

22483

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

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SC Court of Appeals

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

v.

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

**RECORD ON APPEAL
VOLUME II**

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1 delivered to IT Pros via email. My email address from
2 you. And, you know, usually Mr. Ariail was copied on
3 that email. But the three of -- you and me and Mills
4 have had many emails back and forth on search terms.
5 And what we would do -- and I've got a company with
6 employees. I have -- I mentioned Todd Hildebrand. He
7 is a contractor that works for me. He actually was an
8 employee for me, lived in South Carolina, and moved to
9 Rhode Island because his wife got a position in Rhode
10 Island. And when he moved to Rhode Island, I talked
11 with him and we decided to have him continue with us as
12 a contractor. At that point, I did do a confidentiality
13 agreement with him that was different than -- I mean,
14 it's not much different but different than the agreement
15 that I have with employees that are confidential. And
16 we do work for a lot of medical facilities and we have
17 to be HIPAA compliant, so I've got an agreement with
18 anybody that would be doing work in an IT capacity for
19 IT Pros. So Todd's one person that would help with
20 search terms. We take those search terms, we do the
21 search. And when we found any file that met the
22 criteria, we would create a copy of those files and then
23 we could -- because they met the search criteria, we
24 could provide those files to you. And it's my
25 understanding that you had a courier come to our office

1 several times to get copies. We would copy the files
2 onto a portable media. You would get it and Mr. Ariail
3 would get a copy of the same thing that you got.

4 Q. After we went back to court and the judge ordered
5 that you be allowed to remirror the drives, did you
6 physically go somewhere to get the Highsmiths' laptops
7 to remirror the hard drive?

8 A. Yeah. What happened was, you know, we came here.
9 The judge said you get access. And then we had to
10 coordinate time. And it was Shane -- I met Shane at his
11 office. It was a Saturday. And we intentionally chose
12 a Saturday so that it would not be during the workday
13 and we wouldn't interfere with their course of work
14 because these are the laptops that these guys were using
15 to run their business. And from my standpoint, you
16 know, I'm in the wrong here. It's my fault that we've
17 got to re-image. I wanted to bend over backwards, do
18 whatever I could to make things right with getting those
19 drives re-mirrored. So I met Shane at his office. He
20 provided the two laptops. I took both those laptops
21 apart, removed the hard drives and made mirror images of
22 the two hard drives. While I was there at his office I
23 started the process. And then I left for four hours
24 while it copied. I came back, put the -- I put both
25 laptops back together and returned those laptops to

1 Shane and I left with two portable hard drives that had
2 the mirror image of each of those laptops.

3 Q. And I guess mirror image is, as the word implies,
4 it's an exact snapshot of what's on that hard drive at
5 the time you do the mirror?

6 A. I used a software product Acronis to do a clone.
7 And when you do the clone it maintains as much as it
8 possibly can from this drive to this drive. So it puts
9 the files in the exact same position. If there is
10 information on the drive that's been deleted, it
11 maintains any information that could be recovered, as
12 well. So, you know, it's not the same drive, but it's
13 as close as is reasonable for this exercise, doing that
14 mirror using Acronis seems like a reasonable way to
15 complete the task.

16 Q. And the search terms you ran were a number of
17 different terms. And my recollection there were perhaps
18 three, maybe four, different times you entered the
19 search terms and ran the search. Is that ...

20 A. Yeah. And, you know, we would -- if we had search
21 terms, we would make effort to search for those search
22 terms on the hard drive itself using the windows search
23 tools. We also went into Outlook files and searched
24 through an Outlook file to find those search terms. So
25 that's running the exact same list of search terms, but

1 it's running it a different way to find information in a
2 different area that's saved a different way.

3 Q. And using the Windows Operating System
4 capabilities, you can -- for instance, can you determine
5 the author of a document using ---

6 A. Well, there's metadata information on each file.

7 Q. What's metadata?

8 A. Metadata is information associated with a file
9 that's like a label. And it has specific information
10 like a date or an author or -- there's different
11 information in that metadata that just helps you. If
12 you're looking at the file and you're trying to
13 determine when was this last opened or when was this
14 created, there's fields in that metadata that you can
15 look at any file and see.

16 Q. Well, tell us or show us what some of the things
17 you found on the hard drives when you set about to run
18 the search terms?

19 A. Okay. And I've got a PowerPoint presentation and
20 we picked a few files that we found. And I'll go
21 through that. We can turn this on. Okay. This is just
22 a PowerPoint presentation so this is a -- this is just a
23 PowerPoint presentation and I've got one file here that
24 the name of the file is bank confirmation dash Wachovia
25 xls. So it's an Excel spreadsheet. And we've got the

1 file location. This was not listing a drive here. I
2 mirrored the drive, but when you're on the laptop, it's
3 the C drive. If you take a mirror drive and plug it
4 into another computer to look at that drive, it's
5 assigned a different letter. So we wouldn't say it's F,
6 it's just the primary drive. But in the root of the
7 primary drive, you have users and then you have Todd
8 Highsmith. And then you have documents. Then you have
9 personal. And this is the point where we've got Todd
10 app data local Microsoft Windows, temporary internet
11 files, content doc, Outlook, and then the file -- this
12 is a folder named B2KNL6I1. Now this is on Todd's H&H
13 laptop, as you guys have talked about it. And it's
14 within his documents, within his documents folder. The
15 app data -- this was actually a hidden folder. And when
16 you have a hidden folder that means the attribute --
17 there's a hidden attribute and it's either checked to
18 hide it or unchecked to unhide it. And if you tell a
19 Windows Operating System show me hidden files, you're
20 going to see the hidden files. If the Windows Operating
21 System is configured to hide the hidden files, you're
22 not going to see them. This folder was hidden. So
23 you've got app data local, Microsoft Windows, temporary
24 internet files, content doc, Outlook and then B2KNL.
25 Looking at this file, there's a lot about that path that

1 tells me that this file and any files next to it did not
2 originate here ---

3 Q. On the H&H laptop?

4 A. --- on the H&H laptop. The content doc Outlook
5 tells me that this is a temporary file that was created
6 when somebody received an email and opened an attachment
7 in an email and this is where -- it puts it on the hard
8 drive behind the scenes any time you open up an
9 attachment on an email. Well, this file was saved. And
10 if we look down at the dates we've got some information
11 here also. And this -- all this information below the
12 path is coming from the metadata for this file. So
13 we've got author. And it says McKinley Cooper &
14 Company, LLP. This being an Excel file, this
15 information was written to that file by Excel on a
16 computer that's registered to McKinley Cooper & Co.,
17 LLP. So Excel is the application that wrote that
18 McKinley Cooper author name. And that happens behind
19 the scenes. If you create a new Excel file, it's going
20 to put the author of whatever you put in when you
21 register that software. So that came from that. And
22 then it says last saved by Todd Highsmith. And then it
23 says content created 6/30/04. So we've got content
24 created so that's when this file first originated would
25 be in '04 based on that date. And then file created or

1 content created 6/30/04. And then you've got file
2 created 7/30/2012, five twelve twenty-three p.m. So the
3 7/30/2012, this is when this file showed up on the H&H
4 laptop. So when I'm looking at this drive, I see this
5 file, this file showed up on this laptop at that file
6 created date there, 7/30/2012, at five twelve p.m. Last
7 written date 7/1/2011; that's indicating that's the last
8 time this file was written from Excel. Excel would have
9 put that. So this is the last time this would have been
10 modified by anybody within Excel, would be 7/1/2011.
11 Last accessed 7/30/2012. So looking at it, it looks
12 like this is a file that was created on a computer at
13 McKinley Cooper. This is showing up on the Highsmith &
14 Highsmith laptop. And it looks like it showed up on
15 this laptop in 2012. It's three tabs to this particular
16 document and this is just an image of the Excel sheet.
17 And I've put the name of the file up at the top. This
18 particular file has Phyllis Wheatley Association and
19 that is a client of McKinley Cooper's that has been
20 established. It's never been a client of H&H. The date
21 on here, December 31, 2009, we've got Wachovia. We
22 actually have account numbers for the bank account
23 numbers. And then we've got McKinley Cooper's
24 information there. This is another one -- and I just,
25 on that previous one, we just showed the one tab. That

1 one tab was the most relevant information.

2 Q. Right.

3 A. This is very similar. This was found in the same
4 folder so it looks like it's an email attachment that
5 was opened up. It's in the hidden folder. It's bank
6 confirmation SunTrust. The dates and time are similar.
7 The -- let me back up. I'm going to back up to --
8 looking at the last written, we've got 7/1/11 three
9 fifty-eight. If we go -- this is same day but the
10 time's not the same. So it was something that was
11 worked on in July of 2011. This one at two twelve p.m.
12 This one at three fifty-eight p.m. So there's a --
13 definitely worked on, on the same day. So basically all
14 the same information except for that. And actually the
15 seconds, I think, are the same on the file creating the
16 last accessed. This is the SunTrust one. Again,
17 Phyllis Wheatley Association, SunTrust. We've got
18 account numbers, account numbers, McKinley Cooper. So
19 come back to your -- when we're searching these hard
20 drives and we're using the search terms, you know,
21 McKinley Cooper & Company was one of our search terms.
22 So we find this document. It clearly meets the criteria
23 for a search term. We would copy this to portable media
24 and a courier from your office would take it back to
25 him. And he'd get a copy, as well. And that was really

1 the process for us getting files to you to see if it's
2 relevant for this case. This one, confirmations xls.
3 This is actually on a different laptop. The first two
4 files were on -- and from my standpoint, I would just
5 call them laptop one and laptop two. It didn't matter
6 to me whether it was Shane's laptop or Todd's laptop.
7 But obviously the first two came from Todd's laptop.
8 This third one was on Shane's laptop. Author, same.
9 Saved by is Shane Highsmith. Contents created
10 6/30/2004. File creation date 2/5/2013, nine ten a.m.
11 2/5/2013, nine ten a.m. Last accessed 2/5/2013. So
12 these dates aren't the same at all with that, but that
13 is the same. And we've got three tabs, Bank of
14 American, GrandSouth and Palmetto. And our search terms
15 picked this up because the author in metadata we saw
16 McKinley Cooper. So we found this. We looked and
17 you've got -- sorry, I went -- let me go back -- bank
18 confirmations, SunTrust. This is an image of that -- I
19 believe I went too far, sorry. Sorry. I don't want to
20 be confusing. Confirmation xls, Bank of America. This
21 was found on Shane's laptop, not the same path as the
22 previous two. Golden Strip Family Child Development
23 Center, Bank of America, there's an account number and
24 there's Highsmith & Highsmith Certified Public
25 Accountants. So looking at this and the previous two

1 having the -- you know, this is -- it looks like the
2 same file is being used and changed to accommodate the
3 new practice. And we've got, you know, client
4 information. Golden Strip Family and Child Development
5 Center, I have no idea is -- can we answer the question
6 on it? Is that a McKinley Cooper client or not?

7 Q. I can't answer that question off the top of my
8 head.

9 A. Okay. Okay. My assumption is it's a Highsmith
10 client. This is another tab in that same file. Center
11 for Community Services, Inc., GrandSouth, a couple of
12 account numbers, Highsmith & Highsmith in the area where
13 on the other files we saw McKinley Cooper.. This is the
14 third tab in the same file, Center for Community
15 Services. Palmetto Bank account number, Highsmith &
16 Highsmith down here. Now we're on the fourth file, I
17 guess. Let's see. This -- this looks like the same.
18 Let me see. This is Bank of American, GrandSouth.
19 Okay. Here's a fourth file. Confirmations xls. This
20 is, again, an Excel spreadsheet that we found. This was
21 found on the second laptop and you can see the path.
22 Again, the author, McKinley Cooper & Company. Last
23 saved by Shane. That content created date is consistent
24 with the others. And then you've got 1/23/13 on file
25 last accessed. There's one worksheet, Palmetto. And if

1 we look it's South Carolina Rural Water and you've got
2 Palmetto Bank, you've got the account numbers; Highsmith
3 & Highsmith again. Our search picked this up because
4 the author was McKinley Cooper on this document. Here's
5 another file, inventory control procedures xls. This
6 file, to me, is interesting and the first two files that
7 I showed have an identical date but a different time on
8 file created. And so looking at this, it looks like
9 this file was copied to Todd's laptop on the exact same
10 day, July 30th, 2012. And the time frame is a little
11 bit later. We've got five sixteen and twenty-one
12 seconds here. But it appeared -- and, you know, my job
13 was to make sure any files that I got, give them to Knox
14 if they meet the search criteria. But looking at this,
15 I was trying to figure out, okay, if there was a copy
16 done on July 30th, 2012, what happened? So I did look
17 at the folder that this was in, the date that folder was
18 created and, you know, the Todd documents, Todd
19 corporate forms and procedures. I looked at the dates
20 on when these folders were created and the dates of the
21 files there that met the search criteria. And there was
22 definitely a copy from portable media to Todd's laptop
23 that was significant. And when I say significant, the
24 one folder that I looked at, app data folder had
25 seventeen hundred files in it. So we're not talking

1 about four files. We're not talking about one file.

2 We're talking about a significant amount of files that

3 were copied at that time. So I look at that, you know,

4 the 7/30/12, five sixteen. Now, the interesting thing

5 about this file is it is not in a folder that's hidden.

6 So the previous two files that I showed you, file one

7 and file two, they were in an area that was hidden if

8 your computer is configured to not view hidden files and

9 folders. This one was in the clear. It's not hidden.

10 So I did look at that fact and thought about that. And

11 in looking at this, and, you know, I met with Knox and

12 we talked about what do you think happened here, and

13 what makes sense? So, again, on this file we picked it

14 up. It says McKinley Cooper & Company as the author.

15 Last saved by McKinley Cooper & Company. This was a

16 file that it shows contents created 3/2/2009. File

17 created 7/30/12. So that means it showed up on the H&H

18 laptop at that time. Written 3/2/09, last access

19 7/30/2012. There's seven worksheets in this. So I've

20 got some of that information. There's American Fab

21 inventory procedures so there's some details here with

22 this. It doesn't really mean anything to me, but we've

23 got several different slides with that information.

24 Finished goods, accounting transactions, perpetual

25 inventory procedures, physical reconciliation. So

1 there's a lot of information in there, but, you know, I
2 don't know how that's used. Moving on to the next
3 document, retention policy dot doc. This, again, is on
4 Todd Highsmith's H&H laptop. This is also in the clear,
5 not -- this is not in a hidden folder. And it's the
6 same time frame 7/30/2012, five sixteen twenty-one
7 seconds. So this is a little bit -- I think a little
8 bit earlier than the previous document we looked at.
9 Contents created in 2010. Last written 2010. Last
10 access 2012. But it's in the clear and it's in
11 documents, so that path, you've got users Todd
12 Highsmith, documents and personal. Then you've got Todd
13 and documents. And that was very -- that's a focal
14 point for me, seeing Todd and then documents. Retention
15 policy, so this was what was in this document. And, you
16 know, I'm not sure what this -- this is, I don't know, I
17 guess a policy on how long you should keep certain
18 documents within accounting practice or whatever.
19 Here's another. This particular file is a temporary --
20 not a temporary. This is a automatic save of an Excel
21 document. So the name has these percent signs and it
22 says auto saved and has a long number. There's -- let's
23 see. This is under that app data folder that we talked
24 about. So it was hidden. And it was -- this file was
25 automatically saved by Excel. And we're seeing the

1 author is Todd Highsmith last saved by Todd Highsmith.
2 Contents created 10/19/2011. So when I'm looking at
3 this, I know that -- you know, and I heard testimony
4 yesterday that Todd was at McKinley Cooper until
5 November 4th. So this is the 19th. That is before he's
6 left. Last written 10/19/2011. Last accessed
7 7/30/2012, five fifteen forty. So that's the same time
8 frame. And so seeing 10/19/2011 I know Todd had access
9 to his laptop until 11/4. So if he copied information
10 from a computer at McKinley Cooper, he had to have done
11 it after October 19th, 2011 based on the last written
12 date of this. And we saw last written date July of 2011
13 and different dates, but this date 10/19/11 is the most
14 recent date that I've seen prior to November 4th, 2011.
15 So if I'm piecing something together that 10/19/11, that
16 sticks out. We can look at this. This is the tab from
17 that Appalachian Council of Governments test of
18 disbursements. Do we know if Appalachian Council of
19 Governments is a client of H&H? It's not -- I think you
20 talked about that yesterday. I thought that one came up
21 yesterday.

22 Q. It's one of the exhibits. It's in evidence.

23 A. So we've got -- this is, again -- this is a file
24 that I found on H&H laptop and I believe we -- one of
25 the searches -- I asked the question after a couple of

1 the searches. I said, I want a list of your clients
2 that we know they don't have because I want to find is
3 there any files. And I think, you know, I don't know if
4 you thought before I said it, but I know I said it and I
5 did get a list. And I'm not sure Appalachian -- I don't
6 know if Appalachian Council was on that list. But this
7 is a client of McKinley Cooper, not a client of H&H. So
8 we see that file here. Okay. This is MCC SRHTB
9 9/30/2011 dot xls. This is again found in app data. So
10 this file was hidden. Author, Rhonda Cox is -- I don't
11 know who that -- that may be an employee of SRH; I don't
12 know. So we see that here. Date contents created
13 10/17/11, shows up 7/30/12, five fourteen p.m. Last
14 written 10/17/11. So that's a little bit before the
15 19th, but, you know, it's still in October. There's one
16 worksheet. And we've got Self Regional Health Care
17 Foundation trial balance and some information there.
18 Girl Scouts of SC Mountains to the Midlands pdf. I
19 think this actual file may be the file that I heard Todd
20 say that he knew about, the Girl Scouts of SC file and
21 this may be it. But on this, this is a pdf file. It's
22 a temp pdf file. So this pdf could have been opened
23 within a web browser or, you know, somehow this pdf was
24 opened and this was a temporary save of the pdf. And
25 we're looking at 10/14/11 was when this file was

1 created. And then 7/30/12 it shows up on the H&H
2 laptop, 7/30/2012 was the last accessed. And we've got
3 the 7/14 for the last written. There's a table of
4 contents here. And this is the file. There's audit
5 plan risk analysis is the file. And then in the middle
6 of this file, and this is -- this kind of -- it's --
7 I'll tell you a couple of things about this. If I was
8 asked to search on the City of Laurens, which is a
9 customer of McKinley Cooper and not a customer of H&H, I
10 wouldn't have found this file because it's a pdf and the
11 way the computer sees this file it's an image. So this
12 City of Laurens is an image. So our search wasn't
13 perfect. We didn't look at every image file to see, but
14 we had the Girl Scout file so we found that based on
15 Girl Scouts. And you go into the file and there's the
16 City of Laurens transaction in the middle of it. So
17 that was just odd. I mean, it kind of threw us off.
18 Why is this in here and how is it there? But this is a
19 great example, I want to show you, that my search wasn't
20 perfect. And hopefully at no time did I tell anybody,
21 hey, I'm going to do a perfect job on this. And
22 obviously IT Pros didn't do a perfect job, but this is a
23 good example of an image where there's content that's
24 relevant. This should not be on the H&H laptop. It's
25 City of Laurens. It's not a customer of theirs and it's

1 detailed information about, you know, there's, I guess,
2 credits on there. You know, there's confidential
3 information that shouldn't be there. So I wanted to
4 just show that as an example. This is more pages.
5 There was, I guess, seven pages to that. This file
6 right here, this is QB user dot INI. This is an
7 initialization file. So when you open up QuickBooks, it
8 reads an initialization file and it remembers all the
9 previous companies that you've opened and the location
10 of those companies. So this is a QB INI file that's
11 found on Todd Highsmith's H&H laptop. It's in a hidden
12 folder. That app data folder right here is hidden. We
13 know it's QuickBooks 2010 on this. 7/30/2012 is when it
14 shows up on the laptop. Last written 10/18/11. So
15 that's right in our time frame with that 10/19. And
16 time five-o-nine. Now, this file -- I want you to
17 realize we've got five-oh-nine on that day all the way
18 to five sixteen. So I'm showing just bits of
19 information, but there's a seven minute duration that
20 we're looking at. Here's five-oh-nine and I've shown
21 you five sixteen. And we know -- I can tell you in that
22 app data folder there was seventeen hundred files. I'm
23 certain that they weren't individually copied. It was a
24 whole group of information that was copied at the same
25 time.

1 Q. Copied from where?

2 A. Portable media. I mean, is what we're -- you know,
3 there's -- we know -- I mean, I was in the deposition
4 when Mr. Haynsworth deposed their expert witness. I was
5 in the deposition. I know we talked about how many --
6 you know, there were many USB drives that plugged into
7 this laptop. That was not something that my firm
8 checked. We didn't look for how many USB drives were
9 plugged into these laptops.

10 Q. Is a USB a flash drive. Is that the same -- what
11 we ---

12 A. Well, I mean, you -- we're saying portable media.
13 It can be a flash drive that's, you know, tiny. Or it
14 can be, I mean, I've got -- this is a portable drive as
15 well. So, I mean ---

16 Q. It doesn't really matter. I'm sorry. I shouldn't
17 have interrupted. Go ahead.

18 A. That's all right. That's all right. So we've got
19 this QB user INI initialization file. And here's the
20 contents of it. And we've got Heartwood Constructors,
21 Inc., Timbertech, Inc., Money Tree, Inc., Pacific
22 Equipment Sales. We've got City of Laurens. These are
23 customers of McKinley Cooper. So this is a QuickBooks
24 initialization file that's showing all these companies
25 were opened in QuickBooks, but it came from the McKinley

1 Cooper laptop. You know, these are all McKinley Cooper
2 accounts. And when I look at this, it shouldn't be on
3 the H&H laptop. So this got picked up because of one of
4 the name searches. And, I mean, we got multiple hits on
5 this because we had multiple customers listed in it.
6 We've got second QB user INI 2011. The same thing here.
7 This is just a second file. And we've got Phyllis
8 Wheatley Association. We know Phyllis Wheatley is not a
9 customer of H&H. We shouldn't see that information on
10 that laptop. And then I've got -- I put in this -- the
11 last three pages I put that. Do you want me to read?
12 Q. Well, I wanted you to just -- I wanted you, to the
13 extent it plugs into your opinion you've reached in this
14 case, I wanted you to discuss Todd's sworn testimony in
15 his deposition as far as how that plugs into some of the
16 conclusions you reached, specifically as to the number
17 of documents that he claims were inadvertent?
18 A. I mean, this -- I read the depositions that -- you
19 know, when you deposed somebody if I wasn't present, I
20 read through the deposition. So I do have Todd's
21 testimony that I've been able to review to help me come
22 to the conclusions that I'm coming to on this. And, you
23 know, there was a few pages here on that. I don't ---
24 Q. Go back to that prior page, Mr. Hemond, for a
25 second. My eyesight's so bad. Yeah, up there.

1 Question, the four clients that you mentioned. Answer,
2 as far as I know, yes. Well, given that you're not
3 supposed to take client information and the fact that
4 you know you inadvertently took four clients. Answer,
5 correct. Question, have you not gone and made ---
6 A. Yeah. I mean, the biggest thing that stands out is
7 -- and let me say, in my work, I protect company owners
8 from their employees all the time. And owners will ask
9 me, hey, what happened here? And I've got to -- I've
10 got to look. And, you know, sometimes you have a
11 business owner that thinks something happened and it
12 didn't. And I'm protecting the employee. And sometimes
13 I'm going, yeah, you got a problem here. When I read
14 this, we're talking about four files. Well, I've showed
15 you a file that was copied to his laptop at five-oh-
16 nine. And I showed you a file that copies at five
17 sixteen. That's seven minutes. It doesn't take seven
18 minutes to copy four files. And I know for myself, if I
19 copied something and it takes seven minutes, I'm aware.
20 And so I don't -- I see a disconnect here in this
21 testimony and then what I'm seeing on these files; the
22 dates and times on these files. And that's, you know, I
23 think -- that leads me to believe that there's more to
24 this story.
25 Q. On the file path, and you showed up a couple of

1 slides. And, in fact, I want to walk through with you
2 the Todd app data.

3 A. Okay. And help me out. I mean, can we -- I know
4 exactly what I want to say.

5 Q. Have at it.

6 A. Well, I want to be fair here. I mean, he's spoken
7 about a -- I mean, there's a laptop at McKinley Cooper
8 that I looked at. And his expert didn't have a chance
9 to look at that laptop. I want to ---

10 Q. Well, I just want you to tell the ladies and
11 gentlemen of the jury how you concluded that the
12 information on the H&H laptops originated at McKinley
13 Cooper. And I thought it had something to do with a
14 file path, Todd being -- just using his first name on
15 his McKinley Cooper computer and Todd Highsmith being
16 used on the H&H computer, and that that was somehow
17 significant, the different file paths; one being the ---

18 A. Okay. What I -- I mean, I can determine what I'm
19 about to say based on just looking at the mirrored
20 drives. But, you know, I'm just factoring in that I
21 looked at that other laptop. One other thing to
22 consider with looking at seven minutes of copying. What
23 I know is this is a profile that was copied from another
24 computer. Todd was the profile and there's twenty-some
25 odd folders underneath that profile name on any given

1 computer. And on this laptop, I could show you.

2 There's a profile where, you know, where on the desktop

3 of this computer right here, there's a profile and

4 there's twenty-some odd folders underneath. And I think

5 this is solicitor. So it would be solicitor. And there

6 would be an app data. We might not see it if it's

7 hidden. And there's about twenty other folders. Well,

8 I can tell by the way this was copied and the number of

9 files that were copied, that Todd on down was copied.

10 So no matter what, whether I looked at the laptop that's

11 at McKinley Cooper's or I haven't, I know there's twenty

12 some-odd folders that would be copied if you copied

13 Todd. We've got one explanation of only having app data

14 is, well, I started copying it and the copy stopped.

15 Either I stopped copying it or the system stopped or I

16 pulled the drive out, so it's possible that you don't

17 get all twenty-six files, even though you said, hey,

18 copy. It could stop mid way. But I showed you app

19 data. And I also showed you documents. Files are

20 copied alphabetically. And every Windows profile has a

21 desktop folder. Well, desktop is between app data and

22 documents. Desktop is not on this laptop and I looked

23 for it. I said, if he copied everything there ought to

24 be desktop. And anything that was on the desktop on the

25 computer that he copied this from would be included, but

1 it's not. So that leads me to believe that it was
2 copied because we got some stuff from documents. And
3 then it was deleted. And, you know, I looked at the
4 laptop at McKinley Cooper, but I come to that conclusion
5 without that information.

6 Q. And by looking at the laptop at McKinley Cooper, do
7 you confirm that that same Todd slash app data was his
8 profile on his computer at McKinley Cooper; right?

9 A. What I did was this bank confirmation file, I
10 looked at that bank confirmation file on that laptop.
11 And it's there. It's there today. I mean, we could
12 have somebody courier it here and pull it up.

13 Q. And it's the same file path as that?

14 A. Yeah.

15 Q. Okay. All right. I'm sorry. Go ahead.

16 A. I mean, that's -- I mean, I think that's it that I
17 have from you. And then we can ---

18 Q. Now, let me make sure I understand one thing. The
19 time -- was seven minutes?

20 A. I'm showing you right here we've got five twelve.
21 We've got five-oh-nine. We've got all the way up to
22 five sixteen. So seven minute -- you all have seen it.
23 You copy a large amount of files and it goes copying.
24 And you see. And for seven minutes that's on the
25 screen. And you're waiting for the copy to finish.

1 Q. And, Mr. Hemond, let me make sure I understand
2 this, as well. Given the volume of stuff copied off of
3 the McKinley Cooper machine compared with what you
4 actually found in the search terms triggered on the
5 Highsmith machine, you found much less than you would
6 expect given the seven minutes worth of downloading; is
7 that right?

8 A. (No verbal response.)

9 Q. I mean, you made reference to documents not being
10 there you would expect and you thought they were
11 deleted. I thought that had something to do with the
12 seven-minute download, but I might be mistaken.

13 A. You know, I don't -- I didn't do any performance
14 testing on how many files or what size should be copied
15 in seven minutes. I didn't have access to their laptop
16 hardware or the portable media to do that. I mean, when
17 I had their laptop my goal was, take this thing apart,
18 put the hard drive over here and make a mirror. Put it
19 back together and make sure it works and give it back to
20 them.

21 Q. Okay. So you raised a point that I need to ask you
22 about. What's your understanding from Todd Highsmith as
23 to what happened to the portable media that he, himself,
24 indicated some of these documents were copied?

25 A. The word he used yesterday was discarded. He did

1 say that he had a computer guy look at it. That
2 computer guy said, it doesn't work and he discarded it.
3 So, you know ---

4 Q. Okay. Well, Mr. Hemond, thank you very much.
5 Please answer questions Mr. Ariail may have.

6 THE COURT: All right. We'll take a recess at
7 this time.

8 THE WITNESS: Do you want to keep this up
9 here.

10 THE COURT: All right. Take the jury out.

11 (WHEREUPON, the jury exited the open court at
12 approximately 10:29 a.m.)

13 (WHEREUPON, court stood at recess for a short
14 break.)

15 THE COURT: All right. Anything before I
16 bring the jury?

17 MR. ARIAIL: Nothing.

18 THE COURT: Okay. Bring them on.

19 (WHEREUPON, the jury entered the open court at
20 approximately 10:52 a.m.)

21 THE COURT: Okay. Mr. Ariail, you may
22 proceed.

23 MR. ARIAIL: Thank you, Your Honor. May it
24 please the Court?

25 **CROSS-EXAMINATION**

1 **BY MR. ARIAIL:**

2 Q. Gaetan, how you doing today?

3 A. I'm doing all right.

4 Q. Good. I just want to start off briefly and kind of
5 get a little bit of background, kind of baseline of -- a
6 little bit of your testimony. Now, I want to give you
7 situation. If an individual -- let's say for instance I
8 left my law firm or went somewhere else and I was to, I
9 guess, take my personal information off my computer. I
10 would go in -- is there a normal place on -- you have a
11 hard drive, I guess, for your computer that's attached
12 to your desktop or you've got a laptop; is that correct?
13 I mean, is that the way it normally works?

14 A. I'm not sure what you ---

15 Q. Having a hard drive attached to you computer?

16 A. I mean, computers do have hard drives that are
17 attached or in it, yes.

18 Q. Okay. So -- and what I'm trying to get at is
19 there's a difference between a single computer and, I
20 guess, a network is what we call it; is that correct?

21 A. (No verbal response.)

22 Q. I mean, it would be linked to a network or it would
23 be a standalone computer; is that correct?

24 A. Yeah. I mean, pretty much every computer that's
25 being used today is connected to the internet and is a

1 part of a network. If you've got a standalone computer
2 that's not connected to a network, I mean, that's the
3 exception, I guess, if that makes sense. And I don't
4 support any standalone computers in -- for my customers,
5 every computer we have is connected to a network. So a
6 standalone computer would be the exception.

7 Q. Okay. What I'm getting at is on your computer
8 there is, I guess, personal files as you've said.
9 There's a personal drive or there's a user file?

10 A. I don't think I used the word personal. There's a
11 profile ---

12 Q. Okay.

13 A. --- on -- let's talk specifically about a Windows
14 workstation. And that's what we're dealing with in this
15 case. There is at least one profile on any Windows
16 computer, any Windows workstation. Some workstations
17 have more than one profile. And it just depends on how
18 many log-ins there are on there.

19 Q. Right. What we call those is users, I guess; is
20 that correct?

21 A. Well, I call it a profile. I mean, there's a
22 profile -- you can have -- we can have more than one
23 user using the computer and they would have -- they can
24 be configured to have separate profiles. So ---

25 Q. And I'm not trying to make this more difficult than

1 it is. I'm simply -- if I have a computer, it's my
2 computer?

3 A. Uh-huh (affirmative).

4 Q. I want -- things are saved on my computer; correct?
5 They're either saved in, I mean, in company or client
6 files in various directories; right, under there?

7 A. Correct.

8 Q. Okay. And there's a personal -- I guess a -- in
9 this case I've got a -- I think you've talked there's a
10 user and underneath that there was Todd?

11 A. Correct.

12 Q. Who then had documents underneath ---

13 A. Yeah.

14 Q. --- that were in subfolders; correct?

15 A. Yes.

16 Q. Okay. So if I go into my computer in my office and
17 I want to copy my documents or my personal computer
18 information, I would copy that profile; correct?

19 A. Well, I didn't use the word personal. And if I've
20 got a business computer, I mean, you're bringing
21 personal into it. The companies that I support, if
22 there's a computer and it's owned by the business and
23 there's a profile, that profile might be associated with
24 a user. There's nothing personal -- I mean, it's not
25 their personal profile, it's the business profile.

1 Q. All right. But underneath the user there's various
2 files, which personal, pictures ---

3 A. Yeah. There is ---

4 Q. I've got some my documents on mine. There are
5 things that, you know, are there in those files that you
6 store stuff in; correct?

7 A. Yeah. On a computer you store stuff in files. And
8 most of them are stored under the profile.

9 Q. Okay. So in that case if you go in and you copy
10 what you believe is your personal information, your
11 items like that ---

12 A. Right.

13 Q. --- and you copy Todd underneath that, and take
14 that documentation, you're telling us that there is
15 hidden stuff in there that you don't know about; is that
16 right?

17 A. There are hidden folders definitely in the profile;
18 there's hidden folders in there. And if the computer's
19 configured to not display hidden folders ---

20 Q. Uh-huh (affirmative).

21 A. --- a novice user or standard user may or may not
22 be aware that there is hidden folders there.

23 Q. Right. And in this case you are saying there were
24 hidden files that were taken; correct?

25 A. In folders.

- 1 Q. In folders?
- 2 A. Uh-huh (affirmative).
- 3 Q. In an app data folder ---
- 4 A. Yeah.
- 5 Q. --- that were taken without the knowledge of Todd
- 6 or Shane? You said they didn't know about them?
- 7 A. I will say that there's -- the folder that was
- 8 copied had a hidden attribute. And I don't believe that
- 9 when the app data folder was copied, that Todd knew that
- 10 he was copying it.
- 11 Q. Okay. And the easiest way to find out that if he
- 12 knew about it -- and let's go through a document right
- 13 here. I think this is a pretty good explanation of it.
- 14 A. Okay.
- 15 Q. This document -- and let me get my pointer.
- 16 A. I think the battery's dead in that.
- 17 Q. Naw, I got it to work. You've got to hit it a
- 18 couple of times.
- 19 A. Okay.
- 20 Q. This document right here. I'm sorry. I can't keep
- 21 my hand ... It says 7/1/2011, two twelve twenty-three
- 22 seconds; is that correct?
- 23 A. Yep.
- 24 Q. That says last written; is that right?
- 25 A. Yeah.

1 Q. And from my understanding, last written means
2 anything that has been to, modified in or changed?

3 A.. Correct.

4 Q. Okay. So we know that that document was modified,
5 changed or last written when he -- I guess this is on
6 Todd's computer -- when he was at McKinley Cooper on
7 July 1st, 2011; is that right?

8 A. Yeah.

9 Q. Okay. Did you go and find out or go talk to
10 anybody about this bank confirmation or what he did on
11 that date or how he got that or any of the background
12 about this document?

13 A. No.

14 Q. Okay. So you can't sit here and tell me that he
15 didn't get that legitimately as part of his business on
16 July 1st, 2011, when he was working there; is that
17 right?

18 A. (No verbal response.)

19 Q. I mean, you're not going to give me an opinion on
20 that one?

21 A. Yeah. I don't understand the argument. I mean ...

22 Q. Okay. And here's the reason I'm asking these
23 questions. The last time and -- the next time this
24 accessed -- or excuse me. This access date's a little,
25 I think, a little misconceiving on it in that this

1 document went onto the computer of Todd on 7/30/2012;

2 correct?

3 A. It did.

4 Q. Okay. It was there at five twelve twenty-three; is
5 that right?

6 A. Correct.

7 Q. So it shows here the access -- it was never
8 accessed; is that right?

9 A. Yeah.

10 Q. You're saying that is correct it has never been
11 accessed?

12 A. That file on the H&H laptop after 7/30 was not
13 touched.

14 Q. Okay. So you can't say anything about if that file
15 was used. All you can say is right here right now that
16 that file was on MCCs computer at some time and somehow
17 got onto Todd's computer but was never accessed?

18 A. Correct.

19 Q. Okay. Now, one key point I think I keep on
20 thinking about that is, and I know what -- interesting
21 to me, if this document was used -- let's say they leave
22 on 11/1 and 11/4 of 2011. If this document was used in
23 any manner before 7/30/2012. Let's say it's open on
24 2/12/2012?

25 A. Right.

1 Q. It's going to show that right there; isn't it?

2 A. (No verbal response.)

3 Q. That date is going to come up so you can see if
4 it's been accessed or created or used; right?

5 A. Not necessarily. If I have this file on a portable
6 media, I can copy that file and that file is never going
7 to change. All I did was copy it.

8 Q. But you've got to open it up. You've got to look
9 at it. You've got to see what it is. It's going to
10 change some type of the metadata of the document;
11 correct?

12 A. No.

13 Q. Okay. So ---

14 A. If you make a copy of that file, it's not going to
15 change the original metadata.

16 Q. It's not going to change the last written or
17 created, any of that?

18 A. It could. If you have a USB drive and it has a
19 file on it and you access the file and let's say this is
20 an Excel, and you use the Excel application. The Excel
21 application is what's going to make changes to the
22 metadata. So if you open the file on the USB drive, it
23 would manipulate the metadata. But if you copied the
24 file from the USB drive, it would not manipulate the
25 metadata.

1 Q. Okay. Well, the reason I'm asking all of this is,
2 you've been designated as an expert in this field. And
3 they are bringing significant claims against my clients.
4 And I just heard you say it could. Well, that creates a
5 major issue in this case for me. Do you agree? I mean,
6 you need to have some definite certainty; correct?

7 A. Certainty about whether this file was accessed when
8 it was on the USB drive or not?

9 Q. I think that would be a relevant question to ask;
10 don't you?

11 A. It's hard for me to determine that when this USB
12 hard drive was discarded.

13 Q. But what I'm asking and what I'm trying to sit here
14 today and find out is, you haven't done what you needed
15 to do to figure out whether or not that document was
16 accessed or used before 7/30/2012; isn't that right?

17 A. What I did was I found files on the mirrored hard
18 drives that were within the search terms that you guys
19 agreed on. And I provided those files to you and to
20 Knox. And I -- you know, my job was not to determine
21 how often the file was used or whether the file was
22 used. I was just collecting the files and providing
23 them to you.

24 Q. Right. And now you're a document collection
25 individual; is that right?

1 A. (No verbal response.)

2 Q. You're collecting the documents that you've done a
3 search -- or excuse me, that Todd Hildebrand has done a
4 search; right?

5 A. Well, IT Pros searched for files on these drives
6 and provided them to you, to you and ...

7 Q. Okay. Let's go though that. First of all, you had
8 an employee, after we provided you mirror images of
9 these hard drives, who went into an area, took them home
10 ---

11 A. He did.

12 Q. --- and copied over them, destroy evidence pretty
13 much?

14 A. Yes.

15 Q. Okay. And so I'm trying to figure out how this
16 works in this case. We're here on a trade secret
17 confidentiality case of important documentation. And
18 we've got the computer expert for the plaintiffs who has
19 allowed his office to take information home to their
20 house ---

21 A. Uh-huh (affirmative).

22 Q. --- and overwrite it; is that correct?

23 A. That is correct.

24 Q. Okay. And in this case destroyed evidence that
25 could have been used; right?

1 A. Absolutely.

2 Q. Okay. And we had a second mirror of this drive;
3 correct, two drives?

4 A. We did.

5 Q. And allowed you to perform searches. Said, here
6 are the search terms. Search the clients that you want
7 to. Gave you dates, gave you any documents preceding
8 November 4th, 2011. Allowed you to have Todd's
9 information. Allowed you to search McKinley Cooper; all
10 the clients. We let you have that; right? Let you do
11 that search?

12 A. Yeah. I was able to do more than one search. You
13 know the searches came via email and we were allowed to
14 do those.

15 Q. Right. And when you say -- and I want to make sure
16 of this -- you did the search, you didn't do any of
17 these searches; right?

18 A. That's not true. IT Pros did the searches and I
19 had employees that work for me do searches. I also
20 worked with employees on searches. So I was involved in
21 the process. I didn't do everything. I had employees
22 and Todd Hildebrand, who's a contractor, help with the
23 work that we did in this case.

24 Q. Did you or did you not do any of the three or four
25 searches to find the documents to put them in the

1 folders that were sent to Knox and me?

2 A. I assisted in the searches.

3 Q. Did you tell me in your deposition that you did not
4 do any of those searches?

5 A. Possibly. I mean, if you're saying I did.

6 Q. Do you remember taking your deposition with me ---

7 A. I do. At my office.

8 Q. --- and you were under oath in regard to that?

9 A. Uh-huh (affirmative).

10 Q. August 22nd, 2014?

11 MR. ARIAIL: Your Honor, may I approach?

12 THE COURT: Go ahead.

13 Q. Tell me if you recognize that?

14 A. I guess this is the original of my deposition, is
15 what it looks like.

16 Q. Right. And they allowed you to read this, review
17 it, and make sure ---

18 A. I did. Yeah, I read it and signed off on it. What
19 page are ---

20 Q. I'm going to get there. I've got to find that.
21 I've gotten ahead of myself. If you'll bear with me one
22 second. We've talked about a lot of stuff. We're on
23 page 90.

24 A. 90?

25 Q. Uh-huh (affirmative).

- 1 A. Okay.
- 2 Q. Line 16.
- 3 A. Okay.
- 4 Q. Okay. And this was -- this is my question. When
- 5 this was filled in or utilized to search these
- 6 documents, who did the searches? Your answer, Todd
- 7 Hildebrand did all the searches in this document.
- 8 A. Yeah. That's ---
- 9 Q. Is that correct?
- 10 A. Yeah.
- 11 Q. Okay. Now, as part of that Todd was, and my
- 12 understanding, I don't think -- he wasn't an employee
- 13 with you at the time; was he?
- 14 A. No. No. He has not been an employee since prior
- 15 to me engaging in this.
- 16 Q. Okay. So he wasn't an employee. And you knew in
- 17 this case because you've signed, we have a protective
- 18 order ---
- 19 A. Yep.
- 20 Q. --- which requires us to sign to make sure that
- 21 these alleged -- this alleged information doesn't get
- 22 out; correct?
- 23 A. Right.
- 24 Q. Now, he was doing these searches at a time when you
- 25 did not have him sign that agreement; correct?

1 A. After this deposition, I had Todd sign the
2 protective order. Prior to this deposition, I had a
3 confidentiality agreement with Todd that binds us for
4 HIPAA work that we do and everything. I made an
5 assumption that that was sufficient. And that's failure
6 on my part if that -- if that confidentiality agreement
7 that I have with Todd is not sufficient, that's on me.
8 That's my fault.

9 Q. And the concern I have is you're making a lot of
10 assumptions today like you did with that ---

11 A. Yeah.

12 Q. --- that you're asking this jury to believe;
13 correct?

14 A. I am -- when I look at information like this, I'm
15 making some assumptions ---

16 Q. Right.

17 A. --- and I expect the jury to believe me.

18 Q. Okay. But in that case with him not signing that,
19 you assumed wrong. He was supposed to sign that
20 protective order; correct?

21 A. I don't know. I mean, you're saying ---

22 Q. You signed it; right?

23 A. You're saying that I assumed wrong. I mean, I
24 don't know whether the confidentiality agreement that I
25 have with him was sufficient or not. I thought it was,

1 but you asked for the protective order to be signed with
2 him. I got it signed that day.

3 Q. You signed a protective order to begin this case
4 that told you not to disclose or provide this
5 information to anybody else; correct?

6 A. Yes.

7 Q. Okay. He didn't sign that before you had him do
8 these four searches; right?

9 A. Right.

10 Q. Okay. And he did these -- not only did he do these
11 searches, but he did them remotely from Connecticut over
12 the internet?

13 A. He's not in Connecticut. He's actually in Rhode
14 Island.

15 Q. Oh, excuse me. But he did them from Rhode Island?

16 A. He works out of his home in Rhode Island. And we
17 have a virtual private network from his house to my
18 office. And on these searches I provided him a
19 connection to a computer. I attached the mirrored
20 drives and had him execute the searches.

21 Q. Okay. I mean, does it cause you any concern that
22 we're in a trade secret, confidentiality case and we're
23 searching items, doing these reviews over the internet?
24 Does that cause you any concern?

25 A. Not at all.

1 Q. Okay. Now, one key piece of this is, and I know
2 we've discussed the app data. And we're going to get
3 into quite detail here in a little bit. But outside of
4 that app data -- and I think, I want to make sure that I
5 understand so we're going to go through it. And what I
6 understand it to be is -- there we go. App data, right
7 here. Do you see that? Is that app data?

8 A. Uh-huh (affirmative).

9 Q. Outside of that pathway, because you're saying that
10 came, I guess, from Todd's computer at MCC; is that
11 correct?

12 A. The path that came from the previous laptop would
13 be Todd app data local Microsoft Windows temporary
14 internet files, content dot Outlook B2KNL6I1. That all
15 -- every bit of that came from the MCC laptop.

16 Q. Okay. Outside of that pathway there is no other
17 documentation that you've talked about that you can say
18 where it came from; correct?

19 A. There's other document -- like the, I think, fourth
20 document in this that's outside of that.

21 Q. Okay. What's the fourth document?

22 A. Let's look in here.

23 Q. Well, I'm not going to ask you to look on there. I
24 wanted to know, before you go back to it, what the
25 document is you're saying. I mean, you should know

1 these documents. There are ten documents. You should
2 know which document you have that you're saying came
3 from another source. So which one is it?

4 A. There's two that are in the documents folder. I
5 mean, I'm drawing a blank. So you don't want me to ---

6 Q. No. And I'll go back through it. But outside of
7 those documents, the ones you don't know in this app
8 data, you can't say where any of these documents came
9 from?

10 A. Again, you know, when you're asking me questions
11 and you do a broad question, I want to narrow back to a
12 file. If you ask me a question about a specific file, I
13 can answer it. When you give me a broad question about
14 -- I don't know how to answer that.

15 Q. All right. And what I'm getting at is, the key
16 piece of this case is you're saying these documents came
17 from McKinley Cooper's computers; okay?

18 A. All right.

19 Q. If these documents came from legitimate clients,
20 the client gave it to them, the client allowed them to
21 put it on a flash drive and put on the computer ---

22 A. Right.

23 Q. --- that would be highly relevant; correct?

24 A. Certainly. One avenue that H&H could end up with a
25 file is if the client was with McKinley Cooper, they

1 switched to H&H, and they provide the file. I'm not
2 here to testify that that avenue doesn't exist.

3 Q. Okay. Let's go into -- now, let me ask you this.
4 I thought about this earlier. You are retained by them
5 to do a search and do an amount of work you're supposed
6 to do; is that correct?

7 A. I was retained by them.

8 Q. And you're getting paid to do that; right?

9 A. Yes.

10 Q. How much are you getting paid by the hour to do
11 that?

12 A. A hundred and nine dollars an hour.

13 Q. Okay. And isn't it true that you feel really bad
14 about what has happened in this case?

15 A. No doubt.

16 Q. Okay. And, in fact, you haven't charged them for
17 doing the second mirror, for doing any of the work off
18 of that; is that correct?

19 A. I did not charge -- when I went to mirror the
20 drives the second time, I did not charge my time. I
21 went personally on that Saturday. I mirrored those hard
22 drives and I was redoing something that I had previously
23 billed them for. So I did not bill them for my time on
24 remirroring the hard drives.

25 Q. Now, isn't it true when I took your deposition one

1 of the key things we discussed, because I thought it was
2 highly relevant, was when these documents were accessed?

3 A. Uh-huh (affirmative).

4 Q. Do you remember us discussing that?

5 A. I don't remember us discussing specifically access
6 dates, but -- I mean, we talked about a lot. I mean,
7 there's a hundred page ---

8 Q. And I think the reason that we did not discuss it
9 at your deposition if I'm correct, was because you had
10 never evaluated the access times at the time I took your
11 deposition in August 2014; is that right?

12 A. Yeah. We were finding documents based on search
13 terms and not -- you know, the access times wasn't -- I
14 mean, we looked at the metadata on the files. So we
15 were aware of the access times. But ...

16 Q. The way you got that information is my expert
17 provided that; correct?

18 A. I don't know about that. What did he provide?

19 Q. His report. Information that he provided to you
20 showing when the access times were. Y'all have talked;
21 correct?

22 A. I didn't -- I mean, I don't know. There's -- I
23 think, you know, your expert did provide some
24 information that I didn't have and that was the times
25 the USB drives were plugged into the laptop. Is that

1 what you're referring to, is when USB drives were
2 unplugged from the laptop.

3 Q. You can go back through your deposition if you want
4 to.

5 A. Okay.

6 Q. Let me turn your attention to -- let's turn to 82?

7 A. All right.

8 Q. I want you to read or tell me if this is correct.

9 IT Pros has not made attempt to discover access times of
10 these files; is that correct? Is that your ---

11 A. 82?

12 Q. 4 and 5, you can read it again?

13 A. IT Pros has not made any attempt to discover access
14 times of these files.

15 Q. All right. And then it goes on to say ---

16 A. And that is -- that's my answer. We didn't make
17 any attempt to look at access times for the files.

18 Q. But today you come in here with all these access
19 times; is that right?

20 A. They're in the metadata.

21 Q. But you didn't evaluate them at the time. And then
22 I go on to say. So the question you're asking me, I
23 haven't had that discussion with Knox at all. We've
24 merely looked at the files and the contents of the
25 files, not at the time accessed; right?

1 A. Right.

2 Q. Okay. Well, you would agree, would you, that one
3 of the key aspects of this case to determine if my
4 clients have taken these files is when the files were
5 accessed and if they've ever been accessed?

6 A. I think the key is did they take them.

7 Q. Now, the other part -- bear with me one second.
8 This app data folder we're talking about, this Todd?

9 A. Uh-huh (affirmative).

10 Q. Did you testify at your deposition that you
11 believed that Todd copied the entire folder, every
12 document underneath it?

13 A. Yeah. I think that's what happened.

14 Q. So today you now come in here and said hasn't, I
15 thought?

16 A. I don't remember saying he hasn't.

17 Q. You just said that there was not document on there
18 that you would expect to be on there?

19 A. Okay. So why would it not be there? If he copied
20 it all and it's not there, why wouldn't it be there?

21 Q. And here's a good question right off of that. Have
22 you done any review to figure out why it's not there if
23 you believe it's there or should have been there?

24 A. I don't believe it's there.

25 Q. Okay.

1 A. And we did not examine the hard drive to see if the
2 desktop folder was deleted. We didn't do that.

3 Q. Okay. A lot of questions off of that. The
4 software you're using is Microsoft; correct?

5 A. We use Microsoft software.

6 Q. Okay. And it allows you to review that
7 information; right?

8 A. Review what information?

9 Q. Deleted files? See what's been deleted?

10 A. No. I mean, if you have something in the trash
11 can, you can review with Microsoft and see that it's in
12 the trash can. But if it's removed from the trash can,
13 the Microsoft software is not showing you -- I mean, we
14 would use another application like Recuva or something
15 like that to do a recovery.

16 Q. You have done that; right?

17 A. It could have been done, yes.

18 Q. So I'm trying to figure this out. You're here now
19 saying the documents are not on the computer that should
20 be there, that you think should be there, but you
21 haven't used Recuva or some other software to tell us
22 whether or not something's been deleted?

23 A. I don't have any proof of that information being on
24 the H&H laptop and it being deleted. I don't have that
25 proof here today.

1 Q. Okay. I'm a little confused. You testified that
2 he -- okay, we've now got in your deposition saying
3 you've testified that he copied the entire file.

4 A. I think he did.

5 Q. Okay. You've got your information right now saying
6 you don't believe he's deleted anything off his
7 computers?

8 A. No, I didn't say that.

9 Q. Well, out of this app data folder?

10 A. The app data folder was hidden. I don't think he
11 saw it. And that's why it's still there. That's what
12 my thoughts are. App data is a hidden folder. And it
13 was hidden to Todd so Todd didn't see it. So when we do
14 our search all this stuff is there.

15 Q. I mean, I'm confused. I'm just going to go back
16 through it one more time.

17 A. Okay.

18 Q. The issue I'm having is, is you have thrown out a
19 statement, from my understanding, that information is
20 not on there that you would expect it to be; is that
21 correct?

22 A. I did make that statement.

23 Q. Okay. But you haven't done the appropriate steps
24 to definitively say if anything's been deleted or why it
25 wasn't there; is that right?

1 A. Well, you're saying -- I did not do a search of
2 deleted files on the laptop.

3 Q. Okay. And you can't say for certain or provide us
4 anything here right now saying my clients deleted
5 something at some point in time or didn't just make an
6 inadvertent, you know, copy in hidden folders. You
7 can't say anything there?

8 A. The thing that I go back to with that is I know
9 that there was a copy that lasted seven minutes. So
10 when you use -- if we're looking at a seven-minute copy
11 and we're using the term inadvertent, something doesn't
12 add up there. I mean, if you think you're copying four
13 files and, you know, thousands of files are copied, you
14 would think -- I would expect that somebody would be
15 aware of how many files -- you know, at least there's
16 more than four, you know.

17 Q. Seventeen hundred files is what you're saying;
18 right?

19 A. Well, in the app data folder on the H&H laptop
20 only, I just -- all I did was -- because we're told we
21 can do search terms and we're only supposed to look at
22 search terms. So all I did was take the properties of
23 app data and it was roughly seventeen hundred files just
24 in the app data folder on ---

25 Q. Seventeen hundred. So seventeen hundred hidden

1 files; is that right?

2 A. Uh-huh (affirmative).

3 Q. Okay. And those files -- let me understand
4 correctly. If my wife sends me an attachment to
5 something to my office. Let's say she's got some letter
6 she wants me to read or something. When I open it up,
7 it automatically saves a hidden file or some copy
8 somewhere on my computer; right?

9 A. It does.

10 Q. In app data?

11 A. Uh-huh (affirmative).

12 Q. Okay. So out of those documents that you have
13 searched, saying we've taken seventeen hundred files ---

14 A. Uh-huh (affirmative).

15 Q. --- you've come down to whatever you've thrown up
16 here today? Seven? Six files; is that right?

17 A. I presented -- I mean, I selected a few files.
18 Knox and I spoke and determined which files. You know,
19 we've got a jury here. Do we need to go through every
20 single file? It doesn't ---

21 Q. Well, I mean, that's a question for Knox to make,
22 but here's the question I've got. You've got these
23 files. You put six of them up here. I don't see one of
24 them that's ever been opened up by my clients. That's
25 pretty highly relevant, don't you think?

1 A. (No verbal response.)

2 Q. Let me ask you a different way. Or you can finish.

3 A. I mean, it's a factor.

4 Q. All right. Now, if you're sitting here being sued
5 for a trade secret, breach of fiduciary duty and all
6 these different claims and you were the one that was
7 having the issue in this case ---

8 A. Yeah.

9 Q. --- wouldn't that be a pretty significant factor
10 that you would look at?

11 A. Well, I can tell you that I worked for a firm and I
12 left that firm and I started my own business. When I
13 left, I didn't take a file. I didn't take a piece of
14 paper. I didn't take anything. So I would hope that I
15 wouldn't be in that situation.

16 Q. Well, if you were, wouldn't you want to have all
17 the information?

18 A. (No verbal response.)

19 Q. Okay. Now, about the flash drives, these flash
20 drives, portable media drive, when you take a flash
21 drive and put it on a computer -- let's say there was
22 information on there -- other information that's on a
23 flash drive, if you draw it over, gets onto another
24 computer; correct? I mean, there's hidden stuff that
25 gets on there; right?

1 A. I -- I'm ---

2 Q. Okay. Let's just say -- I'll go through it really
3 simple. If you take the flash drive -- there's
4 information. You're saying there's been a flash drive
5 that's been downloaded with app data files that were --
6 no one ever knew about; is that right? In this case?

7 A. I'm trying to follow what your question is, but ---

8 Q. What I'm trying to get at is, we've got testimony
9 in this case that McKinley Cooper employees took flash
10 drives home and used them on their computer. Used them
11 on their computer, put personal -- or excuse me -- put
12 company confidential information on their computers at
13 home; okay? When they do that, there's a copy still on
14 that computer; correct, if they opened it up?

15 A. If I have a USB drive and it's got a file on it and
16 I plug that USB drive into my home computer and I open
17 the file on that USB hard drive, there's certain
18 applications that will cache that file locally. And
19 certain applications won't. I mean, it just depends.
20 But I don't know -- I mean, what you're saying about the
21 McKinley Cooper employees, I wasn't aware of that
22 testimony. Was that said before I showed up yesterday
23 or ...

24 Q. It was part of the depositions I thought you
25 reviewed for your testimony today?

1 A. Okay. Yeah. I don't know.

2 Q. Ms. Loucks testified that she went home and used a
3 personal flash drive.

4 A. Okay.

5 Q. So if you use a personal flash drive of a document
6 on your home computer, then that document is going to
7 have -- there's a cache file, there's a temporary file,
8 whatever you want to call it, is saved on that computer;
9 right?

10 A. Yeah.

11 Q. Okay. At one point I think you had told me that
12 you were using some forensic software called OS
13 Forensics?

14 A. I don't know anything about that.

15 Q. Okay. So you haven't used any forensic software?

16 A. No. I'm not familiar with OS Forensics.

17 Q. And forensic software would be used like EnCase ---

18 A. Uh-huh (affirmative).

19 Q. --- would be used to help you -- actually, let me
20 just ask you this. What do you use EnCase for?

21 A. I have not used EnCase. I think your expert used
22 EnCase, so he'd probably be better qualified to answer
23 any questions about EnCase.

24 Q. I'm just trying to get some understanding of what
25 you believe forensic software can do in helping make a

1 determination in a forensic review of a computer?

2 A. Okay. Go ahead.

3 Q. That's the question. I'm trying to see what do you
4 understand it to be and how can it help you?

5 A. (No verbal response.)

6 THE COURT: If you know.

7 A. Depends on the software. You know, I've looked at
8 EnCase and some of the capabilities of EnCase, but I'm
9 not an expert in forensic software. So, you know, that
10 ...

11 THE COURT: All right. Let's move on, Mr.
12 Ariail.

13 MR. ARIAIL: Yes, Your Honor. I'm trying to
14 get to one.

15 Q. You have brought up these QBW user dot INI files;
16 is that correct?

17 A. Yeah.

18 Q. Okay. These documents, they were never opened or
19 utilized from my client's computer; correct?

20 A. Right. They're initialization files. This QBW
21 user INI file appears to have resided on a McKinley
22 Cooper computer. And you can see, -- you know, you have
23 some dates and times when files were saved and whatnot.
24 But this was -- this is an INI file from a McKinley
25 Cooper computer.

1 Q. I think, if I'm not mistaken, somewhere on there
2 it's for 2010; is that correct? A 2010 version?

3 A. Yeah. We've got two versions.

4 Q. We've got 2010 and 2011; right?

5 A. Yep.

6 Q. Okay. And you searched my client's computer and
7 you found out what version of QuickBooks they use;
8 correct?

9 A. I didn't look at the QuickBooks application on -- I
10 mean, we were searching -- the reason this came up was,
11 you know, we got a hit because there was City of
12 Laurens.

13 Q. All right this is a 2010 version -- 2011 version
14 and it doesn't work on 2012; correct?

15 A. What do you mean it doesn't work on 2012?

16 Q. I mean, you would have to have the 2012 version to
17 be able to operate or utilize the 2012 version. You
18 can't use this on 2012; can you? Do you know anything
19 about QuickBooks?

20 A. I know a lot about QuickBooks.

21 Q. Okay. But this is a 2010 and 2011 version; right?

22 A. Correct.

23 Q. And my clients had 2012 on their computer; did you
24 know that?

25 A. I didn't. I didn't examine -- I mean, understand,

1 we got mirrored hard drives. They're not operating
2 computers. It's just a mirrored hard drive. So we
3 specifically just did searches on the search terms on
4 those drives. So we weren't trying to look at what
5 applications are installed and all that.

6 Q. And I want to make sure of one point that I think
7 that, that I think is relevant here. At no point are
8 you saying that my clients copied any documents, MCC
9 documents, off of the server, the main server for MCC;
10 is that correct?

11 A. Yeah. I'm not -- I haven't made that statement at
12 all.

13 Q. I'm going to try to go through these relatively
14 quickly.

15 A. Okay.

16 Q. These files -- this was never opened up; was it?

17 A. Correct.

18 Q. Okay. Part of the app data, but never opened up;
19 right?

20 A. Yeah. It was in a hidden folder and never opened
21 up.

22 Q. The last time it was shown to be utilized was July
23 1st, 2011 when they were back at MCC; correct?

24 A. Yep.

25 Q. Part of an email; correct?

1 A. This was -- it appears to be an attachment Excel,
2 Excel xls attachment that was within email, yeah.

3 Q. So this would either be attached to an email being
4 received or sent out from McKinley Cooper?

5 A. Correct.

6 Q. Have you talked to anybody at McKinley Cooper as to
7 whether or not they send out bank confirmations by email
8 to the client?

9 A. I haven't talked to anybody at McKinley Cooper
10 about their protocols.

11 Q. Okay. Can you tell me on this document, just help
12 me out; do you know if that's been received or if it's
13 sent? Anyway to determine that out of this?

14 A. I didn't -- from what I see, I don't know whether
15 it was inbound or outbound.

16 Q. Okay. Same with this one, I believe; never opened
17 up?

18 A. Uh-huh (affirmative).

19 Q. Came on the app data folder?

20 A. Correct.

21 Q. Never used?

22 A. It was in a hidden folder.

23 Q. But never used and never opened, accessed? Right
24 here July 1st is the last time it was created at
25 McKinley Cooper?

1 A. Yep.

2 Q. Through an email again; right?

3 A. Yes.

4 Q. This one shows saved by Shane at this time. It
5 shows one second that it's been open. I mean, there's
6 no way you can use it and then ---

7 A. Yeah. This one was used.

8 Q. So he used it for a second?

9 A. No, I mean, he -- flip to the next one. His logo's
10 on here and everything.

11 Q. Well, I'm just asking you. I'm not worried about
12 the document in regards to it. But, what -- I mean, can
13 you put that together in a second?

14 A. Well, I doubt it.

15 Q. Okay. This one right here, same thing in regards
16 to -- it's another confirmation; is that correct?

17 A. Uh-huh (affirmative).

18 Q. That's been opened, McKinley Cooper. You don't
19 know if he got this from the client? You don't know how
20 this was originated? You don't know where it came from?

21 A. What I do know about this file is it's similar to
22 the previous two with the content created, the author
23 and, you know, the template itself is the same.

24 Q. Right. But, I mean, the question I'm asking is the
25 client could have given this to him. I mean, we just

1 they were either being emailed out -- you saw the
2 previous confirmation. These confirmation are being
3 emailed. So if the client emails that to them, they get
4 it through a legitimate means ---

5 A. Uh-huh (affirmative).

6 Q. --- then that's relevant, highly relevant, isn't
7 it? Because that shows they got it through a legal
8 legitimate means?

9 A. You know, the reason we have this is the author is
10 McKinley Cooper & Company and it was interesting that it
11 matched -- you know, how it matched to the other files.

12 Q. Right. And that's a good point. I don't know if
13 I've gotten into it. McKinley Cooper could have been --
14 when it's authored, that was where it was authored, at
15 McKinley Cooper; okay. Is that right?

16 A. The McKinley Cooper & Company, LLP was written on
17 this file by Excel on a McKinley Cooper computer.

18 Q. Correct. But you don't know the individual that
19 did it. It could have been Todd, it could have been
20 Shane when they were working on the Center for Community
21 Services at McKinley Cooper if that was one of the
22 clients they worked for; right?

23 A. Yeah.

24 Q. Okay. Then what I'm saying is, the document is
25 made at McKinley Cooper. They email it, because they're

1 working on the client, just like they previously showed
2 you they were emailing these out?

3 A. Uh-huh (affirmative).

4 Q. The client, they go out, the client hires them and
5 says, hey, here's a bank confirmation. We're going to
6 send it to you or come over and get our files and put
7 them on a flash drive.

8 A. Right.

9 Q. They could get it that way; correct?

10 A. They could get it that way or from the discarded
11 USB drive that could have had it on there.

12 Q. So right now ---

13 A. We don't know. I didn't say this file came from
14 that discarded USB drive, but it could have.

15 Q. Well, when we ask the jury to make a decision at
16 the end of the day about these documents, you don't know
17 where that document came from?

18 A. This document, yes. It came from McKinley Cooper.

19 Q. But you don't know if that was sent to another
20 third party that they got it from legitimately because
21 they're doing work for them; correct?

22 A. I don't know that.

23 Q. Okay. Same thing with this form here, too;
24 correct? You don't know where this came from? It could
25 have gone to a third party and come to them; correct?

1 A. I know it came from McKinley Cooper & Company. The
2 author is McKinley Cooper on this.

3 Q. But I'm an author of a lot of documents that if I
4 send to you and they're on your computer, I can't say,
5 well, hey you took them, you stole them from me, if I
6 sent them to you; right?

7 A. Right. If I -- yeah, if you send me a file that's
8 -- yeah. There's -- if you take a file, you take it.
9 If it's given to you, it's given to you. There's
10 certainly a difference there.

11 Q. And that's an important point in this case. Thank
12 you. Right here. What's interesting about this one is,
13 this is Rhonda Cox. Do you know who Rhonda is?

14 A. I think she's probably an employee for SRH. I do
15 not know Rhonda Cox.

16 Q. Okay. So you think she's an employee for SRH. How
17 do you know that?

18 A. I mean, I know she's not an employee at McKinley
19 Cooper.

20 Q. Okay.

21 A. So for that name to show up, it had to be on a, you
22 know, to me -- and I might have been told that. I don't
23 know.

24 Q. Okay. Same thing with this Girl Scouts
25 documentation. It was last written -- you don't have an

1 author. Don't know who author that?

2 A. Well, it's a PDF. This is a PDF, so the machine --
3 this was scanned in. And that scanner doesn't put an
4 author on the metadata. So that's not surprising that
5 there's no author.

6 Q. Bear with me one second. I mean, you never have
7 produced a report in this case or any documentation to
8 me about your findings; right?

9 A. What I've provided was the files. You know, the
10 files and then Knox determined which files he wanted to
11 use and submitted those, you know, so ... I mean, I
12 gave copies of the physical files.

13 Q. All right. No report?

14 A. I didn't provide you with a report, no.

15 Q. Did you provide him with one?

16 A. Uh-uh (negative).

17 Q. Bear with me one second.

18 MR. ARIAIL: Your Honor, I have no further
19 questions.

20 THE COURT: Any redirect?

21 MR. HAYNSWORTH: Ever so briefly, Your Honor.

22 **REDIRECT EXAMINATION**

23 **BY MR. HAYNSWORTH:**

24 Q. Mr. Hemond, do you think in your hundred pages of
25 deposition that Mr. Ariail took he thoroughly covered

1 with you the opinions that you would have put in a
2 report if I'd ask you to generate a report?

3 A. Yeah. I mean, I think it was a thorough -- you
4 know, when I look at this, it was August 22nd of this
5 year and eight fifty-six a.m. to twelve fifty p.m. and
6 we were full-on, talking back and forth that whole time.
7 I think that day we covered every question he had.

8 Q. All right. Mr. Ariail just made a big deal about
9 well, this document's in Outlook so it could have been
10 either an inbound or an outbound email attachment.

11 A. Uh-huh (affirmative).

12 Q. And you said, well you hadn't undertaken it and you
13 couldn't look at the screen and tell whether it was
14 outbound or inbound. What's your understanding of what
15 Todd Highsmith did with the emails on their MCC
16 computers before they left?

17 MR. ARIAIL: Objection, Your Honor. I didn't
18 go into that.

19 THE COURT: What's your objection?

20 MR. ARIAIL: I didn't go into that in my cross
21 about anything like that.

22 THE COURT: Yeah. I think you did. Go ahead.
23 Overruled.

24 A. It's my understanding that there was information
25 deleted off of the McKinley Cooper laptop prior to Todd

1 leaving McKinley Cooper. That included emails.

2 Q. And you read Todd's sworn deposition testimony and
3 that's what he said; correct?

4 A. Correct.

5 Q. Okay. So when Mr. Ariail asked you, well, you have
6 no evidence that my clients have deleted anything,
7 you've actually seen the sworn testimony of Todd
8 Highsmith that he did do it; correct?

9 A. Yes. I mean, we're talking about him admitting
10 deleting stuff off the McKinley Cooper laptop. He
11 hasn't -- I haven't read anything that he said he
12 deleted stuff off his H&H laptop.

13 Q. Right. But we know he's deleted stuff off a
14 laptop. No doubt about that?

15 A. Yeah. I mean, there was -- it's my understanding
16 that there was information deleted off the McKinley
17 Cooper laptop.

18 Q. All right. Thank you, sir. I have no further
19 questions.

20 MR. ARIAIL: May I ask one question just to
21 follow up.

22 THE COURT: Yes, sir, Mr. Ariail.

23 **RE CROSS EXAMINATION**

24 **BY MR. ARIAIL:**

25 Q. You can go back and recreate deleted emails;

1 correct?

2 A. I have not done -- I mean, yes, you can.

3 MR. ARIAIL: No further questions, Your Honor.

4 THE COURT: Thank you. You can step down.

5 THE WITNESS: All right.

6 (WHEREUPON, Court's Exhibit Number 2 was marked for
7 identification.)

8 MR. HAYNSWORTH: Your Honor, the next witness
9 is out in the hall. I'll run get her.

10 THE COURT: All right. Ladies and gentlemen,
11 your lunch will be here, I think, about twelve thirty;
12 okay?

13 THE COURT: All right.

14 MR. HAYNSWORTH: May this witness be excused,
15 Your Honor?

16 THE COURT: Any objection?

17 MR. ARIAIL: No objection.

18 THE COURT: All right. Mr. Haynsworth.

19 MR. HAYNSWORTH: Yes, Your Honor. At this
20 time I'd call Ms. Sherry Nestor.

21 THE CLERK: If you'll go to the end of the
22 bench there, please. Place your left hand on the bible
23 and raise your right hand.

24 You do solemnly swear or affirm to tell the truth,
25 the whole truth and nothing but the truth, so help you

1 God?

2 THE WITNESS: Yes, I do.

3 THE CLERK: Thank you. Please be seated.

4 Would you please state your name for the record?

5 THE WITNESS: Sherry Nestor.

6 THE CLERK: Thank you.

7 **SHERRY NESTOR,**

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

9 **DIRECT EXAMINATION**

10 **BY MR. HAYNSWORTH:**

11 Q. Good morning, Ms. Nestor?

12 A. Good morning.

13 Q. And I will mispronounce it. Could you tell us for
14 whom you work?

15 A. Montmorenci-Coughton Water and Sewer District.

16 Q. All right. I may just call it the water and sewer
17 district.

18 A. Okay.

19 Q. That way I don't mispronounce it. Who does the
20 audit work for your organization?

21 A. McKinley Cooper.

22 Q. Okay. About how long has McKinley Cooper been
23 doing your audit work?

24 A. Better than fifteen years.

25 Q. Well, let me ask you this. Are you guys, your

1 organization, a member of the S.C. Rural -- or excuse
2 me. I'm messing this up. Is your water system a member
3 of the South Carolina Rural Water Association?

4 A. Yes, sir.

5 Q. Okay. To your knowledge does the National Rural
6 Water Association have some sort of requirement for
7 Water Associations like ---

8 MR. ARIAIL: Objection, Your Honor.

9 THE COURT: Hold on. Hold on.

10 MR. ARIAIL: He's pretty much testifying. And
11 I don't think it's -- also, I don't ---

12 THE COURT: Well, what is your question?

13 MR. HAYNSWORTH: I think my question's going
14 to be, Your Honor, does the National Rural Water
15 Association have a requirement that the regional water
16 associations have to rotate their auditors ever so
17 often.

18 THE COURT: If she knows. That's not leading?

19 A. No, sir, not to my knowledge.

20 Q. Okay. I want to take you back to the time frame at
21 the end of 2011.

22 A. Okay.

23 Q. Did you receive a call from Shane Highsmith?

24 A. Yes, sir.

25 Q. Can you tell the ladies and gentlemen of the jury,

1 as best you recall, the substance of that conversation,
2 what Mr. Highsmith said to you specifically?

3 A. He called and let me know that he was starting his
4 own business, his own practice as a CPA, and if there
5 was any possibility that I could take a bid to take to
6 my board as far as, you know, going with his company.

7 Q. Did he indicate to you in that conversation
8 anything about what he could charge and why?

9 A. Yes, he did. He said that just starting out and
10 everything, that he knew what our charges were. And
11 that he had been doing our taxes for several years. And
12 that he could, you know, he could give us a better price
13 and he would like for me to take that to my board.

14 Q. Okay. So he indicate to you in that conversation
15 that he was aware of what McKinley Cooper had charged
16 you for the prior audit?

17 A. Yes, sir.

18 Q. All right. Thank you, ma'am. That's all the
19 questions I have.

20 THE COURT: Okay. Any questions, Mr. Ariail?

21 MR. ARIAIL: Yes, Your Honor. Just a few.

22 **CROSS-EXAMINATION**

23 **BY MR. ARIAIL:**

24 Q. Ms. Nestor, Shane and Todd worked on your audits;
25 is that correct?

1 A. I don't know Todd at all.

2 Q. Okay. So Shane?

3 A. Yes.

4 Q. But Todd's the one that called you or ---

5 A. No, Shane.

6 Q. Shane did, okay. And Shane, how long had he been
7 doing your audits for you?

8 A. As a team -- I just looked at them as a team so I
9 really don't know, you know. It wasn't to me, in
10 particular, just him.

11 Q. Okay. And he just -- is your information, from my
12 understanding is that -- are you a public or non-profit?

13 A. We are a non-profit.

14 Q. Okay. And your information -- your auditing
15 information is posted on Guidestar; is that right? Do
16 you know what Guidestar is?

17 A. No, sir.

18 Q. Are your financial documents available to the
19 public?

20 A. Yes. If they come into our office we would give
21 them an audit report.

22 Q. And the information -- had you discussed what you
23 had previously paid McKinley and Cooper with Shane at
24 any time?

25 A. No, sir.

1 Q. Would that be a part of the audit that he does
2 every year, basically determine what y'all had
3 previously paid? Wouldn't he put that as a
4 classification?

5 A. From the previous year, right. It would be in the
6 books, yes.

7 Q. So he would know that because he was having to do
8 the audit; is that correct?

9 A. Yes. That would be an invoice that would be in
10 amongst the papers that they would be looking at.

11 Q. Right. And as a non-profit, you're allowed to go
12 out for bids or ask for bids; correct?

13 A. Yes.

14 Q. Okay. And you can choose who you want to use as
15 your auditor?

16 A. Yes, sir.

17 Q. Okay. Thank you.

18 MR. ARIAIL: I have no further questions, Your
19 Honor.

20 THE COURT: Thank you.

21 MR. HAYNSWORTH: No redirect, Your Honor.

22 THE COURT: You can step down.

23 MR. HAYNSWORTH: May this witness be excused
24 or non-sequestered, as it were?

25 MR. ARIAIL: All right. She's excused.

1 THE COURT: She's excused. Thank you so much.

2 MR. HAYNSWORTH: Your Honor, Dr. Alford is
3 going to be my next witness. I know we discussed lunch
4 issues.

5 THE COURT: Is he here?

6 MR. HAYNSWORTH: Yes, sir. He's right here.

7 THE COURT: Well, for the convenience of the
8 jury, let's go ahead until twelve thirty and then we'll
9 recess and then pick back up; okay?

10 MR. HAYNSWORTH: All right. Your Honor, at
11 this time Plaintiff calls Dr. Charles Alford.

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

14 You do solemnly swear or affirm to tell the truth,
15 the whole truth and nothing but the truth, so help you
16 God?

17 THE WITNESS: Yes, ma'am.

18 THE CLERK: Thank you. Please be seated.

19 MR. HAYNSWORTH: May we approach, Your Honor?

20 (WHEREUPON, a bench conference was held off the
21 record.)

22 THE CLERK: All right, sir. Would you please
23 state your name for the record?

24 THE WITNESS: Charles Alford.

25 THE CLERK: Thank you.

1

CHARLES ALFORD,

2

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

3

DIRECT EXAMINATION

4

BY MR. HAYNSWORTH:

5

Q. Good afternoon, Dr. Alford.

6

A. Hello.

7

Q. Could you review for us your educational
8 background?

9

A. Yeah. Greenville County Schools; Bachelor of Arts,
10 Economics, Wofford College; Ph.D. Economics and
11 Business, University of Alabama.

12

Q. All right. What is your current occupation?

13

A. I have a consulting practice where I deal primarily
14 with business appraisal and litigation issues regarding
15 economics and financial matters. I retired from Furman
16 University in 2003. I was on the faculty in the
17 Department of Economics and Business for thirty-two
18 years there.

19

Q. Have you ever been qualified as an expert witness
20 in any court?

21

A. Yes.

22

Q. Do you recall roughly how many times you've been
23 qualified as an expert witness?

24

A. I've been doing this for over forty years; a couple
25 hundred times, I guess.

1 MR. HAYNSWORTH: And, Your Honor, at this
2 time, I offer Dr. Alford as an expert in economic
3 analysis.

4 THE COURT: Any voir dire?

5 MR. ARIAIL: No.

6 THE COURT: He's qualified.

7 Q. All right. Dr. Alford, you were retained by me and
8 McKinley and Cooper to assist us with some aspects of
9 this case; were you not?

10 A. Yes, sir.

11 Q. Okay. Could you briefly review for the jury what
12 information you analyzed and what conclusions you
13 reached from analyzing that information?

14 A. Sure. What I do in cases like this is to deal just
15 with the issue of damages. Where what you have to deal
16 with is the issue of liability and then the issue of
17 damages, I have no opinion about liability. I have no
18 opinion about whether they took things or whether they
19 took things rightfully or wrongfully. All I'm telling
20 you is that there's a way of considering the damages
21 that have result to McKinley Cooper. I looked at
22 certain elements of those damages. There's some
23 elements of damage that I know they assert with regard
24 to some proprietary documents and things like that. But
25 I only dealt with some very narrowly defined measures of

1 damage. To give you sort of an idea -- again, this is
2 not rocket science, okay? This is not nearly as
3 complicated as computers actually. So I think it's easy
4 to understand conceptually what do you have to think
5 about? You know, if you had an investment portfolio,
6 and if for some reason I took a portion of that
7 portfolio, two or three or four years ago and so you
8 didn't have the use of it, and then at some point in
9 time you want to be made whole for that. Well, there
10 are two ways -- two things that have to happen for you
11 to be made whole. First, you have to recover the income
12 that that portfolio would have generated to you from the
13 time that I took a portion of it until the present.
14 Secondly, you have to be compensated for the value of
15 that lost portfolio going forward. And that's really
16 what I've done in this case. It's pretty simple. I
17 looked at the accounts, two types of accounts, auditing
18 accounts and tax accounts, that McKinley Cooper lost,
19 and that according to McKinley Cooper management, they
20 lost to the defendants. And I looked to see what income
21 those were generating, what revenues they had generated
22 in the past. And I looked at the most recent billing
23 prior to their losing that account. And I assumed that
24 if they had not lost the account, they would have
25 continued with that revenue all the way up until today.

1 And, of course, most of those are just once a year
2 because they're annual audits or they're annual tax
3 preparations. So for some of them, it would have been
4 twice. For some of them, it would have been three
5 times. That's revenues. But McKinley Cooper, like any
6 business, has to incur certain expenses in order to
7 generate those revenues. You know, you have to hire
8 people to send out to do the audits. You've got to hire
9 people to prepare the tax returns. You're going to have
10 some office expenses that you wouldn't have if you
11 weren't doing that work. So there's a certain amount of
12 expense that they incur just like any business would
13 incur. So what I did was to look at their tax returns
14 and I determined what portion of their expenses were
15 variable. That is, what portion of their expenses would
16 vary with revenues? Their payroll would. Their rent,
17 for example, would not. You know, they rent an office
18 out here off 385, an office suite. And if they lose a
19 client, they still have to pay that rent. If they get a
20 client, their rent's not going to go up, so that's not
21 variable. But if they lose a client, they don't have to
22 pay quite as much for somebody to go do an audit. Or if
23 they gain clients, they're going to have to hire more
24 people to do audits. So I considered the variable
25 expenses. And those variable expenses were about -- I

1 can give you the precise number. But they were about
2 half of the revenues looking at the most recent tax
3 returns. So I looked at their lost revenues from the
4 time that this event happened until, really until today.
5 For those clients that were lost and according to
6 McKinley Cooper management were lost to the defendants,
7 I reduced those revenues by the expenses that they would
8 have incurred if they had kept those clients -- but, of
9 course, they have kept their clients so they have not
10 incurred those expenses -- to arrive at lost profits. I
11 did it for audit clients, and there were -- I forget the
12 exact number -- fifteen or twenty audit clients. I've
13 got a list of them here. But I did it for audit
14 clients. If I looked at the most recent billing to
15 those audit clients before we lost them, South Carolina
16 Rural Water Association, United Ministries, Center for
17 Community Services, and there's a whole list of them,
18 and if I said, okay, if they had not lost they would
19 have billed at the same rate. They would not have
20 increased their billing. They would have been billed at
21 the same rate once a year doing an audit, you know. For
22 example, with South Carolina Rural Water Association the
23 last time they billed them, they billed them four
24 thousand dollars. I assumed they would bill them four
25 thousand dollars a year. And there would have been

1 three subsequent billings for them. Greer Relief,
2 thirty-eight hundred. United Way of Laurens, four
3 thousand. And there are others. So I assumed those
4 billings would stay the same. Those total billings lost
5 between the event of the defendants leaving and today
6 would have been, in audit clients, just a shade under
7 two hundred and forty-six thousand dollars, two forty-
8 five nine twenty-nine, but about half of that would have
9 been expenses that they no longer have had. So the lost
10 profit from those audit clients to date is a hundred and
11 twenty-eight thousand six hundred and thirty-three
12 dollars. I did the same thing for tax clients. And as
13 you would readily imagine, there is a whole lot more tax
14 clients. I looked again at the tax clients that they
15 lost. And that according to McKinley Cooper went with
16 the defendants' firm. A lot more tax clients, but not a
17 lot -- you know, doing a tax return for an individual is
18 not like doing an audit. Total lost revenue seventy
19 thousand one hundred and four dollars. Lost profit
20 thirty-six thousand six hundred sixty-eight dollars.
21 That is the lost profit to date. And that's the damage
22 that they've incurred. Now, again, you know, it's not
23 up to me to decide whether the defendants are
24 responsible for that. But that's how they've been
25 damaged to date in terms of lost profit; a hundred and

1 twenty-eight thousand for audit clients, thirty-six
2 thousand for clients. That's a total of a hundred and
3 sixty-five thousand three hundred and one dollars. That
4 gets you to today. That's the same as me saying, okay,
5 if I had taken a portion of your portfolio, which
6 accounting firms call book of business, if I had taken a
7 portion of it, here's how much you would have lost until
8 today. The next thing I had to do is to figure out,
9 since you don't have that portfolio going forward,
10 what's it worth? You know, what are you losing in terms
11 of future dollars? Well, in accounting firms with a lot
12 of personal service professional firms, it's readily
13 measured in terms of a multiple of revenues. Accounting
14 firms are typically sold as a multiple of what they call
15 trailing revenues. That is your revenues for the last
16 twelve months. And a common multiple is one. And when
17 I first heard -- when Mr. Haynsworth called me about the
18 case and we talked about it, I said, that is probably
19 the way that I would look at it. Well, after I met with
20 the management at the firm, turns out they have, in
21 fact, sold to two individuals. One is a daughter, but
22 nevertheless, they've sold to two individuals at that
23 exact multiple, twenty-five percent ownership each,
24 based on one times the trailing revenues. And I checked
25 it against the buy-sell agreement. And I checked it

1 against the tax return, so I know that's how they did
2 it. So they have sold ownership in the company at that.
3 So we have really a good way of measuring the value of
4 the company. The value of its future profits is how you
5 would value the company. That means that in order to
6 deal with assessing the value of the business that has
7 been lost, we really look at what we would call the
8 diminution in value. You know, how much has the value
9 of this accounting firm been reduced by losing that
10 portion of its book of business. So if you take all
11 those audit accounts and if you take those tax accounts,
12 but you only look at one year's revenue, because that's
13 the way they're valued, trailing twelve months, one
14 year. You look at one year's revenues for these audit
15 clients, it's ninety-two thousand dollars. You look at
16 one year's revenue for these tax clients, it's twenty-
17 four thousand seven hundred dollars. Those totaled a
18 hundred and sixteen thousand seven hundred sixty-six
19 dollars. So if you take both of those two elements,
20 then you've captured the lost income up until now. And
21 you've captured what is really the present value of
22 future lost income, which is measured as diminution in
23 the value of that practice. I also computed pre-trial
24 interest because, you know, that's an issue for the
25 lawyers to argue. But if pre-trial interest is applied,

1 there's a statutory rate based on South Carolina law.
2 Pre-trial interest obviously wouldn't be applied to the
3 diminution in present day value of the practice, but it
4 would be applied to the lost profits. And that total
5 pre-trial interest is nineteen thousand eight hundred
6 and ninety-six dollars. So through all of that, and
7 through that long-winded explanation, I come down to
8 three hundred and one thousand nine hundred and sixty-
9 three dollars. That is how I measure what it would take
10 to put the plaintiff in the position it would have been
11 in not having lost those accounts. So, you know, it's
12 really pretty straightforward. Now, there's some issues
13 that you will want to recognize and I have to recognize.
14 And we can't completely deal with them. I mean, one of
15 the things -- and I'm sure Mr. Ariail is going to ask me
16 this and he should -- you know, how do you know they
17 would have kept this business? Well, we don't know
18 that. And what I can't do in my role in these kinds of
19 things, I can't go to clients because that disrupts
20 everybody. And so I can't go to a client and say, are
21 you sure you would have stayed there? The offset to
22 that is, historically, they keep clients for a long
23 period of time. There's not a lot of turnover in their
24 clients. Secondly, we're not -- it's not as if they
25 lost these clients twenty years ago. You know, they

1 just lost them a couple of years ago. So there's not a
2 lot of what someone would like to call speculation
3 there. Secondly, with regard to the book of business,
4 you don't assume -- when you buy an accounting firm at
5 one times trailing revenue, that is based on an
6 assumption that there will be some normal attrition of
7 the clients. You're not going to -- if you're buying an
8 accounting firm, you're not going to keep all the
9 clients. I mean, there's some attrition there. So that
10 multiple reflects that already. But certainly, I think
11 that's a question that, you know, you have to think
12 through.

13 Q. As part of your analysis in speaking of this book
14 of business, were you provided with information
15 regarding commissions that were paid for tax clients
16 that were brought into the firm?

17 A. Yes, sir.

18 Q. Okay. And did you glean or did you form any
19 opinions given the commission rate paid to Todd
20 Highsmith versus the normal fifteen percent commission,
21 anything about the book of business for the tax clients?

22 A. Yeah. Well, I didn't form an opinion necessarily.
23 I mean, I got some information. That is that the way
24 McKinley Cooper typically deals with this, you know,
25 you've got a staff accountant and he says my brother-in-

1 law needs his tax return done. I can bring it in here.
2 They pay him a fifteen percent commission for the first
3 year, which is nice and which is sort of expected. They
4 brought them some business. They don't pay them
5 commission every year. But to bring that little
6 additional amount of book of business in, they
7 compensate the employee for doing it. And in Mr.
8 Highsmith's case, they paid him thirty percent as
9 opposed to fifteen percent. Now, I know there's some
10 dispute between the parties as to whether that thirty
11 percent should have been ongoing or not. And you know,
12 I don't offer opinions as to what should be. I can tell
13 you it doesn't make economic sense for them to pay a
14 thirty percent commission when your incremental profit
15 margin is only fifty percent. You can't pay a thirty
16 percent commission year in and year out for business
17 like that.

18 Q. And the thirty percent for Todd for year one being
19 higher than a normal fifteen percent commission, did you
20 reach any conclusions or did you factor in anything
21 relative to that thirty percent as far as retention of
22 those accounts that were brought in and on which that
23 commission was paid?

24 A. Well, again, the only way that makes economic sense
25 at all -- and this isn't, you know, this is not rocket

1 science. You can figure it out yourself. The only way
2 it makes sense for me to pay thirty percent, which is
3 sixty percent of my profit, of my incremental profit
4 before I deal with overhead, the only way for me to do
5 that is if I expect to keep that business. I can't do
6 it and say, okay, I'll pay you, you know, the lion's
7 share of my margin on this account, and then if you want
8 to walk away with it a year later, take it. You know,
9 you can't run a business like that.

10 Q. Dr. Alford, let me show you a document real quick
11 and see if you can identify it for us.

12 A. Yes, sir. That's the report I submitted to you in
13 November.

14 Q. All right.

15 MR. HAYNSWORTH: Your Honor, I'd ask that Dr.
16 Alford's preliminary expert report be entered into
17 evidence.

18 THE COURT: Any objection?

19 MR. ARIAIL: No objection, Your Honor.

20 THE COURT: Without objection.

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

23 Q. Dr. Alford, thank you very much. Please answer any
24 questions Mr. Ariail may have?

25 A. Sure.

1 THE COURT: Mr. Ariail.

2 MR. ARIAIL: Your Honor, may it please the
3 Court?

4 CROSS-EXAMINATION

5 BY MR. ARIAIL:

6 Q. Dr. Alford, how you doing today?

7 A. Fine. How you, Mr. Ariail?

8 Q. I'm doing great. I think you're probably the first
9 guy I've seen who can do a direct and cross in his
10 statement with Mr. Haynsworth. I think you've answered
11 some of my questions. I want to go back through, just
12 to get an understanding of how you got your information
13 in this case first. The information you were provided
14 was from Ms. McKinley; correct?

15 A. Exactly, yes.

16 Q. So the information regarding clients and their
17 amounts, she gave you that information and told you,
18 well these are the normal length of my contracts. How
19 did you get to your years on this. I guess you went ---

20 A. Yeah. That's exactly right. I mean, the
21 information with regard to the clients that were lost
22 and the billing history on the clients and the dates of
23 the bills, all came from McKinley Cooper. I did not --
24 you know, I did not go back and review billing
25 documentation or supporting documentation and explain to

1 her when she provided it to me, it's going to have to be
2 up to her to convince the jury that that's real stuff.

3 Q. Right. And you haven't been sitting here during
4 this trial; correct?

5 A. No, I came this morning at ten o'clock.

6 Q. Okay. Does it surprise you that she didn't put up
7 any of these numbers or any of this information before
8 you got here today?

9 A. I've been doing this longer than you've been living
10 and not much surprises me, you know.

11 Q. Bad question for you. Okay.

12 A. Yeah.

13 Q. Well, in your expertise and doing this for as long
14 as you have, do you think that it's relevant for the
15 jury to see or to hear those individuals testify as to,
16 hey, we were going to continue on. We were going to
17 stay with you. Any of that information?

18 A. I think this is what's relevant. I think it's
19 relevant for the jury to decide, based on whatever
20 information it wants to consider, whether McKinley
21 Cooper would have continued with these clients, whether
22 maybe some adjustments should be made. Maybe they could
23 have gotten additional clients. You know, the jury has
24 a huge amount of leeway in terms of what it can decide
25 and how much, if any, of my testimony it wants to rely

1 on.

2 Q. All right. And I think you went right into what I
3 was kind of saying. In this case if a client says, we
4 no longer want to go or use McKinley Cooper, we want to
5 transfer over to Highsmith & Highsmith, then that would
6 remove that element of damage?

7 A. Well, not exactly. You asked me that in
8 deposition, remember.

9 Q. Right?

10 A. And what I said was, typical answer, it depends.
11 But it depends on whether the defendants had the right
12 to leave and take the client with them. And that's
13 something that I can't decide. That's something y'all
14 have to decide. If defendants had the right to do that,
15 and if a client says, you know, I wanted to go with
16 Highsmith & Highsmith, then that's fine. I mean,
17 obviously all of them did want to go with Highsmith &
18 Highsmith because all of them did go. And nobody held a
19 gun to their head to transfer their account from
20 McKinley Cooper to Highsmith & Highsmith. So, you know,
21 I think it depends again on whether what the defendants
22 did is judged to have been okay.

23 Q. All right. And that is a decision, I think you
24 said you spoke -- in regards to damages, it's the jury's
25 decision in regards to liability if there was causation

1 or those damages were caused but for their -- what they
2 did. That's a decision for the jury to make; is that
3 correct?

4 A. Almost. Almost. The causation is, in this case,
5 pretty clear. I mean, there is -- clearly their leaving
6 caused these damages. The question is whether it was
7 okay for them to leave and take these clients. And
8 that's a question I don't deal with.

9 Q. Okay. And if the jury finds that it is okay for
10 them to leave, they didn't do anything inappropriate,
11 and they got the clients, then we wouldn't have any
12 damages; correct?

13 A. That's right. That's what I said to start with.
14 You deal with liability first. Then you deal with
15 damages.

16 Q. Thank you. I think we got you out of here for
17 lunch.

18 MR. HAYNSWORTH: No further questions, Your
19 Honor.

20 THE COURT: You can step down. And can he be
21 excused?

22 MR. HAYNSWORTH: Yes, sir.

23 THE COURT: Thank you, sir. All right.

24 Ladies and gentlemen, we'll break at this time for lunch
25 and we'll pick back up after lunch. Thank you. Take

1 the jury out, please.

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

4 THE COURT: All right. Be back at one thirty.
5 Will that give you enough time to get a sandwich? All
6 right. One hour.

7 MR. ARIAIL: Your Honor, just for scheduling
8 purposes for my case, I don't know ---

9 MR. HAYNSWORTH: I'm finished. When they -- I
10 should have done it just then.

11 THE COURT: All right. You can rest in front
12 of the jury when we start back.

13 MR. ARIAIL: I'll start getting my guys coming
14 and we'll go from there.

15 THE COURT: Yeah.

16 MR. ARIAIL: Thank you, Your Honor.

17 THE COURT: All right. Do you still have any
18 idea about how long it's going to take to do your case,
19 in view of the stipulation?

20 MR. ARIAIL: Well, that's a question and if we
21 can stipulate on some -- I think I need as many of the
22 audit clients as I can. The tax clients are going to be
23 ---

24 MR. HAYNSWORTH: I'll stipulate that every one
25 of those audit clients had the right to leave McKinley

1 Cooper if you'll stipulate that as to every one of those
2 audit clients that left that Highsmith underbid McKinley
3 Cooper?

4 MR. ARIAIL: No.

5 THE COURT: Well, I thought yesterday we
6 agreed that he would call a certain number and then that
7 you would concede that the balance of the list would say
8 the same thing.

9 MR. HAYNSWORTH: Well, and I guess that's my
10 point. Did McKinley Cooper underbid you and that's --
11 or excuse me. Did Highsmith & Highsmith underbid you
12 for the 2012 audit? Yes. Is that why you left, because
13 they were the low bidder? Yes. I'm assuming all of
14 those people are going to say essentially that same
15 thing.

16 MR. ARIAIL: Well, I can tell you one thing
17 that they're going to say is they never asked her to
18 bid. So I think that's highly relevant and I've got to
19 bring those in. Tax clients are a whole different deal.
20 And I'm fine with doing a stipulation in regards to
21 those because they're all friends and family. He'll
22 acknowledge that, I believe. And they're all going to
23 say the same thing, that they didn't have a contract
24 with her. They could go where they wanted to. And I'm
25 going to have three or four of those testify today.

1 THE COURT: All right. Do this for me. If
2 you can during the lunch period see if y'all can get
3 together and agree on how many to call and how many you
4 concede would say the same thing.

5 MR. HAYNSWORTH: And I guess Mills will have
6 to tell me. Well, we never had her bid. If they
7 snagged a client that used to be hers and she didn't bid
8 on it at all, that may be a different universe than what
9 I thought were the brunt of them. And I'm not sure ---

10 MR. ARIAIL: She's only sent six proposals out
11 of sixteen clients. I mean, out of the audit clients.
12 We know that. She's admitted that. And so if she's
13 only got those six clients then the question is why --
14 what did those six clients -- if you'll stipulate the
15 other ten we have a legitimate reason that there are no
16 damages for those because she never bid on them.

17 MR. HAYNSWORTH: But if she charged eight
18 grand last year and your folks go and bid four grand for
19 this year, they've undercut our price, whether it's out
20 for bid at the same time. I mean, the whole point is we
21 contend y'all took all our stuff, including the list of
22 our customers and what we charged and you used that
23 knowledge to underbid us.

24 MR. ARIAIL: Well, there's two different
25 theories. I mean, what I'm getting at is, is she

1 doesn't have any damages for those clients because they
2 never ask her to continue the business. So they had the
3 free choice to go out -- I'm going to call them to the
4 stand and say y'all can bid whoever you wanted to. They
5 didn't ask her to do it basically because they didn't
6 like the business, so, you know ---

7 MR. HAYNSWORTH: I think you'll get anybody to
8 say they didn't like her. And that's ---

9 MR. ARIAIL: Okay. All right.

10 THE COURT: Well, all right. When we get into
11 that, I'll hear what some say and then I'll take a break
12 to see if we can't agree then.

13 MR. ARIAIL: Okay. That'll be great. Thank
14 you, Your Honor.

15 MR. HAYNSWORTH: Thank you, Your Honor.

16 MR. ARIAIL: And I'll just tell you for your
17 planning purposes, I'm going to call the tax people
18 today. And what I had planned to do is just call four
19 of them. And then if we can agree on that after that,
20 you'll see what we've got and we'll just end it there.
21 I'm trying to expedite as much as I can.

22 THE COURT: Okay.

23 MR. ARIAIL: And I don't think these are going
24 to be long witnesses, Your Honor. They shouldn't be
25 long.

1 MR. HAYNSWORTH: No, I don't think so either.

2 THE COURT: Okay. All right.

3 (WHEREUPON, court stood at recess for a lunch
4 break.)

5 THE COURT: Okay. I understand now you have
6 completed your case, Mr. Haynsworth, and you'll rest in
7 the presence of the jury?

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

9 THE COURT: Are you ready to go, Mr. Ariail?

10 MR. ARIAIL: Yes, Your Honor, I am.

11 THE COURT: All right. Bring them on.

12 (WHEREUPON, the jury entered the open court at
13 approximately 1:36 p.m.)

14 THE COURT: All right. Mr. Haynsworth?

15 MR. HAYNSWORTH: If it please the Court, Your
16 Honor, the Plaintiff rests.

17 THE COURT: All right. Mr. Ariail, are you
18 ready?

19 MR. ARIAIL: Yes, Your Honor. We just have
20 some motions at this time.

21 THE COURT: Oh, I'm sorry. Take the jury out.

22 (WHEREUPON, the jury exited the open court at
23 approximately 1:39 p.m.)

24 THE COURT: Sorry about that.

25 MR. ARIAIL: That's all right. I knew we had

1 ---

2 THE COURT: I wasn't thinking.

3 MR. ARIAIL: That's fine. Your Honor, at this
4 time we'd move for a directed verdict on all causes of
5 action. In this case, I think what you've seen is the
6 trade secret, breach of fiduciary duty and a conversion
7 claim. I think the trade secret, I don't think there
8 has been one piece of information that has been deemed
9 to be or concluded to be or stamped trade secret, made
10 any type of determination as to trade secret. Second of
11 all, there's no -- I think we've seen evidence to show,
12 you know, there might be items that are on my clients'
13 computer, but they have never been opened, accessed,
14 used at any time, so misappropriation. The other thing,
15 I've read the trade secret statute, even if they are
16 misappropriated and misappropriation goes to if they're
17 acquired. There is also a use or disclosure of that
18 information -- it's the third -- I think it's item (c)
19 of that part of the statute. I don't think they have
20 have any information showing they have been used or
21 disclosed or helped to acquire other companies to be
22 able to get the clients. I think we've shown these
23 documents are open and made public. They've been -- I
24 think even their customer list has been included as --
25 and pricing information as part of the complaint in this

1 matter. They have clearly made these items public. As
2 a result, I don't think it goes with the trade secrets
3 cause of action. And a directed verdict should be
4 granted there.

5 In regards to breach of fiduciary duty, I've
6 looked at a case on this. And I think to be able to
7 prove that they -- that these damages were caused but
8 for the breach or whatever they've done, and I think the
9 theories are taking of the confidential information and
10 going out and going out and using it to underbid and
11 that, they would have to show clients that said, yeah,
12 we went with them because they bid low. Or they used
13 this information. That's what they had. They haven't
14 brought in any evidence showing as to the reason those
15 damages or those documents, even if they -- you know, we
16 believe they weren't misappropriated. But even if they
17 related to why that client left. I mean, we're going to
18 -- I mean she said in her statement she hadn't even
19 talked to anybody. Hadn't made any contact with these.
20 Second of all, she said she hadn't -- the bids, I mean,
21 you know, only bid on six. Tax clients, never talked to
22 them, never knew why. I don't think that's enough to
23 get by breach of fiduciary duty. In regards to
24 conversion, I don't know what they're saying has been
25 converted, other than -- I think they're saying some CLE

1 material. She didn't put a value on it. She said the
2 CLE classes, the trip to Baltimore, but there's been
3 nothing I've seen that says, hey, the document -- this
4 is my value for the items that you say are converted.
5 As a result, I don't think she's satisfied or they have
6 satisfied the burden in regards to that. And I would
7 move for a directed verdict.

8 MR. HAYNSWORTH: Your Honor, let me work
9 backwards. On conversion, well, we've obviously gotten
10 money that was converted because Todd Highsmith sent
11 invoices from his house to McKinley Cooper clients and
12 got the money straight to him. So he's converted that
13 money that would be ours. Ms. McKinley did testify
14 about the costs of sending these people to these
15 seminars where these materials would be provided. They
16 took the materials with them. The materials were owned
17 by McKinley Cooper, had value to McKinley Cooper.

18 And the same on the conversion, Your Honor. Ms.
19 McKinley testified about the amount of money and man
20 hours she spent to develop her proposal over thirty-five
21 years or to develop her letterhead or develop these
22 various forms that McKinley Cooper came up with. There
23 is plenty of evidence that our stuff has been converted
24 by the defendants. As to the value of that, I think Ms.
25 McKinley has provided evidence as to the value of some

1 of the documents. She's provided evidence as to the
2 expenses of the continuing legal education seminars.

3 As to the breach of fiduciary duty, again, let's
4 just look at the invoices in the abstract. It's clearly
5 a breached a fiduciary duty where Todd, while employed
6 with McKinley Cooper, would be billing their clients
7 from his house and on the side. It is also clearly a
8 breach of fiduciary duty, at least in my opinion, to
9 delete information from the McKinley Cooper computers
10 before they left. It was a breach of fiduciary duty for
11 them to have been planning, while being paid by McKinley
12 Cooper, to leave as evidenced by the H&H business plan
13 that was actually printed off on McKinley Cooper's
14 printer in October.

15 Those guys owed Ms. McKinley a duty of loyalty
16 during the entire time they worked for her. And they
17 were not loyal to her during the entire time they worked
18 for her.

19 As to the trade secrets, Your Honor, and I don't
20 have the statute in front of me ---

21 THE COURT: I have it.

22 MR. HAYNSWORTH: But there's sort of a
23 different analysis under the trade secret statute if
24 you're an employee. And Mills has made a big deal
25 about, well, nothing was stamped trade secret. Nothing

1 was stamped confidential. If an employee knows or has
2 reason to know that information is considered secret --
3 I think that's addressed in the statute -- the
4 regulations that govern these guys, the AICPA
5 regulations, clearly provide that all client information
6 in a CPA firm is confidential. And none of that
7 information is supposed to be taken when you leave. So
8 while the defendants may contend Ms. McKinley didn't say
9 this is a secret or that's a secret, they should know
10 that based on the regulations that govern CPAs, just
11 like I would know stuff in the legal arena enjoys a
12 different level of protection than maybe a garbage man
13 would. And Mills is right, to the extent I need to
14 establish to the jury's satisfaction that there was
15 potentially use of these trade secrets, well, we know
16 this; we know they took a McKinley Cooper bank
17 confirmation form and slapped Highsmith & Highsmith on
18 it. That form and these other documents that we've
19 talked about is work papers or McKinley Cooper's
20 property that contains information that would be
21 beneficial and advantageous for a competing CPA firm to
22 have.

23 And as I think I probably told you at the start of
24 this case, Judge, we think they took everything. I can
25 only prove what I can find they took. You heard Mr.

1 Hemond discuss a whole lot of information was download
2 from the McKinley Cooper computer and he is not finding
3 near what he would expect on the H&H computer. And an
4 explanation for that is the information was deleted. By
5 it's nature, trade secret theft, you're trying to hide
6 the theft. You're not going to leave a bright line
7 trail. And I'll spot you that you're not going to
8 produce to me documents you took that you may well still
9 have in another computer or on a flash drive. But I
10 think there is plenty of circumstantial evidence that
11 there were many additional documents that would be
12 considered a trade secret under the statute that were
13 more probably than not taken by the defendants.

14 THE COURT: Mr. Ariail, I have to deny your
15 motions. I'm doing so on the basis that, as I will
16 charge the jury, that a conversion is an unauthorized
17 assumption and exercise of the right of ownership over
18 goods or personal property belonging to another or the
19 exclusion of the owner's rights. And it may arise
20 either by a wrongful taking or some other illegal
21 assumption of ownership. I think there's sufficient
22 evidence to go forward on that basis.

23 And with respect to the fiduciary matter, I
24 will charge the jury that a fiduciary relationship is
25 founded on trust and confidence proposed by one person

1 and the integrity and fidelity of another. It exists
2 when one imposes a special confidence in another so that
3 the latter in equity and good conscience is bound to act
4 in good faith and with regard to the interest of one --
5 on the one imposing the confidence. I think there's
6 sufficient evidence to go forward on that.

7 And with respect to the action on the trade secret,
8 I'm looking at the statute, and the trade secret may
9 consist of a simple fact, item or procedure or a series
10 of sequence of items or procedures, which although
11 individually, could be perceived as relatively minor or
12 simple, collectively can make a substantial difference
13 in the efficiency of a process or the production of a
14 product. And so on. And under the statute it defines
15 improper as including theft, bribery, misrepresentation
16 or breach and inducement of a breach of a duty to
17 maintain secrecy. And I think there's sufficient
18 evidence to go forward on that. So I respectfully have
19 to deny your motion.

20 MR. ARIAIL: Thank you, Your Honor.

21 THE COURT: All right. Bring our jury.

22 (WHEREUPON, the jury entered the open court at
23 approximately 1:51 p.m.)

24 THE COURT: Okay. Mr. Ariail.

25 MR. ARIAIL: Thank you, Your Honor, may it

1 please the Court? I call Jeremiah Johnson to the stand.

2 THE CLERK: Mr. Johnson, please come forward.

3 If you'll please pause at the end of the bench. Place
4 your left 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: Thank you. Please be seated.
10 Would you please state your name for the record.

11 THE WITNESS: Jeremiah Johnson.

12 THE CLERK: Thank you.

13 **JEREMIAH JOHNSON,**

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

15 **DIRECT EXAMINATION**

16 **BY MR. ARIAIL:**

17 Q. Jeremiah, thanks for coming today. How do you know
18 Shane Highsmith?

19 A. He's a friend.

20 Q. Okay. How long have you known him?

21 A. About eight years.

22 Q. Okay. Did y'all go to school together?

23 A. No, sir. Actually we started going to church.

24 Q. Where do y'all go to church?

25 A. Well, we did go to Forestville Baptist.

1 Q. Okay. And over those years, have you had a
2 business relationship with Shane?

3 A. No.

4 Q. Has he done work for you during this time?

5 A. Yeah. He did some taxes for me.

6 Q. Okay. And when you say taxes, did he file your tax
7 returns for you?

8 A. Yes.

9 Q. Okay. And how long has he been doing that?

10 A. A couple years; two, three years.

11 Q. And you used him, I guess when he was at MCC; is
12 that correct?

13 A. Uh-huh (affirmative).

14 Q. Well, why did you go and use him while he was at
15 MCC?

16 A. He's a friend.

17 Q. Okay. Do you know anybody, other than him, at MCC?

18 A. No, sir.

19 Q. Excuse me. McKinley Cooper & Company?

20 A. No, sir.

21 Q. Okay. Have you met Toni McKinley, Marcy Loucks or
22 Sheryl Medders?

23 A. No, sir.

24 Q. Okay. Now, Shane's out on his own now with his
25 brother. Are you still utilizing his services?

1 A. Yes, sir.

2 Q. And why did you go with him when he left?

3 A. He's a friend.

4 Q. Okay. Did you have any contract with MCC, McKinley
5 Cooper & Company, or Toni McKinley to stay with them?

6 A. No, sir.

7 Q. Okay. Thank you very much. I have no further
8 questions.

9 **CROSS-EXAMINATION**

10 **BY MR. HAYNSWORTH:**

11 Q. Mr. Johnson, good afternoon.

12 A. Good afternoon.

13 Q. Back when Shane was with McKinley Cooper ---

14 A. Uh-huh (affirmative).

15 Q. --- and McKinley Cooper was doing your taxes;
16 right?

17 A. That would be the company, yes.

18 Q. Right.

19 A. Yes, that would be them.

20 Q. And your returns if you -- what year are we talking
21 about? What year of your taxes would have been done at
22 McKinley Cooper?

23 A. It was -- actually, it was probably about '09,
24 2010, somewhere around there.

25 Q. Okay. '09 and '10. Do you recall whose signature

1 as the preparer was actually on your tax returns in '09
2 or '10? And specifically I'm wondering if you recall
3 that Toni McKinley's name would have been on your tax
4 returns?

5 A. No, I can't recall whose name was on there, off the
6 top of my head.

7 Q. Okay. When did you switch your tax files from
8 McKinley Cooper to Highsmith & Highsmith?

9 A. That was, what, last year, year before? And then
10 after I had been there, I actually went and did my taxes
11 with Turbo Tax actually, so ...

12 Q. So McKinley Cooper did it and then you went and did
13 it on your own ---

14 A. Uh-huh (affirmative).

15 Q. --- for a year?

16 A. Yes, sir.

17 Q. And then went back to Highsmith & Highsmith and had
18 them do it?

19 A. Yes, sir.

20 Q. Did you ever send any written request or written
21 permission to McKinley Cooper authorizing them to
22 release your tax file information to Highsmith &
23 Highsmith?

24 A. Not that I recall, no.

25 Q. Thank you, sir. That's all the questions I've got.

1 THE COURT: Thank you. You may step down. Do
2 you want to excuse this witness?

3 MR. ARIAIL: Yes, Your Honor.

4 THE COURT: Any objection?

5 MR. HAYNSWORTH: No, Your Honor.

6 THE COURT: Okay.

7 MR. ARIAIL: Your Honor, our next witness
8 would be Nate Crabtree.

9 THE CLERK: If you'll pause at the end of the
10 bench and place your left hand on the bible and raise
11 your right hand.

12 You do solemnly swear or affirm to tell the truth,
13 the whole truth and nothing but the truth, so help you
14 God?

15 THE WITNESS: I do.

16 THE CLERK: Thank you. Please be seated.
17 Would you please state your name for the record.

18 THE WITNESS: Nathan Crabtree.

19 THE CLERK: Thank you.

20 **NATHAN CRABTREE,**

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

22 **DIRECT EXAMINATION**

23 **BY MR. ARIAIL:**

24 Q. Nate, thanks for coming today. Give me a little
25 background first. Do you know Shane Highsmith; is that

1 ---

2 A. Correct.

3 Q. Okay. How do you know Shane?

4 A. I met Shane at church when I first moved to
5 Greenville six years ago.

6 Q. Okay. Where did y'all go to church together?

7 A. We used to Forestville Baptist Church.

8 Q. Okay. And when you met Shane did he start doing
9 some work for you, tax work?

10 A. Yeah. I knew he was a CPA and so come tax time, I
11 like to give my business to a friend so ...

12 Q. Okay. And how long did you do, I guess, tax work
13 with him or allow him to do your taxes?

14 A. Since I've known him. The past six years, I guess.

15 Q. Six years. Okay. Are you married?

16 A. Uh-huh (affirmative).

17 Q. And does he do tax work for your wife too?

18 A. Yep.

19 Q. Okay. And when you were using him, he was with
20 McKinley Cooper & Company; is that correct?

21 A. Correct.

22 Q. Do you know anybody at McKinley Cooper & Company?

23 A. No.

24 Q. Other than Shane when he was there?

25 A. Other than Shane.

1 Q. What was the reason you went to use Shane while he
2 was at McKinley Cooper?

3 A. Because he's a friend of mine.

4 Q. Okay. And then he left, and why did you go with
5 him at that time?

6 A. Because he's a friend of mine. He'd been doing my
7 taxes, so I went with him.

8 Q. Okay. And since you left, what information have
9 you provided to him in regard to your tax returns?

10 A. Just routine W-2s and tax information.

11 Q. Have you given him a copy of your other tax
12 returns?

13 A. Yes, sir.

14 MR. ARIAIL: I have no further questions, Your
15 Honor.

16 THE COURT: Mr. Haynsworth.

17 MR. HAYNSWORTH: Thank you, Your Honor.

18 **CROSS-EXAMINATION**

19 **BY MR. HAYNSWORTH:**

20 Q. Mr. Crabtree, good afternoon.

21 A. Hey.

22 Q. So you and Shane were friends, he was working for
23 McKinley Cooper. When y'all met roughly six years ago
24 you had him do your personal tax returns or your joint
25 returns, I guess, if you and your wife were filing

1 together?

2 A. Correct.

3 Q. Back when he was with McKinley Cooper and they were
4 the preparer of your returns, the actual signature line
5 back when it was with McKinley Cooper, Toni McKinley
6 would have shown up as the preparer; correct?

7 A. I assume so. I don't know.

8 Q. I'll represent to you that Shane left McKinley
9 Cooper on November 1st, 2011; okay? Before November
10 1st, 2011, had you told Shane you wanted your tax stuff
11 removed from McKinley Cooper's office?

12 A. Before then, no.

13 Q. Okay. After November of 2011, did you send any
14 sort of writing to McKinley Cooper authorizing them to
15 release your tax information that they had to Shane?

16 A. In fact, I went to their office to get it myself.

17 Q. Okay.

18 A. And nobody had anything -- no questions or anything
19 to me about it.

20 Q. All right. Do you know prior to Shane leaving
21 November 1st of 2011 what tax information of yours he
22 had removed from McKinley Cooper?

23 A. I don't know.

24 Q. Okay. Thank you.

25 MR. HAYNSWORTH: That's all the questions I

1 have.

2 THE COURT: Thank you, sir. You can step
3 down.

4 THE WITNESS: Thanks.

5 THE COURT: And can he be excused?

6 MR. ARIAIL: Yes, Your Honor, he can.

7 THE COURT: Okay.

8 MR. ARIAIL: The next witness is Woody Wood.
9 I'll get him real quick.

10 THE CLERK: Mr. Woods, if you'll please come
11 forward. Pause at the end of the bench, please. Place
12 your left hand on the bible and raise your right 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: Grover Lafoy Woods, Jr.

20 THE CLERK: Thank you.

21 **GROVER LAFOY WOODS, JR.,**

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

23 **DIRECT EXAMINATION**

24 **BY MR. ARIAIL:**

25 Q. Hey, Mr. Woods. How are you doing today?

1 A. Fine.

2 Q. Good. Thank you for coming. How do you know Shane
3 or Todd Highsmith?

4 A. We have come to know them as associates that
5 provide accounting services for our business and now for
6 us personally.

7 Q. And you say your business, do you have multiple
8 businesses or just one business?

9 A. We have had -- at one time we had a small printing/
10 manufacturing business. And then we still have a real
11 estate holding business.

12 Q. Okay. And they do the tax work for you for those
13 business and also your personal taxes; is that correct?

14 A. That is correct.

15 Q. Okay. And how long have you used, I guess, Shane
16 or Todd to do that work?

17 A. I don't remember the exact number of years.

18 Q. Okay. Did you use them while they were at McKinley
19 Cooper & Company?

20 A. Yes, we did. They -- Shane, if I recall correctly,
21 Shane was assigned to our account while they were at
22 McKinley Cooper. And we got to know him. And then Todd
23 later came to work there and seemed to be able to
24 specialize in small manufacturing. And we used --
25 that's how we kind of zeroed in on them.

1 Q. Okay. And they left McKinley Cooper & Company and
2 went out on their own. Why did you go with them at that
3 time?

4 A. Well, when he found out they left, we didn't make
5 an immediate decision to leave. I don't know which year
6 that was, but we decided to not make a change during
7 that year; our fiscal year coincided with the calendar
8 year. And at the end of the calendar year or at the
9 beginning of the next calendar year, then we did make a
10 decision to go with them after they found out they were
11 on their own. And it was totally based on the fact that
12 as we had gotten to understand their abilities and their
13 working with us while they were at McKinley Cooper, then
14 we found that their services were -- their abilities
15 were better suited for our operation than what we had
16 found in general at McKinley Cooper; although they had
17 served us well. But we just felt like it was a better
18 fit all the way around and that's why we chose to go
19 with them.

20 Q. Okay. And just for my information, I don't know if
21 I asked you. What are the names of the companies that
22 you have, the specific names?

23 A. They primarily -- primarily they worked with a
24 company that we had up until about this time last year.
25 It was Label Systems, Incorporated. We also have a real

1 estate holding company that's called Wild Dog
2 Properties. And then, of course, our personal finances.

3 Q. And I don't know if I asked this, but personal
4 taxes, filing for you and your wife; is that correct?

5 A. That is correct.

6 Q. And what is her name?

7 A. Jane, Doris Jane Woods.

8 Q. Okay. And ...

9 MR. ARIAIL: I think that's all I have, Your
10 Honor. Thank you.

11 MR. HAYNSWORTH: Thank you, Your Honor.

12 THE COURT: Mr. Haynsworth.

13 **CROSS-EXAMINATION**

14 **BY MR. HAYNSWORTH:**

15 Q. Good afternoon, Mr. Woods.

16 A. Good afternoon.

17 Q. Do you know Toni McKinley?

18 A. Yes, I do.

19 Q. Okay. And before you met Shane or Todd Highsmith,
20 was some of your tax work handled by Ms. McKinley at
21 McKinley Cooper?

22 A. That is correct.

23 Q. And do you remember roughly when you first started
24 using Ms. McKinley?

25 A. I don't remember the year. The situation was that

1 Toni was referred to us by a mutual friend and somebody
2 else that they were doing business with. At the time,
3 we found that to be very satisfactory compared to what
4 we had been doing. The situation is that once we had
5 the opportunity to meet the Highsmiths, then I felt like
6 it was a better fit for our company, given who their
7 customers normally were.

8 Q. Okay. Who your company's customers were?

9 A. Who their customers or clients normally were.

10 Q. They, being the Highsmiths?

11 A. No. What I'm talking about is the fact that
12 McKinley Cooper, in my opinion, correctly or
13 incorrectly, was not as well set up to handle a small
14 manufacturing company as I felt like Todd and Shane were
15 after they had gotten set up themselves.

16 Q. Okay. And I might have missed it when Mr. Ariail
17 was asking you, when did you -- what year did you switch
18 from McKinley Cooper to Highsmith?

19 A. I don't remember the year. Whatever information
20 they have, I, of course, would vow to. The only thing
21 is that in the year that the decision was made about
22 their leaving McKinley Cooper and setting up their own
23 business, then when they notified us that they were
24 leaving, then we decided that it would be prudent to
25 stay at McKinley Cooper through the remainder of that

1 year and then make a decision at the end of the year
2 about whether to engage them as our accountants after
3 that.

4 Q. Okay. So before they left they notified you that
5 they were planning on leaving; is that right?

6 A. I'm not sure. I'm honestly not sure. I became
7 aware that they were planning on leaving at some point,
8 but dates and even what year it was or when in that year
9 it was, I'm not sure.

10 Q. Okay. Well, I'll represent to you that they left
11 November 1st and November 4th, respectively, in 2011.

12 A. Okay.

13 Q. Do you know before they left McKinley Cooper what
14 documents relative to Label Systems, the tax related
15 documents, client related documents for you and your
16 company that were at McKinley Cooper when they were
17 handling it, do you know what client documents of yours
18 Shane and Todd took from McKinley Cooper?

19 A. No. I'm not aware.

20 Q. All right. Do you recall having -- in connection
21 with potentially selling Label Systems, did you and Toni
22 ever discuss that, that you were thinking about selling
23 it or were going to sell it?

24 A. The only recollection I have about that is the --
25 just in general the fact that when you own a business

1 sometimes you're looking for the next step and a way
2 out, and I very possibly could have discussed that with
3 Toni and probably did. But just in a general matter of
4 -- in the same way with anybody that I've had accounting
5 relationships with, letting them know that if anything
6 came along, I would be interested in that possibility.

7 Q. Okay. Do you recall you and Toni having a
8 discussion wherein she advised you should not give your
9 client list to your potential buyer without having some
10 understandings locked down about that information
11 relative to Label Systems?

12 A. I don't recall that. I'm not saying that that
13 didn't exist, but I don't have a specific recollection
14 of it.

15 Q. Fair enough. Did you -- the transition from
16 McKinley Cooper to Highsmith & Highsmith, did you send
17 some sort of letter to Toni or McKinley Cooper saying
18 I'd like my information to be transmitted to Highsmith &
19 Highsmith?

20 A. I honestly don't remember. I haven't been asked to
21 look for that. I would have been glad to provide it and
22 still would be.

23 Q. Sure. Yes, sir. Well, let me ask a related
24 question. They've obviously got the stuff from Label
25 Systems that used to be at McKinley Cooper because they

1 are now handling your matters going forward; is that
2 right?

3 A. Yes. But that means that could have been provided
4 by me as well as it coming from records there.

5 Q. Right. But you simply don't know the specific.
6 date, what records they took from there versus what
7 records perhaps you provided after they were handling
8 your ---

9 A. Or what records -- historical records I may have
10 given them after the transition was made?

11 Q. Yes, sir. You just don't know one way or the
12 other?

13 A. No.

14 Q. Thank you.

15 MR. HAYNSWORTH: That's all the questions I've
16 got.

17 THE COURT: Thank you, sir. You can step down
18 and be excused. Oh, I'm sorry.

19 MR. ARIAIL: Brief redirect, one question,
20 Your Honor. I just want to make sure -- I want to see
21 if he recognizes this document here.

22 **REDIRECT EXAMINATION**

23 **BY MR. ARIAIL:**

24 Q. Do you recognize that document?

25 A. Yes.

1 Q. Okay. Do you remember if -- that's an email from
2 you, I guess, on June 27, 2012?

3 A. Uh-huh (affirmative).

4 Q. Does that look like -- is that the initial
5 conversation you had with them or I guess about letting
6 them do your work after they left; do you recall?

7 A. I'm trying to get through the first part of it and
8 see.

9 Q. If you need to take a little time to review it.

10 A. I'm sorry to be taking up the time, but I want to
11 give you a good answer. Yeah. It looks at a string of
12 emails, one of which is just information to them. But
13 the body of the second one is just where they are making
14 a proposal about what they would do for us in terms of
15 providing accounting services.

16 Q. Okay. And that -- maybe I'm asking it the wrong
17 way. Was the first time that you engage them after that
18 June 27, 2012 date, I guess?

19 A. It would assume -- it would appear so from the body
20 of this email.

21 Q. Okay. Thank you.

22 MR. ARIAIL: I have no further questions.

23 THE COURT: Thank you, sir. Now, you can step
24 down and be excused. Any objection?

25 MR. HAYNSWORTH: No, Your Honor.

1 MR. ARIAIL: No, Your Honor.

2 THE COURT: All right, sir.

3 MR. ARIAIL: Your Honor, I've got one short
4 witness I think who is out here and then I was going to
5 go into a longer one. I just wanted to see if I could
6 get him.

7 THE COURT: Sure. Certainly.

8 MR. ARIAIL: Your Honor, I'm going to go ahead
9 and call -- Your Honor, we're going to call Shane to the
10 stand now.

11 THE COURT: Okay.

12 THE CLERK: Sir, if you'll please place your
13 left hand on the bible and raise your right hand.

14 You do solemnly swear or affirm to tell the truth,
15 the whole truth and nothing but the truth, so help you
16 God?

17 THE WITNESS: Yes.

18 THE CLERK: Thank you. Please have a seat.
19 Would you please state your name for the record.

20 THE WITNESS: Shane Highsmith.

21 THE CLERK: Thank you.

22 **SHANE HIGHSMITH,**

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

24 **DIRECT EXAMINATION**

25 **BY MR. HIGHSMITH:**

1 Q. Shane, how you doing today?

2 A. Good.

3 Q. I'm going to start off a little bit in regards to
4 your background. Can you give us -- how long have you
5 been here in Greenville?

6 A. I grew up here. Since I was born. I grew up in
7 Greenville and Taylors area.

8 Q. Okay. And where did you go to High School?

9 A. Hampton Park Christian School.

10 Q. Okay. And where did you go after that for college?

11 A. I went to Clemson University.

12 Q. Okay. And I always to hate to ask about years
13 because it puts your age out there. But when did you
14 graduate from Clemson?

15 A. I graduated from Clemson in December of 1999.

16 Q. Okay. 1999 you graduated. Where did you -- any
17 secondary education? Excuse me. That would be -- any
18 degrees or anything after college?

19 A. I passed the CPA exam.

20 Q. Okay. And tell me a little bit about it. When you
21 finished college, did you -- what did you major in or
22 focus on?

23 A. Accounting.

24 Q. Okay. When you finish, explain to me, you go and
25 get your accounting certification; is that correct?

- 1 A. Correct. Well, when I graduated you had to have a
2 hundred and fifty credit hours to sit for the CPA exam.
3 So I actually graduated Clemson with my degree with a
4 hundred and twenty-eight hours. After that, I just had
5 to take extra courses at Greenville Tech to get up to my
6 hundred and fifty hours. I took courses at night while
7 I was -- when I had started working I took courses at
8 night to get to the hundred and fifty hour requirement.
9 And then after that point, you can sit for the CPA exam.
10 Q. Okay. And while you're doing that, you're taking
11 courses, are you working somewhere?
12 A. I'm working for Toni McKinley at McKinley Cooper &
13 Company, LLP.
14 Q. Okay. So when -- you finished Clemson in 1999 and
15 you began to work at that time; is that correct?
16 A. Yes, sir.
17 Q. Okay. And you went directly from college into
18 McKinley Cooper?
19 A. Yes, sir. If I remember correctly, I graduated in
20 December of '99. I think I started there on January 3rd
21 of 2000.
22 Q. Okay. And how -- when you started there, what was
23 your position?
24 A. I was a staff accountant.
25 Q. And I went one step too far. How did you get the

1 job at McKinley Cooper & Company?

2 A. I sent out resumes to CPA firms around the
3 Greenville area and I was called in for an interview at
4 that time. And I went in for the interview and got a
5 position there. Because actually I got the position
6 before I graduated college. I went in, I think it was
7 the early part of December of 1999 or maybe the end of
8 November of that year, went through the interview
9 process before I graduated and then they offered me a
10 job at that point.

11 Q. Okay. And when you say they offered you a job, who
12 was your contact at McKinley Cooper at that time?

13 A. Bob Cooper did my interview.

14 Q. Okay. Bob Cooper, I guess, is the Cooper in
15 McKinley Cooper. What was his role at that time when
16 you joined the firm?

17 A. At that time, he was a shareholder of McKinley
18 Cooper & Company, LLP; a partner.

19 Q. Okay. So he's a partner and owner at that time?

20 A. Yes, sir.

21 Q. Okay. And was Bob a CPA also?

22 A. Yes, sir.

23 Q. Okay. And what involvement did Toni have, Ms.
24 McKinley have -- excuse me -- in regards to your hiring?

25 A. When I was actually hired, I didn't meet Ms.

1 McKinley. I met Bob Cooper.

2 Q. Okay.

3 A. So I'm not sure if they talked after I left. I'm
4 not sure about that. I don't know how that -- I just
5 interviewed with Bob Cooper and he offered me that
6 position later. He's the one who contacted me.

7 Q. Okay. And you began working in the position of a
8 staff accountant; is that right?

9 A. Yes, sir.

10 Q. Okay. And as a staff account what did you do at
11 that time?

12 A. Tax returns. I worked on audits. Went out on
13 auditings to perform actual field work. I'm not sure if
14 I did any, like, payroll or consulting at that point
15 because when you first start out you've got to learn.
16 You've got to get a bit of experience before you can do
17 some other stuff. But at that point it was audits and
18 tax.

19 Q. Okay. And who did you work with at that time --
20 well, first of all, let me ask it this way. How many
21 employees were there at the time you began?

22 A. Are you talking about professional staff or like
23 staff accountants or clerical too?

24 Q. I knew you were going to ask that. I guess how
25 many staff members were there at the time you began?

1 A. At the time, there were probably -- this is a guess
2 because it's been years ago. I'm guessing there were
3 maybe nine, nine staff members.

4 Q. Nine staff members. And in staff members we're
5 including clerical staff and accountants. How was it
6 broken down there?

7 A. There was a receptionist, and there was somebody we
8 referred to as like the office manager at the time. And
9 then there was Toni McKinley, Bob Cooper, and some other
10 staff members after that, but I think the total was
11 around nine people at the time.

12 Q. Okay. And you were out doing audits and tax work;
13 is that correct?

14 A. Yes, sir.

15 Q. Was Ms. McKinley, was she working on those audits
16 with you, or Bob Cooper?

17 A. Bob Cooper was not. Toni McKinley was working on
18 audits at the time.

19 Q. Okay. So again, y'all did audits and then I guess
20 you went on for a little while. Did you at one time
21 leave McKinley Cooper?

22 A. I did. After I passed the CPA exam, at that point
23 I wasn't sure what I wanted to do, but I knew I needed
24 to provide for my family. And a job opportunity opened
25 up in industry where I would be basically their

1 comptroller of the company that I went to. And I think
2 this was around 2004 that I took that position with
3 another company.

4 Q. Okay. At the time you left, how much were you
5 making at McKinley Cooper?

6 A. To the best of my knowledge, because that would
7 have been probably 2004, I was probably making thirty-
8 five thousand dollars.

9 Q. Okay. And you'd been there five years or so?

10 A. Yes, sir.

11 Q. Okay. When you left, you went into industry. What
12 industry? When y'all say industry ---

13 A. Sorry.

14 Q. --- is it a comptroller position?

15 A. We call it industry when you're not in public
16 accounting. You're in industry like a corporate
17 environment. It was a company that sold big printers,
18 like commercial printers. They had a distribution
19 warehouse in Chicago and one out west somewhere. But I
20 was here in Greenville at their corporate headquarters.
21 And I was working closely with the comptroller at that
22 point. They were about to move him up to do more work
23 in another area, and I was supposed to take his
24 position. That's what they hired me for.

25 Q. Okay. And how long did you work there?

1 A. Approximately seven to eight months.

2 Q. Okay. And then after that, what happened?

3 A. Well, when I -- I should back up. When I left
4 McKinley Cooper to take that position, it was during tax
5 season of that year. It was right at the very beginning
6 of tax season. So I took that position and I knew I was
7 leaving Toni in a bad spot because it was right at the
8 busy season. And so I offered to come in on the
9 weekends and part-time to help out, just to get her
10 through tax season. So technically, I don't know if I
11 was ever off of payroll. I still turned in my time on
12 the weekends and at night at that point. But fast
13 forward six to eight months, it was -- she had another
14 auditor at the time that was in charge of a lot of
15 audits that had decided to take another position as
16 well. And so she called me back to McKinley Cooper and
17 offered me a position, another auditing position, but at
18 a higher rate.

19 Q. Okay. And how much -- when you say a higher rate,
20 how much did she offer you, how much more?

21 A. And I don't remember the exact amount, but it was
22 around forty-five thousand dollars.

23 Q. Okay. So a ten thousand dollar increase to come
24 back?

25 A. Yes, sir.

1 Q. And after that, did you stay -- were you in the
2 same position as audit tax, doing those items?

3 A. Yes, sir.

4 Q. Okay. And you stayed in that role, I guess, until
5 your brother got there in 2009; right?

6 A. Yes, sir.

7 Q. Okay. Now, tell me a little bit about your brother
8 coming. Why did he come over there?

9 A. He was in industry for years. He had started in
10 public accounting, was in industry for years and was
11 wanting to move back in a position where he could have a
12 chance for some ownership. And that's why he was coming
13 back into public accounting. That was our goal.

14 Q. And when he came over, I guess -- what was he doing
15 when he came?

16 A. He started on the tax -- I'm sorry, the audit team.
17 The first day he came in we were actually going out on
18 an audit and we told him -- we call it our audit bag
19 where we put all our supplies, our calculators or ten-
20 keys, whatever you call them. And we pack that bag with
21 our supplies and we go and take it with us on the audit.
22 So the day he started he had probably thirty minutes to
23 pack a bag and come with us. So it was right out of the
24 gate.

25 Q. Okay. And during this time, I guess, he's doing

1 the audits with the you. Y'all are working together.

2 What other employees are doing audits, I guess, during
3 the time frame that your brother gets there?

4 A. You have to remember I've worked there for a long
5 time, and so there's different staff in and out. But at
6 the time Todd started, Allan Ward, Rosa Chapman, Matt
7 Phillips, Todd and myself were doing the majority of the
8 audits. Marcy did a few audits during the year and
9 Sheryl did a few audits during the year, but they were
10 on the audit team, I should say. They were on the audit
11 team for some of those.

12 Q. I think we need to go through a little bit because
13 I'm trying to figure out this audit team. When you go
14 and do an audit, explain to me a little bit of the
15 process because we've heard four people go out and do
16 it. Tell me what happens when y'all do an audit?

17 A. Well, when we go -- are you talking about when
18 we're deciding who's going or just getting the team
19 together? We look at the audit, decide how many people
20 we're going to need for that audit. We go out there and
21 we start gathering information as a group, a team on the
22 audit itself. So, sometimes it can be two people.
23 Sometimes it can be four people. The majority of
24 theirs, Toni liked us to go and take four people to get
25 the job done as quickly as we could and get out of the

1 client's office.

2 Q. Okay.

3 A. So most of the time we had a group of four. As she
4 said earlier, it was a car full is what we usually took.
5 So we had four people.

6 Q. And when you go in and do an audit -- I know we've
7 heard a little bit about the auditing process, but what
8 are the key functions in going and doing an audit?

9 A. You're gathering information from the client and
10 testing disbursements, receipts. You're gathering all
11 this information to come up and say that we can rely on
12 these numbers for the audited financial statements, what
13 you're going to give the client. I've got back-up to
14 back up these numbers. So you gather all this
15 information.

16 Q. Okay. And when we're saying gathering this
17 information, I know we've heard questions about work
18 papers. What information do you get from the client
19 when you get there for an audit?

20 A. Several things. You get stuff off of their system.
21 You get ledgers, you get schedules, that sort of thing.
22 When they give you something off their system, you do
23 actual work on it, you test it and you make notes on
24 that paper; that sort of information.

25 Q. Okay. And what do you do with those papers or

1 information you take down?

2 A. We keep them in the client's file. Some of those
3 were kept on the computer. Some of those were kept in
4 paper form. I don't know what they do now, but at the
5 time they had a lot of papers. They have a file room
6 with -- you would put that client's file in there.
7 Sometimes it was a banker's box. If it's a bigger audit
8 you have a box that you're carrying in with this
9 information.

10 Q. Would the client get any of this information?

11 A. Yes. The client could get some of that. They
12 could get any of the information they asked for if they
13 asked me for it. But some of the information is coming
14 right off their system. So it's -- I mean, it becomes
15 your work paper, but it's off their system. So they
16 what you have on some of the stuff.

17 Q. Right. And we've heard a lot about these flash
18 drives. When you go in, how do you use a flash drive
19 during one of these audits?

20 A. We would take a flash drive with us. The client --
21 sometimes they would just say, here's my computer, get
22 what you need. Sometimes we would give them a list and
23 ask them to save stuff on our flash drive. Sometimes
24 they have to run special reports off their system. It's
25 not just a standard thing. We could say we need to see

1 this sequence of checks, so run us these disbursements
2 so we can see who you were writing the checks to. And
3 they would save it on the flash drive for us. Sometimes
4 they would print it out. It just depends on what they
5 wanted to do.

6 Q. Okay. And you could take that information with you
7 back to McKinley Cooper at that time?

8 A. We would. The way we worked on these audits is a
9 lot of days -- we were gone four or five days a week.
10 And we're working on an audit, but it's not always the
11 same place. So we're coming and going to different
12 places and still using that same flash drive to get
13 information from the other clients. And when we finally
14 do get back to the office, we would put that back in the
15 computer at the office and save the information over.

16 Q. Okay. And that information was transferred back
17 and forth on those flash drives?

18 A. Yes, sir.

19 Q. Okay. Now, to your knowledge, has anybody at
20 McKinley Cooper during this time worked from home using
21 those flash drives?

22 A. Yes, sir.

23 Q. Who?

24 A. Marcy Loucks. I think Sheryl Medders has. Allan
25 Ward did. Todd had a flash drive. Rosa Chapman had a

1 flash drive. And I'm not sure about Matt Phillips. I
2 know he worked a lot at home and on the weekends. I'm
3 not sure if it was always at home. I should back up.
4 He worked at the office a lot, but I'm not sure if he
5 had a flash drive. There were some other former
6 employees that had them, as well, that used personal
7 flash drives; David Johnson and Mack Hollis.

8 Q. Okay. Were these personal flash drives or company
9 flash drives?

10 A. A combination. We had two flash drives when I was
11 employed at McKinley Cooper for all the staff to use.
12 And we didn't all have laptops then like we do now. So
13 we couldn't save it over to a laptop. We had two
14 laptops and one of those was a really dated laptop. So
15 everybody was fighting over the faster laptop to do
16 their work. We had two flash drives. One of those did
17 go bad so we had one flash drive for approximately eight
18 or nine people at the time. So people used personal
19 flash drives to take the information.

20 Q. And I'm not technologically savvy like some, but
21 clearly the flash drive I think we're talking about is a
22 little -- it looks like a little rectangular item; is
23 that correct?

24 A. Yes, sir.

25 Q. And it inserts into the side of the computer; is

1 that right?

2 A. Yes, sir.

3 Q. And you can transfer documents in and out that way?

4 A. Yes, sir.

5 Q. Okay. Would employees -- were there any policies
6 about taking information home, how to use -- utilize it,
7 that you were told about by Ms. McKinley?

8 A. No, sir.

9 Q. Okay. Now, we talked about the IT policy. We've
10 seen that. What was your understanding of what the IT
11 policy dealt with?

12 A. The IT policy that I had, that I read was -- came
13 into play once they started to buy more laptops. It was
14 basically telling you which websites you shouldn't be
15 using at work or during work time should not be using
16 these websites. That was pretty much how the IT policy
17 was explained to me.

18 Q. Okay. Now, I know we've gone in a little bit and I
19 want to get your understanding because you were part of
20 this. There was a buy-in that y'all were trying to
21 accomplish; is that correct?

22 A. Yes, sir.

23 Q. And what were y'all trying to do in this buy-in?

24 A. I actually started talking to Toni about buying in
25 back in probably 2006, 2007. During my annual reviews

1 we would talk about that. And at that point I was just
2 talking to her about her future plans with the firm,
3 what she wanted to do. Was she going to sell to a
4 larger firm or was she going to give people that worked
5 there the opportunity to buy in? So I had been talking
6 to her about that for years. Once Todd started, the
7 discussion got a little more because when he talked to
8 Toni the first time, they were talking about his future
9 plans, him wanting to buy in, and her future plans,
10 wanting to cut back and retire.

11 Q. Okay. Well, my understanding is, it was you,
12 Sheryl Medders, who has testified, Marcy, Ms. Loucks,
13 and Todd were interested in buying in with Ms. McKinley;
14 is that correct?

15 A. Yes, sir. Well, at first it was just me and Marcy.
16 I'm talking back from 2006, 2007, it was Marcy and I
17 talking about buying in. Sheryl Medders at the time
18 told me that she did not want to be an owner of a
19 company. She was not interested in ownership. Then
20 that came in later, she was put in.

21 Q. And what conversations -- who was the point person
22 you were dealing with in regard to these conversations?
23 Ms. McKinley?

24 A. Yes. I talked to Toni. That's when it started was
25 my annual reviews so it was just me and Toni at that

1 point.

2 Q. Okay. When you said annual review, when was that
3 annual review; what year?

4 A. When I first started, it was supposed to be every
5 September early October. But as things grew, the
6 business grew, we didn't never know when it was coming
7 in the fall. Usually, September, October, November;
8 sometime in there.

9 Q. And as a part of those conversations were prices or
10 documents ever discussed?

11 A. Not the early conversations with Toni. But later
12 when it became more of a plan, yes.

13 Q. And I think that's where I want to focus to get you
14 on that is that -- I guess, after the four of y'all made
15 a decision that you wanted to approach her, who had the
16 initial discussions with Ms. McKinley?

17 A. I think we all still talked to her during our
18 annual reviews, but I think she met with all of us the
19 first time and said, this is what we're planning to do
20 in moving forward. I'm interested in selling to you.

21 Q. When was that?

22 A. 2010, the middle to late 2010. I don't remember
23 the exact date.

24 Q. So it wasn't a very fast process; was it?

25 A. No, because we all knew what her plans were to sell

1 the firm. So, yeah, by the time she started meeting
2 with all of us, I think it was in -- the middle of 2010.
3 That's what I would think.

4 Q. Okay. And then we get into 2011. And what
5 discussions did you have, I guess, in the middle of
6 2011; do you remember?

7 A. The middle of 2011, we were talking about prices
8 for the firm. She had thrown out a number to Todd
9 during his annual review and we were talking to her
10 about that. And what information we would need to start
11 moving forwarded. We needed a, you know, a billing,
12 collections. We needed office leases. We needed any
13 kind of equipment leases. This information we didn't
14 have that we were wanting to make a list for.

15 Q. Do you recognize this document here?

16 A. Yes.

17 Q. Okay. And what is this document?

18 A. It's the list that I was referring to that we were
19 talking about putting together to ask Toni for the
20 information.

21 Q. Who put this list together?

22 A. As far as actually typing it, I think Todd typed
23 it. Me and Todd, Marcy and Sheryl pieced it together
24 during one of our meetings. And I think he actually
25 typed it out.

1 Q. Okay. And this was based off of y'all's
2 conversations altogether?

3 A. Yes.

4 Q. Was this sent to Ms. McKinley?

5 A. Yes. As far as I know, yes. I think we gave it to
6 her. She knew this is the information we wanted to see.

7 Q. And I know we've heard a lot of discussion about
8 this, and I want to kind of hear it from your side of
9 it, since everybody else has discussed it. It says,
10 non-disclosure confidentiality agreement at the bottom.
11 What is your understanding of that agreement and how
12 that all played out in this?

13 A. We had actually made the offer to sign a non-
14 disclosure confidentiality agreement. We were asking
15 for this information. And Toni said, I can't -- I'm not
16 just going to turn you over all this information. So we
17 asked -- we told her we would be willing to sign this
18 before we moved forward. If this would make her feel
19 more comfortable, we were happy to sign it.

20 Q. Okay. And what was her position in regards to
21 y'all signing that confidentiality non-disclosure
22 agreement?

23 A. At first I think she was okay with that. But at
24 some point she wanted us to sign a non-compete before we
25 looked at anything else.

1 Q. When did that come up?

2 A. I think the first time I heard mention of that was
3 maybe late June, July. I really -- I can't remember the
4 exact date.

5 Q. Okay. You remember at some point in time getting
6 an email or sending an email to the group regarding what
7 you were willing to enter into?

8 A. Yes. That was after -- I think Marcy may have been
9 the one that first told us about a non-compete that we
10 were going to be asked to sign before we received any
11 more information. So I sent this email to the other
12 people that were involved in the purchase, just letting
13 them know I'll be happy to sign a non-compete once we
14 sign the agreement to buy the firm. And at that point
15 we were ready to sign a non-disclosure or
16 confidentiality agreement. And that was where I was
17 letting them know my concerns.

18 Q. I'm not going to hit you with this thing. If I do,
19 you can come get me. But you say right here, non-
20 disclosure and confidentiality agreement is what you're
21 willing to sign; correct?

22 A. Yes, sir.

23 Q. I think up here -- and this is your email address;
24 correct?

25 A. Yes, sir.

1 Q. And you sent it to everybody as part of that;
2 right?

3 A. I sent it to the four people that were involved.
4 Well, four including myself; but the three other people
5 that were involved in the purchase with me.

6 Q. That's a bad question on my part. You sent it to
7 Ms. Loucks and Ms. Medders and your brother?

8 A. Yes, sir.

9 Q. Okay. And your brother responds he's in agreement
10 with that; is that right?

11 A. Yes.

12 Q. To sign a non-disclosure confidentiality agreement
13 to review the financial information and proceed from
14 there?

15 A. Yes. And I actually talked to Sheryl Medders after
16 that email and she was -- she felt the same way, that
17 she would be happy to sign the confidentiality, non-
18 disclosure.

19 Q. Is that standard in the industry or in the
20 accounting industry when you're reviewing financial
21 information to sign a confidentiality agreement?

22 A. I've never been involved in the purchase of a
23 company before, but I think that is one of the standard
24 documents that you would sign.

25 (WHEREUPON, off-the-record discussions were held

1 between counsel.)

2 Q. Sorry about that.

3 A. That's okay.

4 Q. Up here at the top there's a response from Ms.
5 Loucks about y'all's agreement for a non-disclosure,
6 confidentiality agreement; is that right?

7 A. Yes. That was -- my email was in response to her
8 having a conversation with us about a non-compete. I
9 sent the email to let her know why I was concerned about
10 a non-compete and that's her response, that the attorney
11 was going to draw up a confidentiality or a non-
12 disclosure agreement.

13 Q. Okay. So somebody's drawing -- an attorney is
14 drawing up a non-disclosure agreement?

15 A. Yes. And not a non-compete.

16 Q. Okay. And who was having the conversations with
17 the attorney, to the best of your information?

18 A. To the best of my knowledge it was Marcy Loucks and
19 Toni McKinley.

20 Q. Okay. And was Marcy, Ms. Loucks, speaking with her
21 mother, Ms. McKinley, at this time about all of this, to
22 your knowledge?

23 A. I assume so, but I don't know. I wasn't involved
24 in those conversations.

25 Q. What conversation did you have with Ms. McKinley

1 about a non-disclosure?

2 A. Once that was mentioned to us the first time, from
3 the first time it was mentioned until the time that I
4 left, I probably sat down on at least four different
5 occasions with Toni McKinley, in her office, just the
6 two of us, telling her my concerns over this non-
7 compete. It wasn't that I wasn't willing to sign a non-
8 compete, it was once we had a deal where everybody was
9 signing, I would sign a non-compete. I was not willing
10 to sign a non-compete at that point because her
11 daughter's involved in the purchase and I understand
12 that. It's family. But if I sign that non-compete she
13 could name whatever price she wanted to name. She could
14 tell me I could only have two percent or whatever
15 percentage. I would have no control. And the non-
16 compete was very restrictive. And I have a family that
17 I would have to move out of the area and that sort of
18 thing. And I explained my reasons for -- my concerns
19 for not signing a non-compete at that time. It was not
20 that I would not sign it. It was I would not sign it at
21 that time until we have a deal.

22 Q. All right. And you've been there twelve years;
23 correct?

24 A. Other than eight months that I left.

25 Q. Have you ever been asked to sign a non-compete

1 before?

2 A. No, sir. I'd never been asked to sign a non-
3 compete either when I started or when I left for eight
4 months and came back. A non-compete was never mentioned
5 to me in my time there.

6 Q. Let's go through and get a little explanation about
7 this document. What is this document?

8 A. That is the audit review list I made when I was at
9 McKinley Cooper.

10 MR. ARIAIL: I don't know if you could maybe
11 dim the lights a little bit on it. That might be -- so
12 we could see that if you could, please, ma'am. Thank
13 you. That might be better right there. Let me see if I
14 can get a little closer.

15 Q. I want to go through -- because you put this
16 together at the request -- at whose request?

17 A. Toni McKinley asked me to put this list together to
18 help us track audits and reviews, the contract term and
19 that sort of thing, because I had an audit client call
20 me several months after the audit was finished asking
21 why they did not get an invoice for the audit. And they
22 had contacted me at McKinley Cooper. So I went to Toni
23 and asked her -- I showed her that this client hasn't
24 been billed and she was not aware of it. I can't
25 remember the exact client. It was, you know, I think

1 the audit fee was around ten thousand dollars. But the
2 client's like, I need to pay you guys for this audit. I
3 was never billed. And so I had this -- I went and told
4 Toni that they had called. And she couldn't believe she
5 had forgotten to bill a client. So we discussed this
6 list as a way for someone else to help her track when
7 she either hasn't billed or when their contract is up so
8 she knows when she needs to do another proposal. So I
9 prepared that list in 2009.

10 Q. Okay. And that list, where did you keep that --
11 well, this is back in 2009; correct?

12 A. Yes, sir.

13 Q. Where did you keep that list?

14 A. That was on the computer, I believe.

15 Q. And when you say computer, while you were at MCC
16 you had a desktop; correct?

17 A. I had a desktop, yes, sir.

18 Q. And a desktop is one that stays in your office, is
19 my understanding; is that right, on the desk?

20 A. Yes, sir. Correct. I never had a laptop when I
21 worked there.

22 Q. Okay. You never had a laptop. And when you saved
23 this document, what did you -- first of all, maybe this
24 is a better way to ask it. Who was involved in the
25 creation of this document?

1 A. I started this document when Toni McKinley asked me
2 to use it to show her when these proposals -- she was
3 wanting a way to track the stuff. We later looked at
4 this document when we were trying to build a -- or build
5 or decide we're going to put together an actual all-
6 inclusive type thing to track jobs. When engagement
7 letters were sent out for each client, when tax returns
8 were done. We had other deadlines on forms call SFSACs
9 that have to be filed if it's a single audit. So
10 there's a lot of things that would have went in there.
11 And we were trying to figure out a way that Toni --
12 because the audit team was in and out of the office a
13 lot. So there would be several days where we wouldn't
14 see Toni because we're out in the field doing the
15 audits. Clients were calling her asking the status of
16 their audit and she had no well to tell them because we
17 weren't there. We may have had the file with us. She
18 wanted a way to know exactly where she stood on these
19 audits so if the clients called in, she could give them
20 an answer. But the initial start of this was when she
21 forgot to bill somebody. She wanted a way to start
22 doing that.

23 Q. Okay. And this information was -- who was aware
24 that this information existed?

25 A. When I first started this thing, this spreadsheet,

1 Toni McKinley and myself. She asked me to create it.
2 Later Todd Highsmith knew I'd made it. Allan Ward was
3 aware that we had something to start with. He was the
4 one helping us try to decide if there was a way to build
5 an Excel spreadsheet that would be manageable. We have
6 a lot of clients. We had a lot of deadlines. Each
7 client had several deadlines for their -- like I say
8 SFACC -- SFSAC. They had tax deadlines. They had all
9 these deadlines in each audit file. And that
10 spreadsheet we decided was going to be way too long to
11 try to put it on an Excel spreadsheet. It wasn't going
12 to work.

13 Q. Okay. And at some point in time -- or was this
14 sitting around the office? How did y'all -- or did you
15 distribute this?

16 A. I had that on my desktop. We tried to use it for
17 the other thing. It was originally because she forgot
18 to bill. We tried to see if we could think of a way to
19 use for the other thing. It wasn't going to work. And
20 I'd sent that to Sheryl Medders and to Marcy Loucks when
21 we started talking about buying the company. The list
22 of items we were going to need, one of the things was a
23 list of the clients and stuff like that. So I sent them
24 an email telling them I had this old list that we'd used
25 for something; it hasn't been updated, but it would be a

1 start. It was a start of the clients. So it was an
2 older list that I had and I said, you know, that's a way
3 we can start to come up with what we need and
4 information from Toni about buying in. And I sent that
5 to Sheryl Medders and to Marcy Loucks.

6 Q. Okay. And so was Toni ever included in these
7 emails or had knowledge of this?

8 A. I don't know if she had knowledge of that email
9 that I sent to them. She had the knowledge of that
10 list, but I know if she had a knowledge of the email
11 that went to Marcy and to Sheryl.

12 Q. Okay. And you sent it to Marcy and Sheryl, who are
13 owners; correct?

14 A. They're the owners now, yeah.

15 Q. And what was the response in regards to the list?

16 A. I don't remember if they emailed me back, but they
17 let me know they got the email. I don't know if they
18 did that in writing or if they said, you know, I've got
19 it; we'll start from there. And Marcy was going to be
20 the one to go -- start telling her mom, these are the
21 all the things they want to see. This is the list we've
22 got, that sort of thing.

23 Q. Okay. And who -- at some point -- this is tracking
24 collection information; is that why it was started?

25 A. It was -- at that point it was started to know --

1 when she forgot to bill that client, she said, I've got
2 to come up with a way to track all these jobs. Clients
3 are calling me. I don't know where the audit stands
4 because nobody's here; we're out on the road. I don't
5 know when their proposals are up. I don't know, you
6 know, their contract terms. I don't know when any of
7 that stuff's up. Other than to look back through her
8 file. She wanted to be able to just -- because she had
9 some stuff in her credenza back there, but it was all
10 separated out. She says, I want to have a way that I
11 can just pull up it up on the computer, find it really
12 quick when a client calls in, so I don't have to search
13 through all this information.

14 Q. Okay. And this is September 2009.

15 A. Yes, sir.

16 Q. What happened to this document -- I mean, it looks
17 like a lot of the information, most of it expires in
18 2011.

19 A. Yes.

20 Q. Was it updated?

21 A. It was not updated, no.

22 Q. Okay. And did you -- when did you provide -- let
23 me show you something. Is this the email right here?

24 A. Yes. This is when I sent it to Marcy on June 17th,
25 2011.

1 Q. Okay.

2 MR. ARIAIL: Your Honor, can we approach real
3 quick?

4 THE COURT: Sure.

5 (WHEREUPON, a bench conference was held off the
6 record.)

7 THE COURT: All right. Take the jury out for
8 a short recess.

9 (WHEREUPON, the jury exited the open court at
10 approximately 2:50 p.m.)

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

13 THE COURT: All right. Are we ready to bring
14 the jury.

15 MR. ARIAIL: Hold on one second. Yes, Your
16 Honor. We're ready.

17 THE COURT: All right. Bring them on.

18 (WHEREUPON, the jury entered the open court at
19 approximately 2:59 p.m.)

20 MR. ARIAIL: I'm sorry. I was trying to find
21 an email. I think I've located it.

22 Q. Do you recognize this email here?

23 A. Yes.

24 Q. Okay. What is that?

25 A. That is an email from my email address at McKinley

1 Cooper when I worked there to Marcy Loucks on June 17th,
2 2011.

3 Q. Okay. And what does it deal with?

4 A. It deals with this list. This was in the process
5 when we were starting to try to get all the information
6 from Toni. This list -- I sent this to Marcy as a way
7 to start the stuff we needed from Toni.

8 Q. So this email is in conjunction with that -- I
9 think we call it the June 23rd buy-in list; is that
10 right? Let me see. I'm trying to gather information
11 for this, kind of along the lines of this?

12 A. Yes. We were starting to list all the stuff that
13 we needed. Marcy was going to go to her mom. And I
14 told her I had this list that hasn't been updated in a
15 long time, but it was a place to start.

16 Q. Okay. So my understanding is y'all are purchasing
17 -- trying to purchase the business. You're having
18 communications. You found this list that you have?

19 A. Yes.

20 Q. But it's out of date?

21 A. It's out of date.

22 Q. Okay. And you're sending that email to who?

23 A. I sent this email to -- this one is to Marcy.

24 Q. Okay. And it deals with updating this list because
25 it's not up-to-date?

1 A. Yes. It says it will need to be updated.

2 Q. Okay.

3 MR. ARIAIL: Your Honor, if I can move this
4 into evidence, as I think ---

5 MR. HAYNSWORTH: No objection, Your Honor.

6 THE COURT: Without objection.

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

9 Q. Is this the email that you sent?

10 A. Yes. That's the email.

11 Q. Okay. And it's basically referencing -- it says at
12 the top, attachments MCC audit and review list xls;
13 right?

14 A. Yes, sir.

15 Q. And that was from your computer?

16 A. That was from my computer at McKinley Cooper.

17 Q. And it was sent to Marcy?

18 A. It was sent to Marcy Loucks.

19 Q. Okay. And I think one of the key points of this
20 is, it will need to be updated because I'm sure there's
21 some lost and gained since I started it?

22 A. Yes, sir.

23 Q. At no point in time during this had you updated
24 this list?

25 A. No.

1 Q. Okay. Now, Shane, I want to go through a little
2 bit about the process of the buy-in. Did it -- what
3 eventually happened with that?

4 A. When we were asked to sign the non-compete, it
5 started to look like the purchase was not going to
6 happen. That it was not going to move any further than
7 that. I was -- Marcy Loucks came into my office and
8 said everybody's going to sign this non-compete. She
9 actually told me that during the process. So at some
10 point we were kind of up in the air on what was going to
11 happen, where it was going to go from there.

12 Q. Okay. And when did it, I guess, ultimately come to
13 a head?

14 A. The day I left, November 1st, 2011, is when she
15 asked me to sign the non-compete.

16 Q. And explain to me what happened in that meeting?

17 A. I went in for my annual review. That's when Toni
18 was having everyone sign the employment contract, which
19 contained a non-compete that we were talking about. I
20 went in there. As soon as I sat down we started talking
21 about reasons why I couldn't sign that non-compete. I
22 told her we would be happy to sign the non-disclosure,
23 confidentiality. Again, I told her my reasons for not
24 signing a non-compete. I'd already met with her
25 probably four times between June or July and November

1 and told her these are my reasons. You know, I will be
2 happy to sign a non-compete when we have the terms of
3 the purchase, but I'm not going to sign something saying
4 I can't work in Greenville anymore. It was a very
5 restrictive non-compete, that I would have to move away.
6 And I was not prepared to sign something like that until
7 I knew what we were buying.

8 Q. Okay. And did you discuss with her at that time
9 anything about the non-disclosure?

10 A. Yes. We talked about the non-disclosure and we
11 told her -- I told her again, we're fine to sign that.
12 I have no problem signing a non-disclosure. I just
13 can't sign a non-compete until we know the price of the
14 firm, who's going to buy how many shares, you know. We
15 didn't have any of those details at that point.

16 Q. Okay. And how did the meeting end once you said
17 you're not going to sign the non-compete?

18 A. Well, she told me to pack up my bags and leave. Go
19 pack up my office and leave at that point.

20 Q. Okay. And when you left did you leave immediately
21 or how was the process that you left?

22 A. I went and got a banker's box and packed up
23 pictures off my desk, what you would have in your
24 office, your personal stuff, and I left at that point.

25 Q. Okay. And before this, and I know -- we heard

1 testimony from your brother, were any -- did you take
2 any steps to plan for the future or do anything if this
3 buyout didn't happen or buy-in?

4 A. Well, Todd and I discussed that. That was probably
5 when he had that business plan because he had met with
6 Toni and she told him, he would be -- I don't know her
7 exact words, but crazy not to have a plan B if this
8 didn't work out.

9 MR. HAYNSWORTH: Your Honor, I've indulged it
10 a while, but we're testifying about what other people
11 said with other people, and it's hearsay.

12 THE COURT: I sustain the objection. And I
13 would ask the jury to disregard it.

14 Q. Just what you know.

15 A. Okay.

16 Q. As part of that, I guess, -- the part of -- when
17 you left, when you're out, what steps did you take to
18 start Highsmith & Highsmith?

19 A. When I left?

20 Q. Uh-huh (affirmative)?

21 A. I started -- we had to develop a website, our
22 letterhead, our -- you know, that sort of thing. And I
23 started contacting clients to kind of build our
24 business.

25 Q. Okay. And did you do any of that before you left?

1 A. No.

2 Q. Okay. So November 1st, after that, you went out --
3 when did you set your email up for Highsmith &
4 Highsmith?

5 A. I probably talked to someone about setting that up
6 late October, the very beginning of November, as a way
7 to have something set up, but the email was not set up
8 until November 3rd.

9 Q. Okay. And who did that for you?

10 A. My brother-in-law, Tim Cutter.

11 Q. Okay. And what was the name of that email address,
12 I guess?

13 A. My email address is Shane at Highsmith CPAs dot
14 com.

15 Q. Okay. Where did y'all go to work -- you know, how
16 did you find a place to -- it's you right now, November
17 1st?

18 A. Right.

19 Q. Where did you go? Where were you going to earn
20 livelihood at that time?

21 A. We didn't have a place to go. We didn't have money
22 to pay rent. So we actually set up an office in my
23 brother's basement at his house when my brother left.

24 Q. Okay. And when did you set up Highsmith &
25 Highsmith, I guess, LLC?

1 A. I'm not sure of the exact date. It was November
2 12th maybe is when it was registered with the State. I
3 don't know if that's when they register it or -- I can't
4 remember. My brother probably did that.

5 Q. Okay. Do you recognize this document here?

6 A. I do.

7 Q. Okay. And what does that deal with?

8 A. This is when he was setting up our company.

9 Q. Okay. Were you involved in this?

10 A. Yes, I knew we were setting up the company.

11 Q. Did you fill any of this out or submit it?

12 A. No, I think Todd submitted it.

13 Q. And basically it's the Highsmith & Highsmith LLC
14 information?

15 A. Yes.

16 Q. Okay. And when you left, when was the first time
17 you contacted any former clients that you had?

18 A. I probably started the very next day contacting
19 people I've worked with just saying, I'm no longer
20 there; that sort of thing. I had four kids at home, you
21 know, I had to get started. I needed a way to earn a
22 living so I probably started the next day.

23 Q. Okay. And how did you get the information to
24 contact these individuals?

25 A. I pulled up the websites and they either had their

1 email address on there or I called them. The phone
2 numbers are on the websites; that sort of thing.

3 Q. Okay. And when you introduced yourself, I mean,
4 how did you go about doing this?

5 A. A lot of these clients, they knew who I was because
6 I'd worked on the audit for years. But I basically
7 said, I'm no longer with McKinley Cooper. I am going to
8 start my own firm. I would like to be on your bid list
9 for the next time you go out for proposals to do your
10 audit. I would like to just be on the list of any CPA
11 firms you have. If you're going to accept proposals, we
12 would like our name on that list. We would be
13 interested in submitting a bid.

14 Q. Okay. And you would send out that email. Was
15 there any other communication outside of that or did you
16 meet with any of these individuals?

17 A. Yes.

18 Q. Okay. And when did you meet, was it after you
19 left?

20 A. It was after I left McKinley Cooper.

21 Q. And how did you -- after you, I guess talked to
22 them, what process did you go about to keep -- did you
23 keep in contact with them at any time?

24 A. Yes. I probably -- I had worked with these people
25 in these audits, some of them for the whole time I was

1 there, for twelve years. They knew who I was. They
2 knew I had a family with young kids. Several of them
3 asked me to send pictures. So there's probably emails
4 where I'd, through that time, from the time I asked to
5 be on the bid list until we actually got the audit, they
6 probably got emails from me about my family, that sort
7 of thing. We had Christmas cards we sent out to those
8 clients that they're alleging we've taken, but to places
9 all over the state, just wanting to keep our name out
10 there so if anybody does go out for bid, we want to have
11 the opportunity to bid on your work.

12 Q. What information, if any, did you give about
13 pricing or prices?

14 A. None. I didn't talk pricing. I was just asking to
15 have the opportunity to bid if they went out for bid.

16 Q. Right. And explain to me how that works. We've
17 heard of this bidding process, how does it work, you
18 know, with these clients about bids. I know we've got,
19 it sounds like in this case, governmental entities and
20 not-for-profits or something like non-profits. How does
21 it work in the bidding process?

22 A. Basically, a lot of the clients, both non-profits
23 and governmentals will have a -- I call it a bid list.
24 I'm not sure exactly what they call it. That's what we
25 call it in the accounting field, but we're asking to be

1 on the list. Basically saying -- a lot of these
2 companies don't have to go out for bid. They don't have
3 to do that, but if they have a list and you have your
4 name on there when they go out for bid, they have your
5 name as one that they're going to send a request for a
6 proposal from. They're going to send you that request.
7 And then you would submit a bid on what you could do the
8 audit for, your experience, stuff like that. That would
9 be contained in the proposal. But the actual bid
10 process, yeah, you're just asking to be on the list.
11 And if they do go out for proposals they'll send you --
12 a lot of times they'll send you a request for proposal.
13 Sometimes they'll send you an email saying, please send
14 me a bid. And at that point you'd send them your
15 proposal.

16 Q. Okay. And whose decision is it who they send bid
17 proposals to?

18 A. It's the client's decision who -- they can -- the
19 part about being on the bid list, they can still say,
20 well, I'm going to send out a request for a proposal to
21 this firm or to this firm. I've heard of them. I'm
22 going to send it to them. It's their choice who they
23 send these request for proposals to.

24 Q. Okay. And as part of this process, I guess you can
25 choose at that time if you want to make a proposal or

1 not? I mean, or you can make a bid back to them or
2 anything like that?

3 A. Correct. We've actually, since we've started our
4 firm, we've had people that would put it out there on a
5 public bid. You can also check websites. A lot of
6 these agencies will go on and set their request for
7 proposal out there on the internet. So any CPA can go
8 out there and see it and you can decide if you want to
9 submit a bid on that work. It may be work that you've
10 never experienced and a certain type of client. And you
11 can decide, I don't want to bid on that; I've never done
12 that. Or anything could be the reason. You can say,
13 it's going to take us too much time or, you know, it
14 might be further away so you're going to have to bid a
15 different amount. It's all kinds of reasons. But you
16 can decide to bid or not. You don't have to bid.

17 Q. And how do you make a determination of how much you
18 want to bid?

19 A. Well, we look at how long it's going to take us for
20 the audit. It's just my brother and I. We're the only
21 two auditors in our firm. We look at how long it's
22 going to take us to do it, to get through all the work
23 while we're there. And then our work's not done when we
24 leave the client. We take that information, we got back
25 to our office and we have to piece it all together. And

1 there's more time there. There's typing the actual
2 report. There's reviewing the report and all that. So
3 we look at how much time it's going to take us to do the
4 audit from start to finish. We look at our rates, which
5 at the time were pretty low because we were working out
6 of a home office. We had no employees. There's only
7 two of us. So our hourly rate was really low, plus we
8 needed the business. So we've got to bid what we think
9 we can get the business and that's where we come up with
10 our fee.

11 Q. Okay. And there's -- in regards to these
12 communications you had, you sent out or communicated
13 with a lot of others who didn't respond; correct?

14 A. Yes. When we left McKinley Cooper, I had looked on
15 the internet for like Firemen's Associations, the Fire
16 and State -- South Carolina Firemen's Association. I
17 looked for all fire departments. I looked on South
18 Carolina Rural Water Association for any rural water
19 districts. And a lot of times it would list a name or
20 an email address. So I'm emailing people all across the
21 State asking to be on their bid list. I'm emailing
22 towns and cities I've never been to, just trying to get
23 on bid lists to actually get the proposal in and get
24 some work. So I probably -- I couldn't even put a
25 number on the amount that I sent out when I started.

1 Q. Now, during this period of time have you requested
2 or received from the entities or the non-profits any
3 proposals or copies of proposals of McKinley Cooper?

4 A. We've requested some under FOIA, Freedom of
5 Information. We've done that to other clients, as well,
6 to other people.

7 Q. And you've done it for others to find -- why do you
8 do that?

9 A. Well, a lot of times it's done after the fact. A
10 lot of times you want to see what the winning proposal
11 had in it that yours didn't. We were developing our
12 proposal at that point and we're trying to pick up, we
13 need to start doing more of this or, you know. And you
14 want to get all of those proposals because you want to
15 see what all of the CPA firms did. We want to see are
16 we anywhere close or are we on the right target with our
17 proposals, with our fees. Ours was lower because we're
18 working out of a home office. But we still want to know
19 -- we're trying to gauge where we're falling in the list
20 of all of these.

21 Q. And during this process since you've been gone,
22 have you lost -- or are you aware of any bids that you
23 lost to McKinley Cooper?

24 A. Yes.

25 Q. And which ones are those?

1 A. Town of Johnston, City of Laurens, United Way of
2 Anderson, Greenville Chamber of Commerce, Greenville
3 Chamber Foundation. I'm sure there's more. I can't
4 think of anymore off the top of my head.

5 Q. Okay. And how have you become aware that you lost
6 those bids?

7 A. The client has called. They usually notify you.
8 They'll send you a letter sometimes saying you did not
9 have the winning bid. We chose to go with another firm.
10 Sometimes an email. Sometimes it's a phone call just
11 telling you at that point. So sometimes you request the
12 proposals just to see, sometimes you don't. They'll
13 just tell you who got it and what the fee was.

14 Q. Now, we're going into some documentation or some
15 questions about some bank confirmations that apparently
16 have been utilized. I mean, you heard Mr. Hemond
17 testify this morning; is that correct?

18 A. That's correct.

19 Q. Now, I think -- explain to me what this document
20 is?

21 A. This is a standard bank confirmation that's put out
22 by the American Institute of Certified Public
23 Accountants. It's also approved by the banking industry
24 that any CPA when they're doing an audit to confirm
25 these bank balances is going to use this standard form.

1 Q. What does it say at the bottom?

2 A. It says approved 1990 by American Bankers

3 Association, American Institute of Certified Public

4 Accountants and Bank Administration Institute.

5 Additional forms available AICPA. And CPA 2 biz dot

6 com.

7 Q. Okay. And I'm trying to understand this document.

8 We've just said here's a bank confirmation. Explain to

9 me what this bank confirmation, how it is -- how you

10 deal with it in the auditing process?

11 A. Well, this confirmation is sent out during the

12 audit. Sometimes clients will prepare this document.

13 Sometimes we would prepare it for the clients, but we

14 have to send it. The client has to sign -- I don't know

15 if you can point -- but on the customer's authorized

16 signature line, it has to be an approved signer from the

17 bank, like somebody from that client that's authorized

18 to sign checks. They would sign that information.

19 After we had the bank account and all that information

20 on there, they would sign it. We would send that to the

21 bank. And the bank is going to confirm those bank

22 balances as of the date of our audit. So if an audit is

23 -- if their year ends December 31st, we go in to deal

24 with the audit after that point because we wouldn't go

25 into until probably January -- late January, February to

1 do their audit. We're sending these to the bank to say
2 their balance at December 31st is this amount. And
3 that's what this confirmation is for.

4 Q. Okay. And I want to go specifically -- let's see,
5 this first paragraph right here.

6 A. Yes.

7 Q. Tell me -- it says that you have to provide the
8 information as of the close of business on a day. What
9 is the date for that when it's ---

10 A. The date of the bank confirmation is going to be
11 the date on the client's fiscal year. Some clients are
12 calendar year, which means their fiscal year is the
13 same; it ends December 31st. Some clients, a lot of
14 governmentals and non-profits have a June 30th year end.
15 So if we are going in to do an audit for a client that
16 has a June 30th year end, it's going to say June 30th
17 right there and whatever year you're auditing. But it
18 will say that exact date. So the bank is going to send
19 this back. Any kind of interest rate they have, then
20 they'll fill out a balance. The bank is the one that
21 puts in that balance there and they send that back to
22 the auditor.

23 Q. Okay. So the client or -- who filled that out? We
24 look at this and there's account numbers on it. There's
25 a lot of stuff I don't understand. Interest rates,

1 balance. I mean, look right here we've got description
2 of collateral?

3 A. Right. They can also fill out this second part.
4 We were directly liable to the financial institution for
5 loans. If you have a loan at that particular bank
6 you're sending this to, if the client does, they would
7 fill in the account number, description and they would
8 put a balance on the loan. They would say they have a
9 loan with us too. On top of having a checking account
10 here they have a loan here. And they would give you
11 that balance right there, with the other information
12 that has to do with that loan.

13 Q. Maybe I can do a little better because this is one
14 that directly applies here. This is the same form;
15 correct? This is the Plaintiff's Exhibit 4?

16 A. Yes, sir. That's the same standard bank
17 confirmation.

18 Q. And it's a standard form to confirm?

19 A. Yes, sir.

20 Q. And then here, since there's an account number
21 there, all this other information has to be filled in;
22 is that correct?

23 A. That's correct. The bank would fill in that
24 information for you.

25 Q. Send that to the bank. You get that. Now, how,

1 when you were at McKinley Cooper, how did these -- what
2 are the variety of ways that the client got these
3 confirmations?

4 A. We could prepare those for the client. We could
5 take them with us when we went on the audit. It could
6 be by flash drive. We could have emailed these
7 confirmations to the client. Sometimes we would email
8 them ahead of time. Say, hey, we're coming on your
9 audit next week. We're going to go ahead and get these
10 confirmations. Or maybe if their audit wasn't for, you
11 know, another month, say, their year-end was December
12 31st, but we're not going until March, let's go ahead
13 and get these confirmations done now so we could email
14 them to them. We could hand deliver them. We could
15 take them on a flash drive. There are several ways that
16 we would get those to the client.

17 Q. So have you been to clients that have these on
18 their systems?

19 A. Yes.

20 Q. Okay. When you left MCC, what information did you
21 take in regards to CLEs -- let me say that again -- CPEs
22 or any type of continuing education materials?

23 A. I took my certificates from the course. When you
24 take a CPE course they give you a certificate that
25 proves -- it's your proof to the South Carolina Labor

1 Licensing Board, the LLR, that you did take that course
2 during the year. Sometimes if you take self-studies,
3 you actually go on and take a test. And a lot of times,
4 what I would do is I would print out that test and I
5 would fill it out by hand. And then I would go online
6 to fill it out or to actually input it online. But I
7 would have it. And a lot of times that was my back up
8 for the CPE. Sometimes they give you reference
9 material; they'll give you a book. That's your
10 reference material that you attended that CPE. Was that
11 your question?

12 Q. Yes. Yes, sir. Let me grab one more email right
13 quick. Now, during the -- when you were compensated,
14 you had a salary, along with commission and a bonus;
15 correct?

16 MR. ARIAIL: Give me just one second, Your
17 Honor.

18 Q. You had a salary, commission and bonus while you
19 were there; correct?

20 A. Yes, I did.

21 Q. Okay. And your salary when you left, how much were
22 you making?

23 A. My salary at the time I left was around seventy-
24 five thousand dollars. It might have been seventy-
25 seven. I don't remember the exact number, but it was

1 between seventy-five and seventy-seven thousand dollars.

2 Q. Okay. And when you -- I guess when you left you
3 had a commission too. Was there a commission?

4 A. I got a fifteen percent commission on clients that
5 I brought into the firm, so I had that each year.

6 Q. Okay. And then you had a bonus too?

7 A. I had a bonus. Not all employees had a bonus. As,
8 far as I know it was only me and Marcy Loucks that got a
9 bonus.

10 Q. Okay. And what was your bonus based off of?

11 A. My bonus was based off the increase in total
12 collections from one year to the next. So if we had one
13 year -- say, one year collections were a hundred and
14 thousand and the next year the collections were a
15 hundred and ten thousand, my bonus was based on that ten
16 thousand dollar increase. So I got that each year.

17 Q. Okay. And how did you calculate your bonus during
18 this time?

19 A. Toni McKinley gave me permission to get total
20 collections from Amanda up front, who kept track of all
21 the invoices and billing. She gave me permission to get
22 it because I wanted to know -- gauge about what my bonus
23 would be. Just for my family, I kind of know, you know,
24 how much we're going to have at the end of the year. Or
25 we always got paid in January or February of the next

1 year, so I would like to know about where it was going
2 to be. So I would email Amanda Williams and ask for
3 collections for this year compared to last year. So if
4 I was in July of this year, I would say what were the
5 total collections from January to July of last year
6 versus January to July of this year? And that's how I
7 would kind of gauge where we stood. It wasn't exact,
8 but it would kind of give me an idea if we were in the
9 same place with collections or if we were running a
10 little bit ahead.

11 Q. Who would you send an email to to request that
12 information?

13 A. I would send it to Toni McKinley's email address.

14 Q. And would you be provided with that information?

15 A. Yes, I would.

16 Q. Okay. Now, tell me if you recognize this document
17 here?

18 A. This is a proposal for audit services for the Town
19 of Edgefield for June 30th, 2013, '14, and '15.

20 Q. And how did you get a copy of that document?

21 A. I requested a copy of this document from the Town
22 of Edgefield.

23 Q. Okay. And why did you request it?

24 A. We requested it because this is one of the clients
25 that are alleged we took from them.

1 Q. Okay. And they provided that to you?

2 A. Yes.

3 Q. And that was for 2013, 2014, 2015?

4 A. Yes.

5 Q. Okay.

6 MR. ARIAIL: Your Honor, if I could move this
7 in.

8 THE COURT: Any objection?

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

10 THE COURT: Without objection.

11 MR. ARIAIL: Thank you, Your Honor.

12 THE COURT: You might staple it.

13 (WHEREUPON, Defendant's Exhibit Number 8 was marked
14 and admitted into evidence.)

15 Q. I'm going to get you to take a look at page six.

16 Do you see page six?

17 A. Yes.

18 Q. Do you see at the top of the document I think where
19 -- let me make sure we're on the same page. Page six
20 says, summary of qualifications, continued?

21 A. Yes, sir.

22 Q. Is that -- does it look something like this right
23 here?

24 A. Yes, sir.

25 Q. And it has all the clients and various things

1 listed on there; is that right?

2 A. It does.

3 Q. Okay. And what's the date of that document?

4 A. This is February 18th, 2013.

5 Q. Okay.

6 A. It's on the front.

7 Q. All right. And what's the difference between this
8 document that I'm pointing to right here and that one
9 you have in your hand?

10 A. At the top of this one it says confidential.

11 Q. Okay. So that one doesn't have confidential on it;
12 does it?

13 A. Yeah. And it may have some different clients on it
14 as well. But this one has confidential and that one
15 does not.

16 Q. Okay. So the difference here is now it says
17 confidential at the top of it and it doesn't have it on
18 that one; is that correct?

19 A. That's correct.

20 Q. Okay. Now, I'm going to turn the page. Same thing
21 there?

22 A. Yes, sir.

23 Q. Okay. And this one -- is this the -- it looks like
24 it's the same -- maybe I can come out a little bit.

25 We've got page five of this document on the right?

1 A. Uh-huh (affirmative).

2 Q. And page five on that?

3 A. Yes, sir.

4 Q. Is the difference on this one that you see right at
5 the top, there's an addition of confidential; correct?

6 A. Yes, sir.

7 Q. Okay. Were you ever told while you were there that
8 all documents were confidential?

9 A. No, sir.

10 Q. And I'm sorry if I'm blinding you right there.
11 Bear with me one second. I think I'm about done. Do
12 you recognize this document? It's been entered as an
13 exhibit?

14 A. Yes.

15 Q. Tell me, what is that document?

16 A. This looks like a reservation of a name, Highsmith
17 & Associates, LLC with the South Carolina Secretary of
18 State.

19 Q. And what is your understanding of what Highsmith &
20 Associates is?

21 A. I think that is where Todd was reserving a name for
22 his wife. She does signing for deaf individuals and he
23 was reserving a name that could be used for her company.
24 And it was dated 11/2/2009.

25 Q. Sitting here today, have you used any confidential

1 or trade secret, proprietary information, that was
2 called that while you were there, to obtain any clients
3 today that you currently have?

4 A. No.

5 MR. ARIAIL: I have no further questions, Your
6 Honor.

7 THE COURT: All right. Mr. Haynsworth.

8 MR. HAYNSWORTH: May it please the Court?
9 Your Honor, may I approach?

10 THE COURT: Yes, sir.

11 MR. HAYNSWORTH: We may or may not be getting
12 into Mr. Highsmith's deposition, so I thought I would
13 proactively bring you the sealed original. I've got a
14 copy for you.

15 **CROSS-EXAMINATION**

16 **BY MR. HAYNSWORTH:**

17 Q. You said, I believe, that you -- that on November
18 1st you packed up a box of photos and certificates and
19 other stuff in your office and you left?

20 A. Yes, sir.

21 Q. Did you delete the emails from your McKinley
22 Company computer that day or some earlier time?

23 A. That day before I left, I cleaned off the computer.

24 Q. Okay.

25 A. The emails. Sorry. The emails on the computer.

1 Q. No clients that became H&H clients that used to be
2 McKinley Cooper clients told you from the client what
3 McKinley Cooper had charged the year before; did they?

4 A. No, not that I'm aware of.

5 Q. So you didn't get their prior information from the
6 clients' mouth as far as what McKinley Cooper had
7 charged for a prior year audit?

8 A. No. I don't recall any, no.

9 Q. Do you recall sitting in my office when I took your
10 brother's deposition?

11 A. Yes.

12 Q. Do you recall there being a discussion betwixt your
13 brother and I as to a personal flash drive that he had
14 where some documents from McKinley Cooper were found?

15 A. Yes. I think that's what we were discussing
16 earlier today, yes.

17 Q. Right. Right. But I'm really focusing back on
18 what he said in his deposition when you were sitting
19 there in the deposition with us?

20 A. Yes, you'll have to show me because I don't
21 remember his deposition, all of it, but ---

22 Q. Well, do you recall him testifying that there were
23 four specific documents that he inadvertently had copied
24 onto his H&H laptop?

25 A. I think I remember that.

1 Q. Okay. And do you recall him further telling me
2 back then that he could not have accidentally
3 inadvertently copied any other McKinley documents
4 because the flash drive stopped working and it was
5 discarded. Do you recall that?

6 A. I would have to see it, but yeah, I remember the
7 flash drive did stop working at some point, yes.

8 Q. Okay. Well, sir, can you tell me how it is that on
9 your H&H laptop there are McKinley Cooper documents?

10 A. I do not -- no. They could come from a flash
11 drive, that flash drive that was used at a client's,
12 that was a McKinley Cooper client that is now our
13 client.

14 Q. But that flash drive stopped working though?

15 A. Right.

16 Q. So how could Todd's flash drive ---

17 A. I'm saying I could have got it from the client. It
18 could have been at the client's.

19 Q. Do you and Todd share flash drives? Like, does he
20 plug -- get information off his computer and put it on a
21 flash drive and that gets into your computer and vice
22 versa?

23 A. Yes.

24 Q. Did you retain in your head when you left McKinley
25 Cooper knowledge of what McKinley Cooper charged all its

1 audit clients?

2 A. I remembered some of the audit clients that I've
3 worked on for twelve years. I remembered a ballpark
4 amount of some of those, yes.

5 Q. All right. Well, how about tell me last time
6 McKinley Cooper did the audit for S.C. Rural Water what
7 their audit fee was?

8 A. That one is actually on that audited financial
9 statements, so I'm wanting to say it was four thousand
10 dollars that I reviewed off the financial statements
11 themselves.

12 Q. And what did -- that's a client of y'all's now;
13 right?

14 A. It is.

15 Q. What was your audit fee the first year that you did
16 an audit for S.C. Rural Water?

17 A. I am not sure off the top of my head. I would have
18 to look back.

19 Q. Was it three thousand three hundred and fifty
20 dollars?

21 A. It was around that amount, yes, sir.

22 Q. Okay. How about United Ministries, do you recall
23 what McKinley Cooper charged them?

24 A. I do not.

25 Q. Okay. Do you recall what y'all charged United

1 Ministries?

2 A. I would have to look back, but I'm wanting to say
3 around six thousand dollars.

4 Q. How about fifty-nine hundred?

5 A. Okay.

6 Q. All right. Center for Community Services, did you
7 retain in your head what McKinley Cooper charged Center
8 for Community Services?

9 A. That was a small audit, so I would guess thirty-
10 five hundred dollars, four thousand dollars.

11 Q. Do you recall what y'all's fee was for Center for
12 Community Services?

13 A. I will have to look back at the records.

14 Q. Would twenty-five hundred dollars ---

15 A. That could possibly be it. But when we were
16 working out of the home office, as well.

17 Q. Town of Reidville. That's one that used to be
18 McKinley Cooper; right?

19 A. Yes, sir.

20 Q. Okay. Do you recall off the top of your head what
21 McKinley Cooper last charged Town of Reidville?

22 A. That's another small governmental. I can ballpark
23 it, but I can't remember her exact fee.

24 Q. Okay. So clearly you don't remember just because
25 you've got it in your head, some ---

1 A. No. I said I can ballpark a lot of her audit fees
2 because I worked on them for twelve years.

3 Q. Well, ballpark the Town of Reidville then?

4 A. Probably around five thousand dollars.

5 Q. What did you charge Town of Reidville when it
6 became y'all's firm?

7 A. Thirty-five hundred dollars maybe.

8 Q. Would twenty-five hundred maybe be closer?

9 A. Maybe.

10 Q. Okay. Greer Relief, do you remember off the top of
11 your head what McKinley Cooper charged Greer Relief?

12 A. No. But a lot of these I can also pull up a 990 on
13 GuideStar. A lot of this information is out there. And
14 we also review last year's financial statements and a
15 lot of time the information is there as well. So we're
16 not just --- we're reviewing stuff before we submit our
17 proposal.

18 Q. And, Shane, you also knew, did you not, that the
19 information about what Toni charged and how long the
20 customer contracts were and that sort of thing, that
21 that was in Toni's office at McKinley Cooper. You knew
22 that from working there; didn't you?

23 A. I know she had a copy of that. I know it was on
24 the server as well. The proposals were on the server at
25 McKinley Cooper.

1 Q. Oh, let me jump topics for just a second. Let me
2 hand you two batches of documents, Shane, and get you,
3 if you know, if you can tell me what they are?

4 A. These look like our invoices that we ---

5 Q. All right. And I believe one group would be the
6 tax clients and the other group would be the audit
7 clients?

8 A. It appears that way, but I'd need to flip through
9 it to tell you exactly what we're doing for each of
10 these clients.

11 Q. All right. Well, I tell you what, let's assume
12 they are. If we take a break, you're welcome to look
13 through it. But I think -- that's what I understand
14 they are.

15 A. Okay.

16 Q. But those are Highsmith & Highsmith Company
17 documents regarding bills to tax clients and audit
18 clients; right?

19 A. Yes. It appears they are.

20 Q. All right.

21 MR. HAYNSWORTH: Your Honor, I'd ask that
22 those documents be admitted into evidence as Plaintiff's
23 ---

24 MADAM COURT REPORTER: 18.

25 MR. HAYNSWORTH: --- 18

1 MADAM COURT REPORTER: Have you got two?

2 MR. HAYNSWORTH: You know, it doesn't matter
3 to me. I guess since they're clipped separately let's
4 make it 18 and 19.

5 THE COURT: Any objection?

6 MR. ARIAIL: The only question, subject to he
7 gets to review them and make sure that they're the
8 correct ones.

9 MR. HAYNSWORTH: Oh, sure.

10 MR. ARIAIL: I don't have any problem with
11 them coming in. I just don't want to waste the jury's
12 time that way.

13 THE COURT: Okay.

14 MR. HAYNSWORTH: That would be tax. So those
15 would be tax client invoices. And this would be audit
16 client invoices.

17 (WHEREUPON, Plaintiff's Exhibit Numbers 18 and 19
18 were marked and admitted into evidence.)

19 Q. And Mr. Highsmith, I'm not going to ask you
20 anything particular about them. I just wanted them in
21 evidence. And, again, as Mr. Ariail said, I don't want
22 to accidentally misrepresent what they might be. So
23 feel free to thumb through them. Okay. We were talking
24 about what you remembered off the top of your head. I
25 think we were on Reidville Fire. Do you know what

1 McKinley Cooper last charged Reidville Fire?

2 A. I said I couldn't remember exactly. I can remember
3 a ballpark.

4 Q. All right. Do you remember what fee y'all charged
5 Reidville Fire?

6 A. If I flip through there, I can find it for you.

7 Q. Okay. Sure. And we'll just match -- see if you
8 can find United Way of Laurens too, just to make sure
9 these figures I'm telling you are in fact the figures
10 that match your records.

11 A. Which one did you say? Reidville ---

12 Q. Reidville Fire?

13 A. Reidville Fire?

14 Q. Uh-huh (affirmative).

15 A. Okay. Yes.

16 Q. Was fifteen hundred y'all's fee?

17 A. It was.

18 Q. All right. How about from the United Way of
19 Laurens? Can you find them?

20 A. Yes, I see it.

21 Q. Was United Way of Laurens charged by y'all two
22 thousand two hundred and fifty dollars for an audit?

23 A. Yes, it was.

24 Q. And what was your recollection McKinley Cooper
25 charged them the last time they had them as an audit

1 client?

2 A. I don't remember.

3 Q. You charged less than McKinley Cooper did for
4 United Way of Laurens?

5 A. I don't know what they charged for United Way of
6 Laurens.

7 Q. Okay. Well, S.C. Rural water you charged less;
8 right?

9 A. What did they charge? What did we say a few
10 minutes ago?

11 Q. Four grand?

12 A. Yeah. Four thousand dollars and that was off the
13 audited financial statements from the year before; yes.

14 Q. United ministries, they charged eight thousand; you
15 charged fifty-nine hundred?

16 A. Is that the ones we had just went over?

17 Q. Right?

18 A. Okay.

19 Q. And, again, just double check and make sure I'm
20 doing the figures right. Center for Community Services,
21 I've got y'all charged twenty-five hundred and they
22 charged forty-six hundred. Would you see if I'm right
23 that y'all charged twenty-five hundred?

24 A. Yes. We charged twenty-five hundred for that
25 audit.

1 Q. Okay. There's some emails from the McKinley Cooper
2 computer system that are actually an exhibit that I
3 talked to your brother about, he and a fellow named Dan
4 Seecord who were in a deal together called Future Five
5 Consulting. And those are emails that he apparently
6 retained a copy of before he deleted them from his
7 McKinley Cooper computer. Do you have emails that you
8 retained before you deleted all of your McKinley Cooper
9 computer emails?

10 A. The email that I have was from -- one that I sent
11 home regarding what Marcy told us we were going to get,
12 a non-disclosure instead of a non-compete. I kept that
13 email because I wanted to show, you know, we were
14 willing to sign this. I'm not signing a non-compete. I
15 wanted to have that, yes.

16 Q. All right. So let me get this straight. So an
17 email that was going around in the McKinley Cooper
18 computer email, you forward that email to your home
19 computer?

20 A. I did.

21 Q. Okay. And then you deleted that email and all the
22 others off your McKinley Cooper computer?

23 A. I cleaned off my computer for the next person that
24 was going to be using it.

25 Q. By deleting the emails?

1 A. By deleting the emails.

2 Q. And, Mr. Highsmith, would you agree with me that if
3 there had been a customer who had sent a document, such
4 as one of these documents we're talking about here, had
5 sent that as an email attachment to your McKinley Cooper
6 owned computer, and for some reason McKinley Cooper had
7 need to go back and find that attachment, they may need
8 it for a subsequent audit, they couldn't do that now;
9 could they?

10 A. They could do that?

11 Q. How?

12 A. They could go in the file for that client, and I
13 would have copied that email and stuck it in the file.

14 Q. All right. So before you deleted all of your
15 McKinley Cooper emails you made copies of them and put
16 them in the specific client file?

17 A. I would have done that as I got them. If it was
18 something for the work papers, something for that audit,
19 it wouldn't have been I had to do it right then. It
20 would have already been in there.

21 Q. All right. How about contacting people telling
22 them you were planning on leaving. How would we find
23 those emails?

24 A. Contacting people telling them I was leaving?

25 Q. Right?

1 A. I didn't contact anybody and tell them I was
2 leaving until after I left.

3 Q. But, of course, had you done that on your McKinley
4 Cooper email, there would be no way in the world for us
5 to go back and find out since you deleted all the
6 emails; correct?

7 A. You'll have to talk to a computer guy, but I think
8 your computer guy said he could go back and get emails.
9 I think that's what he testified to earlier.

10 Q. And the reason you deleted the emails was why?

11 A. I was cleaning off the computer for whoever was
12 going to use the computer next. I'd done that before as
13 an employee of McKinley Cooper. I'd gone in and done
14 stuff like that for other employees that had left. I
15 was just cleaning my stuff. I'm like, I'm going to get
16 this ready. Before I left, I cleaned off the emails off
17 that computer so whoever got the computer next, whoever
18 was using my office, it was up and running for them.

19 Q. Do you agree with me that you signed a copy of the
20 McKinley Cooper IT policy?

21 A. I do.

22 Q. Do you agree with me that you were provided a copy
23 of the McKinley Cooper Employee Manual?

24 A. I do.

25 Q. Did you ever go ask Toni McKinley if you could

1 delete the information off your computer in her office?

2 A. I did not go ask her. Toni knew I was leaving.

3 She told me to pack the office. No one came down there
4 to see anything in the office.

5 Q. Well, Mr. Highsmith, ---

6 A. No, I did not ask.

7 Q. --- now, somebody doesn't have to formally come
8 tell you not to take something; right?

9 A. No, I don't think so. And I didn't take them.

10 Q. You had occasion while at McKinley Cooper to create
11 documents called confirmations; correct?

12 A. I did.

13 Q. Okay. If there are McKinley Cooper authored
14 confirmations on your H&H laptop, how did they get
15 there?

16 A. Either from the flash drive or from a client.
17 Those have been emailed out. For probably the last or
18 six or seven years that I was there, we would email
19 those confirmations to clients.

20 Q. Can you show me -- you keep making mention that,
21 oh, well, I didn't get that -- that didn't come from
22 McKinley Cooper. It came from a client.

23 A. Uh-huh (affirmative).

24 Q. Can you show me as we sit here today emails where
25 those documents were transmitted directly to you or your

1 brother from the client, once they became a client?

2 A. Can you repeat that? When I was there or when I'm
3 at Highsmith & Highsmith?

4 Q. No, sir. As I understand what you're telling me,
5 your explanation is McKinley Cooper authored documents
6 that are on my, Shane Highsmith's, laptop ---

7 A. Uh-huh (affirmative).

8 Q. --- that they either got there from my brother's
9 flash drive or we got them directly from a client.

10 A. Uh-huh (affirmative).

11 Q. And so my question to you is, as we sit here today,
12 can you show me an email from your client that used to
13 be their client where they are transmitting directly to
14 you these documents?

15 A. It wouldn't have to come through email. It could
16 have come on a flash drive while I'm at that client's.

17 Q. So the answer is, no, you do not have an email
18 showing the underlying documents ---

19 A. I don't know if I do or not. I don't know.

20 Q. Well, surely to goodness you looked?

21 A. We've talked earlier. We can show that those have
22 been emailed out to clients for -- your computer expert
23 showed that, that it's been emailed out. So I could
24 have got it from a flash drive from a client.

25 Q. We've been in this lawsuit, what, two and a half

1 years, give or take?

2 A. Yes.

3 Q. And you haven't gone to look to see if you've got
4 any of the emails showing the source of these documents?

5 A. I don't know if I have any emails that show them.

6 Q. Have you looked?

7 A. But it could have been from the flash drive at the
8 client's.

9 Q. If I told you that seventy-seven percent of y'all's
10 total audit clients in 2011 had been -- excuse me --
11 audit and tax clients had been McKinley Cooper clients
12 before, would you disagree with that percentage figure?

13 A. I would have to look back because I didn't come up
14 with that figure. But you also are saying 2011, like we
15 had a whole year's worth of audit and tax clients. We
16 had two months from the time I left. You're making this
17 generalization that that went on the whole year. That
18 was two months.

19 Q. I'm just ask you if you generally agree that
20 seventy-seven percent of y'all's business had been her
21 business?

22 A. I don't know. I didn't come up with that
23 calculation.

24 Q. Have you ever taken, Mr. Highsmith, an MCC created
25 confirmation and simply changed the accountant line to

1 be Highsmith & Highsmith instead of MCC?

2 A. Not that I'm aware of.

3 Q. Okay. Let me show you what's been marked as
4 Plaintiff's Exhibit 5. See down at the bottom it's got
5 the accounting firm listed as Highsmith & Highsmith?

6 A. I do.

7 Q. Who input that information, you or your brother, if
8 you know?

9 A. I don't know which one of us did it, but I'm sure
10 one of us did, because at the time we only had the two
11 of us.

12 Q. Okay.

13 A. Unless the client did it. I don't know which
14 client.

15 Q. Let's talk briefly, Mr. Highsmith, about some
16 clients that have never been Highsmith & Highsmith
17 clients. You've told this jury that one explanation,
18 you feel like is well, the reason that document's in our
19 H&H computer is we got it straight from a client?

20 A. Sure.

21 Q. Okay. I show you what we've marked as Exhibit 10.
22 The Girl Scouts have never been a client in H&H; have
23 they?

24 A. They have not.

25 Q. Okay. And if you'll look, just thumb through to

1 about the middle it, you see a whole bunch of documents
2 regarding the City of Laurens?

3 A. Yes.

4 Q. Okay. The City of Laurens has never been a H&H
5 client; have they?

6 A. We submitted a proposal for them, but they have
7 never been a client.

8 Q. Right. So you have never, as Highsmith &
9 Highsmith, been down to the City of Laurens system to
10 plug something into their system and get something
11 directly from them; right?

12 A. I have not.

13 Q. Okay. You were here for Mr. Hemond's testimony and
14 he discussed some QuickBook INI files that was in his
15 PowerPoint?

16 A. Yes, sir.

17 Q. The Town of Gray Court, that has never been a
18 client of Highsmith & Highsmith; has it?

19 A. No, sir.

20 Q. Okay. Yet there's QuickBook INI information in
21 your H&H laptop referencing the Town of Gray Court;
22 correct?

23 A. Yes, sir. And I also think he said it was never
24 opened within that year of QuickBooks, as well.

25 Q. Spartanburg Ballet?

- 1 A. Yes, sir.
- 2 Q. They've never been a client of yours; have they?
- 3 A. They have not.
- 4 Q. And they were a client of Ms. McKinley's; correct?
- 5 A. They were at some point, yes.
- 6 Q. Okay. Phyllis Wheatley Center ---
- 7 A. Yes, sir.
- 8 Q. --- was a McKinley Cooper client; correct?
- 9 A. It was at some point, yes.
- 10 Q. Okay. In fact, Phyllis Wheatley's referenced on
- 11 one of our bank confirmation documents that's in
- 12 evidence?
- 13 A. I think that was one you put in evidence; yes.
- 14 Q. Okay. Phyllis Wheatley has never been a Highsmith
- 15 & Highsmith client; have they?
- 16 A. They have not.
- 17 Q. So it would be impossible, would it not, for a
- 18 Phyllis Wheatley document to be in your computer that
- 19 came directly from Phyllis Wheatley?
- 20 A. I do not know that answer. I'm not the computer
- 21 guy. You'll have to rely on your expert and our expert
- 22 for that.
- 23 Q. Well, if they've never been a client and you've
- 24 never gone down to their system to plug in a flash drive
- 25 into their system, it couldn't have come from them?

1 A. I can't think of a way, but I don't know. I'm not
2 a computer guy.

3 Q. You talked about y'all were working out of your
4 house and you're a two-man operation ---

5 A. We weren't working out of my house. We were
6 working out of Todd's house.

7 Q. I'm sorry. Out of his basement. I apologize.
8 Wouldn't you be able to, as a two-man operation with low
9 overhead, under bid any accounting firm out there that
10 was bigger than you?

11 A. Possibly, unless somebody just really wanted the
12 business. We had a couple of audits where somebody came
13 in really low on us. It happens. And we also bid on
14 clients where we were the low bid and we were not
15 awarded the audit, even though we were the low bid. We
16 did that as well, so ...

17 Q. But you have, in fact, have had much bigger
18 accounting firms propose to charge less for an audit
19 than your two-man operation?

20 A. Yes. And I'm not sure if -- it's neither a client
21 of ours or theirs that we bid on against them, and a
22 firm from Columbia came in and bid really low because
23 they wanted the work. So it happens, yes, sir. But
24 we've also been the lowest bid and didn't receive the
25 audit. It's still the client's choice who they want to

1 award the bid to.

2 Q. You heard your brother testify about some invoices
3 that he sent to McKinley Cooper clients that referenced
4 his home address. Do you recall that testimony?

5 A. I recall that.

6 Q. And do you recall his testimony that there probably
7 were invoices but he would have no way to track them
8 down?

9 A. I'd have to look back at what he said, but
10 something to that effect, yes.

11 Q. Okay. What McKinley Cooper clients did you invoice
12 outside the firm?

13 A. I did not invoice any clients outside the firm.

14 Q. And had you invoiced clients outside the firm and
15 prepared the invoices there on your McKinley Cooper
16 computer, there would be no way for us to go find them,
17 since you deleted it; right?

18 A. I think your expert already said he could go back
19 and pull emails, even though they were deleted off that.

20 Q. Well, would it make sense to you that we would have
21 tried to do that if it was possible, to see if you
22 billed any clients outside the firm?

23 A. I don't know. You would have to ask your computer
24 guy who testified to that.

25 Q. Mr. Highsmith, you said that you, you said that you

1 went on various people's websites after you left and you
2 were going to start calling on people, and you'd gone on
3 their website to get their email addresses; is that
4 right?

5 A. Yes, sir.

6 Q. Is that the source of all the email addresses when
7 you started emailing all of these people you used to
8 work with from McKinley Cooper?

9 A. No, sir. I either went on the website and either
10 got their email address or I got a phone number.

11 Q. You didn't just take the email addresses when --
12 you told us that you emailed at least one email to your
13 house?

14 A. That was from my email ---

15 Q. Right. When you were at McKinley Cooper and you
16 specifically emailed something to your house because you
17 wanted to keep a copy of it?

18 A. That's right.

19 Q. All right. You're telling me you didn't email any
20 other McKinley Cooper emails to your house so you could
21 keep a record of them, other than that one?

22 A. Other than that one, that's all I know of. Yes,
23 sir, that's it.

24 Q. All you know of?

25 A. That's it. I told you before I had to work from

1 home before on one of her clients. So I don't know if
2 -- that was probably in 2004. I think I mentioned in my
3 deposition that I worked from home on that client
4 because she had a dial-up internet at work and it was
5 really slow. So If I did another email it would have
6 been back in 2003 or '04. I honestly don't remember.

7 Q. The email you sent that came -- that's from your
8 McKinley Cooper computer at work that you sent to your
9 home. Was that your computer or your wife's computer or
10 ---

11 A. It's our computer. We've got a computer at the
12 house, but I don't use that computer. So I guess you
13 would say it's hers. I probably bought it, but it's her
14 computer.

15 Q. And I'm just -- I'm trying to understand what all
16 computers you use or have. You and brother each bought
17 a laptop ---

18 A. Yes, sir.

19 Q. --- I think on November 2nd or the evening of the
20 1st. Y'all bought your laptops?

21 A. Yes, sir.

22 Q. At that time, your wife had, even though you
23 probably paid for it, she had her computer, which is
24 where you emailed the thing from McKinley Cooper?

25 A. I emailed it to her email address; yes.

1 Q. Okay. Any other computers, other than her one at
2 your house and your H&H one?

3 A. We have two at our house. We have a desktop and a
4 laptop. But, yes, I emailed it to that email address.

5 Q. All right. So you've got your H&H laptop and then
6 at home you've got her desktop and another laptop?

7 A. Yes.

8 Q. All right. Thumb drives or flash drives, how many
9 of those do you have, roughly?

10 A. How many do I have?

11 Q. Yeah.

12 A. I have maybe two.

13 Q. Okay. Do you know how many your brother has?

14 A. Maybe -- I really don't know how many flash drives
15 he has.

16 Q. And I presume in addition to storing information on
17 a computer, you can store information on those flash
18 drives?

19 A. Yes, sir. We've established that; yes, sir.

20 Q. The proposal, proposals rather, the very initial
21 first proposal that Highsmith & Highsmith ever
22 generates, if I understood from your deposition, you
23 didn't have anything to do with that? Your brother
24 handled that?

25 A. My brother typed it up; yes.

1 Q. Okay.

2 A. I did read it and sign it. I might have signed our
3 first proposal; I'm not sure.

4 Q. Okay. And there was -- I think you made reference
5 earlier to -- you know, when Mr. Ariail asked you, well,
6 what did you do to start H&H? And you said, well, one
7 of the things, you said you went and got letterhead.
8 And I think you mentioned actually that your brother-in-
9 law, Mr. Cutter -- no, I'm sorry. Mr. Cutter was about
10 the emails, setting up y'all's H&H email?

11 A. Yes, sir.

12 Q. Y'all's letterhead, did you create that, develop
13 it, the Highsmith & Highsmith letterhead and how y'all
14 ---

15 A. We actually paid somebody to come up with our logo,
16 so we paid for that. We had somebody design our logo.

17 Q. Okay. There's a reference to the left of y'all's
18 letterhead on -- it's a little AICPA symbol and a
19 tagline underneath it?

20 A. Yes, sir.

21 Q. Did you tell me in your deposition that that AICPA
22 symbol and tagline, that you got that from an AICPA
23 website?

24 A. I think I said it was the AICPA website or it was
25 Googled.

1 Q. Okay. Were you aware, Mr. Highsmith, that at the
2 time you left the AICPA had not been using that tagline
3 for five or six years?

4 A. Yes. I think it's an older tagline, but it's still
5 out there to be used.

6 Q. Oh. So it's your contention you can go on the
7 AICPA website and still get that old tagline?

8 A. I'm saying it's out there. If you Google it, you
9 can come up with that tagline and other CPAs still use
10 that tagline, as well.

11 Q. Well, I know, we obviously do.

12 A. Yeah. You're one. We've bid on stuff against
13 people that are using that same tagline, as well.

14 Q. So you didn't take the tagline off the McKinley
15 Cooper letterhead?

16 A. Did not.

17 Q. You went out and got it off the internet?

18 A. Yes, sir.

19 Q. And do you have the paperwork here where you went
20 out and did that search and all that?

21 A. No, I do not. I mean, my attorney may. I don't
22 have anything up here with me.

23 Q. All right. You said that you did not talk to
24 anyone, meet with anyone, any preliminary discussions
25 about I'm going to leave. You just left and then

1 started contacting people; correct?

2 A. Contacting which people?

3 Q. People to potentially snag as clients?

4 A. People to ask to be on bid lists, it was after I
5 left; yes.

6 Q. Okay. Let me ask it a different way. Of the
7 clients you were working on when you were with McKinley
8 Cooper, other than the Label System guy who we heard
9 from directly, did you contact any of her clients that
10 you were familiar with before you left to say, hey, I'm
11 planning on leaving. You know, any information on the
12 front-end that indicates you were going to be going out
13 the door?

14 A. No, I did not.

15 Q. Let me give you -- it's actually two emails that
16 are stapled together.

17 A. Okay.

18 Q. Just take a look at that and see if you recognize
19 it?

20 A. Yes, sir.

21 Q. Are those two emails that you sent to somebody
22 named Patrick?

23 A. This was to Patrick Jackson who worked at South
24 Carolina Rural Water Association. Yes, sir.

25 Q. Okay. And those are emails you generated; correct?

1 A. Yes. They were sent from my Highsmith CPAs email
2 address, yes.

3 MR. HAYNSWORTH: Your Honor, I'd ask that his
4 two emails be admitted as Plaintiff's Exhibit 20.

5 THE COURT: Any objection?

6 MR. ARIAIL: No objection, Your Honor.

7 (WHEREUPON, Plaintiff's Exhibit Number 20 was
8 marked and admitted.)

9 Q. All right. Mr. Highsmith, the date of the first
10 email to Patrick is November 3rd, 2011; correct?

11 A. Yes, sir.

12 Q. So that would have been two days after you were
13 gone?

14 A. Yes, sir.

15 Q. And you indicate, hey, Patrick, here's my email
16 address. We will send other information as we have it
17 ready. Todd and I will call you next week to try and
18 schedule a time to meet with you again; correct?

19 A. Yes, sir.

20 Q. When had you met with Patrick?

21 A. I'd probably met with Patrick either on the 2nd or
22 the 3rd. Probably the 3rd.

23 Q. So you're emailing him on the 3rd, referencing a
24 meeting you just had that day?

25 A. I'm emailing him on the 3rd to give him my email

1 address, which I just had set up on the 3rd. And the
2 email went out at nine forty-seven p.m., which is when I
3 was notified that my email was up and running. So I
4 emailed out my contact information.

5 Q. All right. You said amongst the things you took
6 when you were boxing up your office were some continuing
7 education certificates?

8 A. Yes, the actual certificates that you get from
9 taking the course, my CPE files.

10 Q. And the reason you took the certificate is if the
11 regulators, whomever, wanted to make sure you had your
12 requisite number of hours, you would have certificates,
13 six hours, whatever. You could prove from the
14 certificates that you attended; right?

15 A. Yes. I think I said I took my certificates. And
16 if I took a self-study and if there's materials with
17 that, I think I said I took that, as well.

18 Q. When you say materials, like a CD that may have
19 information from the seminar?

20 A. I don't remember a CD, but I know when I take self-
21 study courses, my test work I would do on hand to do the
22 actual test.

23 Q. Right?

24 A. I would do it on hand and then I would go online to
25 fill it out, so I probably took those actual tests that

1 I took with me. Yes.

2 Q. But if you got, for instance, a CD that contained,
3 you know, the Clemson Seminar y'all went to put on by
4 ---

5 A. It was the Land Grant, something through Clemson.
6 It was a tax seminar.

7 Q. Right. Land Grant?

8 A. Yes, sir.

9 Q. There would be no need when you left McKinley
10 Cooper to take all the CD material from the Land Grant
11 Seminars so you could prove you had attended? You just
12 needed the certificates to prove you attended the
13 course?

14 A. Well, no. I mean, maybe somebody would think I
15 needed that to prove I took it. I don't know.

16 Q. Well, you didn't pay for that material that you
17 removed from McKinley?

18 A. I did not pay for my CPE. That was a part of -- a
19 fringe benefit through the company. They paid for our
20 CPE.

21 Q. Do you agree with your brother's statement that the
22 AICPA regulations regarding confidential information
23 within an accounting firm is subject to interpretation?

24 A. I believe that it is written in a way that is
25 vague, so it is a case-by-case thing, yes.

1 Q. Do you believe in your interpretation of the AICPA
2 regulations that you and your brother were allowed to
3 remove information from McKinley Cooper when you left?

4 A. What information are you talking about?

5 Q. Any information?

6 A. My CPE? Yes, I believe I was okay to take that
7 information.

8 Q. The client files?

9 A. I didn't take any client files.

10 Q. Underlying client documents, work papers?

11 A. I'm not sure which one you're talking about, but
12 ...

13 Q. Any? I mean, it read to me as if you were not
14 supposed to take anything out of an accounting firm?

15 A. No. It says you're supposed to keep it
16 confidential.

17 Q. So it's okay to take it as long as you keep it
18 confidential?

19 A. I'm saying if you had something and never used it,
20 it's still confidential. You didn't use it. It's not
21 your client. That's what I'm saying.

22 Q. All right. Thank you, sir.

23 THE COURT: Any redirect?

24 MR. ARIAIL: Yes, Your Honor. Just briefly.

25 **REDIRECT EXAMINATION**

1 **BY MR. ARIAIL:**

2 Q. Tell me if you recognize this document?

3 A. I do.

4 Q. What is that document?

5 A. This document is the CPA taglines that have been
6 used over the years that are out there for people to
7 use. Any CPA can use this information.

8 Q. Okay. Is that what we printed off the internet in
9 regards to the tagline?

10 A. Yes. That's a Google search. And also what comes
11 up is any CPA that's using that tagline, their
12 information is going to pop up as well. So there's
13 several ---

14 Q. This right here?

15 A. Yes, sir. That's it. It's different variations of
16 CPA taglines that the AICPA puts out there for CPA's to
17 use on their information.

18 Q. Okay. So that's on the internet. It's out there?

19 A. Yes, sir.

20 Q. And other firms are using it too; correct?

21 A. Absolutely. We've seen proposals and audited
22 financial statements from other CPA's that use that same
23 exact tagline.

24 Q. Now, we've gone through and Mr. Haynsworth asked
25 you numerous questions in regards to fees and what

1 you've invoiced and all of that. When you do these
2 audits, are you provided information from the non-
3 profits and -- let's stick with the non-profits?

4 A. Yes, sir. When we go out to bid on an audit, we
5 would ask them for their prior year financial statements
6 as part of that. Some clients will send you their prior
7 year financial statements. They'll also send you, if
8 it's a non-profit, their 990, which is their tax return
9 that they've filed. They don't have to pay tax, but a
10 non-profit is required to file this informational
11 return. So some of those clients could have given me
12 financial statements and the 990. The 990s are also out
13 on the website called GuideStar, which non-profits would
14 submit their forms. They get on that website.

15 Q. Do you recognize that document?

16 A. I do. It looks like a page out of a 990 for
17 Neighborhood Housing Corporation.

18 Q. Okay. And explain, there's sections on here that I
19 guess are separated out as to what's spent?

20 A. This is a statement of functional expenses. So
21 this shows the expenses for Neighborhood Housing
22 Corporation for 2012.

23 Q. Okay. And it's broken down -- and maybe the
24 easiest way is to publish it here. What does this show
25 in regards to Neighborhood Housing Corporation?

1 A. It shows all the expenses that Neighborhood Housing
2 Corporation had for the year that went on the functional
3 expenses here. It's their expenses for, I think it was
4 2012. So it breaks down by category on what these
5 expenses are being spent on.

6 Q. All right. And this is not a full document. This
7 is page ten of the document; right?

8 A. Correct. Correct. The 990 itself is probably
9 twenty-five or so pages.

10 Q. But on this documents they break it down. And it
11 specifically says accounting functions for that year of
12 five thousand dollars?

13 A. It does.

14 Q. What does that tell you?

15 A. For a CPA or somebody -- an auditor that has been
16 doing this for years, if they would review this 990 and
17 they saw an accounting fee for an even number like that,
18 that's usually the audit. That's the audit fee.

19 Q. Okay. Now, that'll show you the audit fee for the
20 full year?

21 A. That would be their audit that they're paying for
22 this year. But it was probably the prior year audit.

23 Q. Okay.

24 A. So if it's a 2012 -- that was a 2012 statement,
25 they're probably paying for the audit from last year.

1 Q. And one last thing, if I can grab it out of the
2 file over here, there was some reference to you not
3 being provided or not showing the documents that they're
4 alleging you received from your clients. Have you
5 provided information to Mr. Haynsworth showing that
6 you've received information clients, I mean emails?

7 A. Yes.

8 Q. In regards to this, do you recognize this right
9 here?

10 A. Yes, sir. This is an email from my friend Danny
11 Woznick at Timbertech where he's sending me some
12 information for his company's tax returns. And it was
13 dated January 11th, 2012.

14 Q. Okay. And this one too; is that the same?

15 A. Yes. This is another email from Danny on January
16 11th, 2012. And he's actually listing two more of his
17 companies' tax returns.

18 THE COURT: Any objection?

19 MR. HAYNSWORTH: No, Your Honor.

20 (WHEREUPON, Defendant's Exhibit Number 9 was marked
21 and admitted into evidence.)

22 Q. This shows that he was sending you two tax returns
23 for your use; correct?

24 A. Yes. He was sending me his 2010 federal tax return
25 for Timbertech, which is one of his companies. And he's

1 sending me the 2010 South Carolina tax return for that
2 same company.

3 Q. And how about this company right here?

4 A. Yeah. Actually, this is two companies that he's
5 sending, Heartwood -- and the reason there's four is
6 there's a federal and a state return. So he's sending
7 me Heartwood 2010 federal return; 2010 state return.
8 He's sending me Money Tree, 2010 federal return and 2010
9 Money Tree state return.

10 Q. Okay. And one last email. Do you recall this
11 document right here? It's down at the bottom?

12 A. This is an email that Toni McKinley sent to Danny
13 Woznick from the McKinley Cooper email address. Do you
14 want me to read it?

15 Q. Sure.

16 A. It says, Danny, an electronic copy of your 2010 tax
17 returns attached. The file is password protected. Your
18 Social Security Number is your password. Also the PDF
19 files for Timbertech, Heartwood and Money Tree were sent
20 to Bruce on November 9th. And this email was then
21 forwarded from Danny to me on this.

22 Q. Okay. So this shows you getting documents from Ms.
23 McKinley? Excuse me. Danny getting documents from Ms.
24 McKinley, which he forwarded to you?

25 A. Yes. This email came from Toni McKinley to Danny

1 at Timbertech. And then Danny at Timbertech forwarded
2 it straight to me, yes.

3 Q. Okay.

4 MR. ARIAIL: Your Honor, may we approach real
5 quick?

6 (WHEREUPON, a bench conference was held off the
7 record.)

8 THE COURT: Hold on. Do you need a recess?

9 MR. ARIAIL: Your Honor, we're finished after
10 we enter this into evidence.

11 THE COURT: All right. And that's without
12 objection?

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

14 (WHEREUPON, Defendant's Exhibit Number 10 was
15 marked and admitted into evidence.)

16 MR. ARIAIL: Thank you, Your Honor, that's it.

17 THE COURT: Anything else, Mr. Haynsworth?

18 MR. HAYNSWORTH: No, Your Honor.

19 THE COURT: Thank you, step down. All right.
20 Take the jury out for a recess.

21 (WHEREUPON, the jury exited the open court at
22 approximately 4:20 p.m.)

23 THE COURT: All right. What we got now?
24 Gentlemen, this jury's getting worn out. I can ---

25 MR. ARIAIL: I've got one short one. Then

1 I've got a real long witness after that. And I've got
2 one short witness right now, a tax client. I've got a
3 short tax client that owns -- Mr. Woznick, who we just
4 talked about right there. And then I've got my computer
5 expert next and that's going to take ---

6 MR. HAYNSWORTH: You don't want to start the
7 computer expert now.

8 THE COURT: No.

9 MR. ARIAIL: That might put me ...

10 THE COURT: All right. So after we get
11 through with your computer expert, where do we stand?

12 MR. ARIAIL: After my computer expert, I have
13 -- I'm going to once again have these short witnesses,
14 the audit clients. I'm going to have them come in. And
15 I should be able, depending on how long Knox is to do my
16 computer expert, and the audit clients before lunch is
17 what I'm hoping. And then I'm going to have my CPA
18 expert who's my last one, which I think it'll be my last
19 witness. We can finish by the middle of the afternoon
20 if it's -- if everything goes like planned, like it
21 should be.

22 MR. HAYNSWORTH: He'll be pretty quick.

23 MR. ARIAIL: Yeah, he's got ---

24 THE COURT: Are you telling me we can get all
25 the testimony in, and then, I guess, argue and charge

1 Friday morning?

2 MR. ARIAIL: That would be great.

3 THE COURT: Okay. All right. All right. One
4 short witness.

5 (WHEREUPON, court stood at recess for a short
6 break.)

7 THE COURT: All right. Bring our jury,
8 please.

9 (WHEREUPON, the jury entered the open court at
10 approximately 4:27 p.m.)

11 THE COURT: All right. Mr. Ariail.

12 MR. ARIAIL: Yes, Your Honor, I call Danny
13 Woznick to the stand.

14 THE CLERK: Mr. Woznick, if you'll pause at
15 the end of the bench, please. Place your left hand on
16 the bible and raise your right hand. If you'll face the
17 Judge, please.

18 You do solemnly swear or affirm to tell the truth,
19 the whole truth and nothing but the truth, so help you
20 God?

21 THE WITNESS: I do.

22 THE CLERK: Thank you. Please be seated.
23 Would you please state your name for the record.

24 THE WITNESS: Danny Woznick.

25 THE CLERK: Thank you.

1

DANNY WOZNICK,

2

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

3

DIRECT EXAMINATION

4

BY MR. ARIAIL:

5

Q. Danny, how you doing today?

6

A. Doing well.

7

Q. Sorry to make you wait a little bit. I appreciate your coming. How do you know Shane and Todd Highsmith?

9

A. Went to -- met them back in 1990 going to high school with them.

10

11

Q. Okay. Where did you go to high school?

12

A. Hampton Park.

13

Q. Okay. And since that time, did you go to college with Shane, I believe?

14

15

A. Yes. Went to Clemson with Shane.

16

Q. Right. Go Tigers. In regards to this matter, you have, I guess -- you're involved. We just went into some of your documents. You've got a variety of companies; correct?

17

18

A. Yes.

19

Q. What are the names of your companies that you own?

20

A. Timbertech, Heartwood Constructors, Money Tree, Mulch Mill, Basket Tree.

21

22

Q. Okay. And what services have Shane or Todd provided you in regards to those companies?

23

24

25

1 A. Tax, audits. I own a construction company. We
2 have to do licensing every two years. So they perform
3 that kind of stuff for us.

4 Q. Okay. And Shane was employed at McKinley Cooper &
5 Company for a time. When he was there, why did you take
6 your business there when he was working there?

7 A. Because of my relationship with Shane.

8 Q. Okay. And how long have you been working with
9 Shane, I guess, tax-wise?

10 A. I'm not sure what year we switched over to him. We
11 had just grown to a point where I felt like our
12 bookkeeper at the time wasn't serving our needs. So
13 then we switch and we started looking and so went to
14 McKinley Cooper, specifically because of Shane.

15 Q. Okay. And after Shane left McKinley Cooper, why
16 did you go with him then?

17 A. Again, because of the relationship, and he was
18 obviously very familiar with our books and companies and
19 everything. Every time I ever had a question, he was
20 the one who called, so ...

21 Q. Have you ever met or dealt with anybody else at
22 McKinley Cooper, other than Shane or Todd?

23 A. No. I believe I met Toni one time. Beyond that,
24 that was it.

25 Q. When you met her, was it in regards to work or was

1 just a ---

2 A. Just an introductory meeting when I was talking
3 with Shane about some tax prep at the end of the year.

4 Q. Now, when you left McKinley Cooper, how did you get
5 your documents or how did you get them when you were
6 transferring your business?

7 A. I had called McKinley Cooper to get everything.
8 And they had sent everything to me.

9 Q. Okay. Do you recognize this exhibit that's been
10 entered as Exhibit 10?

11 A. Yes.

12 Q. Okay. Is that an email you received from Toni
13 McKinley?

14 A. It is.

15 Q. Okay. I don't mean to blind you. There we go. So
16 this is the email that's been entered in and deals with
17 the information that your received for your variety of
18 companies in PDF files; is that right?

19 A. Correct.

20 Q. Timbertech, Heartwood, Money Tree and were sent to
21 Bruce on -- some were sent to Bruce, who is your
22 partner; is that correct?

23 A. Correct.

24 Q. Okay. So you've got the electronic copy of the
25 2010 and Bruce received the others; is that correct?

1 A. Correct.

2 Q. Now, once you got these documents, how did you give
3 them or send them to my clients, Todd and Shane
4 Highsmith?

5 A. I believe some may have been emailed to them, but I
6 know the majority of them, they were just put on a flash
7 drive. Came by my office and copied them.

8 Q. Okay. Do you recognize these two email right here?

9 A. Yes.

10 Q. Are these the emails showing that you had sent this
11 -- I guess these variety of tax returns ---

12 THE COURT: Mr. Woznick, you want to slip this
13 way.

14 Q. Sorry, Danny. --- showing that you sent the
15 Heartwood, Money Tree and Timbertech tax returns to
16 them?

17 A. Yes.

18 Q. Okay. Were you under any contract to stay with
19 McKinley Cooper & Company for your tax services?

20 A. No, I was not.

21 Q. For any other services that you knew of?

22 A. No.

23 Q. Okay. Thank you, Danny. I have no further
24 questions.

25 MR. HAYNSWORTH: I have no questions, Your

1 Honor.

2 THE COURT: Thank you, step down.

3 Okay. Now, with this, ladies and gentlemen, we
4 will suspend. We'll pick back up tomorrow morning at
5 nine o'clock. And please remember my other admonitions
6 to not talk about the case and have your badges on when
7 you come in. Thank you. See you in the morning at nine
8 o'clock.

9 (WHEREUPON, the jury exited the open court at
10 approximately 4:35 p.m.)

11 THE COURT: All right. See you in the
12 morning.

13 MR. ARIAIL: Thank you, Your Honor.

14 MR. HAYNSWORTH: Thank you, Judge.

15 (WHEREUPON, court stood in recess for the day at
16 approximately 4:35 p.m.)

17 **December 11, 2014**

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

20 THE COURT: All right. Mr. Ariail, you ready
21 to go?

22 MR. ARIAIL: Yes, Your Honor, I am.

23 THE COURT: All right. Bring our jury.

24 (WHEREUPON, the jury entered the open court at
25 approximately 9:11 a.m.)

1 THE COURT: Good morning.

2 ALL JURORS: Good morning.

3 THE COURT: All right. Mr. Ariail, you may
4 proceed.

5 MR. ARIAIL: Thank you, Your Honor, may it
6 please the Court? I call Charlotte Cheatham to the
7 stand.

8 THE CLERK: Ma'am, if you'll please step here.
9 Pause at the end of the bench. Please place your left
10 hand on the bible and raise your right hand.

11 You do solemnly swear or affirm to tell the truth,
12 the whole truth and nothing but the truth, so help you
13 God?

14 THE WITNESS: Yes, ma'am.

15 THE CLERK: Thank you. Please be seated.
16 Would you please state your name for the record.

17 THE WITNESS: My name is Charlotte Cheatham.

18 THE CLERK: Thank you.

19 **CHARLOTTE CHEATHAM,**

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

21 **DIRECT EXAMINATION**

22 **BY MR. ARIAIL:**

23 Q. Charlotte, how you doing today?

24 A. Fine, thank you.

25 Q. Good. Thank you for coming. Can you give a little

1 bit of background to the jury about who you're employed
2 with?

3 A. I'm employed with the Town of Edgefield in
4 Edgefield, South Carolina.

5 Q. All right. And you came up this morning?

6 A. Yes, sir.

7 Q. Great. Thank you for coming. And you are employed
8 by the Town of Edgefield. What position are you with
9 them?

10 A. I'm the town clerk and treasurer.

11 Q. Okay. And how long you been in that position?

12 A. Almost thirty-four years.

13 Q. Okay. And during that time do you have or do you
14 deal with accounting firms in regards to audits of the
15 Town of Edgefield?

16 A. I do.

17 Q. Okay. And do you have to do that on a yearly
18 basis?

19 A. Not recently. We have done three-year contracts.

20 Q. Okay. Three years. So you have a contract -- you
21 have to get audited every year I guess; is that correct?

22 A. Yes, sir.

23 Q. And the reason you get audited is to be able to get
24 state funds; is that correct?

25 A. Yes, sir.

1 Q. Now, your auditing process, how do y'all go about
2 choosing an auditor?

3 A. We had gone out for bid many years ago, I would say
4 probably around twelve, fourteen years ago. And
5 initially we had hired an auditing firm and they had
6 been with us for quite a while. We had a new
7 administrator to come in and we went out for bids
8 several years ago. And a new auditor was hired.

9 Q. Okay. And who is that auditor?

10 A. Our current auditor?

11 Q. Uh-huh (affirmative).

12 A. Is Highsmith & Highsmith.

13 Q. Okay. And what was the reason y'all decided to
14 change? I think you were at McKinley Cooper at one
15 time; is that correct?

16 A. That is correct.

17 Q. What is the reason y'all decided to change to
18 Highsmith & Highsmith?

19 A. The contract was up. And actually, I had prepared
20 a contract for council to vote on with McKinley Cooper.
21 We had a new administrator and he thought that the
22 increase was a little too high. So he requested to go
23 out for bids. Council agreed to go out for bid again,
24 since the three-year contract was up. And that's what
25 we did.

1 Q. Okay. Did McKinley Cooper also place a bid in that
2 -- submit a bid along with the Highsmiths?

3 A. They did.

4 Q. Okay. And do you remember when the first time that
5 you were contacted by Highsmith & Highsmith in regards
6 to being on your bid list?

7 A. Not exact dates, but it was several years ago.

8 Q. Okay. Do you remember this email right here?

9 A. Yes.

10 Q. Is that an email from Shane Highsmith to you?

11 A. Yes, sir.

12 Q. Okay. And it was on November 10th, 2011?

13 A. Yes, sir.

14 Q. Is that the first time you had heard from him in
15 regards to, I guess, his new company and putting a bid
16 or submitting a bid at some time?

17 A. I think so. I couldn't -- I don't think I had an
18 email prior to that.

19 Q. Okay.

20 MR. ARIAIL: Your Honor, ...

21 THE COURT: Any objection?

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

23 (WHEREUPON, Defendant's Exhibit Number 11 was
24 marked and admitted into evidence.)

25 Q. And you've entered into a three-year contract with

1 Highsmith and Highsmith; is that correct?

2 A. That is correct.

3 Q. Okay. And since you entered into that contract,
4 has anybody from McKinley Cooper contacted you to
5 determine why you went with Highsmith & Highsmith?

6 A. From a professional standpoint, once we received
7 the bids I personally called each of the three that bid,
8 because I think that's a professional reaction on our
9 part, and especially since McKinley Cooper had been our
10 auditor for a number of years.

11 Q. So when the contract ends, three-year contract, you
12 have the ability to hire whoever you want to at the end
13 of that contract; correct?

14 A. I have the ability to do whatever it is the town
15 council tells me to do.

16 Q. I'm sorry. I should have said that, okay.

17 MR. ARIAIL: Your Honor, I have no further
18 questions.

19 THE COURT: All right. Mr. Haynsworth.

20 MR. HAYNSWORTH: May it please the Court?

21 **CROSS-EXAMINATION**

22 **BY MR. HAYNSWORTH:**

23 Q. Good morning, Ms. Cheatham.

24 A. Good morning.

25 Q. Do you recall roughly how long McKinley Cooper had

1 been y'all's auditor before the switch to Highsmith?

2 A. I'm going to estimate about twelve years. I think
3 we had had about four three-year contracts, but I'm not
4 a hundred percent sure on that.

5 Q. Okay. So McKinley Cooper would give you a price,
6 we'll do your audit for X dollars for the next three
7 years and y'all would do a three-year contract. And
8 then it'd come up for renewal, and you renewed a second
9 three-years with them, so forth and so on?

10 A. Yes, sir.

11 Q. All right. The bid that the Highsmiths submitted,
12 where council actually voted to switch, was that lower
13 than the price McKinley Cooper had been charging?

14 A. I believe it was.

15 Q. Okay. If you remember, does the last fee that
16 McKinley Cooper charged you, would forty-one hundred
17 dollars ring a bell for you?

18 A. It's close.

19 Q. All right. And the bid that the Highsmiths
20 submitted, would thirty-five hundred dollars ---

21 A. I believe that's correct.

22 Q. Okay. Now, you were contacted by email -- and I
23 apologize. I was looking at something, wasn't paying
24 close enough attention. I know Mr. Ariail handed you an
25 email, early November of 2011 where Shane Highsmith had

1 contacted you. Had Shane called you ahead of time
2 before he sent that email; do you recall?

3 A. I really don't recall.

4 Q. Okay. And are you aware of what documents relative
5 to the Town of Edgefield audits, the prior audits of the
6 last twelve years, that the Highsmiths took from
7 McKinley Cooper before they left?

8 A. No, sir. I'm only given the information that the
9 auditors prepare.

10 Q. Yes, ma'am. I just didn't know if you knew
11 anything one way or another about documents regarding
12 your audit that McKinley Cooper had that the Highsmiths
13 may have now?

14 A. I would assume the things, you know, that I give
15 them from the last audit before they came on board.

16 Q. Right. Yes, ma'am.

17 A. But as far as other documents; no, sir.

18 Q. Okay. All right. Thank you very much.

19 MR. ARIAIL: Your Honor, I just have one
20 question in regards to that.

21 **REDIRECT EXAMINATION**

22 **BY MR. ARIAIL:**

23 Q. When they come to do the audit, they have access to
24 your records and can gain that information through your
25 computers and all of that when they come do the audit;

1 correct?

2 A. Yes, sir. That's public information, as you know.

3 MR. ARIAIL: Okay. Thank you, Your Honor. No
4 further questions.

5 THE COURT: You may step down. Can she be
6 excused?

7 MR. ARIAIL: Yes, sir.

8 MR. HAYNSWORTH: Yes, sir.

9 THE COURT: Thank you, ma'am.

10 MR. ARIAIL: My next witness Your Honor, is
11 Caroline Robertson.

12 THE CLERK: Ma'am, if you'll please come
13 forward. Pause at the end of the bench. And please
14 place your left hand on the bible and raise your right
15 hand.

16 You do solemnly swear or affirm to tell the truth,
17 the whole truth and nothing but the truth, so help you
18 God?

19 THE WITNESS: Yes, I do.

20 THE CLERK: Thank you. Please be seated.
21 Would you please state your name for the record.

22 THE WITNESS: Caroline T. Robertson.

23 THE CLERK: Thank you.

24 **CAROLINE ROBERTSON,**

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

1

DIRECT EXAMINATION

2 **BY MR. ARIAIL:**

3 Q. Ms. Robertson, how are you doing today?

4 A. Doing all right.

5 Q. Thank you for coming. I want to go through a
6 little bit of information about your background. Where
7 are you employed?

8 A. Greer Relief and Resources Agency.

9 Q. What does Greer Relief do?

10 A. We prevent hunger and homelessness in the greater
11 Greer area.

12 Q. Okay. And how long have you been employed there?

13 A. Seven years and a couple months.

14 Q. What's your position with them?

15 A. Executive Director.

16 Q. Okay. And when you came -- well, where did you
17 come -- I guess where were you employed before Greer
18 Relief?

19 A. I was employed at Safe Harbor, the domestic
20 violence shelter of the Upstate.

21 Q. Okay. And in this case when you came to Greer
22 Relief, you utilized the services of McKinley Cooper &
23 Company for auditing; correct?

24 A. I had at Safe Harbor and then after one year at
25 Greer Relief we brought McKinley Cooper in; yes.

1 Q. Okay. And what services did McKinley Cooper
2 provide for you at Greer Relief?

3 A. They were our auditor.

4 Q. Okay. And as part of that, y'all are a not for
5 profit or non-profit?

6 A. Non-profit, yes.

7 Q. Would they prepare your audit and your financial
8 statement?

9 A. Yes, sir.

10 Q. Okay. And I guess that's called -- is it a 990?

11 A. Yes, 990.

12 Q. Okay. How long did you use them prior to, I guess,
13 November 2011?

14 A. I'm trying to think. Let's see, two -- I believe I
15 brought them in on the 2008 audit.

16 Q. Did you have a contract with them?

17 A. No. It was a year-to-year.

18 Q. So at the end of each year, you could decide who
19 you wanted to use?

20 A. Yes.

21 Q. Okay. In 2011, you left McKinley Cooper and
22 utilized the service of Highsmith & Highsmith; is that
23 correct?

24 A. I believe that's correct.

25 Q. Why did you do that?

1 A. Two-fold. One, I actually had attended a
2 conference about best practices and attended several of
3 those about -- they suggested that you should actually,
4 you know, vary your auditors every so many years. A lot
5 of Sarbanes Oxley things were coming out. And they said
6 you need to kind of diversify your audit and not have
7 the same people looking at it year after year after
8 year. And we decided to, at that time, move forward and
9 try to get some ideas of other people that might be
10 interested.

11 Q. And when you say get some ideas, did you put it out
12 for bid?

13 A. We called a few folks. We didn't put out any
14 formal bidding process.

15 Q. Okay. And who did you contact to, I guess, ask for
16 prices or bids?

17 A. Our treasurer contacted a business in Spartanburg.
18 We also let McKinley Cooper know -- find out what our
19 pricing would be for the following year. And we also
20 contacted -- we had received an email from Shane stating
21 that he was no longer with McKinley Cooper and decided
22 to contact him, as well.

23 Q. Okay. And who provided you prices at that time?

24 A. What do you mean?

25 Q. Well, I guess my question is, did McKinley Cooper

1 provide you with any price at that time?

2 A. They said it would be the same as it had been.

3 Q. Okay. And based on all that, how did you make a
4 decision as to who to utilize?

5 A. Well, we based a lot of that on price, which was --
6 all three were very different. Over a thousand dollars
7 difference for all three of them. We're a small non-
8 profit so we went with the lower price.

9 Q. Okay. Now, at the end of this year, you can -- as
10 a non-profit, you can use whoever you wanted to for
11 services; correct? For auditing services?

12 A. Yes.

13 Q. So you're not under a contract with them currently;
14 are you?

15 A. We had three years with them and that is done.

16 Q. So you had a three-year contract. When does that
17 come up?

18 A. I believe that would be done already.

19 Q. Okay. Do you recognize these documents right here?

20 A. Yes.

21 Q. And what are those documents?

22 A. Where are they?

23 Q. Oh, excuse me. What are they?

24 A. Oh, okay. These are the balance information that
25 we sign off to submit to our accounts so that they are

1 allowed -- so McKinley -- excuse me -- Highsmith can
2 actually communicate with them.

3 Q. Okay. So it says at the top ---

4 A. This is McKinley Cooper actually, yeah.

5 Q. Okay. So this is a standard form ---

6 A. Yes.

7 Q. --- to conform an account. I think we've been
8 calling this a bank confirmation?

9 A. That sounds about right.

10 Q. Is your signature in the middle at 4/29/2008?

11 A. Yes.

12 MR. ARIAIL: Okay, Your Honor, if I could ---

13 THE COURT: Any objection?

14 MR. ARIAIL: --- move that into evidence.

15 A. And yes, these are already clarified. These are
16 the ones that we signed for McKinley Cooper in 2008.

17 (WHEREUPON, Defendant's Exhibit Number 12 was
18 marked and admitted into evidence.)

19 Q. I'm going to put it up on the board. When that
20 light comes on it may hit your eyes, so you might want
21 to move just a little bit over there. This document
22 here, we've seen this a lot. This is a bank
23 confirmation, we call them. And this was from, I guess,
24 your company, Greer Relief. Does that say Greer Relief
25 at the top up there?

1 A. Yes.

2 Q. Okay. And you filled it out and that's your
3 account number?

4 A. It's a pre-fill. We look at it and approve and
5 sign it.

6 Q. Okay. So somebody sent that to you ---

7 A. Yes. It's part of our audit.

8 Q. Okay.

9 A. Yeah.

10 Q. Do you know if you know got that by email?

11 A. Typically it was hand -- yeah, I think it's
12 typically by hand and then we sign it off and they
13 submit it to the company so that they're able to access
14 those records.

15 Q. Right. And so you would have this and keep it as
16 part of our file; right?

17 A. Yes. Yes.

18 Q. And you gave it to me?

19 A. Yes, this is part of our record keeping for our
20 audits.

21 Q. All right. And that was done on 4/29/2008;
22 correct?

23 A. Correct.

24 Q. Has anybody from McKinley Cooper & Company
25 contacted you to find out why you went with Highsmith &

1 Highsmith since you left?

2 A. Not to my knowledge.

3 MR. ARIAIL: I have no further questions, Your
4 Honor.

5 THE COURT: All right. Mr. Haynsworth.

6 **CROSS-EXAMINATION**

7 **BY MR. HAYNSWORTH:**

8 Q. Good morning, Ms. Robertson.

9 A. Good morning.

10 Q. The bank confirmation document that Mr. Ariail
11 asked you about from December of 2007 with McKinley
12 Cooper at the bottom?

13 A. Yes.

14 Q. Now, as I understand the information in that, like
15 the account number and the bank and so forth, McKinley
16 Cooper would have plugged that in ---

17 A. Yes.

18 Q. --- and delivered the form to you?

19 A. Yes.

20 Q. You would have signed it. And that's giving the
21 bank permission to release your information to McKinley
22 Cooper?

23 A. Correct. As part of the audit, yes.

24 Q. Okay. And Mr. Ariail, I guess he asked you to pull
25 that out of your old records and that's how we're

1 talking about it today?

2 A. Yes.

3 Q. Okay. Now, as I understand it, Mr. Shane Highsmith
4 contacted you about wanting to potentially do some audit
5 work for Greer Relief?

6 A. He sent an email saying that he was no longer at
7 McKinley Cooper and to be considered if we were looking
8 for anything, but not in those exact words.

9 Q. Right. Right. Right. How long -- I think you
10 said and I forgot. I apologize. How long had McKinley
11 Cooper been your auditor prior to the switch?

12 A. It was, I believe, three, maybe four years. I
13 would have to look back.

14 Q. Okay. I mean, you were happy, I assume, with the
15 work they did?

16 A. Yes.

17 Q. Okay. And would you recall -- I think you said
18 that McKinley Cooper was going to charge the same price
19 they'd charged the year before. And then the Highsmiths
20 wound up coming in at a lower price; is that ---

21 A. Correct.

22 Q. Would you recall McKinley Cooper's last audit fee
23 to have been thirty-eight hundred dollars?

24 A. That sounds about right. I would have to look back
25 to see exactly what that was.

1 Q. Okay. And would the bid that the Highsmiths
2 submitted, would twenty-six hundred and fifty dollars be
3 ---

4 A. That sounds about right.

5 Q. Okay. And substantially lower quote. As you said,
6 y'all -- you're small, you've got to pinch pennies, so
7 you went with the lower price; is that right?

8 A. We have to be careful with our finances, so ...

9 Q. Okay. Thank you very much.

10 THE COURT: Thank you. You can step down.
11 And can she be excused?

12 MR. HAYNSWORTH: Yes, sir.

13 MR. ARIAIL: I call Steve Wilson to the stand
14 now, Your Honor.

15 THE COURT: All right.

16 THE CLERK: Mr. Wilson, please come forward.
17 If you'll please pause at the end of the bench. Place
18 your left hand on the bible and raise your right hand.

19 You do solemnly swear or affirm to tell the truth,
20 the whole truth and nothing but the truth, so help you
21 God?

22 THE WITNESS: Yes, ma'am.

23 THE CLERK: Thank you. Please be seated.
24 Would you please state your name for the record.

25 THE WITNESS: Steve Wilson.

1 THE CLERK: Thank you.

2 STEVE WILSON,

3 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION

5 BY MR. ARIAIL:

6 Q. Steve, how you doing today?

7 A. Doing fine, sir.

8 Q. Great. Thank you for coming. Tell us a little bit
9 about yourself. Where are you employed?

10 A. West Anderson Water District.

11 Q. Okay. Are you also on any boards?

12 A. Yes, sir. I'm the President of the South Carolina
13 Rural Water Association.

14 Q. Okay. And as part of your roles in there, in those
15 entities, are you involved in or in charge of the
16 determination of who you use as auditors?

17 A. At West Anderson Water District I am.

18 Q. Okay.

19 A. At South Carolina Rural Water Association we have
20 an internal accountant.

21 Q. Okay. And in regards to both of these entities,
22 were you involved in the selection process of who the
23 auditor is going to be?

24 A. Yes.

25 Q. Okay. And both of these entities, from my

1 understanding, utilize Highsmith & Highsmith now; is
2 that right?

3 A. Yes, sir.

4 Q. Why did y'all choose to do that?

5 A. We liked the fellows. And another reason with
6 South Carolina Rural Water Association, we've gone
7 through four in-house accountants within a year. So we
8 wanted to make sure that the Highsmith brothers was
9 still going to be our auditor during this time period.

10 Q. Have you been contacted by anybody with McKinley
11 Cooper & Company to determine why you went with
12 Highsmith & Highsmith?

13 A. No, sir, I have not.

14 Q. Thank you.

15 MR. ARIAIL: I have no further questions.

16 THE COURT: Mr. Haynsworth.

17 MR. HAYNSWORTH: Thank you, Your Honor.

18 **CROSS-EXAMINATION**

19 **BY MR. HAYNSWORTH:**

20 Q. Mr. Wilson?

21 A. Yes, sir.

22 Q. Would you recall the bid that the Highsmiths
23 submitted that caused you to switch from McKinley Cooper
24 to them? The amount of the quote for your audit fee?

25 A. For who?

1 Q. I'm sorry. For the West Anderson Water District?

2 A. No, sir, not off-hand I'm not.

3 Q. All right. McKinley Cooper had West Anderson
4 before the switch to the Highsmiths; right?

5 A. Yes, sir. And we had a Francis Branyon before
6 that.

7 Q. Would eighty-five hundred dollars ring a bell as
8 being the price McKinley Cooper was last charging y'all?

9 A. It could be.

10 Q. All right. And would eight thousand dollars be the
11 price that the Highsmiths quoted to you when you
12 switched?

13 A. Yes, sir. It could be.

14 Q. All right. Thank you, sir.

15 A. Yes, sir.

16 THE COURT: Thank you. You may step down.

17 THE WITNESS: Thank you, sir.

18 THE COURT: He can be excused?

19 MR. ARIAIL: Yes, Your Honor.

20 THE COURT: Thank you, sir.

21 MR. ARIAIL: Your Honor, we call Brad Powers
22 to the stand.

23 THE CLERK: Sir, if you'll please come
24 forward. If you'll please pause at the end of the
25 bench. Place your left hand on the bible and raise your

1 right hand.

2 You do solemnly swear or affirm to tell the truth,
3 the whole truth and nothing but the truth, so help you
4 God?

5 THE WITNESS: I do.

6 THE CLERK: Thank you. Please be seated.
7 Would you please state your name for the record.

8 THE WITNESS: Bradley Craig Powers.

9 THE CLERK: Thank you.

10 **BRAD POWERS,**

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

12 **DIRECT EXAMINATION**

13 **BY MR. ARIAIL:**

14 Q. Brad, thank you for coming today.

15 A. Uh-huh (affirmative).

16 Q. I want to ask you a little bit of your background.
17 Where are you employed now?

18 A. Blue Ridge Water Company.

19 Q. Okay. And how long have you been there?

20 A. Thirteen years.

21 Q. Okay. And what's your position with Blue Ridge
22 Water Company?

23 A. I'm the general manager.

24 Q. It's Blue Ridge Rural Water Company; is that
25 correct?

1 A. That's correct.

2 Q. It's called BRRW, I think is how y'all do it
3 sometime?

4 A. Yeah. BRWC.

5 Q. Yeah. There you go, okay. As part of your duties,
6 do you have involvement in the hiring of outside
7 auditors?

8 A. Yes, I do.

9 Q. Okay. And how is that process done within Blue
10 Ridge Water Company?

11 A. Generally through a request for proposal, RFP.

12 Q. Okay. And in this case, at one point in time, you
13 utilized the services of McKinley Cooper and Company; is
14 that correct?

15 A. I did.

16 Q. You then transferred your business over to the
17 Highsmiths?

18 A. That's correct.

19 Q. Okay. And why did y'all go about that, the
20 transfer over?

21 A. We issued a request for proposal in 2012 and
22 received two proposals, one from McKinley Cooper and one
23 from Highsmith. And it was simply the cost. If I
24 recall correctly, the cost from -- proposal from
25 McKinley Cooper was ten thousand nine hundred dollars.

1 And the cost from Highsmith & Highsmith was seven
2 thousand eight hundred.

3 Q. Okay. Had you utilized or dealt with Shane and
4 Todd Highsmith before you had hired them?

5 A. Yes. When they were with McKinley Cooper.

6 Q. Okay. And as part of their work for you, are they
7 allowed to come in and obtain documents as part of their
8 audit procedures?

9 A. Yes.

10 Q. Okay. And you're also -- are you also on the Board
11 at South Carolina Rural Water?

12 A. I am.

13 Q. Are they allowed to do the same thing with South
14 Carolina Rural Water?

15 A. Sure.

16 Q. Now, the first time you spoke with, I think it was
17 Shane Highsmith, it was after he left on November 1st,
18 2011; correct?

19 A. That's correct. If I recall correctly, I think we
20 had a meeting on November 3rd, if I'm not mistaken.

21 Q. Tell me if you recognize that right there?

22 A. Yes. This is an email that Shane and I shared on
23 November the 3rd, after a meeting that we had.

24 MR. ARIAIL: I'd like to move that into
25 evidence.

1 THE COURT: Any objection?

2 MR. HAYNSWORTH: No, sir.

3 (WHEREUPON, Defendant's Exhibit Number 13 was
4 marked and admitted into evidence.)

5 Q. Now, that meeting was on November 3rd and you had
6 an email on November 3rd, too, I guess; is that right?

7 A. That's correct.

8 Q. Okay. Now, after that, I think as part of this, do
9 you know what the next steps you took in regards to
10 hiring them, utilizing their services?

11 A. Yes, sir. At that meeting we had -- I'd expressed
12 a desire to get a proposal from Highsmith & Highsmith.
13 They provided that proposal. I presented that proposal
14 to my board, and my board requested that I do a request
15 for proposal for audit services for Highsmith and
16 Highsmith and McKinley Cooper; and I did so.

17 Q. Okay. And I want you to take a look at these
18 documents to see if you recognize those.

19 A. (Witness reviewing documents.)

20 Q. Do these memorialize the emails that -- your
21 understanding of communications with the Highsmiths in
22 regards to your proposals?

23 A. Yes.

24 Q. And I think the first one says -- indicates it was
25 February 9, 2012, which says you -- I think the response

1 to -- or this is from Shane. Says, please keep us in
2 mind if you go out for audit proposals because we'd love
3 the opportunity to give you a bid?

4 A. Correct.

5 Q. All right. So at that time y'all hadn't made a
6 decision or done anything?

7 A. No.

8 Q. I think on the next email you make a decision or
9 say something, February 9th. Tell me if this is right.
10 You respond to them. Could you please send me a
11 proposal to do our audit work. Happy to hear things are
12 going well; is what your response was?

13 A. That's correct.

14 Q. Okay. So at that point in time -- the next
15 document I have in here, I think it was a board of
16 directors minutes meeting discussing the proposals that
17 were submitted; correct? I think it says in the last
18 part of the page down there?

19 A. Yes. I presented Highsmith & Highsmith's proposal
20 that I had requested back in February.

21 Q. Uh-huh (affirmative)?

22 A. And the board requested that I obtain a proposal
23 from McKinley Cooper and Highsmith & Highsmith.

24 Q. Okay. Did any other companies bid on this?

25 A. No.

1 Q. Okay. And after that, the board made a decision to
2 hire Highsmith & Highsmith; correct?

3 A. That's correct.

4 Q. Since that time, have you spoken with anybody with
5 McKinley Cooper to determine -- asking you as to why you
6 left to go with Highsmith & Highsmith?

7 A. Yes. Shortly after we had selected the Highsmith &
8 Highsmith as the auditing firm, I, of course, notified
9 McKinley Cooper that they had not been chosen to
10 continue audit services. And at that time, I received a
11 request for the winning bid, which was from Highsmith &
12 Highsmith, to be provided to McKinley Cooper; and I did
13 so.

14 Q. Okay. So they got a copy of that. You provided it
15 to them ---

16 A. Correct.

17 Q. --- under the Freedom of Information Act; is that
18 right?

19 A. It was just simply a request and we granted it just
20 like what we would do with any request like that. We've
21 always had good relationships with McKinley Cooper, so
22 ...

23 Q. Right. And you can utilize the services at a
24 future date of McKinley Cooper; correct?

25 A. Sure we can.

1 Q. Are you under any contract with Highsmith &
2 Highsmith?

3 A. We have a three-year contract that began in 2012.

4 Q. Okay. So that'll expire in 2015?

5 A. Correct.

6 Q. Thank you, Brad. I have no further questions.

7 THE COURT: Mr. Haynsworth.

8 MR. HAYNSWORTH: Very briefly, Your Honor.

9 **CROSS-EXAMINATION**

10 **BY MR. HAYNSWORTH:**

11 Q. Mr. Powers, before your board told you to get a
12 request for proposal from both Highsmith & Highsmith and
13 McKinley Cooper, McKinley Cooper had been y'all's
14 auditor for, what, roughly ten years?

15 A. That's correct.

16 Q. All right. And during that ten years, y'all just
17 rolled over year after year with MCC?

18 A. That's correct. The initial contract in 2002 was
19 for a three-year term and we just went year by year
20 after that.

21 Q. Okay. Okay. And the price you were -- excuse me.
22 When the board directed you to send it out to both firms
23 to get a price quote, you said that the McKinley Cooper
24 was ten nine. And the Highsmiths was seven thousand
25 eight hundred?

1 A. I believe that's correct; yes, sir.

2 Q. And as the low bidder, y'all had to go with them
3 basically, I guess?

4 A. We didn't have to. We're not required to choose
5 the lowest bidder. It's based upon ---

6 Q. Well, all else being equal, I guess?

7 A. Correct.

8 Q. Okay. All right. Thank you, sir.

9 A. Uh-huh (affirmative).

10 THE COURT: Thank you. Step down.

11 MR. ARIAIL: Your Honor, could I just ask him

12 ---

13 THE COURT: All right.

14 **REDIRECT EXAMINATION**

15 **BY MR. ARIAIL:**

16 Q. You're also on the board of South Carolina Rural
17 Water; correct?

18 A. That's correct.

19 Q. He just asked you, you utilized their services
20 throughout this time, did you have any mandates or any
21 understanding what National Rural Water wanted y'all to
22 do in this situation about auditors?

23 A. It was my understanding that Nation Rural Water had
24 a desire to change auditors periodically. And that was
25 a desire of theirs to switch audit firms from time to

1 time.

2 Q. Okay.

3 MR. ARIAIL: Thank you, Your Honor. No
4 further questions.

5 THE COURT: Thank you. Step down.

6 THE WITNESS: Thank you.

7 THE CLERK: Ma'am, if you'll please come
8 forward. Please pause at the end of the bench. Place
9 your left hand on the bible ---

10 THE WITNESS: Can I do a secular oath or
11 affirmation?

12 THE COURT: Yes.

13 THE CLERK: Yes. If you would please raise
14 your right hand.

15 You do promise to tell the truth, the whole truth
16 and nothing but the truth?

17 THE WITNESS: I do.

18 THE CLERK: Please have a seat. Would you
19 please state your name for the record.

20 THE WITNESS: Kate Franch.

21 THE CLERK: Thank you.

22 **KATE FRANCH,**

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

24 **DIRECT EXAMINATION**

25 **BY MR. ARIAIL:**

1 Q. Ms. Franch, how you doing today?

2 A. Fine, thanks.

3 Q. Ms. Franch, where are you employed?

4 A. I'm with the Neighborhood Housing Corporation of
5 Greenville.

6 Q. And what does the Neighborhood Housing Corporation
7 do?

8 A. We build affordable housing. We're a non-profit.

9 Q. Okay. And what is your position with Neighborhood
10 Housing Corporation?

11 A. I'm the executive director.

12 Q. Okay. And how long have you been in that position?

13 A. Not quite two years.

14 Q. Okay. And as part of that position, are you
15 involved in the auditing process or choosing the
16 auditors?

17 A. I am. Well, I actually, you know, get names and
18 ask to be submitted to our board and they approve the
19 contract.

20 Q. Right. And so currently you're using the services
21 of Highsmith & Highsmith; is that right?

22 A. We are.

23 Q. When did you hire them to do your work?

24 A. Just this year.

25 Q. So just this year?

1 A. Uh-huh (affirmative).

2 Q. Okay. They didn't do -- so that would be, correct
3 me if I'm wrong, 2013 audit?

4 A. Yes.

5 Q. So they didn't do the 2012 audit?

6 A. They did not.

7 Q. Okay. And you utilized the services of McKinley
8 Cooper at that time?

9 A. We did.

10 Q. Okay. You said you've been there two years. You
11 wouldn't have known Shane and Todd while they were
12 employed at McKinley Cooper; is that ---

13 A. I did not.

14 Q. How did you come into knowledge of Highsmith &
15 Highsmith?

16 A. Actually, two ways. When I came on board our
17 QuickBooks needed -- a lot of mess. Anyway, I met with
18 Carol Leavitt in Travelers Rest. And she is with the
19 QuickBooks helper. We went up there, spent several
20 sessions with her. There were a couple of times where
21 she just had a general question. She's not used to
22 working with non-profits. She called, it turned out to
23 be, Highsmith & Highsmith, to just ask them a general
24 question about, for a non-profit what would you do here?
25 And she mentioned, I remembered later, and this is why

1 -- she mentioned, oh, you know, they're a relatively new
2 firm. They're, you know, really good. I like them.
3 They are very familiar with QuickBooks. If you're ever
4 looking for, you know, other auditors, it would be worth
5 getting a bid from them potentially. So I didn't really
6 think of that. That was six months beforehand. In
7 January, we have to renew -- I mean, we review and renew
8 our contracts. The board at the annual meeting -- this
9 is January 2014 -- asked me to get at least one other
10 bid on an auditor. And a board member actually sent me
11 an email. He had said that I heard about a firm and
12 I'll find out about that. And he sent me an email and
13 he said here's the firm, Highsmith & Highsmith, and you
14 might want to check in with them. So I put the two
15 together and I asked them for a proposal.

16 Q. Okay. So you found out about Highsmith & Highsmith
17 from a board member and not them contacting you
18 directly?

19 A. They did not.

20 Q. Okay. Now, tell me if this -- if you remember this
21 email right here?

22 A. Yes.

23 Q. Is that an email from you?

24 A. It is.

25 Q. You sent that to the Highsmiths; is that correct?

1 A. I did.

2 Q. Okay. What's the date of that email?

3 A. January 31st, 2014.

4 MR. ARIAIL: Your Honor, if I can move that
5 into evidence.

6 THE COURT: Any objection?

7 MR. HAYNSWORTH: No, sir.

8 (WHEREUPON, Defendant's Exhibit Number 14 was
9 marked and admitted into evidence.)

10 Q. I'm going to put it on the overhead.

11 A. Okay.

12 Q. You might want to move over just a little bit that
13 way. This thing may blind you a little bit. Now, at
14 the bottom, this is your message to them; correct?

15 A. Yes, it is.

16 Q. Okay. And so you're introducing yourself to them
17 and asking them to contact you in regards to annual
18 audit process; is that right?

19 A. Yes.

20 Q. Okay. And what was their response?

21 A. It's just above. Shane got back to me. He said, I
22 haven't had a chance to call. I'll call you on Monday.
23 And he followed up that following Monday.

24 Q. Now, since you have hired McKinley -- excuse me --
25 Highsmith & Highsmith, has anybody at McKinley Cooper

1 contacted you to ask you why you went with Highsmith &
2 Highsmith?

3 A. Yes.

4 Q. Okay.

5 A. I spoke with Matt Phillips about that. Actually, I
6 also got a proposal from McKinley Cooper and submitted
7 both of these to the board in our February meeting. And
8 then when I -- I sent a letter to McKinley Cooper. I
9 actually called Matt because I had, you know, developed
10 a nice relationship with him. And just to tell him that
11 the decision of the board had been to go with Highsmith
12 & Highsmith. We felt that both firms could do an
13 adequate job and the board thought, one, for financial
14 reasons. Also, because it would be good. McKinley
15 Cooper had done the audit for the NHC for a number of
16 years. We've been around for twenty-five years. We're
17 a part of the Greenville County Redevelopment Authority
18 for many of those years. And they had done the audit.
19 It would be good to just get another set of eyes looking
20 at the books on occasion. So, anyway, I called Matt and
21 told him, wrote a letter as well, and then he followed
22 up. I can't remember when; you know, a couple weeks
23 later, and just said, oh, by the way, here's a situation
24 you might not know about, but why did you go with them?
25 And I reiterated what I had written in the letter.

1 Q. Okay. And you talked to him and that was some time

2 ---

3 A. It would have been after March because I know the
4 letter I sent to them was March 3rd.

5 Q. So somebody at MCC had knowledge of this as the
6 reason why you went ...

7 A. Yes.

8 Q. Okay. As part of the auditing process, they come
9 in and they're able to -- Highsmith & Highsmith, get
10 your information off your computers; correct?

11 A. Yes.

12 Q. Okay. You have a one-year contract with them; is
13 that right?

14 A. Yes.

15 Q. Okay. So you can choose whoever you want to at the
16 end of that contract?

17 A. Yes.

18 Q. And you can go through a bidding process to be able
19 to do that; is that right?

20 A. Yes.

21 MR. ARIAIL: Your Honor, I have no further
22 questions.

23 THE COURT: All right. MR. Haynsworth.

24 MR. HAYNSWORTH: Thank you, Your Honor.

25 **CROSS-EXAMINATION**

1 **BY MR. HAYNSWORTH:**

2 Q. Good morning, Ms. Franch?

3 A. Good morning.

4 Q. So you have been with Neighborhood Housing
5 Corporation for ---

6 A. Since the end of March 2013.

7 Q. Okay. So you started in 2013. And, again, did I
8 understand you to say, though, that even before you came
9 to work there you knew that McKinley Cooper had been the
10 long-time auditor?

11 A. No, I didn't know that prior to my starting.

12 Q. Oh, no, no.

13 A. Yes.

14 Q. But after you started you found out that ---

15 A. I saw that -- in fact, an audit had not been
16 started. I knew that needed to be done. I saw that
17 they had done the last one. I called and engaged Matt's
18 services or McKinley Cooper's services.

19 Q. Right. And you came to understand that long before
20 you got there, McKinley Cooper had been their auditor?

21 A. They had done it for a number of years. But in my
22 going back through the files, every few years they would
23 send out bids. And I know at some point they sent out
24 three-year renewable contracts so that at the end of the
25 year they could choose -- the board could choose to

1 renew it for another year, for a term of three. And
2 that way there was kind of a set price.

3 Q. Right. So McKinley Cooper would do a three-year
4 quote if the board voted to go with them ---

5 A. Right.

6 Q. --- you got it for three years. Then at the end of
7 that three ---

8 A. Well, actually, it was renewable at the end of each
9 of the years. So ---

10 Q. Okay. So it's --- okay. I believe you said that
11 the -- or did you say that the bid submitted by the
12 Highsmiths, would thirty-eight hundred dollars ring a
13 bell?

14 A. Yes.

15 Q. All right. And the bid by McKinley Cooper, would
16 five thousand dollars ring a bell?

17 A. Yes.

18 Q. All right. Let me ask you this, Ms. Franch. Do
19 you have any knowledge one way or another of what
20 documents that resided at McKinley Cooper relative to
21 the Neighborhood Housing Corporation are now in the
22 possession of the Highsmiths?

23 A. The only thing I would know is what I sent, which
24 was a copy of the 2012 audit.

25 Q. But you don't know what other documents they might

1 have gotten from McKinley Cooper?

2 A. No. No.

3 Q. Thank you.

4 THE COURT: Thank you. You can step down.

5 MR. ARIAIL: Your Honor, our next witness is
6 Tara Glenn.

7 THE CLERK: Ms. Glenn, if you'll please come
8 forward. Would you please pause at the end of the
9 bench. Place your left hand on the bible and raise your
10 right hand.

11 You do solemnly swear or affirm to tell the truth,
12 the whole truth and nothing but the truth, so help you
13 God?

14 THE WITNESS: Yes, I do.

15 THE CLERK: Please be seated. Would you
16 please state your name for the record.

17 THE WITNESS: Tara Glenn.

18 THE CLERK: Thank you.

19 TARA GLENN,

20 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MR. ARIAIL:

23 Q. Ms. Glenn, how are you doing today?

24 A. I'm good. Thank you.

25 Q. Tell me where you're employed?

1 A. United Way of Laurens County.

2 Q. How long have you been there?

3 A. Seven years.

4 Q. And what's your position there?

5 A. I'm the executive director.

6 Q. Okay. And have you been the executive director the
7 entire time?

8 A. No, sir. For five years.

9 Q. For five years. During that time, do you have an
10 involvement in the auditing process?

11 A. All seven years.

12 Q. All seven years, okay. And as part of that
13 process, how do y'all choose your auditors with United
14 Way of Laurens?

15 A. We've one bid process.

16 Q. Okay. And when was that bid process done?

17 A. June 2012.

18 Q. Okay. And as part of that bid process who -- did
19 y'all send out a request for proposal to individuals?

20 A. We did.

21 Q. Okay. And who did you send that to?

22 A. Love, Bailey and Associates in Laurens; McKinley
23 Cooper in Greenville; and Highsmith & Highsmith in
24 Greenville.

25 Q. Okay. And do you remember who was the -- what the

1 amounts and the bids for those companies were?

2 A. I do. Love, Bailey and Associates was forty-five
3 hundred. McKinley Cooper was four thousand. And
4 Highsmith & Highsmith was twenty-two fifty.

5 Q. So in that process right there, who did you select?

6 A. We took those three proposals to our board of
7 directors and we based on them on the proposals and on
8 the work that we knew -- we went strictly on price and
9 we selected Highsmith & Highsmith.

10 Q. Okay. So there was a bid that was higher than
11 McKinley Cooper's also; is that right?

12 A. Yes.

13 Q. Did you sign a contract with McKinley Cooper -- or
14 excuse me -- with Highsmith & Highsmith?

15 A. When they came in with their price, we asked for a
16 three-year agreement on that price so that the price
17 would not increase and we did agree to that for three
18 years.

19 Q. Okay. When does that expire?

20 A. This was our third year.

21 Q. Okay. So next year you can go out for bid again
22 and choose the auditor that you want to; is that
23 correct?

24 A. If the board chooses to; yes, sir.

25 Q. Okay. And it's up to the board to make that

1 decision?

2 A. Yes, sir.

3 Q. Have you been contacted by anybody at McKinley
4 Cooper & Company in regards to why they left to go to
5 Highsmith & Highsmith?

6 A. No, sir.

7 Q. Okay. When Highsmith & Highsmith comes down to do
8 an audit there, can they get your computer information
9 and items that are relevant to the audit?

10 A. Yes, sir.

11 Q. Have you ever provided information through FOIA or
12 a request from another auditor and sent that to them?

13 A. No, sir. Well, I take that back. We did sign a
14 letter when we signed the three-year agreement with
15 Highsmith & Highsmith, they did have us sign a letter
16 requesting information from McKinley Cooper. We signed
17 the letter and they submitted that to McKinley Cooper.

18 Q. And have they provided that information to your
19 knowledge?

20 A. (Affirmative nod.)

21 Q. Okay.

22 MR. ARIAIL: No further questions, Your Honor.
23 Thank you.

24 MR. HAYNSWORTH: I have no questions, Your
25 Honor.

1 THE COURT: Thank you. You can step down.

2 THE WITNESS: Thank you.

3 MR. ARIAIL: Your Honor, I call Ginny Waller
4 to the stand.

5 THE CLERK: Ma'am, if you'll please pause at
6 the end of the bench. Please place your left hand on
7 the bible and raise your 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, I do.

12 THE CLERK: Thank you. Please be seated.
13 Would you please state your name for the record.

14 THE WITNESS: Ginny Waller, W-A-L-L-E-R.

15 THE CLERK: Thank you.

16 GINNY WALLER,

17 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

18 DIRECT EXAMINATION

19 BY MR. ARIAIL:

20 Q. Ginny, how you doing today?

21 A. Good. Thanks.

22 Q. Thank you for coming. Did you drive from out of
23 town?

24 A. Uh-huh (affirmative). From Columbia.

25 Q. You're from Columbia? Okay. I was trying to

1 figure out. And you're employed -- where are you
2 employed?

3 A. Sexual Trauma Services of the Midlands.

4 Q. Okay. And what's your position with them?

5 A. I'm the executive director.

6 Q. Okay. Are you also an attorney?

7 A. I am.

8 Q. Okay. And how long have you been employed by
9 Sexual Trauma Services?

10 A. Six and a half years.

11 Q. What do y'all do at the Sexual Trauma Services?

12 A. We provide hospital accompaniment, hotline, twenty-
13 four hotline, crisis intervention, therapy with licensed
14 counselors, personal legal advocacy. And then we also
15 do violence prevention work in the schools. We're in
16 forty-seven schools in our service area, Richland,
17 Lexington, Newberry and Sumter.

18 Q. Okay. And in your position as executive director
19 there, do you have involvement in the auditing process
20 or choosing auditors?

21 A. To some level. Our office manager is doing the
22 work. And then I'm involved in the background of that.
23 And then we have a finance committee, as well, that is
24 involved in the final selection.

25 Q. Okay. But how does the process go about to

1 selecting an auditor with your company?

2 A. So, actually, the last time we selected an auditor
3 was the first time we had done this. But we wanted to
4 formalize our process a little bit more. When I came on
5 board, we had no formal process. So I was trying to
6 clean it up a little bit. So we -- the office manager
7 created an RFP or request for proposal, formal use and
8 stock language and things like that. And then we sent
9 that out to some very purposeful organizations we'd
10 heard about. I picked up business cards at different
11 events and things like that. And we asked a few groups
12 to bid. And I can't remember how many, but we sent out
13 a number and we received back thirty during that
14 process. So then we reviewed -- we did a spreadsheet
15 and we compared each of the organizations or the
16 companies that had given us information back and had
17 bid. And then my finance committee made the final
18 decision.

19 Q. Okay. That sounds like a pretty formalized
20 approach to what you did?

21 A. Uh-huh (affirmative).

22 Q. And y'all hadn't utilized that before; correct?

23 A. Right.

24 Q. And in regards to the bids, do you remember if
25 McKinley Cooper even submitted a bid?

1 A. We did not ask them to.

2 Q. Oh, okay. Why not?

3 A. In the non-profit sector, it's considered best
4 practice to move around with auditors so that you're not
5 using the same audit organization every year. And we
6 had used McKinley Cooper -- we were in the second year
7 with McKinley Cooper when we put out the RFP. So that
8 would have been our final year with them. We were going
9 to do three -- I am setting in a practice and did set in
10 a practice at that time, that we'll only stay three
11 years with an audit firm.

12 Q: Okay. And you can choose who -- or your finance
13 committee can choose whoever they want to at the end of
14 that time; correct?

15 A. Right. Yeah.

16 Q. Okay. Have you been contacted by McKinley Cooper
17 at any time since you last used them?

18 A. No.

19 MR. ARIAIL: I have no further questions, Your
20 Honor.

21 THE COURT: Mr. Haynsworth.

22 MR. HAYNSWORTH: Yes, sir. Very briefly, Your
23 Honor.

24 **CROSS-EXAMINATION**

25 **BY MR. HAYNSWORTH:**

1 Q. Ms. Waller, how long did you say you'd been
2 executive director?

3 A. Six and a half years.

4 Q. Okay. Up until the switch to Highsmith &
5 Highsmith, was McKinley Cooper the auditor during your
6 entire tenure, part of your tenure?

7 A. No, sir. When, I came -- it's not always -- non-
8 profits are not always using best practice. I'm giving
9 that disclaimer. When I came on board, we had been
10 using the same auditor for about twenty years. And I
11 stopped that. And we had hear through the South
12 Carolina Coalition that McKinley Cooper did good work.
13 And so we reached out to McKinley Cooper at that time
14 and started using them as an auditor.

15 Q. Okay. And you had a three-year contract with them,
16 I gather, it's a fixed price each year for a three-year
17 period and then the contract's up for renewal?

18 A. I'm not -- that's what we do now. I'm not sure
19 that that's how we did it with McKinley Cooper, but we
20 did stay with them for three years. And it probably was
21 a fixed price, but I can't -- don't hold me to that one.

22 Q. Okay. If I told you fifty-five hundred dollars was
23 the last per year audit fee McKinley Cooper charged,
24 would that be consistent with your recollection?

25 A. I could be.

1 Q. All right. If I told you that four thousand one
2 hundred and twenty-five dollars is the bid the
3 Highsmiths submitted, would that be consistent with your
4 recollection?

5 A. I thought it was forty-two fifty, but it may have
6 been.

7 Q. Okay. Well, ---

8 A. Uh-huh (affirmative). Numbers are hard, yeah.

9 Q. --- four grand ---

10 A. Sure.

11 Q. Ms. Waller, do you have any knowledge one way or
12 another of what documents McKinley Cooper had regarding
13 Sexual Trauma Services of the Midlands that the
14 Highsmiths took from McKinley Cooper when they started
15 H&H?

16 A. I would have no idea.

17 Q. All right. Thank you, ma'am.

18 THE COURT: Thank you. Step down, please.

19 MR. ARIAIL: Your Honor, my next witness will
20 be Matt Snoddy.

21 THE CLERK: Sir, if you'll please place your
22 left hand on the bible and raise your right hand.

23 You do solemnly swear or affirm to tell the truth,
24 the whole truth and nothing but the truth, so help you
25 God?

1 THE WITNESS: I do.

2 THE CLERK: Thank you. Please be seated.

3 Would you please state your name for the record.

4 THE WITNESS: My name is Matthew Snoddy.

5 That's with two d's; not two o's.

6 THE CLERK: Thank you.

7 **MATTHEW SNODDY,**

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

9 **DIRECT EXAMINATION**

10 **BY MR. ARIAIL:**

11 Q. Matt, how you doing today?

12 A. I'm doing very well, Mr. Ariail. How are you?

13 Q. Good. Thank you. I want to go through a little
14 bit of your background. Can you give us a little bit of
15 your background in regards to your education?

16 A. Absolutely. My education began in 1992 when I
17 graduated high school. I was nominated to and accepted
18 to the United States Air Force Academy in Colorado
19 Springs, Colorado, with the intention of graduating with
20 a four-year degree and flying jets for the Air Force.
21 About a year into that, I decided to change my plans.
22 The Air Force decided they didn't need as many fighter
23 jet pilots as they thought they did. They gave me the
24 opportunity to go ahead and leave without any
25 commitment, and so I transferred to the University of

1 Kentucky in Lexington, Kentucky as a computer science
2 major and went on to be a member of the class of 1997
3 with them. And then made the decision to leave my
4 senior year. So I like to say I have seven-eighths of a
5 degree in computer science. I don't have a full degree
6 in computer science, and went to work. And I've been
7 working in the IT industry since approximately 1994.
8 And my background in IT starts then.

9 Q. Okay. And after you graduated, where did you --
10 what training do you have in regards to information
11 technology, forensic computer investigation?

12 A. With regards to computers, IT and forensics, you
13 heard previously yesterday from another expert that has
14 what's called MCSE, Microsoft Certified Systems
15 Engineer. I also have that. I'm a Microsoft Certified
16 Professional, Microsoft Certified Systems Administrator,
17 Microsoft Small Business Specialist. And I have some
18 other certifications from a organization called CompTIA,
19 which is a governing body for some more general non-
20 Microsoft certifications. And I have what's called an A
21 plus certification, a network plus certification, and a
22 security plus certification, which indicates that I have
23 experience in security related matters.

24 Q. Okay. And specifically, in regards to forensic
25 Investigation, forensic computer investigations, what

1 background do you have in that?

2 A. With regard to forensics, I've had formal training
3 using a PC software called EnCase. They have a
4 formalized certification and training program, which
5 requires, I think it's somewhere around sixty-four hours
6 of formal training. And then an examination period that
7 goes along with that to make sure that you know the
8 software. The EnCase software is relatively new. I
9 only started using it about in the last year and a half.
10 It's a very expensive piece of software and I didn't
11 have the means to purchase it myself originally. But my
12 first forensics case started in 1994 for another law
13 firm that had an embezzlement case with a paralegal.

14 Q. Okay. And how many forensic investigations,
15 computer investigations do you think you've been
16 involved with?

17 A. Over the past twenty years, I can't really give a
18 hard number. I would say more than ten, less than a
19 thousand.

20 Q. How many times -- and when I say that, have you
21 been an expert in those cases?

22 A. I have been retained as a consultant in cases. I
23 don't like to be called an expert because I'm not a
24 professional witness. I have not had any of those cases
25 go to trial. They've all been resolved in some sort of

1 a settlement or mediation.

2 Q. Okay.

3 MR. ARIAIL: Your Honor, at this time I would
4 move him to be admitted as an expert in information
5 technology and forensic computer investigations.

6 THE COURT: Any voir dire, Mr. Haynsworth?

7 MR. HAYNSWORTH: No, sir, Your Honor. No
8 objection.

9 THE COURT: He's qualified. Proceed.

10 Q. Mr. Snoddy, I think I missed one key question too.
11 Where are you from?

12 A. Mr. Ariail, I live in Lexington, Kentucky. After
13 going to the University of Kentucky, I decided to stay
14 in Lexington. And unfortunately, I know that we're SEC
15 rivals with Clemson and USC down here. I hope you don't
16 hold that against me. I'm a Wildcats man. But I met my
17 wife and we live in Lexington. So it's about a five and
18 a half hour drive. I drove down here and Monday. And
19 if y'all have been noticing, I've been sitting back
20 there kind of listening to this entire trial just like
21 you guys.

22 Q. Okay. And is part of your -- and I think you went
23 into it a little bit. You have your own company; is
24 that correct?

25 A. That's correct. My experience in IT, like I said,

1 began in 1994. I was working through college. In 1997
2 I had an opportunity to make considerably more money and
3 work for a Fortune 500 company called Ashland,
4 Incorporated, which at that time was headquartered in
5 Lexington. That's part of the reason that I left
6 college and decided to go into the workforce full-time.
7 I bounced around a little bit. And you have to remember
8 this is the late '90s. And so the IT industry was
9 booming. We had the tech bubble. And so I spent about
10 a year at Ashland. I moved on from there to a
11 government agency in Frankfort, Kentucky called the
12 Cabinet for Families and Children. I was there for
13 about two years where I had about a hundred and fifty or
14 a hundred and sixty servers across the State of Kentucky
15 that I was in charge of. From there, I moved on to
16 Allstate Insurance, which is another very large company.
17 I was in charge of a -- what's called a roll-out;
18 putting in servers and workstations in their Lexington
19 offices. And during my time at Allstate, I decided that
20 it was time for me to start my own business. So in 2000
21 I set up a corporation called Network Therapists and
22 Network Therapists became my own business. And after I
23 left Allstate, I started doing IT consulting for small
24 to medium-sized businesses, taking the experience that I
25 had with very large organizations, servers, and networks

1 and security and bringing that experience to -- on a
2 more affordable level to smaller companies that couldn't
3 afford to hire somebody like me.

4 Q. Okay. And I want to get to what we're involved in
5 this case. One of the key things yesterday we brought
6 out -- you heard Mr. Hemond testify -- was that he was
7 using Microsoft as his search tool. In this case, how
8 have you gone about, and what software, what equipment
9 have you used in regards to searches and various things
10 like that?

11 A. Sure. And I didn't get a chance to complete my
12 entire work history. With Network Therapists, and being
13 involved with small businesses, one of my clients was a
14 company called Chase Legal Imaging, which is a legal
15 services firm in Lexington that handles -- handling
16 things like, you know, making photo copies, you know,
17 making copies of evidence and things like that for
18 lawyers, basically lawyer support. So Chase Legal
19 Imaging is owned by a guy named Chase Phillips. Chase
20 called me up about a year and a half ago and said, hey,
21 I'm getting into -- I'm getting requests from lawyers to
22 do things like what's called e-discovery, electronic
23 discovery or computer forensics. Lawyers are requesting
24 this kind of stuff and there's not many people who do
25 this kind of stuff. There's only eight people in the

1 State of Kentucky that do this. And so Chase asked me,
2 he said, would you be interested in coming in on a
3 contract basis with Chase Legal Imaging. He has
4 employees and he had multiple offices. He spun off a
5 separate division called CLI Discovery just to handle
6 the forensics and the e-discovery type stuff. And part
7 of the enticement was that Chase said, look, there's a
8 big software called EnCase that's expensive. I know you
9 can't get it on your own. How about we partner up, we
10 set up a business agreement between our two companies.
11 You provide the expertise, I'll provide the software.
12 And together we can offer this service to attorneys or
13 for, you know, other types of consultation type cases
14 where we need to get into electronic discovery. So all
15 of that to say, we were then subsequently -- in about
16 June we got a call from Mr. Ariail on a consulting
17 basis. And Mr. Ariail said, we have a case where we
18 would like to have some hard drives imaged. And we
19 would like to have some searches run. Well, that's
20 certainly within the scope of what we can do. That's
21 stuff that I can do in my sleep. And part of what we
22 do, though, is follow all the standard forensic
23 procedures. At our first engagement call, we don't know
24 where a case is going. We don't know if it's going to
25 go to trial, if it's going to go to mediation or if

1 we're just doing searches because a lawyer thinks they
2 need something to have done. And so we follow a strict
3 set of procedures. We have everything documented. And
4 the reason that we do this is so if it does come to
5 something like this, like a trial, we're completely
6 defensible. All of our bases are covered. And the
7 reason that we do that is because there are -- there are
8 lots of ways to search a hard drive. There's lots of
9 ways to image a hard drive. The testimony you heard
10 from Mr. Hemond yesterday talks about how they image
11 with a piece of software called Acronis and how they
12 perform searches using Windows search. Well, that's
13 great if all you're worried about is finding some
14 documents. I can teach my nine-year-old daughter how to
15 do a Windows search in about five minutes and four of
16 that will be waiting for the computer start up. It's
17 not that hard to do a Windows search. It certainly
18 doesn't require any special expertise. But handling a
19 computer and digital evidence in a forensically sound
20 manner is very important and making sure that there is
21 no corruption of data, that there's no accidentally
22 written data to the hard drives. A lot of folks don't
23 realize whenever you hook up a drive to a computer, if
24 you have a Windows Operating System, one of the first
25 things that it does is it actually writes a little

1 invisible piece of data to that. So without you even
2 realizing it, you've already changed data on a hard
3 drive if you haven't used something that's called a
4 write blocker. And a write blocker is something that a
5 forensic computer technician would use. So in answer to
6 your question, Mr. Ariail, about why we -- you know, the
7 difference between using something like a Windows search
8 and an EnCase search, all of our searches and all of our
9 processing of any evidence is done in a very sanitary,
10 very controlled manner. It's also very reproducible.
11 We can go to any other EnCase Certified Examiner and say
12 here is our evidence. Here are the results that we came
13 up with. And they'll be able to reproduce precisely and
14 exactly the types of work that we did. In fact, in most
15 of these types of cases where we will be working with
16 someone else who might have something like an EnCase or
17 competing type product, and we can reproduce results
18 without any problem.

19 Q. Okay. And in this case when I contacted your
20 office and was getting help in this case, what was the
21 initial, I guess, duties or requests that I made to get
22 you involved?

23 A. Our first engagement was really pretty much as I
24 said before. We were contacted by Mr. Ariail. And he
25 said, look, I've got a couple of laptops and we have

1 some search terms. What we would like for you guys to
2 do is to image or make a copy, a mirror copy, an exact
3 copy of these hard drives and run some searches on some
4 words, some terms. And we'll provide you with a list of
5 terms and we want to see what kind of files that you
6 find on these hard drives.

7 Q. Okay. And what steps did you go through, I guess,
8 because we're about a year and a half or two years into
9 litigation at that time. What did you do at that point
10 in time to go in and take the steps necessary to do the
11 tasks that I asked you to do?

12 A. Well, keep in mind that even though this litigation
13 has been ongoing for a year and a half, two years, I'm
14 not sure the exact amount of time, we weren't engaged
15 until June of this year. So we came in well after the
16 fact, after Mr. Haynsworth had already hired his expert
17 witness. And they had already had a chance to touch
18 these laptops twice. If you remember from their
19 testimony yesterday, they did a set of images once and
20 then they overwrote the images for whatever reason. A
21 mistake was made on their part and they had a chance to
22 touch these hard drives a second time. Now, if you'll
23 recall, I said that we use what's called write blocker.
24 We can guarantee that absolutely no data is written from
25 our computers to the hard drives when we do our images

1 because we have a piece of hardware, it's a physical
2 block. It's a big piece of plastic. It's got lights
3 and plug-ins on it that guarantees we haven't written
4 anything onto it. Mr. Hemond had no access to such a
5 device. And, in fact, didn't use such a device and so
6 we don't know what was done to those hard drives, not
7 once, but twice when they had the opportunity to touch
8 them. We know that they hooked them up to another
9 computer and made images. We have no idea of what those
10 other computers could or may have done to those hard
11 drives while they had them. This was well before my
12 company and I were involved. So at this time, we
13 already knew we had what was essentially tainted
14 evidence. But nonetheless, we were still under the
15 requirements to follow the forensic procedures and work
16 with what we had. We didn't know where this was going
17 to go so we just had to start from -- you know, assuming
18 that we had the best copy that we could possibly get.

19 Q. Okay. And when you got into this process, go
20 through, if you can, the process of how you got this
21 data and what you did with it?

22 A. Well, among the various things that you do when
23 you're a computer forensic examiner, there's a very
24 strict set of checklists that you follow. And A, number
25 one, the very first thing you do is pull out a camera

1 and you take a picture of the computer. You don't even
2 touch the computer before you even -- as soon as you
3 unbox it or as soon as you see the computer, you start
4 taking pictures of it. You take pictures of the front,
5 the back, you know, all the plugs. What's plugged into
6 it. What's not plugged into it. Is it on? Is it off?
7 There's a whole lot of checks and balances that we have
8 to do to make sure -- you document to make sure that
9 whatever you did, there's a record of having done it.
10 So we pulled out a camera. Mr. Phillips was with me.
11 Chase Phillips was with me when we received the FedEx
12 boxes. Because we're in Lexington, we had them FedEx'ed
13 to us. Mr. Phillips brought them over to my office. We
14 unboxed them and started taking pictures. One of the
15 other steps in the forensics process is if the computer
16 is off, you don't turn it on. You never turn it on.
17 And so these computers were off. They'd been shipped to
18 us. So we didn't turn them on. The first thing we did
19 was flipped them over. We started taking pictures of
20 the serial numbers. So we could make sure we had all
21 the kind of documentation that we needed to cover to
22 make sure that we had the correct hard drives so if it
23 were ever to come up in question of what hard drives we
24 had, we could say, yes, these are the exact serial
25 numbers that we had. The next step was to remove the

1 hard drives. Hook them up to our write blocker, a piece
2 of hardware that makes sure that nothing can possibly
3 write a piece of data to these hard drives. The write
4 blocker is then plugged into my EnCase examination
5 computer. So it's a special computer we have that's got
6 software on it that we use. And we did what's called an
7 acquisition. The acquisition is not much different from
8 the copy or the mirror procedure that you heard Mr.
9 Hemond talk about yesterday. But with a very key
10 ^udifference in that, we copy to what's called a
11 forensically sanitized hard drive. If you can imagine
12 for just a minute, to tell -- you know, give you an
13 analogy of what we do, when you go to the doctor and say
14 you want to have some blood drawn. Well, the doctor,
15 among other things, he'll get out an alcohol pad, he'll
16 swab your skin. He'll put on gloves. He'll get out a
17 sterile syringe. He'll follow a set of procedures to
18 make sure that blood that he takes from you is not
19 contaminated in any possible way. We have the exact
20 same things that we can do in a digital manner and
21 that's why we use things like write blockers and why we
22 use software like EnCase that ensure that we don't make
23 any changes to any of this data when we copy it.

24 Q. And the way I understand -- tell me if I'm
25 incorrect on this -- the EnCase software is a sterile

1 environment where you cannot change the aspects of the
2 document; is that correct?

3 A. That's correct. This is not -- we don't make a
4 copy that's just on a hard drive you can then plug into
5 another computer and see the contents. EnCase stores it
6 in a forensically sound manner so that the data is only
7 readable inside the Encase program and Encase does not
8 have the capability to make any changes to that data.
9 We can run all kind of searches all day long. We can
10 export data. If we need to make another copy of the
11 hard drive, for instance, to provide to someone else.
12 Or if we want to even make a copy and boot it up on
13 another computer, we have that capability of doing that,
14 but the original evidence that stays in EnCase is never
15 changed.

16 Q. Initially, when we began this process, me and you
17 were trying to figure out what documents were at issue;
18 correct?

19 A. That's correct. Some of the -- at our first
20 engagement so we had the change to image, acquire these
21 laptops and the hard drives. So now we've got
22 photocopies of the hard drives. Okay. Now, what do we
23 do? Mr. Ariail said, well, we have these search terms.
24 Can you run some searches and see what kinds of results
25 that we're getting. So we said, well, yeah, sure, we

1 can run some searches. And we learned very, very
2 quickly that the search terms weren't very good. And
3 the reason I say that is because when you're doing
4 searches on a hard drive, sometimes you can have too
5 specific of a search term. Sometimes you can have too
6 broad of a search term. If you've ever use something
7 like Goggle web search, you know that you can't just
8 type in any word into Google. Because some will come
9 back with too many hits and some will come back with too
10 few hits. And so in this case one of our search terms
11 was the word audit. Well, these are accounting laptops.
12 They do lots of audits. And so that search term, in
13 particular -- I don't remember how many hits we had, but
14 it was something like ten thousand documents came back
15 with the word audit. Well, obviously, that's way too
16 broad of a term. So one of my first replies back to Mr.
17 Ariail was, Mr. Ariail, these terms need to be narrowed
18 down at least a little bit because we're getting
19 thousands and thousands and thousands of documents. And
20 if that's case, then that's the case. We're used to
21 dealing with large volumes of data, but I don't think
22 that's where this is going. So I asked Mr. Ariail, can
23 we please maybe either narrow the search terms down?
24 Can we get an exact copy of what the opposing counsel's
25 been searching on? Or even better if the opposing

1 counsel has already performed their searches, can they
2 just provide us with what documents that they've found
3 so that I can verify it on our copy? Again, keep in
4 mind, this is upwards of a year after they've already
5 made their copy. Mr. Ariail, can I verify that we still
6 have the same files on our copy of the hard drive?

7 Q. Okay. So eventually, Mr. Haynsworth and I agreed
8 to narrow the search terms and came up with documents
9 that you were able to review; correct?

10 A. That's correct. So after some back and forth, and
11 believe me when I say that I was frustrated to say the
12 least, at some of the lawyering that was going on over
13 what the search terms were going to be and what the
14 results were going to be, I put together a formal
15 document saying this is exactly what I need to do to be
16 able to reproduce Mr. Haynsworth's results. We finally
17 got a list of some documents. And the list that came
18 back to us was descriptions of the contents of some
19 documents. And my response to Mr. Ariail was, Mr.
20 Ariail, I can't use this because this doesn't have file
21 names. This doesn't have file paths. This doesn't have
22 dates, sizes. This doesn't have any empirical data that
23 I can look at these hard drives and determine where
24 these files live. All these are just files that say
25 this file is a bank confirmation. Or this file is such

1 and such. Because, keep in mind, I wasn't largely
2 concerned with the contents of these files. I was just
3 looking at trying to find the files to begin with, so I
4 didn't know what was on here. To put this perspective a
5 little bit, Todd Highsmith's laptop has over two point
6 two million files on it. This is a lot of files. I
7 mean, even for a normal computer user. A normal
8 computer user might have two hundred to five hundred
9 thousand files. Todd Highsmith's had two point two
10 million files on there. We're not dealing with, you
11 know, just a normal computer that we can easily find
12 stuff in. Mr. Highsmith was very meticulous. He had a
13 very good file structure and I could tell that he was a
14 person who was intelligent enough to try to keep things
15 sorted out for himself. Obviously, he didn't know that
16 I was going to be looking at these things. But he had a
17 very, very large number of files on his computer. So we
18 had to come up with a way to narrow these down.

19 Q. Okay. And as part of that narrowing down, Mr.
20 Haynsworth agreed to the search terms as to -- and if
21 you can explain to the jury what those search terms
22 were, so they can understand what we're trying to search
23 for in this case?

24 A. Sure. I'll be glad to explain that. I don't
25 remember the exact search terms. There was a list that

1 was eventually agreed upon between Mr. Haynsworth and
2 Mr. Ariail of just a few random -- I won't say random --
3 a few search terms that finally made some sense. And I
4 think there were forty-four search terms in all. And
5 the things we were searching for were things like SCRWA,
6 South Carolina Rural Water, but we were searching for
7 just the initials, SCRWA. If we can find those five
8 letters in a group. In what documents might that
9 appear? Confirmations, I think was one. Bofra, B-O-F-
10 R-A. Lots of things like that that were essentially
11 names of clients so we could narrow it down from this,
12 you know, millions of files to find just the certain
13 files that were pertinent to what this case was actually
14 about.

15 Q. Okay. And at some point in time we were provided a
16 list of documents; correct?

17 A. That's correct. We finally did get a list of
18 documents from Mr. Haynsworth, on Mr. Haynsworth's
19 letterhead, of the documents that he said, okay, these
20 are the documents that we are saying are on those
21 laptops. And now you can search out these documents for
22 yourself.

23 Q. Okay. And, in fact, that was a July 18th letter
24 that we sent over; correct?

25 A. I believe that was the date of it, yes.

1 Q. And said the documents that were deemed to be trade
2 secrets and misappropriated; is that right?

3 A. That's correct.

4 Q. Okay. And how many documents were on that list?

5 A. This list had, I want to say, either fifty-six or
6 fifty-seven documents. So out of all the universe of
7 documents that lived on these two laptops, which, you
8 know, if you take them both together was well over three
9 million files, it was down to fifty-seven files. Fifty-
10 six or fifty-seven. Upon a little bit of review on my
11 part, we determined that some of those files were
12 actually duplicates. And so the true number, after we
13 removed duplicates because they were counting multiple
14 pages within, say, one single Excel file, it was
15 actually a true number of fifty files.

16 Q. Okay. And when you got that information, what was
17 your next step to go figure, okay, we've got these
18 documents, how are we going to figure out where they
19 are? What will you need to be able to do that?

20 A. So after we had this list of documents, again this
21 was mostly descriptions of documents. This wasn't file
22 names or anything like that. So I sent back an email to
23 Mr. Ariail and said, can you please get opposing counsel
24 to give me something so I can find out where these files
25 lives on this hard drive? Maybe they do exist. Maybe

1 they don't. But I need to be able to see these files
2 for myself. And so I asked for a few key things. File
3 names, file path, which is the folder that it lives in,
4 creation date, modify date; anything like that, file
5 size in kilobytes or bytes. And there is another very
6 technical term of what's called an MD5 Hash, which is
7 what's called a unique thumb print. Any given file has
8 what's called an MD5 Hash. We can look at an MD5 Hash
9 and dates, times, names of the file can change but the
10 contents are what determine what that Hash is. As long
11 as the contents don't change we can say, okay, if two
12 files have the same MD5 Hash, then these are identical
13 files, even if it looks like they have different names
14 or times or whatever. So those are the types of things
15 that I requested through Mr. Ariail from Mr. Haynsworth
16 so that we could narrow down and say, okay, you've got a
17 list of fifty files, let me see if I can find these
18 files on these laptops.

19 Q. Okay. Is this a copy of the document that I sent
20 you? A letter from Mr. Haynsworth telling you what
21 those documents were?

22 A. Correct. This is a letter from Mr. Haynsworth to
23 Mr. Ariail that gives the fifty-seven documents in
24 description form but no actual information that would
25 let me find those files.

1 Q. So your response to this was, I need to get more
2 information before I can figure out where these
3 documents were ---

4 A. That's correct. That document describes the
5 content of the files, but doesn't give me any
6 description of where to find the files.

7 Q. Okay.

8 MR. ARIAIL: Your Honor, if I may move this
9 into evidence.

10 THE COURT: Any objection?

11 MR. HAYNSWORTH: No objection, Your Honor.

12 THE COURT: Without objection.

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

15 Q. So after we asked for that information, what did we
16 receive back in regards to how to find these documents?

17 A. After some back and forth, again, we had some
18 discussions with Mr. Hemond, the opposing counsel's
19 computer expert, over whether they were going to give us
20 that information because it was their attitude that
21 things like MD5 Hashes, which are standard in computer
22 forensics, were actually some sort of encryption. We
23 were asking for information that they didn't have to
24 provide. So I made the explanation that it wasn't my
25 job to teach computer forensics to the opposing counsel,

1 especially to their computer expert, but nonetheless if
2 they could at least provide us with some other
3 information to help me find these files, I would be
4 certainly appreciative. And eventually we were able to
5 work out a document where we got file names, file paths,
6 MD5 Hashes eventually and file creation and modified
7 times. And so then I was able to go forth with my
8 search and say, okay, I could look for these files now
9 on my copy of the hard drives.

10 Q. Okay. Now we get down to, we're now going to
11 figure out the specifics of these documents. So how do
12 you go about it? Do you use EnCase to be able to do
13 that?

14 A. Correct. All of my searching and research and
15 investigation happens in this sterile EnCase
16 environment. So at no point am I pulling up the Windows
17 search and searching for anything like that. I don't
18 have that capability. EnCase is designed for and is
19 used exclusively for computer forensic searches. So it
20 has very, very powerful search engines already built
21 into it to the point where I can do very quick searches
22 on very vague terms very easily.

23 Q. Okay. And you've provided and we've gone over a
24 report in regards to your findings in this matter; is
25 that correct?

1 A. That's correct. As part of our standard procedure
2 through CLI discovery, we provide a report, whether the
3 attorney wants it or not, of what our findings were.
4 Basically, I work on enough cases and I have enough
5 clients throughout the year, that if I don't make
6 documentation, I simply won't remember. So as soon as
7 one case is wrapped up, I'm on to another one. And so I
8 prepared a report and submitted it via email to Mr.
9 Ariail of what our findings were.

10 Q. Okay. And you've done some draft reports and then
11 the one here today is your final report; correct?

12 A. That is correct. Among other things, and this is
13 no slight to Mr. Ariail or to Mr. Haynsworth, but
14 they're attorneys. They're not computer guys. There's
15 a lot of technical stuff. And so in preparation for
16 getting Mr. Ariail used to the type of language that I
17 was going to be using, the types of things he could
18 expect from me, and the types of questions I wanted for
19 him to ask me, I submitted several draft reports to get
20 him used to the idea of this is what you're going to
21 expect from me.

22 Q. Okay. And as part of that, part of your evidence
23 and what you testified to today, you've listened to the
24 testimony of Mr. Hemond here for the past week. I want
25 to go through, first of all, and kind of understand how

1 you -- when you did this, what type of information did
2 you produce or get in regards to each of these
3 documents?

4 A. So, with regard to each of these documents, part of
5 what I provide to the attorney in my report is the
6 information like I discussed that I requested
7 originally. File paths, where a file lives on a hard
8 drive. A file name, obviously. MD5 Hashes so we know
9 what the thumb print is. File creation dates, file
10 access dates, file modified dates. And then I had an
11 opportunity to provide some commentary and so part of my
12 report is to take these files, after I find them, it
13 enumerate the files in my report and I can then provide
14 some technical information and then some subjective
15 information about each of these files.

16 Q. Okay.

17 MR. ARIAIL: Your Honor, I'm going to go ahead
18 and move his report into evidence at this time.

19 MR. HAYNSWORTH: No objection.

20 THE COURT: Without objection.

21 MR. ARIAIL: Okay.

22 (WHEREUPON, Defendant's Exhibit Number 16 was
23 marked and admitted into evidence.)

24 Q. Now, you've listened to Mr. Hemond's testimony here
25 earlier this week. I want to go through it. I think

1 there were ten documents that he referenced, ten or
2 eleven documents?

3 A. Correct. I was counting the number of documents
4 that Mr. Hemond put up on his PowerPoint and he had
5 eleven documents, all of which were documents that they
6 originally submitted in that list of fifty-seven and
7 were included in my report.

8 Q. So the fifty-seven that were previously submitted
9 went down to eleven during the trial; is that correct?

10 A. Correct. I assume that Mr. Hemond and Mr.
11 Haynsworth determined those eleven files represented
12 their case the best.

13 Q. Okay. And you've reviewed not only the eleven but
14 the whole fifty-seven; correct?

15 A. That's correct. We didn't realize until Mr.
16 Hemond's testimony that they had narrowed it down to
17 only eleven. So our analysis included all fifty-seven
18 of the originally claimed documents.

19 Q. And as part of your review, you've produced -- and
20 tell me, I guess, some findings in regards to your
21 reviews of where these documents originated, what we
22 call providence, I guess is what you ---

23 A. Correct. I use the term providence. If you've
24 ever seen something line Pawn Stars or Antiques Road
25 Show, whenever they talk about old things, they're

1 mostly trying to determine providence, which is, what's
2 the history of this item? Where did this item come
3 from? You know, was it, you know, owned by someone?
4 Did it pass through the hands of someone? You can do
5 the same thing with computer files. The providence of
6 the file is how you determine -- or the determination of
7 where you think a file came from and how it came to live
8 in a certain place on a hard drive or someplace else.

9 Q. Okay. As part of that your evaluation, too, you
10 determine and figure out when documents were accessed,
11 written, created, various things of that nature; right?

12 A. Correct. Windows saves all that kind of
13 information. If you've ever looked through a Windows
14 file system, you can see it for yourself, there's all
15 those things, usually, available to anyone to see. File
16 creation dates, of course, the file size in bytes or
17 kilobytes. Creation and modified dates. Interestingly,
18 one of the file pieces of information that is not
19 usually visible is what's called a file access date,
20 which is the last time the document was pulled up on the
21 screen, it was printed, it was touched. Whether it was
22 modified is inconsequential. When it was accessed, it
23 keeps track of that information.

24 Q. Okay. Now, and I want to bring up a couple of
25 references in your report. I'll put it on the overhead.

1 And explain to me a little bit -- I'm going to go
2 through your report, put it on the overhead -- but how
3 -- when you got the documents, how did you label them in
4 your report to correspond with the numbers that you were
5 given from Mr. Haynsworth?

6 A. When Mr. Haynsworth provided us the original list
7 of fifty-seven documents, he had his own numbering
8 scheme. He came up with a heading of Shane, and he said
9 he found seven files on Shane's laptop. And then he had
10 the heading Todd and he found, I think, forty-eight
11 documents on Todd's laptop. And then he had the heading
12 of email and there were two emails that he had said that
13 he had found. And so for consistency, I tried to match
14 my numbering system up to his in some way that made some
15 sense, because we had to be able to tell from one
16 document to another that we were talking about the same
17 files. So for that -- for the sake of consistency I
18 started calling files S for Shane and then one, two,
19 three, four, five, six, seven, to correlate with Mr.
20 Haynsworth's list, or a T, one through forty-eight, to
21 match with Mr. Haynsworth's list for Todd. And then
22 there are two Es, so there's E one and E two indicating
23 an email.

24 Q. Okay. And as part of your review the way you did
25 it, I think -- and we can go over to the next page. And

1 this is all the file paths that you've listed
2 separately; correct? I think it's two pages; is that
3 correct?

4 A. Correct. This is basically a copy and a paste from
5 Mr. Haynsworth's list of the information that was
6 provided to me. So they gave me file path information,
7 file name information. And I didn't include all -- some
8 of the extreme stuff like the creation date and the MD5
9 Hash and things like that. So it's a very dense page.
10 But largely we can agree that this is just to match up
11 with Mr. Haynsworth's list. And it was included in my
12 report for consistency sake. Again, just because this
13 is a standalone document. If we needed to cross-
14 reference it with Mr. Haynsworth's list, the information
15 is here.

16 Q. Okay. Let's turn to the next -- because at the
17 bottom you also, I think, on your page three started to
18 break up where these -- I guess there are fifty-seven
19 files that were on here. How they referenced and which,
20 I guess, source or client or company they referenced; is
21 that correct?

22 A. That's correct. Again, going back to when we were
23 originally engaged with this task, we weren't given a
24 whole lot of direction. We weren't told, you know, how
25 these files were going to play out, what was even

1 necessarily being claimed. And so I started making up
2 my own categorization. Without any direction from any
3 attorney and strictly for my own internal purposes, I
4 started categorizing files so that I would be able to
5 keep track of things. When I started to see trends,
6 whenever I started to see that files fell into certain
7 categories, I could start to categorize them a little
8 bit better. So I came up with my own system of how to
9 keep track of some stuff and I included that in my
10 report.

11 Q. Okay. And as part of this, you've gone down and
12 you have divided up the different files between what you
13 have gotten, as I guess filing clients or categories; is
14 that correct?

15 A. Correct. And in a general sense, it made the most
16 sense to me to start categorizing them by what client it
17 seemed like they were applicable to. So, again, I
18 wasn't necessarily looking at the contents of the files,
19 but I could tell from the file paths that certain files
20 were related to certain clients. And I started to group
21 them together in that sense.

22 Q. Okay. The next page. At the top, here's your MD5
23 Hash information that you've listed. But there's some
24 issues that you and Mr. Hemond had in regards to
25 matching up of MD5 Hash information?

1 A. Correct. Again, to go back to when I was engaged
2 and we had some discussion about MD5 Hashes and there
3 was a lot of confusion from Mr. Haynsworth's side as to
4 what the true root reason for asking what an MD5 Hash
5 was, I had to quell any fears that these were not being
6 used for any insidious purpose, but they were strictly
7 being used to be able to tell, hey, is our copy of this
8 file identical, bit for bit, with your copy of the file?
9 And most of the files, except for seven, they did match
10 up bit for bit. So, in other words, we could say for
11 sure the Highsmiths haven't made any changes, haven't
12 deleted, haven't done anything to these files between
13 when you, Mr. Hemond, imaged the file and when I, a year
14 later, imaged the file. However, there were some
15 discrepancies. So there were seven files that didn't
16 match. So that means that the files changed it one way
17 or another. Why, how, I can't say. I was never given
18 access to their files. And so all I can say for sure is
19 that these MD5 Hashes didn't match. And so our copy is
20 different in some way from their copy.

21 Q. You put a provision in here about USB devices. Why
22 are -- you've been sitting here listening to testimony.
23 Why are USB devices, flash drives, portable devices
24 important in this case?

25 A. As a computer user myself and as a consultant for

1 many, many small businesses, we can say without a doubt
2 that flash drives are the way to transfer files. And
3 we've been talking -- I've heard a lot of testimony
4 about flash drives. And I wanted to make sure that
5 everyone was clear. No one up until now has shown you
6 what a flash drive is. And so I would just like to show
7 on the record. This is essentially what I'm talking
8 about. And these flash drives can look like any other
9 number of things. I know that there's some that look
10 like cute little animals. There's some that look like,
11 you know, cartoon characters. There are some that are
12 more business-like. This happens to be a business one.
13 But they have a USB connector on one end to indicate
14 that they plug into a computer through a USB port. And
15 inside they have what is called flash memory. The flash
16 memory can be written to like a floppy, like a CD, like
17 a hard drive. These are essentially tiny little hard
18 drives. And they have a size when you buy them. The
19 price usually is reflective of the size and how much
20 data you can put on them. So these little flash drives,
21 obviously they're compact, they're portable. You can
22 stick them in your pocket and carry them around. As a
23 computer guy myself, I usually have two or three on my
24 person, in my pockets at any given time, just because
25 they're so common. Back in the '90s we would have used

1 floppy drives. In the early 2000s we used CD-Roms.
2 Now, it's, you know, 2014 and flash drives are pretty
3 much the way that we transfer data. If you're not
4 sending it through an email or not copying it across a
5 network, generally the way to get a piece of data on
6 your computer is through a flash drive. And so flash
7 drives help you copy data from one source to a
8 destination very quickly and easily. And so in my
9 report, one of our things that we can do when we get a
10 computer from a client, Windows keeps track of flash
11 drives. Windows keeps track of a lot of stuff that
12 people don't realize to be quite honest. That's why
13 computer forensic guys are involved in a lot of things.
14 But among other things, the Windows register, which is a
15 hidden thing that's a part of the Windows Operating
16 System, the Windows registry keeps track of flash drives
17 as they're plugged in. And generally these flash drives
18 have a serial number, a unique identifier. That's
19 encoded in the flash drive by the manufacturer. It's
20 something that a regular user wouldn't necessarily know
21 or see. It's not written on it anywhere. It's encoded
22 inside the electronics and the circuitry of the flash
23 drive. Windows can see that serial number, though. And
24 in the Windows registry whenever you plug in a flash
25 drive, Windows says, oh, here's a device, a USB device;

1 I'm going to make a note of it and write down that
2 serial number in my registry. And the reason that
3 Windows does this, to be quite honest, is because
4 Windows wants to be helpful to you as a user. If you've
5 ever noticed when you've plugged in a device to a
6 computer, Windows pops up and says, hey, what do you
7 want to do with this device. It's a printer. It says
8 do you want me to install a print driver. If it's a USB
9 device, a flash device, it might say, hey, do you want
10 to see the pictures that are on this? Or hey, do you
11 want to open up the files that are on this? Windows
12 keeps track of this because it's trying to be helpful to
13 the user. So it keeps track of all the serial numbers
14 of those USB devices as they're plugged in so it can
15 remember what a user has said before. The caveat to
16 this is Windows only keeps track of the last time a
17 device was plugged in or unplugged because it's just too
18 much data to keep track of every single time. So it's a
19 rolling list of these files. So if you plug in a USB
20 flash drive, for instance, it says, okay, I plugged it
21 in on X day at Y time. You unplug it. It notes that
22 you unplugged it. But then if you plug it in again it
23 says, oh, I've seen this device before. I'm going to
24 overwrite that first time it plugged in and now I'm just
25 going to write down that it was plugged in at this new

1 time and this new date. So for any given flash drive,
2 it only keeps track of the last time that it was plugged
3 or unplugged. And the reason I say plugged or
4 unplugged, if it's still plugged into the computer, it
5 obviously doesn't have an unplug date, so the date and
6 time reflects when it was plugged in. Having given you
7 all that dense information and I apologize, I get
8 technical sometimes, whenever we get back into the
9 Windows registry we can pull up that list of every USB
10 device that's ever been plugged into a computer. And
11 obviously, there's lots of USB devices. There's things
12 like printers and scanners and, you know, all kinds of
13 other little things that you can plug into your
14 computer, Apple iPhones and things like that. But USB
15 flash drives is obviously one of those. We can narrow
16 that list down and see specifically all the flash drives
17 that have been plugged in. So a part of my report was
18 to make a note that on Todd's computer I was able to
19 determine -- and I don't see it. I may not have put
20 that in there -- that Todd's hard drive, Todd's original
21 Windows, his laptop, had had fifty-seven flash drives
22 plugged in since he'd bought it in 2011. And Shane's
23 had had somewhere in the twenties, between twenty and
24 thirty flash drives. I don't have the exact numbers. I
25 apologize Mr. Ariail. Am I getting ahead of you? All

1 that to say that's a pretty large number. I've seen a
2 lot of, you know, computers and I know how computer
3 users work. If you've got somebody that's used fifty-
4 seven flash drives in three years, it's a pretty good
5 bet to say they use these things for lots of common
6 everyday events.

7 THE COURT: Mr. Ariail, I believe -- just ask
8 him a question and have him give the shortest answer
9 that he can, please.

10 MR. ARIAIL: I am. Your Honor, we'll move on
11 to the questions in regard to the SCRWA documents.

12 Q. Now, we've heard of the documents. And what I want
13 to understanding, regarding these documents, we can
14 break them down into large chunks here pretty quick.

15 SCRWA documents, you've heard Mr. Powers come in here
16 and Mr. Wilson come in here, these documents, from your
17 understanding, from your review, I think we can turn to
18 -- back to page ---

19 A. I'm sorry. My report's gone. I don't know where
20 it went to.

21 Q. Oh, did I take it? We've got documents from SCRWA.
22 You say they were on a flash drive that apparently
23 corresponds with a downloaded date; is that correct?

24 A. Yeah. Can you tell me which number we're looking
25 at specifically?

1 Q. We've got them all up here. Right here?

2 A. Oh, yes.

3 Q. Actually, your report. This was where I was kind
4 of going. There's another page right here. You say
5 there's all these flash drive documents; correct?
6 There's eight here and there's thirteen here; correct?

7 A. Correct. Back to my point. We were trying to
8 determine where there was any flash drive activity that
9 we could correlate with certain files appearing on the
10 Highsmiths' hard drives. And in certain circumstances
11 we can determine that. Sometimes you can't. In this
12 case, we were definitively able to say that there was a
13 correlation between certain files appearing and a
14 certain flash drive being recorded in the Window's
15 registry.

16 Q. Okay. So as part of this -- you've heard the
17 testimony. They had access to these documents. Is it
18 your position that they obtained these while they were
19 at SCRWA legitimately off their computers?

20 A. I can say that these files appeared off of a flash
21 drive that coincided with this date and time. And via
22 the testimony that we've heard from previous folks here,
23 it all lines up that these files were acquired
24 legitimately through a flash drive; yes.

25 Q. Okay. So that takes care of twenty-one documents

1 that you believe came from that direction. Now, there's
2 this question we've been dealing with, and I think I can
3 knock out another group, is the -- we've heard this app
4 data or information that's been downloaded off of, I
5 think, the personal Todd file. Is that ---

6 A. Correct. Yeah.

7 Q. Tell us a little bit about that?

8 A. We've had the discussion of the app data folder.
9 And the app data files came to be a concern because it
10 was pretty apparent early on that these -- based upon
11 the file path, which Mr. Hemond kind of went into on his
12 testimony. Based on the file path, it was fairly
13 obvious that these had been copied from another
14 computer. What computer I can't say. Mr. Hemond and
15 Mr. Haynsworth contend that it came from an MCC
16 computer. I've never been given access to that computer
17 so I can't speak to that. I can say that they appear to
18 come from another profile and another computer, though.
19 The app data folder, as Mr. Hemond said, as well, is a
20 hidden folder by default. Unless you know a little bit
21 about Windows and how to turn on viewing hidden files,
22 under most circumstances, a standard computer user would
23 have no idea that there's even such a thing as an app
24 data folder. App data is generally used to help other
25 programs run on the Windows Operating System. So the

1 app data folder holds a lot of temporary files. It
2 holds files that are programmed, used to run helper
3 files to try to help, you know, Windows run a little bit
4 smoother and better. Anything that's in an app data
5 folder is generally considered hidden and not touched or
6 accessed by any standard computer user.

7 Q. What is your position today in regards to whether
8 or not Mr. Highsmith knew about those documents in the
9 app data collection on his computer?

10 A. Well, I think Mr. Hemond made the statement, and
11 I'll certainly agree with him, that these were hidden
12 and there's no reasonable way that Todd Highsmith knew
13 that these files were even on his computer.

14 Q. One of the questions I asked Mr. Hemond, and I want
15 to make sure -- some clarification in regards to it. It
16 says the date these were written. The last written date
17 is the last time anything changed with it; correct?

18 A. That's correct.

19 Q. Created, for instance, the document is last
20 modified, last changed on a computer. And then it is
21 then, I guess, the created date is when it was placed on
22 a new computer; correct?

23 A. That's correct, yes.

24 Q. Okay. If that document is placed on a new computer
25 or written over between 7/1/2011 and 7/30/2012, it would

1 show different dates; correct?

2 A. That's correct, yes.

3 Q. Okay. So at no time, from my understanding too,
4 has this document been opened up or utilized on Mr.
5 Highsmith's computer?

6 A. That's a true statement. You can verify that by
7 comparing the last accessed and the last created dates
8 and time, which are identical. That indicates that that
9 file was copied onto that computer and never touched.

10 Q. Okay. And so these documents, never touched, never
11 accessed, from your understanding until -- at no time,
12 right now; correct?

13 A. Correct. The only reason that they've been brought
14 up is that they've been found by Mr. Hemond and by
15 myself.

16 Q. Okay. And you're not testifying to anything about
17 the contents of these documents or any nature of that;
18 are you?

19 A. That's correct. I'm not -- largely, I'm concerned
20 with the contents. A few of these files I opened up in
21 their programs, the Excel files, I would open them just
22 to verify that they were valid Excel files. And they
23 opened correctly. As to what the contents were, that
24 goes outside the scope of my work. I'm not here to talk
25 about the contents, whether they're trade secrets or

1 misappropriated or anything like that.

2 Q. Okay. Now, one of the key questions in this case
3 and I think we've gone over it is, how many of these
4 fifty-seven that you were given to search, to find out
5 the specifics on, how many were ever accessed?

6 A. That's an interesting question, because after our
7 research we determined that of the fifty-seven only five
8 files had ever been touched once they were copied. So
9 of the fifty-seven, the large portion of them had never
10 been accessed, never touched, never printed, never
11 looked at, never brought up on the screen. They simply
12 -- Mr. Highsmith acted as if he didn't even know that
13 they were there.

14 Q. Okay. So these are these -- and correct me if I'm
15 wrong. There's duplicates -- from what my understanding
16 is, these are really only four, six -- is it five
17 documents?

18 A. Five. Yeah, five total documents.

19 Q. All right.

20 A. And I apologize. I apologize that this is a little
21 bit unclear because, again, I'm going off of Mr.
22 Haynsworth's document and trying to match up with his.
23 He included some duplicates because some of these Excel
24 files have multiple pages. And so he was counting each
25 page of that Excel file as a separate document. That's

1 not actually the case. So at the top S one through S
2 seven, again this is correlating to Shane's laptop,
3 these are actually only three files, once we took out
4 the duplicates. And then on Todd's computer, we have
5 two files that were positively accessed, so a total of
6 five files out of these fifty-seven were actually --
7 only these five files were positively accessed.

8 Q. Okay. And you've reviewed these or gotten
9 information about these documents, T twelve to T three;
10 correct?

11 A. Correct, yes.

12 Q. Okay. In regards to the Bofra work and trial
13 balance, what do you know about where the providence is
14 for that document?

15 A. The Bofra work and trial balance came from a USB
16 drive that was given -- or copied when the Highsmiths
17 went to do an audit.

18 Q. Okay. And then in regards to the test of the
19 transaction disbursement, I think this is for Warehouse
20 Theater is what we've said, can you look at your report
21 and tell me -- this is one of the documents they put on
22 and was saying was a McKinley Cooper document.

23 A. Correct.

24 Q. What have you found out about that?

25 A. In the original letter Mr. Haynsworth provided,

1 this was claimed to be an MCC authored file. After
2 review, we determined that MCC was not the author of
3 this file and it was actually a Shane Highsmith authored
4 file with a creation, written and access dates all on
5 January 11th of 2012, which was after they had left MCC.

6 Q. So they had claimed in their letter that Shane had
7 misappropriated or Todd had misappropriated or taken MCC
8 files, and one of those is a file that they created
9 themselves?

10 A. That's correct.

11 Q. Now, I turn your attention -- I'm trying to get
12 through this as quick as can.

13 THE COURT: How much more have you got?

14 MR. ARIAIL: Ten minutes.

15 THE COURT: All right.

16 MR. ARIAIL: Ten to fifteen I think, Your
17 Honor. I think I'm trying to speed it up as much as I
18 can.

19 Q. The South Carolina Rural Water documents at the
20 end?

21 A. Yes, sir.

22 Q. I think they are -- let's go to page twenty-four.
23 Twenty-four would be the best one. Page twenty-four.
24 See this document right here? These are projected cash
25 flow minus ARRA. And it says NWRA financials. And this

1 is for South Carolina Rural Water. What do you know
2 about these documents now after reviewing them in
3 EnCase?

4 A. Well, among other things, one of the things that I
5 looked for was the authorship meta tag. And in this
6 case the author can clearly be seen to not be MCC and
7 not Shane or Todd Highsmith. And this is a user name
8 Frannie. As to who that is, I can't say. But that is
9 the author. And, in addition to that, we can say that
10 it had a -- its file creation and access times coincide
11 with a USB drive that was plugged into his hard drive.

12 Q. Okay. So 7/20/2012 and it's consistent with it
13 when it was plugged in; is that right?

14 A. That's correct.

15 Q. Okay. Now, I want to go through. We've got a
16 couple of slides that I want to understand.

17 THE COURT: Mr. Ariail, I'm going to go ahead
18 -- I'm going to give this jury a recess and then we'll
19 pick back up.

20 MR. ARIAIL: That's probably best, Your Honor.
21 I'm sorry.

22 THE COURT: Take the jury out for a recess.

23 (WHEREUPON, the jury exited the open court at
24 approximately 10:58 a.m.)

25 THE COURT: All right. We'll take a short

1 recess.

2 (WHEREUPON, the court stood at recess for a short
3 break.)

4 THE COURT: All right. Bring the jury.

5 (WHEREUPON, the jury entered the open court at
6 approximately 11:13 a.m.)

7 THE COURT: All right. You may proceed.

8 MR. ARIAIL: Thank you, Your Honor.

9 Q. Matt, I'm going to speed along here now. We're
10 down to, from my understanding, five documents that you
11 say have been accessed on the computer; is that right?

12 A. That's correct. We can prove definitively that the
13 other files were not accessed.

14 Q. Okay. And for those five, we got into the
15 confirmations. I think there's a question as to bank
16 confirmations that Shane -- on your report, can you give
17 us a little of your understanding of what those
18 documents -- what the specifics of those documents are
19 and how they play out in this case?

20 A. Okay. The confirmations?

21 Q. Yeah. Those are the S one through S seven. I
22 think ---

23 A. Yep.

24 Q. --- they're the ones that were put into evidence
25 here. Well, actually, that Gaetan testified to, I

1 believe, and also put into evidence.

2 A. Yes. So what is called S one through S seven, as I
3 said before, Mills, I apologize.

4 Q. I'm sorry. I didn't know that was -- yes, sir.

5 A. I wanted to be able to see my mug this morning.

6 Those were originally claimed to be seven files. As I
7 mentioned earlier, that's actually three files. It's
8 multiple pages on three files; not seven different
9 files. So these files are Excel files. You all heard
10 testimony from Mr. Hemond. And you've seen pictures of
11 what those files actually are, the bank confirmations.
12 They're standardized files that are used for, you know,
13 CPA stuff. I'm not a CPA, so I can't really comment on
14 that. Nonetheless, I can comment on how the files exist
15 on the hard drives and the state that they're in. So I
16 said that we had five files that had been definitively
17 accessed. And three of these files are these
18 confirmations files; these templates as I referred to
19 them. Part of what my research was, was to see were
20 these authored by MCC. That was one of the original
21 claims was, well, the Highsmiths have documents on their
22 laptops that we can just -- that anyone can see were
23 authored by MCC. Excel, Microsoft Excel, Microsoft Word
24 do keep track of authorship data. And that author is
25 automatically copied onto a file when a new file is

1 created in Word and Excel and things like that. So in
2 this case, the originating file for these was indeed at
3 McKinley Cooper. Can't deny that and I readily
4 acknowledge that. However, these files were actually
5 created by, in this case, Shane Highsmith. And they
6 were using the previous MCC authored file as a virtual
7 template of sorts. In other words, they were reusing
8 files, wiping out the data that wasn't necessarily
9 applicable to their client's, putting in other client
10 information.

11 Q. Okay. And if they got that legitimately from a
12 client, let's say -- you've heard Gaetan testify to --
13 some of these were emailed out to a client?

14 A. Yes.

15 Q. The Center for Community Services. If they got it
16 that way, then that shows the providence for how they
17 got it; correct?

18 A. Correct. We've heard testimony that these things
19 are regularly emailed out to clients and I think that
20 that shows, you know, a client could readily provide
21 them back to the Highsmiths through legitimate means.
22 The fact that these exist on the Highsmith computers
23 does not in any way show that they were stolen or
24 misappropriated or in any way taken.

25 Q. Right. So I do an Excel spreadsheet on my

1 computer, send it to you. It's authored by me. You
2 make the changes, but I've given it to you through
3 legitimate means; correct?

4 A. Correct. It'll still show the authorship as Mills
5 Ariail, but it'll have my data in it.

6 Q. Okay. Now, we heard, and I want to go through this
7 if we can. This issue about deleted files under this
8 app data July 30th download.

9 A. Yes, sir.

10 Q. Tell me what you understand about this July 30th
11 download?

12 A. So we've talked about this app data folder and how
13 it's been hidden and how there's no way that Todd would
14 have known that he would have copied it. And so part of
15 my job is to figure out, well, you know, then why does
16 it exist? And what else did Todd do that caused this to
17 appear? Obviously, as I've stated, I don't dispute the
18 fact that these files exist on his laptop. I have
19 stated, and Mr. Hemond has agreed, that they're hidden
20 and Todd Highsmith didn't realize that they were on
21 there. However, Mr. Hemond and Mr. Haynsworth make the
22 allegation that, well, Mr. Highsmith copied his entire
23 user profile off his MCC computer onto some removable
24 media, presumably a flash drive. And then in 2012, July
25 30th of 2012 after five p.m. at some point, he had this

1 media flash drive possibly. He decided, hey, I need
2 some documents off of it. Stuck it into his computer,
3 copied everything off of that. They also contend that
4 during this copy, of course, it was seven minutes or so,
5 that he realized that he had something he shouldn't have
6 had and he started doing some deletions on his Highsmith
7 computer. So Mr. Ariail ask me, Matt, can you figure
8 out, you know, did the Highsmiths delete stuff. And I
9 said, well, I can tell you that very easily because
10 EnCase, one of its jobs is to pull up deleted stuff.
11 And so after my deposition when I realized how some of
12 this case was going forward, things that I didn't know
13 previously, I went back and looked at Todd Highsmith's
14 laptop to determine, did he delete stuff? Because if he
15 did, that's an important thing to this case. Good or
16 bad, I need to know whether this actually happened. And
17 so what I did was, I went back and looked at it and I
18 determined that, in fact, no deletions were ever done on
19 the Highsmith laptop of any data, not just MCC data, but
20 regarding this app data, other files that are alleged to
21 have been copied and removed, that simply never
22 happened. And in support of that, I brought some visual
23 evidence to show you, just give you an idea of what I
24 see as an examiner to hopefully help you understand part
25 of where I'm coming from.

1 MR. ARIAIL: Your Honor, may I -- I've got
2 some slides that I want to present to the jury at this
3 time.

4 THE COURT: Yeah.

5 MR. ARIAIL: Thank you.

6 Q. Matt, if you want to step down here so you can kind
7 of explain this to the jury.

8 A. (Witness steps down) I apologize that I'm not
9 slick enough to have a PowerPoint presentations, but I
10 am a computer guy and I know how unreliable computers
11 can be.

12 Q. And so what I want to understand what this document
13 is. And you're using EnCase; correct?

14 A. Correct. This is a screen shot of exactly what I
15 see as an examiner of the EnCase computer program. This
16 is the entire screen. You can see across the bottom
17 it's a Windows computer and it's got all the standard
18 windows stuff. But this is the EnCase program ---

19 THE COURT: Hold on. Hold on just a second.
20 Mr. Ariail, can you trade places with him so he'll be
21 addressing back towards the court reporter?

22 MR. ARIAIL: Sure. Sorry, Your Honor.

23 A. And there's a whole lot of technical information
24 and I certainly don't expect to make any of you all a
25 computer forensic examiner right now in this courtroom.

1 But some of the interesting stuff that has -- where I've
2 pulled up and taken this screen shot of exactly the
3 files that we were concerned with. It would be these
4 whole app data files that were copied over. And so I've
5 highlighted underneath Todd's profile. This is like his
6 profile on his new Highsmith computer. And you can see
7 the profile down here. And I apologize, it's in small
8 print. But this is what we're looking at on my EnCase
9 computer. You can see that there's an app data folder,
10 there's a documents folder and then there's a couple of
11 little miscellaneous files that are miscellaneous files.
12 They're really not relevant to anything we're talking
13 about here today. And I can show, you know, for a fact,
14 yeah, he's got the app data folder and he's got the
15 documents folder. Now the question is, did Mr.
16 Highsmith delete anything off his computer? And I can
17 just by looking at this screen, absolutely not. He did
18 not delete anything off of there. You, as a jury will
19 have the right to say, well, Mr. Snoddy, how can you say
20 that for sure? And for that I have a second screen shot
21 I'll put up here. This is the second screen shot. And
22 what I did was if you've ever seen the show Mythbusters,
23 I enjoy watching Mythbusters. But one of the things
24 that they do is they say, okay, we have a -- we can't
25 reproduce a myth, but what would we have to do to get to

1 reproduce the myth? In this case we have an allegation
2 that stuff was deleted. And I can say for sure that
3 this stuff wasn't deleted. But if I were to show you
4 how stuff would be deleted, how it would look on here,
5 this is what I would do. So what I did was I created
6 another hard drive with exactly the same data. As I
7 told you, EnCase has the capability of doing that.
8 Created another hard drive. And I created files and
9 folders in this file app and then I deleted them. Then
10 I had EnCase pull them back in as if I was reimaging it
11 in a whole new situation. And you can see here, first
12 off, there's a whole lot more folders. But they also
13 have these little red ghostbuster symbols. That's the
14 thing that I really want you to look at; is the fact
15 that if there were files deleted, EnCase makes it
16 painfully obvious that stuff was deleted. It brings it
17 up on the screen. Even though it's no longer there, if
18 I were to pull this up in Windows you wouldn't see any
19 evidence of that there at all. But EnCase can find it.
20 EnCase knows that it was there. And EnCase tags it with
21 a big red circle with a slash through it. That's called
22 the ghostbusters symbol to make sure that you as the
23 examiner know, hey, there's deleted stuff right here.
24 And if that's pertinent to what you're looking for,
25 right there it is. So this is what it would look like

1 if there was deleted data. That over there is what it
2 actually looked like indicating there is no deleted data
3 at all. And so I wanted to make that clear to everyone
4 that we can say for a fact, Mr. Highsmith, not only did
5 he not have any idea that it was there, but he simply
6 didn't make any deletions, didn't make any changes to
7 this once it was copied to his computer.

8 Q. All right. So my understanding is this is what his
9 computer under the app data folder looks like right now?

10 A. That's correct.

11 Q. Okay. At least at the time you mirrored it. And
12 if he had deleted -- let's say I go in and I delete my
13 pictures because I want to get rid of my pictures, it
14 would show up with a ghost busters sign just like that
15 one over there?

16 A. Correct. This is what I would see as an examiner
17 and it would be very obvious to me as an examiner that
18 there was deleted data.

19 Q. And you can recreate or get those documents if you
20 need to; correct?

21 A. Correct. If there's been deleted -- data deleted
22 at any time, if Windows has the capability, and
23 sometimes it does and sometimes it doesn't, there are
24 limitations to it, but in general EnCase tries to
25 undelete everything that they can possibly find. So it

1 gives every tool to the examiner, every possibility of
2 pulling up anything deleted to make sure that the
3 examiner has the access to all the data during the
4 examination. Again, EnCase doesn't know if I'm on the
5 defense or if I'm on the plaintiff's side. All it's
6 doing is giving me information.

7 Q. While you're standing there, we'll finish up with
8 this.

9 MR. ARIAIL: And Your Honor, if I might
10 present these to the jury.

11 Q. Sitting here today and during your testimony, we've
12 got, I think, fifty-seven different documents; is that
13 correct?

14 A. Correct. Mr. Haynsworth's original allegations
15 were that fifty-seven documents were stolen and were on
16 the Highsmith laptops.

17 Q. Okay. Take a look at that. Are those those
18 documents that are listed?

19 A. Correct. Do you want me to put the second up, as
20 well?

21 Q. Yeah. I'm going to put it up here. These are all
22 the documents; correct?

23 A. Correct. So for the sake of simplicity, what I did
24 was just took the file names, put them all into a nice
25 big list so you guys can see. This is the totality of

1 the files that we are examining in this case. These are
2 all the files that were claimed by Mr. Haynsworth and
3 Hemond existed on the Highsmith & Highsmith laptops.
4 And so we can see them all right here.

5 Q. And you have been able through this - during this
6 testimony and reviewing the evidence, to made a decision
7 that these documents have been obtained legitimately;
8 correct?

9 A. Correct. It's my contention that (a) the files for
10 the most part weren't accessed. But that (b) the files
11 that were accessed were given to them legitimately
12 through legitimate means from other clients.

13 Q. Right. These were never accessed or obtained
14 legitimately; is that right?

15 A. That's correct.

16 Q. There's not a file on here you haven't been able to
17 view that fits into those two categories?

18 A. That's correct. I've examined all fifty-seven of
19 these files in depth.

20 Q. Okay. So -- and I guess the way to go about it was
21 you can pretty much scratch through and say that you've
22 made a determination as to where they've all come from
23 and what -- the specifics behind it; is that right?

24 A. That's correct.

25 Q. Okay. So we can mark off all these documents in

1 regards to where they are; is that correct?

2 A. That's correct.

3 Q. How about these ones over here?

4 A. Yes. We can mark all of those off as well.

5 Q. Same with these. Is that right?

6 A. Yes, sir.

7 Q. I have no further questions for you. Thank you.

8 THE COURT: All right. Mr. Haynsworth.

9 MR. HAYNSWORTH: May it please the Court?

10 CROSS-EXAMINATION

11 BY MR. HAYNSWORTH:

12 Q. Mr. Snoddy, I am stunned by something you said
13 about ten times.

14 A. Pardon me. I don't mean to interrupt you, but can
15 I move these out of the way?

16 Q. Sure. I'll sit down.

17 A. I understand you're stunned and I will ---

18 Q. All right. I will explain why I'm stunned in a
19 second. Now, sir, you sat there and said four or five
20 or six times, well, Mr. Haynsworth and them are
21 contending that there are only fifty-four documents that
22 have been stolen. And I've now proved out of two point
23 two million dollars (verbatim) they only found fifty-
24 four and I can prove all these were legitimate. And a
25 letter was submitted that I had written Mills that

1 apparently you relied on. I understand from Mills that
2 you also were provided with my March 18th, 2014 letter
3 to him.

4 A. As to that, I don't recall if he provided this to
5 me or not. I'll take your word for it that it was.

6 Q. That's what he said.

7 MR. ARIAIL: I'm going to object that Your
8 Honor. I said I didn't know if he had it or not.

9 Q. Well, I'll just ask you the question, Mr. Snoddy?

10 A. Okay.

11 Q. Were you aware that we were contending some of the
12 information we were able to retrieve from the scan of
13 your clients' laptop hard drives, which appear to have
14 been misappropriated are as follows: (a) 12/31/2010
15 ending trial balance from McKinley Cooper relative to
16 S.C. Rural Water Association; (b) Blue Ridge Rural Water
17 Company, Inc., audited financial statements year-ended
18 June 30th 2011; (c) Girl Scouts of S.C. Mountains to
19 Midlands; and on and on and page and page afterwards.

20 You knew we contended that they stole a lot more
21 documents than these fifty-four. These fifty-four were
22 what you insisted Mr. Hemond come up with the MD5 Hash
23 information for. Do you remember requesting the MD5
24 Hash information?

25 A. Yes, sir. I remember requesting the MD5 Hash. And

1 I also remember requesting to pin down exactly what we
2 were looking at. Because the target kept moving on us
3 because files were constantly going in and out of being
4 in contention.

5 Q. These files never came out of contention, sir. Did
6 you search their computer to see if you could find Ultra
7 Tax 1040 Tax Code Diagram? SCDR Request for forms?
8 Monthly Deposit Retirement Contributions for Reidville
9 Fire District for month ending 1/30/10. Did you look
10 for any of those documents in the hard drives of your
11 clients' laptop?

12 A. No, sir, I did not because I was going off of the
13 list that you gave me on July 18th. And I assumed that
14 that overtook any previous contended files.

15 Q. Well, did you ever ask me that? Because we were
16 emailing each other. You knew those files were the one
17 we had to come up with your MD5 Hash information because
18 you said, I can't use my super powerful EnCase software.
19 I've got to have this MD5 Hash data. Do you recall
20 requesting that information from us?

21 A. I'm sorry, Mr. Haynsworth, you're bringing up a
22 whole lot of things in one question. Could you break it
23 down for just one question at a time?

24 Q. Right. These documents that you made these things
25 for, did you not specifically request of me and Mr.

1 Hemond that you had to have something called MD5 Hash
2 information ---

3 A. Absolutely, I would have requested that.

4 Q --- about these particular documents?

5 A. Yes, sir.

6 Q. These documents were the MD5 Hash documents?

7 A. Yes, sir, that's correct.

8 Q. Did Mr. Ariaail ever tell you I had suddenly
9 withdrawn all these other documents that we contend the
10 Highsmiths took?

11 A. Again, Mr. Haynsworth, I don't recall seeing that
12 document. I don't recall those files ever being in
13 contention. And they certainly were never brought up at
14 any point during the litigation after we were engaged.

15 Q. Not relayed by Mr. Ariaail to you as to ---

16 A. Again, he may have emailed that to me, but I
17 certainly don't recall receiving that.

18 Q. Well, do you have with you here today the various
19 things Mr. Ariaail emailed you?

20 A. No.

21 Q. I was also intrigued -- I thought when your report,
22 when Mr. Ariaail handed it to me, I thought it was the
23 report that I deposed you about on November 21st of this
24 year. And I started thumbing through it and discovered
25 it's different?

1 A. That's correct. It's been updated.

2 Q. Been updated? Okay. Well, let me get you to take
3 a look, Mr. Snoddy, at -- let me get you to take a look
4 at two documents and tell me if you can identify them
5 for us?

6 A. I can identify from the cover sheet that these are
7 previous iterations of my report.

8 Q. Okay. You did one report dated June 5th of 2014.
9 And a subsequent reported dated 8/12/14?

10 A. Yes, sir, I did.

11 Q. All right.

12 MR. HAYNSWORTH: Your Honor, I'd ask that
13 these be entered into evidence.

14 THE COURT: Any objection?

15 MR. ARIAIL: No objection, Your Honor.

16 MR. HAYNSWORTH: I guess we'll do the June one
17 ---

18 THE COURT: Are you able to staple that
19 together, please, sir?

20 MR. HAYNSWORTH: Probably. This one is June
21 the 5th, 2014, Exhibit 21.

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

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

1 Q. All right. Mr. Snoddy, we've marked your two prior
2 reports. I'm just kind of curious why I wasn't provided
3 before now with what you now say is your final report?

4 A. That would be a question for retaining counsel.

5 Q. Okay. Now, in your original draft report back in
6 June, you reached certain conclusions in it; did you
7 not, sir?

8 A. As a part of the standard procedure of putting
9 together a report, yes. There's a section at the end
10 for findings and conclusions.

11 Q. Okay. And with regard to a number of these
12 documents you've just talked about, in your original
13 draft report -- and if you could turn to page seven, as
14 an example, of your draft report?

15 A. Yes, sir.

16 Q. You see you've got bank confirmations. There's
17 three, four, five?

18 A. Yes, sir.

19 Q. And all of those back in June, you indicated in
20 your comments for all three of those, file found with,
21 quote, McKinley Cooper as MS Office author metadata.
22 But found in email as a file having been received from
23 an outside client with a legitimate providence. Then
24 your conclusion about that same document in your August
25 report had changed, had it not?

1 A. That's correct.

2 Q. Okay.

3 A. The original version of this examination report was
4 a draft. And as I mentioned before, I was to prepare
5 Mr. Mills for the technical information that I was
6 getting ready to give him in case he had any questions
7 on the formatting of the report. The data that appeared
8 in the report was largely irrelevant and was just
9 boilerplate copy and paste information, but it reflected
10 some files that I picked basically at random that didn't
11 necessarily have any bearing on this case.

12 Q. And did Mr. Ariail tell you that that was the
13 explanation that they were emailed to his client, and
14 that's why you chose that? Because that was your
15 understanding at the time as to the source of the
16 documents; wasn't it?

17 A. Mr. Ariail and I had many discussions about where
18 these files came from.

19 Q. Right.

20 A. And one of the options or one of the possibilities
21 was that they may have been sent via email. And one of
22 my tasks was to determine had any of these files been
23 sent via email.

24 Q. Okay. And your EnCase software that was so
25 expensive you couldn't buy it on your own is when you

1 and this gentleman sort of partnered up and he was going
2 to buy it, it can go in and analyze all the emails on
3 their laptops. And it can figure out if an email is the
4 providence of a document. In other words, EnCase can
5 figure out if accounts payable ten xsl was an attachment
6 to an email sent by a client to the Highsmiths; can it
7 not?

8 A. You're asking a specific question about how EnCase
9 works. And the answer to that is, no. EnCase is
10 incapable of determining the providence of a file.
11 However, if given the correct search terms, emails are
12 included in any searches through EnCase. And so if
13 we're searching for a file name or file contents ---

14 Q. Right.

15 A. --- yes, those email contents or names would be
16 included in the search.

17 Q. And you ran that very search; didn't you, on your
18 laptops in EnCase?

19 A. To be honest, sir, I don't remember what the
20 searches were that I ran because there were so many and
21 they were constantly changing.

22 Q. Mr. Snoddy, you've just had a discussion and you
23 actually put in a draft of your report that the
24 legitimate source of these documents was it came to the
25 Highsmiths via an email attachment. That's what's in

1 your original report; correct?

2 A. Again, yes, I put that in my original report as
3 boilerplate filler.

4 Q. And sir, are you now saying that you did not even
5 search to see if the document came as an email
6 attachment to the Highsmiths from a client?

7 A. At the time of the writing of this report, I hadn't
8 yet run that search, no.

9 Q. As of today, have you done that?

10 A. As of today?

11 Q. Right?

12 A. I don't recall specifically, but probably.

13 Q. Okay. And you didn't find the source of the
14 document being an email attachment that a client sent to
15 the Highsmiths; did you?

16 A. That's correct. It did not come in through email.

17 Q. So we know that's not the source?

18 A. That's correct. That was not in contention.

19 Q. Mr. Snoddy, you sounded like, as maybe compared to
20 Mr. Hemond, my guy, that you were much more precise in
21 what you did. You went so far as to actually photograph
22 the laptops from the Highsmiths to get the serial number
23 on the back; didn't you?

24 A. That's correct. That's one of the steps I took.

25 Q. That's pretty exacting. I mean, do you feel like

1 you're a pretty detail oriented guy as far as your
2 analysis of the stuff in this case?

3 A. As far as computer forensics, I try to be as
4 detailed as possible, yes.

5 Q. Okay. And the reason I asked, I was just curious.
6 One of the things that was changed on the report you
7 submitted today was the case date. You had indicated it
8 was a 2009 case in your prior reports. I guess you
9 picked up that error before today?

10 A. That's correct. As a part of the report, I include
11 the case number. And on the original report going off
12 of a document that Mr. Ariail had given me, the case
13 number was a 2009 case. And in my corrected report I
14 updated to have the correct case number.

15 Q. Okay.

16 A. Again, that was not an oversight on my part just
17 simply going off of documentation provided by retaining
18 counsel.

19 Q. Okay. So let me make sure I'm square with you up
20 to this point. You have a number of conversations with
21 Mr. Ariail when you're retained. And one of the
22 conversations and an explanation for the source of these
23 documents may be, my clients got it legitimately. It
24 was sent as an email attachment once the client became
25 their client; right?

1 A. That was discussed as a possibility; yes.

2 Q. All right. And you actually put that in your
3 report as the source of some documents?

4 A. I put that in a draft report that was not intended
5 to be taken into a court of law.

6 Q. Right. And then you actually ran the EnCase
7 software to see if you could support that conclusion?

8 A. Correct. Not just that conclusion, but any
9 conclusion about where any file may have come from.

10 Q. And it wasn't supported when you ran it so that's
11 why that conclusion was changed from one report to
12 another?

13 A. Correct. My report reflected that updated
14 information.

15 Q. Okay. And you talked about some files that may
16 have been accidentally copied by Todd?

17 A. Yes, sir.

18 Q. Okay. At least back when I took your deposition in
19 November and we went over some of the documents in your
20 August report, which is the one I had back in November,
21 you and I did walk through, did we not, some documents
22 that you indicated Todd specifically copied on purpose?

23 A. I don't recall that specifically, but I'd be glad
24 to have my memory refreshed.

25 Q. All right. Well, I will endeavor to do that. Bear

1 with me, Mr. Snoddy. I have more papers than I can keep
2 straight.

3 MR. HAYNSWORTH: I'm sorry, Your Honor.

4 Q. Well, let's do this, Mr. Snoddy.

5 MR. HAYNSWORTH: May I approach the witness,
6 Your Honor?

7 THE COURT: Yes, sir. Certainly.

8 Q. I had a copy and I don't want to hold us up trying
9 to find it, but maybe you and I can just read it
10 together. Now, just to satisfy yourself, does that
11 appear to be a copy of the deposition of Matthew N.
12 Snoddy on November 21st, 2014?

13 A. That's what it says, yes, sir.

14 Q. All right. And when you testified in this
15 deposition you swore to tell the truth. You were under
16 oath just as you are here in court? You were aware of
17 that at the time?

18 A. That's correct.

19 Q. All right. Let's take a look here at my question
20 to you on page 60 line 13. I tell you what, I'll read
21 the question and you can read your answer. Question, so
22 would that suggest to you that Todd went and
23 specifically copied this file on purpose from his MCC
24 computer as opposed to accidentally copying it because
25 it was a hidden file? Mr. Ariail, object to form.

1 Could you read your answer?

2 A. Certainly. My answer was, I can't speak as to the
3 motives. All I can say is that it's very likely that
4 Todd would have known that this was a file that he was
5 copying.

6 Q. Thank you, sir. And there were a number of
7 documents that you had the MD5 Hash information for,
8 that you believe came from what I think you refer to as
9 a sweeping copy of his entire profile?

10 A. I made that comment during my deposition, yes.

11 Q. Okay. Do you stand by that comment? A sweeping
12 copy?

13 A. That comment was given before I had known where the
14 thrust of your interrogation was. I hadn't had a chance
15 at that time or hadn't endeavored to review that app
16 data folder in more detail. But afterwards, I did go
17 back through there. And as far as determining whether
18 it was a sweeping copy, I would probably revise that at
19 this point and say it was a very specific copy.

20 Q. Well, Mr. Snoddy ---

21 MR. HAYNSWORTH: If I could approach again,
22 Your Honor.

23 THE COURT: Yes, sir.

24 Q. --- if we could go through the same exercise, this
25 would be my question. You can read your answer if you'd

1 like. Question. Okay. All right. Let's go to item
2 twenty-one, bank confirmations dash SunTrust dot xls.
3 It appears to me that's again in the same category. You
4 believe that document was captured when Todd did his
5 sweeping copy of all his files under his user profile
6 for his MCC computer, put those onto a thumb drive. And
7 they got off the thumb drive onto his laptop on 7/30/12.
8 Would you read your answer?

9 A. My answer was, that's correct.

10 Q. All right, sir. And now this sweeping copy that
11 came from his MCC computer, you've not been provided
12 with the flash drive that he used to copy the
13 information; have you?

14 A. That's correct. I have not been provided any flash
15 drives regarding this case.

16 Q. Okay. So you have no information as to what MCC
17 documents may still be on that flash drive or another
18 computer that Todd or Shane had?

19 A. That's correct. Again, we're talking about a flash
20 drive that's been stated as being discarded earlier in
21 testimony in this trial.

22 Q. I understand it's been stated it's been discarded.
23 And then, again, Mr. Snoddy, if I could -- well, I may
24 have confused -- do you and I agree that you went out
25 and had EnCase trying to search all the emails to figure

1 out if the documents came through the email?

2 A. Yes, that's a true statement. EnCase indexed all
3 the emails that I could find on both the Highsmith
4 computers..

5 Q. Okay. Now, you also told us a few minutes ago, I
6 think, that you had determined that the Highsmiths
7 didn't delete anything off their computers?

8 A. To be very specific, I didn't say they hadn't
9 deleted anything. In the course of normal computer
10 operating, files are created and deleted all the time.
11 They're called temporary files. However, with regards
12 to the app data folders and things like that, no, they
13 had not deleted anything at all out of those folders.

14 Q. All right.

15 MR. HAYNSWORTH: If I could approach again,
16 Your Honor.

17 Q. Well, let's go through this. And this was you and
18 I just back less than a month ago, about three weeks
19 ago?

20 A. Yep. Can we go to page 111 at some point?

21 Q. We may be able to. But let's go to page 138 for
22 right now. And I'm going to start with my question at
23 line 12 if you could just read your answers. Question,
24 so you may be able to -- using the software, you might
25 be able to determine the date of some deletions? Would

1 you read your answer?

2 A. My answer was, that wouldn't necessarily be
3 comprehensive, though.

4 Q. Question, right. There certainly would be
5 deletions that could have occurred that your software
6 could never detect?

7 A. Which my answer was, I'm sorry, ask that again?

8 Q. Question, there certainly could be deletions that
9 had occurred and your software could never detect the
10 date the deletion occurred; correct?

11 A. My answer was, correct.

12 Q. Question, so as we sit here today, today being
13 November 21st, is it fair to say that the Highsmiths
14 could have deleted information off their laptops and you
15 would not be able to determine the date the deletion
16 occurred?

17 A. My answer was, correct; after Mr. Ariail objected.

18 Q. Mr. Snoddy, you also spoke, too, with Mr. Ariail
19 issues regarding access, whether certain files had been
20 accessed?

21 A. Yes, sir.

22 Q. And you're familiar -- because we went through
23 these, basically some of the same documents you and I
24 went through in November, and we went through some bank
25 confirmations; did we not?

1 A. Bank confirmations, yes, sir.

2 Q. I think I say bank confirmations. In any event, do
3 you recall you and I discussing bank confirmations?

4 A. Yes, sir.

5 Q. And it's true, is it not, that at least as to some
6 of the bank confirmations, the MCC created template was,
7 in fact, accessed, because now the document shows
8 Highsmith & Highsmith instead of McKinley Cooper?

9 A. That's correct.

10 Q. All right. Did you endeavor to search their hard
11 drives for anything called the 2007 National Income Tax
12 Workbook put on by Land Grant University Tax Education
13 Foundation?

14 A. I don't recall specifically, no.

15 Q. I think I recall and I may be wrong, Mr. Snoddy,
16 and I don't want to hold us up trying to find it. I had
17 thought that in your deposition you and I had some
18 discussion about you pulling up -- it wasn't a report.
19 It wasn't anything you printed off. I thought you
20 pulled up a screen and looked at it -- of information, I
21 was thinking dealing with deletions. Is this ringing a
22 bell at all?

23 A. In the course of using the EnCase software, the
24 deleted files appeared alongside the non-deleted files.
25 So, yes, those appear during the course of any natural

1 examination.

2 Q. Okay. And you and I actually walked through,
3 during your deposition, some email exchanges between you
4 and Mr. Ariail; correct?

5 A. Yes, sir.

6 Q. And do you recall in one of your emails -- I can go
7 find it if I need to -- do you recall telling Mr. Ariail
8 in an email, finding some interesting things, mostly
9 good, but a couple at first blush may be trouble?

10 A. Yes, sir. I remember that email.

11 Q. And you recall you and I discussing that email in
12 your deposition?

13 A. Yes, sir, we discussed it.

14 Q. All right. And I asked you what were you referring
15 to that at flush blush may be trouble?

16 A. Yes, sir.

17 Q. And you indicated that it was troubling because the
18 user profile appeared to come from another computer?

19 A. That's correct.

20 Q. Okay. And it appeared that some of the
21 documentation I had contended had been misappropriated
22 lived on that other computer?

23 A. Yes, sir.

24 Q. All right. Now, you are aware, are you not, sir,
25 that -- well, let me back up. Do you recall an email

1 you and Mills exchanged, June 2014, where you said if
2 they can confirm that their server names is front slash,
3 front slash server, that would be all I really need. Or
4 if they can confirm that the MCC server is not named
5 server, I have files referencing that. And if that is
6 actually the MCC server, that's a very bad thing, with
7 a very bad thing all in caps?

8 A. That's correct.

9 Q. So you indicated to Mr. Ariail that would be a very
10 bad thing?

11 A. That's correct. It's my job as an investigator to
12 give both the good and the bad to my retaining counsel.

13 Q. Right. And you are aware, as we sit here today,
14 Mr. Snoddy, that Todd Highsmith testified that flash
15 drive that's no longer available, he plugged it into MCC
16 server. I showed you that testimony at your deposition;
17 did I not?

18 A. Yes, you showed me that testimony, yes.

19 Q. All right. Thank you, sir. That's all the
20 questions I've got.

21 THE COURT: Any redirect?

22 MR. ARIAIL: Yes, Your Honor, just briefly.

23 **REDIRECT EXAMINATION**

24 **BY MR. ARIAIL:**

25 Q. The server question right there, I just want to

1 verify it. There are no documents that you have
2 definitively -- I mean, that came off the server;
3 correct?

4 A. I was not able to determine if any of the documents
5 came off of any server; correct.

6 Q. You heard Mr. Hemond testify yesterday he couldn't
7 say anything about any documents that came off the
8 server?

9 A. That's correct.

10 Q. Okay. And your duties to me are to tell me the
11 good and bad about this case; correct?

12 A. Absolutely.

13 Q. Okay. And that's what you did?

14 A. Absolutely.

15 Q. And that's what you've done here today?

16 A. Yes, sir.

17 Q. Okay. Thank you.

18 MR. ARIAIL: No further questions, Your Honor.

19 THE COURT: Step down.

20 MR. ARIAIL: Your Honor, I would call Ms.
21 Evelyn Balsiger Hargette.

22 THE CLERK: Ma'am, if you'll please come
23 forward. If you'll please pause at the end of the
24 bench. And please place your left hand on the bible and
25 raise your right hand.

1 You do solemnly swear or affirm to tell the truth,
2 the whole truth and nothing but the truth, so help you
3 God?

4 THE WITNESS: I do.

5 THE CLERK: Thank you. Please be seated.
6 Would you please state your name for the record.

7 THE WITNESS: Evelyn Hargette.

8 THE CLERK: Thank you.

9 **EVELYN BALSIGER HARGETTE,**
10 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

11 **DIRECT EXAMINATION**

12 **BY MR. ARIAIL:**

13 Q. Ms. Hargette, how you doing today?

14 A. Good. Thank you.

15 Q. Great. I can move that a little bit closer to you
16 if you can. Thank you. I appreciate you coming today.
17 Tell me a little bit about yourself. Where are you
18 employed?

19 A. I was formerly employed at United Ministries in
20 Greenville.

21 Q. Okay. And now where are you currently employed?

22 A. I'm unemployed.

23 Q. Okay. And United Ministries, what was your
24 position when you were there?

25 A. Director of Business Operations.

1 Q. Okay. And how long were you there?

2 A. Close to thirteen years. Eleven years and nine
3 months or twelve years and nine months, rather.

4 Q. Okay. And in that position did you have time -- or
5 did you deal with audits of United Ministries?

6 A. Yes.

7 Q. Maybe I should have started with this. United
8 Ministries is a not-for-profit; correct?

9 A. That's correct.

10 Q. Okay. And you use outside auditors to do your
11 accounting and financial statements; is that right?

12 A. No. The ---

13 Q. Excuse me. Auditing and your financial statements?

14 A. Yes. The outside audit was performed by hired
15 auditors.

16 Q. Okay. And in that position were you the one that
17 dealt with hiring the outside auditors?

18 A. Yes.

19 Q. Okay. And when you hire an auditor, how do y'all
20 go about it at United Ministries?

21 A. Initially, we had an auditor that worked for us
22 when I started at United Ministries. And I was looking
23 for another firm after a few years. And we got -- we
24 ended up with McKinley Cooper. And what we do is we
25 take a few estimates or quotes from different companies

1 and just go from there, decide on the best one for
2 United Ministries.

3 Q. Okay. And when did you hired McKinley Cooper? Do
4 you remember the dates?

5 A. I don't recall.

6 Q. Okay. At some point in time, when you were still
7 with United Ministries, you transferred your business,
8 the auditing business over to Highsmith & Highsmith?

9 A. That's correct.

10 Q. Okay. And do you know when that was?

11 A. It was several years ago. I don't recall exactly.

12 Q. Okay. And who did you speak with, with Highsmith &
13 Highsmith to -- I guess, in regards to changing your
14 business?

15 A. It was Todd Highsmith. And I think it was probably
16 in '12. I want to say '12 because that's when I -- it
17 might have been '11.

18 Q. And when -- and I guess it was in November of 2011,
19 is that what you said? Do you remember?

20 A. It was either '11 or '12. My affidavit was in '12.

21 Q. Okay. And as part of that, when you spoke with
22 him, what did you and Mr. Highsmith talk about?

23 A. I first -- well, I said that we were in the process
24 of looking for another audit firm. After we had been
25 with McKinley Cooper for a period of time, we decided

1 that we actually needed to review our audit decision
2 because we were -- you know, we have budgetary
3 constraints and we need to find, really, the best firm
4 for our money. And so I actually asked Todd if he would
5 submit a quote.

6 Q. Okay. And he did that?

7 A. Uh-huh (affirmative).

8 Q. Okay. And what was the decision y'all made in
9 regards to ---

10 A. We decided to go with Highsmith & Highsmith.

11 Q. Okay. Did you speak with anybody at McKinley
12 Cooper about that decision?

13 A. I spoke with Toni McKinley briefly.

14 Q. What did you tell Toni?

15 A. I said that we had decided to go with Highsmith &
16 Highsmith.

17 Q. Okay. And did you give any other ---

18 A. And it was nothing personal. It was just a
19 business decision.

20 Q Okay. And as part of the auditing process, did you
21 allow Todd and Shane to have access to your computers to
22 be able to do their auditing work and financial
23 statements?

24 A. They didn't have access to our computers.

25 Q. Did you give them access to information they needed

1 to do your audits?

2 A. Yes. We gave them audit work papers.

3 Q. Okay. Audit work papers. And how did you go about
4 doing that? Would they get certain information?

5 A. Yes.

6 Q. What type information would you give them?

7 A. I gave them spreadsheets, listings,
8 reconciliations, donor lists. You know, over ten
9 thousand dollars donors. The usual.

10 Q. Okay.

11 MR. ARIAIL: Your Honor, I have no further
12 questions.

13 THE COURT: Mr. Haynsworth.

14 MR. HAYNSWORTH: Very briefly, Your Honor.

15 **CROSS-EXAMINATION**

16 **BY MR. HAYNSWORTH:**

17 Q. Ms. Hargette, good morning?

18 A. Good morning.

19 Q. McKinley Cooper had been y'all's auditor for -- or
20 excuse me -- had been United Ministries auditor for,
21 what, roughly seven years before ---

22 A. Something like that.

23 Q. Would it be consistent with your recollection that
24 the last audit fee McKinley Cooper charged y'all was
25 eight thousand dollars?

1 A. That sounds right.

2 Q. And would it be consistent that the fee that
3 Highsmith & Highsmith quoted to you was five thousand
4 nine hundred dollars?

5 A. That's correct.

6 Q. All right. Do you have any knowledge one way or
7 another of any documents relative to United Ministries
8 that were taken from McKinley Cooper by the Highsmiths?

9 A. No.

10 Q. Thank you, ma'am. That's all the questions I've
11 got.

12 THE COURT: Thank you. Step down, please. Do
13 you have a real quick ---

14 MR. ARIAIL: No further questions of her. Can
15 I excuse her?

16 THE COURT: Yes. Any objection?

17 MR. HAYNSWORTH: No, no objection.

18 THE COURT: Thank you, ma'am. You're excused.

19 MR. ARIAIL: Your Honor, may we approach real
20 quick?

21 THE COURT: Sure.

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

24 THE COURT: Take the jury out for a recess.

25 (WHEREUPON, the jury exited the open court at

1 approximately 12:02 p.m.)

2 THE COURT: Just be at ease for a few minutes
3 and let me see what's going on.

4 (WHEREUPON, the court stood at recess for a short
5 break.)

6 THE COURT: Let me tell the jury what's going
7 on and then y'all can be excused until two.

8 MR. HAYNSWORTH: Would you tell them Mills has
9 run out of witnesses and that's why they're being
10 delayed even further?

11 THE COURT: All right. Bring the jury.

12 (WHEREUPON, the jury entered the open court at
13 approximately 12:05 p.m.)

14 THE COURT: Okay. Now, ladies and gentlemen,
15 we're going to have a little longer lunch today than you
16 have had. I have ordered lunch for you. It will be
17 here at twelve thirty. Wait, we're missing a juror.

18 THE BAILIFF: I'm sorry, Judge.

19 THE COURT: Oh, that's all right.

20 THE JUROR: I was in the restroom. I'm sorry.

21 THE COURT: That's all right. All right.
22 Insofar as you're concerned, we're going to start back
23 at two o'clock. We have some witnesses that can't be
24 here until two. Your lunch is going to be here at
25 twelve thirty. So if you'll just be at ease and make

1 your telephone calls if you want to do that. And enjoy
2 your lunch. And like I say, we'll start back with the
3 testimony at two. Okay?

4 All right. Take the jury out, please.

5 (WHEREUPON, the jury exited the open court at
6 approximately 12:06 p.m.)

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

8 (WHEREUPON, court stood at recess for a lunch
9 break.)

10 THE COURT: Okay. Mr. Ariail, are you ready
11 to go?

12 MR. ARIAIL: Yes, Your Honor, I am. My
13 witness, he is coming from the restroom right now.

14 THE COURT: Okay.

15 MR. ARIAIL: And that will be Paul Savas.

16 THE COURT: Okay. Bring the jury.

17 (WHEREUPON, the jury entered the open court at
18 approximately 2:03 p.m.)

19 THE COURT: Okay. Mr. Ariail.

20 MR. ARIAIL: Yes, Your Honor, may I call Paul
21 Savas to the stand.

22 THE CLERK: Sir, if you'll please come
23 forward. Pause at the end of the bench. And please
24 place your left hand on the bible and raise your right
25 hand.

1 You do solemnly swear or affirm to tell the truth,
2 the whole truth and nothing but the truth, so help you
3 God?

4 THE WITNESS: Yes, I do.

5 THE CLERK: Thank you. Please be seated.
6 Would you please state your name for the record.

7 THE WITNESS: My name is Paul Savas.

8 THE CLERK: Thank you.

9 **PAUL SAVAS,**

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

11 **DIRECT EXAMINATION**

12 **BY MR. ARIAIL:**

13 Q. Paul, how you doing today?

14 A. Doing all right. Hanging in there.

15 Q. Great. Tell me where you're employed?

16 A. The Warehouse Theater.

17 Q. Okay. How long have you been there?

18 A. Since June 2007.

19 Q. Okay. And your position with The Warehouse
20 Theater?

21 A. I am the Executive and the Artistic Director.

22 Q. Okay. And as part of that do you have, as part of
23 your duties, to hire outside accounting firms to do the
24 financial statements and audits of ---

25 A. Yes.

1 Q. Okay. And since you've been there in 2007, what's
2 your process in regards to hiring an outside accounting
3 firm?

4 A. Well, the first -- I think it was the first couple
5 of years we were not in a position to do an audit, and
6 did the 990 internally. And then when we were able to
7 do an audit, I think that we went to McKinley Cooper for
8 the sole reason that Bob Cooper was a -- he's always
9 there front row, center, opening nights. So I figured
10 I'd go with the relationship.

11 Q. Okay. And as part of that, after that developed,
12 you were using Bob Cooper. And then did you know Toni
13 McKinley?

14 A. No.

15 Q. How did -- my clients, Highsmith & Highsmith, did
16 you deal with any of them while they were at McKinley
17 Cooper & Company?

18 A. Yeah. They were the people that did the leg work,
19 so those are the people that I saw.

20 Q. Okay. So the people that came out and did the
21 work?

22 A. Right. And a couple of others, whose names I don't
23 recall.

24 Q. Okay. And when they left McKinley Cooper & Company
25 in November 2011, when was the first contact you had

1 with them?

2 A. I forget the date. I have the email here if we
3 need it, but I contacted them, I guess, the date -- this
4 is not the one. This the one after. Hold on. This is
5 the one afterwards. So I sent them an email saying,
6 hey, it's time to do the audit and the 990. When can we
7 set that up? And then they said, oh, look, we're no
8 longer with McKinley Cooper.

9 Q. Okay. And this email that I've sent you, there's a
10 thing right here at the bottom. Do you recognize this
11 email?

12 A. Yeah. Yeah. I have a copy of it. Yes, I do
13 recognize this and I have a copy of it in here
14 somewhere.

15 Q. Okay. Is that where ---

16 A. It's in November. So the top one is from me. And
17 the bottom one is from Todd.

18 Q. Okay. Go through these documents and see if these
19 are documents that you've provided me or if you
20 recognize so I can go ahead and show them to Mr.
21 Haynsworth?

22 A. Yeah. All of these look familiar to me. Yeah.

23 Q. Okay. I think this is information you provided to
24 me previously ---

25 A. Yeah.

1 Q. --- through a subpoena; is that right?

2 A. And I think that I provided these. I forget when I
3 provided these. This was quite some time ago, many
4 years ago, I think.

5 Q. Right. Right. And in part of this information,
6 and I want to go through, it appears that you've been
7 contacted or Todd Highsmith let you know that he's out
8 and no longer with McKinley Cooper; is that right?

9 A. Correct.

10 Q. Was there any contact you had with them prior to
11 them leaving -- or did they solicit your business prior
12 to them leaving?

13 A. No.

14 Q. Okay. So after they get out, tell me how the
15 process works in regards to you determining if you're
16 going to use them or ---

17 A. So when it was clear to me through that email that
18 they had struck out on their own, I said, oh, well, you
19 know, these are the guys that I know. I went to them
20 and I said, hey, look, can you do -- you know, why don't
21 I just come with you. You guys are the people that I
22 know are doing the -- from my perspective, you are the
23 people who are doing the work and you are the people
24 that I know. So let me just go with y'all. So -- and
25 then, you know, then I said, will you do it -- I think I

1 said, will you do it for X?

2 Q. Okay. And you recognize these other documents as a
3 part of this. This is your communication with McKinley
4 Cooper at some time about transferring your business?

5 A. I'm sorry?

6 Q. Did you communicate with McKinley Cooper at some
7 time about transferring your business?

8 A. You know, I don't -- we had a phone call that I
9 think that she -- I think that we had a phone call. I
10 don't remember the phone call. But I think, I mean, you
11 know, it was a -- I don't remember exactly the phone
12 call.

13 Q. Well, and I may can draw your attention to --
14 there's an email in here ---

15 A. Yeah.

16 Q. --- that you had with her on the last page of this
17 document?

18 A. December the 15th, 2011; right.

19 Q. Yeah. See if you see that -- recall that email?

20 A. Yeah. There was a -- I'm just through the first
21 paragraph, but there was a -- I do remember with
22 McKinley Cooper there was an invoice that was
23 unexpectedly high. It doesn't mean that that's not what
24 we had agreed on. It's just that, you know, at the
25 Warehouse Theater during this time, even now, when we're

1 in much better shape, I wear a lot of hats. And I take
2 out the trash and I do a lot of things. I'll do, you
3 know ... So this was a fairly stressful time for me.
4 And so, you know, I may have said, yeah, okay, the six
5 grand or whatever it was, that's fine. But then not
6 thought that that was the case. You know, so it was
7 unusually high to me. And so that's what motivated me
8 to write this email, I think.

9 Q. Okay. And basically it's a discussion about the
10 bill and why you had to move your service; is that
11 correct?

12 A. Yeah.

13 Q. Okay. And at any time has ---

14 A. Go ahead.

15 Q. I'm sorry.

16 A. No, no, no, that's quite all right.

17 Q. At any time has anybody at McKinley Cooper called
18 you since then and had a discussion with you about why
19 you left?

20 A. I seem to -- we may have had a phone call about it.
21 I'm not sure. Or it was maybe with their accounts
22 receivable.

23 Q. Did you tell them today what you're telling this
24 jury; do you remember? Communicated these facts?

25 A. Yeah. I think so. I mean, it was just like, oh,

1 gosh, you know, I didn't expect it to be so high. She
2 told me that, you know, these things in this email.
3 And, you know, so my main goal is to keep the expenses
4 low.

5 Q. You're trying to keep the expenses low to make sure
6 you're making some money; is that right?

7 A. Well, I mean, we're a not-for-profit theater
8 company. So, you know, I don't own it. Actually,
9 nobody owns The Warehouse Theater. That's one of the
10 definitions of a not-for-profit corporations. So I am
11 the person on the ground who is the steward of the
12 finances. Anywhere from forty-two to like forty-five
13 percent of our revenue is based on charitable giving.
14 So it is incumbent upon me to make sure that the
15 expenses are as low as possible.

16 MR. ARIAIL: Your Honor, if I could move this
17 into evidence.

18 THE COURT: Any objection?

19 MR. HAYNSWORTH: No objection.

20 (WHEREUPON, Defendant's Exhibit Number 17 was
21 marked and admitted.)

22 Q. Thank you, Mr. Savas. I have no further questions.

23 MR. HAYNSWORTH: Briefly, Your Honor.

24 **CROSS-EXAMINATION**

25 **BY MR. HAYNSWORTH:**

1 Q. Mr. Savas, that December email between you and Ms.

2 McKinley ---

3 A. Yeah.

4 Q. --- will you turn to that, please?

5 A. Uh-huh (affirmative).

6 Q. You start off saying, Toni, I saw this, as well.

7 Do you have any idea what that's talking about?

8 A. I don't.

9 Q. All right. In your -- it looks like y'all go on to
10 discuss the switch. You say, I suppose what I remember
11 is that the first year was broken into two invoices, so
12 my initial reaction was seeing a huge jump from the
13 second of two invoices from the first year to the
14 combined invoices from the second year. To your
15 recollection, then what happened, the reason you thought
16 there was a big jump was y'all had been paying first
17 year, half a year. Second year, two different invoices.
18 And then what happened in the second year, if I'm
19 understanding your email, is the two invoices were
20 combined. So you get one invoice that makes it look
21 twice as expensive?

22 A. Right. And I think that that's -- so total billed
23 2010 is forty-six hundred, balance twenty-three hundred.
24 Paid, you know. So, I mean, I think that that is -- you
25 know, could like be what happened. That, you know, I

1 paid two -- you know, that it was -- it bridged fiscal
2 years.

3 Q. Right. And you thought so, that the price had
4 jumped. But it really hadn't jumped; it was just one
5 invoice instead of a ---

6 A. Sure, yeah. That could very well be the case.

7 Q. And then you go on here in your second paragraph
8 and say, starting the second sentence. However, the
9 long and the short of it is that with our very tight
10 budget ---

11 A. I'm sorry. Where is that now?

12 Q. On ---

13 A. Yeah. I see it. I see it.

14 Q. With our very tight budget I must take savings
15 where I can find them. When your employees struck out
16 on their own, the details of which I know nothing, and
17 offered a much smaller fee, I assumed you were not able
18 to offer a fee like that due to overhead and expenses
19 that I'm not aware of or else I'm sure you would have
20 offered us something closer to that, as you are very
21 dedicated to the community. So their -- the H&H fee
22 that you were -- that they were going to give you for
23 your audit was substantially less than McKinley Cooper's
24 had been?

25 A. Yeah. And now, again, I don't even see a -- I

1 mean, I don't have a record of exactly what McKinley
2 Cooper and I agreed on in terms of an annual fee.

3 Q. Right.

4 A. So for -- you know, even if it was twenty-five
5 hundred bucks from both organizations and it just seemed
6 like sixty-five hundred bucks from McKinley Cooper, you
7 know, that -- you know, even if it was the same, that's
8 the reason why it seemed as though it was a much
9 smaller fee. With that being said, I mean, frankly even
10 if it was the same amount of money from both
11 organizations, both companies, I would have gone with
12 the people that I knew. You know what I mean?

13 Q. Right. Well, and then you go on here in your third
14 paragraph, your old employees have been to our office
15 and started work. That happened before our phone
16 conversation, and I feel I have to continue with them as
17 they've started work. However, if you're telling me
18 that you can offer me the same deal on future services
19 and not take a huge loss on our account, I give you my
20 word, we'll come back to you for our future. You've
21 always been good to us and I'm a huge fan of Bob.

22 A. That is what it says.

23 Q. And would it be consistent with your recollection
24 if you recall that the last audit fee for the full year,
25 at least for McKinley Cooper, would have been forty-six

1 hundred dollars?

2 A. Ask me that again, please?

3 Q. Yeah. Would you recollection be that the last full
4 year of audit fee from McKinley Cooper when they had the
5 business would have been forty-six hundred dollars?

6 A. According to this. That seems as though that might
7 be what this little handwritten note means.

8 Q. Okay. And the H&H fee, the lower fee, would you
9 recollection be that that was twenty-five hundred
10 dollars?

11 A. Yeah.

12 Q. Okay. Mr. Savas, do you know anything one way or
13 another about what documents the Highsmiths -- what
14 documents regarding The Warehouse Theater the Highsmiths
15 took from McKinley Cooper's office?

16 A. No idea.

17 Q. Thank you, sir.

18 MR. HAYNSWORTH: That's all the questions I've
19 got.

20 THE COURT: Thank you. Step down.

21 THE WITNESS: Thank you.

22 THE COURT: And he can be excused, can he not?

23 MR. ARIAIL: Yes, Your Honor. Your Honor, I
24 call Vanessa Arnold to the stand.

25 THE CLERK: Ma'am, if you'll please come

1 forward. Pause right here at the end of the bench. And
2 please place your left hand on the bible and raise your
3 right hand. Stop right there. There you go. Left hand
4 on -- there you go.

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: I do.

9 THE CLERK: Thank you. Please be seated.
10 Would you please state your name for the record.

11 THE WITNESS: Vanessia Arnold.

12 THE CLERK: Thank you.

13 **VANESSIA ARNOLD,**

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

15 **DIRECT EXAMINATION**

16 **BY MR. ARIAIL:**

17 Q. Ms. Arnold, how are you today?

18 A. Outstanding.

19 Q. Great. Thank you for coming. Tell me where you're
20 employed?

21 A. American Fab, Incorporated, in Travelers Rest.

22 Q. Okay. And do you -- what's your position with
23 them?

24 A. Everything.

25 Q. Okay. All right. So under everything, does that

1 include, I guess, accounting, tax work, all of that?

2 A. Yes, sir.

3 Q. Okay. American Fab, does it have -- is it one
4 entity or do you have other entities that are involved
5 in that?

6 A. There are many other entities involved, as well,
7 but American Fab is pretty much the parent or the
8 foundation company.

9 Q. Okay. And under that, if you can just tell us what
10 the companies underneath American Fab are?

11 A. We have Prolite, Palmetto Silver, Hawk Crest, Hawk
12 Point, Hawkins Properties, Bofra Golden Hawk, many
13 others.

14 Q. Okay. In regards to the work that's done that you
15 help out with, those companies, how have you been
16 involved with the Highsmiths?

17 A. I first became involved with Todd Highsmith first.
18 The owner of our company and his previous, previous
19 employer are brothers. And they were pretty much a
20 vendor of our company. So we knew of Todd through that
21 relationship for many years, over fifteen years,
22 fourteen years. So after that relationship, it
23 progressed a relationship between him and our owner
24 because of the familiarity with our company and Todd
25 Highsmith for so many years.

1 Q. Okay. And in your position, how did you utilize
2 Todd to help out those various entities?

3 A. For twenty years -- I believe the relationship
4 ended in 2010 -- our primary accountant was a gentleman
5 by the name of Stan Edge. And Mr. Hawkins and his
6 family decided to part ways with Mr. Edge in 2010. And
7 Mr. Hawkins is not one to rely on large corporations for
8 accounting work or any other thing. It's a very small
9 business atmosphere. So he reached out at that time to
10 Todd for a little bit of consulting of what should we do
11 since we were parting ways with a twenty-year
12 relationship. It kind of left me in the dark and wanted
13 to make sure I was shored up.

14 Q. Okay. So was Todd there to -- did he help you in
15 some of the things you were doing?

16 A. Absolutely. Absolutely.

17 Q. And as part of the work that was done with Todd and
18 these various entities, did he do the tax work?

19 A. He did do the tax work subsequently. When Mr. Edge
20 left it was a very hard transition that he put us
21 through.

22 Q. Okay. And your relationship with him after he left
23 McKinley Cooper, do you still utilize him?

24 A. Absolutely.

25 Q. Okay. And what was the reason you, I guess, left

1 McKinley Cooper & Company to go with Mr. Highsmith?

2 A. To be honest with you, I didn't have a relationship
3 with McKinley Cooper. I don't know who McKinley Cooper
4 is. My relationship was with Todd Highsmith. So when
5 Todd Highsmith left, I followed a servicer who we were
6 acquainted with for so long.

7 Q. Thank you, Ms. Arnold. I have no further
8 questions.

9 **CROSS-EXAMINATION**

10 **BY MR. HAYNSWORTH:**

11 Q. Just one question, Ms. Arnold. Do you have any
12 knowledge one way or another about documents involving
13 American Fab and related companies? About what
14 documents that used to live at McKinley Cooper were
15 taken by the Highsmiths?

16 A. I am knowledgeable of the documents that I
17 requested once I did realize that the Highsmiths were no
18 longer there. I know the documents that I personally
19 requested, which were pretty much the tax returns and
20 the work sheets. And then I had to amend and get the
21 owners to request it. But that's pretty much all I
22 know.

23 Q. Right. But you know, for instance, whether or not
24 they took any -- when McKinley Cooper had the accounts,
25 you don't know whether the Highsmiths took any from

1 McKinley Cooper of your client related items?

2 A. Absolutely not.

3 Q. Okay. Thanks. That's all the questions I have.

4 MR. ARIAIL: Just one question in regards to
5 that.

6 **REDIRECT EXAMINATION**

7 **BY MR. ARIAIL:**

8 Q. You have provided Mr. Highsmith with access to
9 American Fab's documents, Bofra documents?

10 A. Absolutely. Absolutely. All documents in the
11 transition from Mr. Edge to subsequently Mr. Highsmith,
12 he had all access to.

13 Q. Okay. And if you'd been provided a document while
14 Mr. Highsmith was with MCC, then he had access ---

15 A. He would have had access. All worksheets are kept
16 on my computer.

17 Q. Okay. Thank you. I have no further questions.

18 THE COURT: Thank you. Step down, please.

19 MR. ARIAIL: Your Honor, my next witness is
20 Richard Livingston.

21 THE COURT: All right. Come around, please,
22 sir.

23 THE CLERK: Sir, if you'll please place your
24 left hand on the bible and raise your right hand.

25 You do solemnly swear or affirm to tell the truth,

1 the whole truth and nothing but the truth, so help you
2 God?

3 THE WITNESS: I do.

4 THE CLERK: Thank you. Please be seated.
5 Would you please state your name for the record.

6 THE WITNESS: It's Richard Thomas Livingston.

7 THE CLERK: Thank you.

8 **RICHARD LIVINGSTON,**

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

10 **DIRECT EXAMINATION**

11 **BY MR. ARIAIL:**

12 Q. How are you doing today?

13 A. I'm well, thank you.

14 Q. Great. Give me a little bit of your background?
15 And start off with your education if you could?

16 A. Okay. I graduated from the Citadel in 2000 with a
17 degree in business administration and accounting
18 concentration. From there, I went to work for a public
19 accounting firm. I'm a licensed CPA. I've got a
20 license in South Carolina and North Carolina. I've got
21 several other designations and licenses. One is a --
22 what's called a CFE, which a Certified Fraud Examiner;
23 one is a CFF, which is Certified in Financial Forensics;
24 and one is CVA, which is Certified Valuation Analyst.
25 And I also maintain a South Carolina PI, private

1 investigator license.

2 Q. And tell me, you graduated from the Citadel;
3 correct?

4 A. Yes.

5 Q. Okay. And when did you graduate from the Citadel?

6 A. 2000.

7 Q. Okay. And since that time, have you been -- where
8 did you go after the Citadel? What was your first
9 employment?

10 A. My first employment was, I had an internship with a
11 local Charleston accounting firm, two partners, small
12 firm. I worked there my senior year of college and
13 ended up taking a job with them. Stayed there for a
14 little while before I realized it was just too small an
15 environment for advancement. And then went to work for
16 the firm I'm with now.

17 Q. Okay. And you're with Dixon Hughes Goodman LLP; is
18 that correct?

19 A. Dixon Hughes Goodman, yes.

20 Q. And they're based nationwide is that -- or ...

21 A. We're headquartered in Charlotte. We're fifteenth,
22 sixteenth largest accounting firm in the nation. So
23 we're in seven states, from Texas to New York to
24 Florida; southeast basically.

25 Q. Where is primarily your business with Dixon Hughes

1 -- Dixon Hughes Goodman?

2 A. I have an office in Charleston and Columbia.

3 Q. Okay. And I think you went through some of your
4 certifications. Can you just provide me that again? Is
5 it financial forensics, you have a certification in
6 that?

7 A. Yeah. I have two CPA licenses. I have a
8 designation certified in financial forensics from the
9 AICPA, the American Institute of Certified Public
10 Accountants. I have the CFE designation, which is from
11 the Association of Certified Fraud Examiners. And I've
12 got the CVA designation, which is Certified Valuation
13 Analyst.

14 Q. Do you serve on any boards of non-profits?

15 A. I currently do and I've served on several in the
16 past. Everything from a homeowner's association to Dee
17 Norton Lowcountry Children's Center in Charleston;
18 church, stewardship committee; Community Impact for
19 Christ, a non-profit in Charleston; and Pinewood
20 Preparatory Academy, I'm on their board and finance
21 committee.

22 Q. Have you testified in court before regarding
23 auditing, accounting and accounting standards?

24 A. Yes. I've testified in court over a dozen times,
25 but probably less than two dozen.

1 Q. Okay.

2 MR. ARIAIL: Your Honor, at this time I'd move
3 Mr. Livingston be admitted as an expert in regards to
4 audits, accounting, forensic auditing, auditing
5 investigations and accounting standards.

6 THE COURT: Any Voir dire?

7 MR. HAYNSWORTH: None, Judge.

8 THE COURT: He's qualified.

9 MR. ARIAIL: Thank you.

10 Q. And I'm going to let you take a look at that so I
11 can submit that exhibit. What is that document?

12 A. This is my Curriculum Vitae, essentially my resume.

13 Q. Okay. And it has a list of cases that you've been
14 involved in, too, on there?

15 A. Yeah. These are all cases in which I've provided
16 testimony at deposition or trial.

17 THE COURT: Without objection.

18 (WHEREUPON, Defendant's Exhibit Number 18 was
19 marked and admitted into evidence.)

20 Q. Mr. Livingston, in this case, what -- I contacted
21 you. In regards to this case, what did I ask you to do
22 or evaluate?

23 A. I believe our initial conversation had to do with
24 records that were alleged to have been removed from MCC
25 by the Highsmiths. You asked me about, I guess, the

1 applicable accounting standards associated with that.

2 And I believe at that time you mentioned there's an
3 allegation that they were trade secrets.

4 Q. Okay. And after that, were you provided with
5 documents in regards to this case to review?

6 A. Yes.

7 Q. And out of that, have you been able to make certain
8 findings or render certain opinions out of that
9 information?

10 A. Yes.

11 Q. Okay. Now, as part of this, what are the
12 applicable accounting standards that you understand
13 apply to this case?

14 A. Well, I guess when we say standards, that means
15 something specific to an accountant. The standards I'm
16 referring to are the standards of the American
17 Institutes of Certified Public Accountants, their code
18 of professional conduct. And there are -- the standards
19 are based on principals. There's principals that are
20 put out by the American Association of CPAs that say
21 these are the principals of how an accountant is going
22 to perform their duties. And they use those principals
23 to form rules that we have to follow. And when I say
24 standards, I'm referring to, I guess, those rules that
25 are put out by the AICPA. And as I understand it, I

1 guess the main one that's at question here is Rule 501
2 acts discreditable to the profession.

3 Q. And acts discreditable in regards to confidential
4 information, how does that apply to that acts
5 discreditable standard?

6 A. Okay. The acts discreditable, the way the rules
7 work is there's about eleven different rules. One of
8 them is rule 501, which is, you should not perform acts
9 discreditable to the profession. And after that, there
10 is what are called interpretations. So what does that
11 mean? There's pages of interpretation, so as a CPA, I
12 can look at that and understand what is an act
13 discreditable to the profession. After that is what's
14 called ethics interpretations to that, that give more
15 clarification on specific instances. So what I'm
16 referring to is Rule 501, the interpretations and the
17 ethics interpretations under that. And confidential,
18 client confidential information is one of those
19 interpretations under there.

20 Q. Okay. And what is your understanding of client
21 confidential information in the accounting industry?

22 A. Information provided by a client to an accounting
23 firm?

24 Q. Right. Would it be the -- we've heard the word
25 work papers. Are those deemed to be client confidential

1 information?

2 A. The term work papers is a very broad term. The
3 standards define exactly what work papers are. And so
4 client information is information that belongs to the
5 client that they can request back. And the firm should
6 keep it confidential. There are what's referred to as
7 work -- supporting type schedules that are prepared by
8 the accountant that belong to the client to the extent
9 that they support the client's work papers and
10 information, that they need that information. The third
11 category is the actual deliverable, the actual work
12 product, which is the tax returns, the financial
13 statements. That's the only thing that can really be
14 withheld from the client if they don't pay. You have to
15 give them their records back and supporting schedules,
16 but you get to keep that if they haven't paid. And the
17 last one is what's actually called the work papers. And
18 that's the audit programs, the testing that was done by
19 the CPA; the things that they did, the tests that they
20 did to support their opinion on the financial statements
21 or to support that tax return that they prepared.

22 Q. Okay. And help me in regards to -- I know there's
23 standards for the AICPA. There's the LLR and then
24 there's trade secrets law of South Carolina. How do all
25 of those interplay? Is there ---

1 A. Okay. When you become a CPA, when you pass the CPA
2 exam in South Carolina, you basically have applied
3 through the Department of Labor Licensing and
4 Regulation, the Accountancy Board. And they're the ones
5 that administer the tests. They're the ones that if you
6 pass the tests, they issue you your license. And in
7 order to get your license, you still have to serve under
8 another CPA. It used to be two years. I think it's one
9 year now. So just because you pass the exam, you don't
10 become a CPA. You have to gain the experience. And
11 they have to sign a form saying you're experienced once
12 you meet that. There is -- labor licensing has their
13 own rules. The AICPA is a national organization that a
14 CPA does not have to belong to. It's voluntary
15 membership. But they have those standards. And the
16 licensing board, in the code of laws, incorporates those
17 standards. So even though you're a CPA and you don't
18 belong to the AICPA, if you're licensed in South
19 Carolina, you've still got to follow those rules because
20 they're incorporated. And then, as I understand it, the
21 trade secrets is a specific code section of the South
22 Carolina Code of Laws, separate and apart from the
23 accountancy board and rules, and separate and apart from
24 the AICPA rules.

25 Q. Okay. If there's a violation of the AICPA or LLR,

1 that does not mean that there's a violation of the trade
2 secrets law; correct?

3 A. No. If somebody breaches the AICPA professional
4 standards, you can be reported to the AICPA. They can
5 take away your membership. They can't take away your
6 license. But if you breach that standard more than
7 likely the state board's going to find that you breached
8 that standard too and is going to possibly take away
9 your license, may suspend it, just depending on the
10 severity of it and what they choose to do to you.

11 Q. Okay. And we've heard about the ethics. I guess
12 there was a -- some guidelines that were put in. And I
13 want to see if you might recognize this document here.
14 Do you recognize that?

15 A. This is out of the standards. This is ET, which
16 stands for ethics, section ninety-two. It's the
17 definitions to the standards unless they're not
18 specifically defined within an interpretation.

19 Q. Okay. And so underneath here we've -- let's see.
20 Then we've got Rule 501, acts discreditable; is that
21 correct?

22 A. Correct. This is a different section. This is
23 section 501. The first was ninety-two. And this is the
24 actual Rule, 501 acts discreditable to the profession
25 and it has the interpretations to that underneath it.

1 Q. And I sometimes have a hard time understanding.

2 Acts discreditable means things -- the way I look at it,
3 things you shouldn't do or what is that -- that is
4 discreditable to the profession. What does that mean
5 exactly?

6 A. This is things that the AICPA has looked upon as
7 things that are discreditable acts that you should not
8 do. I mean, they're, I would say, important things you
9 should not do.

10 Q. Okay. And one of those is in regards to taking
11 client confidential information; correct?

12 A. There's one in regard under Rule 501 as it relates
13 to taking information from a former employer.

14 Q. Okay. And how does the -- an inadvertent taking of
15 documentation from an employer relate to this 501 acts
16 discreditable?

17 A. In the ethics interpretations to this the standards
18 are very clear. Should not take client work papers,
19 records. You should not take your former employer's
20 records when you leave. And it's very clear. But the
21 interpretations and the ethics rulings are based on
22 specific facts. And they say, at the beginning, at the
23 outset, that any departure from this the CPA has to be
24 able to justify. So just because you don't follow that
25 rule or don't follow that interpretation does not mean

1 that there is a problem. You'd better be able to
2 justify it. There better be a good reason why you did
3 it. And so when it says you should not take information
4 from your former employer without a contractual
5 agreement to the contrary, then you shouldn't do it.
6 But that's based on a very specific instance that they
7 ruled on. So I would say if you inadvertently took it,
8 I think that's something that the AICPA and the state
9 board would consider. Those are the factors that they
10 consider. It's not that you broke it and you're in
11 trouble. It's something that you'd better be able to
12 justify what happened.

13 Q. Okay. Now, as part of your evaluation of this
14 case, have you reviewed the Trade Secrets Act of South
15 Carolina?

16 A. I've read it, yes, sir.

17 Q. And have you reviewed the documents or seen the
18 documents that have been made or alleged to have been
19 taken in this case?

20 A. I was provided with a binder of documents, I
21 believe, that corresponded to a letter from Mr. Knox to
22 you on documents that were alleged to be either trade
23 secrets or misappropriated.

24 Q. Okay. And I want to go through and get your
25 understanding of the documents. First of all, let's

1 take the -- there's a standard bank confirmation
2 produced by the AICPA; is that -- is this this document
3 here? If you don't mind, I'm going to turn this
4 overhead on. You have a copy of the Trade Secrets Act
5 in front of you right now?

6 A. I've got a copy of what I printed from the South
7 Carolina House website.

8 Q. Okay.

9 A. Yes.

10 Q. And you've reviewed the definition of what a trade
11 secret is; correct?

12 A. Yes.

13 Q. Okay. Now, I want to show you a document that has
14 been made an exhibit by the plaintiff in this case.

15 A. Uh-huh (affirmative).

16 Q. Okay. And this is a -- what is this document here?

17 A. This is the standard bank confirmation that is used
18 by accountants to confirm cash balances of clients. I
19 believe it's put out by the AICPA. You can go to their
20 website and buy the actual paper copy of it with the
21 carbons that go with it. So in an audit, the auditor is
22 required to confirm the balance of cash the client says
23 they have. And how they do that -- this is the most
24 popular way -- is with this paper confirmation that the
25 AICPA and the American Bankers Association put together.

1 And it's been out for a very, very long time. And what
2 you do is you list out the accounts and the account
3 numbers and the balances and the client signs it. You
4 send it to the bank authorizing the bank to disclose the
5 balances to the auditors so they confirm that there is
6 that much cash in the accounts at that time. It's
7 probably the most common, most abundant work papers
8 you'll see in any client file. It has to be done on
9 every one.

10 Q. Okay. And in this case, we've got several of these
11 bank confirmations that have been provided into
12 evidence. Is there anything on here, based on your
13 understanding or review of the trade secrets statute,
14 that satisfies or complies -- falls within that trade
15 secret definition?

16 A. Well, I don't believe the document itself that is
17 put out by the AICPA, I mean, would qualify as a trade
18 secret of McKinley Cooper, when this is a document
19 that's widely available to any accounting firm. Anyone
20 in here can go to the AICPA and buy this form. The only
21 other information on it is, I guess, you know, at the
22 top you have the client's name, a date, a bank account,
23 who the bank confirmation's going to, the account
24 number. It probably falls under confidential client
25 information, but I wouldn't say that that is a trade

1 secret of McKinley Cooper, that that is their trade
2 secret. And then I believe if you scroll to the bottom
3 of the document, the only other information that is on
4 here is the actual signature block of telling the bank
5 where to return the confirmation. Because what's very
6 important with bank confirmations is the client signs
7 it, gives it to the auditor. The auditor mails it to
8 the bank and the auditor receives the confirmation. If
9 that doesn't happen, there's plenty of instances where
10 the client has taken and acted like they were the bank
11 and submitted false cash numbers and tried to forge the
12 confirmation. So I don't see how the return address
13 information on there would be a trade secret.

14 Q. Now, I turn your attention and this has been marked
15 as a Plaintiff's Exhibit. I think it's 3. What does
16 this document look like to you?

17 A. It's entitled test to disbursements. And it looks
18 like -- could you scroll down for the whole document and
19 over? Is there a second page or is that ---

20 Q. Yes, there is.

21 A. Okay. Did you find that first page?

22 Q. Maybe I can just give it to you. Okay.

23 A. Okay. This is a test to disbursement sample. And
24 so in an audit clients don't look at a hundred percent
25 of the transactions in a company. They go in and they

1 pull samples. And they're pulling that sample and
2 they're looking to see, for instance, did that check
3 actually go to that person that it says it's made out
4 to? Is the dollar amount right? Was it properly
5 signed? Is it properly coded? Did it end up in the
6 right general ledge accounts? And based on that,
7 they're able to determine that the -- make the
8 assumption that the rest of the transactions are
9 properly done. That way, they don't have to test a
10 hundred percent. They test based on sampling.

11 Q. Okay. And so from you review of the trade secret
12 statutes, what is your opinion in regards to whether or
13 not this document satisfies that definition of being a
14 trade secret?

15 A. Well, all the information on it is the client's
16 information, who the payee is, the date, the check
17 number, the amount, what general ledger account it went
18 to. I guess the only information on here that may not,
19 I guess, be the client's information is whether it was
20 traced to an invoice. There's a mark that it was tied
21 to an invoice. And then whether it was traced to a bank
22 statement and cancelled check. Did that actually clear
23 on a bank statement and a cancelled check. And it looks
24 like that test was done. And, again, this is one of the
25 most basic tests that -- you know, we're all auditing to

1 the same standards. There's not different standards.

2 We're all trying to do the same work to be able to
3 express an opinion. This is a very common simple test
4 that's done every time on every audit.

5 Q. Okay. Let me take a look, this is Plaintiff's
6 Exhibit 10. I think you've seen that document before.
7 It's called the Girl Scout's audit plan? It's got some
8 documentation in the back of it also. Have you reviewed
9 that document before?

10 A. I've seen it. It's been several weeks.

11 Q. Okay. And you can review it if you need to. But I
12 want to understand if that document falls within the
13 definition, in your opinion, of being a trade secret in
14 South Carolina?

15 A. I'm sorry. Was this provided to the Girl Scouts of
16 South Carolina or is this an internal, I guess,
17 document? Is this a proposal?

18 Q. There's some documentation from the City of Laurens
19 that's attached to it ---

20 A. Okay.

21 Q. --- that might not be related to it. So as a
22 whole, is any of that information that you see deemed to
23 be -- that would fall within the definition of a trade
24 secret? And I think it might be a duplicative copy of
25 ---

1 A. That's what it looks like. So there's several, I
2 mean, there's several different documents in here. One,
3 it looks like the actual -- I can't tell if this is
4 their actual audit plan or if this is a PowerPoint
5 presentation to the client. The rest of it is -- looks
6 like the client's records. It's their amortization
7 schedules on their debt. It's their -- I think their
8 trial balance transaction type information, check
9 number, date, amount, things of that nature. So this
10 looks like a PowerPoint presentation that was given to
11 the Girl Scout's Midland of South Carolina. I'm looking
12 at the information in it and I don't see, I guess, any
13 information in it that I can imagine rises to the level
14 of a trade secret.

15 Q. And if it's been disclosed to the public, that
16 would be something that would not fall within the trade
17 secret definition; correct?

18 A. No, I don't believe it's been disclosed to the
19 public or is readily available to be obtained by the
20 public ---

21 Q. Right.

22 A. --- especially if it was given to a non-profit that
23 -- I just don't see how it meets the definition of a
24 trade secret.

25 Q. And the details, the documents you have at the back

1 for the City of Laurens, those are their records;

2 correct?

3 A. That's what it looks like. It looks like out of
4 their accounting system. It looks like QuickBooks, the
5 reports. And then there's an amortization schedule that
6 looks like it was prepared on TValue that is an
7 amortization of about a seven hundred thousand dollar
8 note or bond or something to that effect.

9 Q. Okay. And as part of your evaluation, I provided
10 you a copy and you reviewed fifty-seven documents that
11 were alleged to be trade secrets or misappropriated; is
12 that correct?

13 A. That's correct.

14 Q. And out of any of the documents that I have
15 provided you, has anything risen to the level of being
16 classified as a trade secret under the South Carolina
17 Trade Secrets Act, in your opinion?

18 A. Of the documents I reviewed, I did not see anything
19 in the universe of documents that in working in public
20 accounting and reviewing audits, doing audits, I didn't
21 see anything there that I believe would meet the
22 definition of a trade secret.

23 Q. Have you reviewed any proposals that have been
24 submitted by McKinley Cooper in your review of this
25 matter?

1 A. Yes. I was provided with a proposal, I believe,
2 for a water authority.

3 Q. Okay. And part of that, there's a list of clients
4 that have been included as, I guess, ones they do
5 business with; is that correct?

6 A. Yeah. Which is very -- I would expect to see that.
7 Very common.

8 Q. Okay. And I think one of the allegations in this
9 case is that a customer list or something has been
10 misappropriated or is a trade secret. If you divulge
11 your customers, what is your opinion in regards to how
12 that applies with the Trade Secret Act of South
13 Carolina?

14 A. Well, I think if you divulge your customer list to
15 the public, then I think it's obtainable by the public
16 and doesn't meet the definition of a trade secret. The
17 first list of clients on here is state and local
18 governments. And so regardless of whether this wasn't
19 here or not, anyone can go to these state or local
20 governments and find out who the auditor is. I mean,
21 that is publicly available information. The second list
22 is not for profits. And all non-profits are required to
23 make their 990 available, at a minimum. I'm able, you
24 know, to look at -- I can go to any 990 or GuideStar or
25 request it from them and get a copy of it and see who

1 the accounting firm might have been that prepared it,
2 and whether they had an audit done. Again, it's non-
3 profits. Most of them, if you know somebody on the
4 board or you call them and ask, they'll tell you who's
5 doing the audit.

6 Q. Okay. And what -- in this case I think there's
7 some question as to these bank confirmations providing
8 -- or cutting down on the amount of time that the
9 Highsmiths needed to put into the job; the bank
10 confirmations, having the work papers, all of this. You
11 have reviewed the documents. What is your position in
12 regards to how any of this documentation received from a
13 prior year will help a successor year CPA?

14 A. Receiving the document in general, an electronic
15 copy of it or ---

16 Q. I'm just saying if you have access to it, either
17 through a computer, how will that -- how would that
18 affect your time or does it help at all?

19 A. If you can put it back up, I might be able to ---

20 Q. Bank confirmation?

21 A. Yeah.

22 Q. Okay.

23 A. If I were the successor auditor and I received this
24 form in electronic copy, the information on it that
25 would have to be updated is, of course, the date up in

1 the top right. I probably wouldn't have to put in the
2 client name. I may not have to change the bank name. I
3 may or may not have to add account names or not. But a
4 lot of the times it's not the accountant adding that.
5 They send the form to the client and ask the client to
6 add it because they're going to have to print it and
7 sign it down here at the bottom. So that may or may not
8 save you a little bit of time. You may have to add an
9 account or if they closed an account. And so the only
10 other information, I guess, at the bottom is the firm
11 that is the return recipient of it. And so if I receive
12 that and it had another firm's information there, it's
13 probably going to take me just as much time to type over
14 that as it is to type it in on a clean copy. So we're
15 talking about -- you don't have to type the client name
16 and you may not have to type the bank name and a couple
17 of account numbers. So, twenty, thirty seconds, maybe a
18 minute to fill that form out.

19 Q. And the key is, this stuff changes every year;
20 correct? Account numbers could change, information, the
21 date's got to be changed. You've got to update that;
22 correct?

23 A. Well, yeah, I mean, that document was for that
24 year, yes. I mean, you have to do a new document each
25 year, of course, for whatever change.

1 Q. The same with this document. You would have to
2 update these test to disbursements; they're not the same
3 in 2012 and they would be in 2011 and 2010?

4 A. No, of course not. The only -- what that looks
5 like is that information might have exported from the
6 client's system and dropped into Excel and then the
7 other columns are added just based on the format of it.
8 But, again, if you got this document electronically and
9 I wanted to use it the next year, I'm going to have to
10 change the date. And I'm going to have to delete all
11 the information below the top line, add the new
12 transactions I've selected, and test those transactions.

13 Q. Now, we've heard some questions in regards to
14 deleting of emails and how that should have occurred.
15 What is your position in regards to the deletion of
16 emails and how it applies at Dixon Hughes?

17 A. Well, at Dixon Hughes, it depends on the type of
18 email and what it is. If it's a personal email, I have
19 no problem deleting it. If it's a client related email
20 and it supports an audit or a work product or something
21 important, I put it in the client file where it should
22 be. If it's just normal client correspondence that
23 doesn't need to be kept, I would probably delete it and
24 try and keep my inbox as clean as I could. You know, I
25 don't think email is a filing system. I think it's what

1 it is, it's email. And once that file with that
2 attachment is put where it is and you don't need to keep
3 the email, I don't see any reason why you can't delete
4 it.

5 Q. Okay. Just so long as you keep a copy and you've
6 documented it, you've done what you needed to do with
7 that email?

8 A. Yeah. As long as the information, the pertinent
9 information on it ended up in the right place.

10 Q. Now, your understanding about emails, and you've
11 done some forensic investigation before; correct?

12 A. A lot of what I do is actual fraud, forensic
13 investigations.

14 Q. Okay. And can you recover deleted emails if you
15 need to?

16 A. Well, we have a computer forensics department, but
17 my experience has been, you know, it depends on how long
18 they've been deleted and, you know, the sophistication
19 of your forensics expert. That's one of the main things
20 we always go after in a fraud investigation, is email
21 and deleted email.

22 Q. Okay. Now, we've heard some -- Mr. Highsmith sent
23 out some invoices for some work he did for a client
24 during weekends. Have you reviewed any information in
25 regards to that?

1 A. I was provided with copies of, I think it was three
2 invoices, that were sent.

3 Q. Okay. Tell me what your understanding and opinion
4 in regards to that is?

5 A. What my understanding was he had done that work
6 directly for the client and billed them separately and
7 was paid separately by the client. That's my
8 understanding of it.

9 Q. Okay. And as part of that -- and my question on
10 this is, is it necessary to have a policy in place or
11 how does an office need to handle that to deal with
12 whether or not you can work outside or any of the issues
13 that could result with that?

14 A. Well, as an employee of a public accounting firm, I
15 think it makes a difference if you're a CPA or not a
16 CPA. And so, I mean, a term normally referred to as
17 moonlighting. And so a non-CPA person working there,
18 you know, may have another job, may do things on the
19 side. There's no, I guess, real professional standard
20 against that. And I would expect the firm to have some
21 type of written standard on that. For a CPA, I
22 definitely wouldn't recommend it. The standards say
23 that you -- as a CPA you shouldn't -- you should
24 practice accounting under the firm that you're with,
25 that you're not supposed to practice accounting outside

1 of the firm. So I definitely wouldn't recommend it.

2 The question is, was that normal? I mean, is that what
3 the firm allowed? I still don't think from a licensing
4 standpoint and a standards standpoint, that it's a good
5 policy to let CPAs do that, but if that's the policy of
6 the firm, and they're allowed to do it, then I think
7 that's between the firm and the employee.

8 Q. Okay. Now, we've heard some issues in regards to
9 CPE seminars and items of that nature. What is your
10 opinion in regards to whether an employee is allowed to
11 take their CPE materials with them after they leave
12 employment from a prior CPA?

13 A. Well, CPE material is Continuing Professional
14 Education. Every CPA, licensed CPA in South Carolina
15 has to go forty hours of continuing professional
16 education every year to maintain their license. And
17 that is a responsibility of the licensee. That's not a
18 responsibility of the firm. That is, that person is
19 responsible for getting their hours. That person is
20 responsible for being able to maintain the support that
21 they did get those hours in case it's requested. I
22 believe they have to keep it for five years. And the
23 firm is not required to pay for CPE. Most public
24 accounting firms will pay for your CPE for you to go get
25 your training. But, for instance, a lot of for-profit

1 companies may not pay for that CPE. Normally, the Army
2 doesn't pay for it. We've got employees that got called
3 up. They have to come back and come to some of our
4 classes because the Army doesn't pay for them to go get
5 their forty hours to keep their license. That's one
6 thing when you go in the industry that you've got to
7 negotiate for it. Is the firm going to pay for my -- is
8 the company going to pay for my hours to keep my CPA
9 license? Is it that important? So, you know, the issue
10 there is, it's the responsibility of the employee to get
11 it. The firm is not responsible for paying for it.
12 They do it to educate them, to keep their license. And
13 when you leave a firm, you are able to take that
14 education and experience with you. And that's what CPE
15 is.

16 Q. Okay. And that went right into my next question.
17 If you leave a CPA firm, you're allowed to take with you
18 your common knowledge, experience, things you've gained
19 while you're there; correct?

20 A. Yes.

21 Q. Okay. And as part of that, it's not a breach of
22 fiduciary duty to go out and to underbid or bid lower
23 than your previous employer; correct?

24 A. I'm sorry. Is it a breach of fiduciary duty?

25 Q. Breach of fiduciary duty to go out and simply

1 compete and submit a bid lower than your previous
2 employer; is it?

3 A. I wouldn't say it's a breach of fiduciary duty to
4 compete with your previous employer unless there is a
5 covenant not to compete?

6 Q. There you go.

7 MR. ARIAIL: I have no further questions, Your
8 Honor.

9 THE COURT: All right. Mr. Haynsworth.

10 MR. HAYNSWORTH: Yes, ma'am. I don't think
11 I'm going to be needing the overhead. So you can turn
12 the lights back on.

13 **CROSS-EXAMINATION**

14 **BY MR. HAYNSWORTH:**

15 Q. Mr. Livingston, good to see you again.

16 A. Yes, sir.

17 Q. We may or may not be referring to some pages of
18 your deposition.

19 MR. HAYNSWORTH: So if I could approach, Your
20 Honor.

21 THE COURT: Sure.

22 Q. I'm going to give you a copy. You and I were
23 together as recently as November 20th, 2014; right?

24 A. That's correct.

25 Q. That when I took your deposition three weeks ago,

1 give or take?

2 A. Yes.

3 Q. Now, you've just given a bunch of testimony about
4 what, in your opinion, is and is not a trade secret.

5 Are CPAs allowed to render legal opinions?

6 A. No.

7 Q. And, in fact, you indicated that -- did you not in
8 your deposition on November 30th (verbatim) that you
9 weren't going to be testifying as to what trade secrets
10 were or were not. That that was the finder of fact, the
11 jury's, determination as to what is or is not a trade
12 secret, as defined by the law Judge Pyle will give them;
13 right?

14 A. Correct. I don't believe I can make the conclusion
15 as to whether it is or is not a trade secret. I believe
16 I am qualified to testify that those documents, those
17 accounting records, how they're kept in the ordinary
18 course of business; is it my opinion that they meet the
19 definition and why they do or why they do not, but it's
20 up to the jury, of course, to decide if that's the case.

21 Q. Okay. How long since you have actually performed
22 an audit?

23 A. Actually been out and done the field work? It's
24 probably been about eight to -- yeah, probably eight to
25 ten years.

1 Q. Okay. So when you were running through with Mr.
2 Ariail, well, this would be or this document -- you
3 know, talking audit lingo, you haven't done an audit
4 yourself for like eight to ten years?

5 A. A GAP financial statement audit, no. What I do is
6 forensic accounting. It's the same skill set. I'm in
7 companies looking for theft, cash disbursements,
8 skimming. A lot of people call it forensic auditing.
9 But under the a GAP financial audit, no, it's been a
10 while. The bulk of what we do, though, is, of course,
11 is review accountants' audit files. That's a big source
12 of information for us in a litigation case because of
13 the way they're maintained, the way they're kept.
14 They're very standardized because we're following the
15 same standards. There's a lot of the same work papers,
16 a lot of the same information. We know what should be
17 in there and what shouldn't. So we have the attorney
18 send subpoenas for it and go review those records. So I
19 spend a lot of time in audit files.

20 Q. And, Mr. Livingston, you don't believe and you're
21 not telling this jury, are you, that it's okay for a
22 prior CPA when they leave a firm to physically take from
23 the prior firm client data or CPA data; are you?

24 A. I think I was very clear that the standards say you
25 should not take former employment records. And that's

1 clearly stated in the ethics interpretations. And if
2 that happens, the member should be able to have a
3 justifiable reason of why they did.

4 Q. Okay. And you made reference to various type of
5 papers. You would have client records, like the
6 client's depreciation schedule. That might be something
7 that would be in an audit file in a CPA firm. And so
8 there are certain documents that are owned by the
9 client. If the client says, I need them, you give them
10 to them. But there are other documents, work papers,
11 work product, that actually the CPA firm owns; right?

12 A. It's their records to support the opinion, yes.

13 Q. It's sort of their -- like in the -- I guess in the
14 legal arena, you know, my legal thoughts as to why one
15 plus one equals two, it's the CPA's rationale for why
16 they had the opinion they had. I did a poor job. Did
17 that makes sense?

18 A. It's the work that they have done. A CPA has to
19 maintain their audit file in such a way that another
20 person coming behind them can get to the same
21 conclusion. So it has to be documented a certain way
22 and kept that way. All that support has to be there.
23 So it's those records, the testing, the audit programs,
24 things of that nature that they have to keep in the
25 file. And they are not required to turn those over to

1 the client if asked. They are required to make them
2 available to the predecessor auditor to come through and
3 look at and flip through and make sure that the balances
4 that they're starting with, that the proper work was
5 done to get there. They're required to make them
6 available for peer review, for another firm to come
7 through and make sure they follow the standards. And a
8 lot of the times, they may be required to make it
9 available for subpoena. May be required to make it
10 available to their insurance carrier. So there's other
11 instances where they have to make it available, but it
12 is their records.

13 Q. Speaking of subpoena, did you get mine?

14 A. I did. I got it -- I think it was dated the 2nd.
15 You took my deposition on the 20th. I think it got to
16 me almost two weeks after.

17 Q. I was busy. I'm sorry.

18 A. Yes. So I'm not sure. It didn't come certified
19 mail. I was out Friday, but I got it Monday when I came
20 back in the office. So it didn't get to me -- I think
21 you mailed it on a Tuesday, it may have gotten there
22 Friday. I responded to it. It was due yesterday. I
23 think I sent you a letter on Tuesday in response.

24 Q. And did your letter -- and I'll be honest, I've not
25 opened my mail all week long. Did your letter

1 essentially say for various reasons you weren't going to
2 give me what I had requested?

3 A. No. I said that I was unable to locate any
4 documents responsive to your subpoena.

5 Q. Okay. Okay. And you were -- I mean, this subpoena
6 came up on November 20th when I was taking your
7 deposition and you remember us discussing generally I
8 might be sending one?

9 A. Yes, sir.

10 Q. And, in fact, the way it came up is because you
11 have actually been involved in, I think, three different
12 cases since you've been with Dixon Hughes, where you
13 represented the plaintiff and the allegation was a
14 customer list had been stolen and it was a trade secret?

15 A. Correct. I remember, I believe at that time I
16 could recall three engagements that dealt with customer
17 lists.

18 Q. Right. And I was wanting to see, since we're
19 dealing with a customer list, trade secret case, I was
20 wanting to see how you'd dealt with that in the past?

21 A. Yes. In the deposition you, I guess, when we were
22 going back and forth to make clear what you were asking
23 for, you asked me of any instances where we have valued
24 customer lists. And had we determined, I guess, if
25 customer lists were or were not trade secrets. And we

1 talked about what you could ask for to get that. Your
2 cover letter to your subpoena wanted any damage
3 opinions. But the actual subpoena just said all
4 opinions related to plaintiff cases for trade secrets.
5 And so, as I explained in my deposition, I have not been
6 deposed nor have I testified on a case involving damages
7 associated with trade secrets. So the only other source
8 of opinions that I can think of is whether a report was
9 issued in that case where it didn't end up at deposition
10 or trial. And I went back and looked at those cases to
11 the best I could. One looks like it was a vendor list,
12 not a customer list. And the other were customer lists,
13 but I was not the named expert on that case. I worked
14 on that case substantially. So I did not issue any
15 opinions on that.

16 Q. Okay. So you couldn't have found what I wanted you
17 to find anyway, so we're good.

18 A. In the day and a half I had to do it, I did my
19 best.

20 Q. Yeah. I apologize. I was scrambling. Let me give
21 you a document and see if you can tell us what it is?

22 A. Oh, yeah, this is a presentation that I do, and I
23 do quite often. I speak probably once a month on this
24 topic at different places. But it's entitled
25 occupational fraud. Do good people commit fraud? And

1 we teach this class to for-profit companies on our
2 experience with fraud and what the statistics are with
3 it. Who does it, how to prevent it and things of that
4 nature.

5 Q. Okay.

6 MR. HAYNSWORTH: Your Honor, I'd ask that Mr.
7 Livingston's occupation fraud, do good people commit
8 fraud document be ---

9 THE COURT: Any objection?

10 MR. ARIAIL: No objection, Your Honor.

11 (WHEREUPON, Plaintiff's Exhibit Number 23 was
12 marked and admitted into evidence.)

13 Q. All right. Mr. Livingston, we've marked your
14 document as Plaintiff's Exhibit 23. Let me back up for
15 one second. I assume you're being compensated for your
16 involvement in this case?

17 A. Yes. The firm sets my billing rate at three-fifty
18 an hour. And that's what I'm billing on this.

19 Q. Okay.

20 A. Plus any -- I'm sorry, I can just clarify it for
21 you -- mileage. And then, of course, travel time we
22 bill at fifty percent. So I billed three fifty an hour
23 to drive up here.

24 Q. So like when we were all together for your
25 deposition, that would be three fifty. Now, it's three

1 fifty. But traveling from -- driving up here today is
2 half that?

3 A. That's correct.

4 Q. You were asked about some invoices. Have you seen
5 the invoices before; the moonlighting invoices?

6 A. I've seen three that we dealt with at the
7 deposition.

8 Q. Okay. Well, I'm not going to try to find them for
9 you because we know what we're talking about. But, I
10 mean, without a doubt, under the AICPA regs and the LLR
11 regs, Todd Highsmith while working for McKinley Cooper
12 under their license number, it was absolutely an act
13 discreditable to send those invoices to McKinley Cooper
14 clients from his home for doing accounting work for
15 them?

16 A. I'm not aware of anything under 501 acts
17 discreditable that would make that an act discreditable.
18 The only place I'm aware of that says you should not do
19 that is in the State licensing regs that say you should
20 not practice accounting outside of a firm as a CPA.
21 You're supposed to practice accounting in a firm. And I
22 think the standards -- the State Code is very clear on
23 that.

24 Q. Okay. So it doesn't violate the AICPA, but it does
25 violate the LLR Code?

1 A. I'm not aware of any AICPA regulation specifically
2 dealing with that.

3 Q. But the board of accountancy is part of S.C. Labor
4 Licensing and Regulation; they absolutely deal with that
5 and it's prohibited to do what he did?

6 A. That would be the body that looked into it, yes,
7 sir.

8 Q. Well, I mean, if your opinion wouldn't it be
9 prohibited if you're working for McKinley Cooper under
10 their license number to bill one of their clients on the
11 side and get the money?

12 A. As I testified to in my deposition, as I testified
13 to now, I don't think it should be done as a CPA. I
14 don't think you should do work outside of a firm and
15 bill for it. But if there's -- if that's the standard
16 operating procedure in a firm, I still don't think it's
17 right, but there's a reason for why it was done.

18 Q. Well, I'll presume no one has ever told you that it
19 was standard operating procedure within McKinley Cooper
20 that people could moonlight and send bills out to
21 McKinley Cooper clients?

22 A. No, I have not spoken with anyone at McKinley
23 Cooper as to whether that was, I guess, allowed.

24 Q. And Mr. Ariail has not told you that that was
25 allowed at McKinley Cooper so it makes it okay?

1 A. No, I don't believe he has.

2 Q. Okay. This document that I handed you, the
3 occupational fraud, do good people commit fraud. I'd
4 like to go over just a bit of it with you now. One of
5 the main things you have done for the last eight, nine,
6 ten years has been fraud -- I'm using that term broadly
7 -- fraud investigations?

8 A. Correct.

9 Q. And that may involve fraud involving money; right?

10 A. That's pretty much what they all involve, yes.

11 Q. Well, I'm thinking fraud involving documents as
12 being another category?

13 A. No. Pretty much all the work I'm doing is actual
14 theft; either they're skimming or cash disbursement
15 frauds.

16 Q. Okay. Okay. And this -- I guess this is a
17 PowerPoint when you do the presentation?

18 A. Yes.

19 Q. Okay. And when you do your PowerPoint presentation
20 to discuss fraud and what the signs are and so forth and
21 so on, I mean, fraud by its very nature is hidden;
22 right?

23 A. That's correct.

24 Q. Okay. And in the typical case if someone is
25 committing fraud or going to commit fraud, they're going

1 to try and hide the evidence of that fraud; correct?

2 A. That's correct. People typically don't set up a
3 general ledger account called fraud and put the charges
4 there.

5 Q. And leave a big paper trail behind so they can
6 easily be caught?

7 A. Well, I don't know. A lot of them leave paper
8 trails, but nobody I've ever seen purposely doesn't try
9 to hide it.

10 Q. Okay. And you've got a section beginning on page
11 twenty-six of your PowerPoint?

12 A. Yes, sir.

13 Q. That page says, do good people commit fraud,
14 question mark. Then you flip over and there's some
15 bullet listings of the good people who commit fraud.
16 And the number two down from the top is trusted
17 employee. And is that typically, in your studies, one
18 of the people -- good people who would typically commit
19 fraud?

20 A. For the fraud I deal with, cash disbursements,
21 skimming, yes.

22 Q. Okay. And if you go a little further in, you make
23 reference to Donald Cressey's fraud triangle. It's on
24 page thirty-two.

25 A. Yes.

1 Q. And it's got a perceived opportunity, incentive
2 slash pressure and rationalization. Are those the
3 triangle, perceived opportunity, incentive or pressure
4 and then rationalization?

5 A. Donald Cressey's fraud triangle is the model that
6 we use for investigating fraud and for designing
7 controls to prevent fraud. And what that says is three
8 things have to happen in an organization in order for
9 fraud to occur. The first is incentive pressure.
10 Something has to happen in somebody's life that they
11 have a need for the money. And we've seen everything
12 from gambling to divorce to keeping up with the Joneses
13 to sick children, sick spouse, drug addiction, whatever
14 happens. Something happens in their life and they need
15 the funds. The next one is rationalization where they
16 convince themselves that, you know, I'm the hardest
17 working employee here. I'm going to borrow it. I'm
18 going to pay it back; whatever it may be. But the third
19 leg is what has to be there, and that's perceived
20 opportunity. They have to believe that they can do it
21 and not get caught. And normally, that's a trusted
22 employee who has that trust in the organization. But
23 even with all three of those factors there, the point I
24 have at the bottom is, you know, personal integrity. We
25 go into organizations all the time and all three of

1 those factors are there. And that employee could have
2 done a lot of damage, but they didn't; and that's
3 personal integrity, that they just haven't. But
4 personal integrity and trust is not a control you should
5 have in your organization because you can't control
6 what's going to happen with that person.

7 Q. So a person with better morals, higher integrity,
8 even if they're under financial pressure or whatever the
9 triangle may be, their own personal moral compass is
10 going to be the thing that would prevent them from
11 committing fraud?

12 A. I mean, if they had the opportunity to do it, yes.

13 Q. All right, sir. Thanks. That's all the questions
14 I have.

15 THE COURT: Anything else, Mr. Ariail?

16 MR. ARIAIL: No questions, Your Honor.

17 THE COURT: Thank you. You may step down.

18 THE WITNESS: Thank you.

19 MR. ARIAIL: That's our case, Your Honor.

20 THE COURT: Anything in reply?

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

22 THE COURT: Okay. Ladies and gentlemen, the
23 testimony in this case is now complete. What we have
24 remaining is the final arguments by the attorneys and
25 then I charge you on the law. And we'll do that in the

1 morning. So I'll excuse you at this time and ask that
2 you be back in your jury room promptly at nine o'clock
3 tomorrow morning, at which time we'll start with the
4 arguments by the attorneys. And then, as I said, my
5 charge on the law. So when you leave, don't talk about
6 this case. And have your badges on when you go home and
7 come back in the morning. See you in the morning.
8 Thank you.

9 (WHEREUPON, the jury exited the open court at
10 approximately 3:18 p.m.)

11 THE COURT: All right. Gentlemen, any
12 motions?

13 MR. ARIAIL: Your Honor, I would previously --
14 renew my previous motions in this case. But I just want
15 to put that on the record. I know you've already ruled
16 on that.

17 THE COURT: It's denied.

18 MR. ARIAIL: Thank you.

19 THE COURT: All right. Mr. Haynsworth, any
20 motions by you?

21 MR. HAYNSWORTH: Oh, gosh, Your Honor. I
22 guess the short answer is, yes. We'd move for a
23 directed verdict on the cause of action for conversion.
24 There has clearly been unrefuted testimony that as to
25 those moonlighting invoices that Mr. Highsmith

1 absolutely should not have done it. It violates the LLR
2 regs. It is McKinley Cooper's money that he got. I
3 don't think I can point to a solid dollar amount on the
4 other conversion parts, Judge, such as the CLE stuff or
5 the proposals. That's, I think, beyond -- it is the
6 jury's providence.

7 And I suppose I should also move for a directed
8 verdict on the breach of fiduciary duty, which is
9 integrally tied into that, on the grounds that there is
10 unrefuted evidence that Mr. Highsmith and the Highsmiths
11 violated their duty of loyalty and their fiduciary duty
12 to Ms. McKinley while they were in her employ.

13 And as to the trade secrets, Your Honor, I'd move
14 for a directed verdict that there's unrefuted evidence
15 that there are documents that fit the statutory
16 definition as provided by South Carolina law. These
17 folks knew, because of the regulations that govern them,
18 they should not have those documents. And that the
19 documents taken, either independently or as a group,
20 provide a commercial advantage to them, to the detriment
21 of Ms. McKinley.

22 THE COURT: And I'd have to deny those
23 motions.

24 MR. HAYNSWORTH: All right, sir.

25 THE COURT: All right. Ladies and gentlemen,

1 ---

2 MR. HAYNSWORTH: I have a curiosity question,
3 Judge. You know, under the -- and I just don't know the
4 answer to this. Under the trade secret theft statute
5 there is -- if you establish that it's a willful
6 violation, you can recover up to three times your
7 damages and attorneys fees?

8 THE COURT: Yes.

9 MR. HAYNSWORTH: I assume the willful is a
10 call the jury makes as opposed to the Court?

11 THE COURT: Sure.

12 All right. So then the possible verdicts. I
13 initially prepared verdict forms. And with respect to
14 your complaint, there will be two possible verdicts;
15 first for -- for the plaintiff for actual damages. And
16 a possible verdict in favor of the plaintiff for actual
17 damages and also for punitive damages. The second
18 possibility is we, the jury, find for the defendants.
19 That would be the verdict if the jury finds that you
20 have not proven any one or more of the allegations in
21 the complaint. And I've put on here that if your
22 verdict is for the plaintiff, then please state on what
23 grounds. And what I want to know is do they find it on
24 the contract action, on the -- on any one of the other
25 two.

1 MR. HAYNSWORTH: Trade secret ---

2 THE COURT: One, two, or three. They could
3 find it on all three or only one or only two. And so
4 I've asked that they specify on what grounds those
5 verdicts are if they return a verdict for the plaintiff.

6 And then I prepared a verdict form on the
7 defendant's thirty-party complaint, which, as I
8 understand, contract -- or breach of contract.

9 MR. ARIAIL: Wage payment, breach of contract
10 and then for unjust enrichment aspect. But it would be
11 wage payment and breach of contract, I guess.

12 THE COURT: All right.

13 MR. ARIAIL: I had two separate causes, didn't
14 I, in there? Because I get wage payment if we find
15 under that statute any credible damages also for the --
16 and I'd like to, you know, look at that, I mean, whether
17 or not I get -- do they decide if they want to award
18 treble damage or is that for your decision to be able to
19 do that?

20 THE COURT: Yeah.

21 MR. ARIAIL: Okay.

22 THE COURT: So all they've got to do there is
23 if they return a verdict for you is to specify the
24 amount.

25 MR. ARIAIL: Okay.

1 THE COURT: And then, of course, the other
2 possibility is that we have found for the defendant.

3 MR. ARIAIL: Yeah. Because I couldn't have --
4 well, I couldn't recover under both causes -- well, no,
5 that would be ---

6 THE COURT: I think that would be duplicitous.

7 MR. ARIAIL: I think it would be too.

8 THE COURT: Yeah.

9 MR. ARIAIL: It's going to be -- so both of
10 them together. My only question, Your Honor, on the
11 first verdict form, if they decide -- I'm just trying to
12 figure out this. If they say it's a conversion or
13 breach of fiduciary duty, do they then go down and
14 specify ---

15 MR. HAYNSWORTH: The amount for each.

16 MR. ARIAIL: --- the amount. Yeah? Whereas
17 ---

18 MR. HAYNSWORTH: Because I would think -- this
19 is a suggestion, you know, do you find in favor of the
20 plaintiff or defendant? If they, you know, plaintiff,
21 go to two. Then ---

22 MR. ARIAIL: What action ---

23 MR. HAYNSWORTH: --- trade secret conversion,
24 breach of fiduciary duty. Let's assume they found all
25 three. You could find different amounts. You know, we

1 think the -- say they use breach of fiduciary duty and
2 just use those invoices. And you've got an amount of
3 eight hundred and something dollars maybe. But if they
4 found that, you know, the trade secrets was a different
5 dollar amount, I'm just wondering if they ought not to
6 have the opportunity to assign a number to each cause of
7 action if they find that that cause of action was
8 proved.

9 MR. ARIAIL: Well, my issue -- well, I don't
10 want to have ---

11 THE COURT: Well, my thought was, and just
12 asking them on what ground or grounds would be that if
13 they find it on even the first two, then you wouldn't be
14 entitled to punitive damages. And if they found it only
15 on the conversion, they could award actual and punitive
16 damages. I just want to know.

17 MR. HAYNSWORTH: I thought I could get
18 punitives on my breach of fiduciary, as well?

19 MR. ARIAIL: No, I don't you can.

20 THE COURT: I don't think so. I think it's
21 only on the conversion.

22 MR. ARIAIL: Yeah.

23 MR. HAYNSWORTH: Okay.

24 THE COURT: Well, I say that. On the
25 violation of the trade ---

1 MR. HAYNSWORTH: Trade secret, all I get if
2 it's a willful, I can get treble damages plus attorneys
3 fees.

4 THE COURT: Yeah.

5 MR. HAYNSWORTH: But I was thinking, and I'll
6 do some research. And if I convince myself I'm right,
7 I'll give it to you in the morning. I thought punitives
8 were an option on the breach of fiduciary duty, but I
9 may be ---

10 THE COURT: I don't think -- no, I don't think
11 so.

12 MR. HAYNSWORTH: And, Judge, how will we
13 handle the issue of willfulness? If it's their
14 determination -- let's say they find the trade secret
15 statute was violated. If it's their call to decide
16 whether it was willful, I guess we would have to have a
17 line item. And I don't -- do they decide? Okay. We
18 found it willful. We want to do treble damages or do
19 they find it willful and you decide whether to treble
20 it? I don't know the answer to that question.

21 MR. ARIAIL: I'm going to look, I'm trying to
22 see what damages say. On the finding of willful, wanton
23 and reckless disregard ... the court may award separate
24 exemplary damage in the amount not exceeding twice.

25 MR. HAYNSWORTH: Okay. I'm wrong on treble

1 damages.

2 MR. ARIAIL: So I think ---

3 MR. HAYNSWORTH: So I guess they've got to
4 decide whether it was willful and then whether -- then
5 the Court is who decides ---

6 MR. ARIAIL: That's what the statute says.
7 The court may award separate exemplary damage in the
8 amount not exceeding twice any award under such action.

9 MR. HAYNSWORTH: Yeah.

10 MR. ARIAIL: You see it?

11 MR. HAYNSWORTH: Yeah. And I know there's
12 attorneys fees in there somewhere.

13 MR. ARIAIL: Well, that comes at the end when
14 we can make our motions right here. So if they make a
15 decision of willful ---

16 MR. HAYNSWORTH: He decides.

17 MR. ARIAIL: Right. And then if they don't
18 decide trade secret, I can make a motion, and say, hey,
19 you didn't have trade secrets case.

20 MR. HAYNSWORTH: Right. Right.

21 MR. ARIAIL: And Judge Pyle can decide. So I
22 guess they've got to make a decision on wilfulness.

23 MR. HAYNSWORTH: Right. So I think that's the
24 only thing we need to plug in, Judge, is if they find
25 trade secrets -- I mean, willful doesn't really matter

1 to the others. But if they find trade secret, they've
2 got to make the call whether they think it's willful.
3 And then that triggers the Court's ---

4 THE COURT: Yeah.

5 MR. ARIAIL: Or wanton or reckless disregard
6 to plaintiff's

7 MR. HAYNSWORTH: And -- oh, that's right.
8 Never mind. You've already told me what I was going to
9 ask.

10 THE COURT: All right. I'll try to figure
11 that out overnight.

12 MR. HAYNSWORTH: And I'll look too, Your
13 Honor. Sort of like when you get home, I'm sure you're
14 tired of dealing with it. I have the same thought at
15 quitting time; I don't want to think about it anymore.

16 THE COURT: All right. See you in the
17 morning.

18 MR. ARIAIL: All right, Judge. Have a good
19 one.

20 (WHEREUPON, court stood at recess for the day at
21 approximately 3:30 p.m.)

22 **December 12, 2014**

23 (WHEREUPON, court convened with all parties present
24 and the following proceedings were had)

25 THE COURT: Good morning. Be seated. Okay.

1 Now, gentlemen, this is what I plan to do. With
2 respect to the verdict form, with the plaintiff's cause
3 of action, I think we talked yesterday about punitive
4 damages on the trade secret cause of action.

5 MR. ARIAIL: No. We -- I thought it was just
6 treble damages ---

7 THE COURT: All right.

8 MR. ARIAIL: Yeah.

9 THE COURT: Well, what we will do that -- if
10 the jury, of course, finds on a conversion they're
11 entitled to the damages if they find them. And with
12 respect to the trade secret cause of action, if they
13 find in favor of the plaintiff on that cause of action,
14 plus punitive damages, then it becomes an issue for me,
15 the Court, to determine whether or not to treble or
16 award additional punitive damages. You disagree with
17 that?

18 MR. HAYNSWORTH: I think, Your Honor, that my
19 recollection from yesterday is that they make the call
20 as to -- if they find trade secret violation, then they
21 make the call whether or not it was willful. And then
22 if they decide it's willful, you decide whether to
23 award, I think it was double ---

24 MR. ARIAIL: Double damages.

25 MR. HAYNSWORTH: I think it was double damages

1 and attorney's fees. So I would think that they would
2 need to have, you know, like we've got here, if the
3 verdict is for plaintiff, please state on what grounds.
4 I would think they would need to have, you know, the
5 three causes of listed so they know exactly the three
6 grounds from which they're going to choose. And then
7 under the ---

8 THE COURT: Well, if it's -- I will charge
9 them that if the find punitive damages it's got to be
10 willful.

11 MR. HAYNSWORTH: Willful.

12 THE COURT: And then if they award it, then it
13 becomes an issue for me.

14 MR. HAYNSWORTH: So finding punitive, if says
15 willful, then that gives you what you need.

16 THE COURT: Of course.

17 MR. ARIAIL: Okay. So they set the damage
18 amount and then you would find whether or not it would
19 -- okay.

20 THE COURT: Yeah.

21 MR. ARIAIL: Well, okay, so you're going to
22 charge on the willful aspect of it. They'll make a
23 decision and then they -- okay.

24 THE COURT: Yeah.

25 MR. ARIAIL: The question I'm trying to

1 figure. On the verdict form if they decide that we've
2 got -- I'm trying to see if we -- there's no need to
3 break it up, I guess, is what I'm getting at. That's my
4 concern is that ---

5 THE COURT: What I'm going to do is, I'm going
6 to charge the jury on the plaintiff's complaint and
7 charge the law with respect to the trade secrets, the
8 fiduciary duty, and then conversion. I'm going to
9 charge that. And then I'm separately going to charge
10 with respect to your counterclaim. And then I'll, you
11 know, I'll get into talking about punitive damages and
12 instruct them that it's, of course, got to be willful.

13 MR. ARIAIL: The only question I would -- I
14 mean, if -- in this case they're either making a
15 decision if they are choosing for the plaintiff or the
16 defendant. And then my -- what I would request to be
17 worded would be, we find for the plaintiff or we find
18 for the defendant. If they find for the plaintiff, they
19 go to the next step, actual damages in regards to that.
20 And then the next step after that would be, if your
21 verdict is for the plaintiff, please state the grounds.
22 Only I would just -- I mean, the way I see it worded is
23 they're already -- I would want to keep them together at
24 the beginning. And then they go to the next step to
25 determine the damages. And the next step would be to

1 state the grounds.

2 THE COURT: Well, you can take exceptions to
3 my charge if you don't like it.

4 MR. ARIAIL: Okay.

5 THE COURT: All right. Are we ready to go?

6 MR. ARIAIL: One more question I had, I went
7 back yesterday, and my understanding with regards to the
8 closings, I'm the defendant in regards to his claims of
9 trade secrets, breach of fiduciary of duty and
10 conversion. My understanding, I went back and pulled
11 the Mendelson decision in regards to counterclaims. I
12 know I have a counterclaim. The question I have, what I
13 understand, what I thought yesterday was, I was going to
14 open. He was then going to be able to come in and close
15 or respond to those arguments. Then I was going to come
16 back with my claims for commissions, what he's owed.
17 And then he was going to respond to that. My
18 understanding in reading it is, and I think what I would
19 request and do is to consolidate it, is that he opens.
20 I come in second and then he responds to everything that
21 I have. So I don't get to either open and close, or I
22 can either ---

23 THE COURT: Any objection to that, Mr.
24 Haynsworth?

25 MR. HAYNSWORTH: I guess not, Your Honor. So

1 ---

2 THE COURT: I mean, I don't have any problem
3 with that if that's what you want to do.

4 MR. ARIAIL: I mean, I just want to be able to

5 ---

6 MR. HAYNSWORTH: I would rather Mills go first
7 since that's where we left it yesterday, but I'm not
8 going to ---

9 THE COURT: All right. Then you'll open fully
10 on the law. And Mills will then argue and then you'll
11 reply to his argument. And then ---

12 MR. HAYNSWORTH: Okay.

13 MR. ARIAIL: Well, I thought -- and my
14 understanding, tell me if I'm wrong, he's got -- he's
15 opening for every -- he can come back and reply to my
16 arguments.

17 THE COURT: Exactly.

18 MR. ARIAIL: Okay.

19 MR. HAYNSWORTH: So me first, then Mills, then
20 me if needed, then we're done.

21 THE COURT: Okay. Is that the way we'll do
22 it?

23 MR. ARIAIL: That's fine with me.

24 THE COURT: All right. All right. Bring our
25 jury.

1 MR. ARIAIL: Your Honor, in regards to that,
2 and I just want to understand, if I don't bring
3 something up in my closing, then that is not a subject
4 that he can come up with?

5 THE COURT: He can reply to your counterclaim.

6 MR. ARIAIL: Well, what I'm asking is, the way
7 I see it is, he's got to open on his -- he's got to put
8 his whole arguments in regards to his trade secrets and
9 all of that.

10 THE COURT: Right.

11 MR. ARIAIL: Then I respond to his. My
12 counterclaim is going to come up in that. And then he
13 responds to that.

14 THE COURT: To your counterclaim?

15 MR. ARIAIL: Correct.

16 MR. HAYNSWORTH: So my second stab, if Mills
17 says something about my claims when he gets up that I
18 think is just wrong ---

19 THE COURT: No. When he gets up on his
20 counterclaim, he's going to address only his
21 counterclaim. You're going to argue fully.

22 MR. ARIAIL: Yeah. He's going to argue ---

23 THE COURT: Hold the jury.

24 MR. ARIAIL: My understanding is, he's going
25 to argue fully about his case in his opening, the law,

1 whatever he wants to do in that.

2 THE COURT: No. He's going to open on the
3 law. And then you're going to argue and then he's going
4 to reply to your argument.

5 MR. ARIAIL: I thought -- my understanding was
6 he has to open in regards to his arguments, I am able to
7 reply to his arguments, then he comes back and replies
8 to my arguments as part of that. So he would have all
9 of his arguments in there that I could be able to then
10 reply to, and then he comes back in with things that I
11 raised that are new to do that. So I see what his
12 arguments are in his opening. That's the way we've done
13 it before. We did that in the last case we had together
14 ---

15 MR. HAYNSWORTH: I just want to make sure that
16 I'm, you know, I get up. I do mine. Mills then gets up
17 and says A, B, C, D, E happened, talking about my
18 claims, not the counterclaims. And then he talks about
19 his counterclaims. I'm not limited when I reply just to
20 addressing his counterclaims if he says something in his
21 closing, you know, about my claims that I contend is
22 wrong.

23 THE COURT: Well, I think the simple way to do
24 this thing is for you to argue first.

25 MR. HAYNSWORTH: Right.

1 THE COURT: On your complaint.

2 MR. HAYNSWORTH: Yes, sir.

3 THE COURT: Mills gets up and argue on the
4 answer to your complaint. Okay?

5 MR. HAYNSWORTH: Okay.

6 THE COURT: And then, after he concludes that,
7 you can argue your counterclaim.

8 MR. ARIAIL: I would like to just consolidate
9 it all together. I mean, I don't have a problem with,
10 as I'm responding to him and at the same time I'm
11 bringing mine in and he can respond to everything.

12 THE COURT: If he does that, and then you
13 follow with arguing only respect to the counter. Well,
14 no, you've got ...

15 MR. ARIAIL: He could respond to my claims I
16 bring up.

17 MR. HAYNSWORTH: See that would be my concern,
18 Judge, is if Mills during his closing, he's addressing
19 two things; his defense to my claims and his
20 counterclaim.

21 THE COURT: Yeah.

22 MR. HAYNSWORTH: If he says something in his
23 closing relative to defending my claims that's wrong or
24 I think mischaracterizes the evidence.

25 THE COURT: He can't do that. You can argue

1 only with respect to your counterclaim.

2 MR. ARIAIL: What I'm understanding we're
3 doing is he's arguing on his claims in the beginning of
4 his opening.

5 THE COURT: Yeah.

6 MR. ARIAIL: I come in, I respond to all his
7 arguments that he's made in regard to his. I, in my
8 argument, what I was intending to do, was to be able to
9 bring out my counterclaims for wages, commissions. And
10 then he gets back up. In his reply he can respond to
11 all that I have addressed in mine that he wants to. And
12 in addition to that can respond to my counterclaim that
13 I have made arguments about.

14 THE COURT: Right.

15 MR. ARIAIL: So he gets an opportunity to
16 respond. I'm not saying he doesn't get that.

17 MR. HAYNSWORTH: Right. Not just to the
18 counterclaim, but if you said something I think is
19 improper.

20 MR. ARIAIL: Yeah, about my trade secret claim
21 or anything that I can argue, you can do that.

22 THE COURT: Okay.

23 MR. ARIAIL: But I just wanted him to have to
24 open fully so I can see what he has.

25 THE COURT: Okay. All right. Bring them on.

1 (WHEREUPON, the jury entered te open court at
2 approximately 9:12 a.m.)

3 THE COURT: Good morning.

4 THE JURY: Good morning.

5 THE COURT: Okay. Now, ladies and gentlemen,
6 we've reached the point in this trial where it's time
7 for the attorneys to make their closing arguments to
8 you. And when they have concluded their arguments then
9 I'll charge you the law with respect to the case.
10 All right. Mr. Haynsworth.

11 MR. HAYNSWORTH: May it please the Court?

12 **CLOSING STATEMENT**

13 **BY MR. HAYNSWORTH:**

14 Ladies and gentlemen of the jury, thank y'all for
15 your patience. I know this has been at times very
16 boring and y'all have other things you need to do. On
17 behalf of my clients and on behalf of the Highsmiths,
18 for the litigants in a lawsuit this is a super important
19 thing. And our judicial system is set up where citizens
20 come and provide jury service and y'all are the finders
21 of the facts. The evidence that's been presented,
22 either in documents or witness testimony, that's what
23 you have to judge. You have to decide who you believed,
24 who you didn't believe. You have to weigh the evidence
25 and draw whatever conclusions your common sense allows

1 you to draw from it.

2 Judge Pyle will charge you with the law that you
3 will apply to the facts you've heard. And I want to
4 briefly go over, if I could, some of the facts you've
5 heard in this case. One of the most difficult things
6 for me in the last two and a half years has to been to
7 find the ball because it keeps moving. Originally, I
8 find some documents. You heard both computer witnesses
9 talk about search terms. I did not have access to the
10 Highsmiths' laptop. All I had access to were documents
11 that happened to be triggered by certain search terms;
12 the search terms Mr. Ariail and I had gotten together to
13 agree on. And you heard testimony that there were
14 multiple searches. So I would find something that
15 looked very intriguing. How is a Girl Scout document in
16 Todd Highsmith's computer when the Girl Scouts have
17 never been a client of the Highsmiths. So as we go
18 along, have some documents, and you may recall I read
19 some deposition testimony with Mr. Highsmith. He
20 specifically said with regard to some of these documents
21 he admitted were on his personal flash drive. All
22 right. So did you in fact download MCC client
23 information that you originally obtained from an MCC
24 server onto your business laptops that yours, not the
25 one MCC issued you. But that was done inadvertently?

1 Yes. And is the only information you inadvertently
2 downloaded from the MCC server onto your business laptop
3 the information relative to S.C. Rural Water and Mr. and
4 Mrs. Woznick? Well, the other two was United Way of
5 Anderson County and the Girl Scouts that you had on your
6 list. And other than those four, would that be the
7 extent of any MCC client information that would have
8 been downloaded onto your business laptop? As far as I
9 know.

10 So we run additional searches, ladies and
11 gentlemen. And we start having other documents pop up.
12 And you'll be able to review some of the specific
13 information regarding these documents because the
14 Highsmiths' expert, Mr. Snoddy seated there, actually
15 did there different reports. One was in June, one was
16 in August, and one I saw for the very first time
17 yesterday. And if you look at those reports in
18 comparison, compare them, I think it'll illustrate what
19 I'm talking about that the ball kept on moving. In his
20 first report, the explanation for how documents from my
21 client wound up in their computer was, oh, it was an
22 attachment to an email when the client became a
23 Highsmith client. And that's how it got on the laptop.
24 And you'll see in Mr. Snoddy's first report that
25 explains these fairly sinister documents. Then you go

1 to his next report and the conclusions are completely
2 different because there were no email attachments. He
3 had a -- and I think it's actually on the front of his
4 report. He has a very sophisticated software program
5 called EnCase. And EnCase is able to go in and analyze
6 the entire hard drives, not just pulling up search terms
7 but to connect the dots with all the documents. And I
8 submit to you, ladies and gentlemen, if email
9 attachments from a client was the legitimate source of
10 these documents, then Mr. Snoddy would have discussed
11 the emails in detail, would have connected the dots for
12 you. And perhaps more importantly, the clients that are
13 now Highsmith clients that Mr. Ariail called to the
14 witness stand, did a single one of them say, I'm from
15 S.C. Rural Water. This document was in the possession
16 of the Highsmiths because they came to my office on X
17 day and I gave it to them or they downloaded it from my
18 system? Not a single witness said that, ladies and
19 gentlemen. In this case, in large part, is almost more
20 significant for what you didn't hear or what you didn't
21 see than what you did see. Mr. Snoddy tried to say that
22 our claim was limited to fifty-four documents and I'm
23 dumb and my computer guy is dumb and we had overlaps, so
24 it's really much less than fifty-four documents. And
25 that's all we're claiming. That is absolutely not all

1 we're claiming in this case, ladies and gentlemen. We
2 could have sat in here for a month and gone through
3 reams and reams and reams of paper. But I don't think
4 y'all would have been very happy had it been done that
5 way. And what I hope I've been able to prove to your
6 satisfaction is, those guys took stuff from Ms.
7 McKinley. And I think even their expert referred to it
8 as a sweeping download. That's all it takes.

9 Every morning I get up I read -- I hear something
10 on the news about cyber theft or computer hacking. It
11 is rampant in our society. And you can literally take
12 something that a lady like Toni McKinley has spent
13 thirty-eight years of her life building and you can suck
14 every document out of that company, slap your name on it
15 and rock right along and do business.

16 Now, one of the things that the Judge will discuss
17 with you are the causes of action that we have brought.
18 There are three. One is conversion, taking something
19 that's not yours. The other is breach of fiduciary
20 duty. You owe me a duty of loyalty. You work for me.
21 You're not supposed to be using my computer three months
22 before you leave to generate the H&H business plan. And
23 you're not supposed to be using my equipment to take my
24 stuff and compete against me. The third cause of
25 action, ladies and gentlemen, is trade secret theft.

1 And the Judge has indicated will charge y'all what the
2 law is regarding that cause of action. But essentially,
3 a trade secret is defined as one thing, two things,
4 three things, either something in isolation or something
5 that combined together would have economic value to
6 someone else. We've heard about bank confirmation forms
7 and you'll have them back with you in the jury room.
8 The metadata, the computer data as to were those forms
9 came from indicate they're McKinley Cooper authored
10 documents. And, again, Mr. Snoddy's report goes into
11 this and I encourage you to read all three versions of
12 his report. But ladies and gentlemen, if you take a
13 bank confirmation form with account numbers and customer
14 information, and all you do is slap your name on it when
15 you get it, you could save some time and effort. You
16 don't have to go back and recreate the information. If
17 you take a test to transactions work paper and then you
18 happen to snag that client, you're already ahead of the
19 game. You don't have to go redo all the work.

20 And ladies and gentlemen, we believe that is a
21 significant reason the Highsmiths were able to underbid
22 Ms. McKinley on every client we got on the witness
23 stand. They knew the prices. They knew the contract's
24 up for renewal. And although it takes X amount of man
25 hours to do an audit no matter who does it, if you've

1 got eighty percent of what you need from someone else,
2 you can obviously do it much cheaper than someone else
3 could.

4 Ladies and gentlemen, another aspect of what we
5 found, and again, the ball continuing to move, you heard
6 some testimony from Mr. Hemond and he did a PowerPoint
7 presentation. And I think these are addressed in Mr.
8 Snoddy's final report. You may recall Mr. Hemond
9 discussed a QuickBook ini file. And the significance of
10 the QuickBook ini file that he found was it has
11 customers that have never been their customers. So the
12 explanation of, we got that information from the
13 customer; well, it's impossible. If you never had the
14 Town of Gray Court as a customer, you could have never
15 gotten the Town of Gray Court documents from them. If
16 you never had the Phyllis Wheatley Center as a customer,
17 that can't be the explanation for the source of the
18 documents. We believe, ladies and gentlemen, and,
19 again, it is up to you and your capacity as jurors to
20 weigh the evidence. But if you look back at the
21 customer list that was found in Shane Highsmith's desk
22 after he left, we believe that the effort to plan this
23 out began shortly after Todd Highsmith went to work. He
24 comes to work there, tells you he's taken a forty
25 thousand dollar pay cut to go to work for McKinley

1 Cooper in hopes that he might be able to buy an interest
2 in it one day. Well, ladies and gentlemen, there's no
3 need to buy an interest in it when at the end of the day
4 you've taken everything that you need to go start your
5 own operation. And perhaps the most insidious thing of
6 all is, October/November time frame when we believe most
7 of the copying stuff was going on, Ms. McKinley's not
8 there half the time. She's dealing with her
9 chemotherapy. And while she's dealing with that, her
10 supposedly loyal employees are wearing out her copy
11 machine and wearing out her computer system and taking
12 everything they're going to possibly need to compete
13 with her. You heard a lot about well, we got that
14 document, but we didn't access it, so it's okay. Well,
15 I submit to you ladies and gentlemen there's no reason
16 to access a client's file until you land them as a
17 client. The sweeping download from the MCC computer, I
18 don't know whether it was discarded and quit working.
19 It may still be out there. We heard testimony, I think
20 from Mr. Snoddy, about a number of flash drives the
21 Highsmiths used.

22 And, ladies and gentlemen, finally, the Judge will
23 charge you regarding punitive damages. You've heard
24 testimony from Dr. Alford and Ms. McKinley about the
25 money she spent over the years developing her proposals

1 and those sort of things. Dr. Alford discussed the
2 economic loss to McKinley Cooper caused by underbidding
3 and using their information to get all of those clients.
4 Punitive damages are a different animal. Punitive
5 damages are not designed to compensate a loss or an
6 injury. Punitive damages are designed to punish.
7 They're designed to punish for conduct that society
8 considers reprehensible. That's really bad what you did
9 and you need to be punished for it. And I submit to
10 you, ladies and gentlemen, based on the evidence we've
11 heard this week, that this is absolutely a case where
12 you should award, in addition to actual damages,
13 punitive damages. Because stuff like this should not go
14 on.

15 Thank you very much.

16 THE COURT: All right. Mr. Ariail.

17 MR. ARIAIL: Thank you, Your Honor.

18 **CLOSING STATEMENT**

19 **BY MR. ARIAIL:**

20 Ladies and gentlemen, thank you very much for your
21 time and effort this week. I know it's been a long week
22 and I'm going to try to expedite this as much as
23 possible. But I want to go into some of the details
24 about this case that I think are extremely important.

25 I just heard Mr. Haynsworth get up here and say,

1 and if you have documents on there you don't need them
2 until you've got the client. Well, the key is that
3 we've been able to show throughout this entire process
4 is, they've put up documents of clients that we don't
5 have. Things we don't have. They haven't brought one
6 client in regards to this.

7 Now, I want to take you back and give you a little
8 bit of background about this because I think it speaks
9 volumes about the individuals involved in this case.
10 Todd and Shane both testified. They're CPAs. Todd was
11 there twelve years; was with Ms. McKinley. She went
12 out, ask him to come back be able to work for him. Gave
13 him a raise. At no time during this whole process did
14 she ask him, hey, sign a non-compete; do this. I want
15 you to enter into these agreements. Went along. They
16 wanted ownership there. Everybody wants to own a
17 business. We, you know, want to be able to -- they
18 wanted to go out and be able to do what they needed to
19 do to start to build their practice. These are guys
20 that were, you know, were looking to buy in with her
21 daughter into her business and to be able to do what
22 needed to be done to have their own practice.

23 Now, as you've seen, and we put up the evidence,
24 and which I think was highly relevant. They're showing
25 that, hey, we've done these things. We've taken all

1 these documents. Well, if that's the case why not just
2 go in on a Sunday, put the flash drive in, walk out the
3 door and never come back. That's not what happened
4 here. What happened here is these guys wanted to buy
5 into this business. They wanted an integral part in the
6 business. They were willing to pay a lot of money, as
7 you've heard, to be able to do this. Went through
8 negotiations, went through the whole process. You heard
9 Ms. McKinley get on the stand and say, well, you know,
10 the whole reason this is, they wouldn't sign a non-
11 disclosure. Well, at one time to sign a non-compete.
12 I'm not sure what it was, but I've shown you a document
13 that's part of the evidence that shows they sent to her
14 they were willing to sign a non-disclosure
15 confidentiality agreement. They were willing to keep
16 that information confidential. They wanted to buy the
17 company.

18 Now, my view of this case, and really it comes down
19 to a simple statement. And I think it was made by Ms.
20 McKinley. I am better off without them. Now, I don't
21 know how you say that except when I show that she's made
22 the year before to the year after a hundred and thirty
23 thousand dollars more. Okay. So she's actually made
24 more money coming in here claiming damages, claiming
25 issues in regards to that. And she said it. She said

1 -- she made another statement I thought that was highly
2 relevant to this case. It's okay to take other people's
3 clients so long as you don't take my clients. I don't
4 know how to say it any easier, but this society is based
5 on individuals being able to compete, go out, start your
6 business, do your thing. Do what you need to do. If we
7 took the approach that no one could leave a business and
8 go out and start a business, there wouldn't be any small
9 business owners. Everybody leaving a firm would have an
10 issue. If we were allowed to bring lawsuits against
11 individuals simply because they left, no one could start
12 a small business.

13 And what you have to look at, and I know y'all will
14 when you get back and look at the evidence, the key to
15 case is focus on what the trade secret, first of all,
16 statue says. The Judge is going to give you an in-depth
17 charge in regards to the law on that. I can tell you
18 there's not one trade secret in this case. There's not
19 one document they have been able to say is a trade
20 secret. You heard our expert get on the stand. I
21 brought it in, didn't have to, didn't need to, because I
22 don't think anything qualifies as a trade secret, but I
23 wanted y'all to hear from an expert who's been doing
24 this for years, to be able to hear, hey, this is not a
25 trade a secret. This is not a document you can say ...

1 Second of all, it's owned by the other individuals.
2 It's owned by the company that has the information on
3 it. This is smoke and mirrors, ladies and gentlemen.
4 What they're trying to do is say, hey, they've breached
5 these standards. They've done this. Well, that's with
6 the licensing board. Those licensing standards, that's
7 to say, hey, they've done all this bad stuff. And so,
8 hey, find for us on the trade secret. Find for us on
9 these causes of action when they don't have the
10 documents to be able to say that. That's why I wanted
11 you to hear him say, I looked at the documents, the
12 fifty-seven documents and nothing's a trade secret. I
13 also want you to take a look when you go back at the
14 letter that Mr. Haynsworth sent me. It speak volumes.
15 And now they're saying, well, there's this other
16 information we have out there. After two and a half
17 years, after searching all these computers, after
18 thousands of documents we reviewed, after all this time,
19 well, now, there's other stuff out there. We just
20 haven't been able to find it. I don't know, that seems
21 kind of odd to me that you wouldn't just come in and
22 say, hey, look, we found your audit review list. We
23 found our customer list. We found this document that
24 says you took it. They don't have it. In fact, that's
25 why I brought in Mr. Snoddy to say, hey, look, tell us

1 if they accessed these documents. Now we know the
2 documents are on there. You've heard Todd and Shane
3 testify in regards to those documents. And we know they
4 shouldn't be there, but it doesn't mean they were
5 utilized. It doesn't mean they're trade secrets.

6 Now, as you'll see, and you'll go through and look,
7 those fifty-seven documents are part of a letter that
8 was given to us by Mr. Haynsworth. He said, here are
9 the documents, fifty-seven; okay? We come into court
10 and y'all can count them back up. There are eleven
11 documents which are the focus now. We've gone from
12 three point five million files on a computer, I think is
13 what Mr. Snoddy said, somewhere in that range, three or
14 four million documents. Okay, that's on people's
15 computers. Everybody has that type of documentation on
16 your computer. And as a result, we've gone and done
17 these searches. We've created these things. We've
18 looked at this information. We've allowed them to, hey,
19 search for any clients you want to that you have that's
20 part of that. And we've come up with eleven documents;
21 fifty-seven to eleven. That's what we brought into
22 court. And you go look at the documents; none of them
23 are the Highsmiths' clients, none of them. And what
24 you'll see is -- their argument now is, well, we'll just
25 waiting to open the documents up until we get the

1 client. Well, what good is that? You would open the
2 documents up to go get their clients. You would open
3 them on your computer. You would have used them. Our
4 expert said those documents hadn't been accessed. You
5 can see the ones. You look at the written time in his
6 report. That's why I submitted his report because that
7 is a key item in this case. If those documents were
8 opened, if they were utilized, they would be standing up
9 here right now telling you these are things, hey, we've
10 got them. They used it right afterwards. They used it
11 right before they went to get them.

12 Another thing you look at, and I didn't have to do
13 this. It's not my burden. And I want to explain to you
14 the burden. It's their burden to prove these are trade
15 secrets, breach of fiduciary duty, conversion. Where
16 were the clients? They brought in one client that we do
17 not have, Ms. Nestor. We brought in client after client
18 after client after client to show you, hey, Steve
19 Wilson, I like those guys. I went with them. Kate
20 Franch, Neighborhood Housing Corporation. I thought she
21 was probably one of the better ones to show you. I
22 didn't even know -- I didn't know the Highsmiths. I
23 didn't know who they were, but, hey, I got a referral
24 for them and I went with them. How does that -- how are
25 they claiming damages in Charlie Alford's reports for a

1 client that came to us without us going to them.

2 Now, my view of this case and when I look at it, it
3 simply comes down to one simple fact -- one simple set
4 of facts. They were buying out the business and what
5 happened was -- is that Ms. McKinley figured out, okay,
6 I'll get them into a situation where I'll get them into
7 a non-compete. I'll have more leverage. It's a shrewd
8 way of doing it. But the problem was they knew that if
9 they signed that document, they're not practicing CPA
10 work in the Upstate of South Carolina. They're going to
11 have to move. Their families are going -- it's sad.
12 But I can tell you those guys have families. And as all
13 of us do, they wanted to support their families. They
14 wanted to go out and do what they needed to do. And
15 it's hard to know if you're going to sign a document,
16 you're not going to be able to work. And they went out
17 and they decided we've got to leave. And I'm tired of
18 hearing they left. They left. They didn't leave. They
19 were told to pack their bags, told to get out of here.
20 And that's what she did. And the reason she did it is
21 because she figured out I am no longer -- I'm not in
22 control. But what she is in control of and what she did
23 is she brought a lawsuit against them on a baseless
24 meritless claims. And the reason she did it is, is
25 because she said the only other option I've got now that

1 they're out competing is I'm going to drive their
2 practice in the ground. I'm going to run them out of
3 business. It's sad and it is a -- it just -- through
4 the whole process, I've said I can't believe we've been
5 around to do this, that we've gotten this far. But
6 these guys have gone through it and what they've gone
7 through with their families and what they've had to
8 endure. But I can tell you -- and I know looking -- and
9 that's why we brought this information in. We didn't
10 have anything to hide. My expert said, hey, if it was
11 there, I was going to tell you. It's as simple as that.
12 There's nothing there.

13 Ladies and gentlemen, it's a very straightforward
14 case, I think. There's a lot of other things I can go
15 into. And I can tell you that if you look at what a
16 trade secret is, you'll see there's no trade secrets.
17 If you look at what fiduciary duties they had, you'll
18 see, hey, they can go out, they can do what they can.
19 They didn't have a non-compete. They're allowed to go
20 out. Converting documents, converting things, these
21 claims, this is vindictiveness at its best. It's sad.
22 And I think y'all will see that.

23 And it's our hope when you do that, you'll see that
24 Todd is owed the money he deserves from his commission.
25 And at the same time, she should not be awarded damages

1 in this matter.

2 I thank you for your time and effort. I appreciate
3 it. Thank you.

4 THE COURT: All right. Mr. Haynsworth.

5 MR. HAYNSWORTH: Ever so briefly, Your Honor.

6 **CLOSING STATEMENT**

7 **BY MR. HAYNSWORTH:**

8 Ladies and gentlemen, Mr. Ariail made an issue of
9 Sherry Nestor. And I will mess up the pronunciation.
10 She worked for a water district down near Aiken. He's
11 right. She's a long time client of McKinley Cooper,
12 still a client of McKinley Cooper. But the reason she
13 was brought, ladies and gentlemen, as you will recall,
14 that she was contacted by Shane Highsmith shortly after
15 he left McKinley Cooper. And he specifically told her,
16 hey, I'd like to do your audit work. I know what you
17 were charged last year. I can beat the price. Now,
18 Shane says he knows the price in his head, so that's
19 okay. And in some sense, that may be correct. And I
20 agree with Mr. Ariail, in our society it is absolutely
21 perfectly okay to compete. And there's nothing wrong if
22 CPAs want to leave a firm and go hang their shingle,
23 absolutely okay to do. And what they learn as CPAs
24 working for McKinley Cooper, you can't unlearn that
25 information. They're absolutely entitled to take their

1 skills and their knowledge in their head that they
2 learned. But they're not entitled to steal stuff.
3 That's just wrong. And when Mr. Highsmiths says, well,
4 I just knew the price in my head, I didn't have a, you
5 know, a price list. Why did he have to sit there when I
6 asked him, and what did you charge for this client
7 versus McKinley Cooper. He had to look at his own
8 invoices that you'll have in evidence to figure out what
9 Highsmith charged. He couldn't even remember that in
10 his head. There's no way in the world that all these
11 customers who were underpriced, that he just simply
12 remembered what they had been charged in years past.
13 And ever so briefly on the counterclaim, Todd contends
14 that Ms. McKinley owes him money. That he was to get
15 thirty percent of all the clients that he brought in the
16 door forever. Year one she told you, I paid a premium.
17 I paid him thirty percent. If he's going to bring all
18 these clients then I'm willing to pay to get them. But
19 the normal McKinley Cooper commission is you get fifteen
20 percent. It's in the employee manual. So year two Todd
21 comes to her and he gives her a commission statement.
22 He's got thirty percent. No, no, no, Todd. It's
23 fifteen percent. Thirty was just year one. There's not
24 a document, not an email, not a memo he put in his
25 computer. There's nothing that he ever said to Ms.

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1 McKinley after he went and calculated fifteen percent
2 and gave her the statement, she wrote him a check and he
3 cashed it. There's not a shred of evidence that fifteen
4 percent is not exactly what he'd agreed to in the
5 commission statement he provided to her. And the
6 reason, ladies and gentlemen, that she has been sued for
7 this commission is the best defense is a strong offense.
8 Well, if you're going to sue us, we're going to come up
9 with something to sue you back. So mysteriously,
10 without any documentation or complaints that fifteen
11 percent wasn't the number, you're being told ,oh, Todd's
12 owed money. Well, I don't believe there's any evidence
13 to support it. And quite frankly, given the moral
14 compass of the various players here, I'm sort of
15 insulted that we had to defend that claim. But
16 nonetheless like the entire suit, that's something that
17 you will have to consider and ponder and weigh based on
18 the facts you've heard and the law Judge Pyle will give
19 you to apply.

20 Thank you.

21 THE COURT: Anything?

22 MR. ARIAIL: No, Your Honor.

23 **CHARGE**

24 **BY THE COURT:**

25 Now, Mr. Foreman, ladies and gentlemen of the jury,

1 as you now know, the plaintiff in this action is seeking
2 recover on three separate theories. The first one being
3 violation of the Trade Secret Act; secondly, for a
4 breach of a fiduciary relationship; and, third, for
5 conversion.

6 Now, with respect to the first, I charge you that
7 section 39-8-10 of our code of laws reads, this chapter
8 may be cited as the South Carolina Trade Secrets Act.
9 I'm going to read further certain additional sections of
10 this act, as follows: As used in this chapter, unless
11 the context requires otherwise, improper means include
12 theft, bribery, misrepresentation, breach or inducement
13 of a breach of a duty to maintain secrecy. Duties
14 imposed by the common law statute, contract, license,
15 protective order or other court or administrative order
16 or espionage through electronic or other means.
17 Misappropriation means acquisition of a trade secret of
18 another by a person by improper means. Acquisition of a
19 trade secret of another by a person who knows or has
20 reason to know that the trade secret was acquired by
21 improper means or disclosure or use of a trade secret of
22 another without expressed or implied consent by a person
23 who used improper means to acquire knowledge of the
24 trade secret. Acquired by mistake or under
25 circumstances giving rise to a duty to maintain its

1 secrecy or limit its use. Or derived from or through a
2 person who owed a duty to the person seeking the relief
3 to maintain its secrecy or limit its use. Or before a
4 material change in his position knew or had reason to
5 know that it was a trade secret and that knowledge of it
6 had been acquired by accident or mistake.

7 Owner means the person or entity in whom or in
8 which rightful legal or equitable title to the trade
9 secret is reposed. Person means an individual, a
10 corporation, partnership, association or any other legal
11 or commercial entity. Trade secret means information
12 including but not limited to a formula, pattern,
13 compilation, program, device, method, technique,
14 product, system or process, design, prototype, procedure
15 or code that, one, derives independent economic value,
16 actual or potential from not being generally known to
17 and not being readily ascertainable by proper means by
18 the public or any other person who can obtain economic
19 value from its disclosure or use. And is the subject of
20 efforts that are reasonable under the circumstances to
21 maintain its secrecy. A trade secret may consist of a
22 simple fact, item or procedure or a series of sequence
23 of items or procedures, which although individually
24 could be perceived as relatively minor or simple,
25 collectively can make a substantial difference in the

1 efficiency of a process or the production of a product
2 or may be the basis of marketing or commercial strategy.
3 The collective effort of the items and procedures must
4 be considered in the analysis of whether a trade secret
5 exists and not the general knowledge of each individual
6 item or procedure.

7 Section 39-8-30 reads: Trade secrets; employees'
8 obligation to refrain from disclosing; civil actions and
9 remedies. A trade secret endures and is protectable and
10 enforceable until it is disclosed or discovered by
11 proper means. Every employee who is informed of or
12 should reasonably have been known from the circumstances
13 of the existence of any employer's trade secret has a
14 duty to refrain from using or disclosing the trade
15 secret without the employer's permission independently
16 of and in addition to any written contract of
17 employment, secrecy agreement, a non-compete agreement,
18 a non-disclosure agreement or other agreement between
19 the employer and the employee. A person aggrieved by a
20 misappropriation, wrongful disclosure or wrongful use of
21 his trade secrets may bring a similar action to recover
22 damages incurred as a result of the wrongful acts and to
23 enjoin its application, disclosure, use or wrongful acts
24 pertaining to the trade secrets. A complainant is
25 entitle to recover actual damages for misappropriation

1 of trade secrets. A material and prejudicial change of
2 position before acquiring knowledge or reason to know of
3 misappropriation may render full monetary recover
4 inequitable and may form the basis for reducing monetary
5 recovery. Damages may included both the actual loss
6 caused by the misappropriation or the unjust enrichment
7 caused by the misappropriation that is not taken into
8 account in computing actual loss. In lieu of damages
9 measured by any other methods, the damages caused by
10 misappropriation may be measured by imposition of
11 liability for a reasonable royalty for a
12 misappropriator's unauthorized disclosure or use of a
13 trade secret. Upon a finding of willful, wanton or
14 reckless disregard of the plaintiff's rights, the court
15 may award separate exemplary damages. That, ladies and
16 gentlemen is the plaintiff's allegations concerning the
17 violation of the Trade Secrets Act.

18 The plaintiff next seeks recover for breach of a
19 fiduciary relationship. In this connection I charge you
20 that a fiduciary relationship is founded on trust and
21 confidence, reposed by one person in the integrity and
22 fidelity of another. It exists when one imposes a
23 special confidence in another so that the latter in
24 equity and good conscience is bound to act in good faith
25 and with due regard to the interests of the ones

1 imposing the confidence. To constitute a fiduciary
2 relationship, the relationship must be more than a
3 casual relationship. I further charge you that a
4 fiduciary relationship cannot be established by the
5 unilateral action of one party. The other party must
6 have actually accepted or induced the confidence placed
7 in him. That, ladies and gentlemen, is the theory upon
8 which the plaintiff seeks damages for a breach of a
9 fiduciary relationship.

10 The third action brought by the plaintiff is that
11 of conversion. Now, a conversion is an unauthorized
12 assumption of exercise of the right of ownership over
13 goods or personal property belonging to another or the
14 alteration of its condition or the exclusion of the
15 owner's rights. And it may arise either by a wrongful
16 taking or some other illegal assumption of ownership.
17 Stated differently, conversion occurs when a person
18 wrongfully acquires possession of another's personal
19 property, thereby depriving him of it. It is a distinct
20 act of dominion wrongfully exerted over another's
21 personal property, and denial of or inconsistent with
22 the owner's title or rights therein or in derogation,
23 exclusion, or defiance of such right. It takes place
24 when a person does any act amounting to an appropriation
25 to himself or itself or herself. Where there is an

1 unlawful conversion, no demand is necessary because any
2 withholding of property against the will of the owner is
3 evidence of conversion. And the intent with which a
4 wrongful act is done is not an essential element of
5 conversion. It is enough that the true owner has been
6 deprived of his, her, or its property by the
7 unauthorized act of some person who assumes dominion and
8 control over it. Conversion is a wrongful act which
9 cannot be justified or excused in law. If an owner
10 expressly or impliedly assents to or ratifies the
11 taking, use, or disposition of his or her property, he
12 or she cannot recover as for a conversion thereof. An
13 act which would otherwise constitute a conversion may be
14 precluded from having that effect by the plaintiff's
15 consent to the act, either expressed or implied.

16 So, ladies and gentlemen, if you find that the
17 plaintiff is entitled to recover a monetary verdict in
18 this case, then I charge you that the plaintiff would be
19 entitled to recover such actual and compensatory damages
20 that have been proven to your satisfaction; that is to
21 say such damages suffered in this case.

22 Now, the plaintiff would not be entitled to recover
23 conjectural or speculative damages in any event. But if
24 you find that the plaintiff is entitled to a verdict for
25 actual damages, it should include all damages of which

1 were naturally the proximate consequence of the alleged
2 acts of the defendants.

3 Now, with respect to the plaintiff's claim for
4 punitive damages, which are allowed upon proof in the
5 action for a conversion or the violation of the other
6 act that I read to you, then I charge you that if those
7 act or acts were the result of recklessness, willfulness
8 or wantonness, then you may consider the element of
9 punitive damages. In the assessment of punitive damages
10 there is no exact standards of which can be used. The
11 things which you may consider in the assessment are the
12 nature of the wrong committed, the punishment, if any,
13 which is to be meted out therefor, and the ability of
14 the defendant to pay. Ladies and gentlemen, punitive
15 damages have relation to an injured party in only one
16 respect, and that is to vindicate his, her or its right,
17 which has been recklessly, willfully, and wantonly
18 invaded. One of the chief purposes in awarding punitive
19 damages is to punish the wrongdoer, not only to prevent
20 him, her or it from a recurrence of the wrongful act,
21 but to deter others in conduct of the same or similar
22 kind.

23 Now, ladies and gentlemen, I charge you that in any
24 civil action where punitive damages are claimed, the
25 plaintiff has the burden of proving such damages by

1 clear and convincing evidence. Proof by clear and
2 convincing evidence is a similar higher degree of proof
3 than proof by the greater weight or preponderance of the
4 evidence. Clear and convincing means evidence which is
5 not ambiguous, doubtful or contradictory.

6 Now, the defendant, Todd Highsmith, has filed a
7 counterclaim or a complaint back against Toni McKinley.
8 And in this action he alleges that she breached a
9 contract with him. Now, with respect to this cause of
10 action by the defendant, Todd Highsmith, I charge you
11 that in a case involving an alleged contract -- in order
12 to understand this I need to tell you what a contract
13 is. A contract is an agreement that creates an
14 obligation between at least two parties. It may be
15 either oral or it can be in writing. The essential
16 elements of a contract are, first of all, parties
17 competent to contract. Secondly, a subject matter.
18 Third, a legal consideration and a mutuality of
19 agreement. That is to say a meeting of the minds of
20 both parties to the contract of all essential or
21 material elements of the subject matter of the contract.
22 I further charge you that a meeting of the minds would
23 mean that an agreement was reached. A meeting of the
24 minds, there must be a mutuality of obligation. That
25 is, the parties to the contract must be bound in one

1 manner or the others. I further charge you that an
2 understanding or an attempt to reach an agreement in the
3 future is no contract and is not enforceable. Unless an
4 agreement to make a future contract is definite and
5 certain as to all subjects to be embraced by the
6 contract, it is of no effect.

7 So for the defendant to recover in his counterclaim
8 against the plaintiff, he must prove to your
9 satisfaction by the greater weight or preponderance of
10 the evidence that a contract was entered into between
11 him and Ms. McKinley. Secondly, he must prove that she
12 breached the contract. That is that she did not comply
13 with the contract, but rather broke it. And thirdly, he
14 must prove -- he must establish that as a result of this
15 breach that he has sustained damages.

16 Now, ladies and gentlemen, as jurors in this case
17 you have a function or a responsibility that is entirely
18 separate and distinct from my function in this case as
19 the trial Judge. I am prohibited by the constitution of
20 our state from charging you on the facts of this case.
21 I am prohibited from discussing the facts with you or in
22 any way letting you know what my personal feelings, if
23 any, are about this case. Now, that's because you, and
24 you alone, are the judges of the facts. Therefore, if
25 during the course of this trial or during the course of

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1 my charge you have a feeling or you've been left with
2 the impression that I have a personal feeling about this
3 case one way or another, then you disregard that feeling
4 or that impression. You and you alone are the judges of
5 the facts. It's also your duty, and yours alone, to
6 weigh the testimony and evidence presented in this case
7 and to pass upon the credibility or the believability of
8 the witnesses you heard testify. In this connection you
9 have the right to believe all that a witness told you or
10 you can disbelieve all a witness told you. You can
11 believe a part of what a witness told you and disbelieve
12 a part a witness told you. On the other hand, you have
13 the right to believe several witnesses as against the
14 one. And you have the right to take into consideration
15 any bias or prejudice or sympathy you may have in
16 weighing the evidence in this case.

17 Now, it is my duty in this case to charge you the
18 law which is applicable to the facts in the case. And
19 it's not a question of what you feel the law should be
20 or might be or what the attorneys may have told you it
21 is, because under your oath, you are required to take
22 the law as I have given it to you. It is also my duty
23 to see that this trial is conducted according to the
24 rules of evidence, as well as to the applicable to the
25 admissibility of the testimony in the case. And I

1 therefore charge you that you are not to consider in any
2 way testimony or evidence that has been ruled out by me
3 as being disallowed or that you couldn't do it.

4 Now, in this case, as in any case, where the
5 parties disagree and deny liability in the case, then it
6 becomes your duty to find the allegations of each
7 complaint to your satisfaction by the greater weight of
8 the evidence. Now, when we speak of weighing evidence,
9 we are, of course, are referring to a mental process.
10 Obviously, there are no scales upon which intangible
11 evidence can be weighed. Therefore, you must resort to
12 your own logic, to your own reason and to your own
13 judgment in weighing the evidence in this case. It is
14 unnecessary for me to tell you that weight of evidence
15 is not determined by counting witnesses. In other
16 words, that evidence weighs, which convinces you of its
17 truth without regard to whether it comes from a witness
18 for the plaintiff or a witness for the defendant.

19 Now, since the burden is on the plaintiff with
20 respect to the complaint, if you should find that
21 evidence is evenly balanced, then your verdict must be
22 for the defendant. In other words, the plaintiff cannot
23 recover unless the evidence weighs or preponderates in
24 its favor. Again, with respect to the counterclaim by
25 the defendant, Todd Highsmith, against Ms. McKinley, the

1 burden is on him to prove the allegations of his
2 complaint.

3 Now, ladies and gentlemen, I further charge you
4 that the rules of evidence ordinarily do not permit
5 witnesses to testify as to opinions or to conclusions.
6 An exception to this rule exists as to those whom we
7 call expert witnesses. Witnesses who, by education or
8 experience, have become expert in some art, science,
9 profession or calling, may state an opinion as to
10 relevant and material matter in which they profess to be
11 expert and may also state their reasons for their
12 opinion. So you should consider each expert opinion
13 received in evidence in this case and give it such
14 weight as you determine it should receive. If you
15 should decide that the opinion of an expert witness is
16 not based upon sufficient education or experience or if
17 you should conclude that reasons given in support of
18 that opinion are not sound or that it's outweighed by
19 other evidence, then you can disregard that opinion in
20 its entirety. An expert's testimony is to be given no
21 greater weight than that of any other witness simply
22 because that person has been declared to be an expert.
23 You're not required to accept a purported expert's
24 opinion even though it is uncontradicted.

25 Now, ladies and gentlemen, I have prepared verdict

1 forms in this case. The first form I will discuss with
2 you is the form for the plaintiff, McKinley Cooper
3 against the Highsmiths. And there is a possibility of
4 two verdicts in this case, either a verdict for the
5 plaintiff or a verdict for the defendant. Now, the
6 first possible verdict would be, we, the jury, find for
7 the plaintiff, blank dollars actual damages and blank
8 dollars punitive damages. Or secondly, we the jury find
9 for the defendants. So with respect to the verdict in
10 this case, if you should conclude that the plaintiff has
11 sufficiently proved that it's entitled for actual
12 damages, then Madam Foreman, you would write out that
13 amount. And then put the figures in parenthesis.
14 Additionally, if you find that the plaintiff is entitled
15 for punitive damages for conversion or for violation of
16 the statute I read to you, then you would write out the
17 amount of punitive damages and then put that figure in
18 parens. And if, on the other hand you find that the
19 defendants are entitled to a verdict on the complaint,
20 then, as I say number two reads, we, the jury find for
21 the defendants. And I would ask that you simply circle
22 all of number two, we, the jury, find for the
23 defendants. Now, if you find a verdict in favor of the
24 plaintiff, then I need some additional information from
25 you. I've written out, if your verdict is for the

1 plaintiff, please state on what ground or grounds. So,
2 if you find a verdict in favor of the plaintiff on the
3 first cause of action, that is violation of the Trade
4 Secret Act, you would put that in. If you decide in
5 addition it is entitled to recover for conversion, you
6 would write that in. And if you find that the plaintiff
7 is entitled to recover on the third ground, then you
8 would put that in. So, in other words, what I'm telling
9 you is if you find that the plaintiff has successfully
10 proved its case, whatever that is, if it's just for one,
11 you would put that in. If it's for two, you would put
12 both of them in. If it's for all three, then you would
13 write out all three causes of action. And then, Madam
14 Foreman, please sign your name on the line where it says
15 foreperson signature.

16 Now, with respect to the defendant, Todd
17 Highsmith's, counterclaim or his third-party complaint
18 back against Ms. McKinley. There are one of two
19 possible verdicts on that. Number one, we find for the
20 plaintiff, blank dollars actual damages. If that's your
21 verdict, then again you would write out the amount, put
22 the figures in paren. If your verdict on the
23 counterclaim or third-party complaint is for the
24 defendant, that is, Ms. McKinley, then you would use
25 number two, we, the jury, find for the defendant. And

1 then again you would sign your name on the line,
2 foreperson's signature.

3 All right. Ladies and gentlemen, at this time I
4 need to go over my charge with the lawyers. I need you
5 to go back into your jury room, but do not begin your
6 deliberations until I send word in for you to do so.
7 Thank you.

8 (WHEREUPON, the jury exited the open court at
9 approximately 11:01 a.m.)

10 THE COURT: All right. Anything further from
11 the plaintiff?

12 MR. HAYNSWORTH: Your Honor, two requests. I
13 ask they also be charged on the definition of
14 circumstantial evidence because obviously ---

15 THE COURT: You're right. I neglected to do
16 that. And I will certainly do that.

17 MR. HAYNSWORTH: And the other request, Your
18 Honor, is in your charge relative to conversion you
19 explained that converted personal property and I don't
20 have a case in front of me, but I think the things that
21 would be converted under personal property have been
22 defined to include money. And I'm just concerned if
23 they don't get a definition of what is personal property
24 to include money, they may miss that the moonlighting
25 invoices is money that -- I just -- I don't know if

1 they'll equate personal property to be a whole series of
2 potential things, including money.

3 THE COURT: Okay. All right. Mr. Ariail?

4 MR. ARIAIL: Yes, Your Honor. In my, and
5 maybe I just missed it, I did not hear that the verdict
6 had to be unanimous.

7 THE COURT: No, you're right. I'll tell them
8 that.

9 MR. ARIAIL: I also -- my understanding of the
10 Trade Secrets Act was there was -- I don't want any
11 confusion. I thought the determination is not punitives
12 for that; it's exemplary damages. And so I don't -- I
13 mean, if they find punitives, I don't know if they can
14 punitives; under the Trade Secret Act they can get two
15 times the damages.

16 MR. HAYNSWORTH: That punitives means willful
17 which triggers the Judge ---

18 THE COURT: Right. And then I'll determine as
19 to whether or not he's entitled for that amount to be
20 increased.

21 MR. ARIAIL: Well, my concern is, is that
22 let's say they find for punitives and they put the
23 punitive amount in here. They're awarding damages for
24 the trade secret in this when I'm understanding is all
25 they can award trade secret -- I mean, punitives for is

1 conversion. So my concern is, let's say they come back
2 and they say, well, we give punitive damages. Well,
3 they find three thousand dollars or whatever for the
4 invoices that my client has used. Well, then my issue
5 is, I would have the argument that, I mean, if they
6 award a hundred thousand dollars that's going to be
7 certainly way above what they ever would have been able
8 to do or get under the law for punitives, because it's
9 disproportionate. But they've kind of put those two
10 together. That's my concern with that. I don't have a
11 -- I think the way I would have liked to do it is say
12 the punitives are one for that. Then you can find if
13 it's willful under the trade statute then that invokes
14 for you to be able to make that decision.

15 THE COURT: Well, it's got to be willful in
16 order to award punitive damages in the first place,
17 conversion or ---

18 MR. ARIAIL: No, I agree with that. I just
19 don't want the damages to be included for the conversion
20 in with the trade secrets and this punitive damage
21 section under your verdict form.

22 MR. HAYNSWORTH: Your Honor, I see Mills'
23 plight. I know you're using a punitive finding to then
24 trigger your analysis under the statute. But I guess
25 his point is well taken. If they think we want to

1 punish them for trade secret theft and they come up with
2 some sort of dollar amount that would be them doing what
3 the Court's supposed to do. So maybe we could modify it
4 to have if they find under trade secret theft willful,
5 they need to -- I don't know. I see Mills' concern and
6 he's probably right.

7 MR. ARIAIL: I don't have a problem with
8 saying if you find conversion to determine the punitive
9 damages. Then it goes to the next section. If you find
10 for trade secrets I think there needs to be ---

11 MR. HAYNSWORTH: You've got to find it was a
12 willful misappropriation.

13 MR. ARIAIL: Yeah. Was it willful. And then
14 that will invoke your ability to determine if there are
15 two times damages. I mean, I've just got an issue we're
16 going to have a verdict form if it comes back where
17 we've got conversion, they put at the bottom they found
18 conversion, trade secrets, and then they award punitive
19 damages. Well, then my question's going to be which
20 one. And then my argument is going to be, well, if it's
21 disproportionate we've got a problem. And I understand
22 you have the ability under the trade secrets to do that.
23 I just don't want to cause any confusion at the end.

24 THE COURT: Well, my thinking here is that --
25 what I'm trying to tell you is would this jury be

1 entitled to recover punitive damages on conversion and
2 exemplary damages on violation of the trade secret act
3 or would that not be ---

4 MR. HAYNSWORTH: I'd have to -- you would
5 think I would have the statute at hand, since ---

6 MR. ARIAIL: Under the trade secret?

7 THE COURT: Well, I mean, under the trade
8 secret, they've got to find that the damages are
9 exemplary. Upon a finding of willful, wanton or
10 reckless disregard of the plaintiff's rights, the court
11 may award. So they're going to have to -- if they
12 awarded punitive damages on the act, then it's got to be
13 willful, wanton or reckless. And then I would -- what
14 I'm saying, if they find punitive damages on that cause
15 of action, it's got to be that they found that it was
16 willful, wanton or reckless.

17 MR. ARIAIL: And I see ---

18 MR. HAYNSWORTH: I agree. I think Mills ---

19 THE COURT: Let's do this. How about just
20 write me out something that I can write on that verdict
21 form that will satisfy both of you. Can you do that?

22 MR. ARIAIL: Yes, Your Honor. And then I'm
23 going back through my notes one more time. I think on
24 the third-party complaint our cause of action is against
25 MCC also. I don't want -- I think we said Ms. McKinley

1 -- it's a breach of contract and a wage payment. I also
2 didn't hear the charge for the wage payment aspect of
3 it. We heard the breach of contract, but I've got a
4 payment of wages, which is the commissions under that.

5 THE COURT: Well, it's actually against Todd
6 and Toni McKinley individually.

7 MR. ARIAIL: You mean against MCC and Toni
8 McKinley? Todd is suing both of them because MCC would
9 be the one that would be paying them. And Toni McKinley
10 was the one under the statute. And I think this is why
11 we need wage payment to be charged is because under the
12 statute she has a liability under that. Because the
13 contract's not -- I mean, we have a contract with her, a
14 contract with the company. But we also have her in
15 charge under the wage payment of making the decision not
16 to pay him. That's what the wage payment statute is and
17 that's how she gets liability under that.

18 THE COURT: What section are you looking at
19 under the ---

20 MR. ARIAIL: Your Honor, I don't have my wage
21 payment -- there's a portion under there that says that
22 the supervisors or, I think, principals of the company
23 can have -- the case, I think it's -- I can't remember
24 the name of it right now. But it is where they were
25 given personal liability for actions taken to prohibit

Charge

1 or not to provide wages to employees when they were due.
2 I can find the case for you. I think it was part of --
3 clearly denoted in the complaint, I believe. It's the
4 knowingly permitting plaintiff to violate the Wage
5 Payment Act. So it's based upon an individual, like a
6 CEO, CFO, some owner of the company that has knowingly
7 allowed it to happen. They then have personal liability
8 underneath the wage payment statute for that amount
9 because they let it go on.

10 THE COURT: Well, how can I resolve that?

11 MR. ARIAIL: My hope would be to, along with
12 that, charge the wage payment law too. And say under
13 the verdict form if you find for either -- if you find
14 for Mr. Highsmith in this, then you would have -- I
15 mean, I know I can't get -- what I'm getting at is under
16 this, I can't get duplicative damages under that. But I
17 can, if I'm under the wage payment, get attorney's fees
18 and other items under that; treble damages. So that
19 would be where I would request that we need to have that
20 included to be able to ---

21 THE COURT: What section?

22 MR. ARIAIL: What section of the verdict form?

23 THE COURT: The payment of the wages?

24 MR. ARIAIL: Oh, under mine?

25 THE COURT: Uh-huh (affirmative)?

1 MR. ARIAIL: In my complaint it was -- I put
2 it was 37, paragraph 37. And then it goes on to ---

3 THE COURT: Wait. Wait. I've got the --
4 chapter ten, payment of wages.

5 MR. ARIAIL: Oh, Your Honor. I was looking at
6 my complaint. I don't have the payment of wages statute
7 in front of me. I know under that there's -- treble
8 damages can be awarded. And then there was a case that
9 provided the individual liability. And I've raised that
10 before in other cases and had it charged. I can find
11 that case and give that to you.

12 THE COURT: All right. I see section 41-10-
13 80, subsection (c), says, in case of any failure to pay
14 wages due to an employee as required by section so and
15 so and so and so, employee may recover in a civil action
16 an amount equal to three times the full amount of the
17 unpaid wages plus costs and a reasonable attorney's fee.

18 MR. ARIAIL: That's it, Your Honor. And the
19 case, I'm trying to find it right now, is it provides
20 individual liability for that amount too. I think it's
21 Sun Microsystems or something.

22 THE COURT: All right. Suppose I just charge
23 section (c) with respect to the counterclaim that in
24 case of a failure to pay wages dues as required by the
25 statute, an employee may recover in a civil action an

1 amount equal to three times the full amount of unpaid
2 wages, plus costs and a reasonable attorney's fee.

3 MR. ARIAIL: That is fine with me, Your Honor.
4 And I would also just say that it was specifically
5 against -- I guess if you charge, which they brought a
6 claim under the wage payment and that they can get
7 damages under that, and it goes against both Ms.
8 McKinley and MCC.

9 MR. HAYNSWORTH: Judge on this, the wage
10 payment -- well, two things. One, there's a completely
11 different statute dealing with commission, which is what
12 he's claiming. So I'm not so sure the wage payment
13 applies. But in any event, if you're going to charge
14 the wage payment, treble damages, attorney's fees, I
15 think there's a subsection in it that deals with whether
16 it's in dispute. And obviously ---

17 MR. ARIAIL: A bonafide dispute. Yeah, I
18 agree with that.

19 MR. HAYNSWORTH: And I'm not sure where,
20 because I likewise don't have the statute, but I think
21 it ---

22 MR. ARIAIL: And if it says there is a
23 bonafide dispute as to wages owed, that that is an
24 argument they had.

25 THE COURT: Well, let's see if you can find

1 then.

2 MR. ARIAIL: Yeah. I'll show it to you, Your
3 Honor.

4 (WHEREUPON, the court stood at ease for a brief
5 recess.)

6 THE COURT: All right. Bring them back.

7 (WHEREUPON, the jury entered the open court at
8 approximately 11:01 a.m.)

9 THE COURT: Ladies and gentlemen, I need to
10 further charge you on several matters.

11 First of all, I charge you that in the trial of a
12 civil case, which is this, a party can rely on direct
13 evidence, on circumstantial evidence or on a combination
14 of the two. Now, direct evidence proves the existence
15 of a disputed fact through the use of one or more of our
16 five senses without the aid of any inferences. And our
17 five senses, of course, being seeing, hearing, feeling,
18 tasting or smelling. Now, circumstantial evidence, on
19 the other hand, is where certain facts are known through
20 using one or more of our five senses gives rise to a
21 logical conclusion that other facts exist without
22 directly proving those facts. Now, these facts must be
23 considered in the light of ordinary experience and the
24 conclusion cannot rest or be based on speculation,
25 surmise or conjecture. In other words, circumstantial

1 evidence must lead to the conclusion with a reasonable
2 certainty.

3 I further charge you, ladies and gentlemen, that
4 when I was charging you on damages and I mentioned to
5 you personal property; that, of course, includes money.

6 Now, I've had to revise -- wait, one more thing.
7 On the defendant's counterclaim they are alleging a
8 violation of the payment of wages statute, which is
9 section 41-10-10 of our code of laws. I'm going to read
10 to you several sections from that statute. Under 41-10-
11 10, wages means all amounts at which labor rendered is
12 recompensed, whether the amount is fixed or ascertained
13 on a time-task case or commission basis or other method
14 of calculating the amount and includes vacation, holiday
15 and sick leave payments, which are due to an employee
16 under any employer policy or employment contract. Funds
17 placed in pension plans or profit sharing plans are not
18 wages subject to this chapter. Every employer in the
19 state shall pay all wages due in lawful United States
20 money or other negotiable warrant or check bearing even
21 date with the pay date. In case of a dispute over
22 wages, the employer shall give written notice to the
23 employee of the amount of wages which he contends to be
24 due and shall pay the amount without condition within
25 the time set by this chapter. Acceptance by the

1 employee of the payment does not constitute a release as
2 to the balance of his claim.

3 Now, with respect to the possible verdicts in this
4 case, on my verdict form which I have prepared, I have
5 struck out the number one, which I explained to you was
6 we find for the plaintiff actual and/or punitive
7 damages. And I am now substituting that the possible
8 verdicts for the plaintiff, and this, of course, is
9 going to be in with you. If your verdict is for the
10 plaintiff, then there are several possible verdicts.
11 Number one -- and this will be in the jury room with
12 you. Number one, trade secret act. (A) Actual damages.
13 You would again write in that amount. And I need you to
14 answer the question, do you find a willful violation?
15 And then you would answer that yes or no. Number two,
16 with respect to the breach of fiduciary duty. Answer --
17 write in if you find a verdict on that cause of action,
18 write in the amount of actual damages. And if you award
19 damages on the conversion cause of action, it would be
20 either actual or punitive or both. And you would write
21 in those amounts. And then I need you to answer this
22 question. Is the violation willful, yes or no.

23 All right. Now, ladies and gentlemen, it's time
24 for you to begin your deliberations. I'll send in, in a
25 moment, all of the exhibits that have been introduced in

1 this trial. I charge you that whatever your verdict is
2 in this case, that it must be a unanimous verdict, that
3 is all twelve of you must agree.

4 Okay. Now, it's time for you to retire and begin
5 your deliberations. As I say, what your verdict is is
6 unanimous. And Ms. Segars, you can remain in the
7 courtroom right now. All right. Ladies and gentlemen,
8 please retire to your jury room and begin your
9 deliberations.

10 (WHEREUPON, the jury exited the open court at
11 approximately 11:08 a.m.)

12 THE COURT: All right. Take this. And can
13 you carry all of those exhibits? All right. Just take
14 that.

15 (WHEREUPON, the verdict forms and exhibits were
16 delivered to the jury at 11:09 a.m.)

17 THE COURT: All right. Ms. Segars, this may
18 conclude your service on this case. What I need for you
19 to do, I need for you to remain and we've ordered lunch
20 for you so that if during the course of deliberations
21 any one of our twelve jurors has to be relieved for any
22 reason, then you would be substituted and become a full
23 member of the jury. So I'm sorry I've got to keep you.
24 So when your lunch comes, enjoy that. And when this
25 jury reaches a verdict, I can let you go; okay? Thank

1 you very much.

2 I guess what I'm going to need you to do is to just
3 let her go to one of the other jury rooms. And do you
4 have her telephone? Go ahead and give her her telephone
5 so she can be at ease. All right. Thank you.

6 All right. Gentlemen, stay close. Don't leave us.

7 MR. ARIAIL: Your Honor, just one thing. And
8 I just want to raise it. When the violation -- is it a
9 willful violation statement, that was applicable to my
10 client's claims against Ms. McKinley. I don't think
11 there was any explanation to the jury about her being
12 included on those claims or MCC being included and being
13 willful for them.

14 THE COURT: Well, I think I've confused the
15 jury enough, Mr. Ariail. Let's wait and see what their
16 verdict is.

17 MR. ARIAIL: All right.

18 THE COURT: I'll try to correct it if it's
19 erroneous.

20 MR. ARIAIL: Will we be able to review the
21 verdict form and get a copy of it before it goes back?

22 THE COURT: It's already gone back.

23 MR. ARIAIL: Oh, it has.

24 THE COURT: We'll have that. You can make
25 copies of it.

1 MR. HAYNSWORTH: It'll be close.

2 (WHEREUPON, court stood at recess awaiting the
3 verdict of the jury.)

4 THE COURT: Gentlemen, the jury has sent in
5 this question. They say please provide the definition
6 of conversion. That tells me they would like a copy of
7 my definition. I can send that in or I can call them
8 back and recharge. What's ---

9 MR. ARIAIL: If we just could look at your
10 copy.

11 THE COURT: Sure.

12 MR. ARIAIL: I don't have any problem with
13 that.

14 MR. HAYNSWORTH: I'm fine if you just want to
15 give them that.

16 THE COURT: That's what I read -- what I
17 charged them, so ...

18 MR. ARIAIL: I don't have a problem sending
19 that back.

20 THE COURT: All right. Tell them to continue
21 deliberation.

22 Here's the question.

23 (WHEREUPON, Court's Exhibit Number 3 was marked for
24 identification.)

25 THE COURT: All right. Please be at ease.

1 (WHEREUPON, court stood at recess awaiting the
2 verdict of the jury.)

3 THE COURT: Okay. Gentlemen, the question
4 from the jury is, to determine conversion is proof of
5 depravation required. I don't believe deprivation is
6 required. I think they've got to prove that property
7 was taken unlawfully and that they made use of it. So I
8 don't know that there's got to be any depravation. All
9 right. Bring them in. Hold on. Hold on. Hold on.

10 (WHEREUPON, the jury entered the open court at
11 approximately 12:56 a.m.)

12 THE COURT: Okay. Ladies and gentlemen, the
13 question you sent in is to determine conversion is proof
14 of depravation required. The answer to that question
15 is, no. All right. I believe now that you have in the
16 jury room with you the definition of conversion. So if
17 you'll just re-read that, that sets forth all the
18 elements for a conversion; okay?

19 Thank you. Please return and continue with your
20 deliberations.

21 (WHEREUPON, the jury exited the open court at
22 approximately 12:58 p.m.)

23 THE COURT: Okay. Here's the question.

24 (WHEREUPON, Court's Exhibit Number 4 was marked for
25 identification.)

Charge

1 THE COURT: All right. Folks, please be at
2 ease.

3 (WHEREUPON, court stood at recess awaiting the
4 verdict of the jury.)

5 THE COURT: Is there another question? I
6 don't believe it is. No matter who the jury finds for
7 are each parties responsible for their own attorney's
8 fees? I think as far as the jury is concerned I'd have
9 to answer that yes. I mean ---

10 MR. ARIAIL: Well, not necessarily because
11 under my wage payment I can request ---

12 MR. HAYNSWORTH: But that's a judge call.

13 THE COURT: I think that would be a matter for
14 the Court.

15 MR. ARIAIL: Yeah, I mean, I guess the way --
16 yeah.

17 THE COURT: All right. Okay. All right.
18 Bring them on.

19 (WHEREUPON, the jury entered the open court at
20 approximately 1:34 p.m.)

21 THE COURT: Okay. Ladies and gentlemen, the
22 question is, no matter who the jury finds for, are each
23 parties responsible for their own attorney's fees. The
24 answer to that question is that insofar as you're
25 concerned, the answer to that question is, yes.

Charge

1 Okay. Thank you.

2 (WHEREUPON, the jury exited the open court at
3 approximately 1:36 p.m.)

4 THE COURT: I think they're having fun.

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

7 (WHEREUPON, court stood at ease awaiting the
8 verdict of the jury.)

9 THE COURT: All right. Gentlemen, they say
10 we've got a verdict. Anything before I bring the jury?

11 MR. HAYNSWORTH: Nothing from the plaintiff,
12 Your Honor.

13 MR. ARIAIL: No, Your Honor.

14 THE COURT: All right. Bring them on, please.
15 (WHEREUPON, the jury entered the open court at
16 approximately 2:28 p.m.)

17 THE COURT: Madam Foreman, have you reached a
18 verdict?

19 FORELADY: Yes, we have.

20 THE COURT: Will you hand it to the bailiff,
21 please, ma'am? All right. Please publish the verdicts.

22 THE CLERK: Your Honor, in the case of 2012-
23 CP-23-4179, McKinley Cooper & Company versus J. Todd
24 Highsmith, Shane Highsmith and Highsmith, LLC. We, the
25 jury, find for the defendants. We, the jury, find for

Charge

1 the plaintiff in the Trade Secret Act. Do you find this
2 a willful violation? No. Zero amount damages. Number
3 two, breach of fiduciary duty, actual damages, five
4 thousand dollars. Number three, conversion, punitive
5 damages, sixty thousand dollars. Is this a willful
6 violation? Yes. We, the jury, find for the plaintiff
7 zero damages in the third-party complainant. All right.
8 And these are signed by Ms. Riccardi, our Foreperson.

9 Ladies and gentlemen, if you agree these are the
10 verdicts you reached in your deliberation room, would
11 you please raise your right hand

12 (WHEREUPON, all jurors' right hands were raised.)

13 THE CLERK: Okay. Thank you.

14 THE COURT: Anything further from the jury,
15 gentlemen?

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

17 MR. ARIAIL: No, sir, Your Honor.

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

20 Ladies and gentlemen, this, of course, will
21 conclude your service not only on this case but for the
22 week. And I want to take this opportunity to thank you
23 for coming and serving. I know that it's a burden to
24 you to take the time off from your jobs and families and
25 spend it with us on jury duty. But I do hope you

Charge

1 understand the importance of being here this week and
2 working on this case. I know one thing for sure and
3 that is that if you found yourselves in this courtroom
4 involved in some type case, surely you would want a fair
5 and impartial jury to serve on your case. And I believe
6 you have been a good, fair jury this week. And I thank
7 you very much for your service. I think if you'll
8 report downstairs to the jury room, Judy will have a
9 check for your service this week.

10 You know, I have one thing I want to say before
11 dismissing you. In most cases that I try, I always
12 learn something. And I have learned something from this
13 case from the testimony of the two expert witnesses, I
14 now know what a geek really is.

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

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

20 THE COURT: All right. Any motions,
21 gentlemen?

22 MR. ARIAIL: Your Honor, I didn't understand
23 the verdict. If I could see the verdict form.

24 THE COURT: Yes, you can look at it; sure.

25 MR. ARIAIL: I thought they said they found

1 for --- okay, Your Honor, my first question, and I need
2 to research this and I would ask for -- first of all,
3 I'd renew my motion. But they found a conversion of
4 zero actual damages but punitive sixty thousand dollars.
5 I don't know if they can have the sixty thousand on the
6 punitive.

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

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

10 MR. ARIAIL: They had a finding on the actual
11 damages of zero for the conversion claim, which is
12 directly related to that. And that's why he put the
13 punitive provision in there just for that claim.

14 MR. HAYNSWORTH: You know, Judge, I think
15 finding a recover of actual damages in a case supports a
16 recover of punitive damages.

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

25 MR. ARIAIL: I think it would be your standard

Charge

1 ---

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

4 MR. ARIAIL: Okay. Your Honor, can I get a
5 copy of those?

6 THE COURT: Sure.

7 MR. HAYNSWORTH: Just submit briefs to you,
8 Judge, on the ---

9 THE COURT: That'll be fine.

10 MR. ARIAIL: Ten days, I'm going to calculate
11 it ---

12 MR. HAYNSWORTH: Why don't we start it on
13 Monday?

14 THE COURT: That's fine.

15 MR. ARIAIL: If you don't mind that'll be --
16 well, then we're into Christmas Eve.

17 THE COURT: Well, how much time. You know,
18 I'm not ---

19 MR. HAYNSWORTH: Fifteen days from now?

20 MR. ARIAIL: Yeah. Why don't we say this, on
21 or before December 31st. That'll give me a date that I
22 can put in my mind.

23 THE COURT: That's fine.

24 MR. ARIAIL: Because I've got a full week of
25 court next week and the next week is going to be

1 Christmas.

2 THE COURT: That's fine. Give them both
3 copies of both 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 attorney's fees on
7 the trade secrets so the theft statute won't apply
8 because they found it was not wilful. I'm trying to
9 recall whether I claimed or am entitled to attorney fees
10 on the other two.

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

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

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

18 MR. HAYNSWORTH: Yeah, thank you, Your Honor.

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

1 consider young lawyers.

2 MR. ARIAIL: Thank you, Judge.

3 THE COURT: All right. Thank you.

4 (WHEREUPON, court stood at recess in this case at
5 approximately 2:58 p.m.)

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8 [END OF REQUESTED TRANSCRIPT OF RECORD]

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SC Court of Appeals

McKinley Cooper and Company, LLC -vs- Todd Highsmith, et al (2012-CP-23-04179)
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CERTIFICATE OF REPORTER

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I, the undersigned Danette P. Hanks, Official Court Reporter for the Tenth 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 Circuit Court for Greenville County, South Carolina, on the 8th day of December, 2014.

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

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September 29, 2015

Circuit Court Reporter

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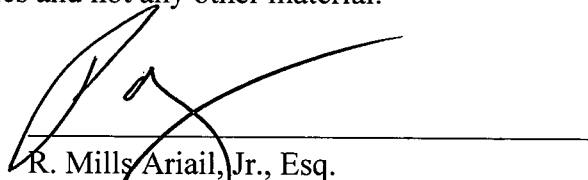
FEB 24 2016

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

February 19, 2016



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