at Lake Keowee.
11 As we all know in 2008, sometime during 2008, the real
12 estate market just crashed and crashed hard. And we
13 were feeling the effects of that in '09 and '10. I
14 wanted to sell the property and just dump it and, you
15 know, start working on the balance that we would have
16 with the bank. My partner decided he wanted a different
17 avenue and we ended up going his way.

18 Q. And you were up front -- I mean, did you tell
19 anybody at McKinley Cooper what was going on?

20 A. No. My brother knew I was in a real estate
21 transaction deal and that's, I think, all that anyone
22 really knew.

23 Q. I guess what I'm getting at is during this period
24 of time, you're going through some financial things as a
25 lot of people did back at that time.

1 A. Yes.

2 Q. Did you make anybody aware at McKinley Cooper of
3 the issues you were having during this period of time?

4 A. Not that I remember.

5 Q. Okay. Did you speak with Toni in regards to, you
6 know, anything about your compensation or money or
7 getting an increase or anything of that nature?

8 A. Each year in September, October, November, sometime
9 in that neighborhood, she would have what she called
10 staff evaluations where you would go into her office and
11 she would tell you how you were doing for the firm.
12 2009, I had my first one. Received what I thought was
13 glowing remarks from Ms. McKinley that I brought another
14 dimension to the firm. At that time she says, as we
15 continue on that path, then we'll starting talking
16 buying in some time during 2010 or at the next
17 evaluation in 2010.

18 Q. Okay. And you proceed that way and doing a good
19 job. Were there -- when did this discussion about this
20 buy-in come into play?

21 A. In 2010, I can't remember if it was October or
22 November, I had my annual evaluation with Ms. McKinley
23 and we started talking about the business and the buy-
24 in. At that time, she offered that her collections were
25 roughly a million two, but would be firmed up at the end

1 of the year. And I said, well, in a typical CPA
2 practice, you typically make about a third off of your
3 collections. I mean, that's typically what CPA firms
4 make, or at least my experience has been with them. So
5 we started talking about, okay, the million two is the
6 price tag. And she said, well, tax season is coming up.
7 You and Marcy and Shane and Sheryl talk, and then after
8 tax season we'll sit down and start planning out the
9 transaction and how it will go.

10 Q. Okay. And during this planning it was you, Marcy,
11 Sheryl, who's has testified, and Shane; correct?

12 A. That is correct.

13 Q. And how many times do y'all think you met with Toni
14 about this?

15 A. I think the four of us met in December 2010. I
16 think we went out before tax season just to make sure
17 this is what we all wanted to do and we all agreed, yes.
18 And after tax season, I can't remember if it was the end
19 of April or the first of May, we sat down with Ms.
20 McKinley and said, okay, you know, we're ready to start
21 proceeding. She said, okay. Well, you know, there's a
22 couple of hurdles we need to get through as a far a -- I
23 think it was called a letter of intent. And that was
24 really all that was mentioned. She needed to know what
25 our plans were. And we kept asking her during this

1 meeting, well, what are your plans for us? I mean, are
2 we going to all be equal partners? Are you going to let
3 us buy the same amount of shares or units, as they're
4 called in an LLC? And she said, that's to be
5 determined. So we went along as far as meeting. And
6 Marcy, Sheryl, and Shane and I met. I think we met
7 three or four other times -- I can't remember for sure
8 -- discussing what we needed for the buy-in. And we
9 started developing a list. I think sometime in June we
10 were told that Mr. Massey was going to be preparing an
11 agreement for us to sign. We said, that's fine. We'll
12 sign a non-disclosure confidentiality agreement. And
13 that's when Ms. Loucks said, that's what he's drawing
14 up. And at that time, I don't think we knew Ms. Loucks
15 had met with Mr. Massey, who was going to be Ms.
16 McKinley's selling attorney, which I thought was kind of
17 unusual because she was part of the buy-in group. I
18 thought that was a huge conflict of interest there. So
19 when we get the first draft of the agreement, if you
20 will, it contained a very restrictive non-compete
21 agreement in it, stating that we could not be CPAs
22 within a sixty mile radius or diameter of her offices.
23 And at that time, she had an office in Clinton and she
24 had an office in Greenville. So I looked at it and
25 said, well, if this doesn't work out and I'm no longer

1 employed with McKinley Cooper, then I have to move sixty
2 miles away from her office locations. That's going to
3 put me in the other side of Asheville or it's going to
4 put me well to the other side of Columbia. I had a, you
5 know, relatively young family with a family of four, and
6 I just could not see myself relocating. I approached
7 Ms. McKinley on several different occasions and said,
8 look, it's not that I won't sign a non-compete. Let's
9 make it part of the purchase agreement because I felt
10 like if we had signed a non-compete it would give her
11 all the leverage in the negotiations. She could dictate
12 at that point whatever she wanted to because I would
13 have been trapped. And I just said I couldn't sign that
14 because of that. I tried to explain it to her, that I
15 would definitely sign a non-disclosure confidentiality
16 agreement, but I could not sign a non-compete until I
17 understood at least what the buy-in amount was and what
18 each one of us was going to be buying as an individual.

19 Q. Okay. And as part of this, you put together and we
20 put it as our exhibit, Defendant's Exhibit 5, it was a
21 June 23rd, 2011, looks like an items needed for this
22 review. Do you remember that document?

23 A. Yes. I remember preparing that document.

24 Q. Did you send that to Ms. McKinley?

25 A. I sent a hard copy to Ms. McKinley and I think I

1 gave a copy to Shane, Sheryl and Marcy.

2 Q. Did you discuss this with Ms. McKinley?

3 A. I think at some point we discussed that, but she
4 was not willing to give us that information until we
5 signed a non-compete.

6 Q. Okay. And so the discussions broke down, it
7 appears, based upon you willing to sign a non-disclosure
8 and her wanting a non-compete?

9 A. That is correct.

10 Q. And you explained to her that the non-compete
11 included a provision which says we can't practice
12 accounting sixty miles of your offices?

13 A. Right. It was in, I think, the July conversation I
14 had with Ms. McKinley. She said, well, you take the
15 agreement and you modify it how you see fit. Well, I
16 just struck through the non-compete portion of it and
17 gave it back to her and said, this is what I'm willing
18 to sign, which was basically a non-disclosure
19 confidentiality agreement. And then in the first of
20 August I sat down with her and went through the
21 agreement again saying, this is why I can't sign it, you
22 know. Let's compromise here and let's make it part of
23 the purchase agreement. I said because if this doesn't
24 work out, then I'm not sure what else I'm going to do
25 because you're making me believe that if I don't sign

1 this agreement, I'm not going to have a job here at
2 McKinley Cooper. And she told me at that point that,
3 yes, I needed to have a contingency plan. And that's
4 where the H&H business plan came up. It was an idea
5 that I had as my contingency plan.

6 Q. In fact, she said, you need to have a plan B; is
7 that right?

8 A. She said I'd be foolish not to have a contingency
9 plan.

10 Q. Okay. And as part of that -- that went on. And
11 then November 1st, I believe your brother had an annual
12 review at that time?

13 A. Yes.

14 Q. And she told him pretty much ---

15 A. I wasn't there at the conversation. I know -- we
16 were on an audit.

17 MR. HAYNSWORTH: I'd object to his hearsay
18 testimony about conversations between the ---

19 THE COURT: Rephrase your question.

20 MR. HAYNSWORTH: Thank you.

21 Q. Your brother left on November 1st; correct?

22 A. That is correct.

23 Q. Okay. And that was after a conversation that he'd
24 had with Toni McKinley?

25 A. Yes.

1 Q. Okay. Now, when he left, you were still there;
2 correct?

3 A. I was on an audit in Spartanburg that day; yes.

4 Q. You came back. I guess you found out, I think
5 through text message from your brother, that you had --
6 that he had whatever, I guess, was fired or was removed
7 at some point?

8 A. Yes. He sent me a message saying I'm not longer
9 with McKinley Cooper.

10 MR. HAYNSWORTH: Hearsay, Your Honor.

11 Q. And don't say ---

12 A. I'm sorry. I'm sorry. I shouldn't have. I'm
13 sorry.

14 Q. That's fine. Well, once that happened you went
15 back in on November 2nd ---

16 A. That morning.

17 Q. --- and had a discussion with Ms. McKinley;
18 correct?

19 A. Yes. I went back in and had started literally
20 packing up my desk because I knew -- the handwriting was
21 on the wall for me too. And Ms. McKinley stopped by my
22 office and we had a conversation.

23 Q. And what was the conference in regards to?

24 A. The conversation was she just couldn't understand
25 why we wouldn't sign the employment agreement that

1 contained the non-compete. She just didn't understand
2 why we wouldn't sign it. I again explained to her this
3 is the reason why we wouldn't sign it because it put us
4 in a very bad position with our families and with our
5 career until we knew the terms of the deal. And I said,
6 I just -- I can't work here any longer.

7 Q. After that conversation, did she ask you to stay on
8 for two days to be able to complete an audit?

9 A. I was working on a school district audit at that
10 time, which is a pretty detailed audit report to draft.
11 And I was the one responsible for drafting it. And I
12 believe I was about half-way through it. And I asked
13 her, I said, what do you want me to do with the school
14 district audit report? And she said, would you mind
15 staying and finishing up? And I agreed with her to stay
16 and finish that up. And I think I finished it up
17 sometime November 4th, around eleven or eleven-thirty
18 that morning, and then I left the office.

19 Q. And when you left the office I guess you and your
20 brother were now going to have to decide what you were
21 going to do; correct?

22 A. That's correct.

23 Q. I mean, had y'all decided what business or how you
24 were going to do things? What was the situation?

25 A. Well, my contingency plan was the H&H proposal that

1 I had put together, the business plan. And that's the
2 avenue that I thought was good for me. Because after I
3 had that August conversation with Ms. McKinley, I
4 started looking at the job market. And the job market
5 for CPAs was still relatively unstable at that time.
6 I've got several friends who are CPAs here in town and
7 they were telling me that they didn't know of anything
8 open. And so that's -- you know, we went with the H&H
9 business plan at that point.

10 Q. Okay. And I just want to make sure because before
11 you left or before Shane left on November 1st, neither
12 of y'all had contacted or asked any clients to come with
13 you?

14 A. No, sir, we have not.

15 Q. Okay. And after you left you purchased computers
16 on November 1st; is that right?

17 A. That's correct. That night.

18 Q. Okay. You set up your email address?

19 A. Sometime that week, yes, sir.

20 Q. On the 3rd, somewhere around there?

21 A. Somewhere around November 3rd, yes, sir.

22 Q. Purchased your supplies?

23 A. Yes.

24 Q. Okay. Prior to this you didn't have a place you
25 were going to go or work out of; did you?

1 A. No. My goal was still to buy into McKinley Cooper.

2 Q. Okay. And being able to buy in -- when you left,
3 when that didn't work out, where did y'all work at this
4 time? Where were you going to do your accounting
5 practice?

6 A. We worked out of my basement for two years, almost
7 two years.

8 Q. Okay. So two years -- so y'all didn't have a place
9 already booked to go into?

10 A. We did not have any building or office space to
11 move into.

12 Q. Okay. Didn't have any clients at that time?

13 A. Did not have any clients at that time.

14 Q. Okay. And then you're going to have to build the
15 practice up at that time?

16 A. That's correct. We were building the practice.

17 Q. Okay. Now, you go forward, and I guess you begin
18 to contact these clients or individuals or ---

19 A. That's correct.

20 Q. And how do you go about doing that?

21 A. Some of them were through email addresses that we
22 got off of their website and some of them were phone
23 calls.

24 Q. And based on that there was a general email about
25 looking to do business or ---

1 A. No, sir. The emails I sent out were, hey, I'm not
2 longer at McKinley Cooper. I really enjoyed working
3 with you. You know, I wish you guys the best of luck.
4 That kind of email. I think I may have told one or two,
5 let me know if I can help you anytime in the future. It
6 was that type of email that I sent out.

7 Q. Okay. Did you talk with any of these individuals
8 on the phone, too?

9 A. Yes. We did make phone calls and talk to some on
10 the phone.

11 Q. Okay. And as you go along, these individuals, do
12 some of them ask you to submit proposals?

13 A. Absolutely. Some of them came back to us and said,
14 hey, look, we'd like a proposal from you and Shane;
15 absolutely they did.

16 Q. Okay. And you submitted those proposals; correct?

17 A. We submitted an offer to them, yes.

18 Q. And we've been going through a lot about these
19 proposals and you've heard the testimony in regards to
20 them. At any time during the time while you were at
21 McKinley Cooper, did you -- I don't know how you would
22 say it -- suck off a computer, download or take a direct
23 copy of a McKinley Cooper proposal?

24 A. No. I used the proposals while I was there. Ms.
25 McKinley, I think I was three or four months into the

1 job, I had an opportunity to get a prospective corporate
2 client. And she said, hey, the proposals are out on the
3 server. Go find one that fits your needs and modify it
4 for that client, whatever their requirements were, and
5 we'll go from there. And that's what I did.

6 Q. All right. And none of these proposals were
7 password protected or anything of that nature?

8 A. No, sir. Nothing was really password protected in
9 the office. I think later on the actual desktops and
10 laptops were password protected, but it was everyone's
11 first name.

12 Q. And this proposal that you developed for H&H, how
13 did you develop this?

14 A. I looked at a lot of different proposals online,
15 did a lot of research. I got a copy of the -- I was on
16 the board of the Better Business Bureau of the Upstate.
17 I was on their board and their finance committee. And
18 Toni had submitted a copy of that proposal to them
19 sometime in January 2011. And being on the board and
20 the finance committee, I was one of the ones that
21 recommended her for that job and told them to call
22 McKinley Cooper, that they could do the review and the
23 audit, that I couldn't because I was on the board. It
24 would have been an independence issue with our
25 regulations.

1 Q. Okay. So when you went in and set up your
2 proposal, looked at ones online, you looked at others.
3 I mean, I think we heard Sheryl Medders say you can get
4 the ---

5 A. Yeah. There's actually companies out there which
6 will give you proposal templates or packages that you
7 can use to develop your proposal. And there's a lot of
8 CPA firms out there whose clients have posted proposals
9 out on the web.

10 Q. At any time while you were employed at MCC were you
11 told that anything was a trade secret or directly
12 stamped a trade secret, anything of that nature?

13 A. No, sir, not even during my time there. I think
14 the first day on the job I wasn't even given an
15 orientation on what any policies or employee manuals
16 were. I came in and they said I was leaving for an
17 audit in thirty minutes, to be ready.

18 Q. Okay. Now, I understand we've gone through a lot
19 of the confidential provisions in the AICPA, and those
20 deal with what is confidential information. There's
21 nothing in there that provides or says these are trade
22 secrets?

23 A. No, sir, it does not.

24 Q. Okay. And she never has told you during your time
25 employed by her that this is a trade secret. Please do

1 not let this get out?

2 A. No, sir, not at any time.

3 Q. I guess the simple question is, do you believe that
4 your proposal, sitting here today, is a trade secret?

5 A. No, sir, I do not.

6 Q. Okay. Do you believe your letterhead?

7 A. No, sir, I do not.

8 Q. The spacing on your document?

9 A. No, sir, I do not.

10 Q. And tell me about that? Tell me how y'all came
11 about the cover?

12 A. Oh, okay. We went to Loftis Printing, which is in
13 Travelers Rest. We live close-by, where our home office
14 was, and Loftis Printing actually said, hey, here's a
15 copy of a cover letter I do for Renita Owens, which is
16 another CPA firm here in town. And we said, yeah,
17 that's what we're talking about, that kind of cover
18 letter or cover report, I should say. It's not a
19 letter. It's just a cover report. And, you know,
20 there's only a few different ways to drill holes or
21 punch holes in those cover reports. And hers was right
22 there in the top third. And then we just went into Word
23 and moved the wording around to fit into that window.

24 Q. Okay. And after you had that proposal in place --
25 strike that. Go back, and I was thinking, we've had

1 this audit review list. I think it was developed in
2 September 2009. Do you remember this document? It says
3 development of -- it's a list of the clients. Do you
4 recognize that?

5 A. Yes. I think I did see this some time during late
6 2009.

7 Q. And it's got a list of all the clients. And tell
8 me a little bit about the document, if you can explain
9 it?

10 A. Yeah. The origination of the document?

11 Q. Well, I guess just what it says first?

12 A. Okay. First it says McKinley Cooper & Company
13 audit review list 9/24/2009. And it's got a number out
14 to the left that shows that there were a hundred and
15 twenty-eight different audit review compilation clients.
16 It has the client's name, and it has the service,
17 whether it was an audit review or compilation. It has
18 the billed amount, the year-end of the company so that
19 we could do our planning, and the contract term, because
20 we wanted to make sure our contract terms were up-to-
21 date, as well.

22 Q. Bear with me. I want to put it on the overheard,
23 but I think this laptop's attached to it. And this is a
24 document, I guess they've submitted it as Plaintiff's
25 Exhibit 6. Do you remember this document?

1 A. Yeah. I remember seeing it in late 2009.

2 Q. What was the reason this document was put together?

3 A. My understanding of the reason the document was put
4 together is we had missed billing an audit client and
5 they had called. So Ms. McKinley came to me, and I
6 think she approached Allan and Shane with it about
7 building some kind of database to not only serve as what
8 we call a tickler file, to remind us when to do things,
9 but also if an audit client came in or called in -- not
10 came in, but called her wanting to know the status of
11 their audit. And we were trying to take this and build
12 a platform, which we would go in and update on her
13 system and let her know. So if the client was on the
14 phone she could look at it and say, well, such and such
15 has your audit. It's in draft form. Or such and such
16 has your audit and they're still finalizing the work
17 papers. And that was kind of the origination of this
18 document.

19 Q. Okay. And it's got, and correct me if I'm wrong.
20 I think it's got a hundred and twenty-eight clients on
21 there; is that right?

22 A. That is correct.

23 Q. And these are all audit clients?

24 A. Audit review compilation clients.

25 Q. Okay. Would that be all of the ones that Ms.

1 McKinley had at the time?

2 A. That, I'm not sure.

3 Q. Well, to the best of your knowledge ---

4 A. To the best of my knowledge that was a client list
5 for audit review compilations. And I did see one AUP,
6 which was what we called agreed upon procedures client
7 on there, as well.

8 Q. Okay. And this document has been submitted as part
9 of their court papers; correct?

10 A. That is correct.

11 Q. Okay. And it looks to me -- one of the key things
12 I see, most of these terms, if you're looking on this
13 side, they all expire in -- most of them are already
14 done by December 11th -- excuse me -- that looks like
15 2011, the terms; correct?

16 A. That's the oldest one I see on there.

17 Q. Oldest one ---

18 A. There's a couple on there that expired in 2011.

19 Q. Some you don't even have contract terms?

20 A. That's correct.

21 Q. Okay. And I'm going through -- I think the latest
22 I see is 2011 again, 2011 again. So this document, from
23 my understanding, you know, only entails information up
24 to 2011; is that ---

25 A. That is correct.

1 Q. Okay. Was this document -- did you see if it was
2 updated or ever see it again?

3 A. No, sir, I did not.

4 Q. Did you have anything to do with this or develop
5 this document?

6 A. I don't think so; no.

7 Q. Okay. I think we've had some discussions in
8 regards to you copying documents on October, I think
9 16th and 17th; is that correct?

10 A. I believe so.

11 Q. I think it was actually -- it might have been the
12 14th -- wait a minute. The time frame around when
13 personal ---

14 A. The extension deadline, yes.

15 Q. --- extension deadline. Sorry. On this, you are
16 -- this is your time sheet; correct?

17 A. That's correct.

18 Q. And this shows, and I'm sorry, this document is not
19 -- it appears to be -- over here is the 14th, the 15th,
20 and then it comes back here for the 16th; is that
21 correct?

22 A. That's what it looks like, yes.

23 Q. Okay. So the 14th, from my understanding, is a
24 Friday?

25 A. Yes.

26 Q. And it's got time that you have billed for these

1 clients during this period of time; correct?

2 A. That's correct.

3 Q. Okay. So the ones that we've referenced, and I
4 just want to go through on this document, which is the
5 corresponding document for this. This is Exhibit 9.
6 This is the copy log.

7 A. Okay.

8 Q. Tell me, looking at that, I want to understand.
9 We've got that time for Randy and Bobby Hawkins?

10 A. Yes.

11 Q. Is that correct?

12 A. That is correct.

13 Q. These are tax clients. Ashley Burton; is that
14 right?

15 A. That's correct.

16 Q. We also have over here, we've got time again for
17 Randy Hawkins, Bobby Hawkins. Are these -- from your
18 review of the records, are these individuals that are
19 included on that sheet for work you've done?

20 A. Yes, they are.

21 Q. Okay. So I guess what I'm getting at is you were
22 billing the clients for doing that work during that
23 time; correct?

24 A. That is correct.

25 Q. Okay. And you're still employed at that time;

1 right?

2 A. That is correct.

3 Q. Tell me -- and I was kind of going down that road a
4 little bit earlier. I want to finish up. Since y'all
5 have begun your own firm ---

6 A. Yes.

7 Q. --- tell me how it's been, I guess and any
8 difficulty or the things you've had in regards to your
9 -- starting your firm up?

10 A. Any start-up business, it's an adventure. You
11 never know from one day to the next if you're going to
12 have cash flow to pay the bills. You know, some months
13 are really tight. Other months we have enough to pay
14 our bills. And trying to obtain new clients is always
15 difficult. So there's just a number of variables.
16 Typically, the first three or four or five years of a
17 small business you just don't make any money. You just
18 don't. It's kind of a rule out there that you've got to
19 get past that fourth or fifth year before you can start
20 making any money at all because it's just so intense on
21 getting one started.

22 Q. Bear with me one second. Okay. And the copier
23 information, I want to go back to that. You didn't take
24 any of that information with you?

25 A. No, sir. The only thing I took were the family and

1 friends tax returns, which I told Mr. Haynsworth.

2 Q. And, in fact, since that time you have -- a lot of
3 these people are tax clients. Danny Woznick, Bruce
4 Vollnogle, they own those companies, Money Tree,
5 Heartwood, those companies, you're still doing business
6 with them; correct?

7 A. Yes, sir, absolutely. We do a lot of bookkeeping,
8 a lot of tax planning, a lot of tax work for them.

9 Q. And they've sent you those records; correct?

10 A. Yes.

11 Q. And you can go to clients and ask them for their
12 tax records; right?

13 A. Oh, absolutely. You know, Danny Woznick said,
14 here's my sign-on to my computer. Help yourself to
15 whatever's on there.

16 Q. And when you're determining your pricing and going
17 to a client to do an audit, how do you and Shane
18 determine what you are going to charge or how that
19 works?

20 A. Right. When we first started it was all about cash
21 flow and it still is for us. We're into our third year
22 now, going on our fourth year. And it's still about
23 cash flow to us. We look at -- what we do is we look at
24 the prior year audit report that the client will send
25 us. We look at the 990, either/or, and we will make a

1 determination on how long that will take us to do it.

2 Since it's just the two of us, it was just our labor

3 rates. We weren't in an office anywhere. So it was

4 really just our labor and our office supplies it would

5 take to do that job. So our hourly rate was pretty low

6 for these jobs. And when we looked at the number of

7 hours that we thought we would spend on that job doing

8 it, plus our hourly rate, that's how we determined our

9 pricing.

10 Q. Bear with me one second. The information in

11 regards to CLE or -- y'all call it CPE?

12 A. Continuing professional education, yes, sir.

13 Q. CPE for you. Are you required to maintain the

14 information as to what you went to the various events?

15 A. Yes, sir. You're required to maintain the

16 information. I can't remember how long it is you have

17 to maintain it with the LLR, South Carolina LLR Board of

18 Accountancy, but you do have to maintain it in your

19 files and in your documentation that you attended it.

20 And a lot of times that includes the course materials as

21 well.

22 Q. Bear with me one second. One more thought, I just

23 want to make sure. While you were at MCC you helped Ms.

24 McKinley prepare proposals; correct?

25 A. Yes. I did one proposal, maybe two or three; I

1 can't remember in total. But I did do proposals while I
2 was there and submit them to Ms. McKinley to sign and
3 send on to the client.

4 MR. ARIAIL: I have no further questions, Your
5 Honor.

6 THE COURT: Do you have anything else, Mr.
7 Haynsworth?

8 MR. HAYNSWORTH: Every so briefly, Your Honor.

9 **REDIRECT EXAMINATION**

10 **BY MR. HAYNSWORTH:**

11 Q. Mr. Highsmith, I think you told Mr. Ariail that
12 after you started H&H you contacted some potential
13 clients about doing their work, or they sent out a bid
14 that y'all bid on. And those conversations were both
15 verbally on the telephone after you're Highsmith &
16 Highsmith and also via email after you're Highsmith &
17 Highsmith. Did I understand that correctly?

18 A. Yes, that's correct.

19 Q. And I believe you also told Mr. Ariail that you did
20 not contact any clients before you left McKinley Cooper
21 about the fact that you were leaving or inquiring as to
22 if you left whether they might be interested in y'all
23 handling their work, those sort of things?

24 A. That's what I remember, yes, sir.

25 Q. But, of course, since you deleted all your McKinley

1 Cooper emails, we would never know whether you contacted
2 them or not; would we, sir?

3 A. I deleted the emails. So I printed out all the
4 pertinent information for the client files.

5 Q. Thank you very much.

6 MR. HAYNSWORTH: No further questions, Your
7 Honor.

8 THE COURT: Thank you. You can step down.

9 MR. HAYNSWORTH: Judge, we may we approach?

10 THE COURT: Sure.

11 (WHEREUPON, a bench conference was held off the
12 record.)

13 THE COURT: Okay. Now, ladies and gentlemen,
14 insofar as you're concerned, we're going to -- we're
15 going to suspend for today. I will excuse you and ask
16 that you be back at nine o'clock in the morning. Nine
17 o'clock. And please remember when you go don't talk
18 about this case among yourselves or with anyone else.
19 If anybody contacts you and tries to talk to you about
20 the case, get their names and addresses and report that
21 to me. Please keep your badges on. Have them on when
22 you come back in the morning. See you back in the
23 morning at nine o'clock. Thank you.

24 (WHEREUPON, the jury exited the open court at
25 approximately 4:02 p.m.)

1 THE COURT: All right. Mr. Haynsworth tell me
2 what you've got next now?

3 MR. HAYNSWORTH: Yes, Your Honor, I would
4 present my IT expert Mr. Gaetan Hemond. If Mills wants
5 to do an in-camera to address whether he's qualified --
6 I'm not sure as to why Mills feels he can disqualify
7 him.

8 THE COURT: Are you going to qualify him as an
9 expert?

10 MR. HAYNSWORTH: Yes, sir.

11 THE COURT: In what?

12 MR. HAYNSWORTH: In computer analysis,
13 computer forensics, that type computer stuff.

14 THE COURT: All right.

15 MR. ARIAIL: And I'm objecting to that first.
16 I mean, I've got numerous prongs off of this. The
17 reason I am objecting first is -- let me go through and
18 give you a little bit of background.

19 We began this case and went through and let them
20 mirror the hard drives. Mr. Hemond sent an employee out
21 to do it. They mirrored it. They mirrored both hard
22 drives. They then went back, took it into their
23 facility, and somebody, Mr. Sean Crisp, one of their
24 employees, took it home and overwrote the hard drive.
25 So Knox and I discussed. We had to go back to court.

1 Basically, they were ordered to have the hard drive
2 mirrored again.

3 What you're going to see, I think, Your Honor, is
4 -- and one of the key pieces in this case is what is on
5 the computer. We hired a forensic expert. We've got
6 testimony in regards to it. But what we've got a
7 problem with and what I've, you know, seen throughout
8 this is, Mr Hemond, in his deposition, he testified
9 numerous times that what he did, is he went and did the
10 mirror of the hard drive. And he took these two mirrors
11 back and he put them in his office. And then he hired
12 an independent contractor, not covered by a protective
13 order, as we were required to do in this case, to remote
14 in from Connecticut, through the internet, into our
15 mirror hard drive, without any encryption or without any
16 type of protection, and do a search. And what he did is
17 he searched, based on criteria that we developed over a
18 two to three-month period of how do we search these hard
19 drives and capture just the documents that we believe
20 are relevant. He did the search, the gentleman, his
21 name is Todd Hildebrand, up in Connecticut. And what he
22 did and what Gaetan testified to is that he took the
23 documents that were a hit, and he then puts them into a
24 folder, outside the computer. He puts it into a new
25 folder on a new flash drive and then gives it to Mr.

1 Hemond who then -- actually -- excuse me. I think the
2 way it went was he sent those documents over to Knox to
3 review to determine if they were deemed to be trade
4 secrets, or if they're going to use them. And then Mr.
5 Hemond has come back and said, okay, well, I'll give you
6 the specifics on those documents. The problem I've got,
7 Your Honor, is we've missed the entire chain of custody
8 on this. First of all, from the first part is they
9 didn't forensically do what they needed to do to verify
10 and to make sure all the procedures, process, everything
11 were in place to protect this. I can't tell you -- I
12 know right now sitting here, I've got an expert who will
13 testify that five or six of the documents they say were
14 created or authored by or happened before November 1st,
15 2011 were -- in fact, happened afterwards. So I don't
16 know what Mr. Hemond -- he's going to testify that
17 here's a document. This is what I understand about it.
18 The problem is, I don't know where it came from. I
19 don't know how it was a hit on the search. I don't know
20 where Mr. Hildebrand found it. I don't have any ability
21 to cross-examine him and be able to say, hey, tell me
22 about why this is a document? They don't want to bring
23 in these individuals because, first of all, they're no
24 longer with the Company, I believe. Mr. Crisp was
25 either terminated or released because he wrote over the

1 drive. There are numerous issues in regards to
2 authentication. Clearly, putting in evidence that's --
3 you know, this way I think misses numerous steps in the
4 chain of custody and prevents me the ability to cross-
5 examine potentially -- talk to these individuals about
6 where they found them, how they were removed? If they
7 were tampered with in the interim? If they were -- you
8 know, what they found through their search that wasn't
9 excluded; all these different things. I think I'm
10 missing a key piece and I think it is highly prejudicial
11 for Mr. Hemond to simply get up on the stand and say,
12 here's a document. Here are the specifics about it,
13 when he didn't do anything in regards to it except
14 analyze it after the fact with Mr. Haynsworth. I've got
15 a significant issue in that they're doing it. The other
16 -- if you want to take that one first, we can deal with
17 that.

18 The other issue I have, Your Honor, outside of that
19 is, they are alleging that my client took documents that
20 he's never opened up. And I'll explain ---

21 MR. HAYNSWORTH: We're not alleging he never
22 opened them up. Go ahead.

23 MR. ARIAIL: Well, his expert testifies he
24 never opened them up. I mean, there's nobody -- well,
25 excuse me. He can't testify to that because he's never

1 analyzed it to see if they've been accessed. The whole
2 point is, he's got these documents and what they're
3 going to do is they're going to try to say there was
4 this file path that existed on the computers of McKinley
5 Cooper and that my client took information, put it onto
6 his personal new H&H laptop, but he's deleted
7 information. They have never given me, and I've
8 requested numerous times, the file path from MCC so I
9 can have my expert review if it mirrors what is on my
10 gentleman's computer. I've never gotten that; requested
11 it. And, first of all, I would say that should be
12 excluded based upon they haven't turned it over in
13 discovery.

14 Second of all, he can't get into any of this
15 information because he's testified he never evaluated
16 access times. He never went back and looked at deleted
17 files. He is simply here to say I found -- hey this
18 document -- here's when the creation date is. Here's
19 when the modified date is, all of that. And I think
20 we've -- I mean, those are the two prongs I think we can
21 start with. And then I can go into his qualifications
22 when he testifies.

23 MR. HAYNSWORTH: Briefly, Your Honor, Mills is
24 exactly right. We had a goofy employee who did take the
25 first mirror images we had. And he overwrote them and

1 corrupted the data and ruined it. And as you might
2 expect, Mills was not inclined to give me permission,
3 since my guy's employee screwed it up, to go mirror
4 their drivers again. We had a hearing before Judge
5 Welmaker. They were ordered to make their drives
6 available to be mirrored again. So any corruption or
7 anything in the first drive is not an issue anymore. We
8 went and reimaged and have a non-corrupt drive.

9 Mills and I did agree -- Mills wasn't going to let
10 me or my expert have free reign to look through their
11 entire computer drives. So we did, as I think most of
12 these sort of cases do, we agreed on some search terms.
13 All right. Knox, your guy can search my client's hard
14 drives for S.C. Regional Water, or Avalonia; you know,
15 different names. And we would have it -- you know,
16 exclude a certain date. And we did a number of searches
17 over the course of litigation. I think we did four
18 separate ones. And as Mills said, Mr. Hemond's employee
19 would run this search for these terms. And it would
20 spit out whatever hits there were. And say the search
21 term was Girl Scouts, which I think was, in fact, one of
22 the search terms, any documents that got hit with Girl
23 Scouts he put in a folder called Girl Scouts or he put
24 in a folder called S.C. Rural Water. The folders were
25 named after the search terms. I was provided by my

1 expert with a flash drive with all these different
2 folders with all the documents that were hit. I gave
3 the identical flash drive to Mills. And we did this
4 back and forth, you know, three or four different flash
5 drives.

6 Mills's expert came in and said, oh, well, I can't
7 analyze the documents in this fashion, we need the md5
8 hash information, which is some computer speak or some
9 little code where an expert can say, I know from that
10 code that this document went from here to there to
11 there. Mr. Hemond is going to testify about documents
12 that were found on their hard drive. And he's going to
13 testify about what he believes the evidence shows the
14 documents came from. He's going to testify that he
15 believes a given document was an email attachment. Or
16 another given document came from a flash drive. Or
17 another given document came from wherever. I mean, he
18 will identify that this document came from their laptop.

19 On the issue of chain of custody and all, I agree,
20 when my expert came to their office and was handed the
21 laptops. He did not independently confirm that the
22 laptops he was given were the appropriate ones, but he
23 was there to mirror their laptops and they're the ones
24 who gave him the laptops. So the chain of custody of
25 the laptops I don't really see as an issue unless

1 they're going to say there were different laptops
2 involved. But, you know, I don't know if Mills has
3 issues with his educational background. I think what
4 Mills is saying is he didn't run the search terms. So,
5 therefore, he can't testify. He didn't run the search
6 terms, but he can certainly testify that the
7 information, these documents he's going to discuss, came
8 from their mirror image hard drives. And if Mills's
9 position is, well, you're not going to be able to say
10 how they got there or why they got there, when Mills can
11 eat him up on cross-examination if he can't establish
12 that.

13 MR. ARIAIL: But my problem, Your Honor, I
14 mean, I'm missing out on numerous steps in the chain.
15 And second of all, he just acknowledged I think here, we
16 gave him the hard drives. They didn't do any serial
17 numbers. They didn't do any pictures. They didn't do
18 any forensically sound things. How do they know when he
19 gets in front of the jury that they didn't switch the
20 laptops up and the documents they're saying were on
21 Shane's are actually on Todd's?

22 THE COURT: Is he going to testify that he
23 used the laptops given to him by the defendants?

24 MR. ARIAIL: Say that again?

25 MR. HAYNSWORTH: Yes, sir.

1 THE COURT: I assume that Mr. Haynsworth's
2 expert is going to testify that he used the laptops
3 given to him by the defendants?

4 MR. ARIAIL: Correct. Well, my issue, Your
5 Honor, and what I'm getting at is there's two -- even
6 though he's going to say he got the laptops. I've
7 missed out on all the stages in between. When he gets
8 on the stand, I don't have the search guy. I don't have
9 the individual that found the document. I don't have --
10 I can't cross-examine him. And that prevents me from
11 having a huge element in my case to be able to show,
12 hold on a second, they were found here. How did you
13 find them? Were the dates -- I mean, all those
14 different criteria that I need that they have to prove
15 that, hey, this document existed on their file
16 beforehand -- on their computer beforehand, instead of
17 after the date, which I've got six documents that they
18 are saying are trade secrets or misappropriated, which I
19 know originated after the fact.

20 MR. HAYNSWORTH: Well, then don't you make him
21 look like an idiot if he says these originated before
22 the fact. And you're like, no, they didn't.

23 MR. ARIAIL: Well, the problem is, it's a ---

24 THE COURT: Well, it appears to me that your
25 objection goes not to admissibility but to the weight

1 that the jury wants to give. And I think, assuming he
2 can qualify him as an expert in his business, then
3 again, and your expert's the same way, then the jury can
4 weigh the believability of each of them. So I am -- I
5 mean, if he qualifies him as an expert in his area then
6 I'm going to let him testify. And the same thing with
7 yours. It's going to be the weight the jury wants to
8 give to it.

9 MR. ARIAIL: Okay. I mean, my concern, Your
10 Honor, was without having the individual here who found
11 the documents -- he is simply -- somebody's done a
12 search on a remote computer and found these documents
13 and put them into a file folder, and Mr. Hemond is going
14 to testify to what his employee found, I'm missing out
15 on the steps that are in between there to give me
16 ability to cross-examine the employee to make sure this
17 is what they truly found and how they found it.

18 THE COURT: I think that makes good argument
19 to the jury.

20 MR. ARIAIL: Okay.

21 THE COURT: All right.

22 MR. ARIAIL: Thank you. I guess we can --
23 well, we can take up his qualifications when he
24 testifies. We'll figure that out.

25 THE COURT: All right.

1 MR. HAYNSWORTH: All right. Your Honor, well,
2 we, you know, for planning purposes, Mr. Hemond will go
3 first. If Sherry Nestor -- this is the gal that I've
4 got coming who will be ever so brief. She's coming from
5 Aiken. She's planning on being here at eleven. If
6 she's here by the time Mr. Hemond finishes, I'll
7 probably put her up briefly. Then Charlie Alford will
8 be my last witness. Or if she's not here yet and we
9 finish Mr. Hemond, I'll put up Dr. Alford, and then
10 she'll be my last witness.

11 THE COURT: Okay.

12 MR. HAYNSWORTH: But I would expect I'll be
13 finished before lunch.

14 MR. ARIAIL: And I'll be ready to go after
15 that.

16 MR. HAYNSWORTH: Nine bells?

17 THE COURT: Nine o'clock.

18 MR. HAYNSWORTH: Thank you.

19 THE COURT: All right. See you then.

20 (WHEREUPON, court stood at recess for the day at
21 approximately 4:27 p.m.)

22 **December 10, 2014,**

23 (WHEREUPON, court convened with all parties present
24 and the following proceedings were had.)

25 THE COURT: The bailiff just let me know that

1 one of the jurors, he thinks, knows one of the
2 defendants. I'm going to bring him in and ask him some
3 questions, see if it's any problem for him to continue.
4 Okay. Mr. Peterson, it is?

5 THE BAILIFF: Yes, sir.

6 MR. HAYNSWORTH: Your Honor, do we know why he
7 didn't speak up?

8 THE COURT: No.

9 THE BAILIFF: He indicated to me that he just
10 realized last night who this gentleman was.

11 THE COURT: All right.

12 (WHEREUPON, Juror number 86 entered the courtroom.)

13 THE BAILIFF: Just stand right there.

14 THE COURT: Okay. Mr. Peterson?

15 THE JUROR: Yes, sir.

16 THE COURT: I understand that you think you
17 know one of the two Highsmiths?

18 THE JUROR: Yes, Your Honor. Not personally,
19 but I know him. We've been around the ballparks because
20 I have four kids as well.

21 THE COURT: All right. Anything else?

22 THE JUROR: And I've seen him around. And I
23 probably, over the years, probably said something to him
24 because it's a small community around the baseball
25 fields and all.

1 THE COURT: Okay. And did you realize that?

2 THE JUROR: Not until he talked about his
3 family yesterday?

4 THE COURT: Excuse me?

5 THE JUROR: Not until he talked about his
6 family yesterday, said about his kids. And then I
7 recognized I'd seen him around.

8 THE COURT: All right. Well, let me ask you
9 this then. Would that fact in any way interfere with
10 your ability to be a fair and impartial juror on this
11 case?

12 THE JUROR: No, sir. I don't know him that
13 well. I just thought I needed to tell you.

14 THE COURT: Thank you. And I appreciate you
15 telling me that. Thank you so much. You can go back to
16 your jury room.

17 (WHEREUPON, Juror number 86 exited the courtroom.)

18 THE COURT: All right. Any objection,
19 gentlemen?

20 MR. ARIAIL: No objection from me, Your Honor.
21 I don't think there's any connection. He actually -- I
22 didn't think he said he knew him, just saw him at a
23 field and maybe talked to him once or twice.

24 MR. HAYNSWORTH: Your know, Your Honor, and he
25 may be telling the God's truth. He just didn't realize

1 until yesterday, but I have some concerns that, you
2 know, the purpose of the exercise when you qualify them
3 is to figure out on the front-end, hey, does he know
4 him? Do I want to strike him?

5 THE COURT: Yes, but he just said he just
6 realized yesterday. So he says he can be a fair and
7 impartial juror, so I've got no alternative but to keep
8 him on the jury.

9 All right. Let's see. We're still on Mr. Todd?

10 MR. ARIAIL: No, we finished him.

11 THE COURT: We finished ---

12 MR. ARIAIL: Mr. Hemond, I think is next. His
13 expert's going to come in now.

14 THE COURT: All right.

15 MR. ARIAIL: I had one -- I know you ruled on
16 the motion for me to exclude him yesterday. I know he's
17 got to be qualified as an expert. The one issue I have
18 and I think we -- in light of trying to get his whole
19 testimony excluded, but one piece that I had also put
20 part of that, they are providing, I think, going to
21 provide testimony about a file path or a path file on an
22 MCC computer matching up with a file path on my client's
23 computer. What the allegation is is that my client
24 copied his personal information off of his MCC computer,
25 his missions documents, other things that he had there,

1 pictures and all of that. And then took it over and put
2 it onto his MCC computer -- or his Highsmith & Highsmith
3 computer at a later date to download this personal
4 information. In that, and as you'll see during this,
5 there were hidden files that were copied over that he
6 didn't know about and didn't access. The issue I'm
7 having -- I think part of the testimony from his expert
8 is going to be that he copied the information from MCC
9 and under that part of the computer there are these
10 folders that are underneath his personal file. And
11 there are documents, my -- pictures, various things.
12 And he's saying that's transferred over. I think
13 they're going to have testimony that he says, well, all
14 those folders are not on his Highsmith and Highsmith
15 computer, which they're going to say is that he has
16 deleted something or lead to that argument. My concern,
17 what my question is -- I mean, I've asked for this
18 information that Mr. Hemond took off the MCC computer
19 about this file path. I've repeatedly asked for it, I
20 think, three times now, have not received the
21 information from them for my expert to be able to
22 review. And I'm asking that that be excluded as part of
23 his testimony because I haven't been able to review it
24 beforehand to even be able to cross-examine him on it to
25 see if that does match up. If it doesn't match up what

1 happened with that file path?

2 THE COURT: Mr. Haynsworth?

3 MR. HAYNSWORTH: Your Honor, most of what
4 Mills told you, I agree with. Some I disagree with.
5 What the testimony is going to be is, is that some of
6 the documents that were authored by MCC -- or we claim
7 are our documents, were on his laptop. Mr. Hemond is
8 going to testify that on July 30th, 2012, a flash drive
9 or some portable media was plugged into his laptop and
10 seven minutes worth of downloading took place. The
11 amount of data that would go from a thumb drive to a
12 computer in seven minutes is a big number. The
13 documents that are actually in his computer are much
14 less than you would expect for seven minutes worth of
15 downloading. One explanation of that is, they were
16 deleted.

17 That has nothing to do with this file path thing
18 Mills is talking about. What the file path is, Todd's
19 computer at MCC had a user profile. His first name Todd
20 slash app data slash whatever. His file path on his
21 Highsmith & Highsmith computer, he used both his names.
22 So the file path on that computer is Todd Highsmith
23 slash app data slash whatever. Mr. Hemond has looked at
24 the MCC computer to confirm that Todd, the first name
25 Todd is what his file path was on that computer. So

1 he's going to testify I know that this information on
2 the H&H laptop came from a McKinley Cooper computer
3 because this file path on McKinley Cooper was Todd not
4 Todd Highsmith. Mills did, in fact, ask Mr. Hemond when
5 he deposed him, well, did you go look at this stuff,
6 copy this stuff off the MCC computer? Yes. Why? Well,
7 I wanted to verify the file path Todd slash app data
8 slash whatever. Mills said, all right. Well, Knox, I
9 want a copy of that. And his deposition was a couple of
10 months ago, I guess. And I said, Mills, your guy needs
11 to sign a protective order. When my guy was going to
12 rummage through their computer, Mills made my guy sign a
13 protective order that limited it to the litigation,
14 nothing else. Mills has not come back to me to do a
15 protective order for his guy to be looking inside my
16 folks' computer.

17 So, you know, this sudden issue of I asked Knox for
18 something he didn't give me, he asked me about it. I
19 said we needed to do a protective order and it never
20 went anywhere from there. We can look in his deposition
21 ---

22 MR. ARIAIL: I've got his deposition right
23 here, Your Honor. And we have an off -- okay. He
24 brings up the protective order. First and foremost, you
25 have to understand, there's -- at no time have we said

1 we can't sign a protective order. Second of all, my
2 client has signed a protective order in this case. So I
3 don't understand we can't -- he's now saying there's not
4 a protective order in place. I've told him that. We've
5 done this. He's excluded me from that evidence. I've
6 asked him numerous times since that time. We had a
7 discussion off-the-record on here. And I can tell you
8 at no time would I have said, no, we're not going to
9 sign a protective order because he's already done it.
10 And I needed this information. It is prejudicial to me
11 for him to bring anything about this file path in about
12 this information that's been put on there. And I think
13 I'm at a loss for being able to do it now. He's going
14 to bring up things in regards to that July 30th download
15 that I can't be able to get into based upon not having
16 the information off the MCC computer, which I requested
17 repeatedly. And I'll go pull my emails, too. I have
18 asked him twice since then to give me that. At one time
19 he said, I am checking with Gaetan, and I can go back
20 and pull the email, to see where that information is.
21 And when he gets back to town -- I'll have to go back
22 and see it. I thought he said that he was going to get
23 me that information. And so at this time, I am not
24 going to be able to cross-examine, do what I need to do
25 adequately based upon this late stage and getting this

1 information. There was a lot of work that we've got to
2 go into to figure out this file path issue.

3 So I would respectfully ask the Court to exclude
4 all evidence in regards to any July 30th download, any
5 information in regards to that matching up with that
6 file path because I'm not able to deal with that, cross-
7 examine him adequately.

8 MR. HAYNSWORTH: The July 30th, 2012 download
9 has nothing to do with the file path. That is
10 information Mr. Hemond obtained from the mirror drives
11 of their computer. In their computer something was
12 plugged in on that July date and a bunch of information
13 came into that computer on that date. That's got
14 nothing to do with McKinley Cooper's computer.

15 MR. ARIAIL: Mr. Hemond will testify that all
16 information that came off that -- we can go through
17 this. All the information is for the app data file,
18 which came off of the profile of the same computer at
19 MCC. What he's going to testify to is that he took and
20 plugged in a flash drive at MCC, took his personal C
21 drive, as it is on my computer, all the information off
22 of that. He says in his deposition numerous times, the
23 entire file path. Took it over, downloaded it onto his
24 Highsmith & Highsmith computer. The problem I have is,
25 how do I cross-examine him without having the

1 information about what was on his MCC computer if I
2 don't have it, when I repeatedly asked for it. Because
3 the key piece is he's going to say, well, he's deleted
4 stuff or he hasn't transferred stuff. Well, there might
5 be stuff on there that would be extremely helpful to me
6 during that cross-examination. I think the whole July
7 30th file path, anything dealing with that should be
8 excluded based upon not being produced. I mean, the
9 key, the way I look at it is, if it was beneficial to
10 them, they would have probably turned it over. If it's
11 beneficial to me, I haven't gotten it. So that means
12 there's something there that helps me.

13 MR. ARIAIL: Mills, I've never seen it. I
14 don't know what's in it. It's simply did it come from
15 his MCC computer, his file path profile was Todd, first
16 name. Todd Highsmith on that computer.

17 THE COURT: I'm going to allow it, Mr. Ariail.
18 All right. Anything before I bring the jury?

19 MR. HAYNSWORTH: No, Your Honor.

20 THE COURT: Bring them on.

21 MR. ARIAIL: Your Honor, can I just ask one
22 follow-up to that?

23 THE COURT: Sure.

24 MR. ARIAIL: Since it's going to be allowed,
25 can I be able to obtain a copy of the documentation that

1 he has tonight so I can be able to have my expert review
2 it.

3 MR. HAYNSWORTH: Mills, I'm not going to give
4 you the hard drive of McKinley Cooper computer for your
5 folks just to rummage through at leisure. I ---

6 MR. ARIAIL: I've got ---

7 MR. HAYNSWORTH: Well, let me finish; let me
8 finish. I never had permission to rummage through your
9 guy's computer at leisure. We agreed on specific search
10 terms so we could go in, make sure stuff that had
11 nothing to do with the case you didn't see, any
12 attorney/client you didn't see.

13 MR. ARIAIL: He says basically, to the best of
14 my knowledge this update -- he goes into it and he says,
15 I felt like we were doing -- okay. He takes some
16 information to verify the file path and puts that onto
17 some flash drive that he's used. He says he messes up
18 the metadata in it. He does all these different things
19 that he says about it. But there's something he's
20 copied. And that's what I'm asking to be able to get to
21 verify that what he is saying matches up. And that's
22 all I'm asking.

23 THE COURT: Okay. I've made my ruling.

24 MR. ARIAIL: Okay. Thank you, Your Honor.

25 THE COURT: Bring them on.

1 (WHEREUPON, the jury entered the open court at
2 approximately 9:18 a.m.)

3 THE COURT: Good morning.

4 THE JURY: Good morning.

5 THE COURT: Okay. Mr. Haynsworth.

6 MR. HAYNSWORTH: May it please the Court?

7 Your Honor, at this time Plaintiffs would call Mr.
8 Gaetan Hemond.

9 THE CLERK: Mr. Hemond, if you'll come
10 forward. Please stop at the end of the bench. Please
11 place your left hand on the bible and raise your right
12 hand.

13 You do solemnly swear or affirm to tell the truth,
14 the whole truth and nothing but the truth, so help you
15 God?

16 THE WITNESS: I do.

17 THE CLERK: Thank you. Please be seated.
18 Would you please state your name for the record?

19 THE WITNESS: Gaetan Hemond.

20 **GAETAN HEMOND,**

21 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

22 **VOIR DIRE DIRECT EXAMINATION**

23 **BY MR. HAYNSWORTH:**

24 Q. Good morning, Mr. Hemond?

25 A. Good morning.

1 Q. Could you review briefly for us your educational
2 background, specifically educational background or any
3 additional studies you've been involved in, specifically
4 with regard to computers and hardware and software?

5 A. Okay. I attended the University of New Hampshire.
6 I also attended Greenville Technical College. Did not
7 graduate from either, but I took computer science
8 courses at both of those. And I took Microsoft
9 certification courses when I worked at MCI
10 Communications. And I got MCSC, which is a Microsoft
11 Certified Systems Engineer certification. I started --
12 in 1998, I left MCI and started consulting as an IT
13 consultant.

14 Q. What's IT?

15 A. Information technology. Basically, we support
16 small businesses with their technology. And I've been
17 doing that work since '98. I've worked for people and
18 I've run two businesses, one I owned in a partnership,
19 and the other, IT Pros, I own and operate. I'm the sole
20 owner of that. And IT Pros is the company that you guys
21 engaged to help with this case.

22 Q. All right. On the Microsoft, was it certification;
23 is that right?

24 A. It's MCSE, Microsoft Certified Systems Engineer.

25 Q. And to get that certification, what all is

1 involved? What sort of things do you deal with?

2 A. Microsoft has many exams and there's certain exams
3 that you must take and there's elective exams, as well,
4 in order to get that. And I've passed seven Microsoft
5 exams to get that certification. I also, I think we'll
6 talk about Todd Hildebrand, is someone that works for me
7 and he's an MCSE, as well.

8 Q. On the Microsoft exams to get the certification,
9 what were those exams on? Is it operating system ...

10 A. I mean, I think the specific certifications that I
11 passed with relation to this, you can take operating
12 system, work station, and operating system server exams
13 and I passed both of those exams; windows server and
14 Windows workstation exams.

15 Q. All right. In your past work experience, have you
16 been involved with computer hard drives?

17 A. I work with computer hard drives daily.

18 Q. And operating systems have you had occasion ---

19 A. The Windows Operating Systems, I work on and
20 configure daily.

21 MR. HAYNSWORTH: Your Honor, at this time, I'd
22 offer Mr. Hemond as an expert in the field of
23 information technology and Microsoft Operating Systems.

24 THE COURT: All right. Mr. Ariail, do you
25 have voir dire?

1 MR. ARIAIL: Yes, Your Honor, I do.

2 THE COURT: All right.

3 MR. ARIAIL: That was IT and Microsoft ...

4 MR. HAYNSWORTH: Microsoft Operating Systems
5 and hard drives.

6 VOIR DIRE CROSS-EXAMINATION

7 BY MR. ARIAIL:

8 Q. Mr. Hemond, I'm going to go through a little bit of
9 background in this case. You have -- you don't have any
10 degrees from college; is that correct?

11 A. I do not.

12 Q. Okay. So did you get a degree in the computer
13 science field?

14 A. I did not.

15 Q. Okay. Regarding your background in that field, you
16 haven't -- in this case, they're offering you as an
17 information technology expert in Microsoft Operating
18 Systems. Have you ever testified in court in regard to
19 those?

20 A. This is the first day that I have been a witness in
21 court as an expert witness. So, no, I have not.

22 Q. So have you ever been retained before as a expert
23 in any cases?

24 A. No, this is the first.

25 Q. Okay. And never provided a report or testimony in

1 regards to information technology and Microsoft

2 Operating System; is that correct?

3 A. That's correct. Today would be the first day that

4 I'm doing this.

5 Q. Okay. And in this case, you're providing an

6 evaluation of the IT. Are you doing any forensic

7 investigations or ...

8 A. Well, a forensic investigation is investigating

9 what's happened and coming to a forum or a court with

10 that information. So, yes, I'm doing a forensic -- or

11 my company has done a forensic investigation of these

12 hard drives, and I'm here to present that information.

13 Q. Okay. What were you retained in this matter to do?

14 A. McKinley Cooper, when they engaged services with

15 us, we were asked to mirror the hard drives of two

16 laptops and find files on those hard drives that met the

17 search criteria.

18 Q. Okay. And you've done that before; is that right?

19 I mean, you've done the hard drive mirroring before?

20 A. I mirror hard drives all the time.

21 Q. Okay. But in this case are you just going to say

22 that you mirrored the hard drives and then you did a

23 search or are you going to provide additional

24 information outside of that?

25 A. I'm here to testify on the files that I found on

1 the hard drives that we mirrored. And so I'm going to
2 testify on that.

3 Q. Okay. And what I'm trying to get at is, you don't
4 have any certifications or any, I guess, additional
5 degrees in telling specific, I guess, information about
6 times computer files or accessed, written or created;
7 correct?

8 A. I have experience working one-on-one with customers
9 all the time providing information. So, I mean, I don't
10 have a certification about providing information, but I
11 provide information to customers every day.

12 Q. You've never provided that information I just
13 requested right there before; correct?

14 A. I have provided information about files. I have
15 provided information about access times. I've provided
16 information to customers about metadata information. I
17 mean, that's -- as a part of my work, I'm working with
18 small businesses and providing information to them. I'm
19 their IT support, and if a file is deleted they'll ask
20 me, you know, who deleted it. And I'll have to
21 determine that. So the information that I'm providing
22 today is not much different than what I do every day,
23 other than we're in this forum here. And I don't
24 normally wear a suit when I'm working with my clients.

25 Q. Okay. And the software you're using in this case

1 is it Microsoft?

2 A. We use Microsoft -- you know, the Microsoft
3 Operating System is on a lot of the products that we
4 support.

5 Q. Okay. And you're not using any type of specific
6 forensic investigation equipment; is that correct?

7 A. In this case when we did the searches on the hard
8 drive, we did not use any software like encase that's
9 specific for forensics. We just used the search tools
10 built into the Windows Operating System.

11 Q. Okay. And have you been certified -- I know you
12 have these certifications in regards to Microsoft, have
13 you been certified as an IT specialist or anything with
14 Microsoft?

15 A. I'm a Microsoft Certified Systems Engineer.

16 Q. And that's for operating systems and operating
17 system server; is that right?

18 A. I passed the exams for work stations and servers.

19 Q. Do they have additional certifications for forensic
20 investigations or additional levels above that?

21 A. There are certifications on forensics that I have
22 not obtained.

23 Q. Okay. And what are those certifications?

24 A. I don't know.

25 Q. Okay.

1 A. I mean, I'm certain there are certifications with
2 forensics, but that's not a focus for me so I haven't
3 done research on what certifications would be out there
4 for forensics.

5 MR. ARIAIL: Your Honor, at this time I would
6 move that he not be qualified as an expert in regards to
7 IT.

8 THE COURT: Well, I'm going to qualify him.
9 And that becomes an issue of fact for the jury to
10 determine.

11 MR. ARIAIL: Thank you. Your Honor.

12 THE COURT: All right, Mr. Haynsworth.

13 **DIRECT EXAMINATION CONTINUED**

14 **BY MR. HAYNSWORTH:**

15 Q. All right. Mr. Hemond, obviously since you just
16 went through it, you were retained to assist us in some
17 of the aspects of this case. If you could just sort of
18 walk through for the ladies and gentlemen of the jury
19 from the time y'all are hired, what you did.

20 A. What happened, initially, I had a friend of mine
21 that has an IT company that provides service for
22 McKinley Cooper. And this court case came about and
23 that friend of mine contacted me, knew that I had --
24 knows that I have an IT firm. And he said, hey, will
25 you take this because he didn't want to be involved in

1 the court case because he was doing work for that
2 client. And I had asked him the year before, same
3 situation; I had a client, They were going to court and
4 I was doing work for both sides. So I didn't want it
5 and I asked him to get involved. So he said; would you
6 be willing to do this? I think he may have passed my
7 email address, phone number on to McKinley and Cooper
8 and they engaged service with me. And it was my
9 understanding we were going to mirror a couple of hard
10 drives on two laptops. And we scheduled a time. Scott
11 Camp was an employee of mine at the time and he went
12 out, made mirror images of both hard drives. When he
13 got those back to the IT Pros office, he did a little
14 bit of work on those drives preparing for the search
15 terms. We didn't have search terms at that time nailed
16 down. So he labeled the hard drives and we had them in
17 a secure area in my office. And the building that I'm
18 in is a multi-tenant office. So the area where those
19 drives were, were secure from the other tenants in the
20 building. Scott Camp resigned and took another job with
21 Laurens Hospital System. I hired another individual,
22 Shawn Crisp, to replace Scott. And we were waiting on
23 search terms. The next point -- this was in November of
24 2012 was when Scott resigned and Shawn was hired in
25 December of 2012. Several months later I got an email

1 from you, here are the search terms. And I went where
2 those drives were stored and they weren't there. I
3 found out -- you know, I talked with Shawn Crisp. I
4 found out Shawn had taken those drives and used them for
5 personal use; he backed up his computers at his home
6 with those drives and overwrote the mirror. I got the
7 drives back from him. I wanted to see is there anything
8 that I can save on this. And that was definitely an
9 embarrassing moment for me and for IT Pros. We were
10 fortunate -- you know, I couldn't get any information
11 off those drives. I think I told you, you know, it's
12 like eighty-five percent of what we had was gone.

13 Q. Were you ultimately able to obtain a remirror of
14 the drives?

15 A. Yeah. I mean, we came back here to this courthouse
16 and a judge ruled that I could get access to the drives
17 again or to the laptops again to do the mirrors. So I
18 personally went, mirrored the drives on the two laptops
19 and brought the new mirrored drives back to my office
20 and we ran -- at that point we started running search
21 terms against the new copy.

22 Q. And the search terms were terms that Mr. Ariail and
23 I agreed on and said you can run these terms; is that
24 right?

25 A. Yeah. Basically, the search terms were always