

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellant Case No. 2018-001444

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SC Court of Appeals

Encore Technology Group, LLC, ...Respondent/Appellant,

v.

Keone Trask and Clear Touch Interactive, Inc.
f/k/a Clear Touch Interactive, LLC, ...Appellants/Respondents.

AND

Clear Touch Interactive, Inc. f/k/a Clear Touch
Interactive, LLC, ...Appellants/Respondent,

v.

Encore Technology Group, LLC, ...Respondent/Appellant.

RECORD ON APPEAL - VOLUME III

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1 reasonable doubt.

2 Clear and convincing truth leaves no
3 substantial doubt in your mind. It means that
4 the evidence is not ambiguous, doubtful,
5 equivocal or contradictory. Convincing means
6 persuading by proof or argument, causing one to
7 believe the truth of what is asserted. Clear
8 and convincing proof establishes in your mind
9 not only that the fact is probable, but that it
10 is highly probable.

11 Before awarding punitive damages, you must
12 consider and weigh four different elements
13 which may be pertinent to the facts of this
14 case; some may not be pertinent to the facts of
15 this case. First, you must consider the
16 relationship between any punitive damage award
17 and the harm caused. Any penalty imposed should
18 take into account the irreprehensibility of the
19 conduct, the harm caused, the defendant's
20 awareness of the conduct's wrongfulness, the
21 duration of the conduct and any concealment.
22 Thus any penalty imposed should bear a
23 relationship to the nature and extent of the
24 conduct and the harm caused, including any
25 compensatory damage award made by you.

1 for extraordinary and outrageous conduct and to
2 prevent the defendant and others from
3 committing similar acts in the future. Punitive
4 damages can only be awarded when conduct of the
5 defendant has been something more than mere
6 negligence. The evidence must establish the
7 defendant's acts were reckless, willful and
8 wanton, meaning there was a conscious failure
9 to exercise due care or a conscious
10 indifference to the rights and safety of others
11 or a reckless disregard thereof.

12 If you find that the defendant's conduct
13 was willful, wanton or reckless, you may award
14 the plaintiff punitive damages. To support an
15 award of punitive damages, the plaintiff must
16 prove by clear and convincing evidence that the
17 conduct complained of included a consciousness
18 of wrongdoing at the time of the conduct. Clear
19 and convincing is more than just a
20 preponderance or greater weight of the
21 evidence, which requires only proof that
22 persuades you that a party claims it's more
23 likely than not true. On the other hand, it's
24 not as high as the standard of the burden in
25 criminal cases, which is proof beyond a

1 person who suffers any ascertainable loss of
2 money or property as a result of the use or
3 employment by another person of an unfair and
4 deceptive method, act or practice may recover
5 actual damages.

6 Actual damages or compensatory damages are
7 damages in satisfaction of, or in recompense
8 for, loss or injury sustained. Actual damages
9 include special or consequential damages which
10 are the natural and proximate result of the
11 deceptive conduct. The phrase "actual damages"
12 refers to common law damages, or the difference
13 in value between that with which the plaintiff
14 parted and which he received.

15 Now, finally, Ladies and Gentlemen, the
16 plaintiff also seeks punitive damages. So I
17 have to charge you on the law of punitive
18 damages and then I'll give you another break.
19 If you award actual damages and only if you
20 aware actual damages, you may also consider an
21 award of punitive damages.

22 Mr. Foreman, each different cause of action
23 will tell you whether or not punitive damages
24 are a consideration for the jury. But punitive
25 damages are intended to punish the defendant

1 character directly and proximately resulted
2 from the defendant's defamatory statement.

3 Ladies and Gentlemen, the last cause of
4 action that we have to go over is the South
5 Carolina Unfair Trade Practices Act. The
6 plaintiff claims that the defendant -- excuse
7 me, this is being asserted against Mr. Trask
8 and Clear Touch. The plaintiff claims that the
9 defendant committed unfair trade practices. A
10 trade practice or act is an unfair trade
11 practice or act if it offends established
12 public policy or is immoral, unethical, or
13 oppressive.

14 The plaintiff must prove that the plaintiff
15 suffered actual damages as a result of the
16 defendant's unfair trade practice or act.
17 In addition, the plaintiff must prove that the
18 unfair trade practice or act affected persons
19 other than the parties to the transaction. The
20 plaintiff must prove that the unfair trade
21 practice or act has an impact on the public's
22 interest. This may be shown by proof that the
23 unfair trade practice or act is capable of
24 repetition.

25 Under the unfair trade practices act, any

1 plaintiff's rights.

2 In determining the appropriate amount of
3 punitive damages, you should consider the
4 nature of the defendant's actions, the
5 punishment, if any, which should be given for
6 those actions, and the ability of the defendant
7 to pay.

8 Ladies and Gentlemen, certain statements
9 are considered to be what is called slanderous
10 per se. If a statement is slanderous per se,
11 injury to the plaintiff is presumed, and the
12 plaintiff does not have to prove any special
13 damages. Statements which charge the plaintiff
14 with the commission of a crime of moral
15 turpitude, contraction of a sexually
16 transmitted disease, adultery, unchastity, or
17 unfitness in the plaintiff's business or
18 profession are slanderous per se.

19 If you find that the statement was
20 slanderous per se, you should return a verdict
21 for the plaintiff and must award the plaintiff
22 at least nominal damages. Nominal damages may
23 be only a small or trivial sum. Nominal damages
24 are required because the law presumed that some
25 actual damage to the plaintiff's reputation and

1 or occupation of the plaintiff, such as the
2 loss of a job, the loss of customers, or the
3 loss of a business relationship as a result of
4 the injury to the plaintiff's reputation.

5 If you find that the plaintiff is entitled
6 to actual damages, you must then consider
7 whether the defendant should be required to pay
8 punitive damages to the plaintiff. Punitive
9 damages are to punish the defendant and to
10 attempt to ensure that neither the defendant
11 nor anyone else commits similar conduct in the
12 future. In order to recover punitive damages,
13 the plaintiff must prove by clear and
14 convincing evidence that the defendant acted
15 with actual malice in making the defamatory
16 statement. Clear and convincing evidence is
17 more than a proper -- excuse me, more than a
18 preponderance of the evidence.

19 Actual malice involves a malicious intent
20 or recklessness, willfulness, or wantonness.
21 This means that the defendant's statement was
22 motivated by ill will with the intent to injure
23 the plaintiff or that the statement was made
24 with such recklessness as to show a conscious
25 indifference toward or disregard of the

1 earshot of another person. The plaintiff must
2 prove that the statement was heard by another
3 person who understood that the statement
4 referred to the plaintiff. The plaintiff must
5 also prove that the defendant made the
6 statement knowing or reasonably expecting it to
7 reach a third person.

8 Finally, the plaintiff must prove that his
9 reputation was damaged by the defamatory
10 statement. The plaintiff must prove that the
11 damages naturally and proximately resulted from
12 the defendant's statement. Actual damages are
13 damages which compensate the plaintiff for the
14 injury and put the plaintiff in the same
15 position as he was prior to the defamatory
16 statement as much as is possible. General
17 damages are also recoverable and include:
18 humiliation, hurt feelings, mental suffering,
19 injury to reputation, and other types of
20 injuries on which you cannot place a monetary
21 value.

22 The plaintiff must also prove special
23 damages resulting from the defamatory
24 statement. Special damages are monetary damages
25 with respect to property, business, profession,

1 meaning. Individual words should not be singled
2 out as defamatory. In addition, the statement
3 must be considered in light of the facts known
4 to the person to whom the statement was made
5 and not in light of the facts known to the
6 parties.

7 The defendant must prove that the statement
8 was substantially true. A statement is not
9 defamatory if it is substantially true. Even if
10 the defendant made the statement for no good
11 purpose, was inspired by ill will toward the
12 plaintiff, and made the statement solely for
13 the purpose of harming the plaintiff, if the
14 statement is true, the plaintiff cannot recover
15 for defamation.

16 If the statement was a matter of public
17 concern, the plaintiff must prove that the
18 statement was false. Matters of public concern
19 are those related to the free exchange of ideas
20 for bringing about political and social changes
21 desired by the people.

22 Next, the plaintiff must prove that the
23 statement was communicated to someone other
24 than the plaintiff. It is not enough that the
25 statement was made within the hearing or

1 attacks. Defamatory language is language that
2 tends to injure or adversely affect the
3 plaintiff's reputation.

4 In order to recover in this case, the
5 plaintiff must first prove that defamatory
6 language was communicated by the defendant
7 about the plaintiff. A defamatory statement is
8 one which tends to attack the honesty,
9 integrity, virtue, or reputation of a person,
10 and exposes the person to disgrace, public
11 hatred, avoidance, contempt, or ridicule.
12 A defamatory statement does not have to be a
13 direct, open, or positive attack. It may be
14 merely a suggestion or hint, which is false and
15 malicious, as long as the meaning is plain.

16 In deciding whether the statement was
17 defamatory, you must give the words used their
18 ordinary and popular meaning. The intent and
19 meaning of the words must be determined from
20 the words themselves and in the context in
21 which they were used. All parts of the
22 statement must be considered together to
23 determine the statement's truth -- excuse me,
24 all parts to the statement must be considered
25 together to determine the statement's true

1 recoverable only where, in addition to or
2 independently of the fraudulent intent that
3 brought about the breach, there is some
4 fraudulent act on the part of the defendant
5 accompanying the breach. Even if there is a
6 willful and fraudulent breach of contract, only
7 actual damages can be recovered, unless there
8 is a clear and convincing evidence of a
9 fraudulent act accompanying the breach of
10 contract. In an action for breach of contract
11 accompanied by a fraudulent act, there must be
12 proof of actual damages, or at least nominal
13 damages, to support a verdict awarding punitive
14 damages.

15 The next cause of action, Ladies and
16 Gentlemen, is defamation. This is asserted
17 against Mr. Trask and Clear Touch. The
18 plaintiff claims that the defendant
19 communicated a defamatory statement about the
20 plaintiff to another person. Libel is a written
21 defamatory statement or one accomplished by
22 actions or conduct. Slander is a spoken
23 defamatory statement. This action is based on
24 the violation of the plaintiff's right to enjoy
25 a good reputation without false and defamatory

1 must first show that the defendant breached the
2 contract.

3 Next, the plaintiff must show that the
4 defendant had fraudulent intent as to the
5 breach of contract. Fraudulent intent relating
6 to the making of the contract is not
7 sufficient. The fraudulent intent is usually
8 proven by examining the circumstances
9 surrounding the breach of contract.

10 Finally, the plaintiff must prove that
11 there was a fraudulent act accompanying the
12 breach of contract. A fraudulent act is any act
13 characterized by dishonesty in fact, unfair
14 dealing, or the unlawful taking of another
15 person's property intentionally. The fraudulent
16 act may be prior to, at the same time as, or
17 after the breach of contract. However, it must
18 be connected with the breach of contract
19 itself. The fraudulent act cannot be too remote
20 in time or character from the breach of
21 contract.

22 While fraudulent intent is a necessary
23 element, a fraudulent intent or purpose in
24 breaching the contract does not itself give
25 rise to punitive damages. Such damages are

1 him as are a natural and proximate consequence
2 of the interference.

3 The measure of damages includes: number
4 one, unforeseen expenses; two, damage to
5 reputation; three, damage for loss of
6 employees; four, damage for loss of customers;
7 five, damage for loss of goodwill. Where the
8 damages alleged are lost profits, the plaintiff
9 must prove that it is reasonably certain that
10 profits would have been realized but for the
11 tort; and that such lost profits can be
12 ascertained and measured from the evidence
13 produced with reasonable certainty. Aggravated,
14 unjustified interference with contractual
15 rights, in reckless disregard of the
16 contracting parties also justifies the award of
17 punitive damages.

18 All right. Ladies and Gentlemen, the next
19 cause of action is against Mr. Pratt --
20 Mr. Trask alone. It is breach of contract
21 accompanied by a fraudulent act. The plaintiff
22 claims that the breach of contract in this case
23 was accompanied by a fraudulent act by the
24 defendant. To establish a breach of contract
25 accompanied by a fraudulent act, the plaintiff

1 breach of the underlying contract before there
2 can be an interference with an existing
3 contractual relationship.

4 The absence of justification may be
5 inferred. Interference with a contract is
6 justified when it is motivated by a legitimate
7 business purpose. The exercise in good faith of
8 a legal right by a party to a contract affords
9 no basis for an action by the second party for
10 intentional interference with a contract even
11 though the consequence of the legal right by
12 the first party is to cause a third party not
13 to perform another contract with the second
14 party.

15 The fact that one is a competitor of
16 another for the business of a third person does
17 not prevent his causing a breach of an existing
18 contract with the other from being an improper
19 interference if the contract is not terminable
20 at-will.

21 Now, an essential element of the tort of
22 interference with the contractual relationship
23 is that damages resulted from the breach. In an
24 action for interference with a contract, the
25 plaintiff may recover such damages sustained by

1 contractual relations and the rights of the
2 parties.

3 For a cause of action to arise, a breach
4 must be intentionally procured. The plaintiff
5 must prove that the outsider intentionally
6 induced the third person not to perform his
7 contract with the plaintiff. The essential
8 element is the intent to cause the result. If
9 the defendant does not have this intent, his
10 conduct does not subject him to liability.

11 The tort of intentional interference with a
12 contractual relationship requires that the
13 third party's interference in fact procures the
14 breach complained of -- excuse me, the tort of
15 intentional interference with a contractual
16 relationship requires that the third party's
17 interference in fact procures the breach
18 complained of. The alleged act of interference
19 must influence, induce or coerce one of the
20 parties to the contract to abandon the
21 relationship or breach the contract. The
22 plaintiff must show that, but for the
23 interference, the contractual relationship
24 would have continued. Regardless of the
25 defendant's behavior, there must actually be a

1 the intentional procurement of the contract's
2 breach; fourth, the absence of justification;
3 and fifth, resulting damages.

4 The rule presupposed the existence of a
5 valid contract. That is, there must be a valid
6 and enforceable contract for a cause of action
7 for tortious interference with an existing
8 contractual relationship to exist. The
9 particular agreement must be in force and
10 effect at the time of the breach that the
11 defendant has caused. If, for any reason, it is
12 entirely void there is no liability for causing
13 its breach.

14 Knowledge of the existence of a contract is
15 a condition of liability for interference with
16 it. Therefore, a defendant cannot be liable for
17 interfering with a contract of which the
18 defendant was unaware. There is no liability
19 where the party charged with producing a breach
20 of contract has acted in ignorance of the
21 existence of any contract. It is not necessary
22 to prove actual knowledge. It is enough to show
23 that the defendant had knowledge of facts
24 which, if followed by reasonable inquiry, would
25 have led to complete disclosure of the

1 a contract. Ladies and Gentlemen, one who
2 intentionally and improperly interferes with
3 the performance of a contract between another
4 and a third person by inducing or otherwise
5 causing the third person not to perform the
6 contract is subject to liability to the other
7 for the pecuniary loss resulting to the other
8 from the failure of the third person to perform
9 the contract.

10 The theory of this doctrine is that the
11 parties to a contract have a right -- have a
12 property right in the contract which a third
13 person has no more right to deprive them of, or
14 to injure them in, than he would have to injure
15 their property. Such an injury, without
16 sufficient justification, amounts to a tort for
17 which the injured party may seek damages.

18 To establish an action for intentional
19 interference with an existing contractual
20 relationship, sometimes referred to as tortious
21 interference with an existing contractual
22 relationship, the plaintiff must prove five
23 elements: first, the plaintiff must prove the
24 existence of the contract; second, the
25 wrongdoers knowledge of the contract; third,

1 before a material change of his position, knew
2 or had reason to know that it was a trade
3 secret and that knowledge of it had been
4 acquired by accident or mistake.

5 Ladies and Gentlemen, the plaintiff is
6 entitled to recover actual damages for
7 misappropriation of trade secrets. Damages may
8 include both the actual loss caused by
9 misappropriation or the unjust enrichment
10 caused by misappropriation that is not taken
11 into account in computing actual loss. In lieu
12 of damages measured by any other methods, the
13 damages caused by misappropriation may be
14 measured by imposition of liability for a
15 reasonable royalty for a misappropriator's
16 authorized disclosure or use of a trade secret.

17 Ladies and Gentlemen, I know those are
18 complex and is hard to follow. I will give that
19 to you independently or as many times as you
20 want. I will not send my charge back there to
21 you because I want you concerned about the
22 facts. I'll have the law -- I'll leave the law
23 with me.

24 Next cause of action is against Clear Touch
25 only, and it is for tortious interference with

1 A person aggrieved by misappropriation,
2 wrongful disclosure, or wrongful use of his
3 trade secrets may bring a civil action to
4 recover damages incurred as a result of the
5 wrongful acts and to enjoin its appropriation,
6 disclosure, use or wrongful acts pertaining to
7 the trade secrets.

8 Misappropriation means acquisition of a
9 trade secret of another by a person by improper
10 means; acquisition of a trade secret of another
11 by a person who knows or has reason to know
12 that the trade secret was acquired by improper
13 means; or disclosure or use of a trade secret
14 of another without express or implied consent
15 by a person who used improper means to acquire
16 knowledge of the trade secret; or at the time
17 of disclosure or use, knew or had reason to
18 know that his knowledge of the trade secret was
19 derived from or through a person who had
20 utilized improper means to acquire it; acquired
21 by mistake or under circumstances giving rise
22 to a duty to maintain its secrecy or limit its
23 use; or derived from or through a person who
24 owed a duty to the person seeking relief to
25 maintain its secrecy or limit its use; or

1 fact, item, or procedure, or a series or
2 sequence of items or procedures which, although
3 individually could be perceived as relatively
4 minor or simple, collectively can make a
5 substantial difference in the efficiency of a
6 process or the production of a product, or may
7 be the basis of a marketing or commercial
8 strategy. The collective effect of the items
9 and procedures must be considered in any
10 analysis of whether a trade secret exists and
11 not the general knowledge of each individual
12 item or procedure. A trade secret endures and
13 is protectable and enforceable until it is
14 disclosed or discovered by proper means.

15 Every employee who is informed of, or
16 should reasonably have knowledge from the
17 circumstances of the existence of any
18 employer's trade secret, has a duty to refrain
19 from using or disclosing the trade secret
20 without the employer's permission independently
21 of and in addition to any written contract of
22 employment, secrecy agreement, non-compete
23 agreement, non-disclosure agreement, or other
24 agreement between the employer and the
25 employee.

1 so. (Pause.)

2 All right. Does everybody have what they
3 need?

4 All right. Ladies and Gentlemen, the fourth
5 cause of action being asserted by the plaintiff
6 in this case is for a violation of the Trade
7 Secrets Act. It is being asserted by the
8 plaintiff against both Mr. Trask and to Clear
9 Touch. This is the law that is applicable to
10 violation of the Trade Secrets Act case.

11 Under South Carolina Code Section 39-8-30,
12 this is what a -- a trade secret is defined as
13 this: it means information including, but not
14 limited to, a formula, pattern, compilation,
15 program, device, method, technique, product,
16 system, or process, design, prototype,
17 procedure, or code that: derives independent
18 economic value, actual or potential, from not
19 being generally known to, and not being readily
20 ascertainable by proper means by the public or
21 any other person who can obtain economic value
22 from its disclosure or use; and is the subject
23 of efforts that are reasonable under the
24 circumstances to maintain its secrecy.

25 A trade secret may consist of a simple

1 and voluntarily gives up that right in
2 violation of all the relevant facts. Once a
3 breach of contract occurs, the plaintiff must
4 enforce his rights under the contract or lose
5 them. If you find that the plaintiff acted in a
6 manner which made the defendant believe that
7 the plaintiff gave up the right to prosecute
8 the breach of contract, you should return a
9 verdict for the defendant on this cause of
10 action.

11 I'll further charge you, Ladies and
12 Gentlemen, a waiver is an affirmative defense
13 that has to be established by this defendant by
14 a preponderance of the evidence. The burden of
15 proof is upon the party who asserts it.
16 Generally, the party claiming waiver must show
17 that the party against whom waiver is asserted
18 possessed, at the time, actual or constructive
19 knowledge of his rights or of all the material
20 facts upon which they depended.

21 All right. Ladies and Gentlemen, now I'm
22 about halfway through. Let's take another
23 little sit down or break because I want you to
24 be able to keep up with me. If anybody needs to
25 take a break, you're more than welcome to do

1 damages are the actual losses and expenses
2 which the plaintiff has suffered because the
3 defendant breached the contract. Generally,
4 actual damages are the out-of-pocket costs
5 actually paid by the plaintiff as a result of
6 the breach of contract and the gains above the
7 cost that would have been realized if the
8 contract had been performed.

9 In this case, and in all contract cases,
10 the plaintiff has the duty to minimize the
11 damages caused by the defendant's breach of
12 contract. The test as to whether the plaintiff
13 has done what an ordinarily prudent person
14 would have done under like circumstances. If
15 the plaintiff has used reasonable care to
16 reduce the losses, the plaintiff may recover
17 the full amount of damages. If the plaintiff
18 has not done so, then you would reduce the
19 damages accordingly.

20 In this case, the defendant claims that
21 even if there were a breach of contract, the
22 plaintiff waived the right to enforce the
23 contract by actions taken after the alleged
24 breach of contract. When a person waives a
25 right, it means that the person intentionally

1 mean, Ladies and Gentlemen, that the plaintiff
2 must prove damages to a mathematical certainty
3 or produce evidence of the exact amount of
4 damages that it suffered. However, the amount
5 of damages cannot be left to guesswork or
6 speculation. Instead, the evidence presented by
7 the plaintiff must be enough to allow you to
8 determine the amount of damages with reasonable
9 certainty and accuracy.

10 Damages for a breach of contract are those
11 that fairly and reasonably may be considered to
12 arise after the breach of contract or those
13 that may be reasonably supposed to have been in
14 the minds of the parties at the time the
15 contract was made. The plaintiff may not
16 recover damages for breach of contract unless
17 the plaintiff shows that he was -- that he has
18 performed his part of the contract, or at least
19 was able, ready and willing to perform at the
20 appropriate time.

21 Actual damages in a breach of contract case
22 are damages to compensate the plaintiff and put
23 him as closely as possible in the same
24 possession he would have occupied, had the
25 contract been performed. In other words, actual

1 bad faith in performance of one's contractual
2 duties would give rise to a violation of the
3 implied obligation of good faith and fair
4 dealing.

5 Now, in this case, the plaintiff must show
6 by the preponderance, or greater weight, of the
7 evidence that the defendant unjustifiably
8 breached his contract with the plaintiff. The
9 word breach means failure without legal cause
10 to perform any promise that forms the whole or
11 a part of the contract. This includes the
12 refusal of the party to recognize the existence
13 of the contract or the doing of something
14 inconsistent with the existence of a contract.
15 The party breaches a contract when that party
16 does not perform as agreed under the contract
17 by failing to carry out a term, promise or
18 condition of the contract.

19 After the breach, the plaintiff must
20 establish by preponderance or greater weight of
21 the evidence that the plaintiff suffered
22 damages, which were proximately caused by the
23 defendant's breach of contract. The plaintiff
24 must prove damages by preponderance, or greater
25 weight, of the evidence. Now, this does not

1 has been damaged by the breach of this duty.
2 And if so, the amount of award the plaintiff is
3 entitled.

4 The third cause of action asserted against
5 Mr. Trask -- excuse me, Mr. Trask, individually
6 is for breach of contract. Now, in this case,
7 the defendant -- the plaintiff claims that the
8 defendant breached a contract that existed
9 between them. Normally, the first thing the
10 parties would have to establish was the
11 existence of a contract. In this case, as I
12 told you at the beginning, the parties
13 stipulate that there were contracts between
14 them, such as the employment contract and a
15 non-disclosure or non-solicitation agreement.
16 Now, in this cause of action, the only contract
17 from which the plaintiff is seeking damages for
18 its breach is the non-disclosure and
19 non-solicitation agreement.

20 Ladies and Gentlemen, in every contract,
21 there exists and unspoken, but legally
22 enforceable promise of good faith and fair
23 dealing between the parties. This unspoken
24 promise is an implied covenant of good faith
25 and fair dealing. Fraud, misrepresentation and

1 result from the wrongful conduct where, but for
2 the wrongful conduct of the defendant, the
3 plaintiff would not have been harmed. Let me do
4 that again. That is to say the damages that
5 result from the wrongful conduct where, but for
6 the wrongful conduct of the defendant, the
7 plaintiff would not have been harmed.

8 Now, such damages, Ladies and Gentlemen,
9 included profits made and advantages gained by
10 an employee during and as a result of his
11 employment with the employer. In the absence of
12 any agreement to the contrary between himself
13 and his employer, and employee is not entitled
14 to avail himself of any advantage that his
15 position may give him to profit at his
16 employer's expense beyond the agreed
17 compensation for his services. An employee
18 cannot, without the employer's consent, retain
19 profits or earnings received in the course of
20 performance of the employer's business.

21 The defendants in this case, Mr. Trask,
22 admits that he violated this fiduciary duty
23 owed to the plaintiff. Therefore, he may not
24 debate whether or not he violated this duty.
25 It's up to you to decide whether the plaintiff

1 disadvantage.

2 An employee is subject to liability for
3 loss caused to the employer by any breach of
4 duty. An employee is duty-bound not to add --
5 act adversely to the interest of his employer
6 by serving or acquiring in the private interest
7 of his own antagonism or opposition thereto.
8 In all cases, the employer is entitled to the
9 best effort and unbiased judgment of his
10 employee and an employee is not permitted to
11 assume two distinct and opposite characters in
12 the same transaction. Acting for himself in one
13 particular and pretending to act for his
14 employer in the other. Indeed, it has been
15 stated that in the usual case, it is the duty
16 of the employee to further his employer's
17 interest, even at the expense of his own
18 matters connected with employment.

19 In a breach of fiduciary duty case, the
20 plaintiff is entitled to damages for harm
21 caused by the breach of fiduciary duty owed to
22 him or her. Damages in an action for breach of
23 a fiduciary duty are those proximately
24 resulting from the wrongful conduct of the
25 defendant. That is to say the damages that

1 contract providing otherwise. Even before the
2 termination of the agency, he is entitled to
3 make arrangements to compete, except that he
4 cannot properly use confidential information
5 peculiar to his employer's business and
6 acquired therein.

7 Thus before the end of his employment, he
8 can properly purchase a rival business and,
9 upon termination of employment, immediately
10 compete in the absence of a restrictive
11 agreement prohibiting the same. He is not,
12 however, entitled to solicit customers for such
13 rival business before the end of his
14 employment, nor can he properly do other
15 similar acts in direct competition with the
16 employer's business.

17 A former employee cannot properly use in
18 competition with the employer, information
19 acquired from the employer by a breach of duty
20 as employee. Thus his use of information
21 improperly acquired is a breach of duty to the
22 employer. A former employee has a duty not only
23 to refrain from competing with the employer by
24 the unfair use of information, but also not to
25 use such information to the employer's

1 confidential or fiduciary relationship exists
2 when one imposes a special confidence in
3 another, so that the latter, in equity and good
4 conscience, is bound to act in good faith and
5 with due regard to the interests of the one
6 imposing the confidence. To constitute a
7 fiduciary relationship, the relationship must
8 be more than a casual one.

9 Parties in a fiduciary relationship must
10 fully disclose to each other all known
11 information that is significant in material.
12 Where an employee engages in a business which
13 necessarily renders him a competitor and rival
14 of his employer, no matter how much or how
15 little time and attention he may devote to it,
16 he is deemed to have an interest which
17 conflicts with his duty to his employer.

18 Unless otherwise agreed, an employee is
19 subject to a duty not to compete with the
20 employer concerning the subject matter of his
21 agency. After the termination of his agency, in
22 the absence of a restrictive agreement, an
23 employee can properly compete with his employer
24 as to the matter for which he has been
25 employed, unless there is a restrictive

1 in which an employee or employee acted
2 disloyally, one period of disloyalty may taint
3 succeeding tasks or time periods.

4 An employee is entitled to no compensation
5 for conduct which is disobedient or which is a
6 breach of his duty of loyalty. If such conduct
7 constitutes a willful and deliberate breach of
8 his contract or service, he is not entitled to
9 compensation even for properly performed
10 services for which no compensation is
11 apportioned.

12 Now, Ladies and Gentlemen, in this case,
13 the defendant has admitted that he breached
14 this duty of loyalty. Therefore, he is going to
15 have to return a percentage of compensation
16 that the plaintiff claims or a percentage of
17 the compensation that the defendant claims or
18 some other amount that you properly find to be
19 the amount that he must return, but it must be
20 some amount.

21 The next claim is breach of fiduciary duty.
22 Again, this is against Mr. Trask. A fiduciary
23 relationship is founded on the trust and
24 confidence reposed by one person in the
25 integrity and fidelity of another. A

1 certain periods of time or to the completion of
2 specified items of work.

3 Whether an employee -- excuse me, whether
4 an employee's compensation is apportioned,
5 allocated to certain periods of time or to the
6 completion of specified items of work, is a
7 question for determination by you, the jury.
8 You must also decide whether the employee acted
9 disloyally during a particular apportioned
10 period or task.

11 In deciding whether an employee acted
12 disloyally, you must focus upon the particular
13 circumstances of the case. The goal is to avoid
14 the unjust enrichment to either party by
15 examining factors, such as, the nature of the
16 employment relationship, the nature and extent
17 of the employee's services and the breach of
18 duty, the loss or expense caused to the
19 employer by the breach of duty, and the value
20 to the employer of the services properly
21 rendered by the employee.

22 In identifying apportioned tasks or time
23 periods in which an employee or employee acted
24 disloyally -- let me do that again. In
25 identifying apportioned tasks or time periods

1 faithful to the employer's interest throughout
2 the term of employment. An employee has a duty
3 of fidelity to his employer. Where an employee
4 acts adversely to the interest of his employer,
5 he is disloyal.

6 Unless otherwise agreed, an employee is
7 subject to a duty to use reasonable efforts to
8 give his employer information that is relevant
9 to affairs entrusted to him and which, as the
10 employee has notice, the employer would desire
11 to have and which can be communicated without
12 violating a superior duty to a third person.

13 An employee is not entitled to any compensation
14 for services performed during the period he
15 engaged in activities constituting a breach of
16 his duty of loyalty, even though part of those
17 services may have been properly performed.

18 However, even when an employee breaches the
19 duty of loyalty during some periods, he may
20 still recover compensation for services
21 properly rendered during periods in which no
22 such breach occurred and for which compensation
23 is apportioned in his employment agreement.
24 Apportioned compensation is that paid to an
25 employee or employee that is allocated to

1 for himself; enticing co-workers away from his
2 employer; or appropriating his employer's
3 personal property.

4 An employee who gains general skills and
5 knowledge and forms relationships with
6 customers and coworkers during the course of
7 his employment may use such skills, knowledge,
8 and relationships to complete -- to compete
9 with his former employer once the employment is
10 terminated, unless there is a restrictive
11 contract providing otherwise. However, an
12 employee may not compete while still employed
13 by his employer, who is lulled by trust in the
14 employee's fidelity and loyalty and is deprived
15 of the opportunity to compete with such
16 employee.

17 An employee is under a duty to disclose to
18 his employer any information concerning the
19 agency which the employer would be likely to
20 want to know. Unless otherwise agreed, an
21 employee is subject to a duty not to compete
22 with the employer concerning the subject matter
23 of his agency.

24 It is implicit in any contract for
25 employment that the employee shall remain

1 it was at least one of the direct concurring
2 causes of the damages.

3 Now, Ladies and Gentlemen, I'm going to
4 identify to you the defendant or defendants
5 which the particular causes of action are being
6 asserted, and it's going to be on the verdict
7 form. But when I use the term defendant,
8 understand it to mean either or both of these
9 defendants.

10 The first is the cause of action for breach
11 of the duty of loyalty the defendant owed to
12 the employer. Now, Ladies and Gentlemen, the
13 employment relationship is one of confidence
14 and trust and places upon the employee a duty
15 to use his best efforts on behalf of his
16 employer. The fundamental duties of an employee
17 are loyalty to the interest of his employer and
18 the need to avoid any conflict between the
19 interest -- between that interest and his own
20 self-interest.

21 While acting as an employee or employer of
22 another, one owes the duty of fidelity and
23 loyalty. Accordingly, an employee cannot act
24 inconsistently with his agency or trust by, for
25 example: soliciting his employer's customers

1 going to repeat it, unless you ask me to.

2 The plaintiff -- excuse me, proximate cause
3 is something that produces a natural chain of
4 events, which in the end bring about damages.
5 It is the direct cause of the damages to prove
6 that the defendant's conduct proximately caused
7 the plaintiff's damages. The plaintiff must
8 first prove causation in fact. This is proven
9 by showing that the damages would not have
10 occurred, but for the defendant's conduct.

11 The plaintiff must also prove legal cause.
12 Legal cause is proven by showing that the
13 damages were foreseeable. This means that the
14 damages occurred as a natural and probable
15 consequence of the defendant's conduct. The
16 plaintiff must prove that the damages -- excuse
17 me. The plaintiff must prove that some damages
18 from the defendant's conduct was foreseeable,
19 but does not have to prove that the particular
20 damages that occurred was foreseeable.

21 However, a defendant cannot be held
22 responsible for something that could not be
23 expected to happen. Proximate cause does not
24 mean the only cause. The defendant's act can be
25 a proximate cause of the plaintiff's damages if

1 There are other claims asserted against
2 Mr. Trask and Clear Touch. Those are, as these:
3 one is a violation of the South Carolina Trade
4 Secrets Act; another one is for defamation; and
5 the last is for violation of the South
6 Carolina Unfair Trade Practices Act. And I'm
7 going to explain each of these causes of action
8 to you.

9 But before I do, let me point out to you,
10 and I think I told you at the beginning of this
11 case that this case involves a dispute between
12 entities known as a corporation and an
13 individual. In our courts, in our courts, no
14 distinction is made between corporations and
15 individuals. A corporation is entitled the eyes
16 of the law to the same fair and impartial
17 consideration and treatment and to justice just
18 like an individual would. You treat them no
19 differently.

20 Also, Ladies and Gentlemen, when discussing
21 the damages aspect of some of the claims, you
22 will hear the term approximate cause. And when
23 you hear that in conjunction with my
24 discussion, I want you to keep this definition
25 of what proximate cause is because I'm not

1 welcome to get you a drink. I want you
2 comfortable. (Pause.)

3 All right. Ladies and Gentlemen, this is
4 the law -- the rules of law that apply to this
5 case. First, let me give you a summary of the
6 claims that have been asserts. The plaintiff in
7 this case is Encore Technology Group, LLC., and
8 it's brought this case against defendants Keone
9 Trask and Clear Touch Interactive, Inc.,
10 alleging multiple causes of action.

11 The first of those would be asserted
12 against Mr. Trask. I think there are four
13 against him, individually. I will remind you
14 throughout the course of this charge. The first
15 one is for a breach of fiduciary duty. The
16 second is for breach of a duty of loyalty. The
17 third is for breach of contract. The fourth is
18 for breach of contract accompanied by a
19 fraudulent act. Those are individual claims
20 against Mr. Trask.

21 Also, the plaintiffs have brought a claim
22 against Clear Touch -- Clear Touch, only for a
23 claim of tortious interference of a contract.
24 And that's the only claim that's only asserted
25 against Clear Touch.

1 or give it as much weight as you think it
2 deserves considering that person's education,
3 their experience and the reason given for their
4 testimony.

5 Also -- and finally, as to the first part
6 of my charge, you heard testimony by way of
7 deposition. A deposition testimony is when
8 somebody is sworn in at another date and time
9 for the convenience of the parties or the court
10 and their testimony is preserved for later use
11 at trial. Deposition testimony should be
12 treated exactly like in-court testimony,
13 because that's what it is, except it's done
14 outside the courtroom under oath, just like
15 live testimony is here.

16 With that being said, Ladies and Gentlemen,
17 that concludes the first aspect of my charge to
18 you. Quite frankly, the next part is on the
19 substantive law that you will apply. It's about
20 30 pages. So let's stand up for a minute. If
21 anybody wants to go back in the jury room and
22 take a quick break, you can. I anticipate this
23 is going to be roughly 45 minutes. I'm not the
24 fastest reader. If anybody wants to stand up or
25 go out, if you want coffee, you're certainly

1 other evidence in the case.

2 Now, Ladies and Gentlemen, certainly those
3 are some factors you could consider in making
4 this determination of the believability or the
5 credibility of the witnesses. But you do not
6 check your common sense at the door. And you
7 shouldn't today. You should use those things in
8 your day to day lives that you find indicative
9 of truthfulness and indicative of lack of
10 truthfulness when you make this determination
11 of which testimony you wish to believe.

12 One thing you may not do, however, is add
13 up the number of witnesses that appeared on one
14 side or the other to make this determination.
15 It does not matter from you if the truth comes
16 from testimony for the plaintiff or testimony
17 from the defense or some combination thereof.

18 Also, Ladies and Gentlemen, you have heard
19 testimony from persons described as experts. I
20 remind you that normally people may not give
21 their opinion in the courtroom unless they had
22 been qualified as an expert. In this case,
23 there were a couple. Expert testimony should be
24 judged by you just like any other testimony in
25 this case. You may accept it. You may reject it

1 before you in this case.

2 But making this determination of the
3 credibility or the believability of the
4 witness's testimony and the evidence before
5 you, I'm going to give you a list of factors
6 that you may consider. Obviously, this is not
7 an exhaustive list, but these are some good
8 considerations. Number one, you could ask
9 yourselves: Was the witness able to see or hear
10 or know the things about which that witness
11 testified? How well was the witness able to
12 recall and describe the subject of their
13 testimony? You could ask yourself, what was
14 their manner while they were on the witness
15 stand. In other words, what was their demeanor
16 while they were up here? Did they have a reason
17 that they'd want to give testimony to help one
18 side or the other? Or did they have a bias or
19 prejudice as to any party or issue involved in
20 the case? You can ask yourself how reasonable
21 the witness's testimony was in light of all the
22 other evidence in the case and whether that
23 witness's testimony had been contradicted by
24 what that witness said at another date, place
25 and time or by other testimony in the case or

1 someone or something walked through your yard
2 during the night, although you did not actually
3 see it.

4 Now, for circumstantial evidence to be
5 considered a fact, the circumstantial, the
6 inference or the facts must lead to your
7 conclusion with reasonable certainty and it may
8 not be simply speculation, surmise or
9 conjecture. The law in South Carolina makes
10 absolutely no distinction between the weight or
11 the value that you, the jury give either to
12 direct evidence or circumstantial evidence.
13 There is not a greater degree of proof required
14 for circumstantial evidence than there is for
15 direct evidence to be considered.

16 Now, Ladies and Gentlemen, in deciding what
17 the facts are in this case, or what the verdict
18 is, you must consider all the testimony and
19 evidence you heard in this case. And in doing
20 this, you're going to have to decide what we
21 call the credibility of the witnesses. What
22 that simply means is you have a right to
23 disbelieve all or part of any witness who came
24 before you in this case. You have a right to
25 believe all of any witness's testimony who came

1 inference.

2 Now, circumstantial evidence is another
3 type of evidence we recognize in South
4 Carolina. We recognize it on the same basis we
5 do direct evidence. This is circumstantial
6 evidence. It is proof of a chain of facts and
7 circumstances indicating the existence of a
8 fact. It is evidence which immediately
9 establishes collateral facts from which the
10 main fact may be inferred.

11 Circumstantial evidence is based on
12 inference, and not personal knowledge or
13 observation. It is proof that does not actually
14 establish the fact in question, but that
15 asserts or describes something else from which
16 you may either reasonably infer the truth of
17 the fact or at least reasonably infer an
18 increase in the probability that that fact is
19 true.

20 Now, Ladies and Gentlemen, an example of
21 circumstantial evidence. If each of you were to
22 go to bed at night and there was a fresh, clean
23 sheet of snow in your front yard, if you were
24 to wake up in the morning and see tracks in
25 that snow, you could reasonably infer that

1 Therefore, if anybody tries to raise that, you
2 are to stop that. Okay, sir. Just take it for
3 granted, Ladies and Gentlemen, that that is the
4 process that goes on in every single trial that
5 is heard.

6 Also, Ladies and Gentlemen, anything that
7 you may have seen when court was not in
8 session, either during breaks or overnight is
9 not evidence. It's only the testimony, the
10 exhibits and the stipulations I have told you
11 about.

12 So that leads me to the type of evidence
13 that we recognize as evidence in this state.
14 We recognize two types: we have direct evidence
15 and we have circumstantial evidence. Direct
16 evidence exists. It is testimony of a person
17 who claims to have actual knowledge of a fact,
18 such as an eyewitness. It is evidence which
19 immediately establishes the main fact to be
20 proven. For example, if an issue in a case was
21 whether or not I ran a stop sign and my law
22 clerk testimony that she saw me run that stop
23 sign, that is direct evidence. It immediately
24 establishes the question or the issue in
25 question and it does not require deduction or

1 importance, but it obviously is very important.
2 But they've not been sworn in. They've not been
3 subject to cross-examination. So if what they
4 told you at any time during the course of this
5 trial, if it differs from your collected memory
6 as to that fact or that issue, then your memory
7 will control.

8 Also, Mr. Foreman, I'll remind you that
9 just because something appears in a juror's
10 notes does not mean it trumps somebody's memory
11 on that particular issue either. That's why
12 they call them deliberations. You'll just have
13 to hash those things out.

14 Also, Ladies and Gentlemen, questions that
15 the lawyers ask to the witnesses, in
16 themselves, is not evidence. The answers back
17 certainly is evidence, but the questions are
18 not.

19 Also, I remind you, and I'm sure you have a
20 very vivid memory of it, lawyers have an
21 obligation to object. The fact that the lawyers
22 objected in this case or the fact that I let
23 you sit in and see my ruling on some of those
24 objections may not and shall not be the subject
25 of any of your deliberations, Mr. Foreman.

1 will be sent back to you and have been admitted
2 into evidence is evidence.

3 Now, normally there's no other evidence,
4 but in this case, there's one additional set of
5 evidence of evidence that you need to consider
6 as evidence, and you may not debate it at all.
7 The defendant in this case admits that he
8 violated the duty of loyalty owed to the
9 plaintiff. That will not be subject to
10 deliberations. You have to take that as grand.

11 Also he admitted that he violated a
12 fiduciary duty owed to the plaintiff. You may
13 not debate that as well. I'll tell you more
14 about in just a few minutes.

15 Also the parties stipulate that there were
16 contractual agreements between the parties, and
17 I will give you more information about those.
18 You may not debate whether or not a contract or
19 contracts existed between the parties.

20 Now, Ladies and Gentlemen, that leads me to
21 what is not evidence in this case. Now, the
22 arguments and the statements by these attorneys
23 in their opening statement, in their closing
24 statements, and at any time during this case is
25 not evidence. That's not to minimize their

1 belief as to facts sought to be proved.

2 Ladies and Gentlemen, as I told you, this
3 is more than a preponderance of the evidence,
4 but it's less than required in a criminal case,
5 which is proof beyond a reasonable doubt. Clear
6 and convincing evidence leaves you firmly
7 convinced that the fact is not only probably
8 true, it's highly probably true. Those are the
9 burdens that you will hear and I want you to
10 remember when you apply this case, the
11 standards in this case.

12 Ladies and Gentlemen, when I give you the
13 illustration of a set of scales, please
14 remember it's not a literal set of scales. This
15 is a mental process. You will use your good
16 sense of logic, judgment and your life
17 experiences when you begin your deliberations
18 and apply the law as I give it to you and the
19 facts as you find them to be.

20 That leads me to what is evidence in this
21 case that you may consider as evidence. The
22 testimony from the witness stand is the
23 evidence that you may consider, whether it be
24 direct examination, cross-examination or some
25 other part of that. Also, the exhibits that

1 means the greater weight of the evidence. It's
2 evidence, which as a whole, shows that the fact
3 to be proved is more than likely not true. If
4 you recall, at the beginning of this case, I
5 gave you an illustration of a set of scales.
6 Right now, they are equal until you begin your
7 deliberations. And after you have unanimously
8 reached a verdict as to each one of these
9 causes of action, as to those -- each causes of
10 action, if the scales were made the same, or if
11 they tilt ever so favor -- ever so slightly in
12 favor of the defense, the plaintiff will not
13 have met his burden of proof. On the other
14 hand, if they tilt ever so slightly in favor of
15 the plaintiff, then the plaintiff would have
16 met their burden of proof on the causes of
17 action that has to do with a preponderance of
18 the evidence.

19 Now, as it relates to punitive damages, and
20 I think it's the cause of action under Unfair
21 Trade -- I mean, Unfair Trade Practices, the
22 burden is a little bit higher. It's called
23 clear and convincing evidence. And this is
24 that. Clear and convincing evidence is that
25 degree of proof which would give you a firm

1 out parts of it, the instructions that you
2 agree with and apply those and not apply some
3 that you may not agree with. They're all
4 equally important.

5 Also, Ladies and Gentlemen, if I have said
6 or done anything throughout the course of this
7 trial that indicates to you the facts that you
8 are to find, in other words, your verdict, I'm
9 going to ask you, but also instruct you to
10 disregard that. Our constitution in South
11 Carolina does not allow judges to comment on
12 the facts or to have an opinion on the facts of
13 a case. You, and you alone, are the judges of
14 what the facts are in this matter.

15 Now, Ladies and Gentlemen, the burden in
16 this case is on the plaintiff. The burden is on
17 the defense to support the affirmative defenses
18 that you will hear about. The burden of proof
19 is by what we call a preponderance of the
20 evidence unless it applies to punitive damages
21 and under, I think, the Trade Practices Act,
22 you will hear there is a clear and convincing
23 standard. I'm going to give you both of those
24 and keep in mind while you hear this.

25 But a preponderance of the evidence simply

1 Now, Ladies and Gentlemen, if you will
2 recall, at the beginning of this case, I told
3 you that you are the sole judges of the facts
4 of this case. In other words, you are the judge
5 of what your verdict is going to be, as to each
6 of the causes of action. From the facts that
7 you find them to be, you must apply the law as
8 I give it to you now. You may not concern
9 yourself with what you would like it to be, but
10 only what it is. If I'm in correct, I will be
11 corrected by the Court of Appeals or the
12 Supreme Court.

13 Also, Ladies and Gentlemen, in reaching
14 your findings of facts, you must not and you
15 shall not be influenced by any person of
16 dislikes, opinions, prejudice or undue sympathy
17 you may have for one side of this case or the
18 other. What that simply means is you will make
19 your decision based on the testimony and the
20 evidence that you heard in this case and the
21 exhibits that have been admitted, as well as
22 according to the law as I give it to you now.
23 That's what you said you'd do when you took an
24 oath at the beginning of this trial. In
25 following these instructions, you can't single

1 this case. There will be no more evidence.
2 Typically, or frequently, when I'm doing cases
3 around the state, jurors will ask for
4 additional information. That will not happen.
5 The record is closed. You're going to have to
6 make a decision on the record before you. If
7 you want to see or hear some other evidence
8 that you've heard, that's fine. But there will
9 be no more evidence put in the case.

10 So it's now up to me to charge you on the
11 law. My instructions are going to be in three
12 parts. The first part will be the general rules
13 that define and control your duties as jurors.
14 The second will be the law that's applicable to
15 the eight various cause of actions and the
16 affirmative defenses raised by the parties in
17 this matter. And finally, there will be some
18 considerations about your deliberations. Then,
19 Mr. Foreman, I will go over the verdict form
20 with you. After which, I will send you out.
21 I'll check with the attorneys to make sure I
22 don't -- didn't misstate -- misstate or omit
23 something from this charge. Then we will tell
24 you either to come back or begin your
25 deliberations.

1 **MR. SMITH:** No, she went back. She's good.

2 Thank you.

3 (Jury enters at approximately 1:15 p.m.)

4 **THE COURT:** All right. Ladies and
5 Gentlemen, we're entering into the fourth phase
6 of this trial. It's where I instruct you on the
7 law. Let me make a few brief statements. First,
8 let me apologize in advance. I'm neither as
9 eloquent or articulate as these attorneys. Are
10 we missing somebody?

11 I'm neither as eloquent or as articulate as
12 these attorneys, therefore, I will read some of
13 this to you. I will try to do my best to
14 minimize it. But these are very complex issues
15 of law. I'm afraid that if I tried to recite
16 them off my head, which I cannot do, I would do
17 a bad job at it.

18 I will apologize to you, because it's
19 somewhat dry. In other words, it's going to be
20 hard for you to go through it. I'm going to do
21 it in phases and let you stand up and move
22 about so I won't just put you all to sleep. But
23 just bear with me.

24 Ladies and Gentlemen, you've heard all of
25 the evidence that's going to be submitted in

1 at-will again. I was going to strike that out.
2 I mean, I think everybody was an agreement
3 yesterday on that.

4 **MR. SMITH:** Yes, sir.

5 **MR. ENGLISH:** Yes, sir.

6 **THE COURT:** Okay. All right. Thank you,
7 guys. And let me say this to the lawyers: I
8 want to commend both sides. You have worked
9 hard. I know this is a tough bear to put
10 together. You have presented your cases well
11 and represented your respective clients in a
12 very professional manner. For my purposes, I
13 just want to applaud both of you. I want to say
14 it now because generally it's a winner and
15 loser and people don't necessarily want to
16 speak afterwards, but thank you, guys.

17 **MR. SMITH:** Thank you, Judge.

18 (The Court goes off the record at approximately
19 1:00 p.m.)

20 (The Court goes on the record at approximately
21 1:13 p.m.)

22 **THE COURT:** We have everybody in here that
23 needs to be in here?

24 **THE BAILIFF:** That door is locked. How
25 about your legal --

1 you back out here just a few minutes and read
2 the charge to you. So take about a 10-minute
3 break. If you need anything, ask our bailiffs.
4 They'll be glad to take care of you.

5 (Jury exits at approximately 12:57 p.m.)

6 **THE COURT:** Gentlemen and ladies, would
7 you look at Page 16 of the charge? Somehow that
8 at-will language found its way back in. I
9 thought we agreed yesterday that it was
10 inappropriate and should be stricken.

11 **MR. SMITH:** 16?

12 **THE COURT:** Yes, sir. Page 16. That's
13 under tortious interference with a contract..

14 **MR. SMITH:** What was the language again?

15 **THE COURT:** I'm looking at the last line
16 on the bottom of Page 16 that says contract
17 terminable at-will. I thought we excised that
18 out of there.

19 **MR. ENGLISH:** Yes, sir.

20 **THE COURT:** So I'm going to do that now,
21 as well as that entire top paragraph.

22 **MR. ENGLISH:** Yes, sir.

23 **THE COURT:** There was on Page 18 -- it's
24 one, two, three, fourth paragraph starting with
25 "Generally." I was going to -- it's terminable

1 is to put Encore in the same position it would
2 have been in if the defendants had honored
3 their obligations."

4 They go on and on to say that Encore is
5 greedy for bringing this lawsuit. But I want
6 you to think: If somebody steals money, is it
7 greedy to ask them to repay it? All Encore is
8 seeking is to get back the value of this
9 business for which it took all of the risks and
10 paid all of the start-up costs. It's something
11 that Encore has had to pursue for over two
12 years now with nothing in return, other than
13 denials by the defendant, and all the work that
14 it's taken to bring out the truth. Thank you.

15 **THE COURT:** All right. Mr. Foreman and
16 Ladies and Gentlemen of the jury, let's take
17 about a 10-minute break or so. Unfortunately,
18 my charge will be probably be in the
19 neighborhood of about an hour. So go ahead and
20 -- the lunch should be getting there around
21 1:30 or so. Hopefully, after we get through
22 with the charge, y'all can sit down and begin
23 deliberations and eat your lunch.

24 Then we'll bring you back out here in just
25 a few minutes -- excuse me, I'm going to bring

1 the adjustments to account for converting from
2 the cash to the accrual basis. And so
3 Mr. Meilinger has accurately calculated those
4 lost profits in the calculations that were
5 given to you.

6 He says that -- complains that Encore has
7 wanted money for products that Encore sold
8 after Mr. Trask left Clear Touch. The reason
9 that's appropriate is, if Mr. Trask had
10 disclosed the opportunity to buy from those
11 suppliers, Encore could have done that from
12 that point forward. There's no reason they
13 would've stopped buying directly from the
14 suppliers. And Encore could have done that if
15 Clear Touch had just -- and Mr. Trask had
16 honored his duties under the contract, under
17 the law the Judge will charge you.

18 As far as the Leon County sales, again, he
19 says Encore could not have made those sales.
20 But Encore could have, if Mr. Trask had honored
21 his non-compete and supported the reseller
22 agreement.

23 Finally, Ladies and Gentlemen, listen to
24 the Judge's charge on damages. Those charges
25 will include the statement, "The goal of this

1 Touch.

2 He says that Encore wouldn't be able to
3 play football in the NFL and none of us are
4 able to play in the NFL and, therefore, Encore
5 shouldn't -- you shouldn't award Encore damages
6 for being able to buy directly from the
7 suppliers. Well, Mr. Viola says he is able to
8 buy direct from CVTE. And Mr. Trask admitted on
9 cross-examination that Encore could have
10 purchased directly from the suppliers, if he
11 just told them from the beginning.

12 Mr. Smith argued that, well, Leon County
13 didn't come and testify about their purchases.
14 But we didn't need Leon County to come testify,
15 because the undisputed evidence is that Encore
16 was selling to Leon County first, and then they
17 stopped and went directly to Clear Touch, even
18 though Clear Touch had this reseller agreement
19 that supposedly fulfilled their obligations
20 under the business opportunity clause and they
21 didn't do anything to make sure that Encore
22 kept those sales.

23 He says that the lost profits calculation
24 is inaccurate because Clear Touch made no
25 money. Mr. Meilinger testified he had to make

1 end of his employment. And he did that based
2 upon a lot of research and digging he did into
3 all of Encore's payroll.

4 He said that Leon County is not a trade
5 secret but -- because there were these
6 billboards. He's being very general. Mr. Trask
7 had access to the prices and specifications and
8 the needs of Leon that he had gotten at Encore.
9 It is a trade secret that he took.

10 He said that Encore could have never gotten
11 Leon County business, but Encore had it. Encore
12 made the sales to Leon County. So that's just
13 not true.

14 He says that Mr. Trask fulfilled his
15 obligation under the business opportunity
16 clause by giving them the reseller agreement.
17 If it's the same reseller agreement that he
18 said he later terminated and took away Encore's
19 exclusivity rights, it doesn't add up. He says
20 that Mr. Leo Gallant caused no harm to Encore,
21 but what he didn't provide you is that
22 Mr. Gallant worked on Encore's payroll for nine
23 months after Mr. Trask got him to sign a
24 non-disclosure agreement. Why? Because he was
25 pushing Clear Touch for the benefit of Clear

1 waiver. That is an intentional relinquishment
2 of a known right with knowledge of all the
3 facts and circumstances. Encore did not waive
4 its rights.

5 Now, he says that the reason we are here is
6 because Clear Touch fired Mr. Higginbotham.

7 That's not the reason we are here.

8 Mr. Higginbotham just clued Encore into what
9 happened. The reason we're here is -- the truth
10 is, we are here because of what Mr. Trask and
11 Clear Touch did wrong. Now, he said that Encore
12 didn't look for a direct source when it found
13 out that, but the testimony was Encore didn't
14 learn about the fact that it could buy from
15 CVTE until this case was already progressing.
16 That's when it finally found out. If Mr. Trask
17 had just told him from the beginning, Encore
18 could have purchased directly from CVTE, just
19 like Mr. Viola says he does.

20 Then, he said that Mr. Trask discovered the
21 suppliers before he came to Encore and that
22 this was publicly available information. Well,
23 that contradicts the testimony of Mr. Trask's
24 cross-examination yesterday, when he said he
25 learned about CVTE in January 2014, near the

1 of 2012. Ladies and Gentlemen, an idea is not a
2 house; it's just an idea. The opportunity
3 didn't come about until he joined Encore, had
4 access to Encore's customers and employees and
5 Encore's information.

6 Now, he says -- and this is significant to
7 his position -- that in January of 2014, he
8 wanted to leave, but Mr. Powell asked him to
9 stay. That was directly contradicted by
10 Mr. Powell.

11 Then he said that Encore waived its
12 position because he told them in the fall --
13 Mr. Newnam in the fall of 2014, that he had
14 acquired an ownership interest in Clear Touch.
15 But he admitted he didn't tell them the full
16 truth then and that Encore didn't find out the
17 full truth until September of 2015.

18 When Encore found out, what did it do? It
19 immediately terminated the reseller agreement,
20 even though that harmed it, because as
21 Mr. Gallant had said back in April of 2014, we
22 spent all of this time building up momentum. So
23 Encore hurt itself by terminating the reseller
24 agreement because that's when they found out.

25 The Judge will charge you the law on

1 That is what Calculation Number 3 does. It
2 is not tied to a breach of the reseller
3 agreement, as argued. This is tied to the
4 normalized profits. And normalized because you
5 heard the testimony, those balance sheets they
6 throw up on the cash basis showing their losses
7 are not reliable.

8 Now, Mr. Smith argues that Mr. Young said
9 that -- I'm sorry, that this was only five
10 percent of Encore's business. But Mr. Young
11 testified, in fact, that this has grown to be
12 20 percent of Encore's business and it would
13 have been even more if Mr. Trask had performed
14 the contract.

15 Mr. Smith talks about, "Well, you got to
16 look at the value of Encore's business to
17 decide damages." That's not true. The issue is
18 not the value of Encore's business any more
19 than the rental house situation. If you are
20 awarding damages for the rental house, you do
21 not need to know how much Encore's worth to
22 figure that out.

23 Now, he says that Mr. Trask had this idea
24 and that was the opportunity. The Clear Touch
25 opportunity was the idea he had back in August

1 Encore.

2 Now, let's pull up Plaintiff's
3 Exhibit 10(H) and let's start with that last --
4 the calculation of the value of the business.
5 To simplify this, Ladies and Gentlemen, I want
6 you to imagine that, instead of building a
7 business, Mr. Trask, while he was an employee
8 of Encore, built a rental house. Let's say that
9 Encore had some lumber and he took some of the
10 lumber. While he was a salary employee, he
11 spent building that house and he may have even
12 used some other employees of Encore to help
13 build that rental house. And then while he was
14 an employee of Encore, he started renting that
15 house out to people and collecting rent on the
16 side.

17 Under the law, the Judge will charge you
18 that Encore is entitled to be put back in the
19 position it should have been in if Mr. Trask
20 had performed the contract and performed his
21 other legal duties. In that scenario, in the
22 rental house scenario, it's appropriate for
23 Encore to recoup the rent payments that
24 Mr. Trask received, as well as the value of the
25 house.

1 Ladies and Gentlemen, I'm again going to
2 ask you what I asked when I first started,
3 please look at all the evidence and render a
4 fair and appropriate verdict. I trust you to do
5 that, and I trust you not to give a bailout to
6 someone who made a bad investment. Please allow
7 my client to go on continuing to do his
8 business, continuing -- Mr. and Ms. Trask,
9 Mr. Gallant and all these folks from
10 Greenville, South Carolina that put hard work
11 and effort into and continue to grow and be
12 successful.

13 To be clear, we want the plaintiff to grow
14 and be successful, too. But they shouldn't be
15 able to destroy my client and his business for
16 every penny they invested and lost through a
17 lawsuit. Thank you, and I appreciate your time.

18 **THE COURT:** Brief reply, please.

19 **MR. ENGLISH:** Well, somebody famous once
20 said, "There he goes again." Ladies and
21 Gentlemen, we are here not because of Encore's
22 greed, but because the defendants admit that
23 they did terrible things and they don't want to
24 take responsibility for it. We're here because
25 Mr. Trask and Clear Touch did wrong and hurt

1 That's not what you're here for. This entire
2 number is just ludicrous. You know where it
3 actually comes from?

4 I'm sorry. I'm asking for a little help.
5 I'm not very good at running that thing.

6 I think y'all know where that \$5.5 million
7 comes from. Mr. Newnam paid -- ultimately, four
8 million originally; the bank made him put in
9 another half-million because Encore wasn't
10 doing well the first year. \$4.5 million. I went
11 through with Mr. Newman and asked him about the
12 revenues and the profits of Encore from year to
13 year. The total money they've lost, according
14 to Mr. Newman's testimony, at this point, is
15 approximately \$1 million. You don't have to be
16 an economic expert to add those two numbers
17 together. 5.5 million. Isn't that coincidence?

18 Mr. Newnam and Encore wants you to bail
19 them out. He sat on the stand and said, I was
20 an investment banker and venture capitalist. We
21 all know, in that world, if you make a bad
22 investment, sometimes the system will come and
23 bail you out. That's what he wants this system
24 to do, bail him out of a bad investment. That's
25 not what it's for.

1 year and round it out. They've got no basis for
2 this third -- well, fourth one, there goes
3 another \$214,000.

4 Now, the 3.9 million, you heard Dr. Alford
5 testify this morning very, very clearly. This
6 five-and-a-half-million-dollar calculation,
7 what it's saying is Encore's business would be
8 worth five and a half million more dollars
9 today had they taken the Clear Touch
10 opportunity in 2013. You heard Dr. Alford
11 testify to make that claim, Mr. Meilinger
12 would've had to look and do an evaluation of
13 Encore's finances and value their business.
14 Mr. Meilinger was very clear, and that report
15 shows he didn't do that. What he did was rely
16 on client's financials and came up with this
17 \$3.9 million.

18 It's not an appropriate analysis. That
19 doesn't show what harm Encore incurred. That's
20 what you're here to get money for. You're here
21 to give them the money that reflects the harm
22 you determine they suffered. You're not here to
23 give them my client's business that was built
24 from this man's vision, this man's hard work,
25 and his family and all of his retirement funds.

1 in the room. I ask you to look at them. They
2 are short and easy documents to read and
3 understand showing that Clear Touch did not
4 make money in 2013 or '14. Yet they want
5 \$105,000 for it.

6 Then, they want -- again, Clear Touch from
7 2014-2015, during my client's non-compete. We
8 contend that they don't have the grounds to get
9 that. It is \$36,000, which I think we all agree
10 is fairly small in the context of what we're
11 talking about here. It's up to y'all to
12 determine if you think they're entitled to
13 that. We contend they're not.

14 Now, again here's what we just talked
15 about, this third one. The normalized profits
16 from April 26, '15 to 10/10/2015, this is the
17 duration. We've got it right here, the reseller
18 agreement. They're not alleging and their
19 complaint in this action does not have to do
20 with breach of a reseller agreement. They have
21 no basis on which to get this other than trying
22 to convince you they would have, could have and
23 should have done it. We all know that's not the
24 case. This \$1.2 million is gone. Now, I guess
25 they just wanted to capture the rest of the

1 back in 2013 he should've disclosed his
2 interest in Clear Touch. It's up to you to
3 determine whether or not you're going to
4 believe that that failure to disclose caused
5 this damage clear down the line. We contend it
6 did not.

7 Now, the last two here, we've talked a lot
8 about Leon County. I'll explain it again. They
9 could not have made the sales. If you can't
10 make a sale, you shouldn't be able to recover
11 for it. So this is where their Calculation
12 Table 2 leads you. They're not entitled to one,
13 two, three, four, out of the five categories
14 that they want. It's up to you to determine
15 whether or not they're entitled to the first
16 one; and how much. We do not -- my client is
17 showing in 2014 and '13 that they are in the
18 red, they are in the negative. Despite that
19 fact, Encore wants you to give them \$125,000
20 from that time period.

21 Now, I told you we'd get to the big one.
22 This is Table 3, five and a half million
23 dollars they want. Again, top line. They just
24 show the profit and loss sheets of our clients.
25 Y'all are going to have them in evidence back

1 period. They want this damage for products sold
2 to them during that period. Mr. Trask didn't
3 work for them anymore. He had no duty of
4 loyalty to them anymore. He had no fiduciary
5 duty to them anymore. He just needed to sell
6 them panels as their manufacturer. He had a
7 reseller agreement. And selling directly to
8 Encore wasn't a violation of his non-compete.

9 So this element of damage, this 344, is
10 absurd. They bought and paid for product that
11 they got. This did not violate any contractual,
12 any fiduciary, any common-law duty that my
13 client had for the plaintiff. That 344 is gone.

14 Now, second one, direct damages on products
15 sold to Encore from Clear Touch, this is the
16 date my client's non-compete ended, 4/25/15.
17 This is the date that Encore terminated the
18 reseller agreement. There is no legal or
19 contractual basis on which they could recoup
20 this money. Yet they want it from you. They
21 want you to give them another \$205,000 and
22 change, during the time in which my client
23 hadn't worked for them in over a year, during
24 the time in which his non-compete didn't apply
25 just because he sold them panels and they think

1 different time periods to Encore. So let's take
2 the easy one out first. Excuse me. Let me take
3 a step back. I got ahead of myself.

4 This says "Profit." If you remember our
5 discussion, and I discussed throughout this
6 case, gross profit versus net profit are very
7 different things. They utilize not my client's
8 net profits. We all saw in 2014, and if you
9 look at Defendant's 36 -- excuse me
10 Defendant's 18.

11 Scroll all the way down to the bottom.

12 My client didn't make any money the first
13 year it existed. Let's take out the expenses.
14 Then, if you look at next year, January through
15 December 2014, my client didn't make any money.
16 But going back to the damages report charts
17 they gave you, they show my client up \$125,000
18 when the evidence shows the lost money for that
19 year, because they don't want to give them
20 credit for their expenses. They just want to
21 take every dollar they pulled in on that. So
22 that's not an appropriate figure.

23 Two, direct damages on products sold to
24 Encore from Clear Touch. This date's important
25 4/26/14 to 4/25/15. That's the non-compete

1 benefits he bought in. That's not appropriate.
2 You got to give the guy credit for bringing
3 stuff in and doing good for your business. You
4 can't say, well, anything that had to do with
5 Clear Touch is recoverable. That's for y'all to
6 look at. And I think you will determine an
7 appropriate percentage. And it certainly is not
8 95 percent of Mr. Trask's time, 95 percent of
9 Mr. Higginbotham's time and 90 percent of Leo
10 Gallant's time was spent solely for the benefit
11 of Clear Touch. The evidence shows that is not
12 the case. But that is a pumped up figure
13 percentage that Mr. Meilinger used for his
14 first element of damages.

15 Now, I couldn't put up the board for
16 Calculation 1 for certain reasons, but let's
17 scroll down to 2. Some of y'all may be able to
18 see this better on the panel. I'm not sure. But
19 this is the lost profit on sales made to Encore
20 and Encore customers that they contend my
21 client owes them for.

22 So looking at this thing, the top here is
23 really -- no. You know, because Mr. Trask had
24 different obligations, either common-law
25 obligation's or contractual obligations, at

1 more today. I trust in y'all more than that.

2 Now, let's look at each calculation.

3 Calculation 1, at the top. Calculation 1 at the
4 top here. This is for Mr. Trask's pay and some
5 expenses and portions of Mr. Gallant and
6 Mr. Higginbotham's pay and expenses. And then
7 they, you know, randomly half the calculation
8 to come up with \$67,000 for trade show
9 expenses. I contend no basis, but if they want
10 to put about half, they can.

11 The important thing on this element of
12 damages, Ladies and Gentlemen, is a percentage
13 utilized in coming up with them. You've heard a
14 lot about that. You're going to hear about
15 apportionment. So under the breach of duty of
16 loyalty and fiduciary duty cause of action,
17 it's up to y'all to look at the evidence and
18 say this is how much time we think Mr. Trask
19 was working for the benefit of Clear Touch. It
20 goes a step further. This is what the plaintiff
21 chose to flatly ignore, but really matters.

22 You've got a look at what actions actually
23 solely benefited Clear Touch and didn't benefit
24 Encore. Encore wants all the money in the world
25 from my client, without any recognition of the

1 he referred a lot to "us," "we," "us," "we."
2 "Us" and "we" was talking about him and Encore
3 management. We did this. Well, you know, we did
4 that. We looked at this. We looked at that. You
5 have to ask yourself should an independent
6 expert be referring to the collective "we" when
7 he's talking about his client. You have to ask
8 yourself how much influence did Encore have on
9 Mr. Meilinger's calculations.

10 As Dr. Alford pointed out just this
11 morning, a substantial amount of influence. As
12 Dr. Alford pointed out this morning, it
13 shouldn't have had that much influence. There
14 should have been and could have been work done
15 to actually look at, as an independent economic
16 expert, facts and figures and information
17 concerning Encore's financials and determine
18 how much it had been hurt.

19 Ladies and Gentlemen, Dr. Alford, I think,
20 was extremely clear: That wasn't done. All they
21 looked at were my client's financials and then,
22 based on a wing and a prayer, and just saying
23 to you in this witness stand, we would have
24 done it, hope that you believe their business
25 would be worth five and a half million dollars

1 up here by the different parties. My client was
2 very clear, and others, with actual knowledge
3 of Leon County's working relationship that that
4 did occur. Mr. Trask testified they had --
5 Clear Touch actually had to airfreight some
6 panels in to try to save the relationship with
7 Leon County. But Leon decided, and the
8 undisputed evidence showed they decided, "I
9 don't want to do business with Encore anymore."

10 I guarantee you if there was an actual
11 witness at Leon County like Mike Fraser, the
12 guy's name you kept seeing over and over again,
13 would've backed up their case, he would've been
14 in that witness stand or, at the very least,
15 would have been on the screen in a video
16 deposition; and he wasn't.

17 Now, let's talk damages. (Pause.)

18 Now before we talk details, real quick, I
19 want to discuss with you the basis for these
20 damages and who put them together.

21 Mr. Meilinger is -- he's a qualified
22 accountant, a CPA. As an expert does, he has to
23 work with what was given to him. I want you to
24 remember some aspects of Mr. Meilinger's
25 deposition. I, first, want you to remember how

1 Here's the key on this, Ladies and
2 Gentlemen: You've had a ton of witnesses
3 paraded in front of you by the plaintiff over
4 the course of three days and then put two back
5 up there today for rebuttal. I think it's very
6 important who you didn't see on the witness
7 stand. You didn't see a single person from Leon
8 County. You didn't see a single affidavit from
9 someone at Leon County saying we want to do
10 business with Encore, we wanted to continue to
11 do business with Encore, and but for this
12 statement -- assuming it was made, but for this
13 statement, we would have continued to do
14 business with Encore. The actual evidence
15 that's been put up here is they didn't want to
16 do business with Encore.

17 The only evidence they have that my client
18 made this statement to Leon County is a
19 disgruntled employee. That's not enough. That
20 is not enough to prove a defamation claim.

21 There is also -- actually, the Judge will
22 tell you there is absolute defense to a
23 defamation claim, truth. You're going to have
24 to decide whether or not that statement was
25 true. There was some conflicting testimony put

1 secret.

2 So you've got to ask yourself: one, did Encore
3 prove they had trade secrets and
4 misappropriate? They didn't. Your evaluation of
5 trade secret claim ends there and that's it.

6 If you somehow find that this information
7 they claim was secret is a trade secret, then
8 you have to ask yourself: Did Encore prove --
9 as the party with the burden, did Encore prove
10 that Mr. Trask misappropriated, used or
11 disclosed that trade secret? The only evidence
12 they have, under their theory, is that my
13 client sold those panels to Leon County. They
14 have failed to make, again, the causal link
15 between their alleged trade secret to show that
16 my client took it and then used it to harm
17 Encore.

18 Now, defamation is pretty easy, from our
19 perspective. There's no evidence of defamatory
20 statement. Mr. Higginbotham then came in front
21 of us and testified. We all saw his affidavit,
22 paragraph five of our friend Jimmy
23 Higginbotham's affidavit, that Keone Trask told
24 him that he told Leon County that some product
25 they had ordered had been diverted.

1 law, is some kind of information. It can be a
2 process. It could be a customer list. Whatever.
3 It's broad. But the key part of the definition
4 is it derives independent economic value from
5 being secret. It's got to actually be secret.

6 Their trade secret claim, again, is that my
7 client misappropriated the identity of the
8 panel suppliers. They didn't put up evidence to
9 show that was a secret piece of information.
10 Mr. Trask was very clear where he got it, the
11 Internet. We all know the Internet is not a
12 place to keep secrets; it's quite the opposite.
13 They didn't have the trade secret to
14 misappropriate. My client cannot be liable for
15 allegedly not -- allegedly taking the identity
16 of supplier information from them.

17 Again, Leon County is another part of the
18 trade secret claim. Something that's advertised
19 on a billboard is not a trade secret, even if
20 it's a secret formula for some important
21 chemical that Michelin uses to lubricate brakes
22 and would make someone \$1 million every other
23 day. If you post it on a billboard, it's no
24 longer a secret and you can't sue anyone for
25 misappropriating that once, former trade

1 agreement that we're discussing. So you don't
2 even get to looking at whether Clear Touch
3 intentionally procured this alleged breach.
4 Without a breach, you've got nothing. We
5 contend they did not tortiously interfere and
6 intentionally procure a breach of anything.

7 My client continued to do business with
8 Encore. Encore continued to do business with
9 Clear Touch. They all knew what was going on at
10 that point. Now, I can't come back and claim --
11 just drag the company into this and try to get
12 the big pile of money they claim we have that
13 Clear Touch tortiously interfered with the
14 agreement. Again, waiver comes into this. I'm
15 not going to explain that to you again, we all
16 understand that. Then, you have to ask about
17 proximate harm, as well.

18 Now the trade secrets claim is one --
19 again, it doesn't get past step one.
20 Plaintiff's burden for a trade secret claim, as
21 the Judge is going to tell you, they had the
22 burden of coming here, first and foremost,
23 number one out of the gate, to prove to you
24 they had a trade secret to misappropriate. And
25 a trade secret, as the Judge will tell you the

1 here. You have to ask yourselves: Did Encore
2 attempt to mitigate its damages? The Judge will
3 tell you the law requires a party to mitigate
4 its damages. That means a plaintiff has got to
5 take some type of action to say, "Okay. You
6 hurt me. Now I've got to do something to try
7 and lessen that injury to myself."

8 In this context, they are saying the injury
9 is they couldn't become a panel supplier
10 because my client didn't give them the
11 opportunity. Well, as we've gone over in
12 detail, they did nothing about it. They didn't
13 try to mitigate their damages by looking into
14 what they could do. All they did is get
15 ViewSonic; file a lawsuit. We don't think they
16 took appropriate action to mitigate the
17 damages.

18 Now, the tortious interference with a
19 contract claim, Mr. English went over with you,
20 is against Clear Touch itself and not
21 Mr. Trask. You've got to look over and ask
22 yourself: Did Clear Touch tortiously interfere
23 with an actual contract? And we contend, as I
24 just outlined in detail, there's been no breach
25 of the agreement, the non-solicitation

1 non-compete. Mr. Trask has a non-compete. This
2 is a non-piracy breach." They didn't do that.
3 They did business with them for months
4 afterwards, nearly 10 months afterwards. So
5 they waived any claim that my client breached a
6 non-piracy provision.

7 And the same goes with the non-solicitation
8 provision. We believe that Encore knowing, as
9 they have testified, that my client was working
10 with other resellers within the territories
11 they sold panels, all the way back to the end
12 of fall of 2014, beginning 2015, and then doing
13 nothing about it, them not saying, "Hey, you're
14 competing with us in our territory. That
15 competition violates the non-solicitation part
16 of Mr. Trask's agreement. Stop it." Didn't see
17 any evidence of that, because they didn't do
18 it. They allowed my client to do that. Everyone
19 continued on and there was no objection.

20 If you do that, you can't later just come
21 back and say, "Well, I let you do all these
22 things that now I'm claiming breached the
23 agreement." That's not how it works.

24 Here's a really, really important aspect on
25 this breach of contract claim, the second one

1 doesn't mean you have to know how to do that
2 thing. There's a reason people play in NFLs,
3 because they can play football better than
4 everyone in this room. They make more money. We
5 can't all just go pick up a football and go
6 play. That's what they're saying they can do.

7 Now, there's two other really important
8 aspects about breach of contract claims: first,
9 we have what the Judge will instruct you as a
10 labor defense, which means to the extent
11 anything you believe is a breach of the
12 agreement -- first of all, if you believe the
13 agreement is binding, then you believe my
14 client breached it, what we are contending is
15 Encore waived any compliance with these
16 provisions. Let me point out exactly what I'm
17 talking about so it makes more sense.

18 Will you pull this back up real quick,
19 Josh? Thanks.

20 First and foremost, this one's easy, the
21 non-piracy provision is. Encore knew
22 Mr. Gallant was leaving. It's very, very clear
23 they testified they didn't do anything about
24 it. They didn't object to it, didn't say, "Hey,
25 Leo, you can't go over there. You've got a

1 closing, to one end. Plaintiff's information
2 concerning the suppliers, that wasn't anything
3 confidential. And then the Leon County upgrade,
4 we've already been over. The bond referendum
5 was more than public. That was not something my
6 client took from Encore, nor owned by Encore.

7 And then finally, the business opportunity
8 provision. Not only the language we just talked
9 about there being no breach, but even assuming
10 that you look back and think there's a breach
11 to the business opportunity provision, what it
12 requires for you to then say Encore is entitled
13 to the money that they want for it is to
14 believe they could have, would have done my
15 client's business; they could have and would
16 have become a direct panel supplier
17 manufacturer and done just as well as Keone
18 Trask has done for Clear Touch, although not a
19 single one of them gave y'all any specific
20 knowledge or detail about the business or how
21 they do that. It was just all speculation. It
22 was just, of course, we would have. We would
23 have made more money.

24 Well, I think everyone understands you can
25 make more money doing a lot of things. It

1 establish that link, then you can't award
2 damages on it.

3 So let's say: Was Encore proximately harmed
4 by Leo Gallant leaving Encore to go work for
5 Clear Touch? They knew about it, didn't object
6 to it, and Mr. Gallant continued to work with
7 them as Clear Touch's reseller to their benefit
8 and didn't have to pay him, again, to their
9 benefit. So no, they weren't harmed. The
10 defendants would contend they actually gained
11 value from Mr. Gallant leaving, doing a lot of
12 the same stuff that he did for Encore, but now
13 under Clear Touch's payroll.

14 Now, the non-solicitation, as I just went
15 over, the big hit of damages they want for the
16 non-solicitation is Leon County. They want
17 those sales back. Let's look at the board real
18 quick, if you don't mind. (Pause.)

19 We contend they're not entitled to those
20 damages -- we'll go over damages in the very
21 end here -- because they couldn't make the sale
22 to Leon. So there's no proximate cause to harm
23 there.

24 The confidentiality provision, again, it's
25 kind of a novel theory we're hearing in

1 Mr. English read off to you, it says, "Shall
2 use employee's good faith effort to cause
3 Company, Encore, to have the opportunity to
4 explore, invest in, participate in or otherwise
5 become affiliated with the opportunity." We
6 contend not only was it not applicable because
7 the opportunity was identified before this was
8 executed, my client fulfilled his obligations
9 under it, if it is applicable, because he
10 brought the opportunity to Encore. He made them
11 an exclusive reseller of the product. They were
12 affiliated with the product. It was an
13 exclusive brand they carried in seven
14 Southeastern states. So we don't believe
15 there's a breach of agreement there.

16 Now, what you have to look at on this
17 breach of contract claim and all of these
18 claims, obviously, is how Encore was harmed by
19 it. Step one is, as the Judge will instruct you
20 is: Was there a breach? Okay. Well, then if you
21 say yes, step two is: Did that breach
22 proximately cause harm? There's got to be a
23 link between the breach and the harm that the
24 plaintiffs claim. And if there's not -- I mean,
25 you don't believe that the evidence can

1 It's not a customer they had anymore. It's not
2 one that wanted to buy from them. And they
3 shouldn't not be able to recover for Clear
4 Touch selling to somebody, on a deal they could
5 have never had.

6 Then, finally, the big one. Where the
7 plaintiff really wants to hang their hat and
8 have you award them millions and millions and
9 millions and millions and millions and another
10 half million of dollars, is this business
11 opportunity provision. I'm going to point out
12 two things in it: it's limited in time. The
13 first words of it are "during the term of this
14 agreement."

15 Now, when was this agreement signed? I
16 believe y'all can see here. We all know it was
17 signed February 18th, 2013. When did Mr. Trask
18 identify the opportunity? In the fall of 2012.
19 This was not Encore's opportunity. He wasn't
20 Encore's employee. Encore didn't exist. And the
21 undisputed evidence, he started cultivating the
22 sourcing opportunity prior to even becoming an
23 employee of Encore. So this is not an
24 opportunity he had to disclose to Encore.

25 But looking at the last bit that

1 attempted to encourage, or encouraged him to
2 leave Encore. So my client did not breach the
3 non-piracy provision of this agreement.

4 Now, the non-solicitation portion, which is
5 a little bit above that, this is the
6 non-compete thing we keep talking about, Ladies
7 and Gentlemen. This is on Page 2 of Plaintiff's
8 Exhibit Number 2. This, again -- it's a
9 mouthful. I'm not going to read it -- the whole
10 thing all to you. The purpose of it is to
11 prevent my client from doing business with
12 certain entities that Encore claims are its,
13 quote/unquote, customers, as that word is
14 defined in the agreement. We all know this is
15 just about Leon County. So I'm not going to go
16 talk about the definition of customers.

17 Well, Leon County didn't want to do
18 business with Encore anymore. That was very,
19 very clear. Jimmy Higginbotham who has been
20 very, very helpful doing asset searches and
21 forwarding along different information to
22 Mr. Newnam, who has been very, very helpful to
23 the plaintiff, said as much in his affidavit
24 and his testimony. His longtime customer did
25 not want to do business with Encore anymore.

1 this was somehow some secret is ridiculous.

2 The fact that Leon County is upgrading its
3 technology is not a secret. It's not
4 confidential information belonging to Encore.
5 My client did not take such information. He
6 learned it from the public domain.

7 Looking to the non-piracy provision on the
8 second page here. Now, this is the provision
9 where Encore is claiming that Mr. Gallant going
10 to Clear Touch, somehow violated my client's
11 contractual duty to them. Well, I hate to do
12 this, but we're going to have to look at a
13 little bit of the language of this thing,
14 because it really matters. The language of
15 contracts -- as I'm sure the Judge will
16 instruct you on the law, the language of the
17 contract, that's what is going to define the
18 duties of the particular parties, right?

19 So let's see what the non-piracy provision
20 did not allow my client to do. They did not
21 allow Mr. Trask to consult, attempt to hire or
22 encourage an Encore employee to leave the
23 company. He didn't do that. Mr. Gallant's
24 testimony was very, very clear, Ladies and
25 Gentlemen. Keone Trask never consulted,

1 information about the identity of the true
2 suppliers of the panels was a confidential
3 piece of information belonging to Encore. Well,
4 let's see when he figured that out. He figured
5 that out before Encore existed when he was
6 developing the TSItouch opportunity. He looked
7 into it. Where did he say he found it?
8 Internet. That doesn't really sound like
9 confidential secret information to me.

10 Next, they say the fact that Leon County
11 was upgrading their technology, that was a
12 secret. I think you heard yesterday from people
13 who actually know about this particular area
14 and customer, and they were very, very clear:
15 The halfpenny sales bond referendum that we
16 heard about was explicitly to upgrade
17 technology in Leon County schools, was
18 advertised on billboards everywhere in
19 Tallahassee. You heard Wes Martin say, "I'd
20 drive by these billboards in Tallahassee. And
21 they were trying to convince me and every other
22 Florida resident to vote so they could get
23 money to upgrade classroom technology. Even had
24 one of those little thermometers we'd see for
25 the fund raising going on." So to claim that

1 been able to do them outside of Encore, had he
2 stayed.

3 Another key thing on that is the fact that
4 this man really is Clear Touch. I don't think
5 that's a fact anybody is going to deny. He is
6 Clear Touch. Without him, Encore certainly
7 cannot say we could have done just as well, if
8 not better. Because the man they know and have
9 called eminently qualified, knowledgeable and
10 capable wouldn't have stayed with them. That
11 really matters here.

12 So let's go through these causes of action
13 really quickly, or as quickly as I can, and
14 let's talk about damages.

15 Bring up Plaintiff's 2 please.

16 Now, Plaintiff's 2 is probably the most
17 complicated one. There's so many things going
18 on here. This is Mr. Trask's
19 non-disclosure/non-compete. We've all seen it a
20 million times, at this point. I believe
21 Mr. English said there's five different
22 breaches that they are alleging.

23 First, we're looking at confidentiality
24 portions of it. The plaintiff's theory is
25 somewhat novel that: first, Mr. Trask's

1 a true thing.

2 It's very easy to say years later, "Hey, we
3 would've done this thing." Looking back now at
4 Keone and Clear Touch, yeah, of course, they
5 would've done it. Why? Because we would've made
6 more money.

7 Well, would you have altered your business
8 model for something that's less than five
9 percent of your business? I'll leave it up to
10 you to figure out whether or not that's
11 believable. Would you allow Mr. Trask to run
12 his business the way he runs it today under
13 Encore's umbrella and under Mr. Newnam's
14 control?

15 Mr. Trask was very clear on the stand: No,
16 he couldn't run the business the way he runs it
17 at Encore because of its business structure and
18 business culture. That really matters, Ladies
19 and Gentlemen. You all know running a business
20 a certain way, having a certain culture, a
21 certain philosophy and a certain marketing
22 scheme, so on and so forth, all those things
23 affect, greatly affect the success of your
24 business. Mr. Trask is very clear, all of those
25 things couldn't have been done the way he has

1 that lawsuit is a stumbling block for them
2 doing what my client does.

3 Now, I think you will all agree after three
4 full days of hearing from the plaintiff's
5 witnesses and the untold number, you know, six,
6 seven, eight witnesses, you had no idea, in any
7 detail, how my client's business operates. They
8 couldn't tell you, at all, about how they
9 became a manufacturer as they claim, how they
10 supply other folks, how doing so wouldn't cause
11 them to have conflicts with Promethean, the
12 other panel supplier, how they would build a
13 network of other resellers as my client has
14 done when they, themselves, are a reseller in
15 competition with these very same people. They
16 didn't tell you any of that.

17 They didn't tell me the process or explain
18 anything in detail because they don't know and
19 they haven't tried to figure it out, but they
20 want you to believe they would've done it. Oh
21 yeah, they would've done it. You want to know
22 why, as their reason for justification? Money.
23 We would have made more profit margin. That
24 seems to be a common theme for motivations for
25 Encore. That, in and of itself, doesn't make it

1 they say, "Wow. Keone sourced these panels. How
2 did he do it? We should look into doing it."
3 They didn't say, "Maybe we shouldn't respond to
4 those people at trade shows that approach us
5 and ask us to manufacture our products in their
6 facilities. Maybe we should do some research to
7 see if this is something we can do. Because
8 obviously, Keone can do it and he's doing well
9 at it."

10 No, they didn't do any of that. What they
11 did was, they got ViewSonic. It's right on the
12 back of that panel right there. And all they
13 did was positioned another supplier, just like
14 Clear Touch, to take its place, continue to do
15 the business they do, value-added reseller, not
16 supplying, not manufacturing any of our
17 products. They positioned ViewSonic in place
18 and then on September 11th, 2015, they send a
19 termination notice.

20 At that point, did they look into how they
21 could do this? Did they make any effort
22 whatsoever to determine if this is something
23 that they can do, if it was such an incredibly,
24 incredibly lucrative thing as they claim? No.
25 They file a lawsuit a week later. And now claim

1 At this point, my client hasn't worked for
2 Encore in a year. He's got no duty of loyalty,
3 no fiduciary duty to them whatsoever. He's got
4 no contractual duty to them whatsoever. Yet as
5 we're going to go through in a moment, Encore's
6 damages or claimed damages don't stop there.
7 They go all the way to the end of October 2015,
8 and in the case of five and a half million
9 dollars, all the way to the end of 2015 with no
10 basis whatsoever, other than greed.

11 Now right near that April time frame, in
12 July of 2015, Clear Touch fired Jimmy
13 Higginbotham. I think now it has become clear
14 to everybody that that event was the catalyst
15 to you sitting here for a week and us trying
16 this case. Mr. Higginbotham called Mr. Newnam
17 and wanted to tell on an employee -- excuse me,
18 his employer. He was upset he got fired. And as
19 you've seen, Mr. Higginbotham hasn't been able
20 really to get work for a month since.

21 Higginbotham contacts Newman -- Newnam in
22 July or August 2015, around that time frame. He
23 doesn't give us the exact date. This is really
24 important in between the two points of what --
25 what did Encore do with this information? Did

1 You heard from Mr. Gallant who is one of
2 the most believable people I've ever met. Maybe
3 it's because he's Canadian. I don't know. But
4 he sat up here and told you clearly that wasn't
5 the case. That's not what happened.

6 "Yeah, I went to dinner with my friend.
7 Yeah, he had me sign a non-disclosure. And that
8 was weird. That was strange. But I wanted to
9 know what he had to say. I listened to him and
10 I went back to work doing what I do. He never
11 once told me, 'Hey. Come on over and leave
12 Encore.'"

13 So Mr. Gallant, on his own volition, comes
14 over and starts working for my client, January
15 2015. This is another extremely important date.
16 All of these dates are really important here,
17 but this as far as the effects of damages go.

18 April 25th, 2015, my client's non-compete
19 expires. You will see in Plaintiff's Exhibit
20 Number 2, which we're going to look at in a
21 minute, the non-solicitation provision, what
22 Mr. English and I both will refer to as a
23 non-compete. Those things can only last for a
24 certain amount of time. This one lasted for one
25 year.

1 exclusive. Everyone went along the way with
2 what they understood to be the arrangement. No
3 one said a peep. No one said, "That's wrong,
4 don't do that," because everybody knew this was
5 a beneficial relationship and arrangement for
6 both parties.

7 So October 2014, Mr. Trask goes to
8 Mr. Newnam. We are at the South Carolina Ed
9 Tech conference and Mr. Trask tells Mr. Newnam,
10 "Hey. I own Clear Touch." To be clear, and
11 Mr. Trask, I think, was very clear on the
12 witness stand, he didn't say, "I've always
13 owned Clear Touch," at that point. It was just,
14 "I own Clear Touch."

15 Encore, at that point, didn't look into
16 Clear Touch and ask, "Hey. Can we buy in? We
17 want a piece." Everyone went on their way and
18 continued to do business because, again, it was
19 mutually beneficial for both of them.

20 Now, December 2014, Mr. Gallant responds to
21 a job posting. The plaintiff has insinuated and
22 accused my client of saying to Leo Gallant,
23 "Hey. You need to quit Encore. You need to come
24 over with me. You need to come with Clear
25 Touch."

1 no one denies it, Encore wanted to terminate
2 Mr. Higginbotham, but they wanted to keep his
3 business. They didn't want to pay him, but they
4 wanted the benefit of his employment. So they
5 went to my client and asked, "Hey, Keone. Can
6 you guys take on Jimmy? We don't want to pay
7 him anymore. He's selling panels, so it makes
8 sense that he comes to you. But we want to keep
9 Leon County." Mr. Trask obliged. He helped out
10 his reseller, took on an employer -- an
11 employment -- excuse me, an employee and had
12 him sell panels.

13 Now, in September of 2014, Clear Touch sent
14 Encore the modified reseller agreement and we
15 saw that e-mail where Mr. Trask outlines, "Hey,
16 these are the changes to it. We don't want to
17 be exclusive anymore. We're going to go with
18 other resellers." No one signed that agreement.
19 We all were very clear about that. But the
20 parties proceeded from that point as if under
21 this modified agreement.

22 Promethean had just come out with the panel
23 product and Encore is selling it, which would
24 have actually been a violation of the original
25 reseller agreement because everyone had to be

1 Because this is a product people want.

2 So he kept working with them and they
3 didn't say anything because, hey, this is
4 bringing them in sales, money, customers. This
5 thing was in booths at the trade shows. I don't
6 know about you, Ladies and Gentlemen, but it's
7 eye-catching. I'm sure you all walked in here
8 and one of the first things that your eye drew
9 to, was this gigantic screen. That's why it's
10 helpful at trade shows.

11 You've heard over and over again from folks
12 that this brought people into the booth. It
13 didn't just bring people into the booth to sell
14 that, it brought them into the booth to sell a
15 whole host of other products that Encore
16 offered.

17 One of the things they offered is a phone.
18 You can walk by a phone and not see it, but
19 this thing grabs your attention. That's how
20 it's utilized and benefited Encore, but they
21 don't want you to even think about that. It's
22 all about the alleged damage to them without
23 any recognition of benefit.

24 So August 2014, this is about
25 Mr. Higginbotham. And the testimony is clear,

1 But he was valuable to Encore. The CEO of
2 Encore, Mr. Chris Powell, asked him to stay.
3 "Hey, Keone, can you stay here through the
4 E-Rate market -- I think was the term. I
5 probably got that wrong -- but could you stay
6 here through the end of the spring so we can
7 finish this cycle? It's really important to
8 us."

9 Mr. Trask said, "Okay. Fine."

10 And then, right after he came back from
11 vacation in April of 2014, Encore fires him. He
12 immediately went out and started working for
13 Clear Touch. A fact that is not secret to
14 anyone, wasn't secret to anyone then.

15 He spoke and communicated with Encore
16 consistently from that point because, as we've
17 seen, Encore was Clear Touch's reseller. Yet
18 Encore seemed to have no problem. They were
19 getting what everyone -- absolutely everyone,
20 no matter adverse witness or no matter whether
21 it was one of our witnesses, no one, has denied
22 this is a fantastic product. People want this.
23 People buy this. And there's a reason you sat
24 here for a week and the plaintiff wants five
25 and half million dollars for this business.

1 when he did things that were beneficial to
2 Clear Touch, the plaintiff wants to just put
3 gloss over any kind of benefit that had to
4 Encore. They don't even get that. You don't get
5 to say, I'm damaged completely and totally. But
6 don't worry about the things that you did that
7 actually helped. You don't get to do that. I
8 want y'all to all be aware of that and keep
9 that in mind when you're looking at what
10 they're claiming here on damages.

11 Now just to finish up the timeline really
12 quick. January 2014, when I was examining
13 Mr. Trask, I think I prefaced it with, hey,
14 that was a busy month, it was an important
15 month, and it was in the timeline of events
16 here. At that point, Mr. Trask went to
17 Mr. Powell and said, "Hey, I want to leave. I
18 want to leave Encore. I don't want to be here
19 anymore."

20 You know, what else did he do that month?
21 He took his life savings -- and his wife took
22 their life savings, his 401(k) retirement
23 account and put it in Clear Touch. He didn't
24 just put some skin in the game. He put every
25 piece of skin he had in the game at that point.

1 Cruse, listed Mr. Trask's mother, as the
2 managing member. That happened. We're not going
3 to deny that.

4 Then, on April 24, 2013, Encore and Clear
5 Touch entered the reseller agreement. Now,
6 you've heard a lot of testimony, a whole lot of
7 testimony about what Mr. Trask did while he was
8 an Encore employee. The plaintiff wants to have
9 you believe that this man -- they have harped
10 on this a lot -- this man they paid \$175,000
11 to, a year, this man that they put out in trade
12 shows and paid his expenses to do that, gave
13 them next to no value for 14 months, yet they
14 did not say anything to him. They didn't talk
15 to him about it in counseling. Didn't
16 discipline him. They just fired him on April
17 24, 2014. I'll leave it to you whether or not
18 you believe a business that is very, very
19 aware, as you have noticed, of their
20 spreadsheets, let somebody just skirt along on
21 their dime when they're not offering them any
22 value.

23 Mr. Trask testified very clearly he went to
24 a bunch of trade shows, and he sold and
25 marketed a bunch of products for Encore. Even

1 opportunity? Mr. Trask, actually, filed the
2 paperwork and established Encore Technology
3 Group, LLC, on September 27th, 2012. And then
4 we all heard the testimony that they courted
5 Mr. Newnam, who put in his money and bought the
6 business and things move forward.

7 So we got Mr. Trask identifying Clear Touch
8 opportunity before Encore even exists. That's a
9 really important point here. You'll see how
10 that affects the liability for the different
11 causes of action, especially when we're talking
12 about they are alleging five different breach
13 of contract causes of action, along with the
14 nine original causes of action. Again, I told
15 you, they're throwing the kitchen sink your way
16 and my client's way, and it is difficult. But I
17 appreciate people bearing -- y'all bearing
18 through that witness.

19 So Encore ends up hiring Mr. Trask as their
20 chief business development officer. We all know
21 that. We've all seen the non-disclosure and
22 everything that he signed. And then, he has
23 recognized, and we have recognized when we came
24 in here, the annual list of managers for Clear
25 Touch filed on April 11th, 2013 listed Kathy

1 So he foresaw this opportunity. And what he
2 did is he -- excuse me, he set up Clear Touch
3 Interactive, LLC, August 24th, 2012. You've
4 seen the e-mails at CSI. He starts to develop
5 that opportunity, starts doing the research,
6 starts talking at CSI, the manufacturer of the
7 product, about what he's looking at, what he's
8 looking for, and then how he can do it. He
9 takes the time to do that. Encore doesn't exist
10 at that point.

11 Then, we've all heard about -- and I'm not
12 going to rehash it -- Harris coming in, doing a
13 hostile takeover, and wanting to slap off the
14 technology part of CSI because they only wanted
15 the software division. Then, the focus shifts.
16 Mr. Trask -- and to be clear, not Mr. Trask
17 alone, Mr. Trask, along with other folks you
18 saw here, along with Chris Powell, they looked
19 at the folks they had been working with for 10,
20 10-plus years and said, "We don't want these
21 people to lose their jobs, so we think we can
22 take what Harris doesn't want and make it a
23 viable business." We all know that that became
24 Encore.

25 So what do they do to pursue that

1 money and not their bail money.

2 Now, I just want to look through the
3 timeline real quick. Mr. English and I -- I say
4 this as a compliment to him -- obviously
5 thought we should walk through this the same
6 way. I'm going to do the timeline real quick,
7 as well, and go through the causes of action.

8 As you can see, our timeline is a little
9 more simplistic. I made that simplistic here
10 because I only want to put in front of you the
11 dates. And you can actually see they are
12 appropriately on the timeline in relation to
13 one another. We all found out that Mr. Trask --
14 we can pull that up -- Mr. Trask started at CSI
15 in 1999 and was there until 2012. The testimony
16 was clear and undisputed that towards the end
17 of his tenure at CSI, he identified an
18 opportunity in the market that he knew so much
19 about, the market he had been in for a decade
20 and a half. And every witness up here, from
21 Mr. Newnam, Mr. Masters, and Mr. Knight, all --
22 everyone from Encore, there's one unassailable
23 fact that they will all agree with here: that
24 man knows what he's doing. That man knows this
25 market and that man's effective in it.

1 and see that's five and a half million dollars.

2 Mr. Newnam's bad investment in Encore's
3 losing business model is not the fault of Keone
4 Trask and Clear Touch. Neither he nor --
5 neither Mr. Newnam nor Encore wants to take
6 responsibility for this failure. And through
7 this litigation, they are attempting to lay all
8 the blame, all the worries of the world, at
9 Mr. Trask's feet. That's not deserved here.

10 My client did some wrong. I said that to
11 you on Monday. He said that to you on the
12 stand. He should've disclosed his interest to
13 Encore and Clear Touch when he brought the
14 opportunity in. When he brought the panel in,
15 he should have told him. We've all seen -- and
16 they paraded all of the evidence up there --
17 the actions he took, and we all know that. And
18 I'm not going to do ad nauseam here.

19 He's willing to pay for those wrongs. But
20 we've got a look at it and your job is and the
21 reason we had to put it in your hands is
22 because we need someone who is actually fair to
23 actually come out with the appropriate number
24 and pay the plaintiff what they're owed. But
25 only, only, what they are owed, not their blood

1 a half million dollars. One employee, one man,
2 that had an interest in a supplier that made up
3 less than five percent of their entire
4 business. You heard Mr. Newnam say this is a
5 \$20- to 30-million-dollar-a-year business that
6 Encore has.

7 The problem is it's a loser for Mr. Newnam.
8 He hasn't made money. He's lost a substantial
9 amount of money. We're going to look into how
10 that feeds into what plaintiff's asking you
11 here. I will tell you it's not a coincidence
12 what they're asking and what's lost so far.

13 They don't want to make my client pay for
14 what he justly owes. Mr. Newnam has a business
15 that he spent, as he testified, four and a half
16 million dollars of his personal funds on. He is
17 out personally four and a half million dollars.
18 Then, as Mr. Newman's testimony bore very
19 clearly -- he was very honest and open with us
20 about this -- he looked at the revenues and
21 profit that Encore was receiving year-to-year
22 since it existed in 2013, it's in the negative
23 about \$1 million. That's not hard math, Ladies
24 and Gentlemen. I'm no economist. I'm no
25 accountant. But we all can add that together

1 thank you real quick for bearing with us. I
2 know sitting here all week with us is
3 difficult. I do this type work, so do the other
4 lawyers here. It can often be boring and
5 tedious, but we appreciate your patience and
6 paying attention to everything.

7 That's one thing I really asked you to do,
8 if you remember, when I first came in front of
9 you on Monday. I asked you to, "Hold on,
10 please. Please wait. Please hear everything and
11 have some patience," because the plaintiff gets
12 to put their evidence first. And they put up a
13 lot. We're going to walk through what some of
14 that means and shows, and very much what it
15 doesn't mean and certainly what it didn't show.

16 I believe, and the defendants believe, as
17 we said at the beginning, the evidence here
18 presented has borne out the true purpose of
19 this litigation. I told you when we first met,
20 and maintain right now as the numbers and the
21 evidence show, it is greed and it is revenge.
22 That's the reason we're here.

23 Now, the plaintiff wants to say my client
24 is greedy, and he took this opportunity for
25 himself and hurt Encore to the tune of five and

1 And his actions, Mr. Trask's actions, hurt not
2 only Encore, but the same employees he said
3 were -- he was thinking of when he convinced
4 Mr. Newnam to pay \$4 million to buy this
5 company. He hurt the same people he said he was
6 trying to help, and all to enrich himself.

7 So Ladies and Gentlemen, we're asking you
8 to render a verdict that speaks the truth and
9 says the truth matters, integrity matters,
10 deception and denial are not acceptable. We ask
11 you to award Encore an amount that would put it
12 in the position it would have been in if
13 Mr. Trask had honored his contractual and legal
14 duties to Encore and worked as hard for Encore
15 as he did for himself. Thank you.

16 **THE COURT:** Mr. Smith.

17 **MR. SMITH:** Bear with me for a moment to
18 bring my stuff out here. Thank you. (Pause.)

19 As Mr. English anticipated, I'm going to
20 shift everything around to the other side so
21 y'all can see behind me. Everyone, obviously,
22 was in agreement this is the timeline of the
23 case.

24 If you could pull that up, Josh.

25 Ladies and Gentlemen, I am, too, going to

1 behavior in commerce, that can be a violation
2 of the South Carolina Unfair Trade Practices
3 Act. It also requires an impact on the public
4 interest. The public interest here that was
5 affected is the delay in getting the schools
6 this product and the fact that Mr. Trask took
7 for himself so much of the margin that there
8 was no opportunity for them. We say that
9 because there were consumers involved,
10 specifically schools, this statute applies and
11 we would ask that you find in the same amount
12 as the other cause of action, except for the
13 first, in defamation, and then check yes.

14 Finally, Ladies and Gentlemen, you might
15 know this, but the word "verdict" is Latin for
16 "speak the truth." And you've heard the
17 attorneys in this case speak, some times on and
18 on and on. But now, it's your turn to speak.
19 That's what the verdict form gives you the
20 opportunity to do.

21 Mr. Trask said in his testimony that his
22 job or what he was doing at Encore that led him
23 to leave was that he could see the sharks
24 circling around the boat. But what Encore
25 didn't know was that the shark was in the boat.

1 consider punitive damages.

2 The next cause of action is Breach of
3 Contract Accompanied by Fraudulent Act. This,
4 again, applies to Mr. Trask. It says he
5 breached the contract, but it wasn't just a
6 regular breach, it was accompanied by
7 fraudulent acts. And those are all the things I
8 covered on the time line. And because of that,
9 you are also able to consider punitive damages.
10 We'd ask you to enter the same amounts that you
11 entered on every other one except for the first
12 one.

13 Next is Defamation. This one's a little
14 unique or a little special in that the only
15 damages we're claiming for defamation are the
16 Leon County school profits. So we think that
17 definitely shows Mr. Trask defamed Encore
18 saying they diverted Leon's product to another
19 customer. As a result of that, Encore lost the
20 \$424,945 in profits. And that's the figure that
21 we would ask you to fill in the blank for
22 defamation.

23 Last is the Unfair Trade Practices Act
24 claim. You'll hear the Judge charge you that
25 when somebody engages in deceptive or unfair

1 secret that Mr. Trask misappropriated along
2 with Clear Touch. And this is the claim that
3 reaches Clear Touch. The first three claims
4 that I told you about were Mr. Trask only. But
5 these are for -- this will be both Mr. Trask
6 and Clear Touch. And again, we'd ask you to use
7 the same damage figure for this claim that you
8 used in the breach of fiduciary and breach of
9 contract claim.

10 Now, there's also, on this one, a find --
11 do you find that the defendants' actions were
12 willful, wanton or reckless? We'd ask you to
13 check yes. We think Mr. Trask knew what he was
14 doing and knew that he was violating Encore's
15 rights when he did it.

16 The next cause of action is Tortious
17 Interference. This is against Clear Touch only,
18 because Clear Touch didn't have a contract with
19 Encore. Mr. Trask did, but it was his company.
20 Basically, what we're saying is Clear Touch has
21 the same responsibility for causing that
22 contract to be breached that Mr. Trask had.
23 We'd ask for you to check for the plaintiff and
24 use the same damage figure that you used in the
25 prior three claims. On this one, you can also

1 efforts to cause the company to have the
2 opportunity to explore, invest in, participate
3 or otherwise because affiliated with the
4 opportunity. He breached that. That's the
5 fourth provision of contract.

6 The fifth provision is actually not written
7 in the contract, but listen to the Judge's
8 charges. The Judge will tell you that in every
9 contract in South Carolina, there's something
10 called an implied covenant of good faith and,
11 fair dealing. It means you've got to act in
12 good faith and deal fairly with the party on
13 the other side. Mr. Trask breached that.

14 Going back to the verdict form. So on this
15 claim, we would ask you to find for the
16 plaintiff. We'd ask you to put the same damage
17 amount as you put for the Breach of Fiduciary
18 duty. We think the damages resulting from both
19 are the same. And that makes it simple.

20 The fourth claim is Trade Secrets. Again,
21 the trade secrets are two-fold. The trade
22 secrets, Encore should have known who the
23 suppliers were. That was Encore's trade secret
24 information. And Leon County's desire to
25 purchase these 900 panels was the second trade

1 that says he won't compete with Encore for one
2 year. This is Leon County. Leon County was
3 Encore's customer. Mr. Trask and Clear Touch --
4 Mr. Trask would not have been involved in
5 making those sales to Leon County. That's the
6 second breach of contract.

7 The third provision is the non-piracy
8 provision on the contract. This is the
9 provision that says that Mr. Trask won't, for
10 one year, hire an employee of Encore. And he
11 hired Mr. Gallant in breach of this. That's the
12 third breach.

13 The fourth breach is the business
14 opportunity provision. And this is the
15 provision that says during the term of this
16 agreement, if he becomes aware of an
17 opportunity that's similar to, competitive
18 with, or in the same field as Encore -- and
19 these panels certainly are -- then he's going
20 to do two things. He's going to notify company
21 immediately of the opportunity. He breached
22 that. He didn't notify them either of the
23 opportunity to buy from the suppliers or the
24 opportunity to build a reseller network. Then,
25 he's got to -- and shall use his good faith

1 reasonable. And then, just like you did in the
2 first cause of action, you consider punitive
3 damages. Let me say that each cause of action
4 is separate. They are not added together. You
5 need to view each cause of action as though
6 it's there by itself.

7 Now, the third -- the rest of this will go
8 a little faster -- the third claim is for
9 Breach of Contract. Mr. Trask, as I've said, is
10 not admitting that he breached the contract.

11 Let's put up Plaintiff's Exhibit 2. Encore
12 claims that Mr. Trask breached his contract in
13 five ways. First, on Page 1, in the
14 confidentiality provision, Mr. Trask had
15 Encore's confidential information about two
16 things: the true identity of the suppliers and
17 the ability to build this reseller network for
18 this -- this product. He used Encore's
19 confidential information in violation of this
20 that says he won't use it for himself or
21 disclosure to third parties. That's the first
22 breach of contract that we're claiming.

23 Next, let's go to Page 2. Let's look at the
24 non-solicitation provision. On Page 2, the
25 non-solicitation provision is the provision

1 The reason I put those figures on the
2 board, as you can see, this \$5.5 million figure
3 isn't the highest. It's actually in the middle.
4 Encore sincerely believes if that Mr. Trask had
5 honored his fiduciary duty to disclose the
6 Clear Touch opportunity, Encore would have
7 realized that \$5.5 million value. Instead,
8 Mr. Trask tricked Encore into taking the risk,
9 paying virtually all the start-up costs of this
10 business and keeping it for himself.

11 You will see on that last page of
12 Plaintiff's Exhibit 10(J) just how rapidly
13 Clear Touch has grown, again, because he caught
14 the wave. His sales went, in 2015, when this
15 valuation was done, from \$7.5 million then
16 jumped to over \$17.5 in 2016. He testified they
17 are even higher this year. They haven't
18 produced that information for you to see.

19 So let's jump back to the verdict form.
20 Number 2, for Breach of Fiduciary Duty, we
21 believe that you should find for the plaintiff
22 and you should find for the amount of \$5.5
23 million based on this analysis. But it's for
24 you, the jury. You're the judges of the facts.
25 I'm not. So you all decide what is fair and

1 then you can add some wages to the \$1.1 million
2 lost profit figure.

3 Now, this \$5.5 million figure has been
4 portrayed by the defendants as some sort of
5 outrageous claim of what Clear Touch was worth.
6 But there are many other alternatives in the
7 evidence that you could look at for that. One
8 is Plaintiff's Exhibit 68 listed at \$10 million
9 the value of Clear Touch. And then the last
10 page of Mr. Meilinger's report has a
11 calculation of basically \$7.7 million for what
12 Encore has lost. So there are definitely higher
13 figures out there that somebody could justify a
14 higher value of Clear Touch. We're not seeking
15 that.

16 If you looked at Clear Touch's own tax
17 records, and that's Plaintiff's Exhibit 70,
18 those show that just the book assets of Clear
19 Touch are \$2,271,746. Of course, book value is
20 on the low end of a value of a business,
21 probably the lowest possible because it doesn't
22 capture the value of future earnings. It's the
23 book value of assets. Adding that to the
24 profits they made would be about 3.9 million,
25 so less than the 5.5.

1 profits are the profits that Clear Touch made
2 through the end of 2015, and that figure is
3 1,636,254. In other words, if Encore had been
4 able to make the same sales that Clear Touch
5 made through the end of 2015, that's the profit
6 that Encore really made.

7 And then at the end of 2015, what was Clear
8 Touch worth? That's the business valuation
9 information you heard. Mr. Meilinger's detailed
10 report on the business valuation is Plaintiff's
11 Exhibit 10(J). That's where he comes up with
12 the figure of \$3,900,000. Those two components
13 add up to the \$5.5 million figure that you
14 heard.

15 Now, let me say that you don't add all
16 these together. In other words, if you were to
17 award Encore the \$5.5 million for the value of
18 the whole Clear Touch opportunity, that would
19 include the lost profits and would include the
20 wages. Now, the same could be true of the \$1.1
21 million and the \$488,000-figure. If you believe
22 that all of these wages would be necessary to
23 generate those profits, then you would just
24 lower the lost profit figure. But if you don't
25 believe all of these wages were appropriate,

1 lawsuit for a business advantage. So Encore's
2 hands had been tied. But if it had known from
3 the beginning, there's no reason why it
4 wouldn't have both brought directly from the
5 suppliers and made those sales to Leon County.
6 So that's the second calculation.

7 Now, let's look at the third calculation,
8 and this is the business opportunity
9 calculation. This looks at what gives the --
10 what would the value be to Encore if Mr. Trask
11 had disclosed not just the suppliers and let
12 them buy from Leon County, but what would the
13 damages be if he had turned over the reseller
14 network that he was building on Encore's dime
15 and let Encore take advantage of that.

16 There are actually two components of this.
17 One is that, again, Mr. Trask was obligated to
18 notify Encore of the opportunity and, second,
19 he was obligated to work with Encore, but let
20 them develop that opportunity, even if it was
21 at their interests, instead of his, while he
22 was an employee. Plaintiff's Exhibit 10(E)
23 shows how these calculations and gives the
24 details for these calculations. They consists
25 of two components. One is just for -- lost

1 County schools. Now, on Leon County,
2 Plaintiff's Exhibit 10(D) shows how those were
3 calculated, if you want to look at the detail
4 on that. But the total of those profits, the
5 sales totaled about \$935,000. That's shown on
6 Plaintiff's Exhibit 9. The profit calculation,
7 though, is, of course, not the total sales
8 amount, but the profit amount is \$424,945.
9 (Pause.)

10 My handwriting is terrible, but that says
11 supplier and that says Leon. So this \$1.1
12 million figure of lost profit consists of the
13 lost of profits of not knowing and purchasing
14 from the true suppliers and not making the
15 sales to Leon County. Those two totaled 1.1. On
16 the supplier point again, Mr. Viola confirmed
17 that you are able to buy directly from the
18 supplier.

19 Now, the defendants say, well, you didn't
20 buy directly from the supplier once you found
21 out. But keep in mind, Encore didn't find out
22 until September 2015 when they filed this law
23 suit. And in connection with that law suit,
24 there's a confidentiality order that prohibits
25 a party from using information gained in a

1 Now, the second category of damages is Lost
2 Profit, and there are two categories of that.

3 Josh, if we could -- yeah, pull up Table 2.

4 Now, there are two sort of categories of
5 lost profits. The first category are the
6 products that Encore sold to its customers that
7 it acquired from Clear Touch at the mark up.
8 And the position here is that Encore, if it had
9 known, could have purchased directly from
10 TSItouch and then CVTE at a lower price. If you
11 can do that, of course, you would. If you've
12 got an option between buying something at a
13 lower price or a higher price, of course,
14 you're going to choose the lower price for the
15 exact same product. Then they would have
16 recognized that additional profit margin on
17 those products. That's the first three
18 categories in Table Number 2. Those categories
19 total \$675,361. So if Mr. Trask had just told
20 Encore who the true suppliers were and
21 arranged, while he was an employee, and let
22 Encore buy directly from them, that's how much
23 additional profit Encore would have recognized.

24 The second category are those bottom two
25 lines, and those are the sales made to Leon

1 It is the duty the employee to further his
2 employer's interest, even at the expense of his
3 own matters, in connection with the employment.

4 Now, what that means, Ladies and Gentlemen,
5 is that you will have a broad range of damages
6 to consider for this cause of action. The first
7 element of damages you can consider are the
8 wages that Encore paid, the direct cost to
9 Encore. These are set forth in Plaintiff's
10 Exhibit 10(H).

11 If we can pull that up, Judge -- Jake. I'm
12 sorry.

13 This is Plaintiff's Exhibit 10(H). It sets
14 forth the wages. Those -- this is a summary,
15 but the wages there include this \$318,000. It
16 also includes the 95 or 90 percent of the wages
17 paid to Mr. Higginbotham and Gallant after they
18 signed the non-disclosure agreement and 50
19 percent of the net expenses. In other words, so
20 this element of damages just shows what Encore
21 paid out in out-of-pocket costs. That's a very
22 conservative number. It doesn't count all the
23 time its other employees were spending
24 promoting the Clear Touch product, not knowing
25 that they were doing that.

1 trust. An employer and an employee have that
2 relationship that an employee can breach in a
3 couple of different ways. First of all, an
4 employee could breach it if the employee fails
5 to fully disclose to the employer knowing
6 information that is significant and material.
7 We know that Mr. Trask did that with regard to
8 the true suppliers of these products. We also
9 know that he failed to disclose that he was out
10 there building this reseller network and that
11 Encore could have done the same thing.

12 The second thing that the fiduciary duty
13 requires is for the employee to work with the
14 employer to take advantage of opportunities and
15 to do things like develop that reseller market.
16 Again, if you listen to the Judge's charge, I
17 believe you're going to hear the Judge charge
18 you something like this, an employee is
19 duty-bound not to act adversely to the interest
20 of his employer by serving or acquiring any
21 private interest of his own in antagonism or
22 opposition to the employer. An employee is not
23 permitted to assume two distinct and opposite
24 characters in the same transaction, acting for
25 himself and pretending to act for his employer.

1 damages. Punitive damages are -- the Judge will
2 charge you what those are -- but those are
3 damages designed to punish defendants for
4 extraordinary and outrageous conduct. I don't
5 know about you, but I've never seen conduct
6 like we've seen in this case. Somebody not only
7 not telling their employer the truth, but
8 changing labels on products, involving their
9 mother and their wife in the cover up. I think
10 we have outrageous conduct in this case.

11 Part of the purpose of punitive damages is
12 to say, look, if somebody is able to, for
13 example, steal money, and all they have to do
14 is give it back, what, really, disincentive is
15 there to do that? The purpose of punitive
16 damages is to deter conduct. It's sending a
17 message that, in our community, we don't
18 tolerate conduct like this. It's not acceptable
19 to just pay back what you took. That's for you
20 to decide if that's appropriate in this case.

21 Now, the second cause of action is Breach
22 of Fiduciary Duty.

23 Jake, if we could put up that.

24 Now, I mentioned for you earlier that a
25 fiduciary relationship is a relationship of

1 2013, Mr. Trask was making sure that TSitouch
2 removed the labels -- it's called white
3 labeling -- again, to hide the fact.

4 Now, plaintiff's -- I've marked all of the
5 plaintiff's damages exhibits with -- as
6 Plaintiff's Exhibit 10 with letters. There's
7 like 10(A), maybe there's a 10(B), a 10 --
8 there are different letters. And I will point
9 that out for you to look at on these. On this
10 one, it's Plaintiff's Exhibit 10(I).

11 Plaintiff's Exhibit 10(I) shows that while
12 he was an employee of Encore, Mr. Trask
13 received in salary, bonus, benefits and
14 expenses, \$335,121. If you take 95 percent of
15 that, Encore is seeking \$318,365. That's
16 actually a component of this number, so I'm
17 going to write it down here. (Pause.)

18 So for the first cause of action, Breach of
19 Duty of Loyalty, we're asking you to check the
20 box A, for plaintiff, in the amount of -- and
21 we would ask for this 95 percent figure,
22 \$318,365. That is the figure set forth in
23 Plaintiff's Exhibit 10(I).

24 Now, you will see that this part of the
25 verdict form also ask you about punitive

1 breached the duty of loyalty. The Judge will
2 charge you on the law. So if he tells you
3 something different than I quote you, go with
4 what he says. But I'm pretty sure he's going to
5 tell you that the defendant has to return the
6 compensation he received during the period of
7 his disloyalty. You've heard a lot of debate
8 about, well, is 95 percent the right percent or
9 some other percent of his wages to return. But
10 the law is return the compensation received
11 during the period of disloyalty.

12 Now, what is that period? If you look at
13 Plaintiff's Exhibit Number 39, you will see
14 that on February 26th, 2013, less than two
15 weeks after he was hired, on a Tuesday at
16 9:33 a.m., Mr. Trask was e-mailing a supplier,
17 TSItouch, and sending them a non-disclosure
18 agreement. He didn't want Encore to find out
19 who the true supplier was. Ladies and
20 Gentlemen, that is when -- the period of
21 disloyalty started at least by then. It
22 probably began from Day 1, but at least by
23 then, and carried on through the rest of his
24 employment. Plaintiff's Exhibit Number 40, the
25 very next Exhibit shows that on March 26th,

1 with Encore and he was within that time period.
2 And the evidence is that Encore lost about
3 \$425,000 of profits on that.

4 And then, the last point of the time line
5 here is Clear Touch hired Mr. Gallant, even
6 though Mr. Trask had a provision in his
7 contract saying I won't encourage any of your
8 employees to leave within a year. So has
9 Mr. Trask taken responsibility for breaching
10 his contract? He has not. He has denied it, and
11 the overwhelming evidence is that he did.

12 Now, Ladies and Gentlemen, all of this
13 makes the defendants liable for damages. The
14 Judge is going to give you, after charging you
15 the law and the verdict form -- and I'd like to
16 go through that verdict form with you and
17 explain to you Encore's position on the
18 different causes of action that you'll be asked
19 to rule upon.

20 Josh, if we could pull up that verdict
21 form.

22 The first page and the first cause of
23 action on the verdict form, the first claim, is
24 called Breach of Duty of Loyalty. In this, this
25 is a claim that Mr. Trask has admitted that he

1 Then we have evidence from Mr. Higginbotham
2 that Mr. Trask admitted to him that he told
3 Leon County that Encore had taken product that
4 Leon County had paid for and sent it to another
5 customer. On cross, Mr. Smith asked Mr. Young,
6 who -- the last witness who testified and said
7 that was a false statement, he said, well, you
8 don't have any evidence of that, do you? Well,
9 Mr. Higginbotham's statement is evidence, but
10 it's not the only evidence.

11 The other evidence is that Mr. Trask
12 himself got on the stand yesterday and said,
13 specifically, he knew that had happened, that
14 Encore had diverted product. So there, you have
15 got to weigh the credibility of Mr. Young and
16 Mr. Trask. If Mr. Trask is claiming that
17 something happened that didn't happen, then how
18 do you think Leon County heard about this? It's
19 because Mr. Trask told them.

20 It goes beyond dispute -- it is beyond
21 dispute that Leon County purchased from Encore
22 and then stopped purchasing from Encore and
23 started purchasing directly from Clear Touch.
24 This happened despite the fact that Mr. Trask
25 knew that he had a non-competition agreement

1 Then Mr. Trask also used specific
2 information he learned about Leon County
3 schools to take an opportunity and orders for
4 about 1000 of these panels, about \$1 million
5 dollars worth of panels from Encore. The
6 evidence shows -- now he tried to claim
7 yesterday this half penny sales tax and Leon
8 County was upgrading its technology. Well,
9 that's very general information. There are
10 thousands of school districts across the
11 country that raised money to improve
12 technology, but he had information about Leon
13 County that was much more specific.

14 If you look at Plaintiff's Exhibit 58, that
15 shows that Mr. Trask knew what Encore's prices
16 were because he was e-mailing with his mother
17 about the prices that were being offered to
18 Leon County. Plaintiff's Exhibit 53 confirms
19 that he knew that Encore had gotten an initial
20 order of 18 panels, that that was the first
21 part of another order from 285 panels. And the
22 following year, it was going to be 600 panels.
23 So he had specific knowledge that he learned at
24 Encore about that that constitutes a trade
25 secret in Encore's confidential information.

1 after this case started. Two years into the
2 case, Mr. Trask admits that he breached his
3 duty of loyalty to Encore and that he breached
4 his fiduciary duties to Encore. The Judge will
5 tell you more about fiduciary duties but,
6 essentially, a fiduciary relationship is a
7 relationship of trust. He admits he breached
8 that trust. He admits that he has not repaid
9 Encore anything. He won't even say how much he
10 thinks he owes. It's a hollow claim to say he's
11 taken responsibility when he won't even admit
12 how much he should repay.

13 And beyond that, there are many more things
14 that Mr. Trask does not admit. For example, he
15 doesn't admit that he breached his contract. He
16 doesn't admit that when Mr. Jimmy Higginbotham
17 was hired by Clear Touch -- and to clarify,
18 we're not claiming that the hiring of
19 Mr. Higginbotham in and of itself was wrong.
20 But to sign Mr. Higginbotham and Mr. Gallant to
21 non-disclosure agreements for Clear Touch while
22 they were Encore employees was wrong. And then
23 to hire Mr. Higginbotham and ask him to
24 download Encore's customer list, which
25 Mr. Higginbotham said he did, was wrong.

1 writes we are working hard to create the demand
2 and awareness for this product and we have
3 built great momentum, momentum that would be
4 very hard to rebuild in a scenario where we
5 quadrupled our competition in the field. In
6 other words, Mr. Gallant is -- or Gallant is
7 acknowledging that the work that Encore had
8 been doing had been building the market for
9 this product. They were doing it at a time when
10 there was a ramp up to catch the wave for this
11 technology. You all heard that -- I think
12 everybody agreed that the market was
13 transitioning at this time from projectors to
14 panels. Mr. Trask knew exactly when to jump on
15 that wave.

16 You heard Mr. Viola testify, and, I think,
17 the other witnesses confirmed, that the demand
18 for the product takes a while to build, and
19 then it shoots up. Mr. Trask saw the
20 opportunity to catch the wave. That's when he
21 jumped ship and went to Clear Touch officially.

22 Now, Plaintiff's Exhibit Number 83 is the
23 stipulation by Mr. Trask. That's where
24 Mr. Trask admits just last week -- if you look
25 at the date, it's September 2017, two years

1 appropriate, there wouldn't have been a need to
2 hide. If what he was doing was appropriate,
3 there wouldn't have been the need to delete
4 e-mails about Clear Touch from his personal
5 account. You heard Michael Knight testify he
6 also deleted e-mails from Encore's system, the
7 e-mails regarding Clear Touch. In fact, the
8 e-mails that we have about his interactions
9 with suppliers and third parties comes because
10 of third party subpoenas that we received. If
11 he wasn't doing anything wrong, there would
12 have been no need to hide them. The reason he
13 was hiding it is because the evidence is clear
14 that he was buying these panels from CVTE,
15 replacing the labels, marking up the price,
16 putting the mark up in his pocket and selling
17 them to Encore.

18 And more than that, he was using Encore's
19 -- he was using his time, but other Encore
20 employee's time, all Encore's sales and
21 marketing personnel to build the market for the
22 Clear Touch product. That's why, in Plaintiff's
23 Exhibit 31, Mr. Leo Gallant wrote, when they
24 were reviewing alternative panels in April of
25 2014, right before Mr. Trask left, Mr. Gallant

1 the e-mails from Mr. Trask's personal account
2 at keonetrask@gmail.com. Those exhibits are
3 Plaintiff's Exhibits 75 -- I'm sorry -- 77
4 through 81, if you want to look at those. The
5 only way we got the e-mail and learned about
6 this conference is because Mr. Viola stepped
7 forward. We wouldn't have learned about it from
8 Mr. Trask. He said, well, that was 18 months
9 and, of course, I permanently deleted my
10 e-mails. So, again, that goes to credibility.

11 He had established Clear Touch -- it's also
12 important that, in 2014, Mr. Trask found a new
13 supplier. In 2013, the supplier had been
14 TSItouch. But in 2014, he did all the research
15 to find a new supplier, an overseas supplier,
16 CVTE. CVTE is the same supplier that Mr. Viola
17 says he's able to buy from directly, and it's
18 the same supplier that makes that panel.
19 Mr. Trask did all that research and found CVTE
20 while he was on Encore's payroll. That's
21 significant as we look at the contract later.

22 Then, Mr. Trask was terminated, as we saw
23 before up here, on April 25th, 2014. Now, we
24 note that the reason that Mr. Trask engaged in
25 this huge coverup -- if what he was doing was

1 wasn't producing anything. So it's not credible
2 for Mr. Trask to say he wanted to leave, but he
3 just hung on and kept getting those paychecks
4 from Encore.

5 And then the evidence shows that Mr. Trask,
6 in February of 2014, attended a trade show for
7 Encore. Encore paid his way. That was the Texas
8 trade show where he met with Mr. Viola and
9 other resellers at night. He met with those
10 resellers for the purposes of signing them up
11 to be Clear Touch resellers. He was building
12 the reseller network for Clear Touch at that
13 conference.

14 Now, the defendants try to claim that
15 Mr. Viola involved himself in this case
16 because, you know, he's down in Louisiana and
17 he's some competitor. They want you to not
18 believe his testimony that the reason he got
19 involved is that he prayed with his wife, he
20 talked with his daughter and he felt like it
21 was the right thing to do. You all be the
22 judges of who is credible on that point,
23 Mr. Viola or the defendants.

24 Now, it's clear though that we know about
25 this trade show only because Mr. Viola produced

1 Touch product.

2 You also heard evidence that Clear Touch,
3 as part of Encore's payments, sent those checks
4 to a P.O. Box in Nevada, again, to cover up his
5 involvement. You heard the deposition testimony
6 read. I think Mr. Trask admitted on the stand
7 that the suppliers were removing the original
8 labels and replacing those with Clear Touch
9 labels.

10 You will also recall, and I think
11 Plaintiff's Exhibit 4 is an example, where
12 Ms. Trask started communicating with Encore's
13 Amy Andrews beginning in early 2014. That --
14 that is a significant date because it's
15 actually -- I think this says February, but I
16 think it's actually January 27 of 2014 that
17 Mr. Trask established Clear Touch Interactive,
18 Inc.

19 Now, you heard some testimony that he said
20 he wanted to leave Encore and Encore asked him
21 to stay. I asked yesterday who told you that or
22 who did you say that to. He said Chris Powell.
23 If you recall Chris Powell's testimony, he said
24 that didn't happen, that the folks at Encore
25 were ready for Mr. Trask to leave because he

1 He did tell -- and you heard from Chris
2 Powell. Mr. Powell was the first witness that
3 testified on Tuesday. He said, yeah, initially,
4 I was involved in Clear Touch, but once the
5 Encore acquisition happened, that was my focus.
6 I divested my interest, because it would have
7 been a conflict of interest for me to have
8 saved in Clear Touch. Mr. Powell handled that
9 the right way.

10 Then, shortly before the reseller agreement
11 -- if you will remember, the reseller agreement
12 was entered April 24, 2013. Just -- within less
13 than two weeks before that is when Mr. Trask
14 transferred his ownership of Clear Touch to
15 Ms. Cruse Krebs, his mother. He admitted in his
16 deposition that we read that the reason he did
17 that is he didn't want the market to be
18 confused about his involvement. It was -- he
19 admits he was intentionally trying to hide his
20 involvement with Clear Touch when he did that.
21 Based on that, Mr. Trask, who was responsible
22 for negotiating reseller agreements on Encore's
23 behalf drafted a reseller agreement, had his
24 mother send it to Encore and then had it
25 executed so that Encore started buying Clear

1 months thereafter, that he disclosed to Encore
2 that he had acquired an interest in Clear
3 Touch. At that time, he did not say, oh, I've
4 owned it all along. He just said I've acquired
5 an interest in Clear Touch. Then, as we said,
6 the one year non-compete expired April 25th,
7 2015. Then, the evidence was that Encore
8 discovered that Mr. Trask had owned Clear Touch
9 all along. And, based on that, it terminated
10 the reseller agreement effective -- it
11 terminated -- gave notice on September 10.
12 There was a 30-day notice provision which
13 expired October 10, 2015. So that's sort of the
14 basic timeline that Mr. Trask would have you
15 see.

16 But if you look at the rest of the story,
17 there's a whole lot more that went on behind
18 the scenes that Mr. Trask purposely covered up.
19 Specifically, Mr. Trask formed Clear Touch back
20 on August 24, 2012. He didn't tell any of the
21 other -- oh, let me show you the paper copy, as
22 well. He formed Clear Touch back on August 24,
23 2012 and didn't tell any of the other senior
24 executives at CSI, like Mr. Knight or
25 Mr. Masters or Mr. Young.

1 -- we know that Encore was formed on
2 September 27 of 2012 to acquire the technology
3 business of CSI. We know that Mr. Trask met
4 with Mr. Newnam and told him this was a good
5 business. And based on that, Mr. Newnam
6 invested \$4 million to buy this business,
7 thinking that he was bringing on Mr. Trask as a
8 senior executive that he could trust as the
9 Chief Business Development Officer.

10 Mr. Trask joined on February 18, 2013 and
11 took that role and took that salary of \$175,000
12 a year, plus all the benefits and bonuses. He
13 also, at this time, signed a non-disclosure and
14 non-solicitation agreement, and then he worked
15 for Encore for about 15 months, to the end of
16 April of 2014. Based upon the fact that he was
17 not providing any value to Encore, Encore
18 terminated him.

19 Now, that led or triggered the
20 non-disclosure/non-solicitation agreement. The
21 non-solicitation portion of that ran for one
22 year, through April 25th, 2015. A one year --
23 some people call it non-competes. He had,
24 essentially, a one year non-compete when he
25 left. It wasn't until the trade show, about six

1 **MR. ENGLISH:** Ladies and Gentlemen, I
2 want to first thank you for your time and
3 attention. I know this has been a long week,
4 and we really appreciate your doing your civic
5 duty and the service that you've done for this
6 community. I really appreciate that.

7 And I didn't get a chance to respond to the
8 defendant's opening, but they told you and
9 argued that the reason you are here is because
10 even though the defendants have taken
11 responsibility for what they've done wrong,
12 that Encore is being greedy. But I hope that
13 you've seen from the evidence that nothing
14 could be further from the truth. The truth is
15 we are here because the defendants engaged in
16 deceitful and fraudulent acts that breached
17 their contracts and their legal obligations to
18 Encore.

19 I want to start by showing you the timeline
20 of the facts. Also, I've put it here so some of
21 you can see it here and -- or you can look on
22 the screen, whichever is easier. Now, this
23 timeline shows what Mr. Trask wanted Encore to
24 see. We know that Encore was formed --

25 And you don't need to blow it up, Josh.

1 **MR. ENGLISH:** Yes, sir.

2 **THE COURT:** All right. Thank you so much.

3 (The Court goes off the record at approximately
4 10:41 a.m.)

5 (The Court goes on the record at approximately
6 11:03 a.m.)

7 **THE COURT:** All right. Mr. English, the
8 plaintiff ready?

9 **MR. ENGLISH:** Yes, Your Honor.

10 **THE COURT:** Mr. Smith, the defense?

11 **MR. SMITH:** Yes, Your Honor.

12 **THE COURT:** Would you bring the jury in?
13 Your technology is up and running?

14 **MR. ENGLISH:** Yes, Your Honor.

15 **THE COURT:** Great.

16 (Jury enters at approximately 11:05 a.m.)

17 **THE COURT:** All right. Ladies and
18 Gentlemen, we are entering the third phase of
19 the trial, which would be closing arguments.
20 Plaintiff, since they have the burden of proof,
21 will go first. The defense will go next. They
22 have a right to reply.

23 Mr. English?

24 **MR. ENGLISH:** Thank you, Your Honor.

25 **THE COURT:** Yes, sir.

1 you're saying is correct, but I think that is a
2 correct statement of the law, as well.

3 **MR. SMITH:** All right. Thank you,
4 Your Honor.

5 **THE COURT:** Anything else?

6 **MR. SMITH:** No, sir.

7 **THE COURT:** All right. Y'all need a minute
8 to get your heads together? Are you going to
9 use props?

10 **MR. ENGLISH:** Yes, sir.

11 **THE COURT:** If you are, please make sure
12 they're operational. Have you looked at that
13 verdict form? That's mine, so don't lose it.

14 **MR. SMITH:** Yes, Your Honor.

15 **THE COURT:** Have you looked at it,
16 Mr. English?

17 **MR. ENGLISH:** If it's the same one from
18 last night, it's fine with me.

19 **THE COURT:** Have you looked at it, though?

20 **MR. SMITH:** Yes, sir.

21 **THE COURT:** You okay with it?

22 **MR. SMITH:** Yes, sir.

23 **THE COURT:** All right. Good. All right.

24 I'll tell you what, you just, both of y'all,
25 send word back when you're ready to go?

1 **MR. SMITH:** It's the previous page,
2 Page 8. It's that whole second paragraph. I
3 believe this is asserted based on the *Lowndes*
4 *Products* case. So I went back and we looked at
5 *Lowndes* last night, and we believe this is from
6 dicta within *Lowndes*. They do cite -- this is
7 from *Lowndes* citing 3 Am. Jur. (2d) Agency,
8 "Duty Not to Act Adversely." They have block
9 quotes where they drop that out. That's where
10 we think it's from. We think it's dicta. Right
11 above that.

12 **THE COURT:** Do you think it's an incorrect
13 statement?

14 **MR. SMITH:** I think it's a statement of
15 what Am. Jur. has. So I mean, I think if that's
16 a question, then yes, it reflects what's in the
17 case. But we think it's -- they looked at Am.
18 Jur. and the holding that it was, a more
19 simplistic statement, an appellant's entitled
20 to collect all damages approximately resulting
21 from the wrongful conduct of the parties, which
22 is the paragraph above it.

23 **THE COURT:** I think I'm going to keep it
24 in there. With all due respect, I don't think
25 it's an improper statement. I'm sure what

1 severance agreement; not the employment
2 agreement. I'm looking in paragraph seven of
3 the complaint and then if you look under the
4 breach of contract cause of action, that's
5 paragraphs 45 through 51. That's what's pled.
6 So I think that needs to be changed to reflect
7 those are the contracts upon which the breach
8 of contract claims were based.

9 **MR. ENGLISH:** Judge, really the only one
10 that we're saying is breach is the
11 non-disclosure/non-solicitation agreement. So
12 if we just want to reference that, that's fine.

13 **MR. SMITH:** Okay.

14 **THE COURT:** All right.

15 **MR. ENGLISH:** I do think it's correct that
16 the parties stipulate there was an employment
17 agreement.

18 **THE COURT:** Yeah.

19 **MR. SMITH:** That is correct. I don't that
20 it's necessary to be in there, but either way.
21 All right. So --

22 **THE COURT:** Hang on. Hang on.

23 **MR. SMITH:** Sorry.

24 **THE COURT:** (Reviewing.)

25 All right. What's your next one?

1 What's your feeling about that?

2 **MR. SMITH:** It's actually straight out of
3 Anderson. We have it ours, so that's fine. I
4 don't think I can sit with a straight face and
5 object to it.

6 **THE COURT:** All right. Sir, any other
7 proposed changes from the plaintiff?

8 **MR. ENGLISH:** None from the plaintiff.

9 **THE COURT:** Mr. Smith, you had some?

10 **MR. SMITH:** Just two.

11 **THE COURT:** Okay.

12 **MR. SMITH:** I may go with the easier one
13 first. I am looking at Page 9 of the charge of
14 breach of contract. I think there is a mistake
15 that we collectively made yesterday.

16 **THE COURT:** Okay.

17 **MR. SMITH:** I'm looking at the third
18 paragraph down. It says, "Parties stipulate
19 there was an employment agreement or there was
20 a non-disclosure/non-solicitation agreement.
21 These are the contracts for which the plaintiff
22 seeks damages for breach."

23 Well, I looked back at the complaint. It
24 seems to me it only alleges breach of the
25 non-disclosure/non-solicitation and the

1 **MR. ENGLISH:** At the end of that, we'd
2 like to add the paragraph from Anderson's
3 request for charge Section 19-22 that says,
4 "Waiver's an affirmative defense. The burden is
5 on the party asserting it, and that the party
6 claiming waiver must show that the party
7 against whom the waiver is asserted and
8 possessed, at the time, actual or constructive
9 knowledge of his rights."

10 **THE COURT:** What page are you on in
11 Anderson?

12 **MR. ENGLISH:** I can hand it up. It's on
13 page ---

14 **THE COURT:** I've got it up here.

15 **MR. ENGLISH:** --- 219 of the book.

16 **THE COURT:** 219.

17 **MR. ENGLISH:** It's Section 19-22. It's
18 that second paragraph on Page 219 that begins
19 "waiver" --

20 **THE COURT:** I must have a different
21 version than yours.

22 **MR. ENGLISH:** I've got the second edition.

23 **THE COURT:** This is Ned Miller's, so it
24 probably came from the eighteenth-century.
25 (Pause.)

1 to the end of the following sentence. That's
2 the right phrase, but I think it was one
3 sentence too soon.

4 **THE COURT:** (Reviewing.)

5 It's fine with me. I think it is fine where
6 it is, but it doesn't matter to me.

7 So what's you're feeling on it? I think
8 it's half a dozen of the other.

9 **MR. SMITH:** I'm with the Court on this
10 one. That's fine.

11 **THE COURT:** Let's go back and make sure.
12 So where do you suggest that I stop,
13 Mr. English?

14 **MR. ENGLISH:** After "acquired therein,"
15 I'd put a period. Then I would move that phrase
16 to the next sentence, which ends "upon
17 termination of employment immediately compete,"
18 and then add in the absence of a restricted
19 agreement.

20 **THE COURT:** (Reviewing.)

21 All right, sir. What other corrections you
22 want me to do?

23 **MR. ENGLISH:** Then, on Page 12, waiver of
24 breach.

25 **THE COURT:** Okay.

1 a couple of changes on the charge.

2 **THE COURT:** I'm about tired of your
3 changes.

4 **MR. ENGLISH:** I know.

5 **THE COURT:** I'm kidding with you.

6 **MR. ENGLISH:** I know.

7 **THE COURT:** Let's go to them then. Point
8 me to where I'm mistaken.

9 **MR. ENGLISH:** Page 6, I think, is a minor
10 typo.

11 **THE COURT:** Where am I?

12 **MR. ENGLISH:** Page 6 under "Employee
13 completing with employer."

14 **THE COURT:** Give me a second. (Pause.)
15 Okay. Where is that?

16 **MR. ENGLISH:** It's the last paragraph on
17 my Page 6. The paragraph begins: "After the
18 determination."

19 **THE COURT:** Correct.

20 **MR. ENGLISH:** But then there is a sentence
21 that says "except he cannot properly use
22 confidential information peculiar to his
23 employer's business acquired therein." The next
24 phrase "the absence of a restrictive agreement
25 prohibiting the same," I think should be moved

1 action. So you will hear the term proximate
2 cause when it comes down to measure of damages!
3 This is what proximate cause means, and just go
4 over that charge with them. Anybody have a
5 problem with that?

6 **MR. SMITH:** No, Your Honor, I don't.

7 **MR. ENGLISH:** No, Your Honor.

8 **THE COURT:** Other than that, I have my
9 charge here. You're more than welcome, I have
10 been burning up the clerk's paper stock. I
11 don't want to do it anymore. If you want to
12 come and take a look at the final product,
13 you're more than welcome to do that.

14 I just talked to my law clerk, too, this
15 morning about whether or not we ought to -- she
16 asked me what you think they're going to do
17 about you charging first or them arguing first.
18 It seems to me that -- you know, I'll leave it
19 up to you guys. But my charge is going to be
20 long. By the time I get through with them,
21 they're going to be ready to go to sleep. I
22 hate to put them to sleep before y'all go to
23 your closing arguments, so it seems to me to do
24 your closing, and then I'll charge them.

25 **MR. ENGLISH:** We agree. Your Honor, I had

1 **THE COURT:** Have y'all seen the updated
2 verdict form?

3 **MR. ENGLISH:** Not if it was updated since
4 yesterday.

5 **THE COURT:** I thought she said --

6 **THE LAW CLERK:** I e-mailed it to you last
7 night at 6:00.

8 **MR. ENGLISH:** Oh, yes. I got that one.

9 **THE COURT:** Just take a look at what I
10 have to make sure everybody's on board with it.

11 **MR. SMITH:** I've got new charges.

12 **THE COURT:** Thank you very much.

13 **MR. SMITH:** We'd gone through a lot of
14 stuff last night.

15 **THE COURT:** While she's doing that, guys,
16 two things: I realized last night I had not
17 included punitive damages in my charge, which
18 would be charged at the end of all of my causes
19 of action.

20 Also, another thought is that some of these
21 causes of action when start they speaking of
22 damages, speak in terms of proximately-caused
23 damages. And it seemed to me that I needed to
24 define proximate cause. I was going to do it
25 before getting into each one of the causes of

1 **A** Absolutely not. During this time in 2013,
2 it was taken -- when we place orders with Clear
3 Touch, it has taken several weeks, sometimes 10 to 12
4 weeks for product to be delivered from Clear Touch to
5 Encore. We -- Leon received product as soon as it was
6 available from Clear Touch. As soon as, you know, it
7 could be shipped from Clear Touch. So any statement
8 that we diverted products from Leon to another
9 customer is just an excuse to cover up that there
10 were delays in shipping.

11 **Q** How do you know this?

12 **A** Pretty clear. I mean, we reviewed our POs
13 and our information -- our orders to Clear Touch, and
14 it shows pretty clearly in our records that we placed
15 an order and they shifted and there was no diversion.

16 **Q** Thank you, Mr. Young.

17 **A** You're welcome.

18 **THE COURT:** Cross-examination.

19 **CROSS-EXAMINATION**

20 **BY MR. SMITH:**

21 **Q** Mr. Young, I know you've been up here once
22 already. Besides Jimmy Higginbotham telling you or
23 telling this jury that my client made this statement
24 to Leon County, the plaintiff has absolutely no
25 evidence that Mr. Trask made such a statement?

1 **A** I do.

2 **Q** Thank you.

3 **THE COURT:** Thank you, sir, you may step
4 down.

5 Call your next witness please.

6 **MS. WALSH:** The plaintiff calls Russell
7 Young.

8 **THE CLERK:** Place your left hand on the
9 Bible and raise your right hand.

10 **RUSSELL YOUNG**

11 having first been duly sworn, testifies as follows:

12 **THE CLERK:** State your name please.

13 **THE WITNESS:** Russell Young.

14 **THE CLERK:** Thank you.

15 **DIRECT EXAMINATION**

16 **BY MS. WALSH:**

17 **Q** Good morning, Mr. Young.

18 **A** Good morning.

19 **Q** Just a few quick questions for you. Did you
20 hear Mr. Trask's testimony that there was truth to
21 the statement that Encore diverted Clear Touch
22 products -- products ordered by Leon County to
23 another customer?

24 **A** I did hear that, yes, sir.

25 **Q** Is this statement true?

1 good introductory. Corporations, I think is
2 fine. Spoilation charge, we'll talk about that
3 later. As to the charge of breach of loyalty,
4 anything from the plaintiff that they have a
5 problem with? And if so, what page and where?

6 **MR. ENGLISH:** Yes, sir. On Page 4, third
7 paragraph, first sentence. It says the employee
8 may use such skills, knowledge and
9 relationships to compete with his former
10 employee once the employment is terminated. We
11 think that -- at the end of that, the same
12 clause that appears on Page 7 should appear in
13 the -- unless there's an agreement not to
14 compete.

15 **THE COURT:** (Reviewing.)

16 What if I put at the end of that: Once the
17 employment is terminated, unless there is a
18 restrictive contract providing otherwise? You
19 start leaving -- there's multiple different
20 ways to do that.

21 **MR. ENGLISH:** That's fine.

22 **THE COURT:** Okay.

23 **MR. SMITH:** And I think the language down
24 on seven --

25 **THE COURT:** Hang on. Hang on. Hang on.

1 unfair trade practices.

2 **THE COURT:** Right.

3 **MR. ENGLISH:** Just looking at the Trade
4 Secrets Act real quick. (Pause.)

5 There, the statute says the Court may award
6 separate exemplary damages in an amount not
7 exceeding -- not exceeding twice any award
8 made, so it's sort of a cap. It lets the Court,
9 I think, award -- if you've got nominal damages
10 on that, I think the Court could award
11 exemplary.

12 **THE COURT:** Yeah, I do. I'm just talking
13 about the question to the jury. I changed it
14 to: Only if you award actual damages, are you
15 to answer the question below.

16 **MR. ENGLISH:** Okay. Yeah, I think that
17 would be fine.

18 **THE COURT:** That kind of takes out the
19 sting of -- all right. That gets the verdict
20 form out of the way.

21 Let's go over the charge. I'm not saying
22 that I'm charging spoliation charge. It's in
23 there. But I'm not saying I -- quite frankly, I
24 don't think that's necessarily been proven.

25 But summary of claims at issue I think is a

1 Q And you got the job?

2 A I did.

3 Q Did you get a pay raise?

4 A I did not. I took a -- actually lowered my
5 salary to go to Clear Touch.

6 Q Why were you willing to do that?

7 A I was willing to do that, again, because,
8 you know, classroom technologies are my passion. You
9 know, I saw that great opportunity to be able to move
10 to the manufacturing side. I also knew that Clear
11 Touch was a very young company at that time and there
12 would be opportunity being able to get in early to be
13 able to grow with the company and see career growth
14 for myself, as well, through that.

15 Q Did you inform Encore of your plan to
16 leave?

17 A I did.

18 Q And did they object?

19 A They did not.

20 Q In selling Clear Touch products for Encore,
21 who benefits from that?

22 A Well, I would say both companies would
23 benefit, Clear Touch and Encore.

24 Q I mean, isn't that what a reseller does?

25 A Absolutely, yeah.

1 lies in the classroom and the interactive classroom
2 products. So for me, I felt like I'd like to go to a
3 company where that could be my sole focus.

4 Q Were you offered a job then?

5 A No.

6 Q How long were you at Encore after this
7 meeting?

8 A I was there through January -- I guess,
9 January 11th, 2015.

10 Q How did you end up at Clear Touch?

11 A Keone told me that if an opportunity ever
12 arose, that it would be posted. He never contacted me
13 directly to say, "Hey, we want to talk about hiring
14 you."

15 With that, I monitored -- I followed their
16 Facebook page. They had social media going. One day,
17 they posted through Facebook. I think when I gave my
18 deposition, I think I said that I thought I saw
19 through ZipRecruiter. Going back now, I remember that
20 I saw it through Facebook. There was a notification
21 on Facebook saying, "Hey, we're hiring in the South
22 Carolina market."

23 Q And so you applied?

24 A And so I applied. I sent them my resume at
25 that point.

1 been there, I might had gone to Promethean over the
2 years, but that opportunity never presented itself.
3 So I did express to Mr. Trask that, should the
4 opportunity arise, I would love the opportunity to
5 possibly move over to Clear Touch.

6 **Q** Was Encore not focused on those types of
7 things?

8 **A** They were. As far as interactive
9 technologies?

10 **Q** Correct.

11 **A** Yes. So I mean, we still had the -- what we
12 would call our interactive classroom group, we had
13 installers, we had trucks and those types of things.
14 So I mean, I was still heavily involved in, you know,
15 assisting the sales cycles, sales reps, with their
16 demonstrations, with trainings.

17 **Q** Why was it that you wanted to --

18 **A** Right.

19 **Q** -- that Clear Touch was a better option?

20 **A** So because of -- with my role at Encore,
21 you know, I was involved with a lot of things, not
22 only in the interactive classroom group, but a lot of
23 the marketing efforts, a lot of the video making,
24 those types of things that were across a lot of
25 different products. As I mentioned before, my passion

1 **A** A little bit, yeah. At the same time, you
2 know, I was curious to see what he was going to talk
3 about.

4 **Q** So what did he disclose?

5 **A** At that time, he disclosed to me and to my
6 wife that he was, indeed, the owner and was the
7 founder of Clear Touch Interactive.

8 **Q** And you were not aware of that before that?

9 **A** I was not.

10 **Q** During that meeting, did Mr. Trask
11 encourage you to leave Encore?

12 **A** Never.

13 **Q** Did he tell you he had a spot ready for you
14 at Clear Touch?

15 **A** No.

16 **Q** Did you discuss with Mr. Trask any interest
17 in Clear Touch?

18 **A** I did. Over the years, you know, it's kind
19 of a natural progression in a lot of people's careers
20 to, say, go from a reseller to working for the
21 manufacturer. In fact, we -- I had seen several of my
22 colleagues at Encore do the same thing and go to
23 other OEM manufacturers, to other direct
24 manufacturers. So for me, you know, I always thought,
25 even over the years, you know, if the opportunity had

1 time, to receive guidance on a support issue.

2 Q Did it bother you that you weren't able to
3 meet them in person or tour their facilities and that
4 kind of thing?

5 A Not necessarily. Early on in the Promethean
6 relationship, you know, I didn't have a lot of access
7 to people at Promethean. You know, management came
8 and said this is what we're selling. So in that
9 regard, it wasn't -- and because it was such a great
10 product, you know, I didn't really focus on the fact
11 of, you know, exactly where did this come from, who
12 are these people. I mean, obviously, I wondered, as
13 anybody would, but it didn't bother me because it was
14 a great product.

15 Q Did you -- after Mr. Trask was terminated
16 from Encore, did you meet with him?

17 A I did.

18 Q Was that the day of or very shortly
19 thereafter?

20 A I believe it was the day of.

21 Q And what was the purpose of that meeting?

22 A He asked me to come over. And my wife and I
23 both went over to their house. He asked us to sign an
24 NDA, so I knew something was up.

25 Q Was that kind of weird?

1 seatwork to do. And so then that teacher can then use
2 her laptop to prepare content aside from, you know,
3 the students aren't taking up that laptop time from
4 her.

5 At the time, I think there was maybe one or
6 two others that offered an internal PC option. So for
7 us, again, that was a very much competitive advantage
8 in the Clear Touch product.

9 Q Based on this analysis, did you determine
10 that Clear Touch was the best option?

11 A I did. Let me just delineate a little bit
12 further, too. Some of those brands up there were not
13 available to us as a resell brand to be able to carry
14 as Encore. Some of them sold direct. Some of them
15 already had established relationships. Based on what
16 was available and what we already had in hand, I
17 truly believe that we had the best product to offer
18 our customers.

19 Q During this time, what kind of interaction
20 did you have with Clear Touch management?

21 A During that time, very limited. Very
22 limited. There's an instance where we had an issue
23 where our panel needed support; needed, you know,
24 guidance on how to repair something. I was put in
25 contact with, I think it was, Kathy Cruse, at that

1 **A** So a couple of things: one is the speed,
2 and it's actually listed there in milliseconds, Clear
3 Touch having one of the fastest speeds of response
4 times to touch; the other thing was what we call the
5 internal PC option. With Clear Touch, you have the
6 option -- and that panel over there has it -- where
7 you have a -- basically, it's almost like a laptop
8 motherboard that's made to fit exactly inside the
9 Clear Touch panel. What that allows for is a smooth
10 and transitionless experience at the panel. It's
11 almost like that becomes a large Tablet PC in itself
12 without the necessity of how we have it set up today
13 with wires coming off of it, you know, to our
14 lawyer's laptop.

15 They wanted to go that route because they
16 wanted to keep all of their information on that. We
17 could've just taken that on a flash drive and put it
18 on the internal PC. In the classroom, that also meant
19 that teacher did not have to share her laptop anymore
20 with instruction to the students. She could keep that
21 for e-mailing and for grades and anything else that
22 she was preparing, while students interacted with
23 content in the classroom.

24 Classroom time is not always, you know,
25 just talking, talking, talking. Sometimes I give them

1 Touch was the first panel that I came across where
2 there wasn't an extreme lag time. When I talked about
3 those other things that we experimented with, with
4 the interactive overlay over TVs, there was an
5 apparent lag time. As you wrote on that screen, you
6 are waiting for the ink to catch up. And while it's
7 cool that you could do this digitally and with touch,
8 you know, the apparent lag time, we knew, was not
9 ready for the classroom.

10 When Promethean -- sorry, when Clear Touch
11 brought their product into Encore to be evaluated,
12 that was the first time that I experienced on a
13 panel, interactive flat panel, that speed that
14 compared to what I, you know, experienced for 10-plus
15 years on a Promethean interactive whiteboard. So I
16 knew it was ready for, basically, time in the
17 classroom. It was ready to be used and enjoyed in a
18 way that would not detract from instruction in the
19 classroom.

20 Q And because this spreadsheet is gibberish
21 to me and to probably a couple of other people in
22 this room ---

23 A Sure.

24 Q --- what was the decision, based on the
25 spreadsheet?

1 actually touch one of these type products. These are
2 very clear specifications that, in my opinion, show
3 that we had a much better product to bring to market.

4 A couple of things in compared -- in
5 particular, one is the speed of touch. So one of the
6 things that our customers enjoyed with the Promethean
7 active board over, say, a company and a brand like
8 SMART is they use very different touch technologies.
9 Promethean actually used what was called
10 electromagnetic, which meant their pen, how it
11 interacted with the panel or with their interactive
12 whiteboard, was extremely fast.

13 For a teacher going from a static
14 whiteboard with a dry erase markers, unless your
15 marker had dried up, that ink flows out of the tip of
16 that pen as fast as you can write. The Promethean
17 experience was the same. That was very important for
18 a teacher. There was nothing more frustrating than
19 writing on something and watching and waiting for
20 that electronic ink to catch up to you. In
21 instruction time in the classroom, time is of the
22 essence. I want to keep my students on task and
23 engaged with me. I need to be able to do things in
24 realtime.

25 As we compared panels on the market, Clear

1 awareness for this unique offering by Encore and have
2 built great momentum. Momentum that would be very
3 hard to rebuild in a scenario where we have
4 quadrupled our competition field."

5 Q Did you write that?

6 A I did.

7 Q Do you believe it?

8 A Yes.

9 Q Mr. Trask didn't tell you to write that?

10 A No.

11 Q Let's look at the last page. There's a
12 spreadsheet there. Did you prepare this?

13 A Yes, I did.

14 Q Mr. Trask help you to prepare it?

15 A He did not.

16 Q Did he have any input?

17 A No.

18 Q Why did you prepare it?

19 A I was asked by management to prepare a
20 comparison of available panel options on the market.

21 Q What does it show?

22 A It shows, based on my findings -- and these
23 were findings that are a combination of looking up
24 specifications through these and manufacturer's
25 websites, as well as any time I had an opportunity to

1 majority of my time over Promethean promoting Clear
2 Touch.

3 Q Let's look at Defendant's Exhibit 34.

4 A Which one?

5 Q Defendant's book over there to your right.

6 A Okay.

7 Q This was an e-mail that I believe
8 Mr. English brought up earlier. Does this look
9 familiar to you?

10 A Yes.

11 Q What -- what does this show?

12 A This is talking about comparisons between
13 different manufacturers' panels that were out there
14 on the market.

15 Q If you'll look -- we're going to have to
16 scroll down here -- the first page, there was a
17 paragraph that was discussed earlier. Can you read
18 that last paragraph?

19 A Okay. "We enjoy a unique position with
20 Clear Touch in a very robust, reliable product that
21 is actually shipping. We are also not competing
22 against other resellers for the same product, a
23 situation that would be there with all the other
24 panels, Promethean included, in this comparison.
25 We're working very hard to create the demand and

1 to put that interactive overlay on top of it.

2 The first one, we tried at one point of
3 touch. Then another one at two points of touch. But
4 they're extremely fragile. We'd move them from one
5 show to the next and there would be a crack in it or
6 too much ambient light shining inside of a conference
7 hall that affected the actual touch technology
8 because they were using up optical sensors. Little
9 things like that, you know, made us feel like, well,
10 the technology is not quite right yet at that point.
11 So that's, you know -- that's where that's been.

12 **Q** Just so I'm clear, particularly about
13 Promethean, how much time would you say you spent on
14 Clear Touch versus Promethean?

15 **A** Because of my opinion that we needed to
16 move more toward panel technology, I would say it was
17 at least two to one, you know, over what I might
18 spend, you know, promoting Prome -- the traditional
19 Promethean interactive whiteboard and projector. I
20 was already convinced that we needed to move beyond
21 projectors and that we needed to get ahead of the
22 marketing curve to push panel technology.

23 At that time, when we brought Clear Touch
24 on board, that was the only thing available to us, at
25 that time, and it was a great technology. I spent the

1 Technology Group, we were always a Promethean
2 partner. One of the reasons -- and I don't know if
3 this had been brought up -- one of the reasons that
4 we did not pursue panels with Promethean from the
5 get-go is that they simply weren't available from
6 Promethean.

7 At the time, going through the acquisition,
8 I sat on several conference calls with Promethean.
9 Several times, you know, the question was asked,
10 "When are you coming out with a panel?" And, you
11 know, many times the answer was, "Well, we don't
12 think it's a viable direction to go as a company."

13 So having sat in on those, you know, well,
14 there's our answer. And we need to find something
15 because our customers were -- several of our
16 customers, what we call our bleeding edge customers,
17 were already moving that direction and asking us when
18 were we going to come out with something to replace
19 their aging Promethean boards with. At the time, we
20 didn't have an answer.

21 So many of them moved toward other
22 manufacturers with some limited success, what they
23 had put in and some of the challenges they were
24 facing. For us, we had experimented with some
25 different solutions, getting a plasma TV and trying

1 Group. My job was to really assist those sales folks
2 with making sure people are educated about our
3 interactive classroom solutions. That being the
4 largest and most visible piece of the interactive
5 classroom, I often call it the most political piece
6 of equipment in a classroom today because it is front
7 and center in the classroom.

8 Administrators want to know that they're
9 getting the most bang for their buck with something
10 that shows well and engages with students, but it
11 also makes parents feel like, you know, my child is
12 not being left behind in technology and access to
13 that. So it's one of the biggest statements that a
14 school district could make to say, "Hey, this is --
15 this is important. We're investing in your students
16 by providing this type of technology."

17 So that's -- can you repeat the latter part
18 of your question?

19 Q You answered my initial question.

20 A Okay.

21 Q That's good.

22 A All right.

23 Q Was -- were you selling Promethean, as
24 well, at that time?

25 A We were. So we -- you know, at Encore

1 The second component of that is generating
2 new business. We talked about going deep and wide
3 into an account. Oftentimes, we hear this, you'll
4 hear this in our sales meetings and even sales
5 meetings at Encore, you've got these great accounts
6 and they're doing this, maybe they're buying
7 computers, but they also need switches; they need
8 wireless access points; they need classroom products;
9 they need classroom audio; room control systems.
10 Don't be afraid to walk across the aisle, as we said,
11 and talk to facilities directors as opposed to just
12 the IT director or just the, you know, the curriculum
13 folks.

14 We had such a breadth of product. There
15 were so many opportunities to develop new
16 opportunities, even with existing accounts and also
17 one of the single best ways to introduce yourself to
18 new prospects.

19 **Q** How much time would you say -- on the road
20 and at these trade shows, how much time would you
21 spend promoting Clear Touch versus the other
22 products?

23 **A** Sure. I would say somewhere between 50 and
24 60 percent. Again, that was my passion as to what my
25 roles and responsibilities were at Encore Technology

1 shows.

2 **Q** And each of those trade shows that you went
3 to, what was the purpose?

4 **A** The purpose was usually twofold: one, was
5 to make sure that our customers still know that we're
6 out there. You know, as we transitioned, then became
7 Encore Technology, it was very important for them to
8 know that we were continuing in business; we were
9 going to continue to support them; that all those
10 Promethean boards that they had, all of those
11 switches and computers that they had purchased from
12 us over the years, were still going to be serviced
13 and supported.

14 So you know, there's a big thing when you
15 go to a show, the first thing you notice are the
16 people and the companies that aren't there anymore.
17 We experienced that in our business. We go to
18 conferences. There might be 12 new manufacturers here
19 at this show; and then by next year, maybe 10 of them
20 are gone and then there's six more new ones. So when
21 you're absent from regional trade shows where you've
22 done business, that speaks more volumes than
23 sometimes being there. So being there to be noticed
24 and for people to know that we're still a viable
25 business is a huge component of that.

1 that we sold. As Keone mentioned, we found -- this
2 was, even from our experience in the Promethean days,
3 if you had something big and flashy in the booth,
4 that's what gets people's attention. We would get
5 comments all the time, "I saw your panel, you know,
6 from 100 feet away down the aisle and it drew me to
7 your booth." So we knew we were onto something that
8 was going to draw people in and get their attention.
9 At trade shows, we have just a finite amount of time
10 to capture someone's attention and get them to enter
11 into a conversation with us. So that was definitely a
12 big drawing point.

13 We'd always set up voice with actual
14 working phones. It's not like we just put dummy
15 phones out on the table. We would actually -- I would
16 take the time to set up, you know, the Verizon router
17 and just, you know, the switch, and make sure
18 everything is plugged in and working and an actual
19 working system. There was a lot of time dedicated to
20 making sure that we represented all of the solutions
21 that Encore had to offer.

22 **Q** How often did you have to attend trade
23 shows while you were at Encore?

24 **A** I would say in the Carolinas and parts of
25 the Southeast, I attended majority of those trade

1 this money on? One year, we said we would love to put
2 in a video studio so we can help to qualify some
3 opportunities before we start sending people, you
4 know, on the road to, you know, travel with all of
5 this heavy equipment and go do demonstrations.

6 So there was kind of a twofold approach to
7 that: one, where we can do online demonstrations of
8 the interactive classroom products we were selling,
9 as well as the other technologies that we sold as
10 well. Even to this day, there was a lot of videos
11 that was made in that studio. My faces are still on
12 those, even on the Encore website today, even beyond
13 the Clear Touch brand.

14 Some marketing also included. As Keone
15 mentioned earlier, helping to plan logistics for
16 trade shows, loading up the trailer, pulling the
17 trailer thousands of miles around the Carolinas and
18 wherever we needed to go to help set up those
19 conferences, as well as, you know, help to organize,
20 you know, booth schedules at the larger shows. So
21 definitely were involved in a lot of those efforts,
22 too.

23 Q What was being promoted at those
24 conferences?

25 A Right. So we always promoted everything

1 your spare time, your technology -- is how you got
2 into technology?

3 A Yes.

4 Q So you didn't devote 100 percent of your
5 time to that construction job?

6 A During the day, yes. And then during the
7 evenings, I --

8 Q They didn't sue you?

9 A What's that?

10 Q They didn't sue you?

11 A They did not. Of course, I was part of --
12 one of the owners in that construction company, so it
13 might've been pointless.

14 Q What was your role with Encore?

15 A My role at Encore was twofold: senior
16 solution specialists in the classroom technology
17 division, as well as, as we became Encore, I was
18 asked more and more to participate in marketing
19 efforts. We had -- even while at CSI, we had begun to
20 develop a lot of things, such as a video studio. One
21 of the things -- you know, we had come up with that
22 idea.

23 We had some marketing funds from our
24 dealings with Promethean. You know, we'd come to
25 year-end and they would say what do you want to spend

1 and expand up to the point where we installed, just
2 in the Carolinas, between 30 and 40,000 Promethean
3 panels -- I mean, interactive whiteboards and
4 projectors across the Carolinas.

5 It was a very exciting time. We got to
6 experience that whole wave of adoption, moving away
7 from just simple things of computers and five
8 computers in the classroom. Schools, we saw, started,
9 you know, reallocating monies to move toward things
10 that are more interactive, front of class.

11 After my time there at CSI, we heard about
12 the whole transition through Harris Constellation and
13 then on to becoming Encore Technology Group. So I was
14 excited to be a part of that, excited to see that the
15 technology side of CSI was going to continue as were,
16 you know, not only myself, but the other 106
17 employees that were at Encore at the time. So I
18 continued to kind of lead the practice of interactive
19 technologies through my time there, as well.

20 January 2015 is when I joined Clear Touch
21 Interactive.

22 Q So you were a part of the transition?

23 A I was, yeah.

24 Q I don't want to back up too far. I believe
25 you said that when you were working construction in

1 Carolina. So I was able to start selling Promethean.
2 Demoed it a lot. I kind of hogged the -- our demo
3 board, and got so good at it that other sales reps in
4 CSI asked me to come and start to demonstrate the
5 product for them and their customers.

6 So out of that, had a meeting with my sales
7 manager who, after scolding me for going outside my
8 territory to do that, asked if I would like to do
9 that full time. So somewhere around that 2004/2005
10 time frame, I transitioned out of sales and into
11 product specialty and sales support with the
12 interactive classroom products that we began to
13 carry. Prior to carrying Promethean, we really didn't
14 do a lot in the classroom outside of the normal PCs,
15 switching and routing.

16 It was something that I naturally
17 gravitated toward. I really enjoyed the product. It
18 was just, you know -- I was always that kid growing
19 up that everybody asked to come and program their
20 VCR, you know, when those things came out. I had a
21 proclivity to anything that was hands-on like that. I
22 really enjoyed it.

23 So moved into that product specialty role
24 throughout my time at CSI. I led a team of product
25 specialists as that classroom practice began to grow

1 get if you vote our way.

2 Q So if you're doing your job as a sales rep,
3 you want to a piece of that, right?

4 A I want all of that.

5 Q Okay. Thank you, Mr. Martin. Please answer
6 any questions for plaintiff's counsel.

7 A Thank you.

8 THE WITNESS: I assume I'm going to need
9 this.

10 MS. WALSH: Maybe not.

11 THE WITNESS: All right. Thank you.

12 CROSS-EXAMINATION

13 BY MS. WALSH:

14 Q Good afternoon, Mr. Martin.

15 A Good afternoon.

16 Q You said you worked at Clear Touch for
17 three years, correct?

18 A Slightly over three years.

19 Q But during that three-year period, you
20 never worked with Kathy Cruse or Kathy Krebs, have
21 you?

22 A I have not.

23 Q You also mentioned that Encore and Clear
24 Touch had a reseller agreement, correct?

25 A That's correct.

1 County was looking to upgrade?

2 **A** To upgrade?

3 **Q** Their technology?

4 **A** No, it wasn't secret at all. I lived in
5 Tallahassee. So I believe I heard it earlier
6 described, there were billboards up literally at
7 every school, as well as commercials that were being
8 run, as well as anything you would normally
9 experience in any type of campaign, because this was
10 a vote that was having to go out on this referendum
11 of charging an extra halfpenny of sales tax. The
12 local government was working extremely hard to win
13 over the public to all of this money that could be
14 used.

15 One of the things that they were
16 advertising very heavily was that this money was
17 going to be used for facilities, as well as
18 technology upgrades, for the school. So they wanted
19 -- they wanted all of the parents and all of the
20 people, the city, to feel really happy about that. So
21 that was kind of where those billboards, for
22 instance, came from. You couldn't help but see them.
23 They had literally half of a penny on there, along
24 with a giant for thermometer and a huge amount of
25 money that said this is what your kids are going to

1 **MR. HUDSON:** Permission to publish this to
2 the jury? (Pause.)

3 Your Honor, permission to publish?

4 **THE COURT:** I am so sorry. Yes, you may.

5 **MS. WALSH:** No objection, Your Honor.

6 **THE COURT:** You may.

7 **MR. HUDSON:** Okay. I'll try not to put you
8 to sleep.

9 **BY MR. HUDSON:**

10 **Q** Mr. Martin, I'm sorry, can you repeat what
11 this e-mail represents?

12 **A** This was an e-mail from myself to Brian
13 Boyd at Leon Schools regarding the FAEDS Conference
14 in 2014.

15 **Q** And how did you get Leon County's contact
16 information?

17 **A** This particular e-mail was one of about 125
18 that I sent that had the same message in there. It
19 was just a mail merge. This particular list was one
20 that I got that was a pre-attendee list on the FAEDS
21 Conference website of who was planning on coming to
22 that event.

23 **Q** So it's public information?

24 **A** It was.

25 **Q** To your knowledge, was it secret that Leon

1 **Q** Are you familiar with Leon County Schools?

2 **A** I am.

3 **Q** What's your -- what's your, I guess,
4 connection to Leon County?

5 **A** Sure. Leon County Schools was a customer
6 while I was at Logical Choice Technologies. I was
7 selling them the Promethean product. They were also a
8 customer while I was at Classroom Technology
9 Solutions; also selling product there. And then also
10 I serviced product for Clear Touch at several schools
11 in Leon County.

12 **Q** What role did Encore have with Leon County,
13 to your knowledge?

14 **A** Encore sold Clear Touch products to the
15 school district.

16 **Q** I would like to pull up Defendant's
17 Exhibit 26 that's been admitted -- I'm sorry. Hold
18 on. (Pause.)

19 Defendant's 26.

20 **A** Okay. I am.

21 **Q** What are you looking at there on
22 Defendant's 26?

23 **A** This is an e-mail from myself to a
24 gentleman, Brian Boyd at Leon Schools regarding the
25 FAEDS Conference in 2014.

1 believe -- let me think about these -- one was
2 Madison -- Madison City Schools in Alabama; another
3 was Social Circle City Schools in Georgia; I believe
4 Newton County Schools in Georgia, as well as Gwinnett
5 County Schools in Georgia, to work on some
6 opportunity with Encore.

7 **Q** And what happened?

8 **A** Nothing. That's the bad part. We would
9 receive leads for those or requests to set up
10 demonstrations, right? Let me bring out the product
11 because the Encore reps didn't carry the product in
12 their vans. They were relying on us to come and do
13 demonstrations. So I would try to set up those
14 demonstrations and would get no response or a
15 response of "I can't make it" or "I have something
16 more important to do," on each one of those.

17 On the case of Newton County, we went -- we
18 did go further, all the way through submitting a bid.
19 I believe it was something where there was a clerical
20 error on Encore's bid, which ultimately resulted in a
21 company called LeCroy out of Georgia who won that
22 bid, and ultimately nothing was really ordered there.
23 I believe even this last six months, LeCroy filled
24 that with a product line that nobody in this room
25 sells.

1 **Q** Okay.

2 **A** So to sell the entire product line. During
3 a phone interview, we talked about my expertise. My
4 expertise really lies in the classroom technology
5 aspect, things like panels, things like the speaker
6 systems, audio systems, control systems, etc. Did not
7 lie in the network and the cloud-based solutions,
8 which was basically what I was told was that -- needs
9 someone with that expertise, as well. That's really
10 the direction that we have as a company. So that -- I
11 didn't think much about it at the time. That
12 opportunity went away and I kept pursuing others.

13 **Q** When you say "went away," were they not
14 interested?

15 **A** Just weren't interested.

16 **Q** Have you ever attempted to work with Encore
17 employees regarding opportunities for Encore?

18 **A** I have. I have. So as -- in my role as
19 business development representative, I was charged
20 with working with all of our resellers, as well as
21 setting up new reseller challenge, as well as selling
22 product direct. So basically sell Clear Touch
23 products.

24 So in my role as business development
25 representative, I had several opportunities. I

1 **Q** What interaction have you had, if any, with
2 Encore?

3 **A** So I had interaction with Encore, I would
4 say started with -- my initial interaction started
5 with David Masters. I was still working as director
6 of sales for Classroom Technology Solutions down in
7 Tallahassee and applied for a position to be a sales
8 rep for Encore in that area.

9 **Q** When was this?

10 **A** That was back around the same time,
11 actually, a little bit before Clear Touch hired me.
12 So this would've been back in 2000 -- late 2013 or
13 2014, spring of 2014.

14 **Q** And what was this potential opportunity?

15 **A** The opportunity was one to be an outside
16 sales representative. You know, I mentioned I was
17 already keeping my ear to the ground. I just didn't
18 like the direction where Classroom Technology
19 Solutions was heading. I was keeping my ear to the
20 ground. I had an industry reference basically say,
21 "You ought to check this one out." It just fit as far
22 as the geography goes. I was looking for a sales
23 position in or around the Tallahassee market.

24 **Q** Was this for panel sales?

25 **A** This was for all sales.

1 **A** I do know Dale Viola.

2 **Q** How do you know Mr. Viola?

3 **A** This was back in the Promethean days when I
4 started to know Dale Viola. Dale worked at Promethean
5 before he went and started his own company. With his
6 role at Promethean, I knew him as one of the managers
7 there. I, then, just basically came to know Dale as
8 the owner of AXI and the guy who landed the big deal
9 after Katrina. That was kind of how everybody knew
10 him.

11 **Q** Is he a competitor?

12 **A** He is definitely a competitor.

13 **Q** In what way?

14 **A** We compete against AXI on the sale of
15 interactive flat screen panels in the states of
16 Louisiana and Mississippi with our other resellers.
17 But maybe I'll delineate there, too. Dale is a
18 competitor, no doubt about it. But in our industry,
19 as the manufacturer role, we're always looking for
20 opportunity. So with that opportunity, while someone
21 may be a competitor, they may also still represent an
22 opportunity for us to form some type of relationship
23 and to be able to come to some type of an agreement.
24 So it does -- I would say that is something a little
25 unique in this role.

1 There were others, too. So we had a couple
2 that we've seen pop up from Clear Touch -- from my
3 experience here with Clear Touch, we've had -- I have
4 one company called Progressive Communications in the
5 state of Georgia. Attempted to -- and they may still
6 be doing this but they attempted to bring in some
7 product from a company called KTC and started
8 marketing that product under their name, and at least
9 according to some of the shipping data that I've seen
10 through Import Genius -- another tool that we can
11 check to see different data so I can see what types
12 of products or at least what weight is being imported
13 along with a description by different companies, if
14 they are shipping that by ocean freight -- I been able
15 to see that they've only had 100 to 200 pieces
16 arrive.

17 Seen very similar -- very similar things
18 also happened with a company called G2, Galaxy. I
19 believe we already heard mentioned, as well, about
20 AXI down in Louisiana. Some similar results there.
21 It's also another one out in California, as well. So
22 yeah, there -- it's been tried a couple of times.

23 Q While you are mentioning AXI, let's go
24 ahead and talk about Dale Viola. Do you know who Dale
25 Viola is?

1 the investment has got to get significantly larger in
2 order to maintain the levels of support that your
3 customers have come to expect and also that you offer
4 and things, like a three-year on-site warranty.

5 Q Are you familiar with any resellers or
6 established resellers who attempted this model?

7 A I am. Like I mentioned, the Classroom
8 Technology Solutions that I was with attempted this.
9 In fact, I was part of that, initially. We went over
10 to Taiwan to source some products. We ended up
11 importing two different ones. We were able to bring
12 those to market, but it was the challenge of having
13 to park all of that money that I think, ultimately,
14 got them into trouble, plus the support that was
15 required on those products. So if something failed or
16 if you had a bad batch of other things, that could
17 literally take you down as a company.

18 The other component that was out there,
19 too, was as a reseller, as we started trying to
20 market those products to other resellers, they
21 quickly reminded us that we were actually their
22 competitor, too. So there was a lack of trust there
23 in that channel. So they were looking for a
24 delineation between sort of manufacturer and
25 reseller, not reseller to reseller, in those cases.

1 successful in doing so. In fact, my company I came
2 from, Classroom Technology Solutions was one of
3 those. They just went bankrupt.

4 There is a challenge here. You've got to
5 have enough money up front to be able to source
6 products, right? So it costs money to bring those
7 products in from somewhere in Asia. That may take
8 upwards of 90 to 120 days. I think we used the number
9 earlier of \$3000 per panel. So if I ordered 50, for
10 round numbers, if I bring those in, now I got
11 \$150,000 of cash outlaid for at least 90, if not 120
12 days, and then I've also got to sell that to
13 somewhere, too. So we assume that there is some sales
14 time.

15 I know this is a long answer to this, but
16 it is worth hearing on this. The financial piece is
17 big because if it takes me 30 days to sell those, now
18 I'm at least at 120 days, if not 150, and then almost
19 every one of these schools allows for at least a net
20 30, if not a net 45. I'm out -- for just 50 panels,
21 I've got \$150,000 that I can do nothing else with
22 that has been outlaid for almost a half of the year.

23 So now scale that. All right. You take
24 where we were as a business and now you start doing
25 this number, right? So that number has got to get --

1 one as an example. We had about 22 competitors who
2 were at that show showcasing something very similar
3 to what we have. Most of whom are going to tell you
4 that they are somehow direct with China, that their
5 product's a dollar cheaper and that they can get this
6 for you and you can become a reseller and you can
7 sell and make all the money in the world. That's one
8 of the challenges that we face.

9 The other is that we sell a large product.
10 We actually have to outfit each of those reps that I
11 just mentioned with the van. In fact, I've got about
12 10 vans in the fleet now with over 100,000 miles on
13 it. So the guys drive -- all these salespeople drive
14 these panels all over the place and they'll set these
15 up. I would say that's a challenge, certainly was for
16 me in the South Florida heat. With that, you know,
17 being able to lug that panel in and out of the van
18 maybe three to four times a day, go set that up, go
19 show it, and go on to the next one. That's certainly
20 another challenge there.

21 The other challenge is financial. As I
22 progressed with Clear Touch, my eyes were opened more
23 and more to the financial needs that are there to set
24 up this type of business. There's a lot of companies
25 that try to do this that have not really been

1 Some useful information there as a rep
2 would have been: What types of projectors did they
3 buy? Did they buy something five years ago that needs
4 replacing? And would that prompt a conversation?
5 Absolutely.

6 **Q** What is your role, currently, at Clear
7 Touch?

8 **A** My role currently is vice president of
9 sales.

10 **Q** Is that -- so you are still out hitting the
11 pavement?

12 **A** Just in a bigger way. So you mentioned that
13 Clear Touch has 28 people. Now I have about 20 of
14 those who report to me. With that role, I have set up
15 teams now across the nation where the structure is a
16 simple one. It's just we have a regional sales
17 manager with reps underneath those. And then we also
18 have a business development team who sort of works on
19 the larger opportunities, as well.

20 **Q** Explain for the jury what the challenges
21 are of the Clear Touch business model.

22 **A** It's a lot of challenges now. We see a lot
23 of entrants to the market. We -- I believe, at the
24 last big trade show, we've seen -- I think we had --
25 at -- the ISTE show we made mention, so I'll use that

1 able to do that. I was able to go through one already
2 existing database I already had, as having been in
3 the industry for seven years. But I could also find
4 things through things like MCH data, as well, which
5 is a -- that's basically a service that allows you to
6 be able to go out and do research on these public
7 entities such as schools, to find out what types of
8 budgets do they have, where they're located, who are
9 the decision makers, etc.

10 In Florida, at the time, we had a tool
11 called SmartProcure. We still utilize that today.
12 SmartProcure allowed us to be able to go in, and it
13 just had a tool that would formalize and, I guess,
14 sort of streamline all of these Freedom of
15 Information requests. It was kind of nice in this
16 industry. We call them a lot of the public entities:
17 schools, local government, etc. They are all part of
18 the public domain.

19 So if you make enough Freedom of
20 Information requests, like someone like SmartProcure
21 does, then you can come up with thousands of entries
22 each day. So I could find out things like who bought
23 what from whom and for how much and when. So we could
24 find out lots of information related to what those
25 customers already had.

1 at least. Part of my responsibilities were to really
2 begin setting up some of our channels and begin
3 setting up sales for Clear Touch. So it was utilizing
4 existing relationships that I already had, as well as
5 going out and finding leads, attending trade shows,
6 servicing existing customers that Clear Touch already
7 had, as well as trying to go out and just promote
8 panels, as well.

9 It's funny. We were -- three years ago, and
10 so much has changed since three years ago. Customers
11 were still trying to figure out: Do I want this type
12 of technology with the projector? Or do I want
13 something with a panel? We were just kind of in that
14 spot where people were still trying to determine what
15 -- even what type of technology. It was just
16 emerging.

17 **Q** At that time, was Clear Touch working
18 directly with customers?

19 **A** So at the time I was brought on, we had
20 resellers and we also processed some orders directly
21 where we did not have reseller coverage or they'd
22 require some type of contract or other.

23 **Q** How would you locate customers, as opposed
24 to going through a reseller?

25 **A** Sure. There's a couple of ways that I was

1 **A** That's correct.

2 **Q** How much do you think you owe Encore for
3 what you did?

4 **A** A portion of my salary from the time that I
5 converted the corporation and expressed my intent to
6 leave.

7 **Q** How much?

8 **A** I don't know what that is.

9 **Q** Have you -- you haven't repaid anything to
10 Encore, have you?

11 **A** To date, no.

12 **MR. ENGLISH:** That's all, Your Honor.

13 **THE COURT:** Redirect?

14 **REDIRECT EXAMINATION**

15 **BY MR. SMITH:**

16 **Q** I will borrow from my esteemed colleague's
17 style on this one. Let's start at the end of the last
18 thing you said. Mr. English has asked you about the
19 comment on the other lawsuit that Encore has going
20 on. Do you recall that?

21 **A** I do recall that. It was misquoted, yes.

22 **Q** Is it not multiple lawsuits, but the fact
23 that they sued multiple parties and former employees
24 they used to do business with, just as they've sued
25 you?

1 it to meet those terms, wouldn't it?

2 **A** No, they paid a deposit for volume orders
3 to get a higher discount, which is a practice we
4 still have today for customers.

5 **Q** Now, you said one thing that you claimed
6 about Encore is that it had multiple lawsuits against
7 employees. In fact, other than this one, Encore only
8 has one other lawsuit in four and a half years with
9 over 100 employees, right?

10 **A** Against an employee, that's correct.

11 **Q** And then, the way Clear Touch has grown, it
12 went from one employee in 2014 to 28 employees three
13 years later in 2017; is that right?

14 **A** That is correct.

15 **Q** Mr. Trask, in the opening, your lawyer said
16 that you've admitted that you breached your duties of
17 loyalty to Encore; is that right?

18 **A** I believe so, yes.

19 **Q** And your lawyer said you admitted that you
20 breached your fiduciary duties to Encore; is that
21 right?

22 **A** I believe so, yes.

23 **Q** And he said that you've taken
24 responsibility for what you've done wrong; is that
25 true?

1 **A** Those retirement funds were contributions
2 made over years.

3 **Q** Including from Encore, right?

4 **A** A portion of that.

5 **Q** And these panels are \$3000 a pop, right?

6 **A** On average. I'll go with that.

7 **Q** And so you had enough in January of 2014
8 for 50 panels, right?

9 **A** That is correct.

10 **Q** So the way you got panels from China to the
11 United States is you had to have Encore pay you so
12 that you could turn around and pay China to get the
13 panels over here, right?

14 **A** That is not correct.

15 **Q** Well, certainly in 2013, Encore had to
16 front the cost of the panels, right?

17 **A** No, it did not.

18 **Q** And yet your first investment in Clear
19 Touch was when you rolled over this \$150,000 in
20 January of 2014, right?

21 **A** We had terms and credit lines with all of
22 our suppliers.

23 **Q** And Encore paid up front, a deposit for
24 these panels, that Clear Touch then would take the
25 deposit that Encore paid to Clear Touch and then use

1 was a benefit, wasn't it?

2 **A** And benefit to Encore, as well.

3 **Q** And there was Encore having its employees
4 going out and marketing and building a market for
5 this product, wasn't there?

6 **A** Something that allowed them to open doors
7 to new opportunities for Encore, yes.

8 **Q** There was Encore paying for you to go to
9 conferences and meet and sign up potential resellers,
10 wasn't there? That was a benefit.

11 **A** It allowed me to network with people,
12 absolutely.

13 **Q** In fact, the truth is, you didn't have the
14 money to pay the start-up costs to get Clear Touch
15 going, did you?

16 **A** There were no start-up costs.

17 **Q** There were no start-up costs because Encore
18 paid them all.

19 **A** No, that's not true.

20 **Q** And then you said in January of 2014 is
21 when you rolled over your retirement funds, your
22 \$150,000 retirement fund, correct?

23 **A** That is correct.

24 **Q** Some of those retirement funds were paid to
25 Encore, weren't they?

1 Chris Powell and Michael Knight and the rest of the
2 team that ultimately got involved, that I could
3 contribute to Encore to help this transition be a
4 success and not just about the jobs, but have the
5 opportunity to continue to build that, so that it
6 could be recognizable in the market, could grow.

7 Value-added resellers in the market at that
8 time -- there was a lot of merger acquisition and
9 growth. It was positioning that was with it. I like
10 to build things and be a part of something that's
11 building and growing.

12 It presented the opportunity after the
13 Clear Touch opportunity. It was something that I
14 thought would be beneficial for the market,
15 beneficial for all the employees that I had come to
16 know, and felt I definitely could contribute with my
17 experience.

18 Q It was also beneficial for you to become an
19 employee of Encore, wasn't it?

20 A There was benefit from it, yes.

21 Q There was \$175,000-a-year salary. That was
22 a benefit, wasn't it?

23 A Yes.

24 Q That was Encore buying these panels that
25 you were marking up by \$130,000, over your time. That

1 **A** By comparison to?

2 **Q** By comparison to Encore.

3 **A** No, that's not true.

4 **Q** All of the start-up cost for Clear Touch
5 were paid by Encore, weren't they?

6 **A** That is not true.

7 **Q** Virtually all of the start-up costs were
8 paid by Encore, weren't they?

9 **A** No.

10 **Q** Your salary was paid by Encore?

11 **A** To be an Encore employee, that's correct.

12 **Q** All of the marketing of the Clear Touch
13 product was paid by Encore?

14 **A** Marketing of all products for Encore.

15 **Q** Why did you even join Encore at all? Why
16 didn't you just start Clear Touch from the beginning?

17 **A** That was -- you know, people keep talking
18 about those 107 jobs that they were coming in to
19 save. When I joined in 1999, I was Number 20 out of
20 264 for Computer Software Innovations. So when they
21 said that this was their baby, this was their family,
22 I literally had been with them the entire time for
23 12, 13 years where we worked hard and grew the
24 business.

25 I knew that in working with the team, with

1 Q But this is the memo you prepared, right?

2 A In November of 2014.

3 Q Okay. And if you look on the third page,
4 that's where you offered one percent of Clear Touch
5 for every hundred thousand dollars invested, right?

6 A That is correct.

7 Q And you offered this to your friends and
8 family, right?

9 A That is correct.

10 Q So you would want to be favorable to
11 friends and family presumably, wouldn't you?

12 A Presumably.

13 Q And so by October or November of '14, you
14 were holding out Clear Touch as being worth millions
15 of dollars, even though at that point, it had
16 incurred virtually no operating expenses on its own,
17 true?

18 A What I was trying to do was back into a
19 number of what I needed for capital requirements to
20 grow the business to our plan.

21 Q But at this point in time, Clear Touch had
22 incurred virtually no operating expense on its own,
23 had it?

24 A It incurred expenses.

25 Q But very minimal, weren't they?

1 **Q** As a businessman, you would be comfortable
2 purchasing hundreds of thousands, over a million
3 dollars worth of product from a company that was just
4 somebody else's hobby, would you?

5 **A** In my experience, it depended on the
6 opportunity and the product solution.

7 **Q** Now you said you decided to leave Encore
8 and go to Clear Touch in January of 2014; is that
9 right?

10 **A** That is correct.

11 **Q** And you said -- why did you decide -- why
12 did you say you decided to do that?

13 **A** Because the plans that we had for what
14 Encore Technology Group was to be were not being
15 realized.

16 **Q** But even then, you stayed on the payroll
17 for another three months or four months, really,
18 right?

19 **A** As was asked to do to complete the E-Rate
20 sales cycle.

21 **Q** And then shortly after you left Encore, you
22 prepared what we marked as Plaintiff's Exhibit 68,
23 the offering number, didn't you?

24 **A** I believe this is an attachment to an
25 e-mail which would give context to the actual date.

1 right?

2 **A** The reason for making the modifications was
3 so that we could build and establish a reseller
4 channel because we were not generating sufficient
5 revenue with all the exclusive resellers in that
6 market.

7 **Q** But the point is, You took away Encore's
8 exclusivity and Clear Touch started selling to a
9 bunch of other people -- a bunch of other resellers
10 in Encore's formerly exclusive territory, according
11 to your interpretation of the contract?

12 **A** That was the modification with the
13 contract, as well as four other very important topics
14 in that contract, as well.

15 **Q** And those modifications -- that contract
16 was not signed by Encore, was it?

17 **A** That contract was not signed.

18 **Q** After you left Encore for Clear Touch, you
19 offered compensation, on the side, to Danielle
20 Stengel to promote Clear Touch products, didn't you?

21 **A** That is incorrect.

22 **Q** Now as I understand it, your claim is that
23 until May 2014, Clear Touch was just a hobby for you,
24 right?

25 **A** That is correct.

1 relationship began in October of 2014.

2 Q Now, LeCroy was in Encore's exclusive
3 territory, wasn't it?

4 A It was in the territory, Georgia, yes.

5 Q And so this -- the Clear Touch sales to
6 LeCroy were in violation of the reseller agreement,
7 wasn't it?

8 A It followed the meeting that we had. We,
9 myself, David Masters and Russell Young discussed
10 changing the contract and modification giving them --
11 not exclusive in those seven states.

12 Q So -- and you testified about this in your
13 direct that you basically took away Encore's
14 exclusive rights in these states and made it
15 non-exclusive all over the continental United States?

16 A And also took the exclusivity away from
17 having to represent Clear Touch and allow them to
18 represent other manufacturers as they were doing.

19 Q The point is: Your position is that you
20 modified, or Clear Touch modified, the reseller
21 agreement to take away Encore's exclusive rights in
22 September of 2014; is that right?

23 A That is correct.

24 Q And then, Clear Touch immediately started
25 selling to other resellers within Encore's territory,

1 sales, did it?

2 **A** No, it did not.

3 **Q** Clear Touch did benefit, didn't it?

4 **A** It did.

5 **Q** And Mr. Gallant supported those sales to
6 Leon County Schools, didn't he?

7 **A** Indirectly, we all did. I believe as a
8 named account, that was actually assigned to Wes
9 Martin, who lived in Tallahassee, Florida.

10 **Q** Now in addition to Leon County Schools,
11 this Exhibit 9 also shows that Clear Touch made sales
12 of about \$1.3 million to LeCroy --

13 **MR. SMITH:** Objection. Relevance.

14 **THE COURT:** Let him ask the question. Go
15 ahead.

16 **BY MR. ENGLISH:**

17 **Q** Plaintiff's Exhibit now shows in addition
18 to these sales to Leon County, Clear Touch made sales
19 of one point -- almost \$1.3 million to LeCroy, true?

20 **MR. SMITH:** Objection, relevance.

21 **THE COURT:** Let him finish his question. I
22 will either strike it or not.

23 **MR. SMITH:** Yes, Your Honor.

24 **THE WITNESS:** The time period reflected on
25 the summary is 2013 through 2015. The LeCroy

1 answer?

2 **A** The answer is, "That's what it says," so
3 there was a referenceable material.

4 **Q** And so at some point between October of
5 2014 and April of 2015, Leon County stopped
6 purchasing from Encore and started purchasing
7 directly from Clear Touch, true?

8 **A** That is correct.

9 **Q** And so that means that while you were at
10 Clear Touch, Clear Touch sold directly to Leon County
11 Schools during the one-year period of your
12 non-compete, true?

13 **A** Yes.

14 **Q** That means you violated your non-compete,
15 doesn't it?

16 **A** If they were an active customer, yes.

17 **Q** And they were an active customer when you
18 left, right?

19 **A** They were, when I left. That's correct.

20 **Q** Then look at Plaintiff's Exhibit 9. This
21 shows, if you look at the Leon County Schools line,
22 that Clear Touch sold \$935,000 worth of product
23 directly to Leon County Schools, true?

24 **A** 934,917, correct.

25 **Q** Encore didn't benefit from any of those

1 **A** Not a direct order, no.

2 **Q** This led to a direct sale from Clear Touch
3 to Leon County Schools, didn't it?

4 **A** These 45, I'm not sure which exactly they
5 account for, but it did lead to an order.

6 **Q** Now, by April of 2015, the end of your
7 non-compete, Clear Touch had sold \$546,000 worth of
8 panels to Leon County Schools, true?

9 **A** You have a reference?

10 **Q** Do you recall telling me in your deposition
11 that that was the case?

12 **A** There may have been reference material
13 provided at deposition.

14 **Q** I would like to hand up the deposition.

15 **THE COURT:** That's a Court's Exhibit.

16 **BY MR. ENGLISH:**

17 **Q** Mr. Trask, take a look at your deposition
18 on Page 154.

19 **A** Is that in the blue binder?

20 **Q** It's in front of the exhibits.

21 **A** Page 154.

22 **Q** Yes. Look at line 21. I asked, "But by
23 April of 2015, seven months later, it, referring to
24 Clear Touch, had sold \$546,000 worth of products to
25 Leon County Schools; is that right?" And what's your

1 Is this an e-mail from -- or between you and
2 Mr. Higginbotham?

3 **A** Yes.

4 **MR. ENGLISH:** Your Honor, we'd ask that
5 Plaintiff's Exhibit 54 be admitted into
6 evidence.

7 **THE COURT:** It's admitted.

8 (Plaintiff's Exhibit 54 is admitted into the
9 record.)

10 **BY MR. ENGLISH:**

11 **Q** Plaintiff's 54. Let's get the top and that
12 middle e-mail. Can we get the full -- all the way
13 through the signature line in the middle e-mail?
14 Yeah.

15 If you'll look in that middle e-mail,
16 Mr. Higginbotham writes to you. And the subject of
17 this is "Initial Leon order estimate," correct?

18 **A** That is correct.

19 **Q** Mr. Higginbotham e-mails to you, "Looking
20 like it would be around 45 units on the first order,"
21 correct?

22 **A** Correct.

23 **Q** And so the day after Mr. Higginbotham
24 leaves Encore, Clear Touch is looking to get a direct
25 order for 45 units from Leon County, true?

1 **A** No, I was not.

2 **Q** Do you recall telling me in your deposition
3 that with -- well, with Clear Touch, you were active
4 on the Leon County account?

5 **A** With Clear Touch, yes.

6 **Q** Okay. But you understood that Encore
7 intended to keep the sales to Leon County Schools
8 even after Mr. Higginbotham became an employee of
9 Clear Touch, didn't you?

10 **A** They intended to, yes.

11 **Q** But you told Leon County that Encore
12 diverted its panels to another customer, didn't you?

13 **A** No, I did not.

14 **Q** But you testified in your direct that Leon
15 County believed that, right?

16 **A** I was called into a discussion between the
17 folks at Leon County and Encore to review a situation
18 that they had.

19 **Q** And you testified that Encore, your claim,
20 did, in fact, divert Leon County Schools panels to
21 another customer?

22 **A** It did.

23 **Q** So you believe that Encore did that?

24 **A** I do.

25 **Q** Now let's look on Plaintiff's Exhibit 54.

1 **A** Correct, from the conversations and
2 meetings we had on or about May 14th with the
3 district, they were intending to purchase additional
4 units over the coming years.

5 **Q** And then the following year was 600,
6 correct?

7 **A** That was their implied forecast.

8 **Q** So the way this works is it takes a while
9 to build a pipeline with the customer, to have them
10 go from -- they'll usually make a small order and
11 then a larger order and then a larger order, true?

12 **A** Sometimes.

13 **Q** And Leon County's first order was from
14 Encore, right?

15 **A** That is correct.

16 **Q** And Leon County was buying these panels
17 from Encore?

18 **A** That is correct.

19 **Q** When you left Encore, you were active on
20 the Leon County account for both Encore and Clear
21 Touch, weren't you?

22 **A** I had not met with the account since
23 earlier in the year when we did the initial demo.

24 **Q** But you were having interactions with Leon
25 County, weren't you?

1 agreement with Encore, didn't it?

2 **A** It did.

3 **Q** Let's talk about Leon County Schools.

4 **A** Okay.

5 **Q** While you were at Encore, you worked with
6 Encore's customers, true?

7 **A** Yes.

8 **Q** One of the customers you worked with while
9 at Encore was Leon County Schools, right?

10 **A** It was -- one of the contacts there was the
11 person that I was introduced to, yes.

12 **Q** And Plaintiff's Exhibit 58, let's turn to
13 that. That's an e-mail from your mother to Leon
14 County Schools providing pricing and copying and you
15 at Encore, correct?

16 **A** That is correct.

17 **Q** And then go back to Plaintiff's Exhibit 53.
18 Let's look at the top e-mail. That is an e-mail from
19 you to CVTE, isn't it?

20 **A** That is correct.

21 **Q** And you're telling CVTE that Leon County
22 has selected Clear Touch as the panel. "Encore
23 received a purchase order for 18 units yesterday, and
24 those 18 were the beginning of 285 units to be
25 acquired," correct?

1 because you wanted to disclose to him about Clear
2 Touch?

3 **A** According to his testimony, that was not
4 revealed to him until after he was a Clear Touch
5 employee.

6 **Q** Okay. But you didn't -- so what is it that
7 you didn't want Mr. Higginbotham disclosing?

8 **A** What our plans were, what we were going to
9 grow the -- what our vision was for the organization,
10 the general sense of things that we had.

11 **Q** And then, you didn't disclose any
12 involvement in Clear Touch to Encore until October of
13 2014, true?

14 **A** Yes. Our meeting with Todd Newnam and
15 myself while attending South Carolina Ed Tech
16 conference.

17 **Q** And you admit that you didn't tell
18 Mr. Newnam how long you had owned Clear Touch at that
19 meeting?

20 **A** I believe that was not a topic of
21 discussion during our conversation.

22 **Q** Now Clear Touch was your company, right?

23 **A** For all intents and purposes, yes.

24 **Q** So Clear Touch, the corporation, knew that
25 you had a non-disclosure and non-solicitation

1 **A** And ultimately approved of him coming over,
2 as well.

3 **Q** But you did encourage Mr. Gallant to come
4 over?

5 **A** We posted a job, he responded. I made him
6 an offer.

7 **Q** All right. So you're saying that even
8 though you got Mr. Gallant to sign an NDA, even
9 though he had expressed interest in coming to Clear
10 Touch, even though you all had communicated about
11 opportunities for him to come over, it was just
12 coincidental that he happened to see this job posting
13 and then apply for a job to Clear Touch?

14 **A** The job was posted, and he did apply.

15 **Q** You're saying that's just a coincidence?

16 **A** I did not characterize that as a
17 coincidence.

18 **Q** Now, three days after you left Encore you
19 got Jimmy Higginbotham to sign a non-disclosure
20 agreement with you also?

21 **A** That's correct.

22 **Q** And Mr. Higginbotham was an employee of
23 Encore at that time?

24 **A** That's correct.

25 **Q** And you had Mr. Higginbotham sign that NDA

1 while he was an employee of Encore, didn't you?

2 **A** We communicated regularly on several topics
3 because we were supporting him in other sales
4 efforts.

5 **Q** Didn't you tell me in your deposition that
6 you e-mailed with Mr. Gallant about the opportunities
7 he had to come work for Clear Touch while he was an
8 employee of Encore?

9 **A** If that's in the deposition, then yes.

10 **Q** Are you denying?

11 **A** No, I'm not recalling the deposition.

12 **Q** And Plaintiff's Exhibit 13 is your job
13 offer to Mr. Gallant, correct?

14 **A** That is correct.

15 **Q** That's dated December 19, 2014, correct?

16 **A** That is correct.

17 **Q** That is within the one-year period that you
18 agreed not to pirate Encore's employees, isn't it?

19 **A** Yes, following the acceptance of other
20 employees from Encore with their approval.

21 **Q** Encore approved of your hiring Jimmy
22 Higginbotham, right?

23 **A** Yes.

24 **Q** But we're not talking about him, we're
25 talking about Leo Gallant?

1 **A** That's correct.

2 **Q** And on the same day you left Encore, you
3 got Mr. Gallant to sign a non-disclosure agreement
4 with you, true?

5 **A** That is correct.

6 **Q** Mr. Gallant was an employee of Encore at
7 the time?

8 **A** He was.

9 **Q** And you got him to sign that because you
10 wanted to tell Mr. Gallant that you owned Clear Touch
11 and had owned it all along, right?

12 **A** I did.

13 **Q** But you didn't want Mr. Gallant reporting
14 that to anybody at Encore, did you?

15 **A** Did not.

16 **Q** And you wanted to disclose that to
17 Mr. Gallant so that he would be comfortable staying
18 on and working at Encore, right?

19 **A** That's correct.

20 **Q** And Mr. Gallant indicated to you at that
21 meeting that he was interested in joining Clear
22 Touch, didn't he?

23 **A** If there was ever an opportunity.

24 **Q** And you e-mailed with Mr. Gallant about the
25 opportunities he had to come work for Clear Touch

1 **Q** And it's Plaintiff's Exhibit 36, if you'll
2 take a look at that -- I'm sorry, Plaintiff's
3 Exhibit 31. This is the e-mail string, in which you
4 are included, that discusses the comparison of the
5 different panels, correct?

6 **A** That is correct.

7 **Q** If you'll look at the last paragraph on
8 this page.

9 **A** Which page?

10 **Q** The first page.

11 **A** Okay.

12 **Q** The recommendation is -- to Encore is
13 because Encore enjoys a unique position with Clear
14 Touch that it needs to focus on selling the Clear
15 Touch panels, true?

16 **A** That is the summary of the e-mail, yes.

17 **Q** And it says, "We're working very hard to
18 create the demand and awareness for this unique
19 offering by Encore," true?

20 **A** That's correct.

21 **Q** That was all being done at Encore's costs,
22 wasn't it?

23 **A** And benefit, yes.

24 **Q** Now, on the same day -- you left Encore on
25 April 25, 2014, correct?

1 paragraph to TSItouch that -- and when you're dealing
2 with TSItouch, TSItouch is thinking of you with your
3 Clear Touch hat on, correct?

4 **A** Yes.

5 **Q** You tell TSItouch that you're traveling
6 that day through the afternoon to another trade show
7 promoting the interactive displays, true?

8 **A** That is correct.

9 **Q** And you were doing that for Clear Touch,
10 weren't you?

11 **A** Traveling to them with Encore Technology
12 Group.

13 **Q** Right. You were on Encore's payroll.

14 **A** Yeah.

15 **Q** But you were promoting and telling the
16 supplier of these panels that you were going to a
17 trade show to promote them for Clear Touch, right?

18 **A** Yeah, I always provide feedback on progress
19 for the suppliers.

20 **Q** Now, in April 2014, you worked with
21 Mr. Gallant to provide a comparison of the Clear
22 Touch product with the other panels that Encore could
23 sell, true?

24 **A** That were available in the market at the
25 time, that's correct.

1 **A** Versus the costs that was paid, but not the
2 actual, overall cost of getting it and delivering it.

3 **Q** And then during the one-year period after
4 you left Encore, Encore paid an additional \$990,000
5 for product that cost Clear Touch \$670,000, correct
6 -- I'm sorry, \$607,000 from CVTE; is that right?

7 **A** Is that the summary of the bottom half of
8 that document?

9 **Q** Yes.

10 **A** That is the cost that Clear Touch sold it
11 for over the raw costs from the factory.

12 **Q** Now Clear Touch didn't have any development
13 costs through this time, did it?

14 **A** Not hard costs, no.

15 **Q** And no time through this -- through the
16 time that you left Encore did you disclose to Encore
17 that it could have purchased directly from either
18 TSItouch or CVTE, did you?

19 **A** I did not.

20 **Q** Let me show you what we're marking as
21 Plaintiff's Exhibit 48. It's already been marked.
22 This is an e-mail from you to TSItouch on February 4,
23 2014, correct?

24 **A** Yes.

25 **Q** And you report in the next to the last

1 **Q** And Clear Touch was making a profit on
2 these -- on Encore, wasn't it?

3 **A** Specifically, at that time, no.

4 **Q** It was at that time, wasn't it?

5 **A** In 2014?

6 **Q** Yes.

7 **A** There was -- there was some profit.

8 **Q** Let me show you what we marked as
9 Plaintiff's Exhibit Number 44.

10 **A** Yes.

11 **Q** We can capture to the right through the
12 column of "Profit," and then all the way across.
13 Yeah. All the way down.

14 So while you were an employee of Encore,
15 you made an additional \$130,000 in profits on sales
16 of panels from Clear Touch to Encore in addition to
17 your salary, correct?

18 **A** These profits did not indicate the actual
19 costs. That's the raw cost of the product from the
20 factory. It requires additional transportation costs,
21 software bundling costs, deferred maintenance from
22 warranty services, etc.

23 **Q** All right. Well, the cost on the product,
24 the amount of the markup to Encore that Clear Touch
25 made was \$130,000, right?

1 **Q** You didn't want Encore to receive products
2 with TSI marking on it, did you?

3 **A** No. As the assembler, no, I did not.

4 **Q** If you had disclosed to Encore that
5 TSItouch was the supplier of the product, Encore
6 could have bought directly from TSI, couldn't they?

7 **A** It could have, yes.

8 **Q** It would have saved Encore money to have
9 bought it directly from TSI than if they bought it
10 from Clear Touch, right?

11 **A** Yes, and increased liability with it, as
12 well.

13 **Q** And then it was January 2014 that you
14 switched from TSItouch to CVTE, correct?

15 **A** On or about.

16 **Q** And when Clear Touch bought products from
17 its suppliers and sold them to Encore, Clear Touch
18 marked up the prices that it charged to Encore,
19 right?

20 **A** That is correct.

21 **Q** And because of that, Clear Touch was able
22 to make a profit on its sales to Encore, wasn't it?

23 **A** Encore was able to -- I'm sorry, Clear
24 Touch was able to provide additional services as
25 required for the product.

1 to make sure that these units do not arrive with
2 anything other than Clear Touch labeling, didn't you?

3 **A** I was reminding them of the expectation on
4 the assembly instructions.

5 **Q** That's actually on the second page, the
6 e-mail from you to Mr. Mundrake and TSI on May 30,
7 2013, the first paragraph. These are panels that were
8 coming to Encore, right?

9 **A** Either to Encore or to the customer
10 directly.

11 **Q** It was critical to make sure that those
12 units do not arrive with anything other than Clear
13 Touch labeling, right?

14 **A** Yes, it was a reminder of what we refer to
15 as the white label requirements.

16 **Q** And then, going down in the same e-mail,
17 you send a link to a sales video. And you say,
18 "Please do not respond or comment online per our
19 NDA." In other words, the non-disclosure agreement
20 you got them to sign, you were invoking to make sure
21 they didn't say anything online that would link TSI
22 to these panels, correct?

23 **A** That is correct. And our standard practice
24 today as well, when we share information with
25 suppliers.

1 **A** We were having them remove certain labeling
2 and documentation, correct.

3 **Q** And replacing them with Clear Touch
4 labeling and documentation?

5 **A** As a requirement of our manufacturing
6 assembly agreement.

7 **Q** You also wanted them to put Clear Touch on
8 the instructions, right?

9 **A** That is correct, so that the end-user could
10 receive that with information on how to use the
11 product.

12 **Q** You wanted the shipping labels to say that
13 they were from Clear Touch, right?

14 **A** That they would be drop-shipped, that is
15 correct.

16 **Q** Let's look at Plaintiff's Exhibit
17 Number 43. Now included in this is an e-mail from
18 you. This is on the third page at the bottom. This is
19 an e-mail from you to TSItouch on May 9, 2013 at
20 10 a.m., correct?

21 **A** Correct.

22 **Q** Again, this is while you were an employee
23 of Encore?

24 **A** Correct.

25 **Q** And you told TSItouch that it was critical

1 the first supplier of the panel that was sold to
2 Encore, correct?

3 **A** That is correct.

4 **Q** This is dated February 26th -- Tuesday,
5 February 26, 2013 at 9:33 a.m., correct?

6 **A** That is correct.

7 **Q** You were an employee of Encore at this
8 time, right?

9 **A** That is correct.

10 **Q** And you are sending TSItouch a
11 non-disclosure agreement that you wanted them to
12 sign, right?

13 **A** Correct.

14 **Q** That is because you didn't want TSI to
15 disclose to Encore that it was the true supplier of
16 the product, right?

17 **A** No. As it was becoming a supplier, it made
18 sense to have a non-disclosure agreement with them.

19 **Q** All right. Well, then, let's look at
20 Plaintiff's Exhibit 40. This is an e-mail from you to
21 TSItouch on March 26th, 2013, correct?

22 **A** That is correct.

23 **Q** And you were having TSItouch remove all of
24 the original manufacturer labels and replacing them
25 with Clear Touch labels, weren't you?

1 Touch, did you?

2 **A** No, I didn't want our communications to be
3 circulated outside that group.

4 **Q** And then you also had -- you testified you
5 had your wife Tamara Trask pose as Amy Andrews in
6 emails with Encore; is that right?

7 **A** That is correct.

8 **Q** And that is because you thought if Encore
9 knew that you and your wife were involved with Clear
10 Touch, they would scrutinize the value they were
11 receiving from the Clear Touch product more closely,
12 correct?

13 **A** Yes.

14 **Q** And you did not want Encore to conduct that
15 scrutiny, did you?

16 **A** No.

17 **Q** So the reason you switched ownership of
18 Clear Touch to your mother, had your wife use a fake
19 name, sent checks to Nevada and then back to South
20 Carolina was so you could hide the fact that you were
21 marking up prices on products that were being sold to
22 Encore, right?

23 **A** That is not why.

24 **Q** All right. Let's look at Plaintiff's
25 Exhibit 39. This is an e-mail from you to TSItouch

1 **Q** And he did, right?

2 **A** He did.

3 **Q** This is January of 2014, right?

4 **A** That is correct.

5 **Q** And his company is ATC, correct?

6 **A** That is correct.

7 **Q** And ATC became a reseller of Clear Touch,
8 didn't it?

9 **A** In October of 2014, that is correct.

10 **Q** And the groundwork was laid in January of
11 2014 for that, wasn't it?

12 **A** The groundwork was laid over years of
13 relationship with Jimmy.

14 **Q** Why -- and you also sent the form -- Clear
15 Touch's non-disclosure agreement to Mr. Viola, right?

16 **A** I did.

17 **Q** Why did you want Mr. Viola and
18 Mr. Williamson or other potential resellers to sign
19 an NDA?

20 **A** Similar to, as Mr. Viola testified, his
21 group had NDA's between each other so they could
22 speak freely and openly about what they saw and
23 observed in the market.

24 **Q** But you didn't want it getting back to
25 Encore that you were signing up resellers for Clear

1 **A** Chris Powell.

2 **Q** And who are you claiming said that they
3 wanted you to stay?

4 **A** Chris Powell.

5 **Q** Mr. Powell was the one who testified the
6 first morning on -- the first witness on Tuesday,
7 right?

8 **A** That is correct.

9 **Q** Now let me refer you to what we marked as
10 Plaintiff's Exhibit Number 82. This is a
11 non-disclosure agreement that you signed with Jimmy
12 Williamson in January of 2014; is that right?

13 **A** This is a non-executed NDA, signed by Jimmy
14 Williamson.

15 **Q** So when you say it's non-executed, you mean
16 Clear Touch didn't execute it, but Jimmy Williamson
17 did, correct?

18 **A** That's correct. It is not countersigned by
19 Clear Touch Interactive.

20 **Q** This is Clear Touch's standard form
21 non-disclosure agreement, isn't it?

22 **A** It appears so.

23 **Q** So Clear Touch prepared this for
24 Mr. Williamson to sign, right?

25 **A** Yes.

1 **A** I'm mistaken.

2 **Q** You say that you went to this conference in
3 January of -- the TCEA conference in February of 2014
4 and attempted to sign up some resellers, correct?

5 **A** None were signed up.

6 **Q** But you met with resellers at this
7 conference and tried to sign them up as Clear Touch
8 resellers, correct?

9 **A** I did not try to sign them up at that
10 event.

11 **Q** You -- all right. After hours, off the
12 floor, you had a meeting where you tried to sign up
13 resellers for Clear Touch, correct?

14 **A** We discussed the opportunity in the market
15 and evaluated what they were seeing that was similar.

16 **Q** And you're saying -- telling this jury this
17 is the only time you went to a conference and
18 attempted to do that?

19 **A** This conference was immediately following
20 our conversion and my admission that we were going to
21 move forward with this full time in January of 2014.

22 **Q** Now, on that, you claim that you -- your
23 attorney said that you told Encore that you wanted to
24 leave and Encore said that they wanted you to stay.
25 Who are you claiming you told?

1 displays," correct?

2 **A** That is correct.

3 **Q** And so you knew, while you were an Encore
4 employee, that the market was transitioning from
5 projectors to these interactive boards, correct?

6 **A** There was the potential for that to happen,
7 yes.

8 **Q** Now, let's look at Plaintiff's Exhibit
9 Number 80.

10 **A** Restate the number.

11 **Q** 80. If you'll look down at the bottom
12 e-mail. This is Ms. Cruse to Mr. Viola. It says,
13 "While Clear Touch Interactive does not have a formal
14 reseller program, we have established a few partners
15 that have -- we have been working with in providing
16 interactive touch panels." Is that true?

17 **A** Yes.

18 **Q** What partners had Clear Touch established
19 at this -- in January of 2014?

20 **A** Encore Technology Group.

21 **Q** That's one. Who else?

22 **A** That was the only partner at the time.

23 **Q** Well, it says a few partners, right?

24 **A** That's what it says.

25 **Q** And you said that was true, right?

1 **A** That is correct.

2 **Q** And you say, "It's a pleasure to introduce
3 you to Kathy Cruse with Clear Touch Interactive,"
4 right?

5 **A** It does.

6 **Q** Do you want the jury to believe that you
7 sent this e-mail, and Kathy Cruse just knew what to
8 do from here?

9 **A** It gives instructions for completing the
10 non-disclosure agreement.

11 **Q** Now this e-mail came from
12 keonetrask@gmail.com. But you didn't produce this to
13 us in this case, did you?

14 **A** No, I did not.

15 **Q** This is another e-mail that you permanently
16 deleted from your personal e-mail account, true?

17 **A** From three and a half years ago, yes.

18 **Q** And if Mr. Viola hadn't come forward, we
19 would've never known about this, correct?

20 **A** Apparently, he maintained a copy of this
21 communication.

22 **Q** And you say in this e-mail that, "Clear
23 Touch Interactive has been a key partner for the last
24 years. We've been witnessing the transition from
25 using projector-based displays to LCD-based

1 **A** I don't believe so.

2 **Q** Are you denying that on April 25th, 2014,
3 the day you left Encore, you went into your deleted
4 items and permanently deleted?

5 **A** I am.

6 **Q** You deny that?

7 **A** Yes.

8 **Q** Now you were also, while you were working
9 at Encore, had a personal e-mail account,
10 keonetrask@gmail.com, didn't you?

11 **A** I maintained that e-mail account for
12 several years, yes.

13 **Q** And you used that personal e-mail account
14 to contact potential resellers for Clear Touch while
15 you were an Encore employee, didn't you?

16 **A** I used that to contact individuals in my
17 professional network, yes.

18 **Q** Specifically, you used the e-mail account
19 to contact potential resellers for Clear Touch while
20 you were an Encore employee, true?

21 **A** Yes.

22 **Q** Let me show you what we marked as
23 Plaintiff's Exhibit 79. This is an e-mail that you
24 sent to Mr. Dale Viola on January 25th, 2014; is that
25 right?

1 some sort of e-mail migration from one provider to
2 another and when it did the migration, it didn't
3 arrange to have any backup in case it lost e-mails?

4 **A** The services that we use for e-mail
5 communications was changed three times since the
6 inception. They have not provided that as a service.

7 **Q** But -- so you didn't make arrangements --
8 so even though you are migrating from one e-mail
9 service provider to another, you didn't make any
10 arrangements for any backup.

11 **A** We were trying to minimize costs associated
12 with the migration.

13 **Q** This is even though you had been the IT
14 director of a publicly traded company?

15 **A** That is correct.

16 **Q** So the e-mails that show the collaboration
17 you had with your mother for Clear Touch have been
18 lost?

19 **A** They're not available.

20 **Q** Now, let's talk about your e-mails at
21 Encore. Isn't it true that you permanently deleted
22 e-mails when you left Encore?

23 **A** E-mails were deleted.

24 **Q** And you permanently deleted them, didn't
25 you?

1 **Q** Even after the prototype had been reviewed?

2 **A** That's correct.

3 **Q** And you set the prices that Clear Touch
4 charged Encore?

5 **A** I established the pricing list, that's
6 correct.

7 **Q** You had access to Encore's prices or its
8 products, both from its suppliers and the price at
9 which it was selling to its customers, right?

10 **A** That was -- yes.

11 **Q** And in the prices that Clear Touch charged
12 Encore, Clear Touch made a profit, didn't it?

13 **A** It didn't make a profit.

14 **Q** The whole time you were an employee, it
15 did, right?

16 **A** Yes.

17 **Q** Now, you claim that you were collaborating
18 with your mother on setting these prices. But you say
19 that the e-mail showing that collaboration had been
20 lost, correct?

21 **A** If they had not been presented, then yes.

22 **Q** And you claim that Clear Touch didn't have
23 any sort of backup for these e-mails?

24 **A** That is correct.

25 **Q** But you say that Clear Touch went through

1 **A** It's assembled in another location with
2 another company.

3 **Q** But my question is: It comes from CVTE to
4 Clear Touch?

5 **A** That is who we purchase it from.

6 **Q** And while you were an employee of Encore,
7 you could have told Encore, "Hey, you could buy this
8 panel from CVTE," and made the arrangement for Encore
9 to purchase directly from CVTE, couldn't you?

10 **A** If they were willing to change their
11 business model, yes.

12 **Q** If they were willing to buy the product
13 cheaper?

14 **A** Everyone will buy it cheaper.

15 **Q** And you supervised Encore employee Leo
16 Gallant, didn't you?

17 **A** I did.

18 **Q** And you drafted the reseller agreement that
19 we heard about, correct?

20 **A** Correct.

21 **Q** And you had your mother present the
22 reseller agreement to Encore instead of presenting it
23 yourself, because you didn't want to show your
24 connection with Clear Touch?

25 **A** Yes.

1 development officer that you found a supplier for
2 these interactive panels from Encore, correct?

3 **A** No.

4 **Q** Well, it was your role as chief business
5 development officer to find suppliers of products for
6 Encore, wasn't it?

7 **A** That's correct.

8 **Q** And when you did the work to find TSItouch,
9 you didn't disclose to Encore that TSItouch was the
10 manufacturer of the panel, did you?

11 **A** I did not disclose that they are the
12 assembler of it.

13 **Q** Well, you say "assembler," but -- okay.
14 Then when you switched over from TSItouch to CVTE,
15 you didn't disclose to Encore that CVTE was the
16 manufacturer of the panel, did you?

17 **A** They're not -- they are not the
18 manufacturer.

19 **Q** CVTE is not the manufacturer?

20 **A** No, sir.

21 **Q** Okay. Clear Touch is not the manufacturer,
22 is it?

23 **A** No, sir.

24 **Q** So the panel comes from CVTE to Clear
25 Touch, right?

1 Q It was paid for by Encore, right?

2 A Correct.

3 Q And Encore was paying you \$175,000 a year
4 to be its chief business development officer, right?

5 A That's correct.

6 Q Your obligation to Encore was to increase
7 its profits; is that right?

8 A That is correct.

9 Q And while you were an employee of Encore,
10 you were supposed to be spending 100 percent of your
11 time for the business of Encore, weren't you?

12 A 100 percent of my working time was given to
13 Encore.

14 Q And how did you delineate your working
15 versus your non-working time?

16 A Number of hours, location.

17 Q Were you an hourly employee?

18 A Was not.

19 Q You were paid a salary, right?

20 A That's correct.

21 Q And your responsibilities at Encore
22 included managing the relationships with Encore's
23 suppliers of products?

24 A Yes.

25 Q It was in your role as chief business

1 product, Clear Touch didn't incur any business
2 development expenses to grow the business while you
3 were an employee of Encore, did it?

4 **A** Not in terms of dollars, in terms of
5 effort.

6 **Q** That was your effort, right?

7 **A** That's correct.

8 **Q** That was your effort while you were on
9 Encore's payroll?

10 **A** Yes.

11 **Q** Part of the effort, you said, you had to
12 research to find the overseas suppliers, right?

13 **A** One aspect of what was required.

14 **Q** Okay. And so the supplier that you ended up
15 using, CVTE, is a supplier that you found while you
16 were an Encore employee?

17 **A** One of, yes.

18 **Q** So all the time and effort it took to find
19 that CVTE supplier, you did while you were on
20 Encore's payroll?

21 **A** That is correct.

22 **Q** Then, when the Clear Touch prototype was
23 shipped to Encore, it was tested by Encore employees,
24 right?

25 **A** Correct.

1 August 1st, 2014, correct?

2 **A** The first person hired and on payroll was
3 myself, on July 1st, 2014.

4 **Q** Okay. The first salesperson -- was
5 Mr. Higginbotham the second employee then, in August?

6 **A** August 1st, 2014, that's correct.

7 **Q** So for the first year and a half of Clear
8 Touch, Encore was doing all the marketing of this
9 product, correct?

10 **A** No, not entirely.

11 **Q** What marketing was Clear Touch doing?

12 **A** Established a web presence and other
13 information to generate leads on.

14 **Q** Did you do that while you were an Encore
15 employee?

16 **A** I was employed by Encore.

17 **Q** And then you said you went to trade shows
18 on Encore's payroll, and that those trade shows were
19 mutually beneficial for Encore and Clear Touch,
20 correct?

21 **A** Yes.

22 **Q** But Encore paid 100 percent of the cost to
23 those trade shows, didn't it?

24 **A** It did.

25 **Q** And in terms of the development of this

1 **Q** It was early on after you joined Encore
2 that the first prototype came to Encore; is that
3 correct?

4 **A** Yes, I believe after the reseller
5 agreement.

6 **Q** Encore employees looked at it?

7 **A** Correct.

8 **Q** You say the reason you weren't disclosing
9 your interest in Clear Touch, because you wanted an
10 unbiased opinion of the product, right?

11 **A** Yes.

12 **Q** When everybody looked at the product, they
13 loved it, correct?

14 **A** Correct.

15 **Q** So once you got your unbiased opinion that
16 everybody loved this product, why didn't you disclose
17 your interest to Encore then?

18 **A** It wasn't an opportune time.

19 **Q** Now, from February of 2013 through August
20 -- I'm sorry, through July of 2014, the only sales
21 and marketing personnel that Clear Touch had were
22 Encore employees, right?

23 **A** Yes, as part of their reseller agreement.

24 **Q** And the first sales and marketing employee
25 that Clear Touch hired was Jimmy Higginbotham on

1 that you formed Clear Touch, did you?

2 **A** That is correct.

3 **Q** And when you became an employee of Encore,
4 you didn't disclose, at that point, that you were the
5 owner of Clear Touch to Mr. Newnam, did you?

6 **A** That is correct.

7 **Q** Now you transferred your interest in Clear
8 Touch to your mother Kathy Krebs in April of 2013,
9 correct?

10 **A** That is correct.

11 **Q** And you claim that Ms. Krebs also goes by
12 her maiden name Kathy Cruse?

13 **A** She did.

14 **Q** You say the reason you assigned your
15 interest in Clear Touch to Ms. Cruse was --
16 Ms. Cruse-Krebs, was to avoid confusion in the
17 market?

18 **A** I did.

19 **Q** You did not want to be associated with
20 Clear Touch when you became employed by Encore,
21 right?

22 **A** That is correct.

23 **Q** Now you say that the first prototype was
24 brought to Encore in March of 2013?

25 **A** I don't remember the specific date.

1 **Q** While you were an Encore employee?

2 **A** That's correct.

3 **Q** Then there were problems with TSItouch,
4 correct?

5 **A** Not necessarily problems, no.

6 **Q** Weren't there problems with customers that
7 reflected poorly on Encore?

8 **A** No.

9 **Q** You deny that?

10 **A** Every product has issues and problems.

11 **Q** So then you switch -- while you were an
12 Encore employee you switched suppliers from TSItouch
13 to CVTE, correct?

14 **A** Clear Touch Interactive changed suppliers,
15 yes.

16 **Q** And that changeover happened while you were
17 an employee of Encore, right?

18 **A** Yes.

19 **Q** Now, it was in February of 2013 that
20 Mr. Newnam acquired Encore from you and used his
21 funds to buy the technology reselling business from
22 CSI, correct?

23 **A** That is correct.

24 **Q** At that time you transferred your interest
25 in Encore to Mr. Newnam, you did not disclose to him

1 that right?

2 **A** That's correct.

3 **Q** And to be clear, when you formed Clear
4 Touch in 2012, it was just a shell corporation,
5 right?

6 **A** That is correct.

7 **Q** And you said that you set it up in Nevada
8 for tax reasons, right?

9 **A** That is correct.

10 **Q** So you were expecting to have big tax
11 problems with Clear Touch from the beginning, right?

12 **A** Not from the beginning, no.

13 **Q** You were anticipating that there was going
14 to be big tax issues that you would need to mitigate
15 by setting up in Nevada; is that your testimony?

16 **A** We all want that.

17 **Q** And then starting in 2012, you were dealing
18 -- the supplier of panels you were dealing with was
19 TSItouch; is that right?

20 **A** They were one of the contacts that I had.

21 **Q** But then after -- it was after TSItouch --
22 you were still working at TSItouch as an Encore
23 employee, weren't you?

24 **A** Clear Touch Interactive was using TSItouch
25 as its ODM.

1 **Q** You were working at CSI with Mr. Russell
2 Young and Mr. Michael Knight and Mr. David Masters,
3 all at CSI, right?

4 **A** That is correct.

5 **Q** You didn't tell any of them that you had
6 formed Clear Touch as a side company, did you?

7 **A** No, I did not.

8 **Q** But you were always working on Clear Touch
9 on the side, right?

10 **A** Yes.

11 **Q** And you say the reason you didn't tell
12 Mr. Knight and Mr. Young and Mr. Masters, is that if
13 they had been involved in Clear Touch that would have
14 distracted them from Encore's opportunities, right?

15 **A** I believe I said that.

16 **Q** So it would have distracted you too, right?

17 **A** It didn't.

18 **Q** It didn't distract you?

19 **A** No.

20 **Q** Is that because you had your mother
21 handling the operations of Clear Touch?

22 **A** No. It's because I delineated my time spent
23 on each.

24 **Q** And then you only contributed, you said,
25 \$3500 to Clear Touch when you started it in 2012; is

1 right?

2 **A** Correct.

3 **Q** And I believe you worked for CSI for 13
4 years, from May 1999 to October 2000 -- until the end
5 of 2012?

6 **A** That is correct.

7 **Q** Part of your job was to work with
8 manufacturing partners and suppliers to evaluate
9 their technologies, correct?

10 **A** That was a responsibility I had.

11 **Q** And you formed Encore for the purpose of
12 buying the CSI business unit that was responsible for
13 sales, marketing and delivery of interactive
14 displays, right?

15 **A** That is correct.

16 **Q** Now, you also formed Clear Touch while you
17 were an employee of CSI, correct?

18 **A** That is correct.

19 **Q** But you didn't disclose to anybody at CSI
20 that you had formed Clear Touch, did you?

21 **A** No, I did not.

22 **MR. SMITH:** Objection, Your Honor.
23 Relevancy.

24 **THE COURT:** Overruled.

25 **BY MR. ENGLISH:**

1 Go ahead.

2 **BY MR. ENGLISH:**

3 **Q** So we know at the end of 2015, based on
4 \$7.5 million of sales, Clear Touch had ending net
5 assets of \$2,271,746, correct?

6 **A** Correct.

7 **Q** And then, in 2016, the sales more than
8 doubled to 17.6 million, right?

9 **A** That's correct.

10 **Q** So the assets of Clear Touch had increased
11 in 2016, right?

12 **A** Not in proportion, no.

13 **Q** But they've increased?

14 **A** Not in proportion.

15 **Q** But they've increased?

16 **A** Sales have increased, yes.

17 **Q** And assets?

18 **A** I don't have that information.

19 **Q** Now let's go back to the beginning. You
20 came, Mr. Trask, from California to South Carolina,
21 in 2000, to work for CSI, correct?

22 **A** No, there was a period of residency in
23 North Carolina prior to that.

24 **Q** All right. But you were -- you came from
25 California, and you were in South Carolina in 2000,

1 **A** Yes.

2 **Q** This is something you didn't prepare, but
3 your accountant prepared, right?

4 **A** I believe so.

5 **Q** Okay. And so the ending assets of Clear
6 Touch in 2000 --

7 **MR. SMITH:** Objection, Your Honor, I don't
8 think this is in the record yet to publish to
9 the jury right now.

10 **THE COURT:** Are those stipulated to as
11 being admissible?

12 **MR. SMITH:** I object to it coming out on
13 the screen.

14 **THE COURT:** It should come off the screen.
15 Madam court reporter, has it been admitted
16 based on your notes?

17 **MR. SMITH:** It was, obviously. A
18 bookkeeping matter. Thank you.

19 **THE COURT:** Put it back. You can publish
20 it to the jury.

21 Ladies and Gentlemen, just what is going
22 on, lawyers are not allowed to show you, the
23 jury, exhibits until they have been admitted.
24 What popped up on the screen was not admitted,
25 that was the objection.

1 at that.

2 **A** Yes.

3 **Q** This is -- Plaintiff's Exhibit 69 is a
4 document that you prepared, correct?

5 **A** Correct.

6 **Q** If you look on the second page, Section 8,
7 you wrote that the value of the corporation -- of
8 Clear Touch at the end of 2015 was \$2.269 million,
9 correct?

10 **A** That is correct.

11 **Q** And you testified, on direct, that that was
12 the sales number, right?

13 **A** I believe so.

14 **Q** But the sales number was the \$7.5 million,
15 wasn't it?

16 **A** I believe so.

17 **Q** Okay. So that \$2.269 million value of the
18 corporation isn't the sales number, is it?

19 **A** No.

20 **Q** Okay. Now, look at Exhibit 70, Plaintiff's
21 Exhibit 70.

22 **A** Yes.

23 **Q** Let me get that on the screen. This is the
24 2015. Let's start with the 2015, the top part. This
25 is part of 2015 federal tax return, Form 550, right?

1 **A** I don't believe so.

2 **Q** You don't think that was a distribution you
3 received?

4 **A** I don't recall.

5 **Q** Well, if you look under net income
6 distributions, you did take distributions in 2013,
7 right?

8 **A** Yes.

9 **Q** Now, let's look at Exhibit 19, the 2014
10 profit and loss.

11 **A** Okay.

12 **Q** Again, here the income shown is 1.9 and
13 then the cost of goods sold is 1.6; is that right?

14 **A** That is correct.

15 **Q** But these financials are also prepared on a
16 cash basis. So there would be the lag time between
17 the time that you pay for it, which would be sooner,
18 and the time that you actually received income,
19 correct?

20 **A** It is on a cash basis.

21 **Q** All right. So that creates a lag time,
22 doesn't it, between the expense and the revenue?

23 **A** That's my understanding, yes.

24 **Q** Now, in 2015, we have what we've previously
25 marked as Plaintiff's Exhibit Number 69. Take a look

1 expense, correct?

2 **A** I believe that, yes.

3 **Q** But the revenue wouldn't be recognized
4 until the panel was actually sold and then the money
5 collected and received by Clear Touch, correct?

6 **A** I believe that is true.

7 **Q** So there is a lag time on profit and loss
8 statements that were prepared on a cash basis,
9 correct?

10 **A** I believe so.

11 **Q** Now, let's look at -- while we are on this
12 one, is this something that -- did you or your mother
13 prepare this?

14 **A** This? I believe I did.

15 **Q** Okay. Now on there, you also -- I think you
16 testified there was no profit this year. But if we
17 scroll down, there were other expenses listed here of
18 13,500, and you've got, "Ask my accountant"; is that
19 right?

20 **A** I'm sorry?

21 **Q** You see the line, "Ask my accountant.
22 \$13,500"?

23 **A** Yes.

24 **Q** Is that money you received while you were
25 an employee of Encore?

1 **A** Not the exact number, no.

2 **Q** Is that approximately right, you think?

3 **A** I wouldn't want to speculate.

4 **Q** Okay. What about 2015? Was that the revenue
5 of Clear Touch in 2016, 17.5 million?

6 **A** Again, I wouldn't want to speculate.

7 **Q** Was that, approximately, the number?

8 **A** It could be.

9 **Q** Okay. Do you think that the revenue of
10 Clear Touch more than doubled between 2015 and 2016?

11 **A** Potentially.

12 **Q** Now, what you did show the jury were
13 defendant's P&L's for 2013 and 2014, correct?

14 **A** Correct.

15 **Q** All right. Let's look at Defendant's
16 Exhibit 18.

17 **A** Yes.

18 **Q** Now, this is the profit and loss for 2013,
19 correct?

20 **A** Correct.

21 **Q** And this is prepared on a cash basis,
22 correct?

23 **A** I believe so.

24 **Q** And so that means that whenever Clear Touch
25 bought a panel, that was immediately recognized as an

1 17.6 million?

2 **A** I don't recall a specific number.

3 **Q** Well, is that about right?

4 **A** If you could present the --

5 **Q** Let's pull up Plaintiff's Exhibit 10(J),
6 the last page. If we can capture the revenue lines of
7 all of 2013 through '16. It is the very last page of
8 Exhibit 10(J).

9 **A** Exhibit 10?

10 **Q** 10(J). Behind Tab 10 is a Tab J.

11 **MR. ENGLISH:** Your Honor, may I approach?

12 **THE COURT:** Yes, sir.

13 **BY MR. ENGLISH:**

14 **Q** Mr. Trask, do you dispute that Clear
15 Touch's revenue in 2016 was 17.67 million?

16 **A** This is an alternative calculation.

17 **Q** I know what the calculation is. I'm asking
18 you about the revenue line. Do you dispute that Clear
19 Touch's revenue in 2016 was 17.67 million?

20 **A** With the information I have here. This
21 isn't one of our documents, I believe.

22 **Q** Do you dispute that figure?

23 **A** I don't have the figure in front of me.

24 **Q** So you have no idea what Clear Touch's
25 revenue was in 2016?

1 **THE COURT:** I'm going to give you some
2 latitude in that regard.

3 **MR. ENGLISH:** Thank you, Your Honor.

4 **THE COURT:** Bring the jury back in. Don't
5 go too far afield.

6 **MR. ENGLISH:** I won't.

7 **THE COURT:** But I'm going to give you some
8 latitude.

9 (Jury enters at approximately 1:13 p.m.)

10 **THE COURT:** All right, Mr. English.

11 **MR. ENGLISH:** Thank you, Your Honor.

12 **BY MR. ENGLISH:**

13 **Q** Mr. Trask, you say you would have
14 difficulty paying a multimillion dollar verdict in
15 this case, right?

16 **A** That's correct.

17 **Q** But you refused to produce your year-end
18 2016 balance sheet, haven't you?

19 **A** That is correct.

20 **Q** Now, for 2015 -- well, we do know, don't
21 we, that in 2016 from your profit and loss
22 statements, that your sales in 2016 were \$17,676,962,
23 right?

24 **A** I don't recall.

25 **Q** Do you recall your sales in 2016 being over

1 I think it's inappropriate. Ask him about the
2 merits of the case, rather than accusing him of
3 withholding some document. I mean, the judges
4 have heard the motions to compel and they have
5 been ruled upon, and complied with.

6 **THE COURT:** Did you ask for financial
7 documents?

8 **MR. ENGLISH:** We did.

9 **THE COURT:** Did the Judge not give them to
10 you?

11 **MR. ENGLISH:** They said, at the time, they
12 weren't available. That was the reason why it
13 was denied because they said they didn't have
14 them available.

15 **THE COURT:** Did you ever supply them?

16 **MR. SMITH:** We gave them the 2016
17 documents we had, Your Honor.

18 **THE COURT:** You gave them P&L statements?
19 Well, that doesn't show much of anything. Does
20 it? Did you go to court and say I want you to
21 compel them to give me this information?

22 **MR. ENGLISH:** I did; and the response was,
23 We don't have it.

24 **THE COURT:** Is that correct?

25 **MR. SMITH:** Yes, Your Honor.

1 (Jury enters at approximately 1:09 p.m.)

2 **THE COURT:** All right. Mr. English,
3 cross-examination.

4 **MR. ENGLISH:** Thank you, Your Honor.

5 **CROSS-EXAMINATION**

6 **BY MR. ENGLISH:**

7 **Q** Mr. Trask, let's start with the last thing
8 you told this jury. You told this jury you would have
9 difficulty paying a multimillion dollar verdict,
10 didn't you?

11 **A** That is correct.

12 **Q** Now, in fact, you have refused to produce
13 Clear Touch's year-end 2016 balance sheet, haven't
14 you?

15 **MR. SMITH:** Objection, Your Honor.
16 Relevance.

17 **THE COURT:** Just one second.

18 **MR. SMITH:** Relevance.

19 **THE COURT:** Just one second. Let me -- let
20 me get you right back out.

21 (Jury exits at approximately 1:10 p.m.)

22 **MR. SMITH:** Your Honor, we've had motions
23 to compel. They've been resolved. He's starting
24 this with a previous discovery issue to try to
25 trash Mr. Trask some more in front of the jury.

1 **THE COURT:** Mr. Foreman, Ladies and
2 Gentlemen of the jury, this is a good spot to
3 go ahead and take a lunch break. If you would,
4 leave your badge in the jury room. If you will
5 be back in your jury room at 1 o'clock, we will
6 resume with cross-examination. Thank you.

7 (Jury exits at approximately 11:46 a.m.)

8 **THE COURT:** You can't tell anybody about
9 your testimony.

10 **MR. SMITH:** You have to go to lunch by
11 yourself.

12 **THE COURT:** You can go to lunch with
13 whomever, just don't talk about it.

14 All right. 1 o'clock, guys. Does anybody
15 need to get in the courtroom during the break?

16 **MR. SMITH:** No, Your Honor.

17 **THE COURT:** Okay.

18 (The Court goes off the record at approximately
19 11:47 a.m.)

20 (The Court goes on the record at approximately
21 1:08 p.m.)

22 **THE COURT:** Are you ready?

23 **MR. ENGLISH:** Yes, Your Honor.

24 **THE COURT:** All right. Will you bring the
25 jury in?

1 **A** They were not.

2 **Q** So Encore lost that business?

3 **A** Yes.

4 **Q** Now, you know they want millions of dollars
5 from you, right?

6 **A** Yes.

7 **Q** Please just tell the jury what this
8 business means to you and your family.

9 **A** Clear Touch Interactive -- when you say
10 family, I extend that to all the team members that we
11 have. It's what we do. It's what we're passionate
12 about. We've come together as quite the team taking
13 care of our own. It means everything to everyone.
14 That's their -- just part of their livelihood.

15 **Q** Could you afford a multi-million-dollar
16 verdict?

17 **A** That would be -- that would be detrimental
18 to the continuation of the business.

19 **Q** Could you continue your business if that
20 happened?

21 **A** Likely not.

22 **MR. SMITH:** Thank you, Mr. Trask. That's
23 all the questions I have for you.

24 **THE COURT:** Why don't y'all step up here?
25 (Bench conference is held off the record.)

1 space.

2 Q Who is Clear Touch's manufacturer?

3 A One of our manufacturers is CVTE that we
4 contracted to ODM, original design manufacturing
5 work, for us.

6 Q Tell the jury what went into identifying,
7 cultivating, and now maintaining that relationship?

8 A I -- first, identifying the relationship is
9 looking and doing research overseas to see what other
10 markets are doing. As you've heard in previous
11 testimony, there are certain areas of geography
12 around the world that do these things in advance of
13 our local geography. Trends can be observed and you
14 can identify who potential market leaders are, and
15 then attempt to establish a relationship with them to
16 do import work and contract manufacturing.

17 Q Does CVTE manufacture other brands, other
18 panel brands?

19 A They do other -- manufacture other brands.

20 Q Off the top of your head, can you name a
21 few?

22 A We talked about ViewSonic, Boxlight,
23 Avacor, Prowise, Clevertouch, BenQ. Those are the
24 ones that are marketed actively in the United States.

25 Q Are some of these brands big brand names?

1 **Q** Thank you. You've heard a lot of discussion
2 about resellers becoming manufacturers, right?

3 **A** Yes.

4 **Q** Do you understand that Encore is claiming
5 it would've taken the Clear Touch opportunity and
6 become a manufacturer of interactive panels?

7 **A** That is the assumption.

8 **Q** So what was Encore's business model at that
9 time?

10 **A** The business model was that of a
11 value-added reseller, one that buys products from
12 manufacturers and resells them to customers.

13 **Q** Do you know if they manufacture any of what
14 I will call a hard product, something other than
15 software?

16 **A** Not during my tenure there.

17 **Q** Do you know if they do that today?

18 **A** Not that I'm aware of.

19 **Q** They talked a lot about trade show
20 attendance. When you attend these trade shows, are
21 there representatives from overseas factories trying
22 to court folks that have a business relationship like
23 you have with CVTE?

24 **A** They are. They're very active in trying to
25 court folks that want to enter into this market

1 County representatives around this time?

2 A Yes.

3 Q What did they want?

4 A An alternative source to buy Clear Touch
5 products.

6 Q Why?

7 A Because they were -- dissatisfaction with
8 their existing provider.

9 Q Did you -- you've heard of the claim that
10 you told Leon County that Encore diverted product
11 they previously ordered, to another customer?

12 A Correct.

13 Q Did you do that?

14 A I did not.

15 Q Is that statement true?

16 A There is truth in that statement.

17 Q Please explain that to the jury.

18 A I was -- the transaction that was expected
19 to be delivered to Leon County Schools, a portion of
20 that transaction was routed to Madison City Schools,
21 Alabama. After Madison City Schools, Alabama,
22 expressed frustration in awaiting their product, and
23 that diversion caused Leon County Schools to have to
24 wait additional time to mediate some of that, Clear
25 Touch Interactive itself facilitated the air shipment

1 with that specific way, it could be very beneficial
2 for you.

3 Q I believe you said this was public
4 knowledge in 2012?

5 A It was advertised in 2012 in the community.
6 I believe the community actually put billboards in
7 front of each of the schools and projected how much
8 money they would get for classroom technology -- a
9 thermometer of money that would be allocated from the
10 halfpenny sales tax. And then that bond referendum
11 was ultimately passed in November 2012.

12 Q And how did Clear Touch get the business,
13 the sales that Encore's complaining about them trying
14 to take from Clear Touch?

15 A We were approached by some of the contacts
16 at Leon County Schools about their dissatisfaction
17 with some of the transactions that had occurred
18 previously. And they asked us --

19 MR. ENGLISH: Objection; hearsay.

20 THE COURT: Sustained.

21 THE WITNESS: And they asked that --

22 THE COURT: Sustained.

23 BY MR. SMITH:

24 Q You can't -- Mr. Trask, please don't say
25 what other people said. Were you approached by Leon

1 with Leon County?

2 **A** They did.

3 **Q** How did it get that business?

4 **A** That was with the hiring of Jimmy
5 Higginbotham who had the existing relationship of the
6 account.

7 **Q** And when did -- when was it first public
8 that Leon County was upgrading its interactive
9 technology in its classrooms?

10 **A** It was made public, in early 2012, by the
11 circulation advertising of a bond referendum, which
12 was going to go out for vote in November that would
13 add a halfpenny sales tax to the County tax rate,
14 specifically for technology in the classroom.

15 **Q** Was that something you in the -- in the
16 interactive -- in the education technology
17 department, is that something y'all pay attention to?

18 **A** That's absolutely something you would pay
19 attention to.

20 **Q** Why is that?

21 **A** Because that's a dedicated allocated pot of
22 money that's available. They go by different names in
23 different geographies and jurisdictions, but those
24 kind of funds have to be spent in a very specific
25 way. And if the products and solutions you have align

1 wanted to solicit friends and family and raise
2 approximately \$1 million in capital to use. I was
3 willing to give away 10 percent of the organization
4 to do that.

5 Q And did you have -- did you yourself or
6 have anyone else perform a business valuation
7 analysis that -- from which you derived this number?

8 A No, I did not.

9 Q Do you believe this reflects the value of
10 Clear Touch at a time it was put together?

11 A Not the value; the opportunity is what I
12 was working for.

13 Q Did anyone take you up on that?

14 A No, they did not.

15 Q Now, I want to go to Plaintiff's 69. Can
16 you just flip one page?

17 A Yes.

18 Q This is that CatchFire document we've seen
19 several times, right?

20 A That is correct.

21 Q Explain to the jury what exactly this is.

22 A This is a form -- let me recall myself.
23 This is a form that is required for administrative
24 compliance of a retirement account. As mentioned
25 before, we've used the retirement funds that I had to

1 you got that in front of you, please. (Pause.)

2 Good workout.

3 **A** Yeah. Thank you. Yes.

4 **Q** Is this something you prepared?

5 **A** It is.

6 **Q** I believe there is a portion of it that
7 we've been focusing on that offers potential buy-in
8 for investors.

9 **A** That is correct.

10 **Q** First of all, why were you looking for
11 investors?

12 **A** The business with the interactive panels is
13 one that requires scale that you have to scale into
14 to make it profitable. Having continued inventory to
15 make available for our resellers and having the
16 ability to grow the sales team and get out and
17 continue to do what the team was doing and scaling to
18 that, was going to acquire additional capital.

19 **Q** There's been a lot of focus on the last
20 bullet point at the bottom of the screen here. Do you
21 see that?

22 **A** Yes.

23 **Q** Was this just -- how was this number
24 generated?

25 **A** It was a number that was backed into. I

1 Q What were the total cost of goods Clear
2 Touch incurred for that year?

3 A \$1,677,117.

4 Q And that's the total?

5 A That's correct.

6 Q And did Clear Touch also have some expenses
7 in that year?

8 A We did.

9 Q Were those reflected here? There are all
10 these line items below the cost of goods sold?

11 A Yes, the largest being the payroll, as we
12 added staff to meet the demand and then also freight
13 and transportation costs.

14 Q In 2000 -- when was the first time you
15 received a paycheck from Clear Touch?

16 A July 1st, 2014.

17 Q When was the first time your wife received
18 paycheck from Clear Touch?

19 A January 6th, 2016.

20 Q So I'm all the way at the bottom here. How
21 much profit does this reflect Clear Touch made in
22 2014?

23 A Minus \$142,946.

24 Q Okay. I want you to flip to Plaintiff's 68,
25 that investor's memo. Again, just let me know when

1 **Q** To be clear for the jury, did you disclose
2 that you always owned an interest in Clear Touch at
3 this time?

4 **A** I did not.

5 **Q** Why is that?

6 **A** The topic of owning it was the discussion
7 on the table; and the details of how, when, why, how
8 weren't part of the conversation.

9 **Q** At the time of the conversation or any time
10 immediately after, was there ever a request that
11 Encore and Mr. Newnam buy Clear Touch?

12 **A** No, it was not.

13 **Q** Was there ever -- excuse me -- was there
14 ever a claim that Encore should be allowed to have
15 all or part of the Clear Touch business?

16 **A** No, there was not.

17 **Q** Was there ever any objection voiced at that
18 time or anytime thereafter until they terminated the
19 reseller relationship?

20 **A** Not until the termination of the reseller
21 agreement.

22 **Q** So I'm going to pull up Defendant's 19. Put
23 19 in front of you, in our notebook, Mr. Trask.

24 **A** Yes.

25 **Q** Do you recognize this document?

1 And we were exhibiting at the conference. Throughout
2 the course of the conference, an opportunity came up
3 to have a casual sidebar conversation with
4 Mr. Newnam, where I disclosed to him that I own Clear
5 Touch Interactive.

6 Q Why tell Mr. Newnam now? Why tell him you
7 had an interest in Clear Touch months after you left
8 the company?

9 A I felt it important as we were adding new
10 resellers, these new resellers were aware of my
11 ownership in Clear Touch. As much as I tried to avoid
12 that conversation, it did arise with several of the
13 new resellers. As they were coming into markets, I
14 didn't want Todd to be caught off guard with that
15 information, and disclosed it to him so that he could
16 make adjustments to his business as needed and the
17 value-added relationship from there.

18 Q And what was Encore's reaction to you
19 informing them of your ownership?

20 A The reaction was one of making themselves
21 available for assistance. There was some follow-up
22 communication that's memorialized as e-mails where
23 their experience and education and -- would be able
24 -- would be maybe of interest to Clear Touch to help
25 it grow.

1 **Q** Who?

2 **A** The first one outside -- the first reseller
3 outside of Encore was actually Academic Technologies
4 in Jackson, Mississippi. We also signed up Howard
5 Technologies based out of the Gulf of Mississippi;
6 and a couple of others, LeCroy Educational
7 Technologies of Toccoa, Georgia; and Collaboration
8 Solutions, local office in Jacksonville, Florida.

9 **Q** Did you also continue to work with Encore
10 as a reseller?

11 **A** Yes, we continued to work with Encore.

12 **Q** In October of 2014, did you attend S.C. Ed
13 Tech?

14 **A** Yes. So this was the next year's South
15 Carolina Ed Tech conference, and it was here in
16 Greenville that year.

17 **Q** I believe a lot of testimony has occurred
18 in this case about a discussion that you had at that
19 conference with Encore. Tell the jury about that.

20 **A** So we were exhibiting as Clear Touch in the
21 booth next to Encore across the way. We also had some
22 other -- another one of our partners exhibiting at
23 the conference. The whole team which now consisted of
24 Tamara; myself; Jimmy Higginbotham, as you know; and
25 then we also recently added our fourth team member.

1 available inventory so that they could meet the
2 demand of their customers in a more efficient time.
3 They didn't have to pay for it. They only had to pay
4 when they sold it.

5 We had a reconciliation period of two times
6 per month where we would have to reconcile the
7 inventory, what was sold, what was -- what would need
8 to be paid for. We would reconcile that inventory.
9 Very akin to how resellers work with taking product
10 and putting it on their shelves and then paying for
11 it at a later date.

12 Q Was that a benefit to Encore?

13 A It was.

14 Q Around January of 2014, did we see the
15 emergence of Amy Andrews' e-mails with Encore?

16 A Yes.

17 Q Is Ms. Andrews, Amy Andrews, an alias for
18 your wife Tamara Trask?

19 A Yes, it is.

20 Q What happened with your mom -- her mother
21 around then, Kathy Cruse, that she just stopped
22 communicating and then we see Amy Andrews popping up?

23 A She began to experience health problems
24 that same winter, part of that reflection about what
25 was important to me and what we were going to do

1 **A** It was.

2 **Q** How much was it?

3 **A** I believe it was about \$150,000.

4 **Q** Why did you roll your life savings into
5 Clear Touch in January of 2014?

6 **A** I knew the product could be viable. It was
7 something that the market was going to need and I
8 wanted to do something that was my own and get out
9 there and start that.

10 **Q** What did Clear Touch use that \$150,000 of
11 your life savings for?

12 **A** The first purchases that went in, other
13 than general administrative, is, we acquired
14 inventory that we presented to Encore as consignment
15 inventory, and actually gave them product to use to
16 sell in advance of taking orders.

17 **Q** Can you explain to the jury what
18 consignment inventory is?

19 **A** Certainly.

20 **Q** Some of us may not know.

21 **A** Sure. As the manufacturer, we would put
22 products into the reseller's hands so that they were
23 able to sell the products, not have to wait for that
24 product assembly shifting and other delays that might
25 enter into that equation. It gave them a ready and

1 **Q** Is this the Articles of Conversion that
2 were filed for Clear Touch?

3 **A** It is.

4 **Q** Please explain to the jury why Clear Touch
5 was converted from an LLC or a limited liability
6 corporation to a Inc., just an incorp -- you know,
7 regular corporation?

8 **A** A couple of reasons. The primary one was,
9 is that the -- in order to access to funds that were
10 going to be necessary to make Clear Touch's own
11 viable business, I had to roll in my 401(k)
12 retirement savings into that and -- through a method
13 called a ROBS 401(k) Rollover, Business Start-ups
14 fund. We had to convert to a corporation to where the
15 retirement fund could buy shares into the
16 organization, that -- thus unlocking my retirement
17 funds to be used as capital in the company. The other
18 is, it signaled a change in the structure from a
19 limited liability company to a corporation, which
20 gave us some additional potential, if profits were to
21 ensue, tax benefits, and others.

22 **Q** You said you rolled your IRA funds into --
23 as capital investment?

24 **A** That is correct.

25 **Q** Was this your life savings?

1 **A** I do.

2 **Q** Tell the jury about that.

3 **A** There were other individuals that had
4 signaled intent to leave and were asked to stay in
5 the same capacity: One, I know very well, is Leo
6 Gallant who, ultimately, joined Clear Touch
7 Interactive and was asked to stay for some additional
8 time to provide some --

9 **MR. ENGLISH:** Objection. This is hearsay.

10 **THE COURT:** Overruled. Go ahead.

11 **THE WITNESS:** It was -- he was asked to
12 stay and clean up a few things before he left.
13 It was amicable for both. Then, other employees
14 had been asked the same thing when they
15 submitted their resignation.

16 **BY MR. SMITH:**

17 **Q** Let me pull up Plaintiff's Exhibit 16 here
18 real quick. It's already been admitted into evidence.
19 If you want to look at plaintiff's notebook,
20 Mr. Trask, it's the bigger one to your left. This is
21 Exhibit Number 16. Let me know when you're there,
22 please.

23 **A** I am.

24 **Q** Do you recognize that document?

25 **A** I do.

1 **A** I did inform Chris Powell that it was my
2 intention to leave. He was aware of some of the
3 concerns that I had about where Encore was going. He
4 signaled that -- I think his words were, "This is my
5 baby" --

6 **MR. ENGLISH:** Objection, hearsay.

7 **MR. SMITH:** Don't say what anyone else
8 said.

9 **THE WITNESS:** Understood. Understood. I
10 did signal my intention to leave for him.

11 **BY MR. SMITH:**

12 **Q** What was Encore's response?

13 **A** I was asked to stay through --

14 **MR. ENGLISH:** Objection, hearsay.

15 **THE COURT:** Overruled.

16 **THE WITNESS:** I was asked to stay through
17 the E-Rate sales cycle that would go through
18 the end of March, historically, and to finish
19 some opportunities that were recently asked to
20 be explored in North Carolina in covering --
21 covering for some sales representatives that
22 were no longer with us.

23 **BY MR. SMITH:**

24 **Q** Do you know of Encore doing that with
25 anyone else?

1 Touch over Encore's other product offerings?

2 A No.

3 Q Now, January 2014, was this an eventful
4 month?

5 A A lot of stuff happened now.

6 Q Tell me what you -- tell me what happened
7 in January of 2014 -- tell the jury what happened in
8 January of 2014.

9 A Certainly. Well, the -- again, the buying
10 cycles for K-12 education, K-12 takes a whole winter
11 break, and things tend to get settled down a little
12 bit. At this point, my personal reflection in looking
13 at what to do going forward, ultimately, led to the
14 decision that Encore was not going in the direction
15 that I thought it was going to go when we first laid
16 out some initial plans and ideas. There were changes
17 happening all the time. There was a lot of
18 uncertainty with where that would go, and that we
19 should invest our entire efforts into Clear Touch and
20 move that forward as its own viable entity and put
21 the focus and energy into it, to actually take it and
22 market it and make it a solution that could be used
23 in education and elsewhere.

24 Q Did you inform Encore that you wanted to
25 leave the company in January of 2014?

1 revenue and relationships were going to be. We had to
2 go out and meet with customers during the six-month
3 -- 6- to 9-month cycle. All of our competitors came
4 out, even -- kind of nipping at the heels, kind of
5 going after the business they knew we were
6 established in and selling through a lot of fear,
7 uncertainty and doubt. "They're not going to be here
8 next year. They're not going to fill your contracts,
9 etc."

10 We had to go out to the contract
11 authorities and get things moved over from state
12 contracts for hardware services. We had to also work
13 with Universal Services Administration Corporation to
14 get our existing contracts -- they facilitate and
15 manage a program called E-Rate, which represented
16 more than 30 percent of Computer Software
17 Innovations' business. We had to move all of those
18 contracts over, as well. So there is a lot of triage
19 going on to kind of bring some consistency to the
20 day-to-day operations of the business, for the first
21 six months.

22 Q Now on April 11, 2013, did you file an
23 annual list of managing members for Encore -- for
24 Clear Touch?

25 A For Clear Touch Interactive, LLC, that's

1 responsibilities, and then also going out and
2 managing a lot of the relationships that we had.

3 In this first couple of weeks -- like I
4 said, the existing customer base that was Computer
5 Software Innovations' before this has now been
6 announced in March, 2012, that the company was going
7 to be acquired; and there was some uncertainty. It
8 was acquired in November of 2012. Further
9 uncertainty. And now, there's a new entity. We had to
10 go out and quickly triage and bring stability to the
11 business.

12 So as far as my role, it was, at that time,
13 whatever it took. It was get out there; get in front
14 of customers. We had upwards of almost \$1 million in
15 paid receivables that had to go out and be collected.
16 Fortunately, I had a lot of relationships with a lot
17 of those accounts. I had to go out, tell them what
18 the plan was, who we were going to be, get that
19 revenue back in. Because we were -- we were depending
20 on that revenue, that revenue stream that was
21 purchased with them.

22 And a lot of other tasks, vendor
23 relationships, establishing vendors, triaging with
24 vendors. The vendors were just as concerned about
25 where their pipeline was going to be and where their

1 working on this was under a non-disclosure. We were
2 working, almost in cloak in the building, shut off
3 from everybody else. There were some whispers going
4 around, but we actually had a kickoff event following
5 the announcement of the acquisition on Valentine's
6 Day.

7 The following Tuesday, we had a big kickoff
8 meeting. Everybody was brought in from around the
9 region. Some drove in; some flew in. We set up a big
10 presentation meeting and kicked it off and introduced
11 Todd to everybody and introduced the team; and kind
12 of laid out that plan for them that we had shared, as
13 well. Then we had a big signing party where everybody
14 moved in, got their employee -- got hired -- I'm
15 sorry -- fired by Harris; and then 20 minutes later,
16 hired by Encore. It was kind of an assembly line
17 approach to that.

18 **Q** And what was your role and responsibilities
19 at Encore, as you understood them?

20 **A** Well, there was the -- there was the
21 assumption of a lot of the marketing efforts. That's
22 an area that I had done for CSI, the previous
23 company, in, kind of, duality with other
24 responsibilities -- it was just something I could
25 excel at and help with -- the marketing

1 building. Everything that comes in adds a lot of cost
2 to your business. Get real lean and mean.

3 Q So that was the business plan?

4 A That's the high level of it, yeah.

5 Q Pull up Plaintiff's 1 for me please.

6 This has been admitted. So were you
7 eventually hired for Encore?

8 A Was, yes.

9 Q And you recognize this particular document?

10 A I do.

11 Q Is this your employment agreement?

12 A It is.

13 Q So what were you hired as, at Encore?

14 A The title was chief business development
15 officer. We went back and forth on that quite a few
16 times, what that was going to be. But chief business
17 development officer was the title that I assumed the
18 responsibility for at Encore.

19 Q You executed this document. Did you execute
20 the non-disclosure and confidentiality agreement we
21 have seen, as well?

22 A Yeah, we actually -- we had a meeting to
23 announce to the employees, because a lot of this was
24 done without being in front of the employees of the
25 previous organization. All of the team that was

1 need to understand how funds are moved through these
2 entities, both at a local level, a state level and,
3 also the federal level. Those funding cycles come in
4 waves. Sales cycles come in waves. One of the things
5 that we sought is, we do need to have some way to
6 bring some consistency to the revenue flow in the
7 business. So we need to get some additional verticals
8 outside of K-12 to represent some of that revenue.

9 Then also, we have to get a little bit
10 leaner, actually, a lot leaner. We called it -- we
11 referenced it, "You're going to get dot-com," which,
12 in hindsight, probably wasn't a great reference,
13 given what happened to them in early 2000s. What it
14 meant was, we had to get real lean with what we were
15 trying to do. Cut costs at all levels.

16 We had -- previously, we had, as you heard,
17 we were a public company, so we had a lot of
18 compliance costs to that aspect of the business which
19 was in excess of \$1 million a year, just to be
20 compliant, to be a small publicly traded company. We
21 had a lot of ancillary expenses that went into that
22 and then also moved from -- what was emerging at that
23 time was, take a lot of the services that we were
24 consuming and run them from the cloud. Don't buy the
25 infrastructure. Don't buy the infrastructure, the

1 all those expenses; and then, as a bonus for that --
2 it has been referred to as a bonus previously, was
3 \$25,000.

4 Q Who came up with the name, the brand name
5 "Encore"?

6 A That was really -- the name, I came up with
7 myself and kind of floated it to "What you guys think
8 about this?" was pretty early on. We weren't trying
9 to be too particular with it. We just wanted to get a
10 entity set up and get a letter of intent in to
11 Harris, so that we could get the transaction
12 potentially posed in front of them and get the letter
13 of intent. I did come up with Encore Technology
14 Group, the logo, the design, a lot of the branding
15 elements that come -- that are still in use today and
16 in existence.

17 Q At that time, did you guys have a business
18 plan for Encore that you were pitching to investors
19 and, ultimately, Mr. Newnam?

20 A We did. We did. We had a plan. What we saw,
21 the -- the value-added reseller business was an
22 interesting one, in the decade-and-a-half experience
23 I had, in that it is -- especially in the public
24 sector markets. There's peaks and valleys to the
25 sales cycle when you have revenue. There's a lot of

1 at the offices in Easley, South Carolina. We were
2 still co-locating with Harris, that did the
3 acquisition in November. We were put into the
4 position of working alongside the acquired, knowing
5 that if we weren't able to do something -- and
6 really, a lot of the conversations, from that point
7 going forward, were mostly facilitated by Chris
8 Powell and Russell Young and Todd Newnam. They were
9 talking about the financial aspects of the deal that
10 they were working out with Harris.

11 Q So eventually, Mr. Newnam invested in the
12 business?

13 A Ultimately, purchased Encore Technology
14 Group from Chris Powell, myself and Michael Knight;
15 and then invested and bought the assets of what was
16 CSI's technology and cloud services division.

17 Q What did he pay you for the idea or
18 opportunity of Encore?

19 A It came in two forms: One was a full
20 reimbursement of expenses. So again, we had to put
21 capital up earlier when we started Encore, just for
22 attorneys fees, filing fees, mailbox rentals,
23 letterhead, just operational-type things that we had
24 to have, e-mail accounts that were temporary. We put
25 that all of that together. Mr. Newnam reimbursed for

1 Mr. Newnam through the Wyche Law Firm and a contact
2 that we had there that actually helped draft some of
3 the documentation that we had for Encore Technology
4 Group, the corporation that we formed in South
5 Carolina. We met with Mr. Newnam on January 12th,
6 2013.

7 Q Tell the jury about that meeting.

8 A It was a casual meeting. We actually met
9 over lunch. We talked about the idea. We had some
10 initial conversations with some things were exchanged
11 electronically, previous. It wasn't walking in and
12 presenting it for the first time. There was an idea
13 of what was -- what was going to be the opportunity.
14 We ended up having lunch and we actually -- I believe
15 we moved to another location and continued that over
16 coffee and spent the better part of the afternoon,
17 you know, reviewing what the potential was.

18 We laid out a -- what we felt was a pretty
19 comprehensive plan at that time that included, you
20 know, financials; the market; here's the top line of
21 what we're doing; here's the messaging; here's what
22 it could be; and here's what the potential is.

23 Q What happened as a result of that meeting?

24 A The result of that meeting was a prompt
25 follow-up by Mr. Newnam with the team. We assembled

1 a lot of uncertainty in the employees' minds: Do I
2 have a job? Am I going to have a job? What's going to
3 happen? Just a lot of anxiety that was going with
4 that.

5 In leading up to that, we took that idea --
6 we, being myself, Chris Powell and Michael Knight --
7 and we started to expand the circle of people that
8 were participating in helping to take this into a
9 different direction and included others in that. We
10 began to solicit the network of contacts that we had.
11 I, myself, had reached out to probably 20 other
12 investors in the market that were also VARs who were
13 looking, or lacking, for a Southeast presence, as far
14 away as California, VARs that may have an interest in
15 this business that was existing, an existing
16 15-million-dollar-a-year business revenue top line.
17 We began soliciting them, putting the idea in front
18 of them, starting to have, I guess, what would be
19 akin to potential investment costs, presentations,
20 going to the different banking institutions and
21 creditors that were existing for Computer Software
22 Innovations.

23 Q So did you, ultimately, meet with
24 Mr. Newnam as a part of that investor search?

25 A I did. We actually were introduced to

1 said let's go ahead and make -- we, myself and Chris
2 Powell, specifically, and then later, Michael Knight
3 who you've heard from as well, we came together and
4 said, "Let's go ahead and form a company here in
5 South Carolina. And let's, at least, get a letter of
6 intent in to Harris Group, that we have an interest
7 to take the technology business and do something with
8 that it, in the hopes of those 107 people we keep
9 talking about that came over as part of the
10 acquisition --"

11 Q When did you incorporate Encore Technology
12 Group in South Carolina?

13 A I believe that was September 2012.

14 Q And tell the jury more about what you did
15 leading up to the meeting that we've heard about with
16 Mr. Newnam about potential investment.

17 A So in the market at this time -- so the
18 Computer Software Innovations, the business as a
19 whole, is very disruptive right now. There's an
20 acquisition that's been public for about six months.
21 Acquisition is near finalized and there's a lot of
22 shifting and things going on. Very disruptive,
23 especially to the existing client base, the existing
24 pipeline. They don't know what's going to happen.
25 There's a lot of uncertainty in the customers' minds,

1 **A** I believe we put in approximately \$3500.

2 **Q** What was that for?

3 **A** That was to take all of this information
4 that was put together and actually have a product
5 made, prototype if you will, put together for that.

6 **Q** I will take a little step back before we
7 get too far into 2013.

8 **A** Uh-huh.

9 **Q** How did you and others -- I believe it was
10 you and others -- identify the Encore opportunity?

11 **A** Well, as I mentioned earlier, the Harris
12 acquisition was taking place, and that was actually
13 finished in November of 2012. But prior to that, we,
14 some of the senior management at Computer Software
15 Innovations at that time in the technology and cloud
16 services division -- there was initial effort by one
17 of the former owners and partners of CSI, Computer
18 Software Innovations, to actually buy the technology
19 division back from Harris Computer very early on.
20 That lasted for about four weeks where that
21 individual was trying to go out, raise capital, get
22 different partners brought in and do some things with
23 that; and that, ultimately, failed. That effort
24 failed for him to do that.

25 It was at that time, knowing that, that we

1 **Q** Why did you file in Nevada?

2 **A** For tax reasons.

3 **Q** Is it still a Nevada Corporation?

4 **A** It is still a Nevada Corporation to this
5 day.

6 **Q** After you filed the initial corporate
7 filings, did you continue to work on Clear Touch
8 opportunity?

9 **A** I did. Continuing to progress that; make
10 outward contacts; actually take some of the ideas and
11 things and cultivate that; test some samples of
12 different products and components, not the actual
13 physical product that you see today here in the
14 courtroom, but the components that go into that; the
15 different glass surfaces; the different film
16 coatings; the different components that go into that.

17 **Q** And did you do this on your own time?

18 **A** I did.

19 **Q** You weren't -- did Encore even exist at
20 this point?

21 **A** At this point, it did not.

22 **Q** Did you invest money in the Clear Touch
23 opportunity in 2013?

24 **A** In 2013, I did.

25 **Q** How much did y'all put in, in 2013?

1 of, as an idea, accelerated when we knew that the
2 acquisition was going to happen by Harris Computer.

3 Q Did you establish Clear Touch Interactive,
4 LLC, at some point?

5 A We did. Came to the conclusion that this
6 was a viable idea. Let's take it a little bit further
7 and let's get, you know, incorporated. And we filed
8 for Clear Touch Interactive, LLC, in the state of
9 Nevada in August of 2012.

10 Q Are you sure it was in August of 2012?

11 A So many dates, I apologize.

12 Q Sure. Sure. Would it be accurate what's
13 reflected on the corporate filings we saw earlier ---

14 A It would.

15 Q --- would be the correct date?

16 A Yes.

17 Q Who was listed as the initial managing
18 members ---

19 A The --

20 Q --- of the business?

21 A The initial managing members of Clear Touch
22 Interactive, LLC, was myself, Keone Trask, and my
23 wife Tamara Trask.

24 Q You filed it in Nevada, correct?

25 A That is correct.

1 but using LED technology versus projection
2 technology. LED, being, the display. They were quite
3 possibly headed for the classroom. The 55-inch model,
4 at that time, were upwards of \$10,000 for the
5 classroom. As we heard, classroom technology really
6 needs to be in that \$5000-range to be equitable.

7 And --

8 Q Go ahead..

9 A I was going -- so there was technology that
10 was out there, but it wasn't ready for consumption by
11 the classroom. The experience was lackluster in what
12 was available. So there was an opportunity to get
13 that technology, bring it to a point that was
14 affordable and change the way people were interacting
15 in the classroom.

16 Q So what did you do to look into this
17 opportunity?

18 A Did an extensive amount of research on my
19 personal time; online, looking at different
20 technologies, the brands that are out there;
21 evaluating the product remotely via video and things
22 like that to look at that.

23 Q And again, when that was -- were you doing
24 all of this?

25 A This was in early 2012. And then it kind

1 wasn't as robust as it used to be. What people were
2 finding, just having technology wasn't making quite
3 the difference in the classroom. What we further saw
4 shifting is the pursuit or the idea that a one-to-one
5 initiative that every child could have one device in
6 their hands. So technology started to move away from
7 the whole group from classroom instruction and move
8 more toward putting a device in their hand. That
9 opened up a lot of questions. We had a lot of
10 product, a lot of technology out there, how do we
11 converge that and bring that together into a solution
12 that could help enhance learning.

13 **Q** So what did you do at that time, when you
14 foresaw this shift?

15 **A** In foreseeing the shift, it really just
16 kind of took a look out at the market and saw what
17 was available. The touch interactivity that came from
18 the interactive whiteboard was limiting. The
19 traditional projector models, the technology itself
20 had some shortcomings in terms of quality,
21 interactivity, the amount of interactivity that could
22 happen and looked out into the market to see what was
23 out there. What I found was that in the market, there
24 were a lot of high-end audio/visual solutions that
25 were out there that could replicate this experience,

1 Constellation Software, through their Harris software
2 division, did consummate the acquisition.

3 Q This is mid-to-late 2012 time frame?

4 A It is. It is.

5 Q Around that time, what was -- did you see a
6 shift in the technology market -- classroom
7 technology market?

8 A In the classroom technology market, we were
9 seeing a shift. We've heard about some trends that
10 were happening, specifically in classroom technology.
11 The interactive whiteboards and projectors had come
12 to the market in or about 2003. Soon, a proliferation
13 of technology was entering into the classroom. Prior
14 to this technology shift, most classrooms maybe had a
15 teacher's computer at their desk, maybe a couple of
16 shared computers for the students to use at break-out
17 time. There wasn't really technology coming in that
18 was whole -- whole-group instruction, is how we
19 looked at that.

20 That technology, as it went on, would
21 continue to age and need to be replaced. We're
22 getting into a cycle of these that were buying in
23 2003 were on their -- maybe their second round of
24 replacement for parts and pieces, and servicing
25 requirements were going high. The technology itself

1 see if they were in the current active mailbox that
2 was not touched, of Mr. Trask's.

3 Q What evidence do you have that Mr. Trask
4 specifically deleted those?

5 A The specific evidence there would be, there
6 would only be one person outside of Mr. Trask that
7 could have gotten there and deleted those.

8 Q Based on what? The password?

9 A No, based on administrative rights and
10 multitiered permissions with role-based access
11 control.

12 Q Okay. Who was that person?

13 A Chris Schmidt, our IT director.

14 Q Mr. Knight, give me just one second.

15 A Sure.

16 Q That may be all. I may be able to let you
17 go here. Let me ask one other thing. When you're
18 setting up a booth at a trade show ---

19 A Uh-huh.

20 Q --- do you always have the panel there?

21 A So the -- and that's a -- that's a great
22 question. When you're at a trade show, you could be
23 there talking about, let's say cybersecurity. What's
24 that have to do with a panel? Very little. But what
25 makes people come over? A big infographic. That's why

1 **A** There is the e-mail that's in the archiving
2 platform. I believe that's what was produced. Then
3 there's the specific e-mails that were here -- that
4 were provided here.

5 **Q** Right. But -- so you're telling me that you
6 did a search two weeks ago that produced e-mails that
7 counsel was claiming was produced six months ago?

8 **A** So what I'm telling you is, what I did was,
9 I searched our e-mail server to see if they were on
10 there. They were not on there. Let's make sure we
11 clarify that.

12 **Q** Two weeks ago?

13 **A** Approximately.

14 **Q** Okay.

15 **A** There's a big delineation between an
16 archiving platform that stores every copy of an
17 e-mail that goes through, and then there's the mail
18 server itself that only holds the active e-mails
19 marked deleted.

20 **Q** Okay. And the deleted e-mails that you
21 searched for two weeks ago --

22 **A** The e-mails that are in here, yes, correct.

23 **Q** The e-mails that are in there?

24 **A** Whatever the ones that you had me look for,
25 I had that information to look for, specifically, to

1 **BY MS. BARKER:**

2 **Q** What did the e-mails have in common?

3 **MR. HUDSON:** Objection.

4 **THE COURT:** Overruled.

5 **THE WITNESS:** The e-mails themselves were
6 -- typically had, at least, one or more of the
7 same recipients in there. They were all related
8 to some measure of Clear Touch business.

9 **BY MS. BARKER:**

10 **Q** Thank you, Mr. Knight. No further
11 questions. Please answer any questions Mr. Hudson has
12 for you.

13 **A** Sure.

14 **CROSS-EXAMINATION**

15 **BY MR. HUDSON:**

16 **Q** Good afternoon, Mr. Knight.

17 **A** Afternoon.

18 **Q** God bless you with five young children.

19 I've got three. That seems like that's a lot.

20 **A** I've got a patron saint for life, so that's
21 about the only reason I can make it happen.

22 **Q** Absolutely. So you were the chief
23 technology officer, correct, at Encore?

24 **A** Encore, correct.

25 **Q** So you, and I think I heard your testimony

1 the junk mail, and then I did another context query
2 through there to validate that those e-mails were
3 not, in fact, there; and they were not in the
4 mailbox.

5 Q So to clarify, what did you conclude from
6 your review?

7 A That those e-mails were absolutely deleted
8 and then deleted permanently from the deleted items
9 mailbox.

10 Q Mr. Knight, would you please review
11 Exhibit 84 in the binder in front of you?

12 A (Reviewing.)

13 Q It's all the way in the back.

14 A I'm there.

15 Q Are these some of the e-mails Mr. Trask
16 deleted from Encore's system?

17 A Yes, the first page here was the one I did,
18 again, a search on based on the full subject and then
19 the abbreviated subject; and even specific words in
20 there, looking for the e-mail, as well as the e-mail
21 addresses themselves. I even scrolled to the date and
22 these e-mails were not in there.

23 MS. BARKER: Your Honor, I'd like to move
24 into evidence Exhibit 84.

25 MR. HUDSON: Judge, we're going to have to

1 have to be able to sign directly into the account as
2 that person. There are other ways around it, but we
3 did not enable that on our system. So what I was
4 given was, the username and password for that
5 specific account.

6 I signed in using what's called Outlook
7 Web Access. It's a web interface that is connected to
8 the e-mail server. The importance of that is that I
9 didn't use an e-mail client that would download
10 e-mail that would take a long time to index.
11 Therefore, searches wouldn't work correctly. So
12 effectively, what I did was, I went directly to a
13 server platform so nothing could be missed.

14 Well, I'm a -- well, I essentially have a
15 little OCD. And my wife would disagree with me; I
16 have a lot of OCD. So what I did was, I did the
17 specific searches. I did full searches for that
18 specific e-mail by subject. I, then, did partial
19 e-mail searches on that, just to make sure there
20 wasn't some data that was wrong. I, then, did e-mail
21 address base searches. Then, I also went to the
22 specific time and date that those e-mails would have
23 been there, and they were not there.

24 So I made sure I went through every
25 process. I checked the deleted items. I went through

1 e-mails, as well.

2 **THE COURT:** Sir? -- ma'am?

3 **MS. BARKER:** There are other e-mails, as
4 well. Mr. Knight conducted the review.

5 **THE COURT:** But they were obtained, not
6 through the defense in this case, but through
7 other customers and vendors or somebody?

8 **MS. BARKER:** Other sources, yes,
9 Your Honor.

10 **THE COURT:** Okay. I'm going to note your
11 objection. I think that's more of a subject for
12 cross-examination. Okay, sir. I'm going to
13 overrule your objection.

14 **MR. HUDSON:** Fair enough, Judge.

15 **THE COURT:** Very good.

16 Would you bring the jury back in?

17 (Jury enters at approximately 1:58 p.m.)

18 **THE COURT:** Ms. Barker?

19 **BY MS. BARKER:**

20 **Q** Mr. Knight, did you look into whether
21 Mr. Trask permanently deleted e-mails from Encore's
22 computer servers?

23 **A** I did.

24 **Q** What did you do?

25 **A** Sure. So what -- in order to do that, you

1 **THE COURT:** All right. Mr. Meilinger,
2 thank you. Thank you for answering my
3 questions.

4 All right. Guys, 1:15. Is there anybody
5 that needs to get in the courtroom during the
6 break?

7 Oh, can Mr. Meilinger be excused?

8 **MR. SMITH:** Yes, Your Honor.

9 **THE COURT:** Thank you, sir.

10 **MR. MEILINGER:** Thank you, Your Honor.

11 **THE COURT:** Now, does anybody think they
12 need to get in the courtroom?

13 **MR. SMITH:** I don't think we do.

14 **THE COURT:** All right. Thank you, guys.

15 **MR. SMITH:** Thank you.

16 (The Court goes off the record at approximately
17 12:06 p.m.)

18 (The Court goes on the record at approximately
19 1:15 p.m.)

20 **THE COURT:** I got a call from one of our
21 bailiffs over lunch. Mr. -- Juror number 37,
22 Mr. Cockrell, apparently is causing some
23 disruption. The Court had -- that's why I want
24 to bring it up. Apparently, he lost some pay
25 voucher for his parking and tried to get back

1 financial statements, was \$1.4 million.

2 **BY MR. ENGLISH:**

3 **Q** On 12/31/15, if Clear Touch were sold, in
4 your opinion, what would a willing buyer pay and
5 willing seller sell for?

6 **A** The \$3.9 million.

7 **THE COURT:** All right.

8 **RECROSS-EXAMINATION**

9 **BY MR. SMITH:**

10 **Q** In that assumption, Clear Touch keeps all
11 the profits it made because it just sold its
12 business, right?

13 **A** Correct.

14 **THE COURT:** All right. Thank you,
15 Mr. Meilinger.

16 **MR. MEILINGER:** But that's additional
17 consideration. The thing is if you made \$1
18 million, right, and you get \$3.9 million, you
19 leave with 4.9. You don't just get the 3.9,
20 correct?

21 **MR. SMITH:** Yeah. In this one, we're
22 asking --

23 **THE COURT:** I got it. I got it.

24 **MR. SMITH:** I think we're on the same
25 page, Your Honor.

1 you have to look at both past profits and future
2 profits?

3 **A** Yes, that's what we did.

4 **Q** And if you just look at past profits and
5 just give Encore the past profits, then you'd have to
6 assume that Clear Touch essentially goes bankrupt on
7 the day you stop looking at profits and its worth
8 zero?

9 **A** (No audible response.)

10 **Q** If you just look at past profits --

11 **A** If you look at past profits, you wouldn't
12 get the true value of the business. Nothing --
13 nothing is valued in the business. You know, if I was
14 thinking of a -- you know, a way -- theoretically,
15 the value of the business is \$3.9 million. I think
16 it's a pretty conservative value considering that the
17 tax return for 2015 showed a million dollars of
18 income.

19 **THE COURT:** Yeah, that may be so.

20 **MR. MEILINGER:** So a future value of the
21 company is always what the earnings are. A
22 company doesn't ever trade -- if the company's
23 not going to make anything, it's not worth
24 anything except the book value. The book value
25 of Clear Touch in 12/31/2015, according to the

1 it just appears to me that there's a double dip
2 here by taking all the profits away, but then
3 turn around and throwing them back for purpose
4 of future valuation.

5 **MR. MEILINGER:** The -- the potential
6 double dip would be the assets or the -- but
7 you still have to put a future value -- I mean,
8 there's still value to the income.

9 **THE COURT:** To be fair to both sides, I'm
10 going to let y'all ask questions, Okay. I'm not
11 making a ruling yet. I'm just telling you, you
12 can tell where I'm going with it and what I'm
13 thinking. But do you want to ask your own
14 expert any further questions based on my --
15 it's not going out in front of the jury. This
16 is for my edification.

17 **REDIRECT EXAMINATION**

18 **BY MR. ENGLISH:**

19 **Q** Sure. This could go to the unjust
20 enrichment claim that's before the Court. So
21 Mr. Meilinger, the business opportunity analysis
22 assumes that Encore owns Clear Touch business; is
23 that right?

24 **A** Correct.

25 **Q** And so to value the Clear Touch business,

1 corresponding business valuation based on
2 income because there's none.

3 **MR. MEILINGER:** No, sir, respectfully.

4 **THE COURT:** If the company has no profits
5 and you are valuing profits in making this
6 determination of \$3.9 million, if it has zero
7 profits, how can you then turn around and put
8 those profits back?

9 **MR. MEILINGER:** Well, we're not putting
10 the past profits back, Your Honor. What we're
11 doing -- at some point in time, you have --
12 we're valuing the future earnings of the
13 company. So for example, if I was to sell my
14 accounting firm, I would keep all the assets. I
15 would get to keep the cash. I would get to keep
16 the receivables, right, and I would sell the
17 accounting firm. So theoretically, the --

18 **THE COURT:** Theoretically, Clear Touch
19 would not be in existence because they would
20 not make any money, right? They all would have
21 been made by plaintiff -- Encore -- excuse me.
22 So in your theory, then there's not even a such
23 thing as Clear Touch because there's nothing
24 out there just earning anything. It all went
25 over to the plaintiff. I mean, the point being,

1 It's all -- the value of the business is what
2 it's going to make in the future. If you bought
3 a business --

4 **THE COURT:** Well, I know. I know. But at
5 the time -- I heard you say that. But in your
6 assumption that all profits went to Encore,
7 then you'd have to have a corresponding
8 assumption under that assumption of zero
9 profits going to Clear Touch because they all
10 went to Encore.

11 **MR. MEILINGER:** Correct.

12 **THE COURT:** So therefore, when you add
13 valuation -- business valuation to a company
14 based on profits it didn't receive, aren't you
15 grabbing something that is not there?

16 **MR. MEILINGER:** We did not add -- we did a
17 capitalization of earnings method, which you
18 are just valuing the income stream. That's what
19 we did.

20 **THE COURT:** Sure.

21 **MR. MEILINGER:** But you have a good point.

22 **THE COURT:** Wouldn't you have to assume
23 that if all the profits are gone, then there's
24 nothing to value because it's -- there's no
25 income to value, therefore, there's no

1 a couple of questions.

2 **MR. MEILINGER:** Yes, sir.

3 **THE COURT:** All right. This is about the
4 3.9 million. That's all I'm going to ask, okay.

5 I'm going to let y'all ask him further
6 questions.

7 You can stand right there.

8 **MR. MEILINGER:** Yes, sir, Your Honor.

9 **THE COURT:** It seems to me, and I'm
10 certainly not an expert like you are, but if
11 you value -- if you add -- assume -- excuse me
12 -- all profits being paid directly to Encore
13 ---

14 **MR. MEILINGER:** Correct.

15 **THE COURT:** --- then you would have had
16 the corresponding -- none of the profits would
17 be to Clear Touch, right?

18 **MR. MEILINGER:** Correct.

19 **THE COURT:** So don't you -- when you put a
20 valuation there putting all the profits with
21 Encore, wouldn't you have to have to have the
22 corresponding value of Clear Touch to be zero?

23 **MR. MEILINGER:** Well, not -- no, sir,
24 because the value of a business has really
25 nothing to do with what it made historically.

1 the large oversea transport container -- if you
2 bought it by the container, you would get your
3 freight cost down to one percent. We did not make any
4 adjustments like that where we added money to sales
5 or we, hypothetically, did anything to say, hey, we
6 would have done better with the higher margins.

7 **Q** Based on all of the points that Mr. Smith
8 raised, would you change your opinion at all?

9 **A** No, I think my report overall is
10 reasonable, correct and to a degree of accounting
11 certainty, yes.

12 **Q** Thank you, Mr. Meilinger.

13 **THE COURT:** All right. If you would step
14 down, but stay here, if you don't mind.

15 **MR. MEILINGER:** Yes, sir.

16 **THE COURT:** How long is your next witness?

17 **MR. ENGLISH:** It will probably be at least
18 30 minutes and probably longer with cross.

19 **THE COURT:** All right. Mr. Foreman, Ladies
20 and Gentlemen, let's go ahead and have a lunch
21 break. Could you be back in your jury room by
22 1:15? If you would, leave your pads in the jury
23 room, please.

24 (Jury exits at approximately 12:00 p.m.)

25 **THE COURT:** Mr. Meilinger, let me ask you

1 **A** No.

2 **Q** Now, Mr. Smith asked you why you didn't
3 subtract Clear Touch operating costs from Calculation
4 Number 2. From which calculation was Clear Touch's
5 operating costs properly subtracted?

6 **A** Calculation 3.

7 **Q** And did you make that adjustment in
8 Calculation 3?

9 **A** I did.

10 **Q** And Mr. Smith asked you about lots of
11 adjustments you could have made. Are there other
12 adjustments you could have made to make this value
13 higher?

14 **A** Yes. There were a lot of adjustments that
15 we did not make. One of the arguments that Encore's
16 management, a good one is they would have sold more
17 because the sales people would make 300 percent more
18 commission at the higher margins. We did not add any
19 sales to the damages.

20 Another argument that Encore's management
21 -- that was verified by Mr. Viola's testimony, was
22 that they could have reduced the shipping costs
23 substantially. I think Encore -- I think Clear Touch
24 averaged about four to five percent shipping costs.
25 According to Mr. Viola's testimony, if you bought by

1 that we had. There's a legal excerpt in there
2 that quotes case law that I think is
3 inappropriate to put in front of the jury.

4 **THE COURT:** Tell you what, to the extent
5 it does have that, we'll look at it and we'll
6 excise that before it goes back to the jury.

7 **MR. SMITH:** Thank you, Your Honor.

8 **THE COURT:** All right. Very good.

9 **BY MR. ENGLISH:**

10 **Q** If we can put up Plaintiff's 10(H), we'll
11 try to go through this quickly. On that first
12 calculation of the wages incurred by Encore for the
13 Clear Touch employees, Mr. Smith asked you if that
14 wouldn't -- that didn't calculate the harm to Encore.
15 Would it harm a company to have an employee working
16 for a side company instead of for the employer?

17 **A** Yes, sir.

18 **Q** In Calculation 2, Mr. Smith asked you about
19 the assumption that Encore would be able to purchase
20 directly from the manufacturer. What is that Encore
21 would be purchasing directly from the manufacturers?

22 **A** Flat screen panels.

23 **Q** Is there any reason, in your analysis, to
24 think that Encore couldn't have done that and made
25 the exact same sales that it made in Calculation 2?

1 correct. I think there is reasonable belief that the
2 33 percent margin is correct.

3 Q Okay. Well, I appreciate your time,
4 Mr. Meilinger.

5 A Thank you.

6 THE COURT: Let me see the attorneys up
7 here, please.

8 (Bench conference is held off the record.)

9 REDIRECT EXAMINATION

10 BY MR. ENGLISH:

11 Q Mr. Meilinger, the report that Mr. Smith
12 was asking you about, that's Plaintiff's
13 Exhibit 10(J); is that right?

14 A Yes, sir.

15 Q And that explains all the details of the
16 calculations that Mr. Smith was going through with
17 you; is that right?

18 A Yes, it does.

19 MR. ENGLISH: Your Honor, we'd ask that
20 Plaintiff's Exhibit 10(J) be admitted into
21 evidence.

22 THE COURT: It's admitted. Let me say this
23 for the record, subject to the objection from
24 the defense that he has previously raised.

25 MR. SMITH: Your Honor, and one other one

1 **A** Well, it would lower your lost profits by,
2 effectively, \$220,000.

3 **Q** Okay. Thank you.

4 **A** It would lower the business value. I would
5 estimate it by \$3-400,000.

6 **Q** So --

7 **A** And that's an estimate. I'd have to --

8 **Q** Sure. We're just trying to get a feel here.
9 So took out 220 already?

10 **A** Correct.

11 **Q** So you took out 220 already and then took
12 out 3 -- I didn't get the whole number from you --
13 300 and something?

14 **A** I'm sorry?

15 **Q** What was the second number you gave me?

16 **A** It would lower the value by -- estimating
17 it -- it counts when the adjustment was made. That's
18 why I'm hesitate.

19 **Q** Sure.

20 **A** 300,000 to 400,000, I would estimate.

21 **Q** So you call that 350. So you were off by
22 over a half a million, based on the percentage
23 utilized?

24 **A** In your opinion, I am. I think our number
25 is correct and I think the number we utilized is

1 and analyzed to make a big number, didn't you?

2 **A** No, we used that -- add \$220,000 for the
3 accounts receivable on the balance sheet at the end
4 of 12/31/2015 that are not included and there's where
5 you get your 33 percent, plus the internal documents
6 from Clear Touch showed a 33 percent gross profit
7 margin. This analysis, Mr. Smith, is very
8 conservative. We did not add any margin for the fact
9 that Clear Touch had a \$5 million -- I'm sorry --
10 Encore had a \$5 million line of credit and could have
11 purchased in bulk. We did not add any additional
12 sales that Encore would have made. The thing is we
13 did adjust a profit margin, but we thought it was a
14 reasonable adjustment.

15 **Q** I understand your testimony. Doesn't the
16 percent of profit margin have a substantial impact on
17 your bottom line number on Calculation 3?

18 **A** In this case, it has about a \$200,000
19 effect on the lost profits.

20 **Q** So what would it be at the 31.07
21 approximately?

22 **A** What? The business valuation or the lost
23 profits?

24 **Q** How would this fluctuation affect the
25 bottom line number?

1 would bring up this gross profit margin?

2 A Correct.

3 Q And based on the figures, wouldn't that
4 come to, still, 31.07 as a gross profit margin?

5 A Correct.

6 Q So eliminate the factoring fees, 31.07,
7 right?

8 A Uh-huh.

9 Q Now, look at Page 10 of your report.

10 A (Reviewing.)

11 Q Let me know when you're there, please.

12 (Pause.)

13 Are you there, Mr. Meilinger?

14 A Yes.

15 Q And you've got a chart at the top there.
16 And you computed a profit of 750,402, right?

17 A Correct.

18 Q And you did that on revenue of 2.461
19 million, correct?

20 A Correct.

21 Q And that would yield a gross profit margin
22 of 30.48 percent, correct?

23 A Correct.

24 Q Yet you use a higher profit margin than all
25 the verifiable information you had available to you

1 **A** 220,000.

2 **Q** I'm trying my best to write neatly,
3 everybody. So that's based on that 33 percent
4 adjustment, correct?

5 **A** It's based on a couple of things. Okay.
6 Yes, it's a 33 percent adjustment, but also the fact
7 that the company was on a cash basis of accounting.
8 So, basically, in our financial statements, the
9 accounts receivable are not included.

10 **Q** And you, obviously, had access to and
11 analyzed Clear Touch's financials, correct?

12 **A** We only had access to the financials on the
13 cash basis of accounting. We did not get the complete
14 accounting records.

15 **Q** You could calculate Clear Touch's profit
16 margin for 2015 based on what you had?

17 **A** Yes.

18 **Q** And wasn't Clear Touch's profit margin, in
19 2015, 28.65?

20 **A** I don't -- I don't believe so. One thing
21 that Clear Touch did is they included factoring fees
22 for cost of goods sold.

23 **Q** We're getting there.

24 **A** Okay.

25 **Q** So if you eliminated factoring fees, that

1 requirements of Clear Touch's factories and contacts
2 they used to supply the products.

3 **A** It does assume they would have been capable
4 to purchase from the suppliers, yes.

5 **Q** And it assumes Encore would meet the
6 requirements of Clear Touch buyers, specifically,
7 Leon County in this instance?

8 **A** Yes.

9 **Q** Now, let's talk about Calculation 3.

10 **A** You made a gross profit adjustment of 33
11 percent. I believe you talked to Mr. English about
12 that earlier.

13 **A** Yes.

14 **Q** Can you explain that a little more to the
15 jury what the gross profit adjustment, how that
16 impacts your bottom line figure?

17 **A** The cost of goods sold adjustment was an
18 adjustment, I believe it was approximately \$200,000
19 adjustment over the period of 24 months or from
20 February of 2013 to 12/31/2015.

21 **Q** Say that number one more time for me
22 please.

23 **A** It was approximately
24 200-and-something-thousand dollars.

25 **Q** Can you be more precise?

1 **A** Correct.

2 **Q** Now, I'm talking about Calculation 2.

3 **A** Yes, sir.

4 **Q** Okay. This, again, was based on a good
5 number of assumptions, fair?

6 **A** Calculation 2 assumes that the sales were
7 made directly from Encore -- the materials were
8 purchased directly from the vendors, yes, it does.

9 **Q** So it assumes Encore would have accepted
10 the sales opportunities, if offered?

11 **A** Yes.

12 **Q** It assumes that Encore would have redefined
13 the business model from a value added reseller to one
14 involving contract manufacturing and assembly for
15 less than five percent of its business.

16 **A** I don't think it assumes that. But it
17 assumes that Encore -- we're talking about Table 2
18 still, right?

19 **Q** Yes.

20 **A** Okay. Table 2 assumes that Encore would
21 have sourced the materials directly from the
22 suppliers instead of paying Clear Touch extra money
23 to do that.

24 **Q** And it assumes that all Clear Touch --
25 excuse me. It assumes that Encore would meet the

1 **Q** And to make those calculations, you assumed
2 that the percentage that you got from Encore
3 Management was reasonable?

4 **A** Yes.

5 **Q** And you assumed that without conducting any
6 independent objective analysis of whether or not
7 those percentages were reasonable?

8 **A** The objective analysis was done when we
9 talked to management and interviewed management, yes.
10 We did interview management, correct.

11 **Q** You interviewed management, which I
12 understand, and you took their word for it, for lack
13 of a better phrase?

14 **A** We determined that management, through our
15 interview, was credible. They appeared to be telling
16 the truth. So, the thing is we had a level of
17 professional skepticism when we interviewed with
18 them, but we used the percentage that management --
19 that after interviewing management we thought was
20 reasonable, yes.

21 **Q** And that's all I'm asking.

22 **A** Correct.

23 **Q** I'm asking did you not do an independent
24 objective analysis to confirm that those percentages
25 were accurate.

1 percent of a company's worth because you have no
2 control. Right? So the thing is -- because it was a
3 document prepared by Clear Touch that showed what
4 they thought it was worth. They presented it to
5 investors, I'm sure, with a straight face and said
6 here's what you'll get for \$100,000.

7 Q You said you -- no. Let's just summarize
8 real quick. Go back to -- we're talking about
9 Calculation 1.

10 A Yes, sir.

11 Q This is a measure of activities that
12 benefited Clear Touch, but no analysis that it
13 actually harmed Encore?

14 A The harm to Encore is done in Analysis 2
15 and 3.

16 Q I didn't catch the very end of what you
17 said. Excuse me.

18 A The harm in Encore is calculated in
19 Analysis 2 and 3.

20 Q And I'm just talking about Calculation 1.

21 A Correct.

22 Q So my question again, does that measurement
23 of activities were just as it benefited Clear Touch
24 without analysis of what actually harmed Encore?

25 A Correct.

1 Touch investor memo, which sold one percent for
2 \$100,000, which valued the company at \$10 million.

3 So again, we looked at those. We
4 discounted. The value is not \$10 million. We didn't
5 say the company was worth \$10 million, right. We
6 didn't say the company was worth \$2.2 million. We
7 just have to say these are some things that you might
8 look at if there was a comparable sale, yes.

9 Q And I believe earlier in your testimony,
10 you said you usually use the fair market value basis
11 because that's what a buyer is willing to pay for the
12 business?

13 A Correct.

14 Q And this investor memo, did you know no one
15 responded to it or paid any money in it from the
16 offer?

17 A That's why we discounted it. I mean, that's
18 why we didn't use it.

19 Q Why even mention it other than to try to
20 justify a big number?

21 A One, our number is not big compared to that
22 number. I think one is \$100,000 for one percent
23 interest is actually valuing a company more than \$10
24 million. It's valuing it somewhere close to \$13-14
25 million. One percent in a company is not worth 100

1 **Q** You assumed that?

2 **A** Yes.

3 **Q** But you don't know that at all, do you?

4 **A** No.

5 **Q** And you don't know if it was a reflection
6 of an actual business valuation, do you?

7 **A** No. We didn't use it. We just show it as,
8 hey, this is a value that was given to the federal
9 government by Mr. Trask of the stock in his 401K. So
10 we used that, but we -- we just noted it in our
11 report. We also didn't use the \$10 million investment
12 -- investor memo to value the business neither. But
13 these are things that we thought were important when
14 you look at our value, yes.

15 **Q** So you used them to justify your 5.5 and
16 3.9 ---

17 **A** Didn't use them to --

18 **Q** --- valuation?

19 **A** -- didn't use them to justify. When you
20 look at business valuations, you're supposed to look
21 at other evidence out there that would suggest the
22 value. The best value would be if some stock had been
23 sold. All right. So we looked at the number that they
24 put on their tax return for what the stock was worth,
25 which was \$2,269,000. We then looked at the Clear

1 that you looked at two particular documents -- you
2 testified earlier that you looked at two different
3 things when calculating the lost business
4 opportunity, the big Calculation 3, correct?

5 **A** Correct.

6 **Q** And the first thing I believe you said you
7 looked at was the CatchFire Funding questionnaire,
8 correct?

9 **A** Correct.

10 **Q** And I believe on that questionnaire,
11 there's an entry about the company representing a
12 value of the company, according to your report, at
13 \$2.26 million.

14 **A** Correct.

15 **Q** Correct?

16 **A** Uh-huh.

17 **Q** And did you know that actually was not
18 valuation of the company's worth?

19 **A** It was a document submitted on Form 5500
20 saying what the stock and the 401(k) was worth of
21 2269. So basically, we used that 5500 that was filed.

22 **Q** Did you know if it was based on any
23 objective business valuation?

24 **A** We knew it would be the owner's opinion of
25 value, that's what we thought it was.

1 that adjustment, in 2015 alone, increased the
2 estimated value by about \$120,000 without
3 understanding what it was and what it represented?

4 **A** I don't believe that's correct. Let me
5 look.

6 **Q** Sure.

7 **A** (Reviewing.)

8 I have the total contract labor adjustment
9 being \$2,500.

10 **Q** You sure?

11 **A** (Reviewing.)

12 **Q** Would it be a total of 30,117? I'm looking
13 one of your appendixes to your report, Appendix 7,
14 Mr. Meilinger, if that will help.

15 **A** Appendix 7. (Reviewing.)

16 I can't find it. Can you show it to me in
17 your report?

18 **Q** It's in Appendix 7, that summary breakdown.

19 **A** Okay.

20 **Q** It's an adjustment you made without knowing
21 what the contract labor actually represented; is that
22 fair?

23 **A** At the time, yes.

24 **Q** Now, looking at Page 16 of your report,
25 subpart E, just for reference, you testified earlier

1 **Q** And you just relied on the plaintiff
2 telling you that and factored that into your report,
3 right?

4 **A** Well, I don't think that was fully factored
5 into our report, because we only adjusted the payroll
6 by -- I'm just giving an exact number -- so that
7 correction would be about --

8 **Q** I'm sorry. I didn't catch that last
9 response, Mr. Meilinger.

10 **A** The correction -- we adjusted the total
11 payroll by \$17,613 over the course of two and a half
12 years.

13 **Q** And then the contract labor, right below
14 that, there was an adjustment done for a contract
15 labor, correct?

16 **A** Correct.

17 **Q** And I believe you verified in your
18 deposition you didn't know what the contract labor
19 entry in my client's financials represented, correct?

20 **A** Correct.

21 **Q** And so you assumed that Encore could have
22 done it for less or not even incurred that contract
23 labor without knowing what it was?

24 **A** Correct.

25 **Q** And most of that was incurred in 2015, so

1 here by 25 percent. Explain that to the jury please.

2 **A** Encore had, at the time of these events, 70
3 employees. Also, at the time of the events, they had
4 additional capacity. So we adjusted the payroll by 25
5 percent, which -- hang on. I have to look at my
6 adjustment sheet to exactly how much that was.

7 **Q** Sure. If you'd tell me what you're looking
8 at so we're on the same page ---

9 **A** Okay.

10 **Q** --- literally, it would be nice.

11 **A** (Reviewing.)

12 There was no adjustment in 2013.

13 (Reviewing.)

14 There's a \$16,000 adjustment in 2015.

15 **Q** Is there one for '14?

16 **A** There was not -- okay, so the '15, the
17 number I gave you was part of '14 and part of '15.

18 **Q** Okay.

19 **A** So a total of about a \$16,000 adjustment.

20 **Q** And this additional employee salary
21 adjustment, isn't the assumption in your report that
22 Encore management represented to you that to do what
23 my client does, it may have had to have one employee,
24 right?

25 **A** Correct.

1 spending when schools are putting back in new
2 technology in the classrooms before the kids get
3 there, right?

4 **A** Correct.

5 **Q** So a month-to-month analysis would be
6 extremely helpful in determining whether or not this
7 adjustment was appropriate, wouldn't it be?

8 **A** And we did the month-to-month analysis
9 after the deposition.

10 **Q** And did you change your report?

11 **A** No.

12 **Q** Did you tell us you did this month-to-month
13 analysis after the deposition?

14 **A** No, I did not.

15 **Q** Now, I'm looking again at the additional
16 employee salary -- did you clarify your answer as
17 much as you wanted to, first of all?

18 **A** Yes, sir, I did. Thank you.

19 **Q** No problem. Let's look at the additional
20 employee salary and other wages. That's how I have it
21 noted. I believe that is on Page 13 of your report.
22 Just let me know when you're there. (Pause.)

23 Are we on the same page?

24 **A** Yes.

25 **Q** Now, you made a downward salary adjustment

1 **Q** Looking at the additional employee salary,
2 other wages adjustment that you did. That's -- I
3 believe, if you want to reference on your report,
4 it's on Page 13 of your report.

5 **A** Mr. Smith, can I clarify the previous
6 answer first?

7 **Q** Go ahead.

8 **A** So our report says we looked at the Encore
9 credit line between the period of 6/30/2014 to
10 12/31/2015. The average amount drawn on the line was
11 \$1,067,143, leaving approximately 3.9 to finance the
12 business.

13 **Q** And that was just average?

14 **A** That was an average.

15 **Q** Across the span of the entire duration that
16 we're looking at?

17 **A** Correct.

18 **Q** And not a monthly analysis, was it?

19 **A** No.

20 **Q** And do you understand that Encore's
21 business, especially interactive panel sales and just
22 the full business in general, it's very
23 (Indiscernible.)

24 **A** Correct.

25 **Q** And it has peak -- really high levels of

1 **Q** But you verified for me in your deposition
2 you actually didn't know what they were for?

3 **A** Correct.

4 **Q** How can you --

5 **A** And I -- also, at your deposition, I want
6 to make sure, I didn't bring any of my notebooks. I
7 wasn't instructed to bring my notebooks. So
8 basically, I could not refer to any notes. So in this
9 report, I have like six notebooks of information from
10 everything that we did, including statements of the
11 credit line and stuff like that. I couldn't refer to
12 it. But off the top of my head, I did not know.

13 **Q** In your report, you put a list of documents
14 you reviewed in your analysis?

15 **A** Correct.

16 **Q** You just referred to the credit line, some
17 credit line documents. Is that in your list?

18 **A** It might have been left off. Let me look to
19 be sure. (Reviewing.)

20 It was left off. But my report mentions
21 that we looked at the quarterly on the credit line. I
22 believe it does.

23 **Q** And that adjustment, this professional fee
24 adjustment, \$49,000 approximately?

25 **A** Yes.

1 deposition again and didn't adjust your report?

2 **A** No, I did not adjust my report.

3 **Q** And I believe you testified in your
4 deposition you didn't know how long Encore had to
5 borrow against accounts receivable?

6 **A** Right.

7 **Q** And you didn't -- so you didn't see it or
8 consider it or ask for it in doing your analysis, did
9 you?

10 **A** No.

11 **Q** Did you ask Encore about their collection
12 cycle when you did your analysis?

13 **A** No.

14 **Q** And I think we just established, you didn't
15 ask them about the cost of that credit line when you
16 did your analysis?

17 **A** No, I did not.

18 **Q** Do you not believe these items are actually
19 necessary in order to do that adjustment?

20 **A** I don't think they are material.

21 **Q** You mentioned professional fees earlier. I
22 believe -- didn't you assume that fees were related
23 to taxes, payroll, essentially, accounting expenses
24 is the way you characterized it?

25 **A** Correct.

1 **Q** Yes.

2 **A** No, I did not, but I do now.

3 **Q** Since learning that, have you changed the
4 calculation in your report?

5 **A** No.

6 **Q** I believe you testified in your deposition
7 you didn't know the cost of Encore, that Encore
8 incurred?

9 **A** It's three percent, annually.

10 **Q** That's another new fact you learned?

11 **A** Correct.

12 **Q** And did you adjust your report?

13 **A** We didn't think it was necessary to adjust
14 the report, and here is why. One is during the
15 largest period of sales that Clear Touch was making
16 and the highest purchases of costs of goods sold,
17 Encore had about \$3.5 million available on their
18 credit line.

19 But also, in a hypothetical world, those
20 profits that Encore would have been generating would
21 have created more cash, which would have lessened the
22 need for a financial statement. But if we had
23 borrowed the money, I figured out the interest was
24 about \$14,000.

25 **Q** That's something you learned after the

1 **A** I would like to look at the total financial
2 statements.

3 **Q** And you know just to reconcile -- first of
4 all, did you generate this?

5 **A** No, I did not.

6 **Q** Okay. That's something I truly didn't know.
7 Thank you. You mentioned factoring fees earlier. You
8 said that's one of the biggest adjustments that y'all
9 made in this case, right?

10 **A** Correct.

11 **Q** And I believe your testimony has been that
12 Encore had not incurred those factoring fees because
13 it had a \$5 million line of credit?

14 **A** Correct.

15 **Q** Now, I believe in your deposition, you said
16 you don't know how much of that line of credit was
17 available each month during the applicable time
18 frame, correct?

19 **A** At the time of my deposition, we had looked
20 at the financial statements on a quarterly basis, the
21 credit line availability only on a quarterly. We did
22 not look at a monthly.

23 **Q** Did you know how much of this line of
24 credit was available month to month?

25 **A** When I wrote the report?

1 they still would have had a loss. But again, it would
2 have lowered the loss, right? So the thing is we know
3 Encore sold this to their customers at a five percent
4 margin. That's, I believe, a fact in the case. We
5 also know that Clear Touch was marking that up. So
6 the additional margin would go to offset the
7 operating expenses. They had all of the sales efforts
8 to make these sales. I don't think there would be any
9 increase in operating expenses, no.

10 Q And you also have in your report and you
11 testified that year-end statements are more reliable
12 reflections of a company's financial -- financial
13 state.

14 A As a general rule, yes. We look for
15 year-end financials and also -- we always like to
16 look at the balance sheet too. So the income
17 statement doesn't mean a lot to me. I like balance
18 sheets.

19 Q This is just capturing a 14- or 15-month
20 time frame is not tied to the year end or anything
21 like that, right?

22 A Correct.

23 Q It would be much more reliable to look at
24 year end statements as the basis for Encore's
25 financial health and stability?

1 document is?

2 **A** It looks like a profit and loss for Encore.
3 I believe I saw it yesterday or Monday.

4 **Q** And I can pull that up here. Encore
5 Technology Statement of Operations that they
6 submitted yesterday. You've seen this document?

7 **A** Yes.

8 **Q** And it's a -- it is not like a profit and
9 loss type statement ---

10 **A** It is.

11 **Q** --- for the duration of Mr. Trask's
12 employment?

13 **A** Correct.

14 **Q** Now, did you not maintain in your loss
15 revenue calculation that the incremental sales costs
16 would have been only 10 percent of the gross margin?

17 **A** Yes.

18 **Q** And does this financial statement, the only
19 one the plaintiff has admitted -- has put out there
20 and shown to the jury, does this financial statement
21 so that that's the case?

22 **A** I think this is a very misleading question.
23 Let me explain something to you. Okay. They have a
24 loss. All we're saying is that they would have more
25 gross margin, okay. If they had more gross margin,

1 of business development. That is our assumption.

2 Q When you say "our" and you say "we" a lot,
3 I mean, you're talking about you and the client,
4 Encore management, who is paying you to give this
5 testimony today; is that right?

6 A That's me doing the report. Basically, you
7 have to make assumptions. The thing is the testimony
8 is that Mr. Trask is vice president of business
9 development for Encore and that he took this
10 opportunity and developed it himself. That's the
11 assumption. We don't eliminate any of the other
12 expenses that you're trying to tell us we did.

13 Q One second. I want to pull up Plaintiff's 7
14 here.

15 A Also, I want to clarify the "we." I have
16 seven employees. I have --

17 Q You work with other folks in your
18 accounting firm?

19 A Yes.

20 Q I understand that. Have you seen this --
21 you can look in front of you, Mr. Meilinger, if you
22 can --

23 A I can -- I can -- I can see.

24 Q Okay. Plaintiff's Exhibit 7, in case you
25 want to see it in front of you. Do you know what this

1 **A** Correct.

2 **Q** And so your assumption is Encore could do
3 what my client does, essentially, spending 90 percent
4 more of their time, money and effort promoting --
5 excuse me. Bad questions. So -- my client spending 90
6 percent more of their time, money and effort
7 promoting these products than Encore does?

8 **A** Correct.

9 **Q** So wouldn't Encore have to do more than
10 it's doing and you're saying it would have the same
11 level of marketing and turn overhead as --

12 **A** I don't think you understand my analysis.
13 Okay. So you're looking at the third analysis. I
14 didn't eliminate any marketing expense for Encore. I
15 didn't eliminate the majority of expenses. I'm trying
16 to explain to you and the jury there is -- 80 percent
17 of the eliminated expenses were factoring expenses
18 and costs of goods sold adjustments, as I explained.
19 Okay. There's \$260,000 of receivables on the books of
20 Clear Touch at the end of 12/31/2015 that were not
21 recognized as income. So basically, there's your
22 adjustment for the cost of goods sold, right? That's
23 the \$200,000. We used all the expenses. We assumed
24 that Mr. Trask would take the opportunity to his
25 employer and do his job as business -- vice president

1 interactive panel technology products?

2 **A** I don't know where that number came from.

3 **Q** So you don't know the answer to that?

4 **A** Well, my understanding was that the panels
5 were the next big thing. From Mr. Newnam and
6 Mr. Viola that, basically, that a product can turn
7 from a two percent product to a 20 to 25 percent
8 product, that it takes time, effort and money to
9 bring that product to market. And I think the
10 accusation is that -- that Encore put the money in,
11 they put the effort in, they paid the sales people.
12 They did everything Mr. Viola did, but then Mr. Trask
13 took the opportunity. Just because it was two percent
14 of sales does not mean they would not have taken
15 advantage of an opportunity for a product that will
16 quickly turn to 15 to 20 percent of sales.

17 **Q** I appreciate that. I think my question is a
18 little more narrow.

19 **A** Okay.

20 **Q** You understand Encore sells a large suite
21 of different technology products?

22 **A** Correct.

23 **Q** And you understand at least in 2015 only
24 five percent of that large product offering were
25 these panels, right?

1 **Q** Do you know how many trade shows they
2 attend a year?

3 **A** No.

4 **Q** Do you know how many trade shows Encore
5 attends a year?

6 **A** No.

7 **Q** And as we've been over earlier, you now
8 know earlier that Encore's business, only about five
9 percent of it, is represented by sales of interactive
10 panel technology?

11 **A** I don't think that's correct for 2016 but,
12 at the time of my deposition, I thought that was
13 correct.

14 **Q** We're looking at 2015.

15 **A** Okay.

16 **Q** 2015, is it your understanding that panel
17 sales represented less than five percent of Encore's
18 business?

19 **A** Yes, it is.

20 **Q** And do you, obviously, know that this
21 represented 100 percent of my client's business,
22 correct?

23 **A** Correct.

24 **Q** So less than a 10th of Encore's time at
25 these trade shows is presumably spent promoting

1 adjustment. The biggest adjustments, again, if you --
2 80 percent of the adjustments were for factoring fees
3 and for costs of goods sold that were previously
4 adjusted. There were some professional fees that we
5 adjusted that totaled about \$43,000, which consisted
6 of a \$13,000 payment to Mr. Trask and some legal fees
7 and different things like that.

8 Q And we'll get to those in a minute.

9 A All right.

10 Q I appreciate you doing that. You'll have an
11 opportunity to address them. Still, on the
12 adjustments we're talking about now about your
13 assumption that Encore has the capability and
14 capacity to do what my client does, do you know my
15 client's business?

16 A Do I know the inner workings of your
17 client's business model? No, but I know how most
18 businesses work like that. I mean, they source
19 products, they market products, and they sell
20 products.

21 Q So in a general sense, that's a fair
22 description and I'll agree with you. But do you know
23 how my client does those general things?

24 A I do not know how they mark their products,
25 no.

1 more, profitable than Clear Touch actually has been?

2 **A** There are certain add-backs that we made
3 that are disclosed in the report.

4 **Q** What is the total number of adjustments,
5 the bottom line figure that you adjusted to pump up
6 the alleged lost profits and the value of the
7 business opportunity damage in Table 3?

8 **A** We made approximately \$505,000 of
9 adjustments over a period of almost two and a half
10 years.

11 **Q** As we spoke about earlier, I believe it's
12 on Page 11 and 12 of your report if you want to refer
13 to it, one of the assumptions is Encore had and has
14 the capacity to handle the Clear Touch sales without
15 incurring the same costs as far as employees and
16 other expenses.

17 **A** Correct.

18 **Q** When you are doing the calculation, did you
19 know how many client -- how many people my client
20 employed in 2014?

21 **A** No, I did not.

22 **Q** Did you know how many people they employed
23 in 2015 when you did the calculation?

24 **A** No, I did not. But I would like to point
25 out that the payroll adjustment was a very tiny, tiny

1 **A** I don't necessarily agree with that, but...

2 **Q** Let's look at Calculation 3.

3 **A** Yes, sir.

4 **Q** Now, you alluded to assumptions made in
5 this one, and I want to go through some key ones with
6 you. You had to make a whole series of assumptions in
7 order to come up with these figures; is that fair?

8 **A** Yes.

9 **Q** First and foremost, you assume that
10 Mr. Trask violated the business opportunity clause,
11 correct?

12 **A** Correct.

13 **Q** And if the jury were to find he did not
14 violate that clause, then Table 3 goes away, doesn't
15 it?

16 **A** I don't think I can make that decision. I'm
17 not a lawyer.

18 **Q** Fair enough. It also assumed, like we
19 discussed earlier, that Encore would have taken the
20 Clear Touch opportunity, correct?

21 **A** Yes.

22 **Q** And your report contains a lot, so bear
23 with me. I believe it has -- the assumption is if
24 Encore had this business, it would -- it would --
25 excuse me -- it would have been at least, if not

1 **A** I think part of the damage calculation is
2 the assumption that Mr. Trask finally did his
3 non-compete and sold directly to a customer of
4 Encore. I think that's where the damages are coming
5 from.

6 **Q** And your assumption is that Encore could
7 meet whatever requirements Leon County would demand
8 before making those sales, correct?

9 **A** Correct.

10 **Q** And if all these assumptions are wrong or
11 somehow off, it affects your calculation, right?

12 **A** To a certain extent, it does. But again, I
13 think you're missing the point. The reason Leon
14 County Schools is on there is there was a non-compete
15 in place for a period of time. Then, basically, Leon
16 County was a customer of Encore, and Clear Touch took
17 the customer and sold to them directly.

18 **Q** The question is straightforward,
19 Mr. Meilinger. Does this not assume -- Leon County
20 sales assume that Encore could have and would have
21 made them?

22 **A** Yes.

23 **Q** Thank you. So it's true that if Encore
24 couldn't have made these sales, it's not a proper
25 element of damages, right?

1 already making the sales and that they could have
2 just bought it cheaper, yes.

3 Q Okay. Well, tell me how many people my
4 client employed in 2015.

5 A 2015, I think it got up to about 27
6 employees. Is that correct? I know at the end of --
7 or six or seven employees. I'm not sure.

8 Q So Encore incurred no additional expense in
9 dealing with 26 to 7 employees than my client in
10 2015?

11 A Again, we're -- this is -- you're looking
12 at the wrong calculation here. The second calculation
13 is just the sales made to Encore and one customer,
14 Leon County. It's not the entire sales for 2015. If
15 you look at the lost profit analysis, we deducted all
16 operating expenses, except for the ones we adjusted.

17 Q And the Leon County sales, the assumption
18 is that Encore could -- could have made those sales?

19 A Yes.

20 Q The assumption is the customer wanted to do
21 business with Encore still.

22 A Correct.

23 Q And it's an assumption that Encore would
24 meet the requirements that particular customer would
25 demand to make those sales.

1 deductions within your calculations, correct?

2 **A** Right.

3 **Q** Does that represent the company's net
4 profit at the end of the day?

5 **A** Again, for this analysis, we did not take
6 the operating expenses because the sales were made by
7 Encore. The assumption is that Mr. Trask would have
8 went to the management of Encore and provided them
9 the suppliers and they would have bought it. The
10 sales were already made. The costs was incurred by
11 Encore and reflected in Encore's financial
12 statements.

13 **Q** And the assumption is -- we go from 2013
14 through 2015.

15 **A** Correct.

16 **Q** The assumption you are necessarily making
17 is Encore could do the same thing my client did and
18 not incur the same costs they did all the way through
19 at least mid-October 2015?

20 **A** During this period of time, Encore had 70
21 to 100 employees, if my memory serves me correct.
22 They would have been able to facilitate that.

23 **Q** And that's an assumption you made based on
24 representations from Encore management, right?

25 **A** Based upon my knowledge that Encore was

1 Mr. Meilinger, this goes to the lost profits
2 calculations, correct?

3 A Correct.

4 Q And you have several numbers on this page.
5 It's not in evidence, so I'm not going to have you
6 read it in here. This talks about you considering
7 deducting operating -- my client's operating expenses
8 from this lost profit calculation?

9 A Correct.

10 Q And tell me why you did not deduct my
11 client's operating expenses.

12 A Because Encore made the sales. They had all
13 the expenses of the sales. The only difference that
14 would have affected Encore per my analysis was the
15 difference in buying it. If you could buy a product
16 for 95 cents on the dollar, you're going to make five
17 percent. If you do everything the same and you buy it
18 for 70 cents on the dollar, you're going to make
19 those many -- that many profits.

20 Q Now, what expenses of my client did you
21 look at and decide they shouldn't be put in here or
22 considered in what you labeled lost profits?

23 A We looked at the operating expenses for
24 2014 and 2015. We had the QuickBook financials.

25 Q And you just did not include those

1 and directly source these panels from the factory as
2 Clear Touch does?

3 **A** I believe that Encore buys stuff from the
4 factories and other resellers buy stuff from the
5 factories. So I don't think it's a complete change,
6 but yes, I think it's true that the assumption is
7 Encore would have bought directly from the Chinese
8 suppliers at 33 percent less than they were getting
9 it from Clear Touch. I do believe that's an
10 assumption.

11 **Q** And you said -- I believe you've been here
12 the past few days, right?

13 **A** Yes, sir.

14 **Q** And I think you probably knew this before,
15 but you certainly know now. Encore, to this day, does
16 not do that, do they?

17 **A** They buy the products from a different
18 vendor, yes. They buy it from a different supplier
19 than Clear Touch.

20 **Q** So the business model as far as interactive
21 panel products remains unchanged to this date,
22 correct?

23 **A** As of today, I don't know. As of the time
24 of this report, yes.

25 **Q** Looking over at Page 9 of your report,

1 **Q** Let's look at Calculation 2, if we can get
2 the summary sheet back up. And what's Calculation 2
3 again, Mr. Meilinger? Please remind the jury.

4 **A** Calculation 2 is the profits lost on sales
5 made to Encore and Encore customers by Clear Touch.

6 **Q** And this calculation assumes -- necessarily
7 assumes that Encore would have taken the Clear Touch
8 opportunity and become a manufacturer of these panel
9 products.

10 **A** No, it does not.

11 **Q** How so?

12 **A** One is Clear Touch is not a manufacturer.
13 There was no manufacturing taking place at any of the
14 facilities here in the U.S. The testimony I heard
15 yesterday was there's three manufacturers in the
16 world. This assumes that Mr. Trask took the vendors
17 that he found and took them to Encore so Encore could
18 utilize those vendors and buy at the same price that
19 Clear Touch was buying.

20 **Q** Okay. This would assume Encore would do the
21 same thing Clear Touch does and would be fair to call
22 them a supplier?

23 **A** Yes.

24 **Q** So this calculation necessarily assumes
25 that Encore would alter it's reseller business model

1 deposition that you did not know why the trade show
2 expenses increased in 2014?

3 **A** Yes, sir. I did.

4 **Q** In your report, and we're on the same page,
5 Page 7, I think.

6 **THE COURT:** Which Exhibit Number?

7 **MR. SMITH:** Sure. It's not admitted. It's
8 a Court's exhibit.

9 **BY MR. SMITH:**

10 **Q** So -- and you may not need to look at the
11 report, Mr. Meilinger. We talked about the 50 percent
12 discount that was applied to the trade show expenses.

13 **A** Correct.

14 **Q** And what is the basis of that 50 percent
15 discount?

16 **A** To lower the amount based upon our
17 discussions, but manage it to a reasonable amount, a
18 conservative amount.

19 **Q** And did you know when you did this
20 calculation that the panel business represented less
21 than five percent of Encore's overall business?

22 **A** I did not.

23 **Q** And you had not adjusted since you learned
24 that important fact, have you?

25 **A** I didn't think it needed to be adjusted.

1 here, correct?

2 **A** Correct. Trade show expenses went
3 significantly down in 2015.

4 **Q** And in your report, you noted an increase
5 in -- as a fact or an assumption to justify the
6 figure.

7 **A** It was an analysis that we did to see if
8 the information that Encore's management was giving
9 us was correct. The analysis showed that it was a
10 reasonable assumption.

11 **Q** Could you have actually looked at the trade
12 show expenses and determined who, in fact, booked
13 each one and is responsible for that?

14 **A** I guess we could have, yes.

15 **Q** And you didn't, did you?

16 **A** No.

17 **Q** Do you -- I think you testified in your
18 deposition you don't know why the trade show expenses
19 increased in 2014.

20 **A** It was explained to me that there was the
21 opportunity with the Clear Touch panels and there was
22 a lot of effort in getting that out to the market.

23 **Q** Is that a "yes" or a "no," Mr. Meilinger?

24 **A** Repeat the question.

25 **Q** Sure thing. Did you not testify in your

1 them up until April. Some of the trade shows in 2014
2 were booked way in advance.

3 **Q** Do you know who booked the trade shows for
4 2014, Mr. Meilinger?

5 **A** It's my belief, from my interview, that
6 Mr. Trask is responsible for getting the trade shows
7 in 2014.

8 **Q** If it's something you don't know, you're
9 assuming it?

10 **A** Yes.

11 **Q** Do you know the trade show booking cycle?

12 **A** I don't know the entire cycle. I just know
13 that they have to be booked several months in advance
14 or even, sometimes, a year in advance.

15 **Q** And the trade show expense in your report,
16 I believe represented another \$100,000 y'all were
17 trying to tack on to this Calculation 1?

18 **A** \$67,689.

19 **Q** I believe the trade show expense in 2014
20 was a little over \$100,000; is that correct?

21 **A** Correct. But you've got to subtract the
22 amount not for Clear Touch, then you've got to
23 subtract the 50 percent adjustment, so it's \$36,514.

24 **Q** Which is the biggest part of the trade show
25 expenses that the plaintiffs attempted to recover

1 testimony of Mr. Viola of where he met with Mr. Trask
2 at a trade show where Encore was paying the bill for
3 the trade show. We did not have any of that. But
4 based upon what I know now and based upon what I know
5 then, I think the 50 percent was a reasonable
6 assumption, yes.

7 **Q** I appreciate that answer. In your
8 deposition, I mean, do you -- let me ask you this
9 because -- you've educated yourself more since your
10 deposition recently; is that fair?

11 **A** I'm more aware of the facts, yes, sir.

12 **Q** And when you did this figure was what, a
13 few months prior to when I deposed you, at least?

14 **A** The initial expert report was issued
15 February 28th of 2017. I don't remember when my
16 deposition was. I believe it was August of 2017.

17 **Q** Yes. So the figure remained the same,
18 correct?

19 **A** Correct.

20 **Q** And do you know today who booked trade
21 shows during 2014? Do you know who booked the trade
22 shows in 2014?

23 **A** I don't know exactly who booked all the
24 trade shows, but I do believe Mr. Trask is
25 responsible for booking them. And he were to book

1 you off.

2 **MR. MEILINGER:** But it is -- my
3 understanding, we looked at e-mails and
4 different things after my deposition and,
5 basically, a lot of these trade expenses --
6 trade show expenses are booked in advance. In
7 fact, one of the largest trade shows in 2015,
8 there's an e-mail chain booking it in 2014
9 before Mr. Trask left.

10 **BY MR. SMITH:**

11 **Q** So it's one trade show. And you did this
12 after my questioning on this in your deposition,
13 right?

14 **A** Well, I think the assumption we used -- I
15 want to tell the jury about the process we did,
16 again, for the trade show expenses. First, we looked
17 at all the detail for the trade show expenses. Then,
18 by interviewing management and Mr. Russell, we
19 determined what trade show expenses were not clearly
20 related to Encore. Then, we only took 50 percent of
21 the trade show expenses as this is the amount of
22 expenses that were analyzed.

23 And I think, you know, again, at the time
24 of my deposition, we did not have the stipulation by
25 Mr. Trask of fiduciary duty. We did not have the

1 **Q** And is this -- this is Plaintiff's
2 Exhibit 10(B). If you want to look into one of -- I'm
3 not sure which book you have right in front of you,
4 Mr. Meilinger.

5 **A** I have the exhibits.

6 **Q** This is Plaintiff's 10(B). Is this the
7 reflection of the calculation you did for the trade
8 show expense figure?

9 **A** Yes.

10 **Q** Well, I want to look -- let me get to the
11 right page. Now, it calculates expense in your
12 report. Did you not note an increase in trade show
13 expenses in 2007 -- excuse me -- 2014?

14 **A** As part of the analysis, we note that the
15 trade show expenses increased in 2014.

16 **Q** And you are aware, now, that Mr. Trask was
17 terminated from Encore in April of 2014, correct?

18 **A** Yes.

19 **Q** So you are aware he wasn't there for 8
20 months out of the 12 in 2014, correct?

21 **A** Correct, but it --

22 **Q** And then in your deposition --

23 **MR. ENGLISH:** Your Honor, can he finish
24 his answer?

25 **MR. SMITH:** Sorry. I didn't mean to cut

1 **Q** So without looking at the detriment to
2 Encore, how is this a measure of the plaintiff's
3 damages?

4 **A** Well, in damages, you have to -- you have
5 to rely on some type of reasonable accounting
6 certainty. The thing is you could look at the
7 damages, but the clear measure of damages in this
8 case is actually the profits that were diverted from
9 the business and the business opportunity that was
10 lost..

11 **Q** Mr. Meilinger, I appreciate you going on
12 into these other calculations. We're staying in
13 Calculation 1 right now. Okay. So does Calculation 1
14 have anything to do with business opportunity lost?

15 **A** No.

16 **Q** Okay. Now, I want to talk to you about the
17 trade show and expenses that made up this Calculation
18 1. If you need to refer to your report, obviously,
19 you do that. We'll communicate so we are all clearly
20 on the same page; is that fair?

21 **A** Yes, sir.

22 **Q** All right. I appreciate that. Now, added
23 into that Table 1 figure was trade show expenses that
24 you calculated, correct?

25 **A** Correct.

1 that you've got, you just relied upon it as being
2 true without doing any objective analysis yourself to
3 verify it.

4 **A** Yes.

5 **Q** Now, I think we've testified to this. I
6 just want to be clear real quick, okay. Your analysis
7 where you came up with Table 1 here, Calculation 1?

8 **A** Yes, sir.

9 **Q** You testified in your deposition that the
10 benefits to Encore just were not considered?

11 **A** For the calculation on Number 1 is a direct
12 cost analysis. The benefits and the detriments were
13 not considered. Okay. So you're saying there's some
14 benefit, and I'm saying to get the other leg of that
15 analysis, you have to look at the detriment. What was
16 the opportunity cost lost by Encore because this
17 employee, instead of working in their best interest,
18 was working in his best interest and in the interest
19 of Clear Touch?

20 **Q** I appreciate that. But, I think, then you
21 said yes. Is it fair to say you didn't look at the
22 detriment or the benefit?

23 **A** No.

24 **Q** That wasn't part of this analysis at all?

25 **A** It was not part of this analysis.

1 from discussing -- you know, it's hard to measure
2 Mr. Trask's results while he was at Encore because
3 everything he did, according to management, was
4 related to Clear Touch. You can see the efforts he
5 spent on Clear Touch by the financial performance of
6 Clear Touch. So the facts made sense to me to use
7 that assumption.

8 Q My question was do you know how they
9 calculated the percentages that you assumed and
10 relied upon in making -- collecting Table 1?

11 A I don't.

12 Q So just an assumption, as their expert, you
13 had to make purely based on the representations from
14 the people who are going to benefit from any kind of
15 damage award based on that calculation?

16 A It was an assumption -- it's a -- experts
17 use assumptions all the time in the field.

18 Q Sure.

19 A It was clearly outlined in my report and
20 again the trier of fact can determine if that's a
21 reasonable percentage based upon the evidence.

22 Q You've got -- as an expert, to be fair,
23 you've got to rely on assumptions?

24 A Yes.

25 Q I'm just making clear that that assumption

1 for which y'all are allowed to try to seek recovery
2 here, just benefited Clear Touch and only Clear
3 Touch?

4 **A** Based on interviews with management,
5 basically most of -- pretty much all of
6 Mr. Higginbotham's sales were with the panels. That's
7 why they worked to transfer his employment to Clear
8 Touch. They made a reasonable sense to use that
9 percentage, yes.

10 **Q** So that's a yes.

11 **A** Uh-huh.

12 **Q** So the converse of that is I asked you a
13 minute ago if Mr. Trask is at respectively 10 and 5
14 percent, Mr. Gallant and Higginbotham's time, the
15 only activity they did the entire time they worked at
16 Encore benefited Encore?

17 **A** Correct.

18 **Q** And you got those numbers from Encore
19 management, didn't you, the percentages?

20 **A** The percentages? Originally by interviewing
21 management, we came up with those numbers and used
22 those.

23 **Q** And do you know how they came up with those
24 figures?

25 **A** Just from the facts of the case and just

1 lost opportunities to the sales they should have made
2 if someone that was being paid \$175,000 a year and
3 they received a \$25,000 bonus was working in their
4 best interest. We did not take out the sales from
5 Clear Touch to -- from Encore of Clear Touch products
6 from that analysis, no.

7 Q Is that a "no" to my question,
8 Mr. Meilinger?

9 A That was a no, yes, sir.

10 Q Thank you. Saying that there was a
11 percentage that y'all utilized in your report to come
12 up with a figure for Mr. Gallant as well, correct?

13 A Correct.

14 Q I believe Mr. Gallant, you utilized 90
15 percent of his time was dedicated solely and only
16 exclusively to the benefit of Clear Touch, correct?

17 A Right. For the time -- in the report, for
18 the time that he actually spent at Encore after he
19 had signed a non-disclosure agreement acknowledging
20 that Mr. Trask owned Clear Touch and he would not
21 disclose that fact to his employer. Yes, we did use
22 90 percent.

23 Q And then for Mr. Higginbotham, you all went
24 back up to 95 percent of his time and said everything
25 Jimmy Higginbotham did at Encore, 95 percent of it,

1 time. So at the time of our deposition, I used 95
2 percent numbers from interviewing Mr. Newnam, his
3 CFO, and coming up and saying this is a reasonable
4 percentage.

5 But based upon the facts of the case and
6 the testimony that I've heard, I feel that the 95
7 percent is reasonable. Again, the jury will be the
8 trier of facts. If they think that 95 percent is not
9 reasonable, they can lower that. The math is very
10 simple.

11 Q I appreciate the explanation. Let's talk
12 about it a little bit more. That assumption is that
13 only five percent of everything Mr. Trask did while
14 he was at Encore benefited Encore?

15 A Correct.

16 Q And don't you have to assume then that
17 Clear Touch sales didn't benefit Encore?

18 A There is an argument that the sales were at
19 such a low margin that they actually didn't benefit.
20 A five percent margin does not generate a lot of
21 profit. But the thing is -- is -- is I think what
22 you're misconstruing on this analysis is -- is that
23 you're saying we should take the, I guess, the sales
24 to Clear Touch and back them out of that costs. But
25 to do that, you would also have to take out Encore's

1 **A** Yes, sir. That's correct.

2 **Q** Now, I want to talk to you about these
3 percentages, because you did not do 100 percent of
4 Mr. Trask pay.

5 **A** Correct.

6 **Q** And you assumed that 95 percent of his
7 activities were to the benefit of Clear Touch,
8 correct?

9 **A** Correct.

10 **Q** And your assumption was 95 percent of his
11 activities solely benefited Clear Touch, correct?

12 **A** 95 percent of his activities benefited
13 Clear Touch, yes.

14 **Q** My question is, your assumption, as you
15 agreed with me in your deposition testimony, is that
16 95 percent of Mr. Trask's activities only benefited
17 Clear Touch; is that right?

18 **A** That's correct. But I would like to point
19 out a couple of things that have changed since my
20 deposition. The first thing is your client's
21 stipulations of breach of trust and breach of
22 fiduciary duty. The second thing is I had never heard
23 Mr. Viola's testimony about Mr. Trask at the trade
24 shows and the efforts he was making to Clear Touch.
25 I'd also never heard Mr. Trask deposition at that

1 have in your report.

2 A Yes, sir.

3 Q And that is what you've titled the direct
4 cost incurred by Encore, correct?

5 A It is.

6 Q And as you showed the jury --
7 If we can pull up the summary.
8 -- it's this top Table 1 figure, right?

9 A Correct.

10 Q And that is made up of Mr. Trask paying
11 benefits 100 percent?

12 A Yes, sir.

13 Q Excuse me. That's not quite right. I'll
14 clarify. That's made up of a large percentage -- and
15 we will go over this percentage -- this made up a
16 large percentage of Mr. Trask's paid benefits he
17 received while at Encore, correct?

18 A Yes.

19 Q And also added into that is a percentage of
20 Mr. Gallant's pay and Mr. Higginbotham's pay while
21 they were at Encore, correct?

22 A Yes, sir.

23 Q And then you've got a second item there,
24 the trade show and related costs. That's the trade
25 show expenses, right?

1 will, please answer any questions that Mr. Smith has
2 for you.

3 **THE COURT:** Just one second, Mr. Smith. I
4 need to take about a five-minute break, if we
5 can, and then we'll come back for
6 cross-examination.

7 Go back to your jury room please,
8 Mr. Foreman.

9 (Jury exits at approximately 10:38 a.m.)

10 (The Court goes off the record at approximately
11 10:38 a.m.)

12 (The Court goes on the record at approximately
13 10:47 a.m.)

14 **THE COURT:** Mr. Smith, you're ready?

15 **MR. SMITH:** Yes, Your Honor.

16 **THE COURT:** All right. Would you bring the
17 jury in please?

18 (Jury enters at approximately 10:48 a.m.)

19 **THE COURT:** Okay. Mr. Smith.

20 **MR. SMITH:** Thank you, Your Honor.

21 **CROSS-EXAMINATION**

22 **BY MR. SMITH:**

23 **Q** Good morning, still, Mr. Meilinger.

24 **A** Morning.

25 **Q** Let's talk about the first calculation you

1 through only these three employees and Clear Touch.
2 Then the second one is the lost profits that if the
3 vendors had been disclosed to them, this is how much
4 money they would have made just selling the products
5 to their customers. The third one is if the business
6 opportunity had been given to them and they had taken
7 the business opportunity, this is how much it would
8 have been worth to them.

9 Q So of these calculations, Mr. Meilinger,
10 what would be the fullest measure of damages to
11 Encore?

12 A \$5,536,254.

13 Q All right. And then if the jury just
14 believes that the entire Clear Touch business was not
15 an opportunity for Encore, but Encore should just get
16 the profits on the -- if it had bought directly from
17 the suppliers and made the Leon County sales, what
18 would those lost profits be?

19 A \$1,100,306.

20 Q And then if the jury only awards the wages
21 that were paid to the Clear Touch employees who
22 became -- the Encore employees who became Clear Touch
23 employees, what would that figure be?

24 A \$488,041.

25 Q Okay. Thank you, Mr. Meilinger. If you

1 calculation for the value of Clear Touch relate to
2 each other.

3 **A** Well, these are alternative calculations.
4 For example, if Encore had been given the business
5 opportunity, they would have continued to pay
6 Mr. Trask, they would have continued to pay
7 Mr. Higginbotham. So you would not take the 488,000
8 and add it to the \$5,536,254.

9 On the second one, again, the damages for
10 the second one are included in the damages for the
11 third one. So, you would not add the \$5,536,254 to
12 the 1.1 million. All the profits that were lost are
13 in this calculation too. It would be -- it would be a
14 double -- it would be duplicative if you added those
15 together.

16 **Q** Let me just clarify that point. Are you
17 saying the lost profits in Calculation 2 are included
18 in Number 3?

19 **A** Yes, sir.

20 **Q** Please keep -- then describe how these
21 other calculations relate to each other.

22 **A** So the lost profits, the second analysis,
23 you would not add the second analysis to the first
24 analysis. So basically, the first analysis is a
25 direct cost of the hard costs that Encore invested

1 future for Clear Touch. So basically, significantly.

2 Q So you were more conservative or liberal?

3 A It's a more conservative analysis.

4 Q Now, if you will, look at Plaintiff's
5 Exhibit 10(H), which is a -- I think a loose sheet in
6 front of you.

7 A That might be it. I'll find it. I think I
8 see it.

9 Q Is this a summary of all of your damage
10 calculations that you just described?

11 A Yes, it is.

12 MR. ENGLISH: Your Honor, we'd ask that
13 Plaintiff's Exhibit 10(H), be admitted into
14 evidence.

15 THE COURT: All right. Subject to prior
16 objection and by Court's ruling, it is
17 admitted.

18 (Plaintiff's Exhibit 10(H) is admitted into the
19 record.)

20 BY MR. ENGLISH:

21 Q Mr. Meilinger, can you explain to the jury
22 how these three different calculations, the direct
23 cost involved and the wages and trade show, the
24 second one for lost profits if Encore had been able
25 to buy directly from the suppliers and the third

1 **A** The loss of the Clear Touch business
2 opportunity is \$5,536,254.

3 **Q** Now, if you'll look on Plaintiff's
4 Exhibit 10(J) beginning on the bottom of Page 16
5 going over to Page 17, do you also do an alternative
6 calculation to test the reasonableness of this value?

7 **A** Yes, I did.

8 **Q** Will you explain to the jury what you did
9 in that alternative calculation?

10 **A** Instead of stopping at 12/31/2015, what we
11 did -- we eliminated the business value, but we just
12 calculated the lost profits that if Encore was
13 continually to run the business through 12/31/16. And
14 just using a two percent growth rate, a 27.79
15 capitalization rate, we took three more years of
16 those profits, just three more years -- so we went
17 2017, 2018 and 2019 -- and we came back to the
18 present value of that number. It calculated at a
19 total of 7,798,632.

20 **Q** So the way you valued the Clear Touch
21 business, is that -- how does that compare as far as
22 being conservative or liberal if you had just
23 continued to calculate lost profits after 12/31/2015?

24 **A** Well, the valuation for 12/31/2015 was
25 significantly lower than if we just went into the

1 Your Honor. I anticipated this fight as, I
2 think, everybody did. That's the only reason we
3 designated Charlie Alford. Dr. Alford is going
4 to sit here and testify, and I don't intend to
5 offer to offer his report in at all because he
6 can testify to its content.

7 **THE COURT:** All right. I'm going to make
8 this 10(J) a court exhibit. Okay, sir?

9 **MR. ENGLISH:** Yes, sir.

10 **THE COURT:** I'm just going to sustain the
11 objection. If you change your minds and
12 stipulate to its admissibility, then it will be
13 made an exhibit. Otherwise, it's not
14 admissible.

15 **MR. SMITH:** Thank you, Your Honor.

16 **THE COURT:** You ready to proceed?

17 **MR. ENGLISH:** Yes, Your Honor.

18 **THE COURT:** Would you bring the jury in?
19 (Jury enters at approximately 10:31 a.m.)

20 **MR. ENGLISH:** If we can get 10(E) back up.

21 **BY MR. ENGLISH:**

22 **Q** Mr. Meilinger, we were talking about the
23 value of the business opportunity of Clear Touch as a
24 whole. What did you say your value of the loss of
25 Clear Touch business opportunity is?

1 **THE COURT:** You know, with that one figure
2 under reservation. But again, I haven't been
3 through this report. But clearly the cases say
4 that while an expert has a right to use hearsay
5 or non-admissible information in formulating
6 his opinions, you still have to establish the
7 admissibility of all the information before it
8 comes in, right?

9 **MR. ENGLISH:** Yes, sir. And they proposed
10 their expert report coming in too. And so a lot
11 of trials, both sides put in their expert
12 reports.

13 **THE COURT:** Well, I understand.

14 **MR. ENGLISH:** Yeah.

15 **THE COURT:** If y'all can agree to it, I'm
16 fine.

17 **MR. ENGLISH:** Yeah.

18 **THE COURT:** If you can't, then I'm going
19 to sustain the objection based on the hearsay
20 rules.

21 **MR. ENGLISH:** Okay.

22 **THE COURT:** Of course, you know that's
23 coming back to you down the line.

24 **MR. SMITH:** The reason we designated was
25 in case I was unsuccessful in this argument,

1 considerations, it very well may be. I'm not
2 saying it is. I just want to give it some
3 thought. If you have any kind of authority for
4 me, one side or the other, I'm letting it in
5 with the reservation that I might strike it
6 out. Okay. Understand me. But go ahead, I
7 hadn't let you speak.

8 **MR. SMITH:** Sure. Sure. There's several
9 problems with the report. Let's take the
10 headline one first.

11 **THE COURT:** Okay.

12 **MR. SMITH:** Mr. Meilinger is here. He's
13 entitled to testify to the contents of his
14 report like he's doing. But an expert's report
15 in themself is hearsay. It just is. They are
16 allowed to rely on hearsay, allowed to offer an
17 opinion based on it, but you are not allowed to
18 enter hearsay through an expert report.

19 **THE COURT:** I agree 100 percent and there
20 are cases to that effect. So each one of these
21 documents, if you want it admitted, you have to
22 show me why they don't violate -- they're
23 admissible under the rules of evidence. Okay.
24 You've got your summaries into evidence.

25 **MR. ENGLISH:** Yes, sir.

1 you're arguing. I'm going to let him testify to
2 it. I may disallow it. I'm not saying I am. I
3 just going to give it some further thought.
4 Now, what are your objection to 10(J)?

5 **MR. SMITH:** Sure, on the point where you
6 were on just now ---

7 **THE COURT:** Sure.

8 **MR. SMITH:** --- I wholeheartedly agree
9 with the Court. This is double dipping in a big
10 way. This is we want all your profits and we
11 want you to pay us another \$3.9 million for
12 your business. It's one or the other.

13 **THE COURT:** Well, I'm not totally
14 convinced you're right either. I think it's
15 clear that these interactive panels were
16 something that the plaintiff was clearly
17 pursuing and pursuing with vigor. Your client
18 was supposed to be helping with that regard.
19 And a point by Mr. English, you just don't drop
20 the company off the face of the earth at this
21 point in time because it's there. It's got some
22 value to it.

23 You said -- I think you told me that 100
24 percent of his business was in these
25 interactive panels. So with that -- those

1 first one, two, three, four lines of figures
2 are adjusted profits that would have been
3 earned by the plaintiff had the business
4 opportunities been presented to them.

5 **MR. ENGLISH:** Correct.

6 **THE COURT:** And I understand those. But
7 then you go further and say, Clear Touch, based
8 on these profits, based on my rate of 24
9 whatever it is of \$3.9 million, I'm having a
10 problem figuring how you are allowed to take
11 the profits away and then turn around and say
12 the business was valued at this much and that's
13 added to our damages as well. It may just be my
14 lack of sophistication. It seems like you're
15 claiming things you're not entitled to.

16 **MR. ENGLISH:** I would say under the
17 business opportunity clause, our argument to
18 the jury, and I think the jury could believe,
19 we are entitled to the Clear Touch business. So
20 if you were to just stop at 12/31/15 with the
21 profits, that would be almost like saying Clear
22 Touch is -- all of a sudden goes bankrupt and
23 is worth nothing. But that is, theoretically,
24 not the right way to look at it because --

25 **THE COURT:** No, I -- I -- I see what

1 you are assigning \$3.9 million as being
2 properly recoverable. How can you get that --
3 assuming that all these profits went to the
4 plaintiff, does that not end the story right
5 there?

6 **MR. ENGLISH:** Well, the way he's done it,
7 what he --

8 **THE COURT:** I understand -- I think I
9 understand what he's done. He's just saying
10 that based on these profits, this is what the
11 value of this business is over here. But I
12 don't see how that's a proper amount for
13 recovery in this case. Profits, I clearly
14 understand.

15 **MR. ENGLISH:** The thing is, profits, of
16 course, would go -- if Encore owned Clear
17 Touch, the profits would go on indefinitely.

18 **THE COURT:** Well, you cut it off at
19 12/31/15.

20 **MR. ENGLISH:** And that's what this
21 calculation does.

22 **THE COURT:** Well, I understand that. What
23 I'm asking -- that's not -- and I may not be
24 very clear about it. But if you look at 10(E),
25 and that's what we have up here, I think. The

1 them. They would have the profits. And then at the
2 bottom is the value that we determined what the
3 business was worth at \$3.9 million. When you add
4 those totals, you get a total lost profits of
5 \$5,536,254.

6 **Q** Are all the details of these calculations,
7 Mr. Meilinger, contained in your expert report that
8 is marked as Plaintiff's Exhibit 10(J)?

9 **A** Yes, sir.

10 **MR. ENGLISH:** Your Honor, we'd ask that
11 Plaintiff's Exhibit 10(J) be admitted into
12 evidence.

13 **MR. SMITH:** I have several objections to
14 that, Your Honor.

15 **THE COURT:** All right. Bear with us. If
16 you will, go back to the jury room please.
17 (Jury exits at approximately 10:23 a.m.)

18 **THE COURT:** I have a couple of questions
19 myself before I hear from you.

20 **MR. SMITH:** Sure.

21 **THE COURT:** Now, I clearly understand
22 claiming profits that would have been earned by
23 the plaintiff if the opportunity for these
24 sales would have been given to them. I don't
25 quite follow the business valuation figure that

1 the value. So we chose 25.79. Then we subjected the
2 gross rate of three percent, which gave us what we
3 call the "discount rate" of 22.79. You -- three
4 percent is a conservative approach rate, especially
5 when you look at the company. The company grew about
6 100 percent between 2015 and '16. Inflation is about
7 two percent. Then we take that capitalization rate of
8 22.79, we divide it into the earnings after taxes of
9 approximately \$880,000. We came up with a value for
10 the business of \$3.9 million.

11 Q And if you look on Plaintiff's
12 Exhibit 10(E), does that summarize your calculations?

13 A Yes, it does.

14 MR. ENGLISH: Your Honor, we'd ask that
15 Plaintiff's Exhibit 10(E) be admitted into
16 evidence.

17 THE COURT: It's admitted.

18 (Plaintiff's Exhibit 10(E) is admitted into the
19 record.)

20 BY MR. ENGLISH:

21 Q If you will look at 10(E), does that
22 describe the -- well, what do those -- each row
23 describe?

24 A Each row is the profits that we calculated
25 Encore would have made if the business was brought to

1 certain adjustments to the financial statements under
2 the theory that Encore owned it and they would not be
3 subject to -- factoring fees was the biggest
4 adjustment. And then we also adjusted the cost of
5 goods sold to 33 percent because there were some
6 large fluctuations in the cost of goods sold account.

7 And then also they were on the cash method
8 of accounting. So when we adjusted those financial
9 statements, we come up with what we call the
10 "normalized profit." This is what Encore would have
11 made if they owned a business. And then based upon
12 that, we valued the business as of 12/31/2015.

13 Q Explain to the jury how you value a
14 business.

15 A Well, the method we used to value this
16 business is what we call the "capitalization of
17 earnings method." The capitalization of earnings
18 method is where the first thing you do is you
19 determine what rate you want to use to capitalize the
20 earnings. So theoretically, you go out and you look
21 at the market and you determine the interest rate an
22 investor would require to invest in this company. We
23 chose an interest rate of 25.79, which is very high.

24 To give you guys an idea of capitalization
25 rate, the higher the capitalization rate, the lower

1 **Q** Is that more or less conservative than
2 going on to 2016 and 2017?

3 **MR. SMITH:** Objection, Your Honor.
4 Leading.

5 **MR. MEILINGER:** It would be --

6 **THE COURT:** Don't answer.

7 **MR. MEILINGER:** Oh, sorry. Sorry.

8 **THE COURT:** Rephrase your question please.

9 **BY MR. ENGLISH:**

10 **Q** How conservative or liberal is that
11 approach?

12 **A** It's an approach because, you know, when
13 you're calculating damages, theoretically, the
14 damages would go on -- could go on forever. Now,
15 because, theoretically, if the opportunity was
16 brought to Encore, they would still be getting the
17 benefits from the opportunity. So we chose 12/31/2015
18 as the date to closed off the lost profits and
19 calculated what that business was worth at that time.

20 **Q** And then explain to the jury how you did
21 these calculations.

22 **A** Well, the first thing we did is, we went
23 through the financial records of Clear Touch.
24 Basically, the tax returns, the financial statements,
25 we analyze those. As discussed before, we made

1 that I have an idea what he's talking about, I
2 hear what you're saying, but I'm going to
3 overrule your objection.

4 **MR. SMITH:** Thank you, Your Honor.

5 **THE COURT:** Yes, sir.

6 Bring the jury back in.

7 (Jury enters at approximately 10:18 a.m.)

8 **THE COURT:** Mr. English.

9 **BY MR. ENGLISH:**

10 **Q** Mr. Meilinger, I was asking you if you
11 assume that Clear Touch, the entire business of Clear
12 Touch, was a business opportunity that belonged to
13 Encore and you make that assumption, you have valued
14 the business of Clear Touch through December 31 of
15 2015; is that right?

16 **A** Yes, sir. And to clarify what we actually
17 did is, we valued the profits; we took the profits
18 that Clear Touch made during the life of the company
19 up until 12/31/2015, then we valued the company as of
20 12/31/2015.

21 **Q** Assuming that if Encore -- if that were
22 Encore business opportunity, that's what Encore would
23 have made through 2015?

24 **A** Right. That's what the business was worth
25 as of 12/31/2015 too.

1 figures?

2 **MR. ENGLISH:** No, sir.

3 **THE COURT:** How are they different?

4 **MR. ENGLISH:** Because the direct purchases
5 figure only looks at the sales that Encore
6 made. It doesn't look at the sales and profits
7 that Clear Touch made. So if the business
8 opportunity was more than just being able to
9 buy directly from the suppliers, but the
10 business opportunity was to have the Clear
11 Touch business, sort of like Mr. Viola said he
12 did or could have done.

13 **THE COURT:** Did Clear Touch only do
14 interactive panels?

15 **MR. SMITH:** Yes, sir. That's 100 percent
16 of the business, Your Honor.

17 **THE COURT:** 100 percent of the business.

18 **MR. SMITH:** This is a theory that they
19 should have us pay them for our business. At
20 the end of the day, that's what it is.

21 **THE COURT:** Right.

22 **MR. SMITH:** I think it's -- it should be
23 an alternative calculation, not a pile on with
24 the lost profits and everything too.

25 **THE COURT:** Well, I think that it's -- now

1 more information from him, but I'm just right
2 now not sure what he's basing these figures on,
3 so I don't have a basis to analyze your
4 objection.

5 **MR. ENGLISH:** I'm trying to -- I guess I'm
6 starting with the big picture and then trying
7 to get him to explain all the details. That's
8 what I'm trying to go through.

9 **THE COURT:** Sure.

10 **MR. ENGLISH:** But he's basically
11 explaining how he valued the business of Clear
12 Touch. The business of -- I asked him to assume
13 that if the jury believes that the business of
14 Clear Touch was the business opportunity that
15 Encore should have had, what is that worth, and
16 just explain how he calculated that. It's a
17 business valuation of Clear Touch.

18 **THE COURT:** I got you. What's -- this is
19 because of my lack of sophistication, but what
20 is the difference between the business
21 valuation of Clear Touch under the figures and
22 the damages alleged from the direct purchases
23 from the supplier?

24 **MR. ENGLISH:** Right.

25 **THE COURT:** Are those not the same

1 that this is something else we need to talk
2 about.

3 **THE COURT:** All right. Mr. Foreman.

4 (Jury exits at approximately 10:13 a.m.)

5 **MR. SMITH:** I'm looking at Page 13 where
6 Mr. English just referenced. I assume the
7 Court's got that there in front of him. Looking
8 down at that chart now, not only do we have the
9 same objection we had earlier with the 4/25/15
10 to the end of October, or 10/10/15, that's what
11 we talked about earlier but, now, we're going
12 all the way through the end of 2015. Reseller
13 agreements done. No relationship. They are
14 reaching for another couple of \$100,000 through
15 the end of 2015 just in this chart alone.

16 **MR. ENGLISH:** This is a calculation of the
17 business opportunity clause under the contract
18 and what the business opportunity -- the value
19 would have been to Encore. So Mr. Meilinger has
20 calculated that through the end of 2015.

21 **THE COURT:** Let me ask you, under this
22 Business Opportunities, as you captioned it
23 under clauses, what are the factors that he's
24 looking at. I'm having a little difficulty
25 following this myself. It may be clear with

1 normalize the margin for that to 33 percent. Those
2 were the two largest adjustments that we made.
3 Overall, the company was very profitable to start
4 with.

5 **Q** Now, are the adjustments you made the kind
6 of adjustments that experts in the field of business
7 valuation normally make?

8 **A** Yes, sir.

9 **Q** Now, in front of you is Plaintiff's
10 Exhibit 10(J). That's a loose document. It's under
11 your -- in front, under your book. You see it?

12 **A** Yes.

13 **Q** 10(J)?

14 **A** Yes.

15 **Q** What is that document?

16 **A** This is my expert report.

17 **Q** If you will, look on Page 13. As part of
18 valuing Clear Touch, did you calculate the profits
19 Encore would have made from the time Mr. Trask was an
20 employee of Encore through 2015?

21 **A** Yes, sir. I did.

22 **Q** How much did you calculate?

23 **A** \$1,636,254.

24 **Q** And then --

25 **MR. SMITH:** Your Honor, I object. I think

1 Basically, Clear Touch started without a
2 lot of capital. So what they would do -- one of the
3 things they would do is they would sell their
4 receivables to a factoring company and the factoring
5 company would charge them a significant amount of
6 money. What we did is we looked at Encore's financial
7 statements and then we interviewed management and we
8 determined that management had a \$5,000,000 line of
9 credit at about three percent interest. During the
10 terms of this -- of this event occurring, they had
11 anywhere from 1.5 million to about \$5 million
12 available on this line of credit, so we eliminated
13 the factoring expenses.

14 Another thing we did is -- it's really
15 important to understand that the financials for Clear
16 Touch are completed -- that were turned over to us --
17 are on the cash method of accounting. The cash method
18 of accounting doesn't truly recognize the accounts
19 receivable or doesn't truly recognize accounts
20 payable. There was a lot of fluctuations in the cost
21 of goods sold.

22 For example, theoretically, if I -- if I'm
23 -- when I'm buying items, I should never have cost of
24 goods sold that are greater than my sales because I
25 am buying at less than I'm selling for. So we

1 **Q** All right. Now, let me refer you in the big
2 book to Plaintiff's Exhibit Number 2, the second
3 page, the business opportunity clause.

4 **A** Yes, sir.

5 **Q** If you assume that the Clear Touch business
6 was a business opportunity that Mr. Trask had an
7 obligation to give to Encore, do you have an opinion
8 to a reasonable degree of accounting certainty as to
9 the value of business that Encore lost as a result of
10 not having Clear Touch business?

11 **A** Yes, sir. I do.

12 **Q** And how much is that?

13 **A** \$5,536,254.

14 **Q** Now, let me show you what we've marked as
15 Plaintiff's Exhibit Number 10(E). Can you explain to
16 the jury how you went about calculating the value of
17 the lost business opportunity to Encore.

18 **A** Well, the first thing we did is we looked
19 at the actual financial statements for Clear Touch
20 during a period of time from the start -- from
21 2/13/2013 til 12/31/2015. And then we normalize those
22 financial statements for adjustments that we felt
23 Encore would not have to pay. There's several
24 adjustments, but the biggest adjustment was factoring
25 fees.

1 statements. And then based upon that, we came up with
2 the profit margin that Clear Touch was making on
3 those sales.

4 Q Now, let me show you what we marked in the
5 big book as Plaintiff's Exhibit 10(D).

6 A 10(D). Yes.

7 Q Is that a summary of your calculation of
8 the lost profits on Leon County sales?

9 A It is.

10 MR. ENGLISH: Your Honor, we'd ask that
11 Plaintiff's Exhibit 10(D) be admitted in
12 evidence.

13 THE COURT: Subject to prior ruling,
14 admitted.

15 (Plaintiff's Exhibit 10(D) is admitted into the
16 record.)

17 BY MR. ENGLISH:

18 Q Okay. Now, you said that the total was how
19 much?

20 A \$424,945, which is made by adding 309,439
21 to the 115,506.

22 Q And did you also subtract the commissions
23 that Encore's employees would have made on those
24 sales?

25 A I did.

1 interviewing management at Clear -- at Encore, if
2 they had sold at this higher margin -- they were
3 selling at a five percent margin -- if they had sold
4 at a higher margin, they would have to pay more
5 commission. Their salespeople would have made more
6 commission. We applied a 10 percent commission and
7 subtracted that from the profit. Therefore, the
8 profit difference was 750,402, but the actual lost
9 profit, after paying the hypothetical commission,
10 would be \$675,362.

11 **Q** All right. Now, let's talk about Leon
12 County Schools. If you assumed that Encore had made
13 the sales to Leon County Schools that Clear Touch
14 did, do you have an opinion to a reasonable degree of
15 accounting certainty as to how much in additional
16 profit Encore would have made on those sales to Leon
17 County Schools?

18 **A** Yes, the total profit that would have been
19 made from the sales at Leon County Schools were
20 \$424,945.

21 **Q** And explain to the jury how you did arrive
22 at that opinion.

23 **A** Well, we, basically, did the same thing we
24 did for the other sales. We found the sales. We found
25 the invoices. We traced those through the financial

1 Most of the revenue was traced. We were
2 able to directly trace 1.5 -- 1,593,000 of the
3 revenue was traced. \$868,000 of the revenue we
4 calculated the profit on here. But then we compared
5 our calculated profit to actually there was an
6 investor memo that Clear Touch had sent out to
7 potential investors. They said they would make a 33
8 percent gross margin. Our margin was very similar to
9 that. So we thought it was reasonable and that's how
10 we calculated the gross profit -- or the lost profit
11 from the sales.

12 **Q** Does Exhibit 10(C) -- did it summarize
13 those calculations?

14 **A** Yes, it does.

15 **MR. ENGLISH:** Your Honor, we'd ask that
16 Plaintiff's Exhibit 10(C) be admitted into
17 evidence.

18 **THE COURT:** Subject to objection, it's
19 admitted.

20 (Plaintiff's Exhibit 10(C) is admitted into the
21 record.)

22 **BY MR. ENGLISH:**

23 **Q** And is the total then that you arrived at
24 in the bottom right-hand corner of lost profits?

25 **A** Yes, it is. One thing I left off is from

1 Touch had set up a company. And they were buying
2 products from China. And then they were marking up
3 those products and selling them to Encore. So the
4 first procedure was we directly traced the invoices
5 that were sent to Encore and tied them into the
6 invoices from the companies in China. And basically
7 -- and determined the difference in that price. So
8 theoretically, if Encore would have bought directly
9 from the suppliers, they would have gotten at least
10 the same price that Clear Touch was getting. So that
11 was what we called the "traced revenue." That was
12 revenue we directly traced to the actual invoices.
13 The total trace revenue was \$1,593,412.

14 Then there were certain invoices that we
15 couldn't trace back when they started getting more
16 and more volume and buying more orders. So what we
17 did then is we created an Excel database of all the
18 items purchased in 2014 and '15. Usually, we were
19 able to determine the items because they were
20 classified by the size of the screen and the number
21 of touch panels on them. So we created a database of
22 the items that were sold to Encore. Then we came up
23 with the average price of each of those items. We
24 applied it to what was -- what it was sold to Encore
25 for, and the difference was the profit.

1 **THE COURT:** Mr. English.

2 **MR. ENGLISH:** Thank you.

3 **BY MR. ENGLISH:**

4 **Q** All right. So Mr. Meilinger, assuming that
5 Mr. Trask had disclosed to Encore at the outset who
6 the true suppliers were and assuming that Encore
7 purchased directly from those suppliers and then made
8 the sales that it did make, you have an opinion to a
9 reasonable degree of accounting certainty how much
10 additional profit Encore would have made?

11 **A** Yes. 670 and --

12 **MR. SMITH:** Objection. Lack of foundation,
13 Your Honor.

14 **THE COURT:** Overruled.

15 **MR. SMITH:** Thank you.

16 **MR. MEILINGER:** \$675,362.

17 **BY MR. ENGLISH:**

18 **Q** Now, let me show you what we've marked as
19 Plaintiff's Exhibit 10(C) in the book. Is that a
20 summary of your calculations of that number?

21 **A** Yes, it is.

22 **Q** Can you explain to the jury how you
23 calculated that figure?

24 **A** Gladly. So the procedures we used to
25 calculate the lost of profits was real simple. Clear

1 **MR. SMITH:** Yes, Your Honor.

2 **THE COURT:** So, I mean, is that the
3 figures that you are using in these
4 calculations? Obviously, I haven't studied this
5 report. I just got it this morning.

6 **MR. SMITH:** I think Mr. Meilinger is
7 saying if Encore had brought directly from the
8 supplier, these are the profits it would have
9 made.

10 **THE COURT:** Right. Based on the pricing
11 schedules that they had in place.

12 **MR. SMITH:** Yes.

13 **THE COURT:** All right. I'm going to
14 overrule your objection also on speculation.

15 **MR. SMITH:** Thank you, Your Honor.

16 **THE COURT:** Now, I think you need to have
17 some more foundation laid as to these figures
18 in the record, Okay.

19 **MR. ENGLISH:** Okay.

20 **THE COURT:** All right. You ready to
21 proceed?

22 **MR. ENGLISH:** Yes, Your Honor.

23 **THE COURT:** All right. Will you bring the
24 jury in?

25 (Jury enters at approximately 10:01 a.m.)

1 **THE COURT:** All right. I'm going to
2 overrule your objection.

3 **MR. SMITH:** Sure. I would add, just for
4 the record ---

5 **THE COURT:** Yes, sir.

6 **MR. SMITH:** --- it's speculation. There's
7 no proximate cause connected to it. I know
8 they've got a --

9 **THE COURT:** Say that again please.

10 **MR. SMITH:** It's speculative, as well,
11 that these damages would flow from him not
12 disclosing this relationship when he was an
13 employee. I understand the Court's ruling.

14 **THE COURT:** Well, let me -- well, I want
15 you to explain yourself.

16 **MR. SMITH:** Sure.

17 **THE COURT:** I'm sure somebody's going to
18 look at this down the road.

19 **MR. SMITH:** I think so. I think that's a
20 fair assumption.

21 **THE COURT:** It seems to me that not so
22 much speculation that they could have gone
23 directly to the supplier and got them at a
24 certain price versus what they got them for
25 from Encore, right?

1 **THE COURT:** You agree?

2 **MR. ENGLISH:** Right. Yes.

3 **THE COURT:** So under which cause of action
4 are you -- I'm asking this. It's under
5 fiduciary claim; is that correct?

6 **MR. ENGLISH:** Yes, sir.

7 **THE COURT:** Let me ask you, yesterday,
8 when I was asking you about the fiduciary
9 responsibilities from the defendant, I thought
10 I understood you to say that they terminated
11 with his termination.

12 **MR. ENGLISH:** I think that's right. I
13 think that the fiduciary duties stem from the
14 fact that he was an employee, but the failure
15 to disclose had ramifications beyond that
16 because Encore was continuing to purchase from
17 Clear Touch without knowing -- if they had been
18 told from the beginning they could purchase
19 from -- directly from CVTE, they would have
20 done that. So all of those -- the consequences
21 of that carried on beyond the time he was an
22 employee.

23 **THE COURT:** Until the plaintiff terminated
24 the reseller agreement?

25 **MR. ENGLISH:** Exactly.

1 Your Honor. This is exactly what I was just
2 talking about. Look at the top chart. You see
3 that? Far right. Same time period I have a
4 problem with, 4/26/15 to 10/10/15, the heading
5 right above that, the basis. Jimmy
6 Higginbotham's non-compete, which is
7 inappropriate and the reseller agreement.
8 That's where this time period is coming from.
9 That's where the damages they're looking for in
10 this time period is flowing from. It's
11 inappropriate for them to seek -- offer a top
12 line number that includes that.

13 **THE COURT:** So you're doing it under
14 fiduciary?

15 **MR. ENGLISH:** Yes, the lost profits on the
16 -- for failure to disclose the supplier, that
17 was the time -- Encore was selling Clear Touch
18 products all that time, but it didn't know the
19 true supplier.

20 **THE COURT:** I've got that part.

21 **MR. ENGLISH:** Yeah.

22 **THE COURT:** I'm just looking at --
23 Mr. Smith is right. You didn't allege breach of
24 reseller agreement.

25 **MR. ENGLISH:** Correct. Yeah.

1 right? So this third column starts right after
2 the expiration of Mr. Trask's non-compete. It
3 goes all the way to the end of the reseller
4 agreement with -- between Clear Touch and
5 Encore. They have not alleged breach of
6 reseller agreement, as we've talked about
7 before. It's not plead in the complaint, so
8 it's not proper time period in which to seek
9 recovery of any damages, cause there's no legal
10 basis to do it.

11 **MR. ENGLISH:** We're not seeking these
12 damages for breach of the reseller agreement.
13 We're seeking these damages for not disclosing
14 the identity of the true suppliers. And I asked
15 him --

16 **THE COURT:** Say that again.

17 **MR. ENGLISH:** We're asking him to -- we're
18 seeking these damages for Mr. Trask's failure
19 to identify the true suppliers. I asked
20 Mr. Meilinger to assume that those suppliers
21 have been identified at the outset by
22 Mr. Trask, if Encore had purchased directly
23 from those suppliers, what would the profits
24 have been?

25 **MR. SMITH:** Look over to Page 11,

1 **THE COURT:** Yes, sir.

2 **MR. SMITH:** Literally?

3 **THE COURT:** Yes, sir.

4 **MR. SMITH:** Okay. They have this broken up
5 into three different time periods, Your Honor.

6 I have an objection to the third time period,
7 the 4/26/15 to the 10/10/15, and let me tell
8 you why. At 4/26/15, Mr. Trask's non-compete
9 was no longer in play. It was done. The one
10 year was done. All right. This time period
11 references the end of -- after the end of
12 Mr. Trask's non-compete to the end of the
13 reseller agreement relationship.

14 **THE COURT:** State that again.

15 **MR. SMITH:** Sure. Mr. Trask's non-compete
16 was a one-year duration.

17 **THE COURT:** Right. It started on
18 April 26th or 27th of 2015.

19 **MR. SMITH:** 2014.

20 **THE COURT:** '14?

21 **MR. SMITH:** Yes, Your Honor, when they
22 terminated him April 24th, 2014. I think the
23 effective termination date was the 25th, 2014.

24 **THE COURT:** Okay. Okay.

25 **MR. SMITH:** So we got a year after that,

1 **MR. SMITH:** I pulled a page out.

2 **THE COURT:** Which exhibit number is this
3 please?

4 **MR. SMITH:** Well, the report I think he's
5 referring to as 10(J), that's one that we
6 handed up.

7 **THE COURT:** Okay.

8 **MR. SMITH:** This will just give us context
9 to my objection and everyone's on the same
10 page.

11 **THE COURT:** Where is he -- he just said
12 600-and-some-odd-thousand dollars.

13 **MR. SMITH:** 675,000-some-odd dollars, yes.

14 **MR. MEILINGER:** Yes.

15 **THE COURT:** I'm trying to find that figure
16 on these exhibits up here and I don't see it.
17 That's why --

18 **MR. SMITH:** It's at the top -- there's a
19 chart at the top of Page 10 of the report,
20 Your Honor.

21 **THE COURT:** Page 10 of the report?

22 **MR. SMITH:** Yes. And I think this lays it
23 out well to illustrate my objection.

24 **THE COURT:** I've got you.

25 **MR. SMITH:** We're at the same page?

1 **A** That Clear Touch sold to Encore and then
2 Encore sold to its customers. Then the second set of
3 lost profits were the amount of profits lost when
4 Clear Touch sold to -- directly to one of Encore's
5 customers, Leon County Schools.

6 **Q** Let's talk about that first category. Do
7 you have an opinion to a reasonable degree of
8 accounting certainty as to how much additional
9 profits Encore would have made if Mr. Trask had
10 disclosed the identity of the true suppliers of his
11 product and Encore had purchased directly from those
12 suppliers?

13 **A** I do.

14 **Q** What is your opinion?

15 **A** \$675,362.

16 **MR. SMITH:** Objection, Your Honor. I think
17 that's something we need to talk about.

18 **THE COURT:** Okay, sir.

19 Mr. Foreman, would you take the jury to the
20 jury room please.

21 (Jury exits at approximately 9:53 a.m.)

22 **THE COURT:** All right, sir.

23 **MR. SMITH:** I'm looking over -- do you
24 have the report in front you, Your Honor?

25 **THE COURT:** I'm not sure where it is.

1 for Encore. We agreed the trade show expenses to the
2 detail presented. Then we subtracted the reimbursed
3 expenses that we had already included with the Trask
4 calculation for wages. We also subtracted expenses
5 that were clearly not related to the Clear Touch
6 opportunity, which gave us a net number. Then we
7 estimated that about 50 percent of that was used to
8 benefit Clear Touch. So the total net number was
9 \$135,378. We calculated \$67,689.

10 Q And so with the wages and the conference
11 expenses, what was the total amount of direct costs
12 that Encore incurred that benefited Clear Touch
13 instead of Encore in your opinion?

14 A \$488,041.

15 Q All right. Now, let's talk about lost
16 profits. Did you calculate how much Encore lost in
17 profits to Clear Touch?

18 A I did.

19 Q What two categories of profits did you
20 calculate?

21 A The first category of profits that we
22 calculated were profits that Encore sold to Clear
23 Touch and that Clear Touch sold to its customers.

24 Q All right. Can you say that again? Was
25 it --

1 **Q** Okay. And I'm sorry, Mr. Trask, what was
2 100 percent of his?

3 **A** \$335,121.

4 **Q** And then did you apply a discount to that?

5 **A** Yes. For Mr. Trask, I used a 95 percent
6 percentage which come to \$318,365.

7 **Q** Did you apply a similar discount to the
8 wages of Mr. Gallant?

9 **A** I applied, I want to say, a 10 percent
10 discount for Mr. Gallant, which took it to \$74,411. I
11 took the five percent discount for Mr. Higginbotham
12 and took that to \$27,577.

13 **Q** And then if you look at Plaintiff's
14 Exhibit 10(B) -- it will be in the plaintiff's book.

15 **A** Oh, the plaintiff's book.

16 **THE COURT:** What number is that please,
17 sir?

18 **MR. ENGLISH:** Plaintiff's Exhibit 10(B).

19 **THE COURT:** 10(B).

20 **MR. Meilinger:** Yes. Yes, sir. I have this
21 exhibit.

22 **BY MR. ENGLISH:**

23 **Q** Did you also calculate the trade show
24 expenses that benefited Clear Touch and not Encore?

25 **A** Yes. We went through the accounting detail

1 **A** Yes, sir. Well, for the gross wages, we
2 looked at the actual payments made after the
3 non-disclosure agreement was signed, and we added
4 those. Also, we looked at the amount of health
5 insurance that the company reimbursed on behalf of
6 each of those three employees. Then there were
7 expense reports. We went to the detailed expense
8 reports. Agreed those numbers. That was the amount
9 for the expense reports. Also, Encore paid on behalf
10 some dental insurance premiums. That amount is added.
11 And there was a 401K match. So when we added all five
12 of those components together, we came up with the
13 total cost for the employee. We did the same thing
14 for Mr. Gallant. We did the same thing for Mr. Trask.

15 **Q** Now, for Mr. Gallant and Mr. Higginbotham,
16 you just went from the date of the non-disclosure
17 agreement forward, right?

18 **A** Yes, sir.

19 **Q** What about for Mr. Trask?

20 **A** For Mr. Trask, we used 100 percent of the
21 wages that were paid to him from the date of Encore's
22 existence until he left the company.

23 **Q** All right. Now, what was 100 percent of
24 Mr. Gallant's wages and benefits?

25 **A** 100 percent of Mr. Gallant was \$82,678.

1 **Q** It's 10(I).

2 **A** Yes, sir.

3 **Q** Is that an accurate summary of your
4 calculation of those numbers?

5 **A** It is.

6 **MR. ENGLISH:** Your Honor, we'd ask that
7 Plaintiff's Exhibit 10(I) be admitted into
8 evidence.

9 **THE COURT:** 10(I)?

10 **MR. ENGLISH:** 10(I).

11 **THE COURT:** Any objection?

12 **MR. SMITH:** The earlier objection we had
13 to recover ability of Mr. Gallant and
14 Mr. Higginbotham's pay in total. I understand
15 the Court's ruling on that, but for purpose of
16 the record, we maintain that objection.

17 **THE COURT:** Understood. It will be
18 admitted subject to the objection.

19 **MR. SMITH:** Thank you.

20 (Plaintiff's Exhibit 10(I) is admitted into the
21 record.)

22 **BY MR. ENGLISH:**

23 **Q** All right. Can you explain to the jury how
24 you calculated each of Mr. Trask, Gallant and
25 Higginbotham's total payments from Encore?

1 for employees on his payroll that benefited Clear
2 Touch instead of Encore?

3 **A** From the date of the non-disclosure cycle?

4 **Q** Yes.

5 **A** Is that correct? So total payments to
6 Mr. Gallant total \$82,678. The total payments for
7 Mr. Higginbotham totaled \$29,028.

8 **Q** And then what about -- do you have an
9 opinion -- did you also review the payments to
10 Mr. Trask?

11 **A** I did.

12 **Q** And are those the same payments that
13 Mr. Newnam testified to in Plaintiff's Exhibit 10(G)?

14 **A** Yes, they are.

15 **Q** So adding those together, what is your
16 opinion to a reasonable degree of accounting
17 certainty how much in total direct cost that Encore
18 incurred for employees on his payroll that benefited
19 Clear Touch instead of Encore?

20 **A** \$446,827.

21 **Q** Let me show you what we've marked as
22 Plaintiff's Exhibit 10(I) in front of you. It's a
23 loose page. It's a -- Mr. Meilinger, it's a loose
24 page in front of -- it's under your book.

25 **A** Okay.

1 Clear Touch Communications. I -- or Clear -- Clear
2 Touch. I reviewed a lot of financial information
3 related to payroll for Encore. Then, in Clear Touch,
4 we also reviewed or examined a lot of what we call
5 "source documents." For example, invoices sent to
6 customers, invoices sent from vendors, people they
7 were paying for supplies. And then -- I have a
8 complete list of documents that were looked at.

9 Q That summary is fine.

10 A Okay.

11 Q You mentioned you reviewed some of Encore's
12 documents. Did you review an Encore document showing
13 the wages that Encore had made?

14 A Yes.

15 Q Now, Mr. Meilinger, I want you to make a
16 couple of assumptions right now. Assuming that
17 Mr. Jimmy Higginbotham devoted 100 percent of his
18 effort to the benefit of Encore until he signed that
19 non-disclosure agreement on April 28th, 2014 and also
20 assuming that Mr. Leo Gallant devoted 100 percent of
21 his effort solely to benefit Encore until the date he
22 signed the non-disclosure agreement with Clear Touch
23 on April 25th, 2014, making those assumptions, do you
24 have an opinion to a reasonable degree of accounting
25 certainty how much, in direct cost, Encore incurred

1 All right. Ladies and Gentlemen, normally,
2 witnesses are not allowed to give their opinion
3 during a trial. They are limited to what they
4 saw, they heard, they smelt, they felt,
5 basically, their senses. However, a person,
6 because of their education or their experience
7 or the combination of the two has developed an
8 area of expertise and is helpful to you, the
9 jury, they are allowed to give their opinion in
10 the area of their expertise.

11 In this case, it's stipulated that
12 Mr. Meilinger is an expert accountant and also
13 an expert in the area of business valuation and
14 that he be allowed to give his opinion in those
15 areas. I'll tell you that expert testimony is
16 just like any other testimony you will hear
17 during this case. You may accept it, you may
18 reject it, or you give it as much weight as
19 you, the jury, think it deserves.

20 All right, sir.

21 **BY MR. ENGLISH:**

22 **Q** Now, Mr. Meilinger, can you tell the jury,
23 with reference to this case, what sort of documents
24 that you've reviewed?

25 **A** I reviewed the financial information for

1 the South Carolina Association of Certified Public
2 Accountants.

3 Q Have you testified in court before as an
4 expert witness?

5 A Yes, I've testified 28 times.

6 Q How many times has a court recognized you
7 as an expert in accounting?

8 A All 28 times.

9 Q And have you been recognized as an expert
10 in business valuations?

11 A Yes.

12 MR. ENGLISH: Your Honor, we'd ask that
13 Mr. Meilinger be recognized as an accountant
14 and business valuation consultant and qualified
15 to give expert opinions in those areas.

16 THE COURT: Give me that area of expertise
17 again please, sir.

18 MR. ENGLISH: Accountant and business
19 valuation consultant.

20 THE COURT: All right. Mr. Smith, any voir
21 dire?

22 MR. SMITH: No, Your Honor.

23 THE COURT: You stipulate?

24 MR. SMITH: Yes, Your Honor.

25 THE COURT: Very good.

1 take for the business being apprised of all facts.

2 Q How many business valuations have you
3 performed?

4 A Over the last 18 years, I've worked on
5 hundreds of business valuations.

6 Q You also provide business consulting
7 services?

8 A Yes, as a part of our practice, we provide
9 a lot of business consulting for business owners in
10 the areas of tax. We do tax consulting. We also do
11 value consulting where we work with business owners
12 who are trying to grow the value of their business.
13 And a lot of cases, we will act -- we will help
14 business owners manage their businesses from a
15 financial aspect.

16 Q And how long have you done that?

17 A I've been doing that since I've been a
18 public accountant -- Meilinger Consulting is -- since
19 1996.

20 Q Are you a member of any professional
21 organizations?

22 A Well, in addition to the American Institute
23 Certified Public Accountants, the Institute of
24 Management Accountants, the National Association of
25 Certified Valuation Analysts, I'm also a member of

1 I've been certified in financial forensics since
2 2009.

3 Then I'm also a certified fraud examiner
4 with the Association of Certified Fraud Examiners.
5 That is a designation for fraud where you are -- you
6 receive knowledge in experience in detection
7 prevention and fraud, fraud in small businesses or
8 businesses. I've been a certified fraud examiner
9 since 2012.

10 Q Thank you. Are you also a business
11 valuation consultant?

12 A Yes, as I have a ABV, I do a lot of
13 business valuation and consulting.

14 Q How long have you done that?

15 A I've been involved with business valuation
16 since 1999.

17 Q And explain to the jury what a business
18 valuation is.

19 A A business valuation is a process where
20 someone will hire us to -- either a business owner or
21 someone interested in learning the value of business
22 to determine what a business would sell for. Usually,
23 you're going to use the fair market value of a
24 business, which is defined as what a willing buyer
25 would pay for the business and a willing seller would

1 CMA, which is a certified management accountant with
2 the Institute of Management Accountants. That is a
3 specialty in analyzing strategic and management
4 accounting issues. I've been a CMA since 1996.

5 Also, I'm accredited in business valuation
6 with the American Institute of Certified Public
7 Accountants, which is a ABV. The ABV designation is a
8 designation where you have to have a significant
9 amount of experience and pass some pretty hard tests
10 and meet some education requirements in order -- all
11 in the area of business valuation.

12 In addition to that, I'm a masters analyst
13 in financial forensics, which is a designation with
14 the National Association of Certified Valuation
15 Analysts. That is another designation that requires
16 continued education, requires education, requires
17 exams and experience. The purpose of that designation
18 is to show the business community that you have
19 knowledge and experience in dealing with litigation
20 matters.

21 Then I'm also certified in financial
22 forensics, which is also with the American Institute
23 of Certified Public Accounting. That, again, is for
24 CPAs who have a specialized knowledge in bankruptcy
25 damages, business valuations and forensic accounting.

1 **A** Approximately a year and a half.

2 **Q** What did you do after -- and when was that?

3 **A** That was approximately from '93 until '95.

4 **Q** What did you do after that?

5 **A** At that time, I was a comptroller for a
6 small company in Spartanburg called Cousters
7 [phonetic]. Actually, I was the assistant
8 comptroller. Then I went to -- after leaving
9 Cousters, I started my own business.

10 **Q** When was that?

11 **A** Approximately '96.

12 **Q** Is that -- was that a certified public
13 accounting practice?

14 **A** Yes, sir. I've been self-employed since
15 about 1996.

16 **Q** And have you been a certified public
17 accountant since then?

18 **A** I got my CPA certification in November of
19 1995.

20 **Q** Does your CPA work include calculating
21 damages?

22 **A** Yes, it does.

23 **Q** Aside from being a CPA, what other
24 certifications do you hold?

25 **A** Well, in addition to being a CPA, I'm a

1 **Q** Did you go to college directly from high
2 school?

3 **A** No, sir. I joined the Marine Corps straight
4 out of high school and I was in the reserve. I went
5 to training before I went to college.

6 **Q** And where did you serve?

7 **A** In the Marine Corps, I served -- I went to
8 Parris Island. I was at Millington, Tennessee; Camp
9 Pendleton, California. And then in the First Persian
10 Gulf War, I was stationed in Jubayl and I was
11 stationed at a camp called Lonesome Dove.

12 **Q** Now, did you go back to college after that?

13 **A** Yes, upon coming back from Saudi Arabia, I
14 went and finished my education at USC Upstate.

15 **Q** And what degree did you get?

16 **A** I graduated with a bachelors of science in
17 business with a concentration in accounting. I
18 graduated cum laude.

19 **Q** And where did you go to work after college?

20 **A** I went to work for the Deloitte & Touche,
21 which, at that time, was a Big 6 accounting firm.

22 **Q** And what sort of work did you do there?

23 **A** I was a staff accountant in their audit
24 department.

25 **Q** How long did you do that?

1 (No audible response.)

2 Thank you.

3 All right. The plaintiff ready to proceed?

4 **MR. ENGLISH:** Yes, Your Honor.

5 **THE COURT:** Would you call your next
6 witness?

7 **MR. ENGLISH:** Plaintiff calls Mr. Mike
8 Meilinger.

9 **THE CLERK:** Place your left hand on the
10 Bible and raise your right hand.

11 **MICHAEL MEILINGER**

12 having first been duly sworn; testifies as follows:

13 **THE CLERK:** State your name please.

14 **MR. Meilinger:** Michael E. Meilinger.

15 **THE CLERK:** Thank you. Please be seated.

16 **DIRECT EXAMINATION**

17 **BY MR. ENGLISH:**

18 **Q** Good morning, Mr. Meilinger. Can you begin
19 by your telling the jury what you do?

20 **A** I am a CPA. I own Meilinger Consulting, a
21 CPA practice in Greenville, South Carolina, with
22 eight employees.

23 **Q** And where did you go to college?

24 **A** I went to college at USC Columbia for two
25 years, and I finished at USC Upstate.

1 **THE COURT:** Oh, oh, oh. All right.

2 Anything else?

3 **MR. ENGLISH:** Yes, our next expert is
4 Mr. Meilinger, our CPA. He is prepared, and
5 he's able to testify, and he did his initial
6 report on all of the wages, including
7 Mr. Gallant and Mr. Higginbotham. I know
8 Your Honor has discussed that. I guess I wanted
9 to -- we've prepared some alternative reports,
10 if we need to use them. I'd just like to
11 reiterate one last time our position that for
12 breach of fiduciary duty, the damages are all
13 that proximately result. I think it's a matter
14 of fact for the jury to decide damages. So I
15 think it would be appropriate --

16 **THE COURT:** I don't disagree that it's a
17 matter of fact for the jury to determine
18 damages. I think it's a matter of law, however,
19 as to proper elements of damages. So my feeling
20 has been, and still is, that the wages from the
21 beginning from the two workers is not an
22 appropriate measure of damages under any of the
23 causes of action that I've seen. Now, from the
24 time of non-disclosure to the end of the
25 period, I think it is appropriate.

1 **A** We do.

2 **Q** And ViewSonic manufacturers -- excuse me.
3 They've got -- their source factory is the same one
4 -- my client's source factory; is that right?

5 **A** As I understand it, yes.

6 **Q** And you haven't attempted -- Encore hadn't
7 attempted to go make its own brand of this factory,
8 have they?

9 **A** No, we have not.

10 **Q** You just continue to buy from another
11 reseller that approached Encore and said, "Hey, we've
12 got the same thing from the same factory. Why don't
13 y'all sell that instead?"

14 **A** No, we haven't. Because a lot of what we've
15 learned in this case, you know, we did not know
16 beforehand. We -- it was Keone's responsibility to
17 bring that to us. We trusted him with that
18 information. We expected him to act in the best
19 interest of the business. There was no reason for us
20 not to trust him. Unfortunately, now, we find out,
21 you know, how we could have done better as a
22 business. But we can't act upon that now, like we
23 could have then.

24 **Q** And talking about late 2014, okay, just to
25 give you a time frame reference, do you recall in

1 on, what he was driving, from his perspective. Again,
2 as I stated, the majority of his time was spent
3 focusing on the Clear Touch product line.

4 Q And Encore as a reseller, part of the
5 business relationship is not that you agree with the
6 supplier that you would market and advertise their
7 product and, in exchange, they will give you the
8 product?

9 A Yes.

10 Q And then part of their relationship and the
11 business model is that you get that product at a
12 discount from the supplier and you mark it up and
13 sell it to the end user, correct?

14 A Yes.

15 Q And that's what Encore did from the
16 inception of the business, correct?

17 A (No audible response.)

18 Q You've always been a reseller, haven't you?

19 A Yes, we've always been a reseller. That
20 doesn't mean that we don't buy direct from the
21 manufacturer, because we have in a number of cases.

22 Q You purchased -- excuse me. It's getting
23 late in the day. You currently purchase -- ViewSonic
24 is what replaced Clear Touch in your panel offerings,
25 correct?

1 **Q** They haven't sued you for it, have they?

2 **A** Not that I'm aware of.

3 **Q** Do you also recall in your deposition when
4 I asked you about that flash drive?

5 **A** Uh-huh.

6 **Q** You said you have no idea if Mr. Trask has
7 it and you don't know what he did with it?

8 **A** That is correct, and I would restate that.

9 **Q** So you have absolutely no idea, assuming he
10 has that?

11 **A** Oh, I can tell you he doesn't have it.

12 **Q** You have no idea, assuming he has that
13 flash drive or the information on it; if he even has
14 it today; or what, if anything, he ever did with it?

15 **A** Let me address that one at a time. I can
16 assure you he does not have the flash drive because I
17 was the one that had the flash drive. I can't answer
18 or speculate or guess if he had it, did something
19 with it, and would not pretend or purport to do. So
20 the answer to that is no, I can't address any of
21 those things.

22 **Q** And since you were terminated by Clear
23 Touch, did you go to work for a company called
24 Newline Interactive?

25 **A** Briefly, I was going to.

1 That's all me. So in many ways, I felt very misled,
2 very taken advantage of, used, for lack of a better
3 word, to be quite candid. I had no knowledge of this
4 at Encore. That was one of the first things that I
5 made sure that not only Todd knew, but more
6 importantly to me, no disrespect Todd, but most
7 important that David Masters knew.

8 Q And at the time you called Todd Newnam to
9 tell them about my client owning an interest in Clear
10 Touch, you also believed that Clear Touch owed you
11 some past due commissions?

12 A I think they still owe it to me. Not did, I
13 think they still do. As does Encore, for that matter.

14 Q And then Encore issued you a subpoena in
15 this case, right?

16 A Yes.

17 Q And you responded to me some of the
18 documents we'll go through in a minute; is that
19 correct?

20 A Yes.

21 Q Let's get back to Number 29 again, now that
22 we got a little more context.

23 A Okay.

24 Q Is this -- this is August 29, 2016. This is
25 after you got the subpoena?

1 Q --- right after Clear Touch fired you?

2 A Yeah.

3 Q How does that clear you conscience when
4 you'd known about it for months prior,
5 Mr. Higginbotham?

6 A Well, I mean, if you look, when I was
7 brought over to Clear Touch, I wasn't told that,
8 "Hey, I own this. I did this."

9 I'll go back one even further. When I had
10 initially reached out about, "Hey, I might have an
11 interest in a job in Atlanta," one of the things that
12 was kind of poked by Keone was, "What do you know
13 about interactive technology." It was like, "I
14 actually have quite a few opportunities in the
15 interactive touch panels space."

16 "Really?"

17 "Yes, one being Valdosta, Georgia," which I
18 brought in the door with me, I want to say -- and
19 David Masters can confirm the numbers here. I want to
20 say it was 60 classrooms, give or take. It was a big
21 deal at that time.

22 So one of the files that was put up earlier
23 -- I was sitting in the back, so I wasn't really
24 paying attention -- but it showed the numbers that
25 Encore had sold, one-point-something million dollars.

1 **Q** And when did you contact Mr. Newnam?

2 **A** I had really just had crisis of conscience
3 for months and months and months about what I
4 perceived to be a conflict of interest. I just felt
5 it was the right thing to do.

6 **Q** And tell me -- tell the jury about the
7 conversation you had with Mr. Newnam.

8 **A** Essentially, as I recall it, I called and
9 left a message and said, "I think we need to talk."
10 As I recall it, it was, "I don't know if you are
11 aware, I'm no longer with Clear Touch." I don't
12 remember if Todd said he knew that or not at that
13 point. And I said, "What do you know about them?"

14 He said, "Well, I know, you know, that
15 Keone owns a portion of it."

16 I said -- and I'm paraphrasing it -- "How
17 far back are you aware of that?"

18 He said, "I don't know. What do you mean?"

19 I said, "Well, he's owned it the whole
20 time."

21 It was just this, like, silence. It was the
22 same reaction when I found out.

23 **Q** And so you did this, you said, to clear
24 your conscience ---

25 **A** Uh-huh.

1 Q You do that often?

2 A Sometimes.

3 Q You randomly search for your former
4 employers?

5 A Hey, you know, he's done well.

6 Q Okay. Let's take a step back in the
7 timeline here so we can get just a little more
8 context. All right. So Clear Touch, at some point,
9 they fired you too?

10 A Uh-huh.

11 Q And when was that?

12 A July 20-something, 2014. I want to say the
13 27th. I'm not absolutely certain. Late July.

14 Q Was it 2015?

15 A '15, my mistake. See, I'm 53. I'm old.

16 Q It's okay. There's a lot of dates being
17 thrown around.

18 A They are.

19 Q So about July 2015, Clear Touch terminated
20 you?

21 A Uh-huh.

22 Q And then you contacted Mr. Newnam pretty
23 soon after that, right?

24 A Six weeks, probably. Mid-September --
25 early- to mid-September. About six weeks.

1 I don't remember the exact time frame, I
2 would say, probably, six to eight weeks shortly after
3 I had started. That would have to put it sometime in
4 September/October of 2014.

5 Q What was your reaction to that disclosure?

6 A I didn't know what to say. I was so taken
7 back and shocked. I don't think I really engaged a
8 whole lot of conversation other than, "Wow." It was
9 one I didn't really want to know. I kind of felt like
10 I stumbled onto something. I was like, okay, I'll
11 just shut that conversation down.

12 Q Why did that disturb you or surprise you?

13 A I think it's a major conflict of interest.

14 Q How long were you with Clear Touch?

15 A One year.

16 Q And when did you leave Clear Touch?

17 A Late July of 2015.

18 Q All right. Mr. Higginbotham, please answer
19 any questions Mr. Smith has for you.

20 THE COURT: Cross-examination.

21 CROSS-EXAMINATION

22 BY MR. SMITH:

23 Q Good afternoon, Mr. Higginbotham.

24 A Good afternoon, Mr. Smith.

25 Q Let's talk about your work history a little

1 **A** Yes, that was at the very start of it.

2 **Q** Now, while you were at Encore, did you know
3 that Mr. Trask owned Clear Touch?

4 **A** No, I did not.

5 **Q** Did you know when you left Encore to join
6 Clear Touch that Mr. Trask owned it?

7 **A** No, I did not. I knew he was managing it,
8 quote, was what he told me, he was managing it. I
9 didn't know he owned any portion of it.

10 **Q** How did you find out that Mr. Trask, in
11 fact, owned Clear Touch?

12 **A** We were coming back from a trade show
13 somewhere. I don't recall where. It was one of these
14 many hours on the road. I was driving. We were just
15 kind of talking about life in general. I had always
16 been told that, quote, it was a Chinese-owned
17 company. Make no bones, I loved the product, loved
18 selling the product, I think it is superb, superior.

19 I was just a little inquisitive, "Tell me
20 the history of the company. Who owns it? Who are
21 these folks?"

22 It was kind of this pull-back-the-curtain
23 moment of, "I own Clear Touch. I have owned Clear
24 Touch the whole time."

25 I was like, "Wow. Really?"

1 Q And did you speak with Mr. Trask about
2 that?

3 A I did.

4 Q And read the next sentence please.

5 A "When I spoke to Trask, he told me that he
6 had told -- he, meaning, Trask -- had told me that
7 he, meaning Trask, had told Leon that Encore had
8 diverted products purchased by Leon to another Encore
9 customer."

10 Q And is that what Mr. Trask told you?

11 A Correct.

12 Q And what did Mr. Trask tell you about
13 whether Clear Touch would sell directly to Leon
14 instead of through Encore?

15 A It's a paraphrase -- I'm probably
16 paraphrasing that that was what the customer
17 preferred that they would. The customer in this case
18 had worked with me for the better part of 10 years.
19 There was a lot of trust from their side and from
20 mine. I was quite comfortable continuing to work with
21 them, but it wasn't my decision to make, whether we
22 could sell to them or not. That was totally Keone's
23 decision.

24 Q And that was during your one-year
25 non-compete period?

1 situation immediately.

2 Q Let me refer you to the defendant's
3 exhibits, which are in front of you, Exhibit 33.

4 A Okay.

5 Q Is that an affidavit that you gave in this
6 case?

7 A Yes, it is.

8 Q And if you will look on the second page at
9 Paragraph 5.

10 A Uh-huh.

11 Q Can you read the first sentence of that for
12 the jury?

13 A "Shortly after I left Encore and joined
14 Clear Touch, in approximately August 2014, Mike
15 Fraser with Leon contacted me about purchasing --
16 excuse me, purchasing interactive displays directly
17 from Clear Touch instead of from Encore because he
18 was upset with Encore."

19 Q Is that what you were just describing?

20 A That is exactly what I was just describing.

21 Q All right. Now, read the next sentence.

22 A "Because I had a non-compete agreement with
23 Encore and knew that Trask did also, I told
24 Mr. Fraser that I would have to speak with Trask
25 about that."

1 **A** Well, he had -- Leon and I had had a
2 lengthy relationship with them; knew them quite well
3 for many, many years; so knew their inner workings.
4 They had a pretty sizable order pending, more on
5 implementation standpoint. They were up against a
6 really tight deadline. He had asked me to reach out
7 and see if -- kind of just take the temperature of
8 what was going on there.

9 Subsequent to doing that, I discovered
10 that, you know, the customer that -- I won't -- I
11 won't exaggerate, has been very fond of these people.
12 I lived there for 20 years. I know them quite well.
13 They weren't particularly happy with Clear Touch and
14 the status of their work -- the Clear Touch product
15 and the status of their work.

16 **Q** They weren't happy with Clear Touch, or
17 they weren't happy with Encore?

18 **A** That's what I came to discover. They were
19 not happy with Encore, quote, because they had been
20 told that Encore had shipped the order that Leon had
21 bought and paid for, prepaid for, to another one of
22 my customers that I was leaving with Encore in
23 Alabama. That didn't sit too well with Leon County
24 Schools. They were unhappy about it. They made no
25 bones about it. I had to fix, or attempt to fix, the

1 Encore was going to continue to at least try and
2 maintain -- at least maintain and service the four or
3 five accounts that I was leaving with Terry Caldwell.
4 So yes, I did. Multiple conversations.

5 Q And did those accounts that you had include
6 Leon County Schools?

7 A Yes, they did. Leon was probably the most
8 important, one of the two most important.

9 Q How was Encore able to sell directly to
10 Leon County while you were an employee?

11 A The state of Florida has a purchasing
12 vehicle. So if each of you is a potential purchaser
13 -- there's 12 of you -- 12 different districts in the
14 state of Florida, if one of you has a contract, the
15 other 11 of you can use the same contract. It's
16 pretty cool how they did it. Florida, as a whole,
17 accepts a purchasing agreement known as TIPS. I
18 apologize. I can't remember the acronym for it. It's
19 something procurement service. It is a national
20 contract. Encore had that contract. While I was
21 employed there, Leon County had accepted it and had
22 used it as their purchasing vehicle.

23 Q Now, what did -- after you joined Clear
24 Touch, what did Mr. Trask ask you to do about Leon
25 County?

1 did Mr. Trask hire you to do for Clear Touch?

2 **A** To grow -- develop and grow business as a
3 whole. As I understood it, my task was to grow,
4 particularly, reseller business -- and reseller, in
5 this case, being what Encore is -- so other resellers
6 in other geographic areas.

7 **Q** When you started, were you supposed to be
8 doing any selling to schools, like Leon County?

9 **A** No, and that was not my desire either.

10 **Q** Was Encore selling products, like the
11 panels to Leon County Schools in Florida, while you
12 were an Encore employee?

13 **A** Yes. I was the rep that made those sales to
14 Leon County for Encore.

15 **Q** Before you left Encore, had you discussed
16 with anyone at Encore transitioning the Leon account
17 to another salesman at Encore?

18 **A** I discussed it with about five or six
19 people. I discussed with -- starting with David
20 Masters, who was my direct supervisor, Megan White,
21 who was my inside salesperson, Terry Caldwell, who,
22 he and I had worked together at a previous company
23 before Encore, so I was quite comfortable with
24 handing off people I knew to someone that I knew and
25 had worked for us. It was my understanding that

1 **A** Keone.

2 **Q** And what did you do with that flash drive?

3 **A** Gave it to him.

4 **Q** And what did he do -- did he give it back
5 to you?

6 **A** Yes.

7 **Q** Do you know how long he had it?

8 **A** I want to say about -- it may have been a
9 month. I don't recall precisely. It was fairly
10 quickly after I had given it to him. I don't remember
11 the exact time frame.

12 **Q** Did Mr. Trask say anything to you about
13 being able to access Encore's information after he
14 had left Encore?

15 **A** Yes.

16 **Q** What did he say?

17 **A** He was still the administrator for, I
18 believe it was: Facebook; Twitter; LinkedIn; the
19 different subscription services, such as E-Rate --
20 that's an industry term for public-funded libraries
21 telecommunications; different subscription services
22 for database management. Made a couple of references
23 to it before, kind of chuckled, "I can still see this
24 stuff. They haven't changed it yet."

25 **Q** Let's talk about Leon County Schools. What

1 talking to Encore. Encore knew I was talking to Clear
2 Touch. Everybody was on board. It would be a great
3 fit. So I didn't leave with anybody's not knowing
4 about it and/or permission or blessing, for lack of a
5 better word.

6 Q And so when was it that you went to work
7 for Clear Touch?

8 A August -- officially, August of 2014. I
9 don't remember the exact date; August sometime.

10 Q And was that after Mr. Trask had left
11 Encore to go work with Clear Touch?

12 A Yes.

13 Q Now, before you left Encore, did Mr. Trask
14 ask you to bring anything with you to Clear Touch?

15 A Yes.

16 Q What?

17 A He had asked me to get the customer client
18 list, which I told him I did not know how to do that,
19 and I was given instructions on how to download it.

20 Q And who gave you those instructions?

21 A Keone.

22 Q And how did you download that?

23 A I can't remember how. It was downloaded to
24 a flash drive. I don't remember the exact steps.

25 Q Who gave you the steps?

1 **A** Well, you know, if I've got 10, let's turn
2 10 into 100. If I've got 100, let's turn 100 into
3 1000. Grow your space as large as you can. My
4 response was always two-fold, "I'm doing the best I
5 can within the geographic boundaries that I have,"
6 which were three states. I had Georgia, Florida, and
7 Alabama. That was it.

8 **Q** And did you understand the phrase "cast a
9 wider net" to be particular with reference to the
10 Clear Touch product?

11 **A** Exclusively.

12 **Q** Now, let's talk about your leaving Encore
13 and going to Clear Touch. When did that happen?

14 **A** It was kind of a long, painful process,
15 from my end. I had heard that there would be some
16 potential changes, that Encore was changing the
17 direction of the company. My role and my expertise
18 was clearly in the classroom and not so much in the
19 direction that they were going. There was a part of
20 me that was very disappointed. But at the same time,
21 Encore was very open about being pleased with what I
22 had done, largely with the interactive panels. And
23 Clear Touch had just -- I don't want to say -- maybe
24 three, four months, in that range. So it was a pretty
25 common open discussion that Clear Touch knew I was

1 timely, was priced well. I was going to want to sell
2 it. I had a lot of ready-made opportunities. So I
3 would say, easily, a good 90 percent.

4 Q Did you discuss your sales opportunities of
5 the interactive panels with Mr. Trask while you all
6 were both employees of Encore?

7 A Yes.

8 Q And what did Mr. Trask tell you about
9 pursuing opportunities?

10 A Well, he -- initially, Keone was -- I
11 didn't report to Keone. I actually reported to --
12 David Masters was my direct supervisor as VP of
13 sales. I don't recall exactly what Keone's title was
14 when I came to Encore. But he dealt, quote, with the
15 vendors and the relationships. He was extremely
16 supportive to me of -- saw I believed in the product.
17 I was ready, willing and able to provide whatever
18 help and/or support. We did discuss opportunities,
19 not only that existed, but potentially future ones to
20 grow and develop. One of the comments that would be
21 made would be, "Hey, that's great," and then one of
22 the comments that would be made would be, "Hey, cast
23 a wider net."

24 Q What did you take that phrase "cast a wider
25 net" to mean?

1 **A** I was an outside sales rep.

2 **Q** And what areas did you -- in what states
3 did you do outside sales?

4 **A** I had Georgia, Florida, and Alabama. My
5 primary responsibility that I had been tasked with,
6 initially, was classroom technology. That mirrored my
7 exact territory with my previous companies, previous
8 customer relationships, previous success, and I had a
9 lot of opportunities I brought in the door with me,
10 to Encore.

11 **Q** And how much of your time at Encore did you
12 spend promoting the Clear Touch product?

13 **A** It wasn't done intentionally out of the
14 box, but I would say, reasonably, probably 90
15 percent. It was because -- and I would still say --
16 it's one of the most superior products I've ever
17 worked with, seen. It's just incredible technology.
18 It was also well-timed.

19 Classroom technology, if you all have ever
20 seen what we used to call a "SMART board," it was
21 kind of the generic term, they age. You've got about
22 a seven-year life span. And I sold most of these
23 school districts, those in the mid- to late-2000s. So
24 the timing was right. It was time for a refresh. So I
25 felt like I had a really strong product that was

1 my wife in Atlanta and me in Florida. And I had
2 talked to several people in the industry that I knew
3 and had expressed my interest.

4 One of those people, I reached out to Keone
5 Trask. I expressed my interest, if he was aware of
6 anything, and essentially was told there might be an
7 opportunity. It sounded like a great fit. It might be
8 60 days. He facilitated an introduction to David
9 Masters with Encore. I interviewed with Encore, I
10 think, over of a series, I want to say, of about 10
11 days, in-person video conference and telephone and
12 was, subsequently, offered an opportunity to come to
13 work and be moved to Atlanta.

14 Q And who was it that facilitated your
15 introduction to Encore?

16 A Keone.

17 Q And when were you hired to Encore?

18 A I believe it was April sometime, of 2013. I
19 don't recall the exact date. I think it was April.

20 Q And how long did you work at Encore?

21 A About a year and four months, give or take.
22 It was through July, the next year.

23 Q Of 2014?

24 A Yes.

25 Q What did you do for Encore?

1 Q Where did you graduate from?

2 A The University of South Carolina.

3 Q All right. Hopefully, the Clemson fans
4 won't hold that against you.

5 A You know, it's all worth it.

6 Q Let's start by talking about CSI. Are you
7 familiar with that company?

8 A I was familiar with it from the outside in.
9 I knew who they were. I didn't have a lot of
10 interaction. I worked for a parallel company that
11 sold the same product. So that's how I knew of CSI.

12 Q And who did you know at CSI?

13 A I knew -- it's really more of, at the time,
14 I knew of four gentlemen, Chip Gumms, Brad Tucker,
15 Keone Trask, and Leo Gallant.

16 Q Now, can you --

17 A Then subsequently, Danielle. I actually met
18 Danielle. I forgot. Sorry.

19 Q Did you, subsequently, become employed by
20 Encore?

21 A Yes.

22 Q And how did you become employed by Encore?

23 A I had a high interest in moving to Atlanta,
24 Georgia, from Tallahassee, Florida. I had gotten
25 engaged. We were doing a long-distance relationship,

1 proceed?

2 **MR. ENGLISH:** Yes, Your Honor. We'd like
3 to play the deposition of Kathy Cruse Krebs.

4 **THE COURT:** Very good.

5 (The deposition of **KATHY CRUSE-KREBS** is played
6 in its entirety.)

7 **THE COURT:** Would you call your next
8 witness please? How long is your next witness?

9 **MR. ENGLISH:** Maybe 30 minutes,
10 Your Honor.

11 **THE COURT:** Go ahead and call your next
12 witness please.

13 **MS. BARKER:** The plaintiff calls Danielle
14 Whelan Stengel to the stand.

15 **THE CLERK:** Place your left hand on the
16 Bible and raise your right hand.

17 **DANIELLE STENGEL**
18 having first been duly sworn, testifies as follows:

19 **THE CLERK:** State your name please.

20 **THE WITNESS:** Danielle Whelan Stengel.

21 **THE CLERK:** Thank you. Please be seated.

22 **DIRECT EXAMINATION**

23 **BY MS. BARKER:**

24 **Q** Good afternoon.

25 **A** Good afternoon.

1 testing, integration and initial marketing." Who
2 purchased that initial prototype?

3 **A** Clear Touch Interactive did.

4 **Q** Did Encore pay for it?

5 **A** In November, they did not.

6 **Q** Did they later?

7 **A** They may have, as part of their reseller
8 agreement.

9 **Q** So there was a prototype shipped to Encore
10 and tested at Encore?

11 **A** That is correct.

12 **Q** Now, you said you didn't want to distract
13 Mr. Knight, Mr. Young and Mr. Masters of Clear Touch.
14 How would telling them about Clear Touch be
15 distracting to them?

16 **A** Because the opportunity at hand was for
17 Encore Technology Group, and any other distractions
18 for them would draw away from that.

19 **Q** So if they were involved in Clear Touch,
20 that would have distracted them from the Encore
21 opportunities?

22 **A** I feel so.

23 **MS. BARKER:** That's the end of the
24 excerpts, Your Honor.

25 **THE COURT:** Is there any response from the

1 Touch Interactive, were they?

2 **A** That is correct.

3 **Q** So why didn't you share with them your
4 plans for Clear Touch Interactive as of November of
5 2012?

6 **A** Because our focus was to drive the effort
7 to have Encore Technology Group to be an independent
8 entity. It was not -- the effort was not on the
9 other.

10 **Q** Well, I don't understand why that would
11 preclude you from telling Mr. Knight, Mr. Young,
12 Mr. Masters about the Clear Touch plans. Why didn't
13 you tell them?

14 **A** I didn't want to provide them with any
15 distraction. Our focus was, Harris was going to
16 terminate 110 employees, for us to take action, use
17 our resources, leverage our networks and try to make
18 something viable, the Encore Technology Group.

19 **Q** But then you were always on the side,
20 working on this Clear Touch project.

21 **A** That is correct.

22 **Q** Now, it says, "With our ability to move
23 forward with introducing the Interactive Display
24 Solutions to the market, we're prepared to order a
25 prototype of the 70-inch product, to allow for

1 for sales, marketing and delivering of Interactive
2 Display Solutions."

3 First, when you say "my colleagues and I,"
4 who are your colleagues?

5 A The colleagues would be Chris Powell and
6 Michael Knight, as well as other members of the
7 management team, of then, the divisions of technology
8 and Cloud that were CSI, including Russell Young,
9 David Masters and Chris Davis.

10 Q And so it was -- was it at that time that
11 you all formed Encore?

12 A No. I think, if you'll refer to the date of
13 the filing with the South Carolina Secretary of
14 State, that Encore was formed prior to this.

15 Q Would Encore had been formed for the
16 purpose of acquiring operational control of those
17 business units?

18 A That is correct.

19 Q Now, you say, "For this reason, we have
20 established Clear Touch Interactive."

21 A Uh-huh.

22 Q Now, who is "we" in that sentence?

23 A Again, I don't -- I do not know who we is.

24 Q Now, Michael Knight and Russell Young and
25 David Masters were not involved in establishing Clear

1 recall what I told you about depositions, this
2 would be -- include this aspect of the
3 deposition.

4 **DEPOSITION EXCERPT OF KEONE TRASK**

5 **BY MS. BARKER:**

6 **Q** Take a look at what we marked as Exhibit 38
7 please.

8 **A** Yes.

9 **Q** Is this another e-mail from you to Gary
10 Mundrake and TSitouch?

11 **A** It is.

12 **MS. BARKER:** Your Honor, I would like to
13 move into evidence Exhibit Number 38.

14 **THE COURT:** It's admitted.

15 (Plaintiff's Exhibit 38 is admitted into the
16 record.)

17 **BY MS. BARKER:**

18 **Q** And you reported that CSI had been acquired
19 by Harris Computer Corporation at that time; is that
20 right?

21 **A** That is correct.

22 **Q** And then you say, "My colleagues and I are
23 diligently working to align our solutions to either
24 stay as part of Harris, or to acquire operational
25 control on the business units that are responsible

1 **A** That is correct.

2 **Q** Has Clear Touch made any effort to obtain
3 e-mails from Zoho?

4 **A** No.

5 **Q** And you say Clear Touch does not have an
6 electronic communications discovery or preservation
7 policy?

8 **A** It does not.

9 **Q** And you're saying Clear Touch does not
10 maintain any e-mail archiving system?

11 **A** We do not.

12 **Q** Clear Touch does not preserve e-mails?

13 **A** We do not.

14 **Q** Do you know which e-mails were missing?

15 **A** Do not.

16 **Q** And of all these e-mails that we've gone
17 through with the TSItouch, came to us from TSI,
18 you're saying that all these e-mails were lost?

19 **A** That's what's in the affidavit, yes.

20 **MS. BARKER:** Your Honor, those are all of
21 the excerpts from the 30(b)(6) deposition. We
22 now have a brief portion from Mr. Trask's
23 individual deposition that we would like to
24 read.

25 **THE COURT:** Ladies and Gentlemen, if you

1 **THE COURT:** It's admitted.

2 (Plaintiff's Exhibit 73 is admitted into the
3 record.)

4 **BY MS. BARKER:**

5 **Q** In Paragraph 5, it says that, "In February
6 of 2015, Clear Touch began experiencing electronic
7 communication issues with its e-mails."

8 **A** It did.

9 **Q** And that just -- you had been using Zoho
10 e-mail since May of 2014?

11 **A** That is correct.

12 **Q** And so, nine months later, you just started
13 experiencing issues out of the blue?

14 **A** We did.

15 **Q** And that led you to attempt to -- or that
16 led you to shift your e-mail provider to Google Apps
17 for Business; is that right?

18 **A** That is correct.

19 **Q** Then it said, "It was later observed that"
20 -- this is Paragraph 7 -- "It was later observed that
21 not all e-mails were successfully migrated to Google
22 Apps for Business." How was that observed?

23 **A** In attempting to search for e-mails.

24 **Q** You searched for e-mails and didn't find
25 them?

1 the plan year-end?"

2 Q And what's the answer you provided?

3 A \$2,269,818.

4 Q Well, if you'll look at what we'll mark as
5 Exhibit 70, the net assets of Clear Touch indicated
6 on the 2015 federal return.

7 MS. BARKER: Your Honor, I'd like to move
8 into evidence, Exhibit 70.

9 THE COURT: It's admitted.
10 (Plaintiff's Exhibit 70 is admitted into the
11 record.)

12 BY MS. BARKER:

13 Q The next assets of Clear Touch indicated on
14 the 2015 federal return were 2.271 million, right?

15 A Uh-huh.

16 Q Is that "yes"?

17 A That is a yes.

18 Q And again, that would be on the low side of
19 a value of a corporation, wouldn't it?

20 A If that number is entered correctly, yes.

21 Q Let me show you what we're marking as
22 Exhibit 73. Is this an affidavit that you signed?

23 A It is.

24 MS. BARKER: Your Honor, I'd like to move
25 into evidence, Exhibit 73.

1 investors as though they were investing in a company
2 worth \$10 million dollars?

3 **A** A valuation of \$10 million dollars, that's
4 correct.

5 **Q** Who did you present Exhibit 68 to?

6 **A** Friends and family.

7 **Q** How many people?

8 **A** Maybe 10.

9 **Q** Let me show you what we're marking as
10 Exhibit 69. Is this a document that you prepared for
11 CatchFire Funding?

12 **A** I believe so.

13 **MS. BARKER:** Your Honor, I'd like to move
14 into evidence, Exhibit 69.

15 **THE COURT:** It's admitted.

16 (Plaintiff's Exhibit 69 is admitted into the
17 record.)

18 **BY MS. BARKER:**

19 **Q** And if you look on the second page, Page 8,
20 what was the value of Clear Touch that you indicated
21 as of December 31st, 2015?

22 **A** I believe that's erroneously placed there.
23 That's actually the sales revenue income.

24 **Q** Well, what is question 8?

25 **A** "What is the value of the corporation of

1 agreement that you got from Leo Gallant. Did you or
2 Clear Touch obtain any non-disclosure agreements from
3 any other employees or former employees of Encore?

4 **A** Jimmy Higginbotham.

5 **Q** Anybody else?

6 **A** No.

7 **Q** Let me show you what we're marking as
8 Exhibit 68. Is this a document you drafted?

9 **A** It is.

10 **Q** Now, when was this drafted?

11 **A** On or about October of 2014.

12 **Q** And if you look on the first page, the
13 first paragraph, second sentence, the purpose of your
14 preparing this was to provide information to
15 qualified investors to evaluate -- or for them to
16 evaluate participation in Clear Touch?

17 **A** That's correct.

18 **Q** So is what you wrote in here truthful?

19 **A** Truthful.

20 **Q** If you look on the last page, you were
21 offering qualified investors the opportunity to
22 convert to equity in Clear Touch of one percent per
23 every \$100,000 invested; is that right?

24 **A** That's what it says.

25 **Q** So that would be treating those equity

1 Trade Solutions. Is that sufficient?

2 **THE COURT:** It can be admitted.

3 (Plaintiff's Exhibit 63 is admitted into the
4 record.)

5 **BY MS. BARKER:**

6 **Q** And if you look down near the bottom of the
7 first page, you'll see two entries with an invoice
8 date of November 7th, 2014 for Leon County Schools,
9 and together, they total about \$227,000.

10 **A** Okay.

11 **Q** Does that indicate that Clear Touch had
12 made a direct sale to Leon County Schools in the
13 amount of \$227,000?

14 **A** If that's the retail value of that -- the
15 invoice, yes.

16 **Q** If you look on the next page, there's an
17 invoice date of November -- I'm sorry, March 19,
18 2015, Leon County Schools, \$267,000.

19 **A** Uh-huh.

20 **Q** Did Clear Touch make another sale directly
21 to Leon County Schools by that March 19 date in the
22 amount of \$267,000?

23 **A** As required by the purchasing department,
24 yes.

25 **Q** Now, we looked earlier at a non-disclosure

1 **Q** And Davidson County Schools was also an
2 Encore customer, right?

3 **A** I don't recall if they were actively buying
4 at that time.

5 **Q** Where did you get the contact information
6 for Anson Schools and Davidson Schools?

7 **A** From my personal database.

8 **Q** And you're saying they're contacts you had
9 while at Encore?

10 **A** They are contacts that I called upon for
11 the benefit of Encore.

12 **Q** Let me show you what we're marking as
13 Exhibit 60. Did you take a list of customer contacts
14 from Encore?

15 **A** Did not.

16 **Q** Did you ask Mr. Higginbotham to?

17 **A** Did not.

18 **Q** Let me show you what we're marking as
19 Exhibit 63.

20 **MS. BARKER:** Your Honor, I'd like to move
21 into evidence, Exhibit 63.

22 **THE COURT:** 63? Has that been identified?

23 **MS. BARKER:** Let me go two sentences down.
24 I think it will be clear to the Court.

25 This is a collection report from Premiere

1 from Encore and started purchasing directly from
2 Clear Touch; is that correct?

3 **A** That is correct.

4 **Q** Now, in addition to selling direct to Leon
5 County Schools, Clear Touch also sold direct to Wake
6 County Schools, which was an Encore customer, right?

7 **A** That is correct.

8 **Q** And then let me show you what we're marking
9 as Exhibit 56. Is this an e-mail from you to a
10 milton@ansonschools?

11 **A** That is correct.

12 **Q** But Anson Schools was an Encore customer,
13 right?

14 **A** Yes.

15 **Q** And this was during your non-compete,
16 right?

17 **A** It is June 26th, 2014.

18 **Q** So it's within that one-year non-compete
19 period, right?

20 **A** That is correct.

21 **Q** Then on the next page of Exhibit 56 is a --
22 it looks like the identical e-mail to ---

23 **A** Uh-huh.

24 **Q** --- Davidson County Schools; is that right?

25 **A** That is correct.

1 **Q** And didn't that violate your non-compete
2 with Encore?

3 **A** I don't know if it does or not.

4 **Q** Well, if you'll look back at Exhibits 51
5 and 52.

6 **A** Uh-huh.

7 **Q** Mr. Wuerstein, [phonetic] is that 51?
8 Clear Touch had not sold anything to Leon
9 County Schools as of October 10th, 2014, right?

10 **A** That is correct.

11 **MS. BARKER:** Your Honor, I'd like to move
12 into evidence, Exhibit 50 -- 50 -- Exhibit 51
13 and Exhibit 52.

14 **THE COURT:** 51 has been admitted. 52 has
15 now been admitted.

16 (Plaintiff's Exhibit 52 is admitted into the
17 record.)

18 **BY MS. BARKER:**

19 **Q** But by April 2015, seven months later, it
20 had sold \$546,000 worth of products to Leon County
21 Schools; is that right?

22 **A** That's what it says.

23 **Q** But at some point, Leon stopped purchasing
24 -- at some point, between October 10th, 2014 and
25 April 2015, Leon County Schools stopped purchasing

1 **A** That is correct, following negotiation with
2 Encore's management while attending ISTE in Atlanta
3 2013 -- 2014.

4 **Q** Now, you understood that Mr. Higginbotham
5 had a non-compete that was identical to yours, right?

6 **A** He may have. I did not view his.

7 **Q** Well, he told you he had a non-compete,
8 like yours, with Encore, right?

9 **A** That's correct.

10 **Q** And then the next day, after he --
11 Mr. Higginbotham starts for you on August 2nd, 2014,
12 Clear Touch has an order -- or a prospect for an
13 order of 45 units from Leon County Schools, correct?

14 **A** I don't know that we have an order, but it
15 looks like an opportunity.

16 **Q** Didn't that violate your non-compete with
17 Encore?

18 **A** If we're working collaboratively on
19 opportunities, it's not competing.

20 **Q** Well, these were sales direct from Clear
21 Touch to Leon County Schools, right?

22 **A** This is not a sale.

23 **Q** I know, but this led to a sale direct from
24 Clear Touch to Leon County Schools, right?

25 **A** It may have, given the requirements.

1 Next year is 600 rooms," correct?

2 **A** That is correct.

3 **Q** So was the plan for Encore to continue to
4 sell to Leon County Schools?

5 **A** I don't know if that was the plan. They
6 were buying in waves.

7 **Q** Leon County Schools was?

8 **A** That is correct.

9 **Q** But you knew two weeks after leaving Encore
10 that Encore had gotten an order for 18, which was the
11 beginning of 285 units, right?

12 **A** That is correct.

13 **Q** And you know that 600 -- you knew in May of
14 2014, that in '15, there was going to be an
15 opportunity to sell another 600 units to Leon County
16 Schools?

17 **A** There would an opportunity.

18 **Q** If you'll look back on Exhibit 9, Clear
19 Touch sold \$935,000 worth of product directly to Leon
20 County Schools, right?

21 **A** For the time period of February 13, 2013 to
22 October 10th, that is correct.

23 **Q** Clear Touch hired Jimmy Higginbotham the
24 day after he left Encore, on August 1st, 2014,
25 correct?

1 Q In fact, it was closer to 95 percent,
2 wasn't it?

3 A If you'll hand me a calculator, I'll answer
4 it accurately for you, but yes, it's close.

5 Q And after Encore, the biggest customer was
6 Leon County Schools, right?

7 A Uh-huh.

8 Q Is that yes?

9 A That is a yes.

10 Q Let me show you what we're marking as
11 Exhibit 53. Is this an e-mail from you dated
12 May 14th, 2014, to CVTE?

13 A It is.

14 Q And this was about two weeks after you left
15 Encore?

16 A That is correct.

17 Q And you report that Leon County School
18 District had selected Clear Touch as the panel
19 manufacturer?

20 A That is correct.

21 Q You said, "Encore received a purchase order
22 for 18 yesterday"?

23 A That is correct.

24 Q And then you say, "These 18 are the
25 beginning of 285 to be acquired through December.

1 **BY MS. BARKER:**

2 **Q** Let me show you what we're marking as
3 Exhibit 51. Is this Clear Touch's summary -- is this
4 Clear Touch's summary of sales by customer from
5 February 2013 through October 2014?

6 **A** Yes. October 10, 2014, being the date that
7 the modified reseller agreement was in effect.

8 **MS. BARKER:** Your Honor, I'd like to move
9 into evidence, Exhibit 51.

10 **THE COURT:** It's admitted.

11 (Plaintiff's Exhibit 51 is admitted into the
12 record.)

13 **BY MS. BARKER:**

14 **Q** And it looks like Clear Touch's sales for
15 that year, in eight months, totaled about \$1.18
16 million; is that right?

17 **A** That is correct.

18 **Q** And of that, Encore was 1.13 million of
19 that?

20 **A** As the exclusive reseller for those states
21 at that time, yes.

22 **Q** But as of Clear Touch's sales, 90 percent
23 were made to Encore, right?

24 **A** As the exclusive reseller to those regions,
25 yes.

1 **THE COURT:** It just seems to me -- and I
2 thought I heard you tell me, Mr. English, that
3 until some point -- and I believe I heard it
4 today when Mr. Trask and Mr. Gallant had that
5 conversation at his house, that he was not aware
6 of his ownership in Clear Touch; and I think
7 Higginbotham, the same thing. Later on, these
8 non-disclosures were signed; is that not
9 correct?

10 **MR. SMITH:** I think that's the evidence so
11 far, yes.

12 **THE COURT:** Okay. All right. So I mean, I
13 think it had to be some -- I hate to use this
14 term -- scienter on the part of Higginbotham and
15 Gallant through some kind of knowing
16 participating with the defendant under those
17 other causes of action. If I'm wrong, I'm wrong.
18 All right.

19 Ready?

20 **MR. ENGLISH:** Yes, Your Honor.

21 **THE COURT:** Ready?

22 **MR. SMITH:** Yes, Your Honor.

23 **THE COURT:** Bring the jury in.

24 (Jury enters at approximately 11:51 a.m.)

25 **THE COURT:** Ms. Barker?

1 them anyway. So under the breach of fiduciary
2 duty, we feel like, as a matter of law, that is
3 something the jury could award damages of all
4 three.

5 **THE COURT:** Well, I'll tell you what, I
6 don't mind you giving me something and let me
7 look at it again. I'm certainly not anywhere in
8 -- I don't think I agree with you on that, but
9 it won't be the first time I'm wrong, okay, and
10 it won't be the last. I'll be glad to hear from
11 either side.

12 **MR. SMITH:** Yes, Your Honor. That's
13 inflating two things, I think. We were talking
14 about, first, Mr. Gallant and Mr. Higginbotham's
15 pay. Mr. Trask left the company in April of
16 2014. These two gentlemen signed NDAs with Clear
17 Touch after that point. Mr. Gallant -- excuse
18 me, Mr. Higginbotham then worked for Encore for
19 about four more months after that; and then
20 Mr. Gallant goes all the way to December.

21 I think -- I'm hearing the Court. I think
22 you agree with our position, right now, as a
23 preliminary, they're not entitled to that pay
24 unless they prove a breach of the non-piracy
25 provision on the non-compete.

1 covenant for him, or an agreement, as to
2 non-solicitation, you know, it would seem like
3 it would be recoverable during that period that
4 that agreement was in force and effect. Okay.
5 Now, that's what I thought and that's what I
6 think. I don't have a problem of you correcting
7 me now or later, either one of you, but that's
8 just my preliminary.

9 **MR. ENGLISH:** Your Honor, I hear you loud
10 and clear on the law under breach of duty of
11 fidelity and loyalty. I do think that because
12 breach of fiduciary duty requires disclosure and
13 because all damages that proximately result from
14 the failure of disclosure are recoverable for
15 breach of fiduciary duty --

16 **THE COURT:** So fiduciary duty continues
17 after you leave your employment in certain
18 areas?

19 **MR. ENGLISH:** I wouldn't say that. But I
20 would say, when he became an employee, Mr. Trask
21 had a fiduciary duty to disclose his involvement
22 with Clear Touch and how he was using
23 Mr. Gallant and Mr. Higginbotham. The testimony
24 is if Mr. Trask had made that disclosure, then
25 Encore would not have paid any of the three of

1 sure you will correct me if I'm wrong. I believe
2 when you're talking about Mr. Gallant and
3 Mr. Higginbotham's pay being recoverable for the
4 time after they signed non-disclosures for my
5 client, it was through the end of Mr. Trask's
6 non-compete, as a time period. Did I hear that
7 right?

8 **THE COURT:** Right. Yeah. I think that
9 would be correct. Here's what I said -- also,
10 thank you for that. I was getting my charges
11 together. I researched, it looks like under the
12 duty of loyalty and fidelity, my law clerk tells
13 me also and I'll restate in a second, that you
14 recover wages paid, benefits paid, during the
15 period of disloyalty under that cause of action.

16 Then you go over to the breach of
17 fiduciary, which is a different cause of action
18 and those are proximately caused damages. From
19 what I'm understanding -- and this is where I
20 wasn't sure, and I'm still a little bit fuzzy --
21 I thought I heard you guys tell me that both
22 those employees signed the non-disclosure after
23 Mr. Trask left his employment. So that wouldn't
24 fall under either one of those theories of
25 recovery. But if he had an existing restrictive

1 perspective. I told the plaintiffs that because
2 the defendant doesn't deny violating the duty of
3 loyalty, fidelity or a fiduciary duty, that I
4 was going to direct a verdict on those.

5 On the issue of the damages, I asked about
6 whether or not the defendant agreed that they
7 violated the contract. I thought I heard that. I
8 was corrected by Mr. Smith that they did not. So
9 that's still an issue in this case. I also
10 brought up to the plaintiffs, I have excluded
11 the -- as damages, salary paid to
12 Mr. Higginbotham and Mr. Gallant, or Gallant,
13 because they covered the entire period that were
14 -- where the defendant worked for Encore. I
15 didn't -- I still don't think those are
16 appropriate. But from the period that they,
17 Higginbotham and Gallant, signed the
18 non-disclosure, I think that that would be
19 appropriate as potential damages in this case.

20 Now, Mr. English, do you want to clarify or
21 add to or subtract from anything I put on the
22 record about our meeting in my chambers?

23 **MR. ENGLISH:** No, Your Honor.

24 **THE COURT:** Mr. Smith?

25 **MR. SMITH:** One thing, Your Honor. I'm

1 retirement fund to use to create this
2 corporation, he used his mother for it so I'm
3 going to overrule the objection. If he's put a
4 doubt or somebody's put a doubt in his
5 direction, because he is the one who controlled
6 it.

7 **MR. SMITH:** All right. Thank you.

8 **THE COURT:** Yes, sir.

9 Let's take a quick five minutes.

10 (The Court goes off the record at approximately
11 11:31 a.m.)

12 (The Court goes on the record at approximately
13 11:43 a.m.)

14 **THE COURT:** Anything from the plaintiff
15 before we resume?

16 **MR. ENGLISH:** No, Your Honor.

17 **THE COURT:** From the defense?

18 **MR. SMITH:** No, Your Honor.

19 **THE COURT:** All right. And let me just
20 tell the nature -- I called the attorneys back
21 -- and just for the record; I always like to try
22 to put conferences in my chambers on the record
23 in case anybody has any questions about it. I,
24 quite frankly, pointed out that those e-mails
25 looked pretty bad from the defendant's

1 factoring arrangement, this goes to the cost
2 Clear Touch was paying and, thus, is relevant to
3 our damages.

4 **THE COURT:** I'll overrule your objection.

5 **MR. SMITH:** Thank you, Your Honor. And you
6 want me --

7 **THE COURT:** You got another one?

8 **MR. HUDSON:** Two more, Your Honor.

9 **MR. SMITH:** Two more, real quick.

10 **THE COURT:** Okay.

11 **MR. SMITH:** 69.

12 **THE COURT:** 69.

13 **MR. SMITH:** Yes, Your Honor. Let me know
14 when --

15 **THE COURT:** I'm here.

16 **MR. SMITH:** Again, the -- first of all,
17 hearsay objection. They focused on -- if I
18 recall the deposition testimony correctly, it's
19 Number 8 on Page 2, Question Number 8, "What is
20 the value of the corporation?"

21 And I believe the testimony was, "We don't
22 know who even put this number together," so I
23 think it's hearsay.

24 **THE COURT:** The defendant has already
25 testified that that was created through his

1 **MS. BARKER:** We do, yes, Your Honor, and
2 that is on Page 165 of the deposition
3 transcript. It's a collection --

4 **THE COURT:** The Higginbotham e-mail?

5 **MS. BARKER:** It's a collection report from
6 Premiere Trade Solutions.

7 **THE COURT:** Oh, excuse me. I'm on...

8 **MR. SMITH:** Premiere Trade Solutions was
9 his factoring company. I'm sure the Court is
10 familiar with factoring and how that works.

11 **MR. ENGLISH:** Judge, the specific
12 relevance of this report shows sales to Leon
13 County Schools by Clear Touch.

14 **THE COURT:** All right. I'll listen to it.
15 I assume -- I want hear you. Go ahead. What's
16 the nature of your objection? it's hearsay?

17 **MR. SMITH:** Yes, Your Honor. That could be
18 part of it. And also, that it includes a bunch
19 of irrelevant sales, like to Ronco and different
20 resellers and distributors we had at different
21 time periods. If it was just Leon County, that
22 might be one thing. But this is a big, long list
23 of a bunch of different sales that they have no
24 relevance at all to what's going on.

25 **MS. BARKER:** Your Honor, because this is a

1 Your Honor. On Page 100, Ms. Barker read
2 Exhibit 34, but then she said, "Move 33." I just
3 want to make sure Exhibit 34 is in.

4 **MS. BARKER:** Yes, the court reporter also
5 noted that for me. Thank you all.

6 **THE COURT:** 34 is admitted. 35 is
7 admitted, 33 is admitted.

8 (Plaintiff's Exhibit 34 is admitted into the
9 record.)

10 **MS. BARKER:** Thank you, Your Honor.

11 **MR. SMITH:** I've just got one or two more,
12 one or two more exhibits that weren't subject to
13 that ongoing objection that I think they'll move
14 in.

15 **THE COURT:** Which ones are they?

16 **MR. SMITH:** They're in the same notebook
17 we're looking in, Your Honor. They are 60 and
18 63.

19 **THE COURT:** 60 and 63, and that's the
20 plaintiff's?

21 **MR. SMITH:** Yes, Your Honor.

22 **MS. BARKER:** We do not intend to move into
23 evidence 60 during this portion of the trial. We
24 do intend to move into evidence 63.

25 **THE COURT:** You do?

1 **MR. ENGLISH:** It does. It's in the book as
2 Exhibit 51. There it is.

3 **THE COURT:** Exhibit 51?

4 **MR. ENGLISH:** Yes, sir.

5 **THE COURT:** (Reviewing.)

6 It says February 13th, '13 through
7 October 10th, '14.

8 **MR. SMITH:** Time frame, it's just a long
9 time range. I'm saying these particular sales to
10 these customers --

11 **THE COURT:** I overrule your objection. You
12 have any further objection, Mr. Smith?

13 **MR. SMITH:** Let me look at our list real
14 quick.

15 **THE COURT:** While we're here, there are
16 several exhibits I've got marked that you've not
17 moved in. I don't know if that's your intent or
18 not, but it looks like it's 40, 41, 43 --

19 **MS. BARKER:** 40, 41 and 43, we moved into
20 evidence before --

21 **THE COURT:** They're already in?

22 **MS. BARKER:** Yes. Yes, sir.

23 **THE COURT:** I was just getting
24 clarification. All right. Thank you.

25 **MR. ENGLISH:** One housekeeping matter,

1 **MS. BARKER:** Your Honor, I'd like to move
2 into evidence, Exhibit 51.

3 **MR. SMITH:** Objection, Your Honor.

4 **THE COURT:** Just one second.

5 Mr. Foreman, could you take the jury to the
6 jury room please.

7 (Jury exits at approximately 11:25 a.m.)

8 **MR. SMITH:** We object to this particular
9 summary for a couple of reasons: One, it's an
10 arbitrary time period. We gave -- we put these
11 together because the plaintiff requested
12 these --

13 **THE COURT:** That's going to be denied. The
14 plaintiff can present its case the way it wants
15 to, so that aspect of your objection is denied.
16 What's your other basis?

17 **MR. SMITH:** Sure. It doesn't break down
18 when these particular sales were made, so it
19 doesn't give an accurate depiction of when these
20 sales were made, and timeline is very important
21 here.

22 **THE COURT:** Pop it up on the screen for
23 me, please.

24 Doesn't it have, Mr. English, a definitive
25 time frame of the sales?

1 aren't they?

2 **A** While also promoting other products and
3 services, yes.

4 **Q** Now, when did Clear Touch shift from using
5 TSItouch as a supplier to CVTE?

6 **A** On or about January of 2014.

7 **Q** And you don't recall whether Clear Touch
8 ever sold to Encore any CVTE panels?

9 **A** Yes, we did.

10 **Q** And the payments that had to be made to
11 CVTE in advance, weren't those made by Encore?

12 **A** No, they were made by Clear Touch.

13 **Q** Well, didn't Encore pay Clear Touch first
14 for the products, and then Clear Touch used that
15 product -- or used product to pay CVTE?

16 **A** According to the pricing sheet, there was a
17 direct pricing option, which required 20 percent
18 product down payment.

19 **Q** From Encore?

20 **A** From, at the time, Encore.

21 **Q** Let me show you what we're marking as
22 Exhibit 51. Is this Clear Touch's summary of sales by
23 customer from February 2013 through October 2014?

24 **A** Yes, October 10, 2014, being the date that
25 the modified reseller agreement was in effect.

1 **A** There was a markup involved.

2 **Q** Right. And my question is: Therefore, it
3 would have been cheaper for Encore, correct?

4 **A** In the sales of and information, yes.

5 **Q** During that period of April -- that
6 one-year period after you left Encore, do you dispute
7 that Encore paid \$990,000 for product that -- to
8 Clear Touch that cost Clear Touch \$607,000?

9 **A** I do agree with that, but it was not
10 competitive.

11 **Q** Let me show you what we're marking as
12 Exhibit 48. Is this an e-mail from you to TSitouch in
13 February of 2014?

14 **A** It is.

15 **Q** And you say that you're going to a trade
16 show to promote interactive displays, right?

17 **A** Well, I'm talking to our manufacturer of
18 interactive displays, that's correct.

19 **Q** And the interactive displays you are
20 promoting are the Clear Touch displays, right?

21 **A** That's correct.

22 **Q** And you're traveling to that trade show for
23 Encore, aren't you?

24 **A** That is correct.

25 **Q** And Encore's paying your costs for that,

1 for product that cost Clear Touch \$472,000, so that
2 Clear Touch made a 130,000-dollar profit while you
3 were an employee. Do you dispute that?

4 **A** I would have to verify the numbers to not
5 dispute it.

6 **Q** But it's true that while you were an
7 employee of Encore, you were causing Encore to buy
8 product from TSItouch at a markup?

9 **A** That is correct.

10 **Q** And if you had disclosed to Encore that
11 TSItouch was the supplier of the product, Encore
12 could have bought directly from TSItouch, right?

13 **A** They still can.

14 **Q** But they could have at the time, right?

15 **A** That is correct.

16 **Q** And it would have saved Encore money to
17 have bought directly from TSItouch than to have
18 bought through Clear Touch, correct?

19 **A** There was a markup involved, yes.

20 **Q** So it would have been cheaper for Encore to
21 buy directly from TSItouch than to have bought
22 through Clear Touch?

23 **A** There was a markup involved.

24 **Q** Right. So it would have been cheaper for
25 Encore?

1 **Q** And that's because you didn't want Encore
2 to receive product with TSItouch marking on it,
3 right?

4 **A** I stated earlier, I did not want the
5 customer to receive product that did not have the
6 brand on it that they purchased.

7 **Q** And Encore was a Clear Touch customer,
8 right?

9 **A** They were a customer of Clear Touch.

10 **Q** Let me show you what we're marking as
11 Exhibit 44. Clear Touch bought products from its
12 supplier and sold them to Encore, didn't it?

13 **A** That is correct.

14 **MS. BARKER:** Your Honor, I'd like to move
15 into evidence, Exhibit Number 44.

16 **THE COURT:** It's admitted.

17 (Plaintiff's Exhibit 44 is admitted into the
18 record.)

19 **BY MS. BARKER:**

20 **Q** And because of that, Clear Touch was able
21 to make a profit on its sales to Encore?

22 **A** That is correct.

23 **Q** Now, it looks like, based on our
24 calculations, between February of 2013 and April 25th
25 of 2014, when you left Encore, Encore paid \$603,000

1 right?

2 **A** That is correct.

3 **Q** And then, going down in that same e-mail,
4 you say, "Here's a sales video that has been
5 circulating from our reseller Encore."

6 **A** Uh-huh.

7 **Q** "Please do not respond or comment online
8 per our NDA." Why did you not want TSItouch
9 commenting on Encore's video?

10 **A** I don't recall.

11 **Q** Isn't it true that you didn't want TSItouch
12 to reveal to Encore that they were the source of the
13 product?

14 **A** No, that is not correct.

15 **Q** But you don't know why you told them not to
16 respond or comment online?

17 **A** I do not.

18 **Q** And then on the first page, Mr. Mundrake
19 responds to your May 30th e-mail on May 31 and says
20 in the last paragraph, "We will ship everything white
21 label/CTI branded, no TSItouch marking on anything,"
22 right?

23 **A** Uh-huh.

24 **Q** Is that yes?

25 **A** This is yes.

1 Q Looking back at Exhibit 41 -- before we
2 leave that, though, before we get to 42, it looks
3 like our e-mail to TSItouch was on Friday, April 5th,
4 at 3:20 p.m.; is that right?

5 A That is the time of the e-mail server, yes.

6 Q And you were working for Encore at that
7 time, right?

8 A That is correct.

9 Q All right. Let me show you what is marked
10 as Exhibit 43. If you will look on the next to the
11 last page, it looks like at the bottom is an e-mail
12 from you to TSItouch on Thursday, May 9th at 11:00 --
13 I'm sorry, at 10:00 a.m.; is that right?

14 A That is correct.

15 Q Now, on the second page, on May 30th, you
16 write to TSItouch in the second sentence, "It is
17 critical to make sure these units do not arrive with
18 anything other than Clear Touch Interactive
19 labeling."

20 A Yes.

21 Q These were the units coming to Encore,
22 right?

23 A These were the units and specifications
24 required from the previous white labeling.

25 Q And these units were coming to Encore,

1 **Q** And this was on March 26th, 2013, before
2 the reseller agreement was signed, right?

3 **A** That is correct.

4 **Q** Let me show you what we're marking as
5 Exhibit 41. Is this an e-mail you sent to TSItouch on
6 April 5th, 2013?

7 **A** That is correct.

8 **Q** You tell TSItouch that you were already
9 getting information out to the sales force. Now, who
10 is the sales force?

11 **A** It doesn't exist.

12 **Q** Well, were you being dishonest in this
13 e-mail?

14 **A** No, I was posturing.

15 **Q** Well, Encore had a sales force, right?

16 **A** Yes.

17 **Q** And Clear Touch did not have a sales force,
18 right?

19 **A** That is correct. That is the nature of a
20 manufacturer/reseller relationship.

21 **Q** And so, if you were getting information out
22 to a sales force, it would have gone out to Encore's
23 sales force; is that right?

24 **A** If information was getting out to the sales
25 force, that is correct.

1 **A** Sharp.

2 **Q** Did TSItouch label any of these products as
3 Sharp products?

4 **A** They were boxed in Sharp boxes.

5 **Q** So are you saying that when TSItouch got
6 these products, they had the Sharp labels on them?

7 **A** That is correct.

8 **Q** So did TSItouch have to remove those?

9 **A** It was critically modified as a product.

10 **Q** And as part of that, were they removing all
11 Sharp labels?

12 **A** Yes.

13 **Q** And then you tell TSItouch you want to add
14 a Clear Touch Interactive label, right?

15 **A** That's correct.

16 **Q** And for the instructions, you want those to
17 have the Clear Touch brand on the instructions,
18 right?

19 **A** That's correct.

20 **Q** And the shipping labels, you want to say
21 from Clear Touch Interactive, right?

22 **A** Uh-huh. Drop-shipped.

23 **Q** And then you say your initial distribution
24 partner is Encore; is that right?

25 **A** That is correct.

1 partners?

2 **A** At this time, on Tuesday, February 26th, no
3 one.

4 **Q** But Encore was the first?

5 **A** As of April 24th, 2013, that is correct.

6 **Q** And then you said, "I will be limitedly
7 available for the balance of this week, attending a
8 conference on the west coast." Was that a conference
9 for Encore?

10 **A** It was.

11 **Q** Let me show you what we're marking as
12 Exhibit 40. Is this an e-mail from you to TSitouch on
13 March 26th, 2013?

14 **A** It is.

15 **Q** And again, this is while you were an
16 employee at Encore, right?

17 **A** Correct.

18 **Q** Now, in the second paragraph, you say,
19 "Couple of items we would like to have considered:
20 associated white labeling efforts."

21 **A** Uh-huh.

22 **Q** What are "white labeling efforts"?

23 **A** Branding, and taking advantage of using the
24 brand of Clear Touch versus the manufacturer's brand.

25 **Q** What was the manufacturer's brand?

1 supplier of the product that Clear Touch sold to
2 Encore; is that right?

3 **A** That is correct.

4 **Q** Let me show you what we're marking as
5 Exhibit 39. Is this an e-mail that you sent to
6 TSItouch in February of 2013?

7 **A** Yes.

8 **Q** This is while you were an employee of
9 Encore?

10 **A** Correct.

11 **Q** And you sent TSItouch a non-disclosure
12 agreement. Why did you do that?

13 **A** As it's been our practice to provide a
14 non-disclosure agreement for any communications.

15 **Q** Why were you concerned that TSItouch would
16 disclose your communications?

17 **A** There wasn't a concern that they would, but
18 for best effort to have that in place.

19 **Q** And you said you will be reviewing pricing
20 and creating additional supporting documentation that
21 will allow Clear Touch Interactive to leverage its
22 direct sales partners in bringing the displays to
23 market?

24 **A** Uh-huh.

25 **Q** Who was Clear Touch's direct sales

1 Solutions in Florida?

2 **A** I believe you have the full sales
3 information to delineate that.

4 **Q** Well, I'm asking you. Were those sales to
5 Collaboration Solutions in Florida?

6 **A** There would be some, yes.

7 **Q** Did you make any effort to work with Encore
8 so that it could get those sales from Leon County
9 Schools instead of making sales direct from Clear
10 Touch?

11 **A** We had communications with Terry Caldwell,
12 who is the account manager assigned to that following
13 the transition of James Higginbotham, as well as
14 David Masters, about the account.

15 **Q** And why did Encore then not make some
16 effort to get the sales?

17 **A** That's not something I can answer.

18 **Q** You don't know?

19 **A** I don't know.

20 **Q** Is it true you didn't disclose your
21 involvement with Clear Touch to anybody at Encore
22 while they were involved with the development of
23 Clear Touch as a supplier to Encore?

24 **A** That is correct.

25 **Q** And TSItouch was Clear Touch's initial

1 **Q** And of those, about 2.5 million were to
2 Encore?

3 **A** That is correct.

4 **Q** Now, Leon County School Board was a
5 customer of Encore, we talked about earlier?

6 **A** That is correct.

7 **Q** But it looks like Clear Touch sold about
8 \$935,000 worth of panels directly to Leon County; is
9 that right?

10 **A** That is correct.

11 **Q** Now, there are also sales here of about 1.3
12 million to LeCroy. LeCroy is based in Georgia; is
13 that right?

14 **A** That's correct.

15 **Q** And Georgia was in Encore's exclusive
16 territory, right?

17 **A** Yes.

18 **Q** Okay. And then Galaxy Technology
19 Distribution ---

20 **A** Uh-huh.

21 **Q** --- accounts for about \$985,000 worth of
22 sales. That is owned by the same folks as LeCroy; is
23 that right?

24 **A** It is.

25 **Q** And these sales, were they to Collaboration

1 to Mr. Newnam, the owner of Encore." Was that true?

2 **A** This is not true.

3 **Q** When did you disclose these facts and
4 conflicts of interest to Mr. Newnam?

5 **A** On October -- of 2014.

6 **Q** What did you tell Mr. Newnam at that time?

7 **A** That I owned Clear Touch.

8 **Q** What did you tell him about how long you
9 had owned it?

10 **A** It wasn't a topic of conversation.

11 **Q** Was that your first disclosure to Encore of
12 your ownership of Clear Touch?

13 **A** It was.

14 **Q** Let me show you what we're marking as
15 Plaintiff's Exhibit Number 9. Is this a summary of
16 Clear Touch sales from February 2013 through
17 October 10th, 2015?

18 **A** Through October 10, 2015, correct.

19 **Q** Right. And that was the date that the
20 Encore's termination of the reseller agreement was
21 effective?

22 **A** Effective, yes.

23 **Q** Now, during this time, it looks like Clear
24 Touch sold about \$8.9 million worth of panels?

25 **A** That is correct.

1 (Plaintiff's Exhibit 35 is admitted into the
2 record.)

3 **BY MS. BARKER:**

4 **Q** So was Encore providing -- through this
5 agreement, was Encore providing warehousing for
6 Encore product?

7 **A** Yes, with access to product at no
8 additional cost.

9 **Q** Let me show you what we're marking as
10 Plaintiff's Exhibit 8. Is this Encore's termination
11 of the reseller agreement?

12 **A** It is.

13 **Q** It says that you were the primary Encore
14 employee responsible for the developing the supplier
15 relationship between Encore and Clear Touch; is that
16 true?

17 **A** Primary, yes.

18 **Q** It says, "Encore understands and has
19 evidence that you and your immediate family members
20 were owners, managing members and managers of Clear
21 Touch prior to and during the term of the agreement
22 and your employment with Encore." Was that true?

23 **A** That is correct.

24 **Q** Then it says, "Neither you, nor Clear
25 Touch, disclosed these facts or conflicts of interest

1 **A** I did.

2 **Q** And you told her that you had left Encore,
3 right?

4 **A** Correct.

5 **Q** So you could have had her direct this to
6 somebody else?

7 **A** Uh-huh.

8 **Q** But you didn't?

9 **A** No, the e-mail was sent to the Encore
10 account.

11 **Q** To your Encore account?

12 **A** That's correct, which, again, was being
13 monitored.

14 **Q** And is that why you didn't direct her to
15 somebody else?

16 **A** I didn't direct her in any specific
17 direction.

18 **Q** Let me show you what we're marking as
19 Exhibit 35. Is this a consignment agreement that your
20 mother sent to you at Encore for Encore to enter with
21 Clear Touch?

22 **A** It appears so.

23 **MS. BARKER:** Your Honor, I'd like to move
24 into evidence, Exhibit 35.

25 **THE COURT:** Admitted.

1 departed?

2 **A** To make sure that clear line of
3 communications stayed open.

4 **Q** Were you accessing Encore's -- any of
5 Encore's databases after you left?

6 **A** No.

7 **Q** And if Amy Andrews wanted to know how
8 things were going, she could ask you at home, right?

9 **A** That is correct.

10 **Q** Let me show you what we're marking as
11 Exhibit 34. Is this an e-mail from Amy Andrews to
12 your Encore e-mail address on May 2nd, 2014?

13 **A** It is.

14 **MS. BARKER:** Your Honor, I'd like to move
15 into evidence, Exhibit 33.

16 **THE COURT:** Admitted.

17 (Plaintiff's Exhibit 33 previously has been
18 admitted into the record.)

19 **BY MS. BARKER:**

20 **Q** Why would she be sending you a lead from
21 Clear Touch's website on May 2nd, 2014, after you've
22 left Encore?

23 **A** I assume because no direction was given on
24 the change in communications' structure.

25 **Q** You worked at Encore, right?

1 (Plaintiff's Exhibit 33 is admitted into the
2 record.)

3 **BY MS. BARKER:**

4 **Q** And she says, "Hi, Keone. I just wanted to
5 touch base with you to see how things are going."
6 Now, she sent this to your Encore address, right?

7 **A** That is correct.

8 **Q** And she knew you were no longer at Encore,
9 right?

10 **A** That is correct.

11 **Q** Why is she e-mailing you April 30th, 2014
12 to see how things are going?

13 **A** To continue communications, because no
14 vendors were notified of my departure.

15 **Q** But no vendors were copied on the e-mail,
16 were they?

17 **A** No, they were not.

18 **Q** So why is Amy Andrews sending you an e-mail
19 to your Encore address to touch base to see how
20 things are going?

21 **A** Because this address is being monitored.

22 **Q** By whom?

23 **A** By Encore.

24 **Q** And so why did you want Encore to see an
25 e-mail from Amy Andrews to you after you had

1 Touch, what else did you disclose to Mr. Gallant that
2 required a non-disclosure agreement?

3 **A** I don't remember the content of the
4 conversation.

5 **Q** Did he indicate to you that he was
6 interested in joining Clear Touch at some point?

7 **A** If it made sense, yes.

8 **Q** And how did you maintain contact with
9 Mr. Gallant, from the time that he signed the
10 non-disclosure on April 25th, 2014 until Clear Touch
11 hired him in January 2015?

12 **A** Telephone.

13 **Q** Did you e-mail with Mr. Gallant about the
14 opportunities he had to come work for Clear Touch?

15 **A** I believe so.

16 **Q** And you did that while Mr. Gallant was an
17 employee of Encore?

18 **A** That is correct.

19 **Q** Let me show you what we're marking as
20 Exhibit 33. Is this an e-mail from your wife to you
21 dated April 30th, 2014?

22 **A** That is correct.

23 **MS. BARKER:** Your Honor, I'd like to move
24 into evidence, Exhibit 33.

25 **THE COURT:** It's admitted.

1 **Q** And you got Mr. Gallant to sign a
2 non-disclosure agreement so he wouldn't tell anybody
3 that, right?

4 **A** That is correct.

5 **Q** And specifically, so that he wouldn't tell
6 Encore, right?

7 **A** Or anybody.

8 **Q** Why would you not want Mr. Gallant telling
9 Encore that?

10 **A** Just confidential information.

11 **Q** Was it because you knew that Encore was
12 evaluating whether to sell interactive panels other
13 than Clear Touch panels?

14 **A** They were already selling other panels.

15 **Q** Well, you understood that there was a
16 review underway of which panel to focus on selling,
17 correct?

18 **A** I didn't understand the extent of it,
19 but...

20 **Q** Why would you think that Encore's comparing
21 different panels?

22 **A** Because they're evaluating the features to
23 make sure -- in Exhibit 31, they are evaluating the
24 features of the available products in the market.

25 **Q** Other than the fact that you owned Clear

1 **A** Because we have policy of having all that
2 we have communications with about Clear Touch
3 Interactive sign a non-disclosure.

4 **Q** All right. So what did you discuss about
5 Clear Touch with Mr. Gallant?

6 **A** Just sharing with him that Clear Touch was
7 its own entity and would be moving forward.

8 **Q** Well, Mr. Gallant knew that Clear Touch was
9 its own entity because he knew that -- in connection
10 with Exhibit 31 and the comparison of panels -- he
11 was comparing the Clear Touch panel with other
12 panels, right?

13 **A** Uh-huh. Yes.

14 **Q** So he knew that Clear Touch was a separate
15 entity. What additional information were you giving
16 him on April 25th?

17 **A** We were talking about the Clear Touch
18 Interactive, LLC and our plans for what it was going
19 to be.

20 **Q** Did you disclose to him at the time that
21 you were the owner of Clear Touch?

22 **A** I did.

23 **Q** And is that something you considered
24 confidential?

25 **A** Yes.

1 **A** Uh-huh.

2 **Q** Is this a non-disclosure agreement -- the
3 non-disclosure agreement you got Leo Gallant to sign?

4 **A** It's one presented to Leo Gallant and
5 signed by Leo Gallant, that's correct.

6 **Q** And it's dated April 25th, 2014; is that
7 right?

8 **A** That is correct.

9 **Q** And that's the same day that you received
10 the severance agreement from Encore?

11 **A** That is correct.

12 **Q** And Mr. Gallant was an employee of Encore
13 at the time?

14 **A** That is correct.

15 **Q** Why did you have Mr. Gallant sign a
16 non-disclosure agreement with you the day you were
17 leaving Encore?

18 **A** Well, the day of, which actually was the
19 evening of, where Leo and his spouse Kim joined us
20 for dinner.

21 **Q** And do you ask all of your dinner guests to
22 sign non-disclosure agreements?

23 **A** I'll have you over. No, I do not.

24 **Q** Why did you have Mr. Gallant sign a
25 non-disclosure agreement?

1 for Clear Touch products, weren't you?

2 **A** As part of that for creating the
3 opportunity for Encore, yes.

4 **Q** And Mr. Gallant was working hard to create
5 the demand for the Clear Touch product, wasn't he?

6 **A** Mr. Gallant was working hard on several
7 projects.

8 **Q** Including the Clear Touch product?

9 **A** Including, yes.

10 **Q** And this chart, that is attached, indicates
11 that Clear Touch is the product that Encore should go
12 with, right?

13 **A** With its unique opportunity, yes.

14 **Q** Now, you've got Mr. -- let's see. Before we
15 get into that, let me show you what we've marked as
16 Plaintiff's Exhibit Number 6. Is this a severance
17 agreement and general release you entered with
18 Encore?

19 **A** It is.

20 **Q** Now, around this time, you've got Mr. Leo
21 Gallant, who was still an employee of Encore, to sign
22 a non-disclosure agreement with you, correct?

23 **A** Uh-huh. That's correct.

24 **Q** Let me show you what we're marking as
25 Exhibit 32.

1 to Clear Touch in South Carolina?

2 **A** To expedite the delivery of mail.

3 **Q** Let me show you what we're marking as
4 Exhibit 31. If you will look back on the fourth page,
5 you will see there's an e-mail from Todd Newnam to
6 Leo Gallant on April 11th, 2014, saying, "Leo, Keone
7 was going to give you a list of performance
8 characteristics and a list of product offerings for
9 you to prepare a grid so we could view the product
10 options."

11 **A** Uh-huh.

12 **Q** Was that true? Was that something you were
13 working with Leo Gallant on?

14 **A** Yes, I believe so.

15 **Q** If you will look at the last paragraph, the
16 second sentence says, "We are working very hard to
17 create the demand and awareness for this unique
18 offering by Encore." Was that true?

19 **A** Which sentence again?

20 **Q** That's okay. So the question is, was it
21 true that you all were working very hard to create
22 the demand and awareness for this unique offering by
23 Encore?

24 **A** Yes.

25 **Q** But you were working hard to create demand

1 ambiguity or prospective confusion.

2 And Amy Andrews was to take over in Kathy's
3 place as we transferred the company to Clear Touch
4 Interactive, Inc.

5 Q After you left Encore, you disclosed your
6 involvement in Clear Touch?

7 A That is correct.

8 Q And didn't Encore start paying Clear Touch
9 directly in South Carolina?

10 A That is correct.

11 Q So wasn't the purpose of having the PO box
12 in Nevada to hide the fact that you all were involved
13 in Clear Touch?

14 A No, because the business address for Clear
15 Touch Interactive, Inc. is in Reno, Nevada.

16 Q And the business address for Clear Touch
17 was also in Nevada after you left Encore and
18 disclosed your involvement, right?

19 A It is today.

20 Q But then, at that point, you started having
21 checks go directly to South Carolina, your South
22 Carolina address?

23 A That's correct.

24 Q Why did you change -- after you left
25 Encore, why did you change the checks going directly

1 **Q** And so why not just have the Encore checks
2 sent directly to Clear Touch in South Carolina?

3 **A** Because the business address for Clear
4 Touch Interactive was in Reno, Nevada.

5 **Q** And that was important because you didn't
6 want Encore to know that Clear Touch had a South
7 Carolina connection, right?

8 **A** No. It was important because it was a
9 Nevada corporation.

10 **Q** Well, isn't it true that the reason you put
11 Kathy Cruse on the public documents, you had your
12 wife pose as Amy Andrews, and you had Encore ship
13 checks to Nevada, only to turn around and be shipped
14 back to South Carolina, was to hide the fact that you
15 and your wife were involved in Clear Touch?

16 **A** No.

17 **Q** What was the reason for putting Kathy Cruse
18 on the public documents, having your wife pose as Amy
19 Andrews, and having Encore send checks to Nevada
20 first, instead of directly to South Carolina?

21 **A** The last one, as indicated before, the
22 address for Clear Touch Interactive was in Reno,
23 Nevada. That is the business address for that entity.

24 The reasons for Kathy Cruse is -- we
25 discussed earlier, in detail, was to remove any

1 **A** No.

2 **Q** It begins with Amy?

3 **A** That is correct.

4 **Q** Which is your wife?

5 **A** No.

6 **Q** Which is -- Amy is Tamara Trask?

7 **A** That is a pen name that she uses, yes.

8 We've already established that.

9 **Q** Why did Clear Touch have Encore send
10 payments for its product to a PO box in Nevada and
11 then turn around and have those checks sent back to
12 Clear Touch in South Carolina?

13 **A** Because it's a Nevada registered
14 corporation.

15 **Q** So my question is, why did Clear Touch not
16 just have Encore make payments directly to it in
17 South Carolina where it deposited the checks?

18 **A** Because the business address for Clear
19 Touch Interactive, Inc., was located in Reno, Nevada.

20 **Q** All right. But Clear Touch's bank account
21 was in South Carolina, right?

22 **A** One of them, yes.

23 **Q** Weren't Encore's checks sent from Nevada to
24 South Carolina?

25 **A** Yes.

1 **MS. BARKER:** Your Honor, I'd like to move
2 into evidence, Exhibit 29.

3 **THE COURT:** It's admitted.
4 (Plaintiff's Exhibit 29 is admitted into the
5 record.)

6 **BY MS. BARKER:**

7 **Q** Was Amy Andrews your wife?

8 **A** No, Tamara Trask is my wife.

9 **Q** And was Tamara Trask Amy Andrews?

10 **A** It's already been established.

11 **Q** Is that yes?

12 **A** Yes.

13 **Q** So it is fair to describe this as an e-mail
14 from you to your wife, right?

15 **A** No, it's from Keone Trask to
16 aa@cleartouchinteractive.com.

17 **Q** And that's your wife's e-mail account?

18 **A** That is Amy Andrews's e-mail account.

19 **Q** Are you saying that Amy Andrews is not your
20 wife?

21 **A** I didn't say that.

22 **Q** She is your wife?

23 **A** No, Tamara Trask is my wife.

24 **Q** Do you really view Amy Andrews as a
25 different person from your wife?

1 **Q** And you're copying Leo Gallant at Encore
2 with this e-mail?

3 **A** That is correct.

4 **Q** Is the reason that you're referring to your
5 wife as Amy to maintain this ruse that you all are
6 not involved with Clear Touch?

7 **A** No, the purpose of the e-mail was to
8 facilitate information.

9 **Q** But the purpose of addressing it to Amy was
10 to hide the fact that you are all involved in Clear
11 Touch, right?

12 **A** No.

13 **Q** Well, why did you refer to your wife as
14 Amy?

15 **A** Because Amy is the one that sent the
16 e-mail.

17 **Q** Isn't your wife going under the alias Amy
18 Andrews?

19 **A** That is correct.

20 **Q** And you are playing along with her.

21 **A** Playing along, no.

22 **Q** Let me show you what we're marking as
23 Exhibit 29. Is this an e-mail from you to your wife
24 dated March 24th, 2014?

25 **A** It's an e-mail from me to Amy Andrews.

1 Touch e-mail address?

2 **A** Potentially.

3 **Q** And is that to keep Encore from knowing
4 that you're involved with Clear Touch?

5 **A** No, it's to capture leads and then forward
6 them on.

7 **Q** Well, if your wife is forwarding the leads
8 to you at your Encore e-mail address, why wouldn't
9 you just arrange to have the website notify you at
10 your Encore address?

11 **A** I don't have an answer for your question.

12 **Q** Let me show you what we're marking as
13 Exhibit 27. Is this an e-mail from you to your wife
14 on February 10th, 2014?

15 **A** It's an e-mail from me to Amy Andrews, yes.

16 **MS. BARKER:** Your Honor, I'd like to move
17 into evidence, Exhibit 27.

18 **THE COURT:** It's admitted.

19 (Plaintiff's Exhibit 27 is admitted into the
20 record.)

21 **BY MS. BARKER:**

22 **Q** And Amy Andrews is your wife, right?

23 **A** Yes.

24 **Q** And you address her as Amy, correct?

25 **A** That is correct.

1 scrutiny?

2 **A** Not at that time, no.

3 **Q** Let me show you what we're marking as
4 Exhibit 26. Is this an e-mail from your wife posing
5 as Amy Andrews to you dated February 10th, 2014?

6 **A** It appears to be.

7 **MS. BARKER:** Your Honor, I'd like to move
8 into Exhibit 26.

9 **THE COURT:** It's admitted.

10 (Plaintiff's Exhibit 26 is admitted into the
11 record.)

12 **BY MS. BARKER:**

13 **Q** And it says, "Here is a lead from a general
14 inquiry to the website." Is that the Clear Touch
15 website?

16 **A** In this context, it appears to be.

17 **Q** If the Clear Touch website forwarded leads
18 to you, would they have forwarded them to your Encore
19 e-mail address?

20 **A** No, they would not.

21 **Q** Did you have a separate Clear Touch e-mail
22 address at this time?

23 **A** Yes.

24 **Q** And would the leads from the Clear Touch
25 website have been forwarded to you at your Clear

1 **Q** Let me show you what we're marking as
2 Exhibit 4. And do -- you understand that your wife
3 posed as somebody named Amy Andrews for Clear Touch,
4 correct?

5 **A** That is correct.

6 **Q** Why did you have your wife pose as Amy
7 Andrews for Clear Touch?

8 **A** At this point, we had signaled with our
9 filing with the Secretary of State in Nevada that we
10 were incorporating as Clear Touch Interactive, and it
11 was going to be our interest going forward. But with
12 my mother's help -- Kathy Cruse -- she was stepping
13 aside and needed somebody to fill in the gap until
14 that was formalized.

15 **Q** Well, why did your wife not just appear to
16 Encore as Tamara Trask?

17 **A** Because, at the time, we thought there
18 would be some bias towards the decisions that were
19 involved.

20 **Q** So you think if Encore knew that you and
21 your wife were involved with Clear Touch, they would
22 scrutinize the value they were receiving from the
23 Clear Touch product?

24 **A** That was -- that was the thought, yes.

25 **Q** And you didn't want Encore to conduct that

1 **A** At this time, it was.

2 **Q** And why did you need your mother to confirm
3 the modified terms of pricing for Leon County School
4 District?

5 **A** To communicate the confirmation of the
6 modified terms and pricing.

7 **Q** Mr. Trask, you said you collaborated by
8 e-mail with your mother on things like the reseller
9 agreement, the price list. Where are the e-mails
10 between you and your mother showing that
11 collaboration?

12 **A** I believe we submitted it into the record
13 -- information regarding the loss of an e-mail
14 server.

15 **Q** So you're saying those e-mails have been
16 lost?

17 **A** If they were there, yeah. They're no longer
18 available.

19 **Q** And you're saying that Clear Touch didn't
20 have any sort of backup for those e-mails?

21 **A** As a formality, no, we did not.

22 **Q** Well, I want to make sure I'm clear. I'm
23 not just talking about formality, but did Clear Touch
24 have a backup for the e-mails?

25 **A** No.

1 contacting them, is because it would conflict with
2 your duties with Encore, right?

3 **A** That's what I said.

4 **Q** Because at this time, you were supposed to
5 be spending 100 percent of your time and devote 100
6 percent of your time to the business of Encore,
7 right?

8 **A** And I was.

9 **Q** Let me show you what we've marked as
10 Exhibit 58. This is an e-mail from your mother to you
11 on December 17, 2013?

12 **A** Correction. It's from Kathy Cruse to
13 purchasing@encoretg.com, copying myself.

14 **MS. BARKER:** Your Honor, I'd like to move
15 into evidence, Exhibit 58.

16 **THE COURT:** It's admitted.

17 (Plaintiff's Exhibit 58 is admitted into the
18 record.)

19 **BY MS. BARKER:**

20 **Q** And it says, "The e-mail is provided as
21 confirmation of modified terms and pricing for Leon
22 School District"; is that right?

23 **A** That is correct.

24 **Q** Leon School District was a customer of
25 Encore, right?

1 **MS. BARKER:** Your Honor, I would like to
2 admit into evidence, Exhibit 57.

3 **THE COURT:** It's admitted.

4 **BY MS. BARKER:**

5 **Q** And you said, "We have a single order
6 opportunity exceeding 100 units. Can we get any
7 additional pricing assistance to complete this deal?"
8 Is that your asking for a discount?

9 **A** For an opportunity, that's correct.

10 **Q** Did you really need to ask your mother for
11 whether a discount could be taken on this?

12 **A** I needed her to contact our suppliers to
13 see what additional latitude they had to support
14 pricing discounts.

15 **Q** And that's something you could not do?

16 **A** Not during this period of time, no.

17 **Q** Why not?

18 **A** Because I had other responsibilities I was
19 attending to.

20 **Q** And the other responsibilities you had were
21 as Encore's chief business development officer,
22 right?

23 **A** That is correct.

24 **Q** So you just said the reason you had Kathy
25 Cruse contacting the supplier, instead of your

1 Carolina, Tennessee and Virginia; is that right?

2 **A** Per the exhibit, that is correct.

3 **Q** So Encore had the right to be the exclusive
4 reseller of Clear Touch products in those states,
5 correct?

6 **A** Until modified, correct.

7 **Q** Who determined what price Clear Touch would
8 charge for the products it was selling to Encore?

9 **A** It was the collaboration of a price list
10 development and presented to Encore on a regular
11 basis.

12 **Q** And who collaborated?

13 **A** That would be myself and Kathy Cruse.

14 **Q** And at the end of the day, if you wanted
15 the price to be a certain amount, did you have the
16 authority to set that price?

17 **A** If it was requested to lower pricing, which
18 actually happens in transactions of what the price is
19 going to be for specific opportunities, yes, I would
20 participate in that.

21 **Q** Let me show you what was previously marked
22 as Exhibit 57. Is this an e-mail from you to your
23 mother dated November 2013?

24 **A** It's an e-mail between me and Kathy Cruse.
25 That's correct.

1 things like that?

2 **A** I wasn't always available for those
3 communications.

4 **Q** And you copied Wendy Metcalf; is that
5 right?

6 **A** That is correct.

7 **Q** Isn't it true that you were trying to give
8 the appearance to Encore that Clear Touch was owned
9 by an unrelated third party?

10 **A** That was a responsibility -- I mean,
11 through the periods leading up to that, Wendy would
12 coordinate the signing of the non-disclosure
13 agreements and other documents.

14 **Q** Let me show you what we're marking as
15 Exhibit 3. Is this the executed reseller agreement
16 between Clear Touch and Encore dated April 24th,
17 2013?

18 **A** It appears so.

19 **Q** In section 1.1, Clear Touch appointed
20 Encore as reseller -- or as exclusive reseller to
21 market, sell and lease Clear Touch products within
22 the territories stated in Exhibit A; is that right?

23 **A** That is correct.

24 **Q** And Exhibit A included the states of
25 Alabama, Georgia, Florida, North Carolina, South

1 **Q** Do you really think that there might be
2 some aspect of this agreement that you wouldn't
3 understand that your mother would?

4 **A** There is that potential.

5 **Q** Did you have access to your mother's Clear
6 Touch Interactive e-mail account,
7 kc@cleartouchinteractive.com?

8 **A** Yes.

9 **Q** Let me show you what we're marking as
10 Exhibit 22. Is this an e-mail that you wrote back to
11 Ms. Kathy -- well, to your mother, on April 22nd of
12 2013?

13 **A** That is correct.

14 **MS. BARKER:** Your Honor, I'd like to move
15 into evidence, Exhibit 22.

16 **THE COURT:** It's admitted.

17 (Plaintiff's Exhibit 22 is admitted into the
18 record.)

19 **BY MS. BARKER:**

20 **Q** Why did you e-mail her to let her know that
21 you were actively reviewing the contract and would
22 likely complete it that week?

23 **A** To provide her an update to her previous
24 e-mail.

25 **Q** You didn't just talk to your mother about

1 Kathy Cruse and myself.

2 Q Well, was it you or was it Kathy Cruse?

3 A Could have been either one of us. I don't
4 recall.

5 Q Why did you have your mother send you an
6 e-mail attaching this agreement to you at Encore?

7 A She may have been the last to prepare it
8 and review it and then, subsequently, submitted it.

9 Q Are you saying that's what happened?

10 A I'm speculating that it happened.

11 Q Why didn't you just present the reseller
12 agreement directly to Encore?

13 A I suppose I could have.

14 Q Why didn't you?

15 A I don't recall.

16 Q And then when your mother says in the last
17 sentence, "If you have any questions, you may contact
18 me for clarification" ---

19 A Uh-huh.

20 Q --- would you really need to talk to your
21 mother for clarification about this agreement?

22 A I could.

23 Q But would you need to?

24 A That's speculation. We don't know. I
25 didn't.

1 **A** Prices of its products? From its suppliers?

2 **Q** Both from its suppliers and the price at
3 which it was selling to customers.

4 **A** Yes.

5 **Q** And, of course, because you were involved
6 with both Clear Touch and Encore, Clear Touch had
7 knowledge of your non-disclosure/non-solicitation
8 agreement, correct?

9 **A** That is correct.

10 **Q** Let me show you what we're marking as
11 Exhibit 21. Is this an e-mail from Kathy Cruse Krebs
12 to you, at Encore, dated April 18, 2013, attaching a
13 reseller agreement?

14 **A** It appears to be.

15 **Q** Who drafted the reseller agreement?

16 **MS. BARKER:** Your Honor, I would like to
17 move into evidence, Exhibit 21.

18 **THE COURT:** Any objection?

19 **MR. SMITH:** Same objection.

20 **THE COURT:** Very good.

21 (Plaintiff's Exhibit 21 is admitted into the
22 record.)

23 **BY MS. BARKER:**

24 **Q** Who drafted the reseller agreement?

25 **A** That was a culmination of activity between

1 **Q** And it's dated February 14th, 2013; is that
2 right?

3 **A** That is correct.

4 **Q** And Encore paid you \$175,000 a year as a
5 base salary?

6 **A** That is correct./

7 **Q** What was your role for Encore?

8 **A** The title that was given was chief business
9 development officer. The roles and responsibilities
10 were not defined.

11 **Q** Well, what did you understand your
12 responsibilities to be as chief business development
13 officer?

14 **A** Relationship management.

15 **Q** Relationships with whom?

16 **A** Customers, staff, business partners.

17 **Q** What about suppliers?

18 **A** And in some cases, yes.

19 **Q** Did you supervise any employees for Encore?

20 **A** I did.

21 **Q** Who?

22 **A** That would be Leo Gallant and Carla
23 Davidson.

24 **Q** Did you have access to Encore's prices of
25 its products?

1 **Q** How much did Clear Touch spend in
2 developing it's products?

3 **A** Define "development."

4 **Q** Well, what do you have to do to get a
5 product ready to sell?

6 **A** Well, you have to define what the product's
7 going to be.

8 **Q** Well, the interactive video panels that
9 Clear Touch sells.

10 **A** Okay. So you have to define and outline
11 your specifications for that product, and you have to
12 find a manufacturer to deliver that.

13 **Q** And how much did Clear Touch spend on doing
14 that?

15 **A** In terms of dollars, it would be hard to
16 pinpoint a number on that. In terms of time and
17 effort, significant.

18 **Q** Did it spend any money developing the
19 products?

20 **A** Very little.

21 **Q** Let me show you what we're marking as
22 Exhibit 1. Is this your employment agreement with
23 Encore?

24 **A** This is an employment agreement between
25 myself and Encore.

1 Q But as of that time, you and your wife were
2 also officers of Clear Touch, right?

3 A Correct.

4 Q And the third employee was Leo Gallant; is
5 that right?

6 A That is correct.

7 Q And both Mr. Higginbotham and Mr. Gallant
8 were employees of Encore before coming to Clear
9 Touch; is that right?

10 A That is correct.

11 Q What sales and marketing personnel did
12 Clear Touch have from February 2013 through
13 April 2014?

14 A The sales and marketing was performed by
15 our affiliates and resellers as part of their
16 agreement.

17 Q And that was Encore?

18 A At that time, yes.

19 Q Other than providing sheets about the
20 product to Encore, did Clear Touch engage in any
21 other business development?

22 A Can you define "business development"?

23 Q Well, any effort to -- incurring any
24 expenses to grow the business.

25 A No.

1 **A** The role was to evaluate product, look at
2 suppliers, look at opportunities.

3 **Q** Who did the practical management of Clear
4 Touch?

5 **A** The practical management being...?

6 **Q** Day-to-day business.

7 **A** Day-to-day business was conducted by
8 myself; Kathy Cruse; on occasion, Tamara Trask would
9 collaborate on things in our personal time, weekends,
10 after hours.

11 **Q** Did Kathy Cruse Krebs get paid any money by
12 Clear Touch, LLC?

13 **A** Did not.

14 **Q** Let me show you what we're marking as
15 Exhibit 18. Is this a list of employees of Clear
16 Touch?

17 **A** Yes, but I cannot determine for which
18 period.

19 **Q** Well, if you'll look at the column called
20 "Hire Date" ---

21 **A** Uh-huh.

22 **Q** --- is the first employee of Clear Touch
23 indicated on here a James Higginbotham, as of
24 August 1st, 2014?

25 **A** That is correct.

1 is the Clear Touch Interactive Retirement Fund.

2 Q And what is the Clear Touch Interactive
3 Retirement Fund?

4 A It's a retirement fund that was established
5 to roll over 401(k) proceeds.

6 Q And those were your 401(k) proceeds, right?

7 A That's correct.

8 Q Other than you, were there any other
9 directors of Clear Touch?

10 A My wife, Tamara Trask.

11 Q So you two were the sole directors?

12 A That is correct.

13 Q From inception?

14 A That is correct.

15 Q Other than you and your wife, were there
16 any other officers of Clear Touch?

17 A In what time period?

18 Q From the time it was formed.

19 A Not at the inception, no.

20 Q But if we limit officers to president,
21 secretary and treasurer, have there been any other
22 officers of Clear Touch since inception?

23 A No, there have not.

24 Q What was your role for Clear Touch, LLC,
25 beginning in April of 2013?

1 Clear Touch Interactive, LLC in Nevada, right?

2 A That is correct.

3 Q So that was your decision?

4 A Yes.

5 Q Were you, in fact, the president and
6 director of Clear Touch?

7 A That is correct.

8 Q And it looks like your wife is the
9 secretary and treasurer of Clear Touch; is that
10 right?

11 A That is correct.

12 Q When did you become president?

13 A I don't know the actual date, but it was
14 upon the formation of Clear Touch Interactive, Inc.

15 Q Would you have been the director of Clear
16 Touch when it was formed?

17 A Yes.

18 Q And would your wife have been the secretary
19 and treasurer of Clear Touch when it was formed?

20 A That is correct.

21 Q Now, who was the owner of Clear Touch
22 Interactive, Inc., the shareholder?

23 A In which period?

24 Q When it was formed.

25 A That would be the single shareholder, which

1 **Q** Now, did you discuss with Kathy
2 incorporating Clear Touch?

3 **A** Yes.

4 **Q** What were the reasons and purpose?

5 **A** To apply funding that was available.

6 **Q** What do you mean "apply funding"?

7 **A** So we had an initial -- initial infusion of
8 dollars, which was retired from my personal 401(k)
9 account, and used what's called a ROBS Funding,
10 retirement-owned business start-up fund, that
11 required a C Corporation be established so that it
12 could own the shares.

13 **Q** And whose retirement funds were used to
14 invest in Clear Touch Interactive, Inc.?

15 **A** That would be mine.

16 **Q** Did Kathy Cruse invest any money in Clear
17 Touch?

18 **A** No, she did not.

19 **Q** Let me show you what we're marking as
20 Exhibit 16. Were these Articles of Conversion filed
21 with the Nevada Secretary of State in January '14 --
22 January of 2014, to convert Clear Touch Interactive,
23 LLC, into Clear Touch Interactive, Inc.?

24 **A** It appears to be.

25 **Q** Well, you made the decision to incorporate

1 owned Clear Touch?

2 **A** It's readily available to look online.

3 **Q** So you didn't want anyone to look online
4 and see you as an owner of Clear Touch?

5 **A** No, I didn't want to create confusion for
6 prospective customers of those of Encore. People
7 doing business with us, those that needed trust, we
8 didn't need to have them confused by finding
9 information like that.

10 **Q** Would it be troubling to somebody to find
11 out that you are both an employee of Encore and an
12 owner of Clear Touch?

13 **A** I can't speak for anybody -- for somebody
14 else.

15 **Q** But you were supposedly making this change
16 in the public records to avoid confusion, right?

17 **A** That's correct.

18 **Q** Let me show you what we're marking as
19 Exhibit 15. Were these Articles of Incorporation of
20 Clear Touch Interactive, Inc., filed with the Nevada
21 Secretary of State in January of 2014?

22 **A** It appears so.

23 **Q** And who caused these to be filed?

24 **A** That was Kathy that initiated the
25 conversion.

1 **Q** So did you assign all of your and the
2 Powells' interest in Clear Touch to Ms. Cruse?

3 **A** That is correct.

4 **Q** And who is Kathy Cruse?

5 **A** Kathy Cruse, also known as Kathy Krebs, is
6 my mother.

7 **Q** And why did you and Ms. Trask assign your
8 interest in Clear Touch to Ms. Cruse?

9 **A** Well, there was -- at the time Encore was
10 starting, and there was a lot of confusion in the
11 market following the acquisition of CSI by Harris,
12 then the transition to Encore and a lot of people
13 that were missing from the teams as a result of that.
14 And there was a lot of confusion with that, and
15 further confusion by having myself associated with
16 another company, was one that we wanted to remove,
17 for the benefit of Encore.

18 **Q** So for the benefit of Encore, you did not
19 want to be associated with Clear Touch at that point?

20 **A** That is correct.

21 **Q** Well, if the goal was to avoid confusion in
22 the market, how would transferring your ownership
23 interest in Clear Touch clarify any confusion?

24 **A** It would remove confusion, not clarify.

25 **Q** How would anybody in the market know who

1 Mr. Powell's involvement with Clear Touch.

2 A Uh-huh.

3 Q When did that end?

4 A At the interest of Encore, and he assumed
5 the role of CEO. That's where he wanted to put his
6 focus and energies.

7 Q So did he relinquish his ownership
8 interests in Clear Touch at that point?

9 A We did move that interest to another
10 member.

11 Q To whom?

12 A To Kathy Cruse.

13 Q And when did that occur?

14 A I don't have the exact filing, but that
15 occurred in or about April of 2014.

16 Q Of 2014?

17 A 2013, I apologize.

18 Q Let me show you what we've marked as
19 Exhibit 14. Is this a filing with the Nevada
20 Secretary of State for Clear Touch that shows a Kathy
21 Cruse as managing member as of April 2013?

22 A It appears so.

23 Q Now, did you and Ms. Trask also retain your
24 ownership interests of Clear Touch at this time?

25 A No, we did not.

1 that did lead to the acquisition, through the
2 participation of Todd Newnam and acquiring the assets
3 from Harris.

4 Q Now, did Mr. Newnam acquire the assets from
5 Harris individually, or did he acquire them from --
6 did Encore acquire them?

7 A I believe Encore acquired them.

8 Q So Mr. Newnam acquired Encore?

9 A That's correct.

10 Q From you and Mr. Powell?

11 A That is correct.

12 Q At the time that you transferred the
13 interest in Encore to Mr. Newnam, did you disclose to
14 him that you had formed Clear Touch?

15 A No, I did not.

16 Q And then when Encore purchased the assets
17 of -- I guess the technology reselling assets of
18 Harris, you became an employee of Encore?

19 A That is correct.

20 Q So the last question on this, when you
21 became an employee of Encore, did you disclose to
22 Mr. Newnam about Clear Touch?

23 A I did not.

24 Q And then, we were talking about Mr. -- what
25 led us down this road was trying to pin down

1 the exact timeline.

2 Q What happened with their involvement with
3 Clear Touch?

4 A We shifted our focus when the new
5 opportunity arrived, and that's why we formed Encore
6 Technology Group.

7 Q And so what was, then, the idea among the
8 CSI employees who were involved in that technology
9 reselling business?

10 A Well, the idea was to see if there was a
11 way to take the viable nature of that business, the
12 technology reselling and Cloud services, and create
13 its own entity.

14 Q And was Clear Touch going to be the
15 business -- or you said Encore was the entity that
16 was formed to purchase that business; is that right?

17 A That is correct.

18 Q And who was involved, originally, in
19 forming Encore?

20 A Myself and Chris Powell.

21 Q And so, then did you and Chris Powell use
22 Encore to acquire the technology reselling business
23 from Harris?

24 A We solicited several prospects to
25 participate in making Encore viable. And ultimately,

1 CSI?

2 **A** I did.

3 **Q** Did you disclose that you had formed Clear
4 Touch to anyone at CSI?

5 **A** No.

6 **Q** Now, let me show you what we're marking as
7 Exhibit 12. It looks like a few days later, you
8 filed, with the Nevada Secretary of State, a list of
9 managers or managing members of Clear Touch, LLC,
10 that included not only you and your wife, but also
11 Chris and Jamie Powell. Can you explain to me how
12 that occurred?

13 **A** The filing process?

14 **Q** No. How Mr. and Mrs. Powell came to be
15 added as managing members of Clear Touch, LLC.

16 **A** After establishing the opportunity and
17 sharing what the opportunity was, there was an
18 interest to participate.

19 **Q** Was Mr. Powell also an employee of CSI?

20 **A** At the time, I believe so.

21 **Q** How long were Mr. and Mrs. Powell involved
22 with Clear Touch?

23 **A** The length of involvement?

24 **Q** Yes.

25 **A** For a short period of time. I don't know

1 **Q** Starting from?

2 **A** Systems Engineer, ending with Senior Vice
3 President of Cloud services.

4 **Q** And what did your job involve at the end?

5 **A** Working with partners, to liaison with
6 customers.

7 **Q** What do you mean "partners"?

8 **A** Partners such as manufacturing partners.

9 **Q** Suppliers?

10 **A** Yes.

11 **Q** And what were you supposed to do with
12 suppliers?

13 **A** Evaluate their technologies, determine if
14 it was marketable.

15 **Q** Let me show you what we're marking as
16 Exhibit 11. Is this the document showing when you
17 formed Clear Touch Interactive, LLC, with the Nevada
18 Secretary of State in September of 2012?

19 **A** It appears to be.

20 **Q** And were you and your wife the sole members
21 of Clear Touch, LLC?

22 **A** As indicated here, yes.

23 **Q** Why did you form Clear Touch?

24 **A** To bring an idea to market.

25 **Q** And you did this while you were employed by

1 background information from you. What's your date of
2 birth?

3 **A** 1/12/72.

4 **Q** And were you born here in Greenville
5 County?

6 **A** No, I was not.

7 **Q** Where were you born?

8 **A** In Northridge, California.

9 **Q** When did you move to South Carolina?

10 **A** In November of 2000.

11 **Q** What did you do next?

12 **A** Worked for a company called Computer
13 Software Innovations.

14 **Q** What did you do for them?

15 **A** Network engineer.

16 **Q** And what dates?

17 **A** That would be from May 1999 to
18 October 2012.

19 **Q** And what did you do for -- let's just call
20 Computer Software Innovations, CSI, okay?

21 **A** We can do that.

22 **Q** What did you do for CSI throughout the time
23 you were there?

24 **A** I had 10 different titles associated with
25 that tenure.

1 You ready to proceed, Mr. English?

2 **MR. ENGLISH:** Yes, Your Honor. We're going
3 to proceed first with reading the 30(b)(6)
4 deposition of Clear Touch given by Keone Trask.
5 Ms. Barker is going to read the questions and
6 Mr. Andy Coburn, from our office, is going to
7 read the part of Mr. Trask.

8 **THE COURT:** Very good.

9 **DEPOSITION EXCERPTS OF KEONE TRASK 30(b)(6)**

10 **DIRECT EXAMINATION**

11 **BY MS. BARKER:**

12 **Q** Good morning, Mr. Trask. As you know, my
13 name is Greg English -- actually, my name is not, but
14 I'm playing the role of Greg English today -- and
15 we're here today to take your deposition on behalf of
16 Defendant Clear Touch. This is the deposition under
17 Rule 30(b)(6) of the South Carolina Rules of Civil
18 Procedure of Clear Touch Interactive, Inc., formerly
19 known as Clear Touch Interactive, LLC, and attached
20 to the Exhibit A are topics or matters that we have
21 designated for the deposition. I understand that
22 Clear Touch has designated you to give the responses
23 to all of those matters; is that correct?

24 **A** That is correct.

25 **Q** Mr. Trask, let me get a little bit of

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