UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 14-81395-CIV-MARRA

FEDERAL TRADE COMMISSION AND STATE OF FLORIDA,

PLAINTIFFS,

-v-

INBOUND CALL EXPERTS, LLC, ET AL.,

DEFENDANTS.

West Palm Beach, Florida
December 17, 2014

VOLUME 2 - PAGES 1 - 305

TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS

BEFORE THE HONORABLE KENNETH A. MARRA

UNITED STATES DISTRICT JUDGE

Appearances:

(On Page 2.)

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* * * * *

(Call to the order of the Court.)

THE COURT: Good morning, everyone. Please be seated.

We ready to proceed?

MR. FERGUSON: Yes, Your Honor, we are.

THE COURT: Okay. So I assume we're going to start with the defense witnesses, and then when the Plaintiffs' expert gets here we'll take the Plaintiffs' expert?

MR. FERGUSON: Yes, Your Honor. In light of Mr. Skoudis not getting in 'til the afternoon, we'll agree to go ahead. And I want to see, we have one consumer witness. I want to see if he's in the hall. If he's not, we have another witness that we'll put up.

THE COURT: Okay.

MR. STREISFELD: Your Honor, while we're waiting for a witness to come in, we spoke to the Attorney General's Office and to the Federal Trade Commission counsel about moving in these two binders, which have all 11 of our declarations in them, and then allowing, if it's okay with you, allowing the witnesses to just, if they're being cross-examined on a declaration, to flip to the tab where their declaration is. Is that okay?

THE COURT: Sure.

MR. STREISFELD: So how would you like to mark, there's two volumes.

THE COURT: Well, do you have each one set out with a specific exhibit number?

MR. STREISFELD: Yeah, there's a tab. They're numbered 1 through 11 in the two binders.

THE COURT: Any objections to 1 through 11 being admitted?

MS. ROBBINS: No, Your Honor.

MR. EDMONSON: No, Your Honor.

THE COURT: They'll be admitted without objection.

(Defendants' Exhibit Nos. 1 through 11 entered into evidence.)

MR. STREISFELD: And I can help the court reporter. I guess I could read off the names.

THE COURT: It's not necessary.

MR. STREISFELD: Not necessary. Thank you.

THE COURT: Sir, would you raise your right hand, please.

Louis Martire, Defendants' witness, sworn.

THE COURT: Would you please be seated.

Sir, if you could tell me your name and spell your first and last names for me, please.

THE WITNESS: My name is Louis Martire, L-o-u-i-s M-a-r-t-i-r-e.

THE COURT: Thank you.

Cross-examination.

Cross-examination

BY MS. KIZIAH:

Q Mr. Martire.

A Good morning.

Q My name is Katherine Kiziah, and I'm with the State of Florida office of the State Attorney General. I have your declaration in front of me and I'm going to ask you several questions based on that. My understanding is you have your declaration in front of you, as well, correct?

I'll just ask when I'm asking you a question you answer with a verbal response. Okay?

A Okay.

Q To start, you testified that you began working in the remote tech support field three years ago when you started at iS3.

A Yes, I can.

Q Prior to starting working at iS3, what was your experience in the computer field?

A Throughout high school I was in the computer club. Also, I pursued computer programming one through four and AP computer programming in high school, and when I was in college it was also my major, but I did not complete college yet.

Q And you started working at Inbound Call Experts in February 2012, correct?

A That is correct.
Q Why did you switch over from iS3 to Inbound Call Experts?
A We were all laid off at iS3, the tech department, and for a while I was just jobless, and that's when I got the job at iS3 in February.
Q Did you reach out to Inbound Call Experts, or did they reach out to you?
A Actually, I was reached out by Edwin Ramirez.
Q And who is that?
A He's the director of the tech department at iS3 -- or was, and then now also at ICE.
Q You testified that in March 2013 you were promoted to senior technician, correct?
A Yes.
Q Is that your current position there?
A Yes.
Q Do you work at the T-Rex location?
A Yes, that is correct.
Q Have you always worked at T-Rex location?
A I also worked at the Banyan Trail location when the tech department was in that building.
Q And when was that?
A About three months ago, I believe. Yeah, about three months ago, then we moved, something like that.
Q Currently do all the tech employees work at the T-Rex

location?
A Yeah, the in-house techs work at T-Rex.
Q As a tech, were you ever required to sell any products to customers?
A No.
Q Were you ever trained on the script covering the initial sale of tech support services?
A No.
Q Have you ever seen the script that sells the initial tech support sales?
A No, can't say I have.
Q Can you provide any testimony as to the initial sales made to customers before they are transferred over to a tech?
A Repeat the question one more time.
Q Do you have any knowledge of the sales process before the customer is transferred over to the tech side of the business?
A Well, to my knowledge, the customer is informed of what our services are. Usually they come in with some kind of problem already that they've been experiencing, and, you know, the sales agent, you know, makes the sales pitch, and they take notes as to what -- and observations as to what they see on the system, you know, what might be wrong with it, and from there they create a support ticket once the customer has paid for the services, and then we follow

through with the work that's noted on the support ticket.

Q Have you ever listened in on a sales call?

A No.

Q What is your knowledge based on?

A My knowledge based on?

Q Your description of what happens in the sales process. What is that based on?

A I really don't do sales, I just fix computers.

MS. KIZIAH: Okay. I have no further questions.

One second, Your Honor.

BY MS. KIZIAH:

Q Why were all the techs laid off at iS3?

A To my knowledge, it's because of budget cuts.

Q And you don't have any firsthand information about what is said to customers before they're transferred over to the tech side of the business, correct?

A I don't have exact knowledge. You know, like I said, it's mostly they try to gather information for us. That's where my knowledge of sales is, they gather information for us as to what they've observed on the system. But as far as that, I don't do any selling or I'm really not aware of their pitch either.

Q Do you know when they gather that information that is given to you?

A It's usually -- they gather during the whole call.

They're taking notes from the beginning as to what the customer's issues are, what they complain about is wrong with their computer, and they also try to find if there are any other symptoms on their computer, do they need updates and things like that.

Q How do you know they take notes from the beginning?

A It's actually in the support ticket. It's all documented through a note-taking program that they have, and they just copy those notes that they've taken into the support ticket.

Q Right.

But my question was how do you know they take notes from the beginning?

A From the beginning?

Q Yes.

I understand that you know that there are notes. How do you know when those notes are taken?

A Because they write it down on the -- it should be that they write down what they've observed on there.

Q Right. But does it say on the notes when they answered the phone, took --

A Oh, when they add the notes, that's actually time stamped within the note-taking system. So that time stamp is also included in the support ticket with the agent's name on it.

Q Okay.

A So that can all be traced back.

Q You testified that you weren't required to sell any products to consumers, correct?
A Correct.
Q Were you ever required to do any up-sells?
A No, because that's also sales, and I don't do up-selling either.
Q Okay.
THE COURT: Any redirect?
MR. FERGUSON: Briefly, yes.

Redirect Examination

BY MR. FERGUSON:
Q Good morning.
A Good morning.
Q Would you tell the Court the importance about the notes that are taken by the sales agent with regard to the tasks that you're to perform, the technical tasks on the computers?
A Well, it's important to have the notes on there, so we kind of identify the most important issue to the customer first. We try to, you know, identify any other issues in addition to that, but mainly we try to solve the problem that they want fixed.
Q What are the types of things that you would normally see in the notes that you would use in your job?
A The notes usually list what kind of software that the customer requested to remove, if there's any kind of malware

on the system, you know, that's present, what, you know, malware -- what browser they're using. That also is important.

Q Let me ask you a question about the malware. Would it be what they suspect they have or they know they have, if you know?

A Usually in the case of malware, it's very apparent what is going on because the user is locked out from doing certain functions, and, you know, with malware or ransomware you're locked out. Sometimes you can't even log into Windows.

MR. FERGUSON: All right. I have nothing further. Thank you.

THE COURT: Anything else from the defense?

MR. NICHOLSON: We have nothing.

MR. EDMONSON: No, Your Honor.

THE COURT: Any recross?

MS. KIZIAH: I just have one additional question.

THE COURT: Yes.

Recross-examination

BY MS. KIZIAH:

Q Just wanted to clarify something. When a call is transferred over to you to start doing the tech services, are you speaking with the consumer at that time?

A Usually when I get a support ticket, the customer has already been in contact, because I work as a senior

technician, these customers have already dealt with previous technicians on the phone, so a lot of the times communication from my end is not needed until the work is completed or for some reason I can't get connected, the customer is not connected remotely yet, and then that would require me to call the customer.

Q Okay. So that is in your current position?

A Correct.

Q And is the answer no or yes? I was unclear as to what your answer was. When you're transferred the call, are you typically on the phone with the consumer?

A When I'm transferred the call? I get transferred tickets, the support ticket.

Q Right. When you're transferred the ticket.

A Sometimes I'm on the phone if it is a non-connected remote session. Other times I'm not. I'm just given the support ticket, and the session is remotely connected, and a technician has already documented what the issue is that they need help with or is outstanding.

Q Initially you started out not in the position that you're currently in, correct?

A Correct.

Q Just the regular tech.

In that position, when you were transferred the ticket were you on the phone with the consumer?

A Not always. It's the same situation. It would either be a non-connected ticket, which would require us to call the customer, and if it is connected, then we observe and read the notes of what's going on in the system and solve those issues.

MS. KIZIAH: Okay. Thank you.

THE COURT: Thank you, sir.

THE WITNESS: You're welcome.

MR. FERGUSON: Your Honor, the Defendants call Ryan Campeau. He's tab 9 in our binder.

THE COURT: Sir, would you raise your right hand, please.

Ryan Campeau, Defendants' witness, sworn.

THE COURT: All right. Sir, if you could tell us your name and spell your last name for us, please.

THE WITNESS: Ryan Campeau, that's C-a-m-p-e-a-u.

THE COURT: Thank you.

Cross-examination.

Cross-examination

BY MS. KIZIAH:

Q Good morning, Mr. Campeau.

A Good morning.

Q My name's Katherine Kiziah. I'm with the State of Florida Office of the Attorney General. I have your declaration here in front of me, and I understand that you

have yours in front of you, correct?
A Yes.
Q I'm going to ask you several questions based on that declaration, we'll go through it. Okay?
A Okay.
Q You testified that you started working in the remote tech support field at iS3 in April 2010, correct?
A Yes.
Q What was your experience with computers beforehand?
A Just fixing computers for friends, family, neighbors, people around me.
Q Okay. Did you graduate from college?
A No, I'm currently in college.
Q Okay. What's your major?
A Business administration.
Q Okay. And you started working at Inbound Call Experts in December 2012, correct?
A Yes.
Q Why did you -- did you go straight from iS3 to Inbound Call Experts?
A Yes.
Q Okay. How did you come to start working at Inbound Call Experts?
A Well, Harold, my supervisor from iS3, went over to Inbound Call Experts, and he liked it, told me I would like

it. So I went and checked them out, and it was a really good environment, so moved over there.

Q Okay. And in February 2013 you were promoted to technical team lead, correct?

A Yes.

Q Is that the position you currently maintain?

A Yes.

Q Okay. So you've always been a tech at Inbound Call Experts, correct?

A Yes.

Q Okay. And where do you currently work as a tech at Inbound Call Experts?

A At the T-Rex building.

Q Your declaration goes through some things involved in the tech side of the business, correct?

A Yes.

Q Okay. Are you familiar with the sales side of the business?

A No, not particularly.

Q Okay. Can you provide any testimony as to the sales side of the business?

A No.

MS. KIZIAH: I have nothing further.

THE WITNESS: Thanks.

THE COURT: Anything else?

MR. EDMONSON: No, Your Honor.
THE COURT: Any redirect?
MR. FERGUSON: No, Your Honor.
THE COURT: Thank you, sir.
MR. FERGUSON: Your Honor, may I step out in the hall just for a moment to check on our consumer witness to see if he's in?
THE COURT: Sure.
MR. FERGUSON: Okay.
Your Honor, the Defendants call Dennis Cannon. He's tab 6 in our binder.
THE COURT: Sir, would you raise your right hand, please.
Dennis Cannon, Defendants' witness, sworn.
THE COURT: Please be seated.
The chair doesn't move, sir, so you have to kind of --
THE WITNESS: That's the problem, being short.
THE COURT: If you can just lower that microphone just a little bit.
THE WITNESS: Sure.
THE COURT: And speak into it, and tell us your name and spell your last name, please.
THE WITNESS: C-a-n-n-o-n.
THE COURT: And your first name is?

THE WITNESS: Dennis, D-e-n-n-i-s.

THE COURT: Thank you, sir.

All right. Cross-examination.

Cross-examination

BY MS. KIZIAH:

Q Good morning, Mr. Cannon.

A Hi.

Q My name is Katherine Kiziah. I'm an attorney with the State of Florida Office of the Attorney General. I've reviewed your declaration that you've prepared.

A Yeah.

Q And I'm going to go through it and ask you a few questions. Okay?

A Sure.

Q And you have it in front of you, as well, if you need to refer to it. I'll start referring you to the second page and the first bullet point.

Let me know when you're there.

A Go ahead.

Q Okay. You testified that you purchased some software online but still could not get your computer, which had stopped working, to work, correct?

A Now, where is that?

Q In the first bullet point on the second page. Starts with "approximately two years ago."

A "My computer stopped working, I tried to" --

THE COURT: Sir, sir, Mr. Cannon, if you can speak into the microphone.

THE WITNESS: I'm sorry.

THE COURT: Can you start over again?

THE WITNESS: Have me read it?

THE COURT: I don't think she wants you to read it.

THE WITNESS: I'm familiar with it.

You have questions?

THE COURT: Go ahead.

BY MS. KIZIAH:

Q Do you recall what software that you purchased?

A You know, I thought about it, and I believe what happened was at that time there was a virus going around, and it came up, locked on my computer. It was from the FBI. It said that my computer was found to have child pornography on it, and if I wanted to get it started again I had to take $60 to Wal-Mart -- Walgreen's, excuse me and have it sent to a particular company. I said, well, that's ridiculous.

One thing I know, I don't view child pornography, and so I have another computer in the house. I went to that. I first went to malware, and I believe with malware it gave the number to call for any technical problems. And I believe that was how I first got my contact. You know, I can't -- it was two years ago, but I can tell you I couldn't go into the

safe mode. You know, I was dead in the water.

So I called it and I spoke to a gentleman who said he was familiar with what I'm dealing with.

Q Okay.

A Apparently it was a common problem then.

Q Let me stop you right there.

A Sure.

Q I just want to make sure I'm clear.

So you found the 800 number when you went onto your other computer and downloaded something called malware?

A No, I had the malware on the computer, but the one that had been infected, it wouldn't start not even in the safe mode.

Q Right.

Okay. So you found the 800 number on the noninfected computer --

A Yeah.

Q -- through that software program?

A Yeah.

Q Correct or no?

A Through a software program?

Q You said that you went on your functioning computer, and you had a malware program?

A Yeah.

Q Okay.

A Also.
Q And that's how you found the 800 number?
A Yeah, uh-huh.
Q Okay. You then state you called and spoke to an ATS representative. What happened -- do you recall what happened right after you called the number?
A Well, he -- he -- I told him I believe, you know, he was familiar with my problem, and said that it would cause X amount of dollars for them to repair it, and he said if we don't repair it, then, you know, you don't pay. And he said, or your other option is you can get a year subscription.

Well, I'm retired now, and unfortunately, something goes wrong like with a computer, because of my background, I think I know how to fix everything. Unfortunately I do not, and I end up causing more problems than I do solving them. So knowing that, I said I better go with the subscription.

It's a very good thing I did. In fact, I need them very badly the other night, and I couldn't go on, there was a message of what was happening to them at the time.

Q Okay. Thank you.

Going back to that initial time that you called them, you testified that you allowed ATS to remotely access your computer.
A Yes.
Q Was that on the computer that was shut down?

A Yeah, that was the computer that was infected.
Q Okay. Did you -- had you paid money to ATS before they remotely accessed your computer?
A I don't recall. Really, I don't. Probably, you know, I did, but it was -- you know, it truly was not at any time a major problem, I didn't think. Not that I'm wealthy, that it was out of line, it was too expensive. And I've been with them for a couple years now, and I have to use them every couple months, because, you know, I keep downloading stuff three or four times, and after a while it's just, you know, time to call them.
Q Understood.
So going back to when they remotely accessed your computer. Did they ever -- the ATS representative ever take you through a diagnosis either before your computer was back working or after?
A What they do in a case, you don't have to stay on the computer. In fact, they don't want you to touch the mouse when they're working on it. And in reality, you don't even have to stay at the computer while they're working.
In fact, not that long ago I had a problem, and it was at night, and I spoke to the ATS technician. She said we'll take care of it. And I told her what the problem was, and she says, were you getting ready to go to bed? And I said, yeah, I was, actually. She said, well, you can go do

that, because I'm going to be here for a while. And they leave you a note as to what they've done.

And it's just, you know, another day.

Q So my question, just to be clear, whether you know or not, did they take you through a diagnosis of your computer either before they started getting your computer working or after?

A No. I gave them the symptoms. You know, at that point they were accessed. I gave them permission to access my computer. So they were essentially viewing what I was seeing. And then, you know, then it was a matter of, you know, describing and their repairing.

Q Did you ever purchasing anything other than the initial fix and the subscription services?

A Yes, I did.

Q What else did you purchase?

A I'll tell you, I had been using McAfee Virus -- Antivirus. Wasn't especially pleased with it. I used to use Norton, but they kind of -- I don't know. They just blew up or something.

Anyway, they said they had a antivirus called Panda, and they said it's constantly running, and it will always be there for you, trust me, nothing will get through it. And it hasn't. I've been happy with it for a couple years now.

I mean, it was -- you know, living in Miami, you

never know what you're going to get. So I have yet to get anything they haven't been able to cure.

Q I just want to kind of go back to discussions we had earlier.

A Sure.

Q Okay. Do you know how Advanced Tech Support got access to your computer if it was completely shut down?

A I was able to access enough that I could put the code in that would allow them to go in, but, you know, in terms of running Windows, it was just -- it wouldn't work. But they were able to get in. I could not. Then again, I'm not an IT person.

Q Right.

And I understand this happened two years ago, so it's a little --

A Yeah. And, you know, I had -- I was asked about the reason for calling them, and, you know, I honestly couldn't remember.

Q And so what I want to ask you is do you remember the -- anything about the details about the call when you first contacted them other than what you've already testified?

A Well, I spoke with one person. Then I was connected to a technician, and told him what was going on and discussed whatever.

Q Do you remember the details of that discussion any more

than what we've already discussed?
A No, I really don't.
Q Okay. And you said that you've used them several times since.
A Yeah.
Q About how many times since you've had the contract with ATS have you used them or have you called?
A I don't know the exact number. I would think somewhere around six or seven.
Q Okay.
A I would have liked very much to have been eight, because I really needed them the other night, but I couldn't get them.
Q And you've had the Panda software since the very beginning?
A The first time, yeah, that I got. And the problem with the computer wasn't due to this time, it was due to my own technical expertise.

MS. KIZIAH: Thank you.

THE WITNESS: You're welcome.

THE COURT: Any redirect?

MR. FERGUSON: No.

Thank you, Mr. Cannon.

MR. EDMONSON: No, Your Honor.

THE COURT: Thank you, sir.

MR. FERGUSON: Your Honor, would it be possible to take a five-minute break?

THE COURT: Yes. We'll take a short recess. Thank you.

(A recess was taken from 9:35 a.m. to 9:45 a.m., after which the following proceedings were had:)

THE COURT: Please be seated, everyone.

We ready for our next witness?

MR. FERGUSON: Yes, we are, Your Honor.

Defendants call Mark Deviny. He's tab 7 in our notebook binder.

THE COURT: Sir, raise your right hand, please.

Mark Deviny, Defendants' witness, sworn.

THE COURT: Please be seated, sir.

Sir, if you can try and pull that microphone towards you and tell us your name and spell your last name, please.

THE WITNESS: Mark Deviny, D-e-v-i-n-y.

THE COURT: Thank you, sir.

Cross-examination.

Cross-examination

BY MS. KIZIAH:

Q Good morning, Mr. Deviny.

A Good morning.

Q My name's Katherine Kiziah, and I'm with the Office of the Attorney General, State of Florida. I'm going to ask you

several questions based on your declaration that you have in front of you, correct?
A Correct.
Q Okay. You started out Inbound Call Experts in February 2012, correct?
A That's a typo; it's supposed to be 2013.
Q Okay. Where did you work before Inbound Call Experts?
A Worked at Medcare Diabetic and Medical Supplies.
Q And what was your position there?
A Sales.
Q How long did you work there?
A Two years.
Q Okay. And before Medcare?
A Owned my own business, United States Mortgage Advisors.
Q Okay. And how long was United States Mortgage Advisors in business?
A I believe it was about a year, nine months, 10 months.
Q And what did United States Mortgage Advisors do?
A We provided loan modifications.
Q Why did that business shut down?
A The banks made it extremely difficult to issue those out.
Q Where did you work before you owned your business?
A I worked at National Medical Group, which was a diabetic and medical supply company.
Q And what was your position there?

A Sales.
Q And how long did you work there?
A That was, I want to say eight months.
Q Is it fair to say the bulk of your employment experience is in sales?
A Yes.
Q Okay. So you started in February 2013, correct?
A Correct.
Q And then you were promoted to sales trainer in April of 2014?
A Correct.
Q Is that the position you retained until the TRO?
A Correct.
Q Okay. I'm going to direct you to page 2 of your declaration, paragraph five, about halfway down the sentence: "If permission is granted, the ICE agent performs a diagnostic on the computer."
Let me know when you're there.
A I'm with you.
Q Okay. Is a diagnostic always run on the computer, consumer's computer?
A Yes.
Q No matter what the reason that the consumer is calling, and assuming, again, that you can access that person's computer, i.e. it's not shut down completely?

A Only if permission's granted. I mean, if they don't want us to do it, then we don't perform a diagnostic.
Q And when you say if permission is granted, do you mean remote access permission?
A Correct.
Q Below that, you testify that you~-- the final step is running System Advisor? Do you see that?
A Correct.
Q Just to clarify, System Advisor has been run for the past three to four months?
A That sounds about right.
Q Okay. And prior to implementing System Advisor, what was the final step in the diagnostic?
A Event Viewer.
Q I'm now going to direct you to page 3 of your declaration, paragraph 7. The first sentence, when it says: "If the System Advisor diagnostic determines that there are no apparent issues with the customer's computer, then the ICE agents offer the support package as preventative maintenance."
Do you see where I'm referring?
A Yes.
Q Okay. What is the cost of the support package?
A The support package or the preventive maintenance?
Q I'm referring to the support package.

A 250 and then 19 a month.
Q I'm sorry, I talked over you.
A 250 and then 19 a month.
Q And 250, is that a flat amount?
A What do you mean flat?
Q Is it always 250 no matter what consumer it is?
A Correct.
Q Has that flat amount been in place -- how long has the flat $250 amount been in place?
A Since I started.
Q Okay. You've never -- in your experience at ICE, you've never charged a consumer more than 250 for the upfront fee?
A Correct.
Q Have you trained employees to only charge $250 for that upfront fee?
A Only 250?
Q Exactly 250. Let me clarify.
A Correct. I trained them to start at 250.
Q And what do you mean when you say start at 250?
A That's the price point they're to start at.
Q As the upfront fee?
A Correct.
Q Can that upfront fee be higher than $250?
A No.
Q It cannot be higher?

A Correct.
Q It cannot go up to $600?
A No. The fee for the support cannot go higher than 250.
Q Are there other charges other than the flat fee and then the monthly amount?
A Can you ask me that again?
Q Are there other charges other than the flat fee and the monthly amount that consist of the support package?
A No.
Q Okay. And are there other fees -- are there other upfront fees besides this 250-dollar fee?
A Regarding the support package?
Q You just testified that the support package is $250 and then the monthly amount, correct?
A Correct.
Q Outside of that.
A Outside of the support package?
Q Yes.
A Are there any other fees?
Q Yes.
A Yes.
Q How much -- what are they?
A 150 for a one-time fix.
Q Okay. If the one-time fix is 150, what's the 250 initial charge for?

A That's for the support package.
Q So what does a consumer get for that initial 250 in the support package?
A Are you asking for, like, what are the services included in the price?
Q Yes.
A Tune-up, infection and virus sweep, clear out your cache, fix any of the existing problems you're calling in with.
Q So what's included in the one-time fix?
A That, as well.
Q Okay. Are the one-time fix and support package two different issues?
A They're two separate SKUs, if you will.
Q And the one-time fix you said is how much money?
A 150.
Q Always?
A Yes.
Q Exactly 150?
A Correct.
Q Okay. Any other fees associated?
A With?
Q Outside of the support package besides the one-time fix?
A Outside of the support package and besides the 150 one-time fix?
Q Yes.

A No.

There's -- that's pretty much it. I mean there's a yearly, but it's also 250.

Q And what is that?

A 250, you get your problems fixed today, get all the services, and then you have a full year of unlimited tech support for no monthly cost. It's like guaranteeing your work for a year.

Q As opposed to the monthly amount?

A Correct.

Q So would a consumer be charged the 250 for a year plus the monthly amount?

A For the support package, yes. If they don't want to pay a monthly fee and then we can offer that to them.

Q Okay. So the support package, $250, a monthly fee. If they don't want that, there is the $150 one-time fix, correct?

A Correct.

Q And then the $250 is what as compared to those two?

A All right. So here you go. You ready?

Q Yes.

A You got 250 and the monthly fee for the support package, also called your preventive maintenance package. You've got the 250 one-year, which gives you one full year of unlimited coverage with no monthly fee. And then you have the one-time

fix for 150.
Q Any other fees?
A No.
Q Is the support package offered -- strike that.
Your testimony in paragraph 7 is that if the System Advisor diagnostic determines there are no apparent issues with the customer's computer, then they're offered the support package, correct?
A Correct.
Q Is the support package offered if there are apparent issues with the customer's computer?
A Sure.
Q In paragraph 8, you testify that the customer is asked a series of questions.
A Correct.
Q Just to clarify, that's after the transaction is complete also, correct?
A Correct.
Q Mr. Deviny, have you been training sales employees since April of 2014?
A Yes.
Q Are there any other trainers named Mark?
A Not that I know of.
Q Okay. When you're training employees, do you say such things as, with the script that the employees are given, the

sense of urgency is already there?
A Correct.
Q Do you train your -- do you tell your employees that you are training your actors and actresses. Imagine an actor telling the director, I'm not going to say this part in the script?
A Say that again?
Q Do you train your employees or tell your employees that you are training things such as the following: You're actors and actresses. Imagine an actor telling the director, I'm not going to say this part in the script?
A Correct.
Q Do you tell the employees that you're training: Think of actors in a play saying the script over and over two times a day, day after day. Each performance is the same?
A Correct.
Q Do you train your or tell your employees that you are training you are salesmen posing as a tech?
A Correct.
Q Do you tell the employees that you're training that browser hijackers are your friends?
A Repeat that, please?
Q Browser hijackers are your friends?
A Yes.
THE COURT: Are you finished, counsel?

Are you finished?

MS. KIZIAH: Yes.

THE COURT: Okay.

Any redirect?

MR. FERGUSON: Yes, Your Honor.

Redirect Examination

BY MR. FERGUSON:

Q Do you try to make training fun for the attendees?

A Absolutely.

Q You try to keep their attention?

A Yes.

Q And they make some money if they make a sale, don't they?

A Correct.

Q And with regard to the comment that browser hijackers are your friend, if there were no browser hijackers, in the business they're in, how much money would they make?

A Not very much.

Q But to your knowledge, does the company give people browser hijackers?

A No.

Q In your mind, would that be similar to the unfortunate reality that finder benders are the friend of the person at the auto body shop?

A That's exactly right.

Q But that doesn't mean the auto body shop employees are

out there causing fender benders, does it?
A That's correct.
Q The salespeople, they are instructed not to do any repairs or technical work on the computer other than go through the diagnostic; is that right?
A That's correct.
Q And salespeople, whether they have computer experience, like Mr. Tomich that the Court met yesterday, or not, are given some computer training, some technical training; is that right?
A That's correct.
Q For a week, if not two, prior to taking the floor?
A Correct.
Q But, again, they are instructed not to do any actual repairs. That's for the technical department?
A That's correct.
Q And they don't, in any way to your knowledge, represent to callers that they're going to do any technical work. They're going to show them some things, correct?
A That's correct.
MR. FERGUSON: I don't have anything further.
THE COURT: Anything else?
MR. EDMONSON: No, Your Honor.
THE COURT: Any additional cross?
MS. KIZIAH: Just a few.

Recross-examination

BY MS. KIZIAH:

Q Mr. Deviny, have you ever personally given any of the sales employees commissions?

A No.

Q Have you ever personally given them any bonuses or prizes?

A No.

MS. KIZIAH: Nothing further.

THE COURT: Any objection if I ask a couple of questions?

MR. FERGUSON: No, Your Honor.

Examination

BY THE COURT:

Q I'm trying to understand this support package options that you provide.

As I understood what you said, you could get the support package for an upfront $250 plus $19 per month; is that correct?

A That's correct.

Q And that goes on indefinitely?

A For as long as they wish, correct.

Q As long as you want to keep paying $19 per month?

A Correct.

Q And then the other option is $250 for one year coverage

of support?
A That's correct. That would include unlimited support. You name it, we'll fix it.
Q For that one year.
A That's correct.
Q So if you're going to pay $19 a month for 12 months, I think that comes out to $228; am I correct?
A That's correct.
Q Okay. So why would anybody pay $250 and then $19 a month for that first year, which is like $478 --
A Right.
Q -- when you can just pay $250 and then $250 and then $250 and keep going?
A You could.
Q All right. I'm just trying --
A Some people just don't like paying $250 every year.
Q But you're going to pay $250 upfront, and then 19 a month, which is another, what was it, $228.
A You would probably purchase the one-year plan, then.
Q So people just don't sit down and do the math?
A Sometimes they do, like you just did. Other people just don't like the idea of having a monthly charge every month. So I guess it just depends on what makes the customer happy.
Q Okay. So you're basically saving, what is it, $32 a year by paying a monthly fee, but you have to pay the upfront

$250?
A Correct.
Q So maybe in eight or nine years you'll make up that $250?
A That's true.
Also, the service is transferable to a new computer, as well, like the monthly. So if you toss your existing computer and go out and buy a new one, you can transfer the monthly maintenance fee to the new computer.
THE COURT: All right. Any questions based on my questions?
MR. FERGUSON: Just briefly, Your Honor, if I may.

Redirect Examination

BY MR. FERGUSON:
Q So following up on what the Judge is asking you, if I'm a caller and I'm presented these options, let me understand and make sure I understand it and the Court does, too. I could pay 250 down and basically be eligible for lifetime coverage, as long as I paid the monthly fee; is that right?
A That's correct.
Q If I didn't do that, then -- so that first $250 would be the one and only time I'd have to pay a lump sum of $250. Thereafter, it would be the monthly fee?
A That's right. You never pay the 250 again.
Q For as long as I want to use it?
A Correct.

Q Versus if I went the other route where I say I'll give you 250 now, that will get me through this year, say it's January. So come January next year if I want to use it, I've got to come up with $250 --
A That's correct.
Q -- every year if I want to stay in the program?
A That's correct.
Q And pay a one-time shot.
A Uh-huh.
Q Versus spreading it out over the year in monthly increments?
A That's correct.

MR. FERGUSON: Okay.

THE COURT: Any additional? Cross?

MS. KIZIAH: Can I ask one question?

THE COURT: Yes.

Recross-examination

BY MS. KIZIAH:
Q Can the prices be lower than what you testified to?
A Yes.
Q How low can they go?
A For which package?
Q Any of them.
A Any of them?

The one-year cannot go lower. The one-time fix

cannot go lower. The support package, the preventive maintenance, that can be as low as 195. That includes 180, plus the $19. So that would be 199.

Q And is that based on a consumer's ability to pay?

A Correct.

Q Anything else?

A What do you mean anything else?

Q Is it based on anything else other than the consumer's willingness to pay?

A No. Sometimes they want it but they can't afford it, so we work hard to try to make it affordable for them.

MS. KIZIAH: No further questions.

THE COURT: Thank you, sir.

THE WITNESS: You're welcome.

MR. FERGUSON: Your Honor, the Defendants call Harold Sobers. He is tab 8 in our notebook.

THE COURT: Sir, would you raise your right hand, please.

Harold Sobers, Defendants' witness, sworn.

THE COURT: Please be seated.

Sir, if you can speak into that microphone and tell us your name and spell your last name, please.

THE WITNESS: Harold Sobers, S-o-b-e-r-s.

THE COURT: Thank you, sir.

Cross-examination.

Cross-examination

BY MS. KIZIAH:

Q Good morning, Mr. Sobers.

A Good morning.

Q My name is Katherine Kiziah, and I'm with the State of Florida Office of the Attorney General.

I'm just going to go through your declaration, which I've reviewed, and you have it in front of you in case you need to refer to it. Okay?

In paragraph 2, you testified that you started working with iS3 in August 2010, correct?

A Uh-huh.

THE COURT: Is that a "yes"?

THE WITNESS: Yes.

BY MS. KIZIAH:

Q Where did you work before August 2010?

A Before August 2010 I was with Olive Garden.

Q For how long?

A About two years.

Q And before that where did you work?

A I was with FPL.

Q At Olive Garden what was your position?

A I was a line cook, and then I went into management.

Q At FPL what was your position?

A I was a meter reader.

Q And how long did you work there?
A FPL?
Q Yes.
A About two, two and a half years, as well.
Q Did you have any prior employment in the computer field?
A No.
Q Before you started working at iS3?
A No.
Q And you started working at ICE in July 2012, correct?
A Yes.
Q How did you come to work at ICE from iS3?
A I resigned at ICE -- iS3, and then I sought employment at ICE.
Q Did you know someone at ICE?
A Yes.
Q Who?
A Edwin Ramirez.
Q And who is he?
A He is a former coworker at iS3.
Q In September of 2014, you testified that you became the technical operations manager, correct?
A Yes.
Q Was that your position as it remained through the TRO?
A Yes.
Q Were you ever employed in the sales side of the business?

A No, ma'am.
Q Are you familiar at all with the sales process?
A The process?
Q Are you familiar with the script that the sales employees use?
A No.
Q Were you trained on the sales script?
A No.
Q Have you ever done a sales call?
A No.

MS. KIZIAH: No further questions, Your Honor.

THE COURT: Thank you.

Any redirect?

MR. FERGUSON: None, Your Honor.

THE COURT: Thank you, sir.

MR. FERGUSON: Making some headway.

Your Honor, the Defendants call Robby Birnbaum. He is five in our notebook.

THE COURT: Right up here, sir.

THE WITNESS: Thank you.

THE COURT: Sir, would you raise your right hand, please.

Robby Hershel Birnbaum, Defendants' witness, sworn.

THE COURT: Would you tell us your name, sir, and spell your last name, please.

THE WITNESS: My name is Robby Hershel Birnbaum, and my last name is spelled B-i-r-n-b-a-u-m.

THE COURT: Thank you.

Cross-examination?

MR. FERGUSON: Your Honor, if I may, some of the witnesses who have already testified would like to watch the remainder of the trial. Is it okay? Does the FTC or the Court have any objection to that?

THE COURT: As long as you're not going to call them again.

MR. FERGUSON: We have no intention of calling them again. We wanted to make sure they were okay with that.

MS. BURTON: That's fine, Your Honor.

Cross-examination

BY MS. BURTON:

Q Good morning. Remind me, is it Birnbaum or Birnbaum?

A Birnbaum.

Q Not the German pronunciation?

A No.

Q Okay. I'm Emily Burton. I'm an attorney for the Federal Trade Commission, and I have read your declaration and I have a couple of things I want to ask you about. Do you have a copy of your declaration in front of you?

A I do.

Q In paragraph 4, you say that your firm has represented

more tech support service companies than you think any other firm in the United States. What do you mean by tech support service?

A Companies that assist consumers over the telephone with computer or technology problems.

Q Is there inherently a sales aspect to these companies?

A What do you mean by sales aspect?

Q When you refer to tech support service companies, are you talking about any company that provides tech support or companies that sell their product and provide tech support or a combination of those things?

A It's a combination, because some of the companies provide the fulfillment to the service.

Q In-house?

A Yes.

Q When you wrote your declaration, why did you put quotes around tech support service?

A When did I put quotes?

Q Why did you put quotes?

A Oh, why did I put quotes? Just because that's how I refer to it. There really doesn't seem to be a standardized industry term that I was aware of, so I just put that. That was just me typing it that way.

Q Have you represented a company called Vast Tech that does business as OMG Tech Help?

A Yes.
Q Any other of ICE's competitors?
A Yes.
Q How many of ICE's competitors would you say you've represented?
A I don't know if they're in direct competition, but companies, I'm just guessing, maybe three or four.
Q So what percentage of the south Florida tech support service companies would you say you've represented?
A I have no idea.
Q In paragraph 7, you state that you usually have between four and 10 investigations or cases pending with the AG's office in Florida involving -- well, you don't say what they involve, but how many of these cases involved clients that you counseled proactively about their compliance matters?
A During what time period?
Q Let's take 2014. Of the cases you have pending before the Florida AG's office, how many of those involve clients where you provided advice proactively about how to comply with the law?
A I don't think the majority. I don't have an exact number for you. Generally, we -- I tend to see my practice split between companies that proactively come to us for compliance counseling and assistance. They want to be real proactive on getting their operations right, checking it against the laws.

And then we have the other side where companies come in on the reactive, I call it. So we have the proactive versus reactive, where they've already had a problem and they need us to help them manage it or deal with it.

Q Right.

And my question is about the companies that you provide proactive advice for. How many of them end up being sued?

A Oh, I have no idea, quite frankly, but it's not -- during the 2014 period I would think it's very low, actually.

Q And what about the 2013 period?

A I'm not prepared to give you numbers.

Q Okay.

A Sorry.

Q But some of your clients that you provide proactive legal advice to end up being sued, as we see today?

A Yes.

Q And this is not the first such client this year?

A No, but it's generally the minority of our practice.

Q When you -- in paragraph 11, you state that -- you talk about your original engagement with Inbound Call Experts, or ICE. When they called you in, did they have a particular issue or concern that they were worried about that they wanted you to address?

A They had a number of concerns, yes.

Q And what were those concerns?
A Well, the primary overriding concern that I got the feeling was their strongest concern was basically that they felt that in the South Florida area, there were a good number of competitors of their's, or let's not call them necessarily competitors, but just other companies out there who were offering these tech support services, as I called it in the declaration, to consumers, and they felt that their -- that these other companies out there weren't doing it, let's say, as well or with a clear customer focus as they were or they wanted to.

So they were concerned that eventually there could be problems, meaning regulators would come in and say, hey, companies, you're not doing these things the right way, and we want to go after you.

So ICE's instructions and their primary concern, to answer your question, was basically they wanted to work on compliance to be able to set themselves aside from all those other companies out there.

Q So their concern was that they were part of a dirty business, and they wanted to distinguish themselves from their competitors; is that correct?
A I wouldn't use those terms. I think that that's actually a mischaracterization. I think that their concern was that the industry as a whole has, what in a lot of industries that

I have to deal with, is considered what we would call a very low barrier to entry, meaning that a lot of companies who are looking to make quicker money without taking care of customers properly, would jump into it too easily.

And I think that what ICE was concerned with was they were making a substantial investment, or had started to make a substantial investment when I got there into their customer services, their resources, their tech support, all the stuff that goes into running the business properly, and they didn't want to get caught up in a situation where the Government comes down and says, hey, 10 of the companies out there, you're all bad guys, now fight your way out of it and show us why you're not.

They didn't want to be in that defensive position. Essentially, they wanted to set themselves apart.

Q So in your role as a compliance counsel, is it your job to help your clients distinguish themselves from other competitors?

A In my role as a compliance counsel, our job is to basically take the situation that we're dealt with, figure out what laws could -- do apply or could potentially apply based on where they're taking the business, and try to get the company focused on here's what they need to do to stay in compliance with those rules, basically.

Q In paragraph 16, you state that you requested particular

documents from the principals of Inbound Call Experts. What exactly did you request that they provide to you?

A Sure.

Well, I believe the company had already started working on a compliance binder, so -- and that's a good way to get company owners, who don't necessarily have legal experience or get into the details of consumer protection laws, to get them focused. So when you focus owners on basically saying we need to build a binder, they understand that. And they had the start of it going.

And the binder isn't necessarily the end-all of compliance materials, but I wanted to see what they had already, what materials that I could gather to basically improve to put in the binder basically. And I requested specifically, I think we went through, I wanted to see versions of the scripting that they had, I wanted to see internal policies and procedures, I wanted to see HR materials, I wanted to see if they had any insurance policies, I wanted to see training materials, which are very important. I'm sure there were other items.

Q And you said that included in that list were scripts?

A Uh-huh.

Q Did you review those scripts?

A Yes.

Q In those scripts, did you see phrases like "running

services?"
A I don't recall.
Q "Trace elements?"
A I think I saw a number of variations of scripts, and I know that we had discussed a term like that, and I don't recall if it was in the script itself, though.
Q "Trace damages?"
A It's possible.
Q Did they use Event Viewer as part of the pitch, according to the scripts?
A I think your use of the term "pitch" is a mischaracterization, but I think the word "Event Viewer" was used in scripts, yes. I mean I think that's pretty obvious that an Event Viewer is a tool used to analyze consumers' computers. I know there was a lot of debate over that, but, yeah, I believe that was in there.
Q Do you recall a script containing bolded warning with exclamation points that said do not say Event Viewer?
A It may have.
Q Did you ask your clients why they instructed their telemarketers never to use the words "Event Viewer?"
A It wasn't that simple. We had a number of long discussions, because when I do my job I try to dig into the client's business as much as possible. So I really wanted to get to the bottom of this concept of an Event Viewer. I know

from dealing with the industry that it's used in a lot of different of these sort of tech services businesses, but the issue really isn't so much if they're using the term Event Viewer, it's was there support for their use and did they have an actual process behind them to say, hey, there's some value here in using it as a tool in analyzing computers.

So it wasn't just, did I ask them or did they talk about it, we had a lot of discussions on the Event Viewer.

Q What was your conclusion after all of these discussions about their use of Event Viewer?

A You know, it varies by company, and in this situation I actually thought that they had very legitimate -- first of all, they were well grounded in the limitations in what it could be used for and what it couldn't be used for, and I think it was made -- usually it's me making something clear to the client, but from their tech backgrounds, they do have a lot of experience in the industry.

They were making very clear to me that it was -- it's a useful tool. It's not an end-all. But as one piece of an examination of a consumer's computer, it definitely can provide data, basically.

Q But you read the script, correct?

A Yes.

Q The question I'm asking is not about their interpretation of the use of the tool. It is about how they used the tool

based on the script, the words that were actually used. What did you conclude about the way -- the words that the telemarketers were using about Event Viewer in the original script?

A Oh, I thought it was relatively fairly balanced, actually.

Q What do you mean by balanced?

A If you have a consumer on the telephone -- you know, consumers really have no -- most consumers don't have much technology background. They don't know how to dig into the computer. They don't really -- you know, they know they have a problem and they want it fixed. But you've got to be very careful as you go through one of those scripts that when you're talking to a consumer and you say, open up the Event Viewer, they open~-- the company opens it for the consumer, and they look in there, you know, you can tell what's going on in the computer.

And the real analysis, or what I was checking for in the script, was sort of putting myself in the shoes of the consumer to say, you know, if I was the average consumer -- and I use my wife a lot as a comparison because when our computer breaks or doesn't work well or whatever, she just repeatedly clicks it or hits it or whatever, and the issue is basically, would she understand, you know, that there are problems there, or would she just sort of go blank on the

whole thing and say, okay, there's a massive problem with my computer, throw it out and buy a new one.

So I was trying to put myself in the average consumer shoes when I read it. And to answer your question, what I meant by balanced --

Q Yes, please.

A -- is that -- would the consumer sort of get the whole picture that this is a tool used in analysis and not necessarily, okay, there's some issue there, and I automatically have to buy something.

And my reaction to the script when I read it was, yeah, it was pretty fair. I mean, I don't really understand how if someone's calling up with a problem in their computer, you know, they're going to be automatically persuaded by one thing. There was a full before and after the Event Viewer came up, there was a full before and after discussion of how the computer works, what the issues are, what we offer, that type of stuff.

Q But you do understand that this is a script, and that the words are read the same way, regardless of what the results are on the screen, correct?

A That's not necessarily true, because I secret-shopped the company a bunch of times, and I know that a lot of people secret-shopped the company, but I did well before any issues came up. And I realized that there was definitely, you know,

sort of a -- the salespeople necessarily, they're supposed to stay on the script, but they're also supposed to adjust to what the consumer's needs are.

For example, if I'm reading through the script, I was sort of thinking when I was reading it, you know, would the salesperson be able to sort of stop and answer, and then I come up with what are the most frequent questions that I would think would come up, and would they be able to deviate to sort of fairly get to those questions and get back into the script.

So, yeah, I understand it's a script, but I think that you have to have tools in the script to basically figure out what's going on with the computer.

Q But if the script says, you have a lot of damage here --

A Uh-huh.

Q -- and every telemarketer is saying, you have a lot of damage here, I mean, is that not deceptive --

A Well --

Q -- based on your expertise as a compliance attorney?

A Based on your question, if that was the situation, sure, but it wasn't.

In the script, I mean I am recalling that there was a delineation, especially in the training of these people, based on what was going on in the computer. I mean, what was the number of processes in the Event Viewer, what else was

going on in the computer? Was it stalling versus was it running slow, did they just put new software on it versus did they just put some disc in it? Stuff like that.

Q Did you sit in on any training?

A Yes.

Q So you observed what the trainers were saying to the trainees?

A On and off, yeah. I didn't sit in on one full training session, but I would pop my head in for a couple minutes at a time.

Q How many minutes at a time? How many total minutes would you say of a training did you listen to?

A Oh, I think I got the full sessions over a period of months. I mean, I'd sit in for maybe 15 minutes because I'm just listening for certain things, and then go out and then wait for another one to happen and then come back and go sit through another one.

Q And when you sat in on those training sessions, did the trainers know who you were?

A Probably the time that I wore a suit and tie to the office, yes. But then I realized I should not wear a suit and tie to that office, so probably not subsequent times.

Q Did you ever hear a trainee -- trainers stating that the trainees needed to follow the script exactly?

A The trainers -- I don't recall, actually.

Q Do you recall them ever saying that they needed to memorize the script and repeat it multiple times?
A Script memorization is something we typically want our clients to work on, yes.
Q And are they --
A I don't recall if they said it specifically there, though.
Q Are they supposed to just remember the general outlines of the script, or are they supposed to remember the actual words of the script?
A Oh, it depends on the company, but I think in this case they wanted the staff to remember -- to learn the script so they knew what they were talking about, knew what was going on.
Q The actual words of the script, correct?
A I don't recall for the specific company.
Q Have you seen the same script in your work with ICE's competitors?
A Variations, heavy variations.
Q Have you seen any light variations or identical copies of the script?
A I don't remember which company, but I know that at times, because of South Florida and because of how different groups work, there was a lot of secret shopping between competitors. So I recall that one or two times I think we had seen

companies come in with similar scripts, and you could tell that someone had copied someone else's script, but what I had always noted is that with ICE's script, is that when I would see someone else's script that I thought was a ripoff or a copy, it could have been versions before, because I could see the ICE script, and it looked more advanced or had more stuff added to it.

Q You testified earlier that you have represented OMG Tech Help and other of ICE's competitors, and in connection with those representations, would you have reviewed their scripts?

A Yes.

Q Okay. And your testimony is that you did not see any scripts that were the same as ICE's scripts with those competitors?

A Not identical, no.

Q Okay. How different are we talking?

A Oh, I don't recall specifically, but, I mean, not -- when I say not identical, I mean not even close from what I recall.

Q Okay. You call these scripts in paragraph 19, you call them telephone guidelines, and you seem to take issue with the idea that we're calling them scripts.

A In which paragraph?

Q Paragraph 19, I believe.

A Sure.

Q But you are aware that the telemarketers were trained not to deviate from these, from this script?
A Yeah, but I don't think your use of the word telemarketer or script is accurate, because, frankly, telemarketer varies by definition by state law. So were these people on the phone who were trying to basically diagnose computer problems and then maybe sell something to the consumers? Sure. I don't know if that's a telemarketer, because they weren't making outbound calls.

And then, second, as to scripts, yeah, I mean same thing, they were guideline scripts. This is what people were trained on to basically sell with.

Q Did you propose changes to the script? I'm going to continue to call it a script.
A Sure.
Q Did you propose changes?
A Yes.
Q What sort of changes did you propose?
A I don't have those in front of me, but I will tell you that changes ran -- I mean, exact changes, but the categories of changes basically ran along the lines of being -- knowing that there were competitors out there -- I mean it was along the same lines from our initial client meeting, that the company wanted to set itself above and apart from its competitors. So changes basically involved putting in extra

things, extra items to clarify consumer issues, sort of trying to predict what a consumer question would be and answering it ahead of time, restressing certain points, things like that.

Q Do you remember anything specific about your advice?

A Not specific word for word, no.

Q Were there any portions of the script that you cut?

A There were red line versions, so words were removed, and then words were put in place. I don't remember specifically which words.

Q Let's talk about the Event Viewer section --

A Okay.

Q -- of the script.

Did you recommend changes to this portion of the script?

A I believe I did, yeah, yes. Because I wanted to make really clear to consumers that -- first of all, I think my initial comment was, I wanted -- and this goes along lines of items that have basically been programmed into me by the FTC. I wanted to make very clear that we had statistical or some form of support for everything that was said in the script. So I believe one of the more common -- the item that I really remember in that script was, if there were a certain number of processes, a range of items that were going on in the consumer's computer, and I looked at that range and I said we

need to be sure, have some support here in our compliance materials to say that if it's above this number, you know, we can support that that is sort of a good indicator of a problem in a consumer's computer. Not necessarily a full indicator, but a tool.

So, yeah, I made comments on those types of --

Q So let's go back to the Event Viewer portion of the script, which is not the processes portion. I believe that's the first step in the diagnosis. We're talking about the Event Viewer, which is the final step in the diagnosis.

A Right.

Q Did you recommend that ICE cut that portion of the script and replace it with something else?

A We had discussions on that, yes.

Q Did you discuss striking that portion of the script and not replacing it with something else? Just striking it?

A No.

Q So what did you discuss replacing it with?

A Other forms of a service that would -- of a technology that would supplement or replace it, basically.

Q What were you trying to replace? What from the Event Viewer portion of the process were you trying to replace with something else?

A The Event Viewer, the concept of the Event Viewer, meaning --

Q Right.

But what is the role of the Event Viewer in the script that it needed replacing with something else?

A It didn't really, but the issue --

Q So why not strike it?

A Excuse me?

Q Why not just strike it entirely and leave it out? Why replace it with something else if it didn't serve any purpose in the script?

A No, I didn't say that. It definitely served a purpose.

Q Okay. What purpose did it serve?

MR. FERGUSON: Excuse me.

THE COURT: Let him finish the answer before you ask the next question, please.

THE WITNESS: I think if I just explain it a little differently it might help you.

The issue that we come back to on our core set of issues was that this was a low barrier to entry industry for a number of companies. Not necessarily the Defendants, because they put a lot of money into this company. But a lot of people were jumping into it on the sales side essentially. So the concept was, set the company apart from everyone else, and if a lot of other companies in South Florida were using this Event Viewer, that was one of the concerns.

So discussions over time said, essentially, what

else can we use so we don't use the Event Viewer? It's not necessarily a bad thing, because it's a tool, but we don't -- we think there may be abuse out there. So what else do we come up with? And the Defendants came up with another software product that they wrote in-house, I believe.

BY MS. BURTON:

Q Based on prior FTC actions, did you conclude that Inbound Call Experts had potential legal liability if they continued to use the Event Viewer portion of the script?

A No.

Q But you're aware of cases we had brought in the past regarding tech support companies using the Event Viewer?

A Yes.

Q And in what way did you believe that Inbound Call Experts was distinguished from those companies in the deceptive practices that were alleged there involving the Event Viewer?

A Well, in general, I felt that they had -- from what I can read and learn on their website, that they had a substantial number of support staff in place and training that would basically -- or at least, you know, on the management side, enough forethought of management to say, we've got to do a whole consumer computer analysis, not just, you know, put everyone into the same program every time.

And I felt that, you know, that if they understood the fact that the Event Viewer was one tool out of many that

could be used, they were headed in the right direction.
Q So it was your impression that the FTC's position was that only using the Event Viewer was deceptive, but because your clients were using Event Viewer, along with other tools, that it somehow was not deceptive?
A No, I think first the FTC's position was wrong, quite frankly, and I know the FTC will highly disagree with that because they just believe they're right. But I will tell you that I think that analyzing this company and sitting there listening to phone calls on a daily basis randomly when they didn't know I was listening, and sometimes when I would just stand behind the staff and listen, I didn't detect levels of deception that were alleged in prior cases, basically.

I didn't detect consumers who were confused. I didn't detect consumers who were hearing the word "Event Viewer," doing the Event Viewer thing and then automatically jumping into a purchase scenario.

I looked specifically at, let's say, charge-back ratios, which is a huge indicator of consumer dissatisfaction, and I saw shockingly low charge-back numbers comparative to other companies in the industry, including ones I believe the FTC looked at or went after.

So, no, I didn't think the FTC was right on focusing on that issue.
Q But as a compliance attorney, isn't your role to ensure

that your clients are in compliance with federal law as interpreted by those agencies even if you disagree with the agency's view? I mean, you're trying to get your clients to comply, to not get into trouble, correct?

A I don't think I could disagree with your statement, but the answer is, yes, as a compliance attorney my job is to, you know, make the clients aware of what different parties who regulate their systems look at and basically make them aware so that we can move toward making sure we don't irritate or get those entities or those regulators upset.

Q And did you make the Inbound Call Experts clients aware that using the Event Viewer in the script could lead to regulatory issues in the future?

A They were well educated on their industry.

Q So they already knew that?

A Well, they knew that -- you know, they knew that -- from my recollection, they knew of the companies who the FTC had prior issues with, and they knew that those companies pushed very hard on sales aspects as compared to customer service aspects, and they made very clear to me plans that they had laid out to make sure that they didn't have that sort of confused or injured consumer at the end of every presentation.

Q You said you listened in to a lot of sales calls?

A Uh-huh.

Q How many sales calls would you say you listened into?
A Well, they were telephone calls, a mix of both calls. They weren't necessarily the classic sales calls. They were calls where the consumer would come into the system, I mean, into the company, and have issues with their computer which would need to be worked through. And then there were calls where the consumer would call in later after they had taken on some sort of software product or help product or whatever, and would call their tech end to basically get a fix or an ongoing upgrade or whatever it is.

So I would say that I probably listened to probably somewhere between 50 and a hundred calls.

Q How many of those 50 to a hundred calls fall into that first category, the one you described, where a consumer is calling in with an issue?
A The vast majority.
Q And when you say a consumer is calling in for an issue --
A No, I'm sorry, I want to be clear. What you would define is essentially a sales call, where a consumer is calling in with an issue, the help software is on, they're trying to activate the software, it's been activated, the consumer then is being exposed to that script that you classified. That was the vast majority.
Q So we'll call those activation calls.
A Okay.

Q When you say they called in with an issue, what you really mean is they called in to have their software activated, correct?
A Yes.
Q And that's the majority of what you listened to of those 50 to 100 calls?
A Yes.
Q And did you listen to them in-person or recordings of those calls?
A No, in-person.
Q So you were standing there in your suit and tie --
A No, not my suit and tie. The vast majority were live calls. Later, when the company adopted the CallMiner technology, I would go into a room and you could actually click on the computer and listen to either a recorded or a live call.
Q When did that start, the CallMiner technology?
A Oh, it started a little bit before your office came in with guns.
Q Okay. So -- I don't believe there were any guns.
A There were a lot of guns.
Q When you -- so you listened to CallMiner calls only for a very short period of time, correct?
A Yes.
Q Prior to that, you would have been in the room, listening

to the sales agent as they were on the call?
A I would dress in plain clothes and hide. Not hide, but basically sort of quasi disguise myself, and I would go sit down in an open chair and then just sort of listen to what was going on around me. And then other times I would go to a telephone in a room that they wouldn't even know I was there, and you could have the guy push the phone buttons and you could hear the live call side. I would make sure I could hear both the consumer side and the rep side.
Q So what percentage of these 50 to a hundred calls would you say you actually heard both sides of the conversation?
A The majority. That's the point. I've gotta hear both sides.
Q So most of the time you were in another room on the telephone listening to both sides of a conversation?
THE COURT: Is that a "yes"?
THE WITNESS: Yes, yes.
BY MS. BURTON:
Q Do you know why Inbound Call Experts wanted to differentiate themselves from their competitors?
A Yes.
Q What was that reason?
A Well, there were a bunch. First -- and this is in no specific order -- but they were really fearful of the FTC coming in, because they had seen that -- and I was surprised

when I visited this client, because usually the compliance are is to put the fear into the company.

These guys had a lot of fear because they had seen that companies out there who were probably doing bad things, had these visits or raids or lawsuits or whatever, and they didn't want any of that. They just wanted to grow their business. So they were super focused, especially Mr. Deignan, on stressing to me, his, you know, we want -- we will spend the money, we want everything aboveboard, you know, just move us toward compliance. We'll listen to whatever you want.

The second reason was -- go ahead.

Q Can I stop you there?

A Sure.

Q Were you -- did you become aware that they were wooing investors?

A Yeah, that was my second reason.

Q Okay.

A When I first met them, I believe they were in the either initial stages or they had just closed around some sort of loan or financing or something like that, and they wanted to continue to do that to grow, because any business needs money. And they wanted to make sure that they could present their best foot forward basically.

Q Okay. And was that -- were they seeking investors or

trying to sell the company?
A Oh, I think I would -- I believe both.
Q In paragraph 22 of your declaration, you talk about how you were working on drafting a letter to the FTC?
A Uh-huh.
Q Were you expecting the FTC to take action against this company?
A It goes back to our initial meeting and a theme throughout the entire representation, and I brought sort of a handout I wanted to show you. The issue is really that we -- you know, from my experience in doing this probably for the last, I don't know, 15 or so years, a lot of -- don't take this personally, but a lot of government agencies, especially at the federal level, sort of view companies, especially in Florida, from a distance, and they view them very suspect.

So one of the tools that we use once we're comfortable with the company's, you know, compliance and everything's buttoned up and looking good, is that instead of sort of waiting, knowing that you're in a potentially suspect industry -- and a lot of attorneys won't do this, but I expose the client to this. And I said why don't we just proactively go to them.

And, you know, the expected response from the FTC, because we've done this before, is basically, well, we're just an enforcement agency, we can't tell you anything, thank

you for your submission.

But the point is to send a letter, to send a compliance binder to the FTC, put this in your file so that in the event there is a problem or you try to pull -- file a lawsuit or something, at least we'll be able to point to the fact that, look, we were communicating with you first. So it's part of a compliance strategy, yes.

And what I brought, because I wanted to show you, because I know in a declaration is just me saying it, we sent out our bills, and I just got this a few days ago, our pre-bill for the last few months. But I wanted to show you just some of the entries because I thought that would help the Court. And you referenced a prior case. I thought this would go to your question.

"On October 28th, review FTC injunction as to Pairsys, Inc." Which was one of your prior cases. "Begin outlining proactive letter to FTC explaining how client complies with the law, review ICE's policies and procedures, code of business conduct, and scripts." And it just goes on and on about all these things we're doing.

MS. KIZIAH: Your Honor, we're just going to object because we haven't been able to see that.

THE WITNESS: I brought you copies.

MS. KIZIAH: Great. We haven't seen it before now.

THE COURT: Overruled. Go ahead.

BY MS. BURTON:
Q Are you aware the receiver in this action requested documents from your law firm?
A Yes.
Q And why have those not been provided to him?
MR. FERGUSON: Objection. Did you say have not been provided?
MS. BURTON: I believe the receiver testified yesterday that he has not been provided with the documents --
MR. FERGUSON: That's absolutely incorrect. And I believe he's here, Your Honor.
THE COURT: I thought he said he did eventually get them.
MS. BURTON: He did? I'm sorry. I must have misunderstood.
THE WITNESS: I can tell you why, too, if you want to know.
MS. BURTON: That's fine. No worries.
BY MS. BURTON:
Q In paragraph 23, it says that you reviewed the scripts, and you found that there was no intent to be deceptive.
You understand, though, that there is no intent requirement in an action like this, based on your experience as a compliance lawyer?
A My statement -- first of all, I understand that under the

statute, the FTC asserts, and there's some case law that says, that you don't necessarily have to have intent in these claims, but my statement was focused on essentially the companies and its management.

You know, after reviewing the scripts with them, after reviewing the operations with them, I mean, sitting in these meetings repeatedly, there wasn't an intent to trick consumers here. There wasn't an intent to basically say, hey, sell aggressively as you can to get the dollars. And these guys were so focused on hiring these Microsoft tech guys in there to provide customer service, they just wanted to build this company into essentially another Geek Squad from Best Buy.

Q And to your knowledge, were you the first compliance counsel retained by Inbound Call Experts?

A I think so, but I don't know for certain.

Q But you're not aware of any attorney who worked on this before you?

A Well, they had worked with prior attorneys, but I don't know if they --

Q On compliance matters.

A But I don't know if they did specific compliance matters. I'm not sure. There's not a lot of law firms that do this service.

Q And if Inbound Call Experts is permitted to reopen

operations, would you be the one responsible for ensuring future compliance?

A If they continue to retain my services, I would continue to work with them, yes.

Q Have you ever filled out a form for a client and omitted information?

A I don't think so.

MS. BURTON: Thank you. That's all I have.

Actually, I have a whole stack of additional questions. Sorry.

BY MS. BURTON:

Q You said that you represented OMG Tech Help in compliance matters?

A No, I just said we represented them.

Q Did you represent them in compliance matters?

A In some matters, yes.

Q Did you review their script?

A I believe so, yes.

Q Did it use the Event Viewer?

A I believe so, yes.

Q What are the other niche industries that you've worked with besides tech support services? You listed several in your declaration. Are there others?

A Other industries that we work with?

Q Yeah.

A Sure.

I believe I put a list at the end of the declaration. It's just a history over the last 15 years.

Q Are those you personally or your law firm?

A No, I personally worked on most of those. I mean, we have other attorneys in our office, but I personally worked on most of those.

I will tell you that in this year, a lot of our work has come in the area of healthcare brokerages and companies that offer healthcare services and dental insurance-type services to consumers. We've done a lot with the FTC working -- meaning with, you're the FTC, working at industry conferences on consumer student loan relief services, which I know is a very hop topic, very regulated.

We've done other consumer financial -- usually it's consumer financial, but I was interested this year, we saw a big deviation into the healthcare and also into the companies that sell the satellite dishes, like the satellite TV dish companies.

Q So you work -- would debt settlement be included in this?

A Sure, absolutely. I was very involved in working with the FTC on their 2010 amendment to those rules, yeah.

Q And loan modification, is that an industry that you've worked in?

A Remember when I said we sort of slipped between the

proactive and the reactive? We don't really do very much on the proactive compliance counseling for loan mod companies, but on the reactive side, yes. For the last three or four years we've had a lot of them come into our office saying, we're in trouble, we're getting sued, what do we do, that kind of stuff.

Q Do you know what -- we talked about the Event Viewer portion of the script being taken out and replaced with something else. Do you know what it was replaced with?

A I believe it was called, a program called System Advisor.

Q And did you review the revised script that referred to the System Advisor instead of the Event Viewer?

A I may have. I don't recall.

Q So in paragraph 22 -- sorry, 23, when you say you reviewed the scripts and you didn't observe an intent to be deceptive, you're referring to the script that did include Event Viewer?

A Oh, yeah. When I drafted this I was thinking about the initial~-- the first versions of the script that were provided. Yes, it wouldn't have included the new system Advisor, the replacement concept. But I think I had probably an associate in my office who looked at that, because he was working on that draft of the letter to the FTC, which I was actually carrying in my folder the day that you visited and raided their office, because I was going to go through it

with the company; and I believe he did probably review something on it.

I knew that I had meetings with the company where the management had walked me through in detail how this new concept of the program worked, basically.

Q Is it your view that as long as a company provides good customer service and a fine product, it's okay to sell the product or service in any way that works?

A That's a very general question. I don't think I -- I don't think so.

Q Do you think that a deceptive sales pitch is remedied by providing a great product after the deceptive sales pitch?

A No, the case law is clearly against that.

Q Okay. You said you listened to calls and observed calls. Did you bill for reviewing those calls?

A Yes.

Q For the time spent?

A Yes.

Q Okay. And would that -- would that be reflected in the bills that you are --

A It would probably be meeting at office, something like that.

Q So there would be no way for us to look at the bills to see the time that you spent reviewing sales calls?

A I'll tell you in a sec. No, because we weren't -- no, I

wasn't planning to put that in there. Probably -- I mean, there might be, I just don't remember. You're welcome to look at all the billing entries, but generally it would say, meeting at client office to review compliance issues, something like that.

Q Okay.

A And I can tell you even at one point -- and when you visited the office, the reason I was there is because the company said, hey, Robby, we want to continue pushing this compliance issue. We're either going to hire an in-house general counsel -- and I said, wait, guys, I can do this really well. Why don't I come in, so let's just set Thursday or Friday for three hours in the morning or whatever, and I'll just come in and work on compliance issues. That was one of the reasons I was there, sitting there listening to calls.

Q Okay. Did you have to withdraw as counsel in the case of CFPB v. Hoffman Law Group?

A Yes.

Q Did you provide proactive guidance to that company?

A CFPB versus Hoffman Law Group?

Q Uh-huh.

A It was a law firm, and I think it's still a hotly contested case, and we had to withdraw, yes.

To your question, I'm sorry, did we provide

counsel --

Q Yes.

A Yeah.

Q Okay.

A I don't necessarily know if that was a good comparison to this case, though, because it's a much different case.

MS. BURTON: That's all I have. Thank you.

THE COURT: Thank you.

Any redirect?

MR. FERGUSON: Briefly, Your Honor.

Redirect Examination

BY MR. FERGUSON:

Q Good afternoon, Mr. Birnbaum.

A Good afternoon.

Q Don't have a lot, so it will be quick.

You said that you listened to some calls at my clients' company's office; is that correct?

A Yes.

Q Was that at the Banyan facility?

A That was on Banyan Trail Road, yes.

Q In Boca Raton?

A Yes.

Q Were those live calls that you were listening to?

A Yes.

Q Are you aware that CallMiner was being rolled out and

wouldn't allow access to live calls and in fact, you were using a system called Five9, f-i-v-e, number 9?

A Yes, that was their system at the time.

Q Are you aware that Five9 provides the capability to listen to calls live?

A Yes.

Q And you're aware that's used by the company?

A Yes.

Q In your professional endeavors over the last couple of years, have you become aware of any outfits or heard about any enforcement action by the FTC against outfits particularly emanating from -- outbound calls emanating from India, where companies would call and say -- cold call outbound -- Hello, sir, my name is Sylvester Stallone, I'm with Microsoft. We're getting event reports from your Event Viewer, and you're infected, and you better pay us some money or you're going to lose your computer and your data?

Are you aware of those companies doing that?

A I'm aware of -- yes.

Q And you're aware that probably back in 2012, there was a flurry of enforcement actions by the FTC with regard to those activities?

A Yes.

MR. FERGUSON: I don't have anything further. Thanks for your time.

THE WITNESS: Thank you.

THE COURT: Any other recross -- I mean redirect from counsel?

MR. NICHOLSON: No, Your Honor.

THE COURT: Anything else?

MS. BURTON: Nothing, Your Honor.

THE COURT: Thank you, sir.

THE WITNESS: Thank you.

MR. FERGUSON: One second, Your Honor.

Your Honor, the Defendants call Scott Grushoff. He's number 4 in our binder.

MR. STREISFELD: Your Honor, he's in the other volume.

THE COURT: I've got it.

MR. STREISFELD: Okay. Thank you.

THE COURT: Sir, would you raise your right hand, please.

Kenneth Scott Grushoff, Defendants' witness, sworn.

THE COURT: Please be seated.

Sir, if you could tell us your name and spell your last name, please.

THE WITNESS: Sure.

Kenneth Scott Grushoff, G-r-u-s-h-o-f-f, like Frank.

THE COURT: Thank you.

Cross-examination.

MS. BURTON: Thank you.

Cross-examination

BY MS. BURTON:

Q Good morning, Mr. Grushoff.

A Good morning.

Q I'm Emily Burton. I'm an attorney for the Federal Trade Commission.

What's your current title at Inbound Call Experts?

A My title as of August 1st is president.

Q And what was your title before that?

A Senior vice president of operations.

Q And so you were promoted from senior VP of operations to president?

A Yes.

Q And in, you said August of 2014?

A This year, uh-huh.

THE COURT: I'm sorry?

THE WITNESS: August of this year.

THE COURT: Thank you.

BY MS. BURTON:

Q What was the reason for your promotion?

A The reason for my promotion is they wanted me more involved with the day-to-day operations of the business and the future of the business.

Q And who was the president before you?

A Justin Wright.
Q I'm going to ask you some questions about your declaration. You have it in front of you. On page 4, paragraph 14B -- actually, let me grab my copy. Hold on one moment. Sorry about that.
MR. FERGUSON: Your Honor, is it okay if I tell the witness he can put that notebook in his lap for convenience? He don't have to stretch over there.
BY MS. BURTON:
Q So paragraph 14B, when you say customer service calls, do you mean calls where a consumer called for help activating software?
A No, customer service calls are calls that come from active customers that have already purchased a support plan from us that are calling in to use it.
Q Okay. And of those 2.1 million calls, were any of those calls in which a telemarketer pitched ICE's services or products?
A No.
Q On page -- same page, paragraph 14C, you say: "Investment costs for technicians and customer service for year to date."
Again, are you using the same definition of customer service there?
A That's correct. Those are the technicians and the

customer service agents, the support personnel.
Q Who are speaking only to people who have already purchased services; is that correct?
A Correct, speaking to or repairing computers of those customers.
Q Are you, in your position as president of operations -- sorry, president of Inbound Call Experts, aware that ICE's revenues for 2014 have been about a hundred million dollars so far?
A Yes.
Q Let's go to paragraph 27. You're talking about the refund policy.
Isn't it true that a zero resistance refund policy of the kind you describe is a good way to keep angry customers from calling their credit card company and seeking a charge-back?
A Is that part of the reason? Yes.
Q Okay. Do you know what Inbound Call Experts' refund rate was for 2014?
A I know roughly what it was.
Q And what was it?
A I would say it was around 12 percent.
Q So -- okay. Do you know for any prior years what the refund rate was, 2013, for example?
A I wouldn't be accurate. I'd be guessing.

Q For calls -- for activation calls that initially came into the sales team and then were transferred, the remote session was transferred to the technicians, isn't it true that it was -- in that instance, the technician would not speak to the customer directly?
A In some cases they would.
Q In what cases would they talk to them directly?
A There were many cases where there was what we termed action required, where the technician would have to speak to the customer to get questions answered or action on their end, has the paper printed out, is the modem working, is this plugged in. So there were many times where the technician did have to speak to the customer.
Q Would the technician then just call the customer --
A Yes.
Q -- to get those questions answered?
A We contacted the customer. We had a tool within Ninjato that was called the action required tool, and when they pressed that button, it would send the customer an e-mail and they would also contact the customer via telephone.
Q But when those calls were initially transferred, the technician would initially be relying on what the salesperson had put in the notes as to what was wrong with the computer and what needed to be fixed, correct?
A Correct.

Q In paragraph 33, you say that you contracted with a firm to become PCI level one compliant with regard to customer data protection. Was this decision based on Mr. Birnbaum's legal advice?
A No.
Q Do any of the technicians, the ICE technicians, or customer service reps sell products or additional services to customers?
A Rarely.
Q But they do at times sell products and services?
A They take orders for products and services. Generally, a customer may not have purchased something on the front end, and when they speak to a customer service agent they may want it, and that customer service agent would process that sale, yes.
Q What do they sell?
A Generally, it would be a software product, or they may want to add an additional computer that's in their household or with their family.
Q Are there scripts for these sales, these up-sells?
A On the customer service floor, I do not believe so.
Q And where was the customer service floor located?
A Customer service floor was in the middle room.
Q Are we talking about the Banyan site or the T-Rex site?
A I'm sorry. The customer service floor was in the middle

room of Banyan, which just switched to the T-Rex site.
Q So at the time of the immediate access, when the FTC showed up, customer service was located where?
A T-Rex.
Q And just so I'm clear, were there scripts regarding up-sells?
A There were scripts on the floor for the process of handling inbound customer calls.
Q Okay.
A I don't recall 100 percent whether there was any sales language on there, but I'm fairly sure there wasn't.
Q Have there been policies in place regarding -- suggesting that technicians should pitch certain products or services in connection with their -- sorry, not technicians, customer service representatives should pitch particular products or services on each call?
A There was not.
Q There were no such policies to your knowledge?
A There were no policies where customer service agents would directly pitch a customer products. There was no policy for them to do it. Did some of them do it? Yes.
Q Did they get commissions for products that they sold?
A Yes.
Q Did they get bonuses or additional prizes for selling a particular amount of additional products?

A No.
Q Was there a prize wheel at the T-Rex location?
A If there was a prize wheel at the T-Rex location, it was from the sales team that was there before customer service got there.
Q But technicians receive a commission on any sales they make, correct?
A Technicians or customer service agents did.
Q What's their commission?
A Ten percent.
Q How much revenue is generated by the up-sells made by customer service representatives and technicians?
A Under a hundred thousand dollars per month, probably. It was minimal.
Q But over a million dollars a year?
A Yes, uh-huh. So about less than one percent of our revenue, yes.
Q What are spiffs?
A A spiff is a prize or a promotion for a contest or doing well.
Q Were technicians or customer service agents ever given spiffs?
A They were, but not for commissions. They were given spiffs for performance.
Q And only for performance?

A That's correct.
Q Was the amount of products sold considered part of performance?
A It had no weight on the spiff.
Q Okay. I apologize for not having an extra copy of this for you. I'll hand it to you in a binder. But I'm referring to Plaintiffs' exhibit 37, pages 1861 to 1871, and I want you to take a look at these.
Can you just take a look at page 1861 to 1871?
Have you had a chance to look that over?
A Yes.
Q Do you recognize these?
A I do.
Q What are they?
A This is the sales guideline for the satisfaction sales department.
Q So would this -- would the satisfaction sales department fall into the customer service group that you were talking about?
A Completely separate division.
Q Where does that division sit?
A That division sits in Banyan.
Q Okay. Do you have any idea why these documents would have been at the T-Rex location?
A That division used to be at that location but hasn't been

for the better part of five or six months. There would be no reason for this script to be at T-Rex. Nobody there uses it.

Q Sorry.

Can you remind me what you said about who would use this script?

A Satisfaction sales department.

Q And what do they do?

A The satisfaction sales department talks to customers that are -- have had their work completed and that are happy and satisfied with the work, and they're offered additional products and services that may be of value to them.

Q And you see it starts out by saying: "Your computer was in pretty bad shape, and the senior tech identified a weakness in your current security setup"?

A Uh-huh.

Q Was this script read only to people where a senior tech had actually identified such a weakness, or would it have been read to possibly anyone?

A That script was written after they reviewed the notes and, in fact, saw that that had happened. It wasn't read every time the same way.

Q So the -- your testimony is that the satisfaction sales department would review the notes from the senior tech?

A Uh-huh, yes.

Q Identify people to call, to up-sell --

A They did not make outbound phone calls, no.
Q So they would wait for someone to call in and then read this script to them?
A That's correct.
Q Okay.
A The division made no outbound phone calls unless a customer had asked them to call them back.
Q If a customer asks someone to call them back to confirm that work had been completed, would this script have been read to them?
A I don't understand the question, I'm sorry.
Q If a customer requested a call back just to confirm that the technician had finished working on their computer, is that an instance in which this script may be read to them?
A This division wouldn't call them back to confirm whether the work was done or not. The customer service division would.
Q Okay. Are you familiar with a service called ID Watchdog?
A Yes, very. I'm a member.
Q And at the conclusion of customer service calls, was there a wrap-up script involving pitching ID Watchdog?
A The script was not a pitch. It was, would you be interested in learning more about ID Watchdog.
Q And if the customer said yes, what would happen?

A They would be transferred to the satisfaction sales department.
Q And the satisfaction sales department would then pitch them a paid service; is that correct?
A They would offer them ID Watchdog, yes.
Q So each of the technicians would ask a consumer if they were interested in that product, correct?
A If the customer was satisfied within the customer service department and we had fixed their problem, then they would be offered the opportunity to learn more about ID Watchdog.
Q And then passed to the satisfaction sales department, who would then pitch them a paid service, correct?
A Yes.

We discontinued that process probably about a year ago.

Q And how long was that process in place?
A I would be guessing, but I would say approximately six months.
Q And to your knowledge, so -- sorry.

You ended that service approximately a year ago, so the end of 2013?

A Roughly.
Q And so it was offered from the middle of 2013 to the end of 2013 roughly?
A I would say roughly. Probably the end of the first

quarter last year and probably 'til the end of the third quarter last year, right around that timeframe.

Q And during the time that the satisfaction sales department was engaging in this up-sell, did they, in fact, sell, I guess it's a subscription to ID Watchdog to consumers?

A The customer service agent did not. The satisfaction sales agent did, yes.

MS. BURTON: Okay. I think that's all. Thank you.

THE WITNESS: Thank you.

THE COURT: Redirect?

MR. FERGUSON: Yes, Your Honor. Brief direct.

Redirect Examination

BY MR. FERGUSON:

Q Hello, sir.

Do you have any ownership interest or options in the company?

A I do not.

Q You talked about tech, the technicians operating out of the T-Rex facility in Boca Raton, correct?

A The customer service agents and technicians resided there, yes.

Q And where else are there technicians?

A There are technicians in Jamaica.

Q And at the time the TRO was served on the company, the

company was taken over by the receiver, tell the Court about the significance of Nice's operation with regard to tech support.

A So we were very, very pleased with what we had found in Jamaica. We found an incredible workforce that was patient and kind and really had aspirations of learning and becoming as technical as they possibly could, and many of them were already very technical.

Q Who oversaw that operation?

A A gentleman by the name of Shavey (phonetic).

Q And were they a significant component of ICE's technical support operations?

A Month after month they grew, but, yes.

Q And the satisfaction department, is there a screen that leads customers to that department after the work is completed?

A Yes.

MR. FERGUSON: No further questions. Thank you.

MR. STREISFELD: David.

MR. FERGUSON: Wait, one.

BY MR. FERGUSON:

Q Okay. At the time the TRO was served, what, just roughly, percentage of the company's technical services were being provided by the Nice operation?

A On the customer service side, I would say they were

answering about 60 percent of the inbound customer service calls from active customers, and on the technician side, we were slowly growing that, but I believe we were in the 20-something range of technicians out of close to 200. So it was a lower percentage.

MR. FERGUSON: Thank you. Nothing further.

THE COURT: Anything else?

MR. EDMONSON: No, Your Honor.

THE COURT: Any recross?

MS. BURTON: No, Your Honor.

THE COURT: Thank you, sir.

THE WITNESS: Thank you.

THE COURT: Let's take a five-minute recess.

(A recess was taken from 11:17 a.m. to 11:31 a.m., after which the following proceedings were had:)

THE COURT: Please be seated, everyone.

All right. Who's next?

MR. FERGUSON: Your Honor, we are down to our -- my three clients and our expert witness, and our codefendants have their client and two expert witnesses.

I understand from counsel for the FTC that Mr. Skoudis' plane was delayed, but they think he's in the air right now. And I don't want to speak for them if I'm wrong, jump in, because they're not getting on the phone. So they believe he's in the air, and they believe he'll be here

around 1:00 o'clock.

What I would request is that we just break early now for lunch and come back at 1:15 and deal with Mr. -- put Mr. Skoudis on.

THE COURT: That's a pretty long lunch break.

MR. FERGUSON: It is, Your Honor, but I really -- and I'm not -- I know this isn't by design, I understand it, and planes get delayed and whatnot, but my clients, I think -- I want them to hear what Mr. Skoudis has to say about them, and they have a right to do that, and so, that's why.

THE COURT: All right. Is it likely we're going to finish today?

MR. FERGUSON: Well, you know, we rolled through the morning, but we've got four experts. It is possible, but I can't imagine -- no, four total, including Mr. Skoudis. I can't imagine we're going to get through everybody and close today anyway.

So I'm doubtful of that. But it's possible we could get through all the witnesses today even with such a break, but I doubt it.

THE COURT: I doubt it, too.

MR. FERGUSON: And I doubt if we didn't take the break that we would get through today anyway.

THE COURT: I agree. I don't think the break's

going to make that much difference.

All right. I guess that's fair to have them finish their case before your clients testify.

MR. FERGUSON: Could we come back at 1:15, if that's fine?

THE COURT: What's wrong with 1:00? If he's going to be here at 1:00?

MS. ROBBINS: He was supposed to get in originally 11:30 and he said his plane was delayed an hour. I'm assuming he could be here by 1:00 but I haven't heard from him. Hopefully, that is a good sign.

THE COURT: Why don't we shoot for 1:00, and if he's not here, he's not here.

So let's try for 1:00 o'clock.

MR. FERGUSON: Thank you, Judge.

(A recess was taken from 11:33 a.m. to 1:01 p.m., after which the following proceedings were had:)

THE COURT: Please be seated, everyone.

All right. We're ready to proceed?

MS. ROBBINS: Yes, Your Honor. The Plaintiffs call Edward Skoudis. And we would like to introduce his two exhibits into evidence at this time.

MR. FERGUSON: No objection, Your Honor.

MS. ROBBINS: Those are exhibits 18 and 35.

THE COURT: They'll be admitted without objection.

(Plaintiffs' Exhibit No. 18 and 35 entered into evidence.)

MR. FERGUSON: Not at this juncture, but we do have some questions about the expert's opinion with regard to something's intentionally designed to mislead or is likely to be misleading. So his attempt to proffer expert testimony on consumer behavior is something that we do intend to challenge as we question him.

THE COURT: Okay. Let's bring him in, please.

Sir, raise your right hand, please.

Edward F. Skoudis, Plaintiffs' witness, sworn.

THE COURT: Please be seated.

Sir, if you would tell us your name and spell your last name, please.

THE WITNESS: My name is Edward F. Skoudis, S-k-o-u-d-i-s.

THE COURT: Thank you.

THE WITNESS: Thank you.

THE COURT: Cross-examination.

MR. FERGUSON: Thank you.

Cross-examination

BY MR. FERGUSON:

Q Good afternoon, Mr. Skoudis.

A Hello.

Q How are you doing?

A Good, thank you.
Q Do you have a copy of your declaration handy? If not --
A I do not, no, sir.
MR. FERGUSON: May I approach, Your Honor?
THE COURT: Yes.
THE WITNESS: Thank you.
BY MR. FERGUSON:
Q I am going to just walk through your declaration. I've read it maybe 50 times or so.
A Yes, sir.
Q I understand what I can understand. I've got a few questions, so I'll walk through. It's pretty much in order here and just ask you some questions, if you don't mind.
A Certainly.
Q I see that you are a SANS Fellow. Could you tell the Court what SANS is and what being a SANS Fellow means?
A Sure. SANS is the System Administration Audit and Network Security Institute. It is a research and educational institution that provides information security training, system administration training to thousands of people around the world every year.
SANS Fellows are those recognized by the SANS Institute for unique contributions to the industry. I believe there are eight fellows. It's approximate. There might be six, there might be 10; and I'm one of them.

Q Understood.

I -- in preparing for this, you provided a list of things you've written, and I spent a great deal of time on the SANS.org website. Is that the same institute?

A Yes.

Q There seems to be a lot of material on there. They have a reading room. I see that you've got pieces in there, and I guess the other pieces that are in there, are those other fellows?

A No, those pieces are typically written by SANS students in the SANS reading room, and the fellows as well as other SANS instructors supervise the writing of those research papers.

Q I see. So if something makes it into the SANS reading room it was more than likely written by a student but vetted by a fellow and --

A Not necessarily a fellow. It could be an instructor.

Q I see. Very good.

I've read everything about your expertise and more online. I think it's fair to say you are an expert in computer technical issues particularly with regard to threat analysis and protecting large companies and networks from intrusion, is that fair to say?

A I do spend a lot of time working on that, sir.

Q And forgive me. I'm probably not as good at hitting your

lingo as you might even be at playing a lawyer. So if I misspeak or get something wrong, let me know.

A Certainly.

Q I'll do my best to make sure we can talk the same language.

A Likewise.

Q I didn't see any expertise in the area of, say, like you're not a behaviorist or an expert in consumer behavior, are you?

A I am not.

Q In a few places in your declaration, and I can get to them, but you make -- you draw conclusions or offer an opinion that something was intentionally designed to mislead or could be highly misleading to a consumer. Are those -- can we say those are your personal opinions but not necessarily --

A No, no. I do believe I have the ability to analyze a statement and determine whether it matches the facts, independent of consumer things.

Q And I'll give you that. I don't challenge that. I guess my question is when you opine that something is intentionally designed to deceive, you don't -- you haven't done anything to understand exactly -- other than check if something's true or not, say, in a script --

A My focus is on whether it's deceptive based on whether

the statement matches the facts.
Q Okay. Understood.
Will you turn to -- give me one second.
Oh, before I get into the substance, I understand you're being compensated. Is your rate 200 an hour?
A 220.
Q 220.
And you've been compensated a total of $11,000?
A Approximately. In preparation for this seating here, there's some extra hours that I've spent. But for the original declaration that is the truth.
Q Understood.
THE COURT: Mr. Skoudis, can you wait for him to finish before you start answering, please?
THE WITNESS: Sure. I apologize.
BY MR. FERGUSON:
Q And I understand from your declaration, that as of the date of your declaration, while you have served as an expert, you hadn't testified in trial as an expert before?
A That is correct.
Q And now that's changed, because I'm aware you have testified in a hearing involving Boost Software in this very court?
A Yes, sir.
Q So that's the one time you've testified in open court as

an expert?
A Correct.
Q Very good.
If you would turn to page 2 please.
In the second paragraph you talk about the test calls, the first two test calls, and then the third test call.
I'm not asking you to go into this paragraph. The only reason I'm there is because it reminds me of my question, and I want to make sure we're on the same page. But it's your understanding there were three undercover calls that -- substantive undercover calls that were used in this investigation, and they're referenced in the filings in this case, correct?
A I was provided with information about three calls. There may have been other calls, but I wasn't involved with it.
Q So if there were more, you don't know?
A That's correct.
Q Do you know -- so do you have any way to know you were given all of the evidence in this case or just selective evidence that was given to you by the FTC and the Florida Attorney General?
A I have no way of knowing.
Q Who was your principal point of contact with the Plaintiffs? Walk me through how you came to be an expert in

this case, if you would.
A I was -- I had been doing work for the FTC for the last 12 years on a variety of different cases, doing analysis, technical work and so forth. For this particular project, the attorney Colleen Robbins contacted me and asked if I would be interested in participating with this project with me and my team doing the analysis. We said yes, and that's how it came to be.
Q And as your role in this case, you didn't supervise the preparation of the laptops used in this investigation, did you?
A Not the laptops used by the FTC that made the calls, no.
Q Do you know how many laptops were used in this investigation?
A I don't know how many physical pieces of hardware were used. They were different -- there was three virtual machines, one used for each call, but the physical pieces of hardware I don't know.
Q So you presume there's three separate hard drives, but you don't know if they were encased in different laptops or the same over time as the investigation --
A I know there were three different virtual machines. They could have all been from the same hard drive and the same physical computer. With virtualization, you can't really tell.

Q Understood.

So you'll defer to the FTC investigators as to how many actual machines were used?

A Indeed.

Q Very good.

The third paragraph on page 2, the last sentence states: "The superficial maintenance and cleanup actions of the representatives, especially given the clean state of the FTC computers, should not have had an appreciable effect on the FTC employee's computers performance or stability."

You wrote that?

A Yes, sir.

Q In reading that, I'm left to sort of say, of course, isn't that what you expected, because there was, according to the FTC and you, nothing wrong with those machines?

A The software product indicated that there were problems with the computer, but we saw no change based on the application of any of the changes from that.

Q And if you put aside the fact that the investigators reported that the computers were working, running slowly, if they weren't, you wouldn't expect any appreciable change in the performance --

A That is correct.

Q -- if the baseline is, it's performing fine?

A That is correct.

Q Do you have any experience -- let me back up.

I understand if I had a computer problem and you were my house guest, you could probably help me with my laptop if maybe it was infected with malware or running slowly.

A I'd be happy to help you out sometime, sir.

Q And I need help, but I'm on the verge of getting a new machine anyway. But I understand you could definitely fix everyone's computer in this room if they needed it. What I want to know is, do you have any experience repairing consumers' machines along the lines of what my client's company does?

A Sure.

In the process of teaching my SANS classes, we have many different people, different kinds of people that take my classes. Some of the people who take the classes are in the IT industry and therefore do this kind of work, and I teach them how to do it better. But I also frequently have people in my class who are brand new to this space, and they're trying to build their information security skills. I teach over 3000 people a year. I have hundreds of people who come to the class brand new, fresh, without IT experience, without information security experience.

My job is to help instill that into them, and I do get to see their computers as they bring them in, and repair

them, fix the problems that they have there. Sometimes they come with malware in class, and I work with them to irradicate that.

Q So you're not doing it on a retail level or in a commercial level, but you come across many machines, and I would say there's no reason to conclude that students aren't consumers of sort, right?

A Yes, sir.

Q Okay. Understood.

Throughout your report, you talk about certain things that you think are problematic, or false, or an issue, and the Event Viewer comes up. And we'll talk a little bit about the Event Viewer. But in general -- not in general, specifically as you sit here today, are you aware that my client doesn't use the Event Viewer on the sales side of its operation?

A I am not aware of that. I had some scripts that seem to indicate that in the sales side that they did use Event Viewer, as I indicated in my second declaration.

Q And in your second declaration, you were also, I guess in preparation for that called upon by the FTC, to test a product called System Advisor, which you opined about.

A Yes, sir.

Q Are you aware or do you understand that my client, for three, four months, has been using System Advisor in lieu of

that last phase of the presentation involving the Event Viewer?

A I am.

It seems to me that they were using the Event Viewer before, while I was working on the first declaration, and they were also using it for some of the scripts in the second declaration. But there seems to have been a transition, I'm not sure of its timing, from the Event Viewer to just a cursory analysis by the sales representative of looking for 40 different kinds of malware, to now using the System Advisor tool.

Q Okay.

A So a transition over time from Event Viewer to System Advisor.

Q So if my clients have or were to testify that they haven't used the Event Viewer in sales for three or four months, and that the scripts you saw referencing the Event Viewer are from that period from prior, you would have no reason to dispute that as you sit here today?

A It's consistent with my understanding.

Q Okay. On page 5, if you will, the paragraph towards the bottom, it says: "In my opinion, the tasks performed by the representatives on the three calls with the customer were based on a pre-written script and designed to conceive" -- I'm sorry -- "designed to deceive the customer into falsely

believing the computer had a number of serious issues."

First of all, you don't suggest that the use of a script in and of itself is necessarily misleading or a problem, do you?

A No, sir. I do believe a script can establish a methodology for analysis. However, due to the diversity of issues that can come up on a computer system, a script can only cover the basic flow. You have to have decision points in the script based on the evidence as you find it.

Q And my question was a little more pointed than that. You don't have an opinion that the use of scripts, just that concept, is necessarily misleading or a bad thing. It depends on the content of the script and how --

A It depends on the content and the context on which the script is applied. But I'm not against written scripts to help codify and build a methodology.

Q Understood.

And the second part of that sentence, "designed to deceive," again, that's not your expert opinion, that it was intentionally designed to deceive. Basically, you're saying that it could deceive the way it was written?

A No, sir. I actually believe that the script was designed to lead the consumer through a series of actions that -- and a series of statements on the part of the script that actually are not diagnosing the state of the computer system.

Q Okay.
A But instead, are designed to show things to the user to evoke an emotional response in the user.
Q Emotional response?
A Indeed.
Q And how is it -- what is it in your background that allows you to opine that my clients intentionally did something to evoke an emotional response in a consumer?
A If you look at my second declaration, you'll see that they, for some of the scripts, mention the Russian Mafia, they mention how common and significant the piece of malware might be, they talk about the blue screen and use terms like that as something you definitely don't want to get.

The scripts are designed to amplify any concerns that might be displayed on the screen. The scripts are not designed to ascertain the state of the computer system.

Q Well, let's talk about the Russian Mafia comment.
A Yes, sir.
Q That was in the context of what we'll call -- it was script four in your declaration.
A Yes, sir.
Q And it's dealing with viruses. And in there, you opine that the agent receiving the call, my client's employee, would have no way to know what virus the person was calling in about.

A I don't think that's quite what I've stated. I think you've misread perhaps what I said.
Q Okay. Well, let me ask you this. Are you aware that that script was, first of all, a limited use script?
A I wasn't aware of that.
Q And it hasn't been used since January of 2014?
A That is news to me.
MS. ROBBINS: Objection, Your Honor. This isn't in evidence.
THE COURT: Sustained.
BY MR. FERGUSON:
Q My clients, that script, do you know how the call~-- the person receiving the call would know which virus the caller was calling about?
A I believe I do, because if you look at the script itself, it says wait for it -- I can quote it. It's in my declaration. If you'd like, I can give you the exact wording from it.
Q You can go ahead and tell me generally.
A But generally it says wait for the consumer to tell you what their virus is and then respond back to them saying, the virus you just said is very common, it's a new strain of it.
Q So when I hear that I'm thinking if someone called in and said I just spilled water on my keyboard, that the person on the other end using that script might say, well, spilling

water on my keyboard is the virus of the day?
A Perhaps.
Q Do you have any reason to dispute my client's contention that they used that script for very limited campaigns when there would be a particular virus --
MS. ROBBINS: Objection, Your Honor, this isn't in evidence.
THE COURT: Your clients will say what they did or didn't do.
MR. FERGUSON: That's right.
THE COURT: You're testifying now. Okay. So you can't -- you know, your question's based on facts not in evidence thus far.
MR. FERGUSON: Understood.
BY MR. FERGUSON:
Q You're aware that from time to time, certain viruses will sweep the Internet?
A Yes, sir.
Q For example, the FBI virus. Are you familiar with that one?
A Yes, sir.
Q We heard from a client of my client's company today, Dr. Cannon. You weren't here obviously. But he testified that he had observed on his machine before he ever talked to us the FBI virus and was locked out of his machine.

A Uh-huh.
Q And do you understand that businesses like my client's could bid on words for specific viruses to launch a campaign, for example, the FBI virus --
A Yes, sir.
Q -- and then by bidding on that search term with, say, Google, it would help direct traffic to them?
A Absolutely. I understand that.
Q And if that is what my clients did, then the receiver of the call would know what the virus of the day was if it was launched in a specific campaign aimed at a particular virus, like the FBI virus.
A That would catch a certain percentage of those calls coming in, but you may get other calls. While there might be a virus of the day that represents a significant percentage of the issue, there are tens of thousands, hundreds of thousands of different malware specimens that plague users on a regular basis. So while the virus of the day might capture 25, 30, 50 percent of that, there's the remaining fraction that could be viruses from two months ago, six months ago.

The virus of the day from three months ago is still a very significant issue.
Q Sure. Like the FBI virus is still a significant issue.
A Sure.
Q Let's go to the section where you talk about the comment

about the Russian Mafia. Is that in your supplemental declaration?

A Yes.

Q Let's go to that. I believe it's on~--

A PX35 1036.

Q Yes, sir.

And there you state: "Misleading statement." With regard to script four. This is pretty much in the middle of the page.

"The groups that produce and profits" -- error there -- " (sic) from this infection, are sometimes backed by the Russian Mafia."

That's a problem, that statement, to you, you believe it's designed to alarm the consumer and it's false?

A I do, given that we don't have the context of the specific virus that the consumer called in with. If they had called -- my concern is there wasn't an analysis step. The consumer called in with something. Was there a step to ensure that it was associated with this allegation or not? The script doesn't hold such a step.

Q I see.

But you're not taking the position that it's not well-known that Russian organized crime has taken a large -- taken large steps in the cyber crime and malware industry?

A Oh, yes, sir, undoubtedly.

Q And I even saw on the SANS Institute, SANS.org, there was a phrase -- at first when I saw it, I thought it was innocuous. It's called the Russian Business Network and I thought it was like the Russian Chamber of Commerce. And then I saw a link and I clicked it and I realized it's hardly the Chamber of Commerce. It's a Russian organized crime outfit that is responsible for a large production of cyber crime and malware today; is that right?

A They're called the RBN for short, the Russian Business Network, and they have been very busy over the last several of years.

Q And not to elevate Wikipedia, but they've got their own Wikipedia page, RBN and when you type in RBN --

MS. ROBBINS: Objection, Your Honor.

THE COURT: Sustained.

BY MR. FERGUSON:

Q But you're well familiar with Russian organized crimes actions in the cyber crime and malware industry, if you will?

A Sure, but I think it's worth noting that there are many other contributors to the malware problem, including China, including illicit businesses within the United States. I mean this is a worldwide problem. Russia has a particular role in it, there's no question about that, Russian organized crime, but this is something that comes from around the world.

Q And it looks like North Korea might be getting into the fray, as well, doesn't it?
A Perhaps. The jury's still out on that one, I suppose.
Q I understand.
Give me one second. I'm looking for one particular area that I wanted to go ahead and skip to.
On page 20 of your initial declaration.
A Yes, sir.
Q In the middle of the page you talk about the use of the term -- throughout, but specifically you talk about the term "trace elements" as a nonindustry term.
A Uh-huh.
Q Is that right?
A Yes, and it's actually two related terms that you see in escalation of -- in the dialogue in the scripts. It starts by talking about trace elements, and then escalates to trace damage.
Q Well, right now let's focus on trace elements.
A Yes, sir.
Q That term, have you ever seen "trace elements" used to refer to remnants or artifacts of a deleted piece of software remaining behind on the machine?
A I have occasionally seen the word "trace." That's reasonable. But trace elements and its significant use within the scripts surprised me. It's not widely used in the

industry. And then the escalation from trace elements, to put that seed out there in the consumer's mind, and then escalating to trace damage pretty seamlessly as the script advances.

Q Did you review Mr. Kraemer's declaration as part of your preparation for this case?

A I don't remember. Do you have Mr. Kraemer's declaration for me to take a look at?

Q I do, yes.

MR. FERGUSON: Can I approach, Your Honor?

THE COURT: Yes.

BY MR. FERGUSON:

Q I'll draw your attention to --

A I do not believe I have seen this, no.

Q Okay. Well, if you would, turn to page 5. And we've -- at page 5, we are dropping into the middle of what Mr. Kraemer did to prepare the machines.

A Okay.

Q And at Item L he says: "Un-installed one or both of the antivirus programs and removed traces of them from the C program file folders that were not removed during the un-install process. Do you see that?

A Yes.

Q Is it fair to say it's unambiguous what he's referring to? At least Mr. Kraemer -- I understand he's not

necessarily a computer expert of your caliber, if at all, but he's clearly using the term "trace" to discuss the same concept that my client's script discussed as with regard to remnants or artifacts of software left behind after the un-install process.

A He uses the word traces here, not trace elements or trace damage. A much more common use of the term is forensics artifacts.

Q I don't -- no need to ask that.

But looking just at trace elements for a second, I understand you got a problem with the two together, but I want to focus on trace elements, is adding the word "elements" to trace in and of itself problematic? The word "elements" is pretty neutral, isn't it?

A Not problematic other than as it escalates to trace damage.

Q But if you said trace stuff instead of trace elements, that wouldn't change your analysis with regard to that term?

A Correct.

Q Turn a page backwards on Kraemer's declaration. And I just want to talk to you a little bit about his preparation of the machines, because my understanding, before we get into this just big picture, is that your contention, your opinion is that the machines, or machine used, was near pristine, and that's based upon the way it was prepared by the FTC, and

then antivirus software was run.

And then by the time it got to, say, PC Cleaner being run on it, PC Cleaner shouldn't have picked up anything; is that right?

A My understanding was that these were fresh installs of the operating system, and therefore would be akin to what you'd get them from the manufacturer.

That said, PC Cleaner searches for many, many things, and may find some anomalies on a machine even brand new from the manufacturer. I don't have a concern with that. I have a concern with calling the anomalies problems on a fresh install of the machine.

Q Okay.

A So PC Cleaner may very well find things on a fresh install. In fact, it did.

Q Well, let's talk about what might be problems in the way the machines were prepared. And I understand you didn't have a hand in it, and you haven't -- you said you hadn't reviewed this declaration before?

A This is the first time I've seen it.

Q Okay. Do you agree that, at least for your purposes, it's important to know that the machines were pristine or near pristine condition when they got to you?

A That seems reasonable.

Q Okay. And do you think that it would be important and

best practices for the FTC employees who are preparing the machines to keep detailed -- a detailed record of what they did to prepare the machines?

A That seems reasonable, as well.

Q So let's look at what Mr. Kraemer did. And I understand Mr. Kraemer is -- I believe he's a -- let me make sure I don't get him confused with somebody else. Hold on. He's a paralegal specialist with the FTC, and he prepared the machines.

It says: "For each of the three" --

A Can you show me where you're reading from?

Q I'm sorry. Paragraph 12, at page 4.

A Okay.

Q "For each of the three calls, I received the laptops from the Internet lab and litigation support staff roughly three business days before each call. I connected the laptop to the Internet, powered up the computer, performed several actions, including but not limited to"-- and here comes the list.

A All right.

Q So right there, that "not limited to," I guess that tells us that the list that follows is not exhaustive of everything that he has done; is that right?

A It's a plain --

MS. ROBBINS: Objection, Your Honor. Calling for

him to speculate as to what Michael Kraemer thought or said.

THE COURT: Overruled.

BY MR. FERGUSON:

Q You agree?

A It's the plain meaning of the language.

Q And in fact, he testified, and he provided us some of the other things that he did, but he never kept a record of everything he did that would fall into that but limited to category. Are you aware of that?

A I have no knowledge of it.

Q Okay. He ran initial virus scans which never found any virus or issue. One or two of the scans only found a nominal amount of cookies.

Don't you think it would be more important there to be a little more precise and say --

MS. ROBBINS: Objection, Your Honor.

THE COURT: Overruled.

MR. FERGUSON: May I finish the question?

BY MR. FERGUSON:

Q Don't you believe that could be a little more precise? Do you think it's best practices to say one or two? How about one; if it's two, say two; and list the amount of cookies instead of saying nominal cookies, or you think that would be best practices, a little more informative?

A I'm sure --

MS. ROBBINS: Objection, Your Honor.

THE COURT: What's the objection?

MS. ROBBINS: That he's asking him to comment on something that the paralegal at the FTC thought or did.

THE COURT: Well, I would like to know whether he thinks he would need more information than what was provided by Mr. Kraemer in order to evaluate the condition of the machine in order to give his opinion. So . . .

THE WITNESS: It would be helpful to have more information about these cookies. They were very likely placed there by the antivirus company when he updated the antivirus tool.

BY MR. FERGUSON:

Q Okay. And that's -- you're assuming, then, that everything is in sequential order of when he did it, chronological order?

A So far I've only read A and B, and they seem to be in order, yes.

Q Okay. So let's keep going.

"Installed files, including photos of various travel destinations, Word and Excel documents, and recipes."

You see that?

A Yes, sir.

Q Do you think it would be a little more useful and informative, particularly for you to make opinions about the

state of the machine, to know what the photos were and where they came from?

A Actually, I don't believe it's particularly important in the case, or I don't believe that the PC Cleaner really did anything with those particular photos or Word or Excel documents.

Q Well, but you, as you sit here now, with that scant information can't opine or have any knowledge of whether, for example, what the source of the photo was and whether it infected the machine with malware.

A Possibly.

Q Right?

A I suppose.

It's unlikely for a photo to infect a machine with malware. That would be quite an unusual circumstance, a fascinating one from a research perspective. I don't think you'll see it.

Your argument maybe holds more water, sir, for Word or Excel documents. They're much more likely to be infected than a photo.

Q Okay. So wouldn't that be a good idea, then, to be a little more specific about what the document is and the source of it?

A Fair enough.

Q "Opened Microsoft Word and edited documents."

A Yes, sir.
Q You don't have copies of those documents, and you don't have any knowledge of the source of those documents?
A I do not.
Q So we'd have to rely on Mr. Kraemer, and hopefully, he could shed some light on that, right?
A Right.
Q "G, surfed the Internet by visiting popular and specialty websites, including but not limited to epicurious.com, Amazon.com, CNN.com, MSN.com, TripAdvisor. You see that?
A Yes, sir.
Q You see the "but not limited to" in that sentence?
A I do.
Q So unless Mr. Kraemer's got a side list somewhere or has remembered them all in his head, none of us in this courtroom have any way to know what other and all of the websites he went to.
A You'll have to ask him, but I certainly have no idea of the additional sites.
Q Go to J. "Watched videos on CNN.com and YouTube.com."
A Yes, sir.
Q Now, I'm pretty sure you can get malware watching a video on YouTube.com. I'm not here to say you can always get it, but do you agree it's possible?
A I think it's really unlikely. YouTube is run by Google,

who has a security team that is quite on top of their game. I don't think you'll find that you're going to get infected from YouTube. You might get infected by something as an imposter to YouTube, but getting infected by YouTube, I don't think you're going to see that, sir.

Q So you say it's impossible?

A It's very unlikely.

Q But very unlikely means it's possible.

A With computers almost anything is possible. These are human created things that can be manipulated in arbitrary ways. It's possible but very unlikely.

Q But how many times a day do you guess that people are watching videos on YouTube?

A Oh, hundreds of millions of times every day.

Q And you believe it's impossible that every day someone is not getting some infection from watching a video on YouTube?

A I believe that every day someone is not getting infected by YouTube. If they were, this would be a huge problem for Google, and we would be in the court talking about Google, sir.

Q Let's go down to K, "conducted a second round of antivirus scans, finding no viruses any time, and fully cleaning the computer."

What do you understand fully cleaning the computer to mean?

A I don't know what it means. It could mean that he removed the documents we were discussing earlier, the photos, it could mean that he cleared his cookies, but I don't know for sure.

Q Or it could mean that the antivirus scan didn't find viruses but found other issues, something that he went ahead and deleted or removed --

A That's a possibility, as well.

Q So we don't know if fully cleaning the computers means that the virus, antivirus software that he was using, did it, or he did something else beyond just using those programs?

A That is correct. You can't tell from item K.

Q Okay. And then M. Let's go to M. "Emptied the computer's recycle bin and removed any files from the downloads folder."

A Right.

Q Unless that's out of sequence, he'd have to go back to the recycle bin one more time, wouldn't he?

MS. ROBBINS: Objection, Your Honor. He's misstating the testimony that Michael Kraemer gave yesterday.

THE COURT: Overruled.

BY MR. FERGUSON:

Q I'm asking you, sir, to just, based on your interpretation of that sentence, let's go through it.

A Yes, I understand where you're going with it.

So emptied the computer's recycle bin, which will throw those documents away. Then removed many files from the download folder. Its plain meaning would be that it moved those into the recycle bin, yes.

Q So if this is not out of sequence and it's in sequence, without one more back to the -- back to the recycle bin, it's not empty, is it?

A That's correct.

Q Let's go back in Mr. Kraemer's report and look at the page 4. We've got a little information about the three different laptops or three machines used here. You see that chart?

A Yes, sir.

Q The first machine has Malwarebytes and Symantec Endpoint, as does the second machine, and this third machine has Malwarebytes and Avast Antivirus.

A I don't want to interrupt. It's pronounced Avast.

Q Thank you. Probably say it different every time I say it. McAfee gives me a problem, too. Did I get that right?

A You got it right. But it gives a lot of people problems, too.

Q So let's -- when he says ran the antivirus software on the other page, he didn't specify which -- what he did, but let's assume it's Malwarebytes. Okay?

A Or it could very well mean both.

Q Or both. Or the other, right?
A Sure.
Q But he doesn't specify.
A That's correct.
Q Why, if you know, would he use these two antivirus programs as opposed to the one that's built into the Microsoft Windows 7 product itself?
MS. ROBBINS: Objection, Your Honor, it's calling him to speculate as to what he would have done.
THE COURT: Sustained.
BY MR. FERGUSON:
Q Are these programs, these two programs, better than the antivirus protection that comes built into Windows 7?
A So, I have a potential to get in trouble with the folks at Symantec here or the folks at Microsoft.
Q Malwarebytes is going to get the vote?
A No. Actually, the fact is, Microsoft includes with its operating system Windows Defender which provides a baseline of security. It does a fine job. I don't want to upset anybody at Microsoft here. That said, Malwarebytes and Symantec, those organizations focus on antivirus, and therefore their solutions tend to be more comprehensive than the built-in Windows Defender.
Q Is Malwarebytes the best?
A I wouldn't say that.

Q What would you say is the best?
A I wouldn't say what was the best.
Q Why not?
A Because it's a constant leapfrog game here. McAfee, Symantec, Avast, these companies, I work with them, I analyze their tools on a constant basis, and at any given time it changes who's the best. So each of these is a very credible program that is widely used in the industry. People work very hard keeping these things up to date and adding new features to them all the time.

But I cannot render an opinion on who's best at any given moment because it changes.

Q And, in fact, you said on any given date one could be the best or the other, but even on any given day, one could be better than the other at a particular infection.
A Which is why this is typically done with multiple samples. You'll see my own work was done with three separate antivirus tools.
Q Well, and I see you used, at page 8 of your declaration, you used Malwarebytes, which is on there.
A Yes, sir.
Q McAfee Stinger, and ClamWin?
A Yeah, ClamWin.
Q Are those better than, say -- are Stinger and ClamWin better than Symantec Endpoint?

A They're all very fine tools.
Q And I've used this analogy before. Correct me if I'm wrong, but in my -- in trying to talk to the Court or a witness or anyone about how these operate with regard to identifying malware, I liken it to, for example, the FBI fingerprint database, where you got to catch the guy and roll his prints and get him into that database before he'll get flagged.
Those prints, if you found them out in the wild, you wouldn't know whose they were unless the person had been keyed into the system; is that right?
A That's a rough analogy.
Q I'm sure.
A Let me explain in a little more detail different ways to detect malware. One way matches very closely with what you've just described. It's referred to in the industry as signature based.
Q In the signature base if no one's yet identified a particular piece of malware in a wild, it's not going to get flagged on a signature base?
A That's correct.
Q Now if that malware was based on some prior malware and had some similarities, it might get flagged because those -- the prior bits of malware were already profiled, is that --
A That second -- now you're moving from the first,

signature based, into a second form of detection, which some people refer to as heuristic based detection. You could almost consider it fuzzy matching of the signatures. You're matching, instead of across an entire file, you're looking at pieces of the file. Malware authors will often reuse their work and will pull in pieces from earlier specimens that they have generated. So the heuristic check is designed to get that.

Q I understand.

A There is another way to detect malware, as well.

Q Go ahead.

A And that would be behavior based. That's where you're not looking for a strict sequence of bits on the hard drive or in memory. That would be signature based or it would be heuristic based. Instead, you're analyzing what a running program is doing and trying to determine whether the running program is consistent with what malware would do on the machine.

Q So meaning the observed conduct of the machine indicates that it's not normal, something bad is going on?

A Something has gone wrong, yes.

Q Now, you used three bits of anti-spyware, anti-malware. Why not four?

A Well, three separate opinions on the matter seemed a reasonable approach. Commonly do that in our analysis of

infected machines when we're trying to prove that a system is uninfected by malware. Usually a second opinion does it. We went with a third opinion here.

Q Do you know why Kraemer didn't go with a third opinion in his preparation?

MS. ROBBINS: Objection, Your Honor.

THE COURT: Sustained.

BY MR. FERGUSON:

Q You gave some opinions about PC Cleaner, and we've got some other counsel that will talk to you a little more length about that, counsel for PC Cleaner, but I just want to know, as you sit here today, can you unequivocally say that PC Cleaner does not and cannot provide any benefit to consumers' computers?

A Oh, I do not say that. I do believe it provides some benefit to consumers. My concern with is how it represents the state of the computer system in advance. But I do believe that it can provide for some systems cleaning operation that has benefit.

Q Okay. Could you -- I want to talk to you about a comment you made about registry cleaners. Let me find it. On page 22.

A Yes, sir.

Q In the middle you state that in regards to the recommendation for a registry cleaner, Microsoft and

Microsoft-recognized experts generally recommend not to use registry cleaners.

A I think -- I'm sorry to interrupt, sir, but I think we should point out this is not what I state. This is a quote from the representative, right? Where are you reading from exactly? Sounds like you're paraphrasing.

Q Do you see right in the middle of the document it says explanation?

A Okay, I gotcha. I thought you were reading from the quote prior, sir.

Q That's you there, right?

A Yes.

Q And I'm focusing in on you basically saying that Microsoft and Microsoft-recognized experts generally recommend not to use registry cleaners. Is that your position?

A Registry cleaners are a point of some controversy in our industry. Many, including Microsoft itself, have recommendations not to use them. Others will recommend using them.

Q Could you -- go ahead.

Go back to page 10, because you've got a blurb there from Microsoft about registry cleaners.

A Yes, sir.

Q You see that?

A I do.
Q I'll ask you to read it in a second, but before I do, let you know what I'm looking for. I've read this, and I don't see that it recommends not to use them. I see that it warns people to be careful because it's dangerous to do so, and if problems go wrong they're not going to warranty it. But I'm asking you to read this and help me understand where in there Microsoft says, as opposed to warning to be careful, where they recommend or say not to use a registry cleaner.
A Shall I read the whole thing?
Q You can if you want, or you could read it to yourself and then point me to the section, or you could read the whole thing. It's up to you.
A "So some products, such as registry cleaning utilities, suggest that the registry needs regular maintenance or cleaning."
We should point out that Microsoft itself does not suggest that, despite what the representative said early on page 22.
Q Understood.
A "However, serious issues can occur when you modify the registry incorrectly using these type of utilities. These issues might require users to reinstall the operating system due to instability. Microsoft cannot guarantee that these problems can be solved without a reinstallation of the

operating system, as the extent of the change made by registry cleaning utilities varies from application to application."

Microsoft is waving its hands at this to say if your registry cleaner hurts you, it's not on our fault.

Q It's on you.

A It's on you, right.

Q But in fairness, that doesn't say --

A Don't use it. You're correct, it doesn't say don't use it. It does provide --

THE COURT: Only one of you can talk at a time.

MR. FERGUSON: That was my fault. I apologize.

BY MR. FERGUSON:

Q Go ahead.

A I'm done.

Q Give me one second.

I'm just going to finish flipping through my notes. I'm almost done. I want to just make sure I don't sit down and realize that --

A Feel free, please.

Q Let's take a look at 13. Just got a few questions about --

A Page 13?

Q Of your original declaration.

A Yes, sir.

Q It says, under every web browsing cookie, that section right there --

A Yes.

Q -- towards the end: "While some cookie behaviors can be malicious, all of the cookies on the system during the initial analysis were, in fact, benign."

A Uh-huh.

Q I guess my point is, since some cookies can be malicious, if they're picked up in, say, a product scan, would you recommend going ahead and deleting them? Is there any good reason to keep the cookies?

A Yes. Cookies for widely used services, such as the ones I cite in my declaration, like Facebook or gmail or a variety of other organizations, these cookies are actually maintaining state. It's a technical jargon term, meaning that you're logged into the application so you don't have to retype your password again and again and again.

If you wipe those cookies out, those useful and good cookies, those users will not be logged in automatically when they go back. This actually causes some users to not know their passwords anymore, because they were stored as a representation in the cookie. Those are wiped out now. The user has to maybe ask for a password reset. It requires more user time and effort.

So before characterizing a cookie as a problem on a

computer system, some analysis should be done as to the nature of the cookie. Is it for Facebook or gmail or others, or is it a cookie that is commonly associated with perhaps the Russian Business Network or some other malicious activity.

Q So some cookies could be malicious, but most cookies are not?

A Correct.

Q And deleting all cookies could create somewhat of an inconvenience?

A Yes, sir.

Q But, on the other hand, given the information that's stored in cookies, they could, for example, if you were in an Internet cafe, someone could steal your cookie and have access to your log-in information or passwords that were contained in that cookie?

A If they were to hack into your cookie. But I think the salient point here is the product calls all cookies problems, whereas most cookies are not a problem at all and are, in fact, just a feature there for the user.

Q And which product are you talking about now?

A I'm sorry, the PC Cleaner.

Q I'm about to turn it over to PC Cleaner's lawyer and give him a signal to get ready.

A I appreciate that clarification.

Q No.

And the last thing is Panda, the Panda product at issue here. Are you of the opinion that Panda is of no value to consumers?

A No, Panda is a fine antivirus tool.

Q Okay. Thank you.

Oh, wait.

MR. FERGUSON: Thank you.

THE WITNESS: Thank you, sir.

Cross-examination

MR. NICHOLSON: Bear with me one second while I get set up.

THE WITNESS: Sure thing.

BY MR. NICHOLSON:

Q Good afternoon, Mr. Skoudis.

A Hello, sir.

Q My name's Robert Nicholson. I'm one of the attorneys for PC Cleaner Pro.

A Yes, sir.

Q I have a few questions for you. I have had the benefit of reading your testimony from the Boost hearing, and hopefully in the interest of not having to go through all the questions and answers that were had in that hearing, I'd like to see if I can get you to agree to some of your prior testimony on some of those points. Okay?

A Okay.
Q In your prior testimony --
A Is it possible for me to get a copy of this?
Q Absolutely.
A So that I can look at the context regarding what I said?
Q There you go.
A Thank you, sir.
Thank you.
If you could cite page numbers to help speed the process I would appreciate that.
Q Sure. Why don't I ask you the questions, and if you agree with the point, great. If not, we can go back to the testimony. How about that?
A That sounds wonderful. Thank you, sir.
Q Okay. Sir, in your prior testimony, one of the things you testified to was that as part of your computer duties or what you do for a living is that you deal with registry issues several times a week?
A Oh, at least, yes.
Q So you would agree with me that computers can develop registry issues which can be detrimental to safety, security, and the functionality of the computer?
A Sure. Especially if the computer is infected with malware. But even short of that it could cause issues on the machine. Microsoft itself and what we read earlier says the

same.
Q One of the things you also testified to at the last hearing, or correct me if I'm wrong, is that typically the longer a period of time that a consumer, customer or computer user is using their computer, the greater the likelihood that they may develop registry issues in their computer?
A I'd have to see the context of the quote, sir.
Q Sure, if you look at page 137, starting at, I believe, line 17.
A So the context of what you just described is a consumer that is installing and removing computers on their -- programs on their computer on a regular basis, and the quality of the removal software is not very good. That would lead to the accumulation of things in the registry on the computer system.

The reason I asked for the clarification for the context is, first of all, this is not every user on a computer system. It's not a common use case. And it doesn't necessarily build up over time.

The context that I offered in my previous testimony was for the top 10 percent of computer users.
Q Understood. And that was the second part of my question was specifically did you say that the top 10 percent of computer users, typically those that are adding or removing software, are more likely to experience these registry

issues?
A Yes, sir.
Q Okay. Now, it doesn't necessarily have to be someone that's had their computer a long period of time. You may have an active user, if you will, that is doing more in a shorter period of time; is that correct?
A Sure.
Or it might be -- they might be using particularly bad software that they're installing or removing, or as I mentioned before, the machine might be infected with malware that introduces registry anomalies.
Q And so the second part of my question, or the third part, I guess, that you anticipated, is similar to registry issues, a consumer, customer, computer user, over a period of time, if they're active, the longer period of time that they're using it the more likely that they could pick up malware at some point in time?
A Depends on the use case. This is probabilistic in nature, so at any given day a given user could be infected with something. Users that go to riskier sites or engage in riskier activities are more likely to have that happen.
Over time that would add up. That's just the nature of probabilities.
Q Right.
We're talking about probabilities here.

A Yes, sir.
Q But you would agree with me that a person that has a computer a longer period of time, given standard usage rates, by the percentage of probabilities is more likely to have this issue than someone who pulls the computer out of the box?
A Depends on their use case.
Q Understood. I agree. But I was asking you to make an assumption about regular usage over a period of time increasing the probabilities.
A Yes, sir.
Q Okay.
A Well, not increasing the probabilities, but the probabilities add up. There's a difference in statistics.
Q Agreed. But I don't think we should get into game theory statistics here.
A Agreed.
Q Now, one of the other points that you testified at the prior hearing was that a PC could be optimized but not have a virus or malware on the computer.
A Yes, sir. Depends on the definition you want for optimization, but there are things that you could tweak on a Windows machine to improve its performance.
Q Which goes to the next one. There are things that one, such as yourself or another computer expert, can do in the

right case to improve computer performance?
A There are. An example, and this is an example that is actually used by your client's product, is to tweak the way Windows are drawn on the graphical user interface of the computer system. Microsoft, when it ships its product, is trying to optimize across performance and esthetic appeal. They want it to look pretty. If you're willing to take a hit in how pretty the interface looks, according to Microsoft, you can gain better performance.
Q So I think the answer to my question was yes?
A Yes.
Q Okay. If -- one of the things you testified was if a consumer is suffering slow performance, then computer optimization may be in order?
A I'd like to see the specific context, if you don't mind, but it seems reasonable.
Q Sure. Page 111, line 3.
A Yes, that looks like -- yeah, that's what I believe and know to be true.
Q Okay. Fair enough.
And, again, pulling from your prior testimony, you listed a variety of PC optimization programs that exist, and specifically you mentioned -- well, actually, I'll let you mention some of them. Can you name some of the PC optimization programs that exist out there on the

marketplace?
A Sure.
I believe in my prior testimony some --
Q It's on page 114.
A Thank you.
But I believe they were brought up by the attorney, but there are many out there. For example, Symantec has one that they put under their Norton imprint. There's a product from AVG. There's several different ones out. There's one called Winferno and so forth.
Q The Norton one in particular is Norton Utilities?
A Norton Utilities has in it a PC Cleaner.
Q McAfee also has a product, as well?
A Well, that's interesting. From my testimony last time, the opposing attorney talked about McAfee Winferno, and if you read the details here I hadn't heard of it, because it's actually not by McAfee. McAfee does sell it, but it's not their software. There are some references to it on the McAfee site, but Winferno comes from a different company.
Q Okay. Fair enough.
Now, you got into a discussion during the prior hearing that there were certain types of issues that these programs can appropriately and properly address, and one of those was something called shared DLLs?
A Yes, sir.

Q Something called file association?
A Yes, sir.
Q Okay. And you commented something about doing something with the system tools?
A I'd have to look up the specific context.
Q Page 127, line 17, please?
A Thank you, sir. I appreciate your pointing me to this. 127, line?
Q Seventeen.
A Yes. Okay.
Q And I think you went on to comment that even in your estimation, it would be appropriate to refer to problems or issues in these areas as errors?
A Yes.
Q And --
A I should clarify.

Certainly for file associations, certainly for shared DLLs. I'd have to look at the context of system tools here, because this is just a display on the screen. But I can wholeheartedly say with file associations and shared DLLs, that those are errors. They're inconsistencies in the registry. They're pointing to things that aren't there.

Q Okay. And would you also agree that Active X control fixes are also a useful feature of these computer optimization programs?

A Some Active X control fixes can be. I have some concerns with some of the Active X checking that is done by the product PC Cleaner. It looks for --

Q Can I just -- we're going to get to that.

A Okay.

Q If you don't mind just working with me a little bit here, it's just to get these points and I'm happy to come back and address that issue.

A There are some Active X control things that are done by PC Cleaner that are useful on the system.

Q Now, one of the things that you testified in the prior hearing that you had a particular concern with the Boost product was that it lumped the errors and issues into a single screen; is that correct?

A And called them all errors. I'm okay with the single screen, it's just adding those numbers together, when they're talking about vastly different things that represent different categories. Some I agree are errors or problems. Others are merely the behavior of Windows under normal operation. My concern, as you rightly point out, was aggregating those together.

Not the fact that they're on the same screen, but putting that single number together and treating them as though they're all the same kind of thing.

Q Now, I haven't seen the Boost screen, but would you agree

with me that PC Cleaner Pro tracks these out into the categories that they are associating the issues or problems with?

A It does, but it still adds them together right at the top and refers to them -- well, different versions refer to it at different things over time, but still calls them problems or errors.

Q And I certainly understand that you find that problematic, that you have issues with that representation, and we'll get to that in a minute. But I'm asking you in terms of just setting out the layout here, would you agree with me that PC Cleaner Pro identifies the issues by different categories?

A Yes, sir, it does.

Q And would you agree with me that PC Cleaner Pro then allows the user to drill down, that is, identify the specific items that that category is picking up?

A Yes, which I actually very much like about the product. I think that is a feature to be extolled.

Q And, so, for you, as a computer expert, if you were to use this program, you would be able to drill down to exactly the item in question and determine whether it is or is not an issue in your mind?

A Correct.

Q And do you have any evidence that PC Cleaner exaggerates

that list of items? In other words, it populates in that drill-down things that aren't there?

A No. I do believe, and based on my analysis, that PC Cleaner Pro is indicating what it has found on the system. My concern is how it characterizes that.

Q I understand. I understand it's the characterization issue, but I just -- for the purpose of the Judge, I need him to understand exactly what this program does or doesn't do, and we'll talk about the representation.

A Understood.

Q So essentially, what this program does is it is reporting the things that the program has been told to go look for and put in the list?

A Correct.

Q Okay. It's not making stuff up?

A Correct.

Q Okay. Now, you've spent some time, at least a little bit of time, with PC Cleaner, correct? PC Cleaner Pro?

A Yes.

Q Would you agree with me that it has a number of functions within the program? In other words, it's not just a registry cleaner.

A Yes.

Q In fact, although I don't think you set them out, there's a list of nine, 10, a dozen different functions that the

software has?
A Sure.
My focus was on the -- I was asked to investigate and look at the details of the scan itself.
Q I understand. I understand. I just want to make sure that we're on the same page in terms of the program.
And would you agree with me that those functions -- would you at least agree with me that at least some of those functions in your estimation would have value to a computer user?
A Yes, sir.
Q And in your examination of PC Cleaner Pro, did you find any evidence that that program could -- or that it did damage a~-- the registry on any of the computers you looked at?
A No, sir.
Q And, sir, were you aware that the program has a built-in registry backup function to it?
A Before it makes any changes, yes.
Q Okay. And can you explain what that is and why that's either a good or bad thing?
A So a registry backup tool creates essentially a snapshot of the registry with its settings so that at a later time you could restore the registry to its original settings. And as I had testified in my previous testimony in this Court, that is a very useful feature should something go awry, as we saw

earlier, with Microsoft statements about how something could go bad.

Q So, in other words, if a consumer bought PC Cleaner Pro, ran it and hit the fix button and something went awry, they didn't like the outcome, the program has a built-in feature to essentially undo what the program did?

A Yes, sir.

Q Now, this is a little out of place here, but one of the things that -- and when you were talking to Mr. Ferguson, I thought I heard you say that even on a hypothetical or theoretical clean machine that the FTC was using, that a PC optimization or registry software program like PC Cleaner Pro could legitimately find issues, and I'm doing air quotes there.

A It may find some inconsistencies in the registry that the user doesn't experience either as a performance hit, instability. That's why I think we could refer to the machine as a fresh machine. I use fresh often in my declarations. I also use clean, but clean seems to have some complexity associated with it.

So with a fresh install there may be things that it finds, first of all, for optimization. The software may have a difference of opinion as to performance versus esthetics that Microsoft has. But additionally there may be other optimizations that it could do.

Q I just want to break that down a little bit, because -- so in a sense, using the term clean machine here is, in essence, somewhat of a misnomer?
A Well, we'd have to have a discussion and go forward and try to debate what clean means. That's why I prefer using fresh, because it implies it's in the state it was when you purchased it.
Q And if I understand your testimony correctly, even this fresh machine, a software in a nondeceptive manner, could still find issues with either how that registry currently exists or in terms of how the system settings are currently optimized.
A It could find issues, but those issues will have no performance stability or other impact to the user.
Q Well, that's certainly an assumption you're making, because I guess we're talking about a hypothetical machine. So as you said, in the computer world anything's possible, correct?
A That is true. I'm talking about a machine that you've purchased from a reputable vendor who has configured the machine in a way that makes it, you know, a sellable system.
Q Presumably it comes out of the box and operates?
A Right.
Q So since you mentioned this, this machine that we're buying from a seller, a retail seller --

A Sure.
Q -- one of the things that happens with those boxes is they ship with a number of additional pieces of software on them, don't they?
A Yes, sir, they do.
Q And I think the term in the last hearing was crapware?
A That was a term that was used. It was quoting a reporter who was asking for the industry to lower the amount of that.
Q Okay. And without analyzing each of the -- a particular computer or each of those pieces of software, it would be impossible for you to know what impact that would have on the registry and on the optimization of that machine?
A Yes. And I think the same could be said for the PC Cleaner product.
Q Okay. And I'm going to get to that, because I'm going to ask you if you checked that.

Now, you talked about the cookies.

A Is this in my previous testimony or my testimony --
Q I'm sorry. What you just testified to a few minutes ago.
A Thank you.
Q So I'm actually done with that, so you can close that up if you like.

Mr. Ferguson asked you something about cookies, and one of the things you said is they can be malicious, yes?
A Some cookies could be used for malicious purposes. I

think it's an important point here. The cookie itself is merely some data that's put on your computer system. That data put on the computer system itself is not going to hack your computer, cause problems for your computer. It can be used in a malicious fashion in that when you go to websites, the cookie is passed back to the websites. The maliciousness could be used to target you as individual, it could be used to violate your privacy.

So calling the cookie malicious is I think misleading. Instead, it's the use of the cookie by certain websites that could be malicious.

Q I accept your clarification, sir, and it's apropos to my point.

A Thank you.

Q The existence of the cookie on the computer could be exploited by someone who sought to exploit it?

A If that someone put the cookie on the system or if they were affiliated with whomever put the cookie on the system.

Q Or if someone got access to your computer and you had a cookie on there that secured or that remembered all your passwords and automatically logged into things like your bank accounts, that could be problematic, could it not?

A If someone hacks into your computer and grabs the cache of cookies that were on your machine, that would be certainly a concern. They would be able to use those cookies in many

applications to access the application.

However, from an industry perspective, the general trend is for ease of use and not requiring users to type in their password again and again and again. Facebook wants to make it easy for you to log into Facebook. Google wants to make it easy for you to access your Google accounts. Amazon wants to make it very easy for you to buy things on Amazon. So storing cookies is very commonplace for all of these big Internet services.

Calling it a problem, I think, is deceptive.

Q So notwithstanding the fact that the computer industry or the vendors, like Amazon or eBay or whomever, might like to facilitate quick access for purchase purposes, the existence of that cookie with your personal information potentially exposes it to third parties, yes?

A If the computer itself were to be hacked. By itself, no. But potentially is the crux of it.

Q Thank you. Thank you. That word was purposeful, sir.

It potentially exposes personal information to a third party, yes?

A Potentially, if the computer were to be hacked or taken over by an attacker. That said, calling a common feature of every major Internet service a problem and then adding up every single one of those problems and presenting that to the user is where my concern lies.

Q I understand that, and maybe if we could just chat for a minute, because we all get that your concern is what all of these things are called. What I am --
A How they're aggregated.
Q How they're aggregated and how they're reflected. I get that. Okay? But this will go a lot faster if we can get through the base points here in terms of, you know, simply answering for me whether or not that item, the existence of a cookie with your personal information could potentially be exploited, yes or no.
A Potentially. But with computers all things are possible.
Q Do you find it imprudent for a computer user to be informed of the fact that the existence of that cookie with their personal information might be a security risk?
A Well, the product doesn't really differentiate between cookies that have --
Q I'm not asking you what the product did. I'm asking you, forget PC Cleaner Pro here for a minute.
A But you're making --
Q I'm asking you a generic question. Is it imprudent for a consumer to be made aware that that is a potential security threat?
A If there is a cookie that includes personal information for that user, I agree with you. However, the sheer number of cookies, most cookies do not have personal information in

them, and yet, the product which you don't want to talk about all refer to any cookie on the machine, regardless of whether it's storing personal information or anything else.

Q Whether you think I want to talk about it or not, we're going to be talking about it. But I'm just asking you, sir, on those general points, to answer the question directly. Okay?

A If the cookie has personal information, I think it is useful to inform the user, but not to call it a problem, because that's the way E-commerce works.

Q Again, we all get it. You don't like the characterization. I'm not asking you about the characterization right now. I'm asking about the underlying items. Okay?

A And I will answer only in the context of a cookie with personal information is useful to provide, to tell the user, but not calling it a problem.

Q Right.

But I didn't ask you to call it a problem, say you're calling it a problem. I asked you whether it's prudent for a consumer to be informed that that -- their personal information is potentially subject to compromise.

A I've answered the question five times.

MS. ROBBINS: Objection, asked and answered.

THE COURT: Sustained.

BY MR. FERGUSON:
Q Okay. So let's talk about --
A There's subtilties here, sir, and sometimes I have to answer with those suttleties pointed out so that someone doesn't take the wrong conclusion from this.
Q Let's talk about malware for a minute.
A Yes, sir.
Q Specifically, let's talk about -- well, strike that.
Let's talk about Active X controls.
A Okay.
Q Would you agree with me that Active X controls are, have been and are, a potential security risk for computers?
A Some Active X controls are very useful features; some have been malware, yes.
Q Okay. And one of the things in your declaration is, you make the point of saying that in your opinion, that in the last five years, the import of these malicious acts -- malicious Active X controls, have diminished.
A Can you --
Q I'm paraphrasing a little.
A I don't think I have any statement about that in the last five years, but it seems reasonable. I mean, there's still issues with Active X controls.
I think maybe what you're referring to is I talk about how the specific product blocks the execution of some

Active X controls from 2004 and earlier, but I don't recall ever saying something about the last five years and a change in malware behavior. Perhaps you're thinking of another witness or something.

Q So let me ask you. You familiar with various Microsoft operating systems?

A Oh, yes.

Q Windows XP. You're familiar with Windows XP?

A Yes, sir.

Q Is it true that Windows XP, in particular, had a problem with being susceptible to malicious Active X controls?

A In particular.

Microsoft did get better after Windows XP with Windows Vista and Windows 7, but if you compare Windows XP with what came before, which would be to say Windows 2000, I wouldn't make a characterization you're making. Microsoft got better over time from 2000 to XP, continuing with Vista and 7 and 8.

Q Let me make it even simpler.

A Yes, sir.

Q Was Windows XP susceptible to malicious Active X controls?

A Oh, yes.

Q Was Windows Vista susceptible to malicious Active X controls?

A Yes.
Q Now, the improvements that Microsoft started making was something in terms of the dot net framework; is that correct?
A Dot net framework, yes, which improved over time, as well.
Q When did the dot net framework start to come in play?
A I'd have to research where it first was released, but it's been out for at least 10 years. I'd have to look up the specific timeframe. I'm sorry, I don't know off the top of my head.
Q Fair enough.
Would you agree with me that software programs still in operation today that were not created in the dot net framework may still be susceptible to malicious Active X controls?
A Yes, and I would go even further. I think even modern Windows machines built with the dot net framework in mind, are subject to malicious Active X controls.
Q Okay. So we can all agree it's still a threat?
A Yes, sir.
Q Now, were you aware that two of the consumers that were called by the FTC to testify in this hearing were using computers that were five and eight years old respectively?
A No, I saw no information about that.
Q Okay. Didn't know if anybody told you about that or not.

A Sure.
Q One of the gentlemen was using a Microsoft operating system that the testimony was is no longer supported by Microsoft.
A Right.
Q Is it correct that Windows XP is presently no longer supported by Microsoft?
A It was, I believe in April of this year that Microsoft dropped support for that. They had supported it for over 12 years. They still do have support available for pay, but it's typically only for large customers.
Q So with respect to the scans that PC Cleaner Pro did -- and now I'm asking you specifically about PC Cleaner Pro.
A Yes, sir.
Q Was -- do you have any evidence that its scanning for the 926 Active X controls in any way caused harm to the computers that you analyzed?
A It did not cause harm to the computers.
Q Would blocking those 926 malicious Active X controls cause harm to a computer in your estimation?
A It would not cause harm to a computer.
Q You just think it's unnecessary?
A Yes.
Here's the idea behind that. Most Active X controls are released on a regular basis. A short-term industry

solution for dealing with the malware de jure as the gentleman referred to earlier, is to push a specific Active X control block for it. I and my friends have written some of these little blockers. There are some people that aggregate them together, including the PC Cleaner Pro product.

However, representing a lack of one of these blocks that was created 10 years ago for malware that you don't see in the wild, and for which there's already a defense on Windows with Windows Defender I think is misleading.

So, for example, on a Windows 7 machine, which is the version of Windows that the FTC was using, to characterize lack of blocking of an Active X control, when you have a defense in Windows Defender already built into the operating system, I think is misleading.

Q Let's talk about Windows Defender. When did that come about?

A Windows Defender, I believe it was 2006, 2007. Again, I'd have to look up the specific dates of it, but it was a while ago. Could have been as late as 2009.

Q So your comment just now in terms about the relative threat of these Active X controls, presupposes that the computer user has Windows Defender on their computer?

A The comment is based on systems that have Windows Defender.

Q And if a consumer did not have that, for instance, in our -- one of the gentlemen that testified with his eight-year-old computer, he wouldn't have the benefit of that, of Windows Defender.

A Right. He may have another antivirus tool installed that would handle that problem, blocking the execution of those Active X controls, yet the PC Cleaner Pro product would still add 926 findings -- I'm sorry, problems to the results.

Q Wait a minute. Are you telling me that you have made an independent determination through analysis, that a computer that has already had a block in place for these Active X controls, that PC Cleaner will report those as being in existence?

A No, no. Gosh, no. I'm sorry if I was unclear in what I said.

Q That's what it sounded like what you said.

A No, no.

If it has another tool included in the system, which might be Windows Defender, if we're talking Windows Vista and later, or another antivirus tool, which could be on XP, or even before XP, it is going to report that it's missing a block, which is true. It's missing a block in the browser, but the system is still defended against the specific Active X control by other software on the machine.

Q Have you done a test on a machine with some other blocker

program on there to determine whether or not PC Cleaner Pro would still report those 926 items as a potential threat?

A I believe that the Windows Defender system itself that was included on the FTC machines was that test that you're suggesting.

Q You've not done a specific test on that point?

A I personally have not, no.

Q So for those consumers that do not have Windows Defender or have not already had these malicious Active X controls blocked, would you agree with me that they would at least potentially benefit from the blocking of these known malicious Active X controls?

A I would agree unless they had another antivirus tool installed.

Q And that was my hypothetical. They didn't have Windows Defender or have already handled it at some other point in time.

A Well, we can't put everything on Windows Defender. But, yes, Windows Defender or an equivalent antivirus product. Yes, I would agree to that.

Q Okay. And would you agree with me that you have not analyzed the customer base of Windows -- or PC Cleaner Pro to determine the status of any of our customers' computers?

A That is correct. I have not looked at the customers' computers.

Q As you sit here today, you have no idea what software any of our customers had or what virus protection they had at the time they purchased the software?
A My analysis was focused on the FTC machines plus a laboratory machine I used myself.
Q So that's a yes, you don't have any information about the status of our customers' computers?
A I wasn't provided any for my analysis.
Q So is that a "yes"?
A Yes.
Q Now, there are -- well, let me ask you. Are you aware whether or not there are commercially available databases that publish known malicious Active X controls?
A Certainly. Not only commercial, but also free.
Q Those are published for the purpose of informing persons like yourself and software developers of the types of threats that they might protect against, yes?
A Yes, sir.
Q Let me just talk about a couple of the other functions of PC Cleaner Pro.

One of the things it does is defrag a hard drive, correct?
A Yes, sir.
Q Helpful utility?
A Certainly, although already built into Windows.

Q And not every consumer is aware of that and knows how to use that, correct?
A Yes, and I think it's unfortunate that Microsoft left it that way, but they did.
Q It is what it is, right?
A Indeed.
Q And would you agree with me that it's important for computer users to update the security updates that Microsoft puts out for their operating system?
A It is vitally important to do so, yes, sir.
Q But yet not every consumer does it, do they?
A That is correct. That's why several years ago Microsoft gave consumers the ability to turn on automatic updates, but many consumers have not turned that on.
Q So, again, would you agree with me that the security update function of PC Cleaner Pro could be vitally helpful to a consumer?
A Yes.
Q Now, let's talk about semantics for a minute.
A Okay.
Q You've made it very clear that you have a personal problem with the description of some of these items that PC Cleaner Pro picks up as being problems, correct?
A I do, yes.
Q Would you agree with me that a person whose computer was

infected, if that's the right term, with a malicious Active X control, has a problem?

A Yes.

Q Would you agree with me that a consumer whose registry has become corrupted has a problem?

A Depends on how the manifestation of that corruption is displayed. There are inconsistencies in the registry that the user may never see. However, I will agree with the point. If the user is experiencing crashes or problems like that due to inconsistencies in the registry, the consumer can be benefited by fixing those problems.

Q Now, you've made it clear that you think a more appropriate term, in your estimation, is to use a word such as item or issue.

A I think that perhaps, having multiple categories that sum together -- my concern is -- I do have a concern with the word, calling it an error or problem, but as you've just pointed out, correctly so, some of these are errors or problems. Bundling in things that are not and giving it one number I think is confusing.

So instead, you could have errors and problems and then you could have a separate count of issues, which could include Windows temporary files, which we haven't described here yet, or the cookies. You might even break the cookies out into a separate category, such as privacy and so forth.

Q And have you had the opportunity to look at PC Cleaner Pro 15?

A I have, yes. I received it last Friday evening.

Q I understand it got to you fairly recently.

A Yes.

Q Would you agree with me that it's changed the terminology?

A It has changed the terminology.

And the reason I think this is good to have the terminology precise so that the consumer understands the state of their computer system, it's almost if you think about it this way. I might have three oranges on the table here and two apples next to it. PC Cleaner Pro does its scan. I don't doubt that it is counting the number of apples and the number of oranges. That is fine. I believe it is counting them correctly. I believe it is identifying them correctly.

My concern is when it displays to the user and says you have five pieces of fruit, which are obviously different things, and then it says, pardon the analogy, oranges are a problem, or they're all problems, all fruit is a problem on your machine. It's this -- I don't have any concern the way it is counting or the fact it is counting specific things. It's the aggregation leading to a misleading diagnosis of the computer system.

Q And I understand that's your interpretation of it.

Would you agree with me, and you said you looked at 2015, that it uses different verbiage now? It uses the word "issues," correct?

A It does use the word "issues," but it's still an aggregate number.

Q I understand.

Would you agree with me that there's also a color coded speedometer, if you will, that's associated with those subcategories?

A They're actually two. They're all included in one circle, but there's one associated with performance and another one associated with security.

Q And on those items, they rank the severity, if you will, of each of those sub items from low, low medium, medium, high of great concern, correct?

A Yes, sir.

Q One of the other issues that have been mentioned in this case is the activation key.

Did you review the screen shots of the -- when the FTC downloaded PC Cleaner Pro?

A I don't recall those screen shots, sorry.

Q Okay. Did you review the installation to see where, after it was purchased, there was an activation code?

A No. That was separate from the analysis that I did. I

don't recall seeing the activation code being put in.
Q So nobody showed that to you. You don't have any information about whether an activation code was or was not provided?
A My analysis was independent of that.
I did receive post-activation and run images from the computer systems. That's what I analyzed.
Q Okay. When you say images, you're talking about images of the hard drive?
A That's correct, yes, sir.
Q Not photographs.
A Thank you for the clarification. I was using computer industry jargon there.
Q That's fine. I've been around just enough to know that.
Okay. So in terms of the FTC computers, what part of the analysis that was done on those computers or those imaged hard drives did you personally conduct?
A It was me, as well as my team. I have a team at my company that does this analysis, and we looked at each of the three file system images. I was supervising the gentleman who did that analysis. I talked with him every day as he was working on the analysis, and I personally analyzed piece parts of it to verify the integrity of his work.
So we looked at the three images from each of the three calls, and for the fourth call we had an additional

image.
Q So you kinda answered my question.
A Uh-huh.
Q You actually had a member of your team that did the analysis from beginning to end?
A Yes. With my supervision and direct involvement.
Q I understand you're supervising, but I'm asking you, it was a member of your team that did the analysis from A to Z?
A Yes.
Q You supervised, as you said, I think to use your word, pieces and parts of that?
A Yes, and did hands-on analysis of those pieces and parts. It's what we commonly do on our team. This is very common in the industry.
Q And when you did that analysis, you observed that the FTC had installed programs in addition to the Windows operating system; is that correct?
A Yes.
Q Do you recall what other programs were installed?
A I don't recall off the top of my head.
Q Did you determine whether there was any temporary files as a result of their browsing on the Internet?
A There were, yes.
Q Did you examine the registry to determine whether or not there had been any changes made to the computer registry from

the, if you will, fresh install of the Windows operating system, 'til the time it got to you?

A Yes, there were changes there based on a variety of activities on the machine.

Q And one of the things that you did was, at the conclusion of your analysis, or your team, is you ran a malware program on those imaged hard drives, correct?

A A malware detection program.

Q Sorry, malware detection program. A important distinction, right?

A Actually, we ran three, yes.

Q And you did not find any evidence that PC Cleaner Pro did harm akin to malware to any of these computers?

A Oh, we found none whatsoever. I do not believe PC Cleaner Pro is malware.

Q Now, let me ask you --

THE COURT: Mr. Nicholson, how much more do you think you have?

MR. FERGUSON: I've got a little bit more, Judge. I'm happy to take a break here.

THE COURT: Let's take a break, then. Let's take a 15-minute recess.

(A recess was taken from 2:40 p.m. to 2:58 p.m., after which the following proceedings were had:)

THE COURT: Please be seated, everyone.

MR. NICHOLSON: May I proceed?

THE COURT: Mr. Nicholson.

MR. NICHOLSON: Thank you.

BY MR. NICHOLSON:

Q Mr. Skoudis, we're talking about the examination you did of the FTC's imaged hard drives.

You testified also about, I guess, some of the interaction between ICE and the FTC person, correct?

A We refer to them as the representative and the customer respectively, yes.

Q But in this case that would happen to be a representative of the FTC and ICE or Advanced Tech Support?

A Right.

Q So one of the things that was talked about was an Event Viewer.

A Yes.

Q Can you tell us what an Event Viewer is?

A So the Event Viewer is a program included in Microsoft Windows operating system that allows you to look at the logs on the computer.

Q And when you say the logs, what is it logging?

A It's logging various activities on the machine, particularly the operating system itself. It logs security issues, it logs issues associated with applications on the machine.

Q How does it go about doing that logging? What information does it gather and where does it gather the information from?
A It's gathering information from thousands of activities on the computer system, such as the downloading of the updates or if an application crashes. Each one of these will write an entry into the log file. An Event Viewer allows you to view those logs.
Q So the Event Viewer is a view of an event log, hence the name Event Viewer?
A Yes, sir.
Q So when it populates this entry on the event log, does it note that -- a time associated with that event?
A Yes, sir.
Q And where does it get that time from?
A It's inside the Event Viewer file itself, and it's the system time when the log was created.
Q So, for instance, if we open up an event log, we open up the viewer for the event log, and there were 10 items on there, would they be presented chronologically? The answer is yes, chronologically?
A Yes, chronologically.
Q If we looked at those individual entries, we could determine, according to the system clock, when that event occurred relative to any other event?

A Provided the system clock is set accurately.
Q Understood. But even if it was set inaccurately, they would still flow chronologically from whatever that date and time was?
A They can be sorted in other ways, but generally one sorts them chronologically because it makes sense as a narrative of what's happening on the machine.
Q Got it.
So what you expect to see if all the events occurred on a particular date, a single date, that all the events would reflect that date in the event log?
A Very likely.
Q For instance, if I took a fresh install, using I think our new terminology, of Windows 7 and put it on a, quote, clean machine, and then I started doing things today, and that's all I've ever done on this, and I loaded Microsoft Excel, I went on the Internet, I loaded some programs, et cetera, and those were all done on today's date, would you expect to see the Event Viewer showing those events listed only on today's date?
A Sure, provided no one changed the clock while it was happening.
Q Okay. So let me show you what's been admitted as exhibit L to -- I'm sorry, attachment L to exhibit 28, page 370.
MS. ROBBINS: What's the exhibit number?

MR. FERGUSON: Sure. It's exhibit 28.

MS. ROBBINS: You have my copy.

MR. FERGUSON: I have your copy?

MS. ROBBINS: Yeah.

MR. NICHOLSON: Attachment L. Can you share them with ours?

Bear with me one second while I allow counsel to find our copy. Okay?

MS. ROBBINS: Which page was it?

MR. NICHOLSON: It's page 370.

May I approach the witness, Your Honor?

THE COURT: Yes.

MR. NICHOLSON: Sorry to belabor this.

THE COURT: That's all right.

BY MR. NICHOLSON:

Q So let me ask you to look at this. I'm going to ask you a few questions. Okay?

A Okay. It's hard to read, but I shall do my best.

Q I sympathize, even with my glasses.

First of all, sir, do you recognize generally what that screen is?

A It's the Event Viewer.

Q Okay. Who designs the Event Viewer and the format of the Event Viewer?

A Microsoft.

Q Okay. So that's a Microsoft set thing?
A Yeah, it appears to be. I can't see the title of the screen because it's obscured behind some things, but it looks like the Event Viewer.
Q Okay. Can you do me a favor? Can you look at the entries on there and tell us generally what type of entries appear on that particular log?
A What do you mean by type?
Q Well, the log captures different information, correct?
A Right.
Q So, for instance, what type of information is captured in the first screen? I don't have it in front of me. That's why I'm asking.
A I'm sorry.
So there's a variety of warnings and errors on the machine. It also indicates the source. It should be noted this is the application log specifically that we're viewing, as opposed to the security, setup and system logs that you can see on the left-hand side. But we're focused in here on the application log.
Q Are there different dates that appear relative to the entries in this log?
A Yes. It appears to be March 13th up to March 18th, as I can tell. I see some earlier dates. It's just too hard to tell. I think it's March 18th and March 13th.

Q You sure there's not one also there from March 19th down at the bottom? I'm sorry, at the top.
A Oh, top? Sorry. Yes, I think it does.
Q Okay.
A You almost need a magnifying glass. Sorry.
Q Let me ask you a question.

Are you sufficiently familiar with the Event Viewer screen to offer an opinion as to the contents of that screen?
A Yes.
Q Would it be consistent, in your expert opinion, for those entries to appear on three different dates, would that be consistent with a witness' testimony that they conducted all those actions on the same date?

MS. ROBBINS: Objection, Your Honor. That actually is not the testimony that came in.

THE COURT: Overruled.

MS. ROBBINS: Those questions were never asked.

THE COURT: Overruled.

THE WITNESS: It could be that they had a base image, a base computer system hard drive image, that was created on a particular date, and then later they made -- they ran the computer system and ran some applications on it. That would give you multiple dates. If you had a base image for the build and then later, say, from March 13th, then later March 18th you get some additional things on the

computer system. But those are two different dates.
BY MR. NICHOLSON:
Q Actually three different dates, et cetera?
A Oh, three, right.
Q Would that be consistent or inconsistent with someone making a fresh install of Windows 7 and installing other software, et cetera, on a single date?
A The software may have --
MS. ROBBINS: Objection, Your Honor, that's not the evidence, and that's not what's in evidence, the date that the installation was created.
MR. NICHOLSON: Judge, I understand they can argue what they want, but I'd like to ask my question.
THE COURT: She can object and I can overrule it, which is what I'm doing. So go ahead.
THE WITNESS: Can you repeat the question, please?
MR. NICHOLSON: Yes, sir.
BY MR. NICHOLSON:
Q With the entries that you see, would those be consistent with a fresh install on a particular date, followed by on the same date someone installing, operating software and going out on the Internet all on the same day?
A It is not consistent with the installation of the operating system, but as for the installation of additional software, I can't tell without analyzing each one of these.

Using that software, though, was done on a different date. So the installation of the software I would have to do more detailed analysis, but the first and the third of your points I can confirm.

Q Okay. Thank you.

Okay. I'd like to ask you a few more questions about your examination of PC Cleaner Pro.

A Yes, sir.

Q Did you perform any tests on PC Cleaner Pro to determine whether or not it would improve or speed up the performance of a -- any particular computer?

A We looked at PC Cleaner Pro only on the fresh installs that were provided by the FTC, as well as our own machines.

Q Did you conduct any test on the FTC's computer to determine whether there was a performance increase from before they installed PC Cleaner Pro to after they ran it?

A We did not.

Q Did you conduct that analysis on any other computer?

A We did not.

Q You weren't asked to do that?

A That's correct.

Q Did you conduct any test or comparison to PC Cleaner Pro to any of the other PC optimizer programs that are commercially available?

A We didn't do that as part of this project, but we run

those programs periodically to analyze their behavior in the lab, specifically Norton and AVG, although occasionally we'll look at other ones.

Q Did you conduct a comparison of PC Cleaner Pro in connection with this case, or at any other time for that matter, to Norton or any of those other programs?

A No, sir, we did not.

Q You were not asked to do that?

A That's correct.

Q Did you have the occasion to review the source code of PC Cleaner Pro?

A We did not review the source code for PC Cleaner Pro. Our analysis did not require the source code, because, well, we had no reason to question whether it was measuring the things that it said it measured and counting them appropriately. You can do that without the source code.

Q Fair enough.

So your -- examination you did conduct of PC Cleaner Pro was is that it accurately counts up and reports the items that the software is designed to count and report?

A That's correct. And as I said before, I'm concerned with how it displays those to the user and characterizes them.

Q Understood.

And with respect to that, one of the points that you made with Mr. Ferguson was that you can only analyze the

facts, correct? You have made a statement to that effect?
A I can analyze statements and compare them to facts, yes.
Q Okay. So the statement that PC Cleaner Pro makes, if you will, we'll call it a statement, that aggregate number at the top --
A Uh-huh.
Q -- okay. Is that an inaccurate, meaning factually erroneous statement?
A Calling it errors or problems I do believe is factually erroneous.
Q So let's break that down.
Does it accurately report the number of items that the software was designed to count?
A Yes, but by aggregating them, it leaves the -- it leaves the impression that all of the problems or all of the items or issues are at the same level of severity.
Q And that would be an opinion, not a fact, wouldn't it?
A Yes.
Q Okay. So I'm asking you, since you said you can only analyze the facts and determine whether a statement is truthful, if it had 100, 200, 300, 400, and we added those up, and that was 900, I think, and it had a 900 at the top, would it be accurately reporting the numbers below it?
A It accurately sums up the numbers of items that it found, yes, sir.

Q You've made it very clear you don't like the characterization, but that's your impression of the characterization, correct?

MS. ROBBINS: Objection, Your Honor. He's testifying as an expert.

THE COURT: Overruled.

THE WITNESS: It -- it's very misleading to bundle together different kinds of information to indicate that there's a bigger problem with the computer system than there really is.

BY MR. NICHOLSON:

Q And, again, not to belabor the point, that's your personal opinion, that's not a fact?

A Seems to me a statement of fact. You may disagree, sir.

Q Now, one of the -- you did do an examination of PC Cleaner Pro, and you did that on a computer running Windows XP, correct?

A Yes, sir.

Q Why did you pick Windows XP instead of a more modern program?

A There's a variety of different systems we could have analyzed it on. We wanted to choose one control system just to see how the tool would behave on that control system. The images we received from the FTC are all Windows 7. We wanted to see how it performed on another version of Windows,

especially one that still has a considerable market share, and we used Windows XP Service Pack 3.

Q And isn't it true that, by definition, because Windows XP is an older version, that the software, PC Cleaner Pro, was likely to identify more issues than if you had run it against, say, Windows 7?

A Perhaps. We had a fresh install of Windows XP Service Pack 3, so there wasn't a lot of software installed on it, there wasn't inconsistencies in the registry. So I don't think that the age of the operating system itself would be at issue. It's the amount of use, as we had talked about earlier.

Q Isn't Windows XP, and in particular Service -- what's the SP stand for?

A Service Pack 3.

Q Service Pack 3, hasn't that been associated with registry errors?

A All of Windows has been associated with various errors over time.

Q I'm asking you --

A Yes, but that's due to the fact that it is the most common version of Windows that is older that is still in relatively wide use. So, yes.

Q In fact, there was a particular issue that came out with Symantec and Windows XP Service Pack 3 where there was quite

a number of registry errors created, so much so that both software companies had to put out a patch, right?

A That happens from time to time, yes.

Q Okay. And you picked Service Pack 3 for XP, correct?

A Because it was at the time a very common version of Windows in use and still relatively older, so we could see how the software would perform on it.

Q And it still is a very common version, correct?

A Yes, much to Microsoft's consternation. They begged their customers to move off of it.

Q Sure, in fact, they've got a program, they've now put out a notice every week on people's computers saying, hey, you really need to upgrade this, right?

A Yes.

Q And the reason that is is because there are security vulnerabilities with XP that do not exist with the current versions, right?

A Right. Microsoft has stated as of April 2014 it will not push any more patches for Windows XP. They did release some patches, though, because of some particularly egregious malware examples that followed their discontinuation. Still, longterm, they're not going to be patching it.

Q Now, did you, in your analysis of PC Cleaner Pro, try to determine whether or not the software had been subjected to analysis by any certification agencies that operate within

the computer world?
A We did not.
Q Are you familiar with a company by the name of ICSA Labs?
A Yes, I am.
Q Can you tell us what ICSA Labs is?
A ICSA Labs is an independent lab that does analysis of various kinds of software. They tend to focus on security software. They analyze things such as firewalls, antivirus tools and a variety of other types of software.
Q And if a piece of computer software has been submitted to ICSA Labs and received a certificate, what, if anything, does that indicate?
A It indicates that the software matches the functionality that it advertises.
Q Let me --
MR. NICHOLSON: May I have one second?
BY MR. NICHOLSON:
Q And, sir, are you familiar with a company by the name of Tolly, T-o-l-l-y?
A I'm not.
Q Not familiar with Tolly?
A No.
Q Now, with respect to PC Cleaner Pro 2015, you said you've had the opportunity to look at that software, correct?
A I looked at it briefly because I received it very last

minute before I had to leave on a business trip.
Q And you would agree with me that it has changed the scan presentation, correct?
A It has.
Q And one of the things that it's changed is the verbiage is now "issues" as opposed to "problems," correct?
A I believe it said issues, yes.
Q And that was an item that was of concern to you, correct?
A Uh-huh.
Q Is that a "yes"?
A Yes.
Q And, sir, did you also make note of whether or not the program reports as individual items the 982, you know, malware or Active X -- sorry, Active X control items that I guess you noted in your prior report?
A I did note that the 2015 version has started to aggregate some of those items together. Some of the cookies seem to be aggregated together. In other words, it's collapsed down into a smaller number of items. But I did not have enough time to do the analysis to see exactly how that collapsing and counting was being done.
Q Okay.
A But I did note that that was being done.
Q Okay. So you don't know whether or not those items are still not -- that the Active X items are no longer reported

in the security screen?
A Right.
MR. NICHOLSON: One second.
I pass the witness.
THE COURT: Thank you.
Any redirect?
MS. ROBBINS: Yes.

Redirect Examination

BY MS. ROBBINS:
Q Hi, Mr. Skoudis.
A Hello.
Q So I just want to clarify something.
So the FTC sent you hard drives of three undercover calls in this case; is that correct?
A Yes, ma'am.
Q Okay. And two of the calls were with PC Cleaner Pro and ICE, and then one of the calls was ICE calling about a Panda problem; is that correct?
A Calling into ICE with a problem with Panda, yes, ma'am.
Q Okay. And those are the only ones that you've analyzed?
A Correct.
As well as our own Windows XP Service Pack 3 image, as we discussed earlier.
Q Correct. Your own analysis.
A That's right.

Q Now, several hours ago, defense counsel asked you about the scripts that you reviewed.
A Yes, ma'am.
Q I just want to go back to that.
You were talking about how with the Event Viewer portion of the script and the task manager portion of the script, and I just wanted to ask you, does it appear in the script at all that the salesperson is directing -- is directed to do any kind of further analysis other than look at the Event Viewer or the task manager?
A I would suggest it doesn't really have them look at the Event Viewer/task manager, as opposed to it has them show it to the customer. But based on what's in the Event Viewer, task manager or MS config., they don't seem to be doing any analysis of the system itself. It's more to just show the user.
Q And in order to use that as a tool to diagnose the computer, what would someone do with that? Would they just show it to the consumer?
A No, no.
For Event Viewer specifically, if I could focus that, you would have to look at each event, analyze its event ID and determine what caused that event, what specific piece of software, what configuration on Windows, what potential attack that happened across the network, what is it that

caused those specific events. You'd start by looking at the most critical events first.

Q But then you would have to dig in further to find out more information about that?

A Yes, ma'am.

Q And in the scripts that you read, were the salespeople in those scripts directed to do any of that that you just described?

A They were not.

Q Now, I want to ask you a little bit about the hard drives that the FTC sent to you.

A Yes.

Q There was some talk about the preparation that Michael Kraemer did with the computers that were used in the undercover calls, and then you were sent copies of those images; is that correct?

A That is correct, yes.

Q And when you received those images, you said in your opinion, in your report, you say on page 5 --

A This is of the first declaration?

Q Of the first declaration. You say: "My pre-call analysis of the computer system image indicates that the customer's computer was completely clean and free of any malware or malicious activity prior to the call."

A Can you tell me where that is on the page?

Q On page 5, the last paragraph.
A Yes, that is correct.
Q What did you base that on?
A I based that on our analysis of the machine, looking at the image itself, going through the various settings in the registry, as well as three scans of an antivirus -- of different antivirus tools on each one of the images that we were presented.
Q So when defense counsel asked you about Michael Kraemer's preparation of the laptop and you heard what the preparation was, including putting on the photos and the documents, does that change your opinion in any way that you've stated in this report?
A No, it doesn't. The machine was uninfected at the time of the calls, and after.
Q Okay. So there was some talk about -- sorry, one moment -- about the 926 pieces of malware that PC Cleaner checks for, PC Cleaner 2014 checked for?
A Specific Active X controls that it checks to see whether the system was blocked. It's not looking to see if the machine's infected.
Q Right. Sorry. I made a mistake.
THE COURT: One at a time.
MS. ROBBINS: Sorry.
BY MS. ROBBINS:

Q So -- and when PC Cleaner is run on a computer and is looking to see whether those pieces are blocked, does PC Cleaner, the software itself, distinguish between whether it's running on an XP computer, whether it's running on Windows 7, whether it's running on Windows Vista?

MR. NICHOLSON: Objection, foundation. The witness has testified that he didn't look at the source code of the software.

THE COURT: Overruled.

THE WITNESS: I looked at it only on Windows XP, our system, as well as Windows 7. I haven't looked at it on other versions of Windows. But the 2014 version was counting them on both Windows XP and Windows 7.

BY MS. ROBBINS:

Q Okay. And whether or not that's the case, are these 926 malware, or blocks of malware, are those pieces of malware still in the wild today? Is that . . .

A Very rarely. The older they are the less likely you are to see them, and many of them were over 10 years old. So the number was quite higher than what you would see in the wild today, but some of those you still see in the wild.

Q Okay. So what is the likelihood that you would see any of that today? Do you have an opinion about that?

A I'd have to do a detailed analysis of each individual one, but there's a chance that it could occur.

Q Okay. So you were asked about the Event Viewer log and about the different dates in the log.
A Yes.
Q So would it be consistent if a base image was made on one day, and then it was given to someone to prepare on another day, and then it was given back to image again and used on a call on different days? Would that event log that you saw that had different dates on it, would that be consistent with that situation?
A Absolutely. That is, in fact, what I believe happened.
Q And were you given any information about the process that the FTC used in terms of the timing of when it imaged the computer or when the calls happened? Were you given any of that information?
A We didn't get any details of that, but instead were given the images themselves, as well as a verification, essentially like a signature that those images were intact from when they were sent to us.
MS. ROBBINS: Okay. Excuse me one moment. I'm sorry. One moment, Your Honor.
Here it is.
BY MS. ROBBINS:
Q Okay. So did you have the opportunity to read Mr. William Easttom's declaration?
A Yes, I did.

MS. ROBBINS: Your Honor, I'd like to show him Mr. Easttom's declaration and ask him some questions about that. He's the expert for the PC Cleaner Defendants who's going to be testifying today.

MR. NICHOLSON: It's not in evidence as of yet.

MS. ROBBINS: Your Honor, he won't be available for rebuttal. I'm sorry. He won't be available tomorrow, so I'd like to just ask him some questions about what was said in that declaration.

THE COURT: Who will be available tomorrow, or won't be available?

MS. ROBBINS: Mr. Skoudis has a flight out at 8:00 a.m. tomorrow morning.

THE COURT: So you want him to respond to their expert's declaration?

MS. ROBBINS: I would like to, yes.

MR. FERGUSON: Your Honor, if I may join in the objection. This is the exact same objection that was dropped on me in my cross. My clients, they haven't testified yet, and she objected when I wanted to talk about what they were going to say about the targeted script campaigns for viruses.

The fact that this witness is going to be sitting in these bleachers or on a plane going somewhere tomorrow is irrelevant, because once he leaves the stand they have no right to call him back, and if we don't, he's not going to be

heard from again. If this is a good objection for her, it should be a good objection for the defense.

THE COURT: Why are we going to be using experts to rebut each other?

MS. ROBBINS: Your Honor, the expert, their experts talk about the state of the computer and the cleanliness of the machine and his procedures in doing that, and so I wanted to ask him about certain things that that expert had talked about to talk to him about his opinions and how -- why the machine was, in fact, clean.

THE COURT: Yes?

MR. NICHOLSON: I'll renew the objection. She doesn't have to refer to my expert's testimony, which isn't in evidence yet, to ask about some particular fact. She doesn't need to refer to that declaration. If she wants to talk about something he did or didn't do, I don't have an objection to that. But as far as asking him to critique my expert's declaration of what he's going to testify, I do have an objection.

THE WITNESS: If it would help the Court --

MR. FERGUSON: Hold on.

I would like to be heard as well.

Again, it's the exact same objection that she dropped on me about my clients. In their declaration they specifically talk about what they did to campaign for

specific viruses. I wanted to ask him about that. She objected, facts not in evidence, it got sustained, and here we are, it's a two-way street, and I do not think that the witness can clear up this objection, and I just join in a request that you not let her do this, and if she has questions she wants to ask, ask them, but not about something that's not in evidence.

THE COURT: We didn't set this up for rebuttal of witnesses, so I don't want him to be now critiquing the other expert's opinions. You gave me your opinions, they're giving me their opinions, and we're going to rest with the -- you know, the declarations that were submitted.

So I'm going to sustain the objection.

THE WITNESS: Would changing my meetings and such tomorrow to delay my flight help the situation?

THE COURT: Well, then we're going to be in a situation we're going to call him in rebuttal.

MS. ROBBINS: I don't think so. I think that's fine. Thank you, though, for the offer.

BY MS. ROBBINS:

Q So I wanted to go back, then, to your first declaration.

A Yes.

Q About -- and we're talking about PC Cleaner now.

A Yes.

Q And I want to show you, this is -- this is an exhibit

that is already --

MS. ROBBINS: This was an exhibit from our exhibits. I'll show the defense counsel. We just blew it up so he would be able to take a look at it. We'll mark it as exhibit 40.

Your Honor, may I put it on the easel, please?

THE COURT: What exhibit number is this?

MS. ROBBINS: It's going to be exhibit number 40.

THE COURT: Is there any objection to it?

MR. NICHOLSON: If it's in the declaration, which they're representing, then I don't have a basis.

MS. ROBBINS: The only thing that's not in the declaration is that this part is blown up. So it's just bigger to read it. This is in the declaration. Not in his, in Martha Vera's. This part is blown up so you can read it.

THE COURT: It's already part of the declarations?

MS. ROBBINS: Yes.

THE COURT: Any objection?

MR. FERGUSON: None here, Your Honor. We're looking for it, but I don't doubt that counsel's accurate, that it's a part of the declaration.

MR. NICHOLSON: Can they at least tell us where it is in the declaration so we can just crosscheck it?

THE COURT: I'll admit it without objection.

(Plaintiffs' Exhibit No. 40 entered into evidence.)

MR. NICHOLSON: Your Honor, may I just walk up to it and compare it real quick?

THE COURT: Yes.

MR. NICHOLSON: Thank you.

THE COURT: Is this the one that we were using yesterday?

MR. NICHOLSON: No, it's not.

THE COURT: It's not?

MR. FERGUSON: May I approach, Your Honor?

THE COURT: Yes.

MS. ROBBINS: It's page 362 in exhibit number 28.

BY MS. ROBBINS:

Q So Mr. Skoudis, you testified that the undercover computers that were used for the buy of PC Cleaner were clean computers?

A They were fresh installs.

Q Fresh installed computers.

A Without malware infection.

Q And so can you just tell the Court how is it that on a fresh install, that PC Cleaner Pro 2014 was able to find 8056 errors?

A It found 8056 errors because it was counting under the security defense each one of the individual Active X controls that were not blocked.

Q Right.

A But also in the privacy cleaner section, it was counting each one of the cookies associated with that individually.

Also, under junk files and clutter, it was counting each Windows temporary file that had created by the operating system just under normal behavior as it runs, as well as the applications that run on it, it was counting each one of those individually. That results in an inflated number about the actual number of problems on the computer.

Q And is it your opinion that it is deceptive to characterize those cookies that way?

A Yes.

Q Okay. And then is it also your opinion that it is deceptive to characterize the blocking of those 926 items in the -- in that way?

A Yes.

MR. FERGUSON: Your Honor, I'm going to object. I think it's your job to determine what is and is not deceptive. Accurate, or truthful, or false, but I think they're just pushing this expert out to basically be the adjudicator of fact here on this disputed issue, highly disputed.

THE COURT: I'll decide the ultimate issue. All right? He can help me decide whether it's --

MR. FERGUSON: Fair enough.

THE COURT: So overruled.

THE WITNESS: I believe that to be the case, yes.
BY MS. ROBBINS:
Q And --
A Especially, to give it some additional clarification and context, it says warning with an exclamation point after it. It's got a yellow triangle next to it with an exclamation point in it, something like a yield sign, or there's a significant concern, and it says 8056 problems require attention.
These temporary files are really not impacting the computer at all and will be created every day that that computer runs on a continual basis. As users log into things like Google or log into Amazon.com, those cookies will continue to be there. So I think it is untrue to say that these problems, all of them, require attention.
Q I want to go back to something defense counsel talked to you about, the source code, he had mentioned source code.
A Yes.
Q Would source code help you analyze how the software represents the results that you see?
A No, no. Source code would allow you to look at how it's calculating those results, how it's measuring things, but I don't have any reason to believe it is not measuring the individual things correctly or calculating them correctly. So therefore we were able to do our analysis without the

source code by running the program using a form of analysis called dynamic analysis.

Q Okay. And so the issue is more that it's the way in which it's categorized, as opposed to that it's not finding the right amount of numbers?

A That is --

Q It's not counting properly?

A That is my concern, that the way that it is characterizing, which you don't need the source code to see that, because it's displayed right on the screen.

Q Okay. And I want to show you -- did you also have an opportunity to analyze PC Cleaner Pro 2015?

A I did, but briefly.

MS. ROBBINS: Your Honor, I'd like to --

BY MS. ROBBINS:

Q And did you, when you were analyzing PC Cleaner Pro 2015, did you take any screen shots of what you analyzed?

A Yes, I did. I ran it over the space of about 30 to 60 minutes, just ran it again, and again, and again, as it scanned my system repeatedly, just to look for if the results would change each time it was run.

MS. ROBBINS: Your Honor, I'd like to show the witness the screen shots and mark this as Plaintiffs' exhibit number 41. And I'll give defense counsel copies.

MR. NICHOLSON: Judge, I'm going to object. This

isn't the subject of prior declaration, and we're just now seeing these for the first time.

MS. ROBBINS: Your Honor, he brought it up on direct, and he asked the expert to -- he asked us to ask the expert to review PC Cleaner Pro 2015. So I'd like to ask him questions about the difference in the program now as opposed to the 2014 version.

THE COURT: Who asked you to do what?

MS. ROBBINS: Sorry. Defense counsel.

THE COURT: They asked you what?

MS. ROBBINS: To have the expert look at PC Cleaner Pro 2015.

THE COURT: When did they do that?

MS. ROBBINS: Last week.

THE COURT: Okay. Why did you ask her to do it, and then you don't want to know the information that he gathered from it?

MR. NICHOLSON: It's not a problem about knowing the information, it's a problem about knowing the information after I've cross-examined the witness without any advanced notice that they had taken screen shots and that he had even analyzed it.

MS. ROBBINS: He has the opportunity to redirect or recross.

THE COURT: Well, either one or both of you asked

him about the new updated version.

MR. NICHOLSON: I did.

THE COURT: Okay. So if you asked that he look at it, then I guess, you know, you should find out what he learned about it.

MR. NICHOLSON: Well, that's why I asked him on cross-examination.

THE COURT: You'll get to recross him on whatever new information comes out.

MR. NICHOLSON: Okay.

THE COURT: All right. I'll overrule the objection.

MS. ROBBINS: I'll hand the Court the exhibit.

BY MS. ROBBINS:

Q Does that look like the screen shots that you took when you analyzed PC Cleaner Pro 2015?

A Yes, it does.

Q And do those look like true and correct copies of those screen shots?

A Yes.

Q Could you please tell the Court what you did to analyze PC Cleaner Pro 2015?

A I downloaded it from the URL that was provided to me by the FTC, and I installed it on a computer system and ran a scan, and then I ran a scan again, and I ran a scan again, and I did it several times between 30 and 60 minutes.

Q And what did you find?
A I found that it discovered a large number of issues, but that it had -- instead of calling them problems or errors, I guess is the case, problems, it had renamed them to issues.

The yellow sign with the exclamation point remains, but I also noticed an interesting trend. The number of issues fluctuated significantly on my computer system. And you can see that as it varies each time I ran it. I ran it once and it gave me 389 issues. I ran it again, it gave me 461. I ran it again and I got 463. I think that gradual increase from 461 to 463 was due to temporary files.

I do believe it's important to point out I was doing nothing with this computer system at all other than just running this tool every several minutes.

It then went down to 391 issues, 395. So you see that gradual increase.

Q Did you have the opportunity at all to find out exactly what it was counting and whether it was counting accurately?
A I did not have the time available to find out what it was counting, but I have no reason to believe that it was counting inaccurately.
Q And does it still -- do those screen shots still show the --

MS. ROBBINS: Excuse me. If I might go to the exhibit.

BY MS. ROBBINS:
Q Does it still show this severity bar?
A Yes, it does show the severity bar, which is, again, I'll point out, two different measurements. One is performance, the other is security.
Q And what did you find when you looked at the severity bar for performance?
A The performance severity bar was consistently in the red, but the security severity bar went from green, up to red and so forth.
Q So, did it fluctuate?
A It did.
The performance one did not fluctuate, but the security one did.
MS. ROBBINS: Okay. I don't have anything further, Your Honor.
THE COURT: All right. Any recross?
MR. FERGUSON: None here, Your Honor.
MR. NICHOLSON: Yes. May I have a moment?
THE COURT: Well, if you'd like, since you just got these, to take a few minutes to look at them, I'll let you before you recross.
MR. NICHOLSON: Yeah, I need a few minutes just to review them.
THE COURT: Let's take a 10-minute recess.

MR. NICHOLSON: Thank you, Judge.

(A recess was taken from 3:43 p.m. to 3:54 p.m., after which the following proceedings were had:)

THE COURT: Please be seated, everyone.

Are you ready?

MR. NICHOLSON: I am, Judge.

Recross-examination

BY MR. NICHOLSON:

Q All right. Mr. Skoudis, hopefully, just a few more minutes and we'll wrap this up.

A Yes, sir.

Q I want to make sure that I didn't mishear something, because I thought I heard counsel for the FTC ask you a question about whether this program inflated the numbers.

Is it your testimony that this program in any way inflates or artificially increases the number?

A It is not, no.

Q I want to make sure we're crystal clear on that.

A Yes, sir.

Q Now, with respect to the 2014 edition, you noted that in the top it had the word "warning," correct?

A Right.

Q Now, you've already agreed with me that some of the items that PC Cleaner Pro checks for are potential security risks for the computer?

A Yes, sir.
Q But it's your testimony that somehow using the word "warning" to alert the customer of the existence of a potential security risk is misleading?
A No, it's not the use of "warning" by itself, it's the use of "warning" with the aggregate number right next to it, which implies that the aggregate number of problems as it labels them are associated with the warning.
Q So it's not the word "warning" itself, it's, again, your concern about the way the numbers are represented?
A Which makes them seem larger, a larger number of problems that require action.
Q I understand that's your opinion. You've made that very clear.
A Yes, sir.
Q Now, clearly, some of the items that PC Cleaner Pro checks for, and if they exist, reports, are -- do require attention --
A Sure.
Q -- for a computer user, correct?
A Yes. For example, Windows patches.
Q Okay. And --
A Security patches. I should be clear.
Q Now, when we were talking about the software earlier, we went through the fact that when PC Cleaner Pro does its scan

and identifies the various issues, that it has a drill down for what each of those things are, right?

A That is correct. And in the screen shots that we recently received, I tried to show that drill down as I was trying to determine whether it was aggregating those things together. You can see that from the screen shots.

Q Let me ask you, in your opinion, would the average computer user be qualified to go through that detailed list and determine which ones were issues for them or not issues for them?

A Not in the deep drill down. However, if there were more information available for each one of these particular items, I do think they would get a sense of what was particularly important from a security of the system or the performance of the system, whereas the issues associated with junk files and clutter are not, or the cookies as we've talked back and forth about so much earlier.

Q And if they had someone like yourself sitting next to them, certainly you would be able to explain to them in your opinion which ones were important, which ones weren't, right?

A Well, certainly that's the case, but I think the tool needs to lend itself to allowing them to understand the true state of their computer.

Q But since it's not practical for each customer to have someone like yourself sitting next to them, and since we

cannot expect every customer to appreciate the relative import of each of these items, how would PC Cleaner or any program possibly differentiate that for the customer, other than reporting the list of potential problems?

A By separating out those things that aren't problems from those things that are problems.

Q And, again, we've gone through some of these things you absolutely agree with me are problems, correct?

A Yes.

Q And some of which you've testified, actually the Boost hearing, that you didn't think they were of that much concern, correct?

A Because they happen in the normal nature of using the computer system and characterizing them as a problem is extremely misleading.

Q And notwithstanding what you just said, those items can nonetheless affect the performance of the computer, at least some subset of them, correct?

A For some computers the junk files and clutter could impact performance. It depends on if there's a lot of additional free space, which the tool doesn't really check, it just counts the number of those temporary files.

The cookies likely would not impact performance at all, but do have the privacy potential, as you talked about earlier, sir.

Q Okay. Thank you.

So again, someone like yourself would certainly be able to differentiate all of these things and make an intelligent decision which ones to act upon and which ones not, but would you agree with me that the average consumer doesn't have the ability to go through and identify which cookie might be a problem and which cookie might not be a security risk?

A Exactly.

I agree with that, and that's why the tool could identify which of the cookies are a security problem and which ones are not.

Q And in --

A Rather than counting them all as a problem.

Q And let me ask you this. As a computer security expert, when you're advising your clients on computer security issues, do you recommend that the virus protection, or whatever measures they put in place, be over-inclusive, or would it be better for them to be under-inclusive?

A That's actually a very complex question. It's a good question.

We have an issue in our industry with false positives and false negatives. False positives is where it identifies a problem that's not actually there. False negative is where it misses a problem. We try to achieve a

balance between the two. If you have too many false positives you have people chasing their tails. If you have too many false negatives you have a lot of computer systems.

So what you have just described is indeed a difficult problem that the various vendors work to optimize against.

Q Okay. And is it unreasonable in your opinion for PC Cleaner Pro, for the benefit of its customers, to choose to have an over -- a slightly or a lot over-inclusive software program instead of an under-inclusive program?

A Yes, for cookies. Because most of those cookies are not a problem in any way, and certainly, this is an issue for junk files and clutter.

So I would disagree with your previous statement for some specific categories. I think it's pretty clear that that's the case, given how most cookies are not a problem.

Q Okay.

A Most clutter and junk files are just temporary and are generated in the normal course of use of the system.

Q Without going back through cookies and clutter ad nauseam --

A Thank you.

Q -- you've agreed with me that at least some cookies are problematic for security reasons?

A Yes.

Q Would you agree with me that the average consumer is not capable of necessarily figuring out which ones might or might not be a security risk for them?
A Yes, I agree.
Q Would you agree with me that the average consumer does not have the technical expertise to determine which extraneous clutter items might be beneficial in speeding up their computer and which ones might not?
A Correct, but software could help make that determination.
Q The kind of software like PC Cleaner Pro?
A It could, but by counting everything, it doesn't, and that's the problem.
Q I understand that's your view, but if a software manufacturer makes the determination to be over-inclusive instead of under-inclusive, when they're on the hook for selling this product and on the hook for refunding the money if the consumer's not happy, why is it unreasonable for them to be over-inclusive?
A Because I think it misrepresents the state of the computer system.
Q Again, that's your opinion in terms of this security screen, right?
A Yes.
Q Okay. And were you aware that PC Cleaner Pro had an unconditional money back guarantee?

A Yes, I was.
Q Okay. When you were doing the scans that you did of PC Cleaner Pro 2015, what processes did you have running in the background on the computer?
A I had no spare processes running on the machine. It was just a Windows box by itself.
Q So let me ask you, when you looked at these screens, can you tell us what order these were done?
A I believe -- and I don't have my source system to -- with me. It's not in the court right now, it's outside. I believe these are in the order that I took them, but I can't confirm that. You would have to ask counsel.
Q May I retrieve that one from you for a moment?
A Sure.
Q Because -- thank you.
Okay. I'd like to go through --
A Is this the same set back or . . .
Q It is the same set I just handed you back, yes.
A Okay. Thank you.
Q So let me ask you to look at these four screens.
A Okay. By four screens, you mean the PC Cleaner Pro main screen, right?
Q And would you agree with me, if you can put them side by side --
A Yes, sir.

Q And let's go through the individual categories.

Let's start with system issues.

A Yes.

Q Which I believe is the top one in each one.

A Yes.

Q With me?

A Yes. I'm just checking to make sure it's the top one in each one.

Q Would you agree with me that the number is consistent across each of the four scans?

A Indeed.

Q Thirty-seven items?

A Yes, sir.

Q Would you look at the PC optimizer screen.

A Yes. Column or row, I guess.

Q Or row.

Would you agree with me that each of those are 24?

A Yes.

Q Okay. Would you look at the privacy cleaner column, or row, I guess.

A Yes.

Q And would you agree with me that three of them are 10 and one of them is 11?

A I agree, yes.

Q So fairly consistent across the board there?

A Very similar, although I did not have the time to drill into what the difference was between those.
Q And would you look with me at the row for system performance.
A Yes.
Q Okay. And would you agree with me that, again, three of these are 16 and one of them's 15?
A Yes, sir.
Q And, again, you didn't -- I assume you also did not have the time to look at what the one variation there was?
A Correct.
Q Okay. The junk files row.
A Yes.
Q Would you agree with me that two of these are 301, one's 302, one's 304?
A Yes.
Q Okay. So fairly consistent across the board there?
A Right.
And I believe that the later ones -- this is the thing that helps to kind of indicate that they're probably in order -- is that the system was creating temporary files as it was just sitting there.
Q And that was my next question.
A Yes.
Q Indeed, the fact that as it was sitting there, these

numbers increasing slightly would not be inconsistent with what a computer might do naturally?
A Correct.
Q Okay. So if we look, the one item that has a significant variation is the Windows security screen --
A Yes, sir.
Q -- or row. Would you agree with me?
A I would agree.
Q And two of these show 74 items, correct?
A Yes.
Q And the two where there's the significant, or the difference, I'm not going to say significant, but the numerical difference, that reports zero?
A Yes.
Q Okay. Now, sir, in analyzing the software, you're aware that when you run these scans, you can turn off portions of that scan, correct?
A I did not look at that capability or feature, no.
Q And that if you don't run the security system scan, that it would indeed read zero?
A I ran the same scan configuration for each of those four scans. There was no difference between them.
Q Do you have screen captures or video of what you did when you ran these scans?
A I do not. I have the screen shots that I produced here.

Q Did you take a log key entry record --
A I did not, no.
Q Okay. So we have to take your word that you somehow didn't accidentally turn off the security screen scan?
A I didn't reconfigure it at all. I just relaunched the scan again and again and again. No change in configuration.
MR. NICHOLSON: I have no further questions.
Well, actually, yes, I do. Sorry, I forgot.
BY MR. NICHOLSON:
Q When you were doing the review --
A Yes, sir.
Q -- did you also observe that in the 2015 version, there are now hover boxes that discuss the specific nature of each of these issues?
A I did, yes.
Q Did you look at those explanations?
A I did.
Q Were they accurate?
A I found they were helpful, yes.
Q Did you also observe that the 2015 version has an explanation of the concern level?
A Yes.
Q In fact, there's extra color coding now, at least one different additional shade to represent the relative concern level of these items, correct?

A Yes.
Q In fact, the screens that you ran, with the exception of the Windows securities issue, which you would have already said Windows security issue would be an area of concern if the computer wasn't properly protected, right?
A Yes.
Q That one detecting the items read medium-high?
A Uh-huh.
Q And that the other one was junk files clutter saying a little over four gigabytes of junk files, that that one was rated high?
A Yes.
Q The others were actually rated on the lower end of the range, correct?
A Sure. But, again, remember my hesitancy to compare apples to oranges. So these numbers are not absolute. To your point, one single Windows security issue might be much more important than a large grouping of junk files.
Q And one last thing. Did you observe that there was difference in the verbiage on the top reporting the overall scan results?
A I noticed the difference in -- from before. We went from problems to issues, the word "warning" was removed, and the verbiage, that sentence that's there does differ.
Q For instance, in the scans where no security issue,

system security issue, was found, the language says PC Cleaner Pro has found the following issues that may decrease your computer's performance, correct?

A Indeed, yeah.

Q Not alarmist, correct?

THE COURT: I'm sorry, did you answer that?

THE WITNESS: Yes.

THE COURT: What did you say?

THE WITNESS: I said yes, sorry.

BY MR. NICHOLSON:

Q With respect to those screens that detected a potential Windows security issue, the verbiage is: PC Cleaner Pro has found the following issues that may decrease -- oops, sorry, decrease your -- try that again in English.

PC Cleaner Pro has found the following issues that may decrease your computer's performance or compromise its security.

A Yes, the phrase "or compromise its security" is added.

Q And if, indeed, there was a security, potential security, system security issue found, that would be a fair characterization, yes?

A Indeed.

And I think what has changed in the tool is the sentence there where there are both performance and security issues as identified and characterized by the tool, the

sentence is very similar to what was there in the 2014 version.

When there are no security issues, the 2015 version does not have the mention of security.

MR. NICHOLSON: I have nothing further, Judge. Thank you.

MS. ROBBINS: Your Honor, may I ask one more question?

THE COURT: Okay.

Redirect Examination

BY MS. ROBBINS:

Q You were just talking about the categorizing the performance of the computer in the red zone? That was one of the issues that came up?

A Yes.

Q What was the performance like on the computer you were running this on?

A It was a very fast computer. I had noticed no performance issues. It was not an issue at all.

MS. ROBBINS: Okay. Nothing -- nothing further.

THE COURT: Can I ask a couple of questions? Any objection? No?

MR. FERGUSON: None, Your Honor.

Examination

BY THE COURT:

Q I thought I heard you say earlier in your testimony that there was a fourth call that you --
A No, it was a fourth image for the third call. So there were three calls. Each of them had three images, but for the call that we refer to as the Panda call, there was a fourth image provided by the FTC. It was another snapshot just before and after they ran the antivirus tool.
Q So there were only three calls?
A There were only three calls, but there was three images per call with the exception of the Panda call where there was a fourth image.
Q I thought you said call, but I may --
A I may have misspoke. I'm sorry, sir.
Q I just wanted to clarify that.

With respect to your concern about the images, the way that the issues are being portrayed on the screen shots, and your concern that they, I guess, suggest that all of the issues are equal weight or concern, when some are more troublesome than others --
A Yes, sir.
Q -- or some may not be any concern at all, is it possible for the computer program to actually focus on the ones that are truly problematic in your judgment and exclude the ones that are of no concern or little moment?
A I believe it is. I wouldn't have it exclude those other

issues. Those might be for some consumers something important to tell them. My concern is conflating them. It's aggregating them together. But focusing on the issues that require immediate and important attention and then separating out the separate issues, such as the clutter and the cookies.

Q So is it possible for the -- a program to be designed that will do that, or do you need a human being to be able to actually tell you which ones are the ones to be concerned about and which ones aren't?

A A program could be designed to do that, yes.

THE COURT: All right. Any follow-up?

MS. ROBBINS: No, Your Honor.

THE COURT: Any follow-up on my questions?

MR. FERGUSON: Hold on. I'll leave it to them.

MR. NICHOLSON: Actually, Judge, I do have a couple.

THE COURT: Okay.

Recross-examination

BY MR. NICHOLSON:

Q You're familiar with Norton System Utilities, correct?

A Sure.

Q And a couple of other programs we've talked about that do similar functions?

A AVG and others, yes.

Q They have very similar reports regarding the items that they scan for and find, correct?

A Yes.

The larger vendors, though, tend to be more careful in separating out things into categories, or not using terms like problems or errors.

Q Are you sure about that?

A Well, it's not in every case. I said generally.

Q Okay.

A There are many versions of Norton.

Q Do you recall during your testimony in the Boost hearing that, indeed, you were cross-examined on two programs, two of those major programs, that actually used the word "error" and "problem," correct?

A Yes. But I believe, and we would have to look at the details, that the errors and problems were associated with actual registry inconsistencies, and they were separating out the cookie issue and the clutter issue, if you want to call it that.

Q Okay.

A Yeah.

Q And 2015 uses the word "issues," correct?

A Yes, sir.

Q Okay. The Judge has asked you is it possible to construct a program that would somehow glean which of the temporary Internet files are problematic, somehow glean which of the cookies a person might want to remove. Is that your

testimony?
A Yes.
I could get more specific if you'd like, but I don't know if you would.
Q Does such a program exist on the market today?
A Sure. There are a variety of antivirus tools themselves that characterize the different findings that they have on the machine, but they're full blown Endpoint security suites. Norton sells one, McAfee sells one.
PC Cleaner Pro is moving in the direction of a full-blown security suite, but it's not there yet.
Q So when you say a full-blown security suite, are you talking about an enterprise level product?
A No, they sell them for consumers, too.
Q Okay.
A You probably have one installed on your computer system.
Q I doubt that, but, okay.
So when you say suite, now you're talking about multiple programs?
A That work together and are sold as a single product.
Q And you're telling me that such a program can determine which cookie a customer might want to remove?
A Well, it could identify cookies that are planted there by malicious websites to track that user and then separate those things from other cookies that are just normally included on

the system.
Q You would agree PC Cleaner Pro identifies the problematic ones, as well.
A It identifies all cookies.
Q You're concerned about it being over-inclusive?
A I'm concerned that it counts all cookies, when the vast majority of cookies are not a problem at all.
Q When you say there's a program that can do this, what program in particular are you telling us can determine which cookie and which temporary Internet file should be removed versus not?
A I don't have an example for you I'm sorry to say, but you could -- you could have an inventory. Just like it has an inventory of malware, you could have an inventory of malicious cookies, you could also have an inventory of non-malicious cookies. In other words, if it treated the malware category and separated out the cookie category into those that are truly a concern versus those that were routine usage of the computer system, it would be giving an accurate statement about the computer system.
Q Okay. So let me just make sure I got the last question and answer right.
A Yep.
Q You're saying theoretically such a program can exist, but you can't name one?

A That is correct.

MR. NICHOLSON: Thank you. I have no further questions.

THE COURT: All right. Thank you, sir.

THE WITNESS: Thank you.

THE COURT: I'm sorry, can I ask another follow-up question based upon Mr. Nicholson's questions?

Examination

BY THE COURT:

Q And this is just -- I'm not expecting you to necessarily have an answer to this.

A Okay.

Q But if you say it's possible to design a program that would do what you would like to see their program do, but you're not sure if one exists --

A I don't believe one actually does exist.

Q Okay. Then economically feasibly, is it feasible to put such a product on the market that would be economic and for someone to actually buy?

A I do believe it would be feasible. The reason that the industry hasn't created a tool like that is because the industry is not aggregating all cookies and marking them as a problem on an industry perspective.

Most cookies, 98 percent on your typical computer, are completely benign. They're there for purposes of keeping

that user logged into Google and so forth.

We have the capability and the option included in the browsers to wipe out all of the cookies. The problem is when you count all those cookies together as a problem.

But I do believe, to answer your question directly, that a product like that could be created, could be released in the industry, but the industry deals with the problem either by individual cookie editing, the browsers include the ability to turn off or on cookies, add or remove a cookie, or to delete the cookies entirely.

Q All right. So you think it's economically feasible to produce such a product?

A Yes. In fact, it'd be easier to do than to create an anti-malware product.

THE COURT: Any additional follow-up?

MR. FERGUSON: No, Your Honor.

MR. NICHOLSON: No, Your Honor.

THE COURT: Okay. Thank you, sir.

THE WITNESS: Thank you, sir.

THE COURT: So are we going back to the defense witnesses?

MR. NICHOLSON: I think they rest at this point.

MS. ROBBINS: Your Honor, yeah. So the only thing before we rest is that there are two exhibits that we just need to admit. These actually have to do with the Rule 807,

the motion in limine. So these were -- it's just the business declarations from the BBB woman, which is exhibit 19, and then exhibit 42, which is the actual BBB complaints that were too voluminous to put in paper. So I want to just move those into evidence pending Your Honor's ruling.

THE COURT: All right. Is there any objection to the affidavit?

MR. NICHOLSON: There is, Your Honor.

THE COURT: To the affidavit?

MR. EDMONSON: Yes, it's an affidavit that was presented as an affidavit of a witness who was going to testify. The witness never testified, was never made available for cross-examination and was never here, which clearly contravenes the Court's order. To put in a declaration as direct testimony in this case, the witness has to be available for cross.

THE COURT: This is just a records custodian.

MR. EDMONSON: Well, the declaration contains a number of statements that I would hardly characterize as just a records testimony -- excuse me, records verification, including on, opining on the BBB rating of the Defendant at a given time, things of that nature which are the hardly in the nature of records.

MS. ROBBINS: Your Honor --

THE COURT: I thought the affidavit you were referring to was just authenticating the record of the complaints.

MS. ROBBINS: That authentication is in the affidavit, and that's all that we're relying on. We're not relying -- there are some other paragraphs in there, but we are not relying on those. Merely just to authenticate the BBB records.

THE COURT: Is there any reason I shouldn't accept the affidavit just to authenticate the records and then later decide whether I'm going to accept the record?

MR. FERGUSON: Well, the first thing I think of is if that's the case, can they redact out the paragraphs they're not relying on? You've got a lot to read, and I know this is the type of thing you're not going to sit on for a long time because of the nature of the posture of this case. So could they just redact out the paragraphs?

THE COURT: Could you redact the paragraphs?

MS. ROBBINS: Sure.

MR. EDMONSON: That would result in redacting the entire declaration because none of the records are attached here.

THE COURT: I assume that this woman, I think it's a woman you said, maybe it's a man, whoever it is, this affiant is saying these are copies of the -- our complaints that we

received on the so-and-so of the business -- Better Business Bureau, and we've received these complaints, and these are true copies of the complaints we received.

MS. ROBBINS: Your Honor, if they would like to stipulate that these are the records without having this in evidence, that's fine.

MR. EDMONSON: I don't know why we would be asked to stipulate. I think what you're asking is paragraph 7 of this declaration says that the San Diego BBB received at least 26 complaints, and that they provided copies of the complaints to the FTC. If all they're asking is that subject to all of the other objections that we will and have already indicated we'll raise to those complaints, the only purpose of this declaration is to allow them to later try to admit those 26 complaints, no more, and none of the other evidence that is contained in the declaration is ever going to be admitted, then with -- you know, we won't stipulate to that, but the only objection we'd have then is they didn't make the witness available.

THE COURT: But why do you need the witness available? Are you going to challenge this witness as not -- these are really not the complaints that we received?

MR. EDMONSON: If that's the only thing it's for, is to authenticate those 26 documents, then we'll withdraw the objection.

THE COURT: That's what I understood.

MS. ROBBINS: That is the only thing.

THE COURT: Okay.

MR. EDMONSON: As long as everything else in the declaration is stricken.

THE COURT: We don't need the declaration if you would just agree that those are true copies of the complaints that they got.

MR. EDMONSON: That's fine, Your Honor.

THE COURT: And I will decide later whether to rely on them and accept them into evidence.

MR. EDMONSON: That's fine, Your Honor.

THE COURT: Okay. Is there anything else you need before you rest?

MS. ROBBINS: No, Your Honor.

THE COURT: What's the number of the exhibit of the actual complaints?

MS. ROBBINS: Forty-two.

THE COURT: Forty-two. Okay. Forty-two has been identified as authentic. I will decide later whether to rely upon those complaints at a later date.

All right. Anything else from the FTC and the State of Florida?

MS. KIZIAH: No, Your Honor.

MS. BURTON: No, Your Honor.

THE COURT: Okay. Thank you.

MR. FERGUSON: As much as I want to blurt out motion for directed verdict, I won't do that because I know that that's not appropriate at this -- in this proceeding. But I do have one thing that I'd like to move into evidence that I thought was going to be moved into evidence by the Plaintiffs.

This is the declaration of John Konopka. He is an investigator with the Florida Office of Attorney General. This was originally presented as a witness, I guess it was going to be live, we can cross-examine or the declaration will come in. Apparently they didn't bring him and they don't want to rely on this. We do. It's a declaration of a party opponent.

Talks about going out to our offices and seeing big huge signs with our names on it and easily locating us, and there's woven throughout the pleadings are insinuations that my guys are hiding from law enforcement and the public.

So we would like to move this affidavit in as evidence on the admission of a party opponent rule.

THE COURT: The Plaintiffs have chosen not to present this witness?

MR. FERGUSON: Yes, Your Honor.

THE COURT: Okay.

MR. FERGUSON: They chose not to submit the

declaration. Originally it was given to us in a pile that would be submitted for this proceeding, and we would have stipulated that this witness did not need to come, but we do want you to consider this declaration, because we think it contains evidence that is -- rebuts much of the allegations of hiding and whatnot that they've levied against my clients.

THE COURT: Do you have any objection?

MS. BURTON: We have no objection to admitting this into evidence. The reason we didn't put him on the stand was just efficiency. And he's available if anyone would like to cross-examine him.

MR. FERGUSON: I wasn't planning on cross-examining him.

THE COURT: There's no objection, so it's admitted.

MR. FERGUSON: I'm just passing on the opportunity to bring him up for no reason.

THE COURT: All right. So what exhibit is that going to be?

MR. FERGUSON: I believe it would be Defendant's 21, Your Honor.

Oh, I'm sorry. It's Plaintiffs' exhibit 21.

THE COURT: No, this is now a defense exhibit. So you tell me what defense number is it?

MR. FERGUSON: Defendant's --

THE COURT: How about 50, okay? Defendant's

exhibit 50. How is that?

MS. BURTON: Your Honor, if it's easier, we're happy to submit it as our own exhibit and just keep the exhibit number.

THE COURT: We're making this a lot more complicated.

MR. FERGUSON: We'll leave it at that.

THE COURT: What number is it for the Plaintiffs'?

MS. ROBBINS: Twenty-one.

THE COURT: Plaintiffs' 21 is admitted without objection.

(Plaintiffs' Exhibit No. 21 entered into evidence.)

MR. FERGUSON: May I bring it up, Your Honor?

THE COURT: Sure.

All right. So where are we as far as the defense?

MR. NICHOLSON: I'm going to go out of turn at this point. With the Court's permission, I have an expert that can only be here today, and I would like to go out of order and call him with -- I think I already have the other party's consent.

MR. FERGUSON: We have no problem with that, Your Honor.

THE COURT: Are we going to finish him today is the question.

MR. NICHOLSON: I certainly hope so.

THE COURT: Who is this witness?

MR. NICHOLSON: This is William C. Easttom, II. I believe the Court's already familiar with him.

THE COURT: All right. Bring him in.

William Charles Easttom, II, Defendant's witness, sworn.

THE COURT: Please be seated.

Sir, if you could tell us your name and spell your last name, please.

THE WITNESS: William Charles Easttom, II. The last name is spelled E-a-s-t-t-o-m.

THE COURT: Thank you, sir.

MR. NICHOLSON: We would move the declaration of William C. Easttom into evidence. I don't know if the Court needs a physical copy. It was previously filed with the Court.

THE COURT: I have it somewhere.

Any objection?

MS. BURTON: No objection.

THE COURT: Admitted without objection. What number is that?

MR. NICHOLSON: Well, let's call it defense -- I believe we're up to Defense 2.

(Defendant's Exhibit No. 2 entered into evidence.)

THE COURT: Thank you.

All right. Cross-examination.

MS. BURTON: Yes, please.

Cross-examination

BY MS. BURTON:

Q Good morning, Mr. Easttom. Actually, good late afternoon, I should say.

A Good afternoon.

Q Do you have a copy of your declaration?

A Not with me.

MS. BURTON: May I approach the witness?

THE WITNESS: Thank you.

BY MS. BURTON:

Q Mr. Easttom, I'm an attorney for the Federal Trade Commission. I'm going to be asking you a couple of questions about your declaration and your opinion in this case.

Let's start by turning to paragraph 6 of your declaration. So in paragraph 6 through approximately -- well, exactly 27, looks like you spend a fair amount of time discussing whether registry cleaners and PC optimizers are generally useful; is that correct?

A That's correct.

Q But you understand that the issue in this case is the way these products are sold, not the general utility of this type of product, correct?

MR. NICHOLSON: I'm going to object to the characterization. It's to the Court to determine what the

issue is on an expert witness.

THE COURT: Overruled.

BY MS. BURTON:

Q Did you do any analysis of the way these products were sold?

A No, I did not do a marketing analysis, no.

Q Did you see -- were you aware that the PC Cleaner scan is run in two very different -- two different circumstances. The first being before a consumer purchases the product and the second being after they've purchased it, and then they can run scans whenever they want? Are you aware that there's that distinction?

A Well, I'm aware you can run different scans at different times. I don't know that I would characterize those as very different as you just did.

Q Okay. But did you, in your analysis, distinguish between a scan that a consumer might run prior to purchasing the product and a scan that the person might run subsequent to purchasing the product?

A No, I saw no significant technical differences.

Q Are you aware that -- were you aware that there are -- that it does occur in both of those circumstances?

A I'm aware that as with many products, you can run a limited version prior to purchasing, and then purchase and run a more full featured version, yes.

Q And do you know whether what you were testing was a limited version or a full version?
A Well, I read it once with the limited, and then I ran the full version to get the additional features.
Q And was -- were the results any different between the limited version, as you call it, and the full version?
A The full version checked more areas basically.
Q Okay. So your opinion is that there is a difference between the limited version that a consumer might experience before they purchase the product and the more full version of PC Cleaner that they might use after they had purchased the product?
A There's a difference in the breadth of items checked, yes.
Q And just to clarify, did you test both of those circumstances?
A Yes.
Q Okay. Can you look at paragraph 21 of your declaration?
A I have it open.
Q Okay. You say that software un-installation often leaves fragments behind, correct?
A That's correct.
Q And then in paragraph 23, you said it also left behind significant fragments, correct?
A Yes.

Q And then in paragraph 24 you say that Bonjour also left behind artifacts in the Windows registry, correct?
A That's correct.
Q Is there a difference between fragments and artifacts?
A Well, in this particular case, the fragments, as you can see in the screen shot, are specific files that you can find on the computer by using Windows Explorer. What I refer to as artifacts are items left in the registry, which would not be quite the same thing as finding a file on your computer, it would be a key left in the registry.
Q Okay. Thank you for clarifying that.
In paragraph 21, going back to that, you said that Norton Utilities left fragments behind. Did it leave running services?
A Yes. In fact, what you see in the picture there, the SSD monitor is a service that actually continually runs. I had to manually shut it down.
Q What about -- sorry. Is there a difference between what's running in paragraph 21 and what's running in paragraph 22? Are those both the same Norton Utilities?
A They're both the same Norton Utilities. In 21, what you're seeing is an actual full program. Most applications that a user purchases today are actually several little programs. What you're seeing in 21 is a full program that was left totally un-installed and running on the system after

I used Windows un-installation.

What you're seeing in paragraph 22 are specific registry keys that were left even after I ran the Windows un-installation.

Q But those registry keys are not running services, correct?

A Well, that's not the nature of a registry key, no.

Q Okay. And when you tested Bonjour, what you talk about in paragraph 23, you talk about fragments, and in paragraph 24 you talk about artifacts, again, are those running services that are left behind?

A Well, under the paragraph 23, yes, some of that was running services. In 24, we're talking about registry keys. A registry key and a Windows service are two different things.

Q Thank you.

In paragraph 28, you state that in order to sort of simulate the normal user, you took a virtual machine and you spent about an hour or so doing some things that a consumer might normally do, correct?

A That's correct.

Q In your view, is that a -- is that an accurate way to prepare a computer to run a scan? Setting aside that obviously there would be less activity on the computer.

A Not only is it accurate, it's really the only way, as I

discuss elsewhere in my report. Simply opening up a computer out of the box is not going to give you an accurate result.

Q But if, subsequent to opening that computer out of the box, you then spent some time downloading a few things, going to some websites, having some files open, that would better replicate the consumer experience, or a typical computer?

A Yes. And the more such activity you do, the more closely it would emulate what end users would experience.

Q So if you did that over the course of several days, for example, would it be more accurate than if you did it over the course of one hour?

A It certainly would be closer to a real user's experience.

Q Okay. Thank you.

So let's go to --

So first, you ran Norton Utilities 16, correct?

A Yes.

Q And according to your declaration, that found 136 registry errors, correct?

A That's correct.

Q And then after that, you ran Windows Registry Power Cleaner, correct?

A That's correct.

Q And it found 1070 errors?

A Well, it was not just registry errors. But, yes, that's correct, 1070.

Q And then you installed PC Cleaner Pro 2014, correct?
A That's correct.
Q Where did you get that version of PC Cleaner Pro?
A From the vendor.
Q What do you mean from the vendor? Did you download it online?
A No, I believe the link was sent to me.
Q Okay. By Defendants?
A Counsel.
Q And do you know whether what you were looking at at that point was a -- the sort of free trial version or the full version?
A Well, at that point, I had the full version. I was told that this is what a person might purchase.
Q Okay. And so you -- at this point, you're replicating what a consumer would experience after they had purchased the program?
A That's correct.
Q And you said that you tested the free scan version at some point. At what point was that testing done?
A Well, once I had completed all this testing and had pretty accurate results, just for my own curiosity I went out, independent of counsel, and downloaded and ran, and I saw significantly that basically it tested fewer areas. And that's pretty normal for Symantec or any of them.

Your trial version will either work for a shorter period of time or it will test a certain limited number of areas, and the full version tests everything. I didn't see anything alarmingly different.

Q But the full version, do you believe, is a more accurate version, has more accurate results?

A I don't know if it's more accurate. It tests more areas.

Q Okay. Other than testing more areas, did you identify anything else about the free scan that makes it any different than the full version?

A No.

Q So when you ran this PC Cleaner version -- and just to be clear, this was the 2014 version that you are talking about running here in these paragraphs?

A Yes. And later in my report I mention also doing 2015.

Q Okay. And the PC Cleaner scan identified 2217 problems, correct?

A That's correct. As I point out later in my report with a chart, PC Cleaner Pro tests a few areas other products don't test.

Q Okay. But the total number reported was more than twice the number of problems identified by Windows Registry Pro Cleaner -- Power Cleaner?

A Yes, because, again, it checks several areas that Windows Registry Cleaner doesn't.

Q Uh-huh.

And it was more than 2000 more problems than the Norton scan, just to be clear?

A No, the Norton scan, all I showed here were the registry problems. It found other problems, but I identified and highlighted the registry issues. Norton had other issues it had found.

Q Do you remember what that total number was?

A It was in the hundreds. It was under a thousand, but it was several hundred.

Q Okay. So this number is still substantially higher than what one might see when running Norton?

A Exactly as I would expect, since it tests additional areas.

Q Okay. Can I ask you about the screen shot in paragraph 43? Sorry. That's the wrong screen shot.

No, it is the correct one, I'm sorry, 43.

So if you look at screen shot in paragraph 43, it identifies five instances of malware or five -- there is a number 5 in the malware line. Do you see that?

A That's correct.

Q In your one hour of replicating a normal user behavior, do you believe that you managed to somehow infect your virtual machine with five pieces of malware?

A Yes. If you'll read the description there, it says

viruses, spyware and adware. In the installation of one of the utilities, particularly iTunes, if you're not careful and click "no" to the right things, you will install pop-up ads. There's lots of things in the Internet that give you adware, which are very annoying to most end users.

Q Is it dangerous, these ads that iTunes puts on everyone's computer?

A Ads in general are dangerous. They're incredibly annoying, and they can inhibit your productivity because you're trying to work, and you're responding to all these silly ads that you're not interested in.

Q And did you actually drill down to see what these five instances of malware were, or are you just saying generally your opinion would be it's probably iTunes' associated adware?

A I might say my many years of experience you get adware all the time. It's very easy to. So, yes, it seems to be this was most likely adware.

Q Just to be clear, this screen does not distinguish between adware or malware, or I think it also includes spyware -- sorry, viruses, spyware and adware?

A Well, actually it does.

If you'll notice on the right there's a bar that's color coded and tells you how severe the issue is. And in this case another indication it was just adware is it ranks

it as pretty low severity, a minor issue. Had it been spyware or virus, it would have ranked medium high or high.

So it tells the end user, yes, this is a problem, but for example in this case it's not a really big problem.

Q Okay. If you look at the line, two lines down, PC optimizer new exclamation point.

A I'm sorry, I'm not sure where you're at.

Q Sorry. Same screen shot.

A Okay. Yes. I was trying to look at the paragraphs and I couldn't find that.

Q So we were looking at malware. If you drop down to there's PC itemizer new?

A Yes.

Q And that line seems to indicate that there are 23 issues?

A Yes.

Q Correct? And it has a high or red in color level. I don't know if you have color shots. I do not.

A I can see it filled all the way to the end, so, yes.

Q You'll notice there is a speedometer, I believe that's what you call it, or what the PC Cleaner Defendants have called it, a speedometer in the under right-hand corner that is sort of a gage, correct? And it goes red to green.

And that also is on, I believe, the high slash red end of the spectrum; is that correct?

A Well, actually the gage is on the low, because it's the

opposite. The gage is showing you you're currently getting lower than optimal performance, and when you look at that section down below the PC optimizer, it's telling you the issues with your performance are actually quite high.

Q Let me clarify.

The red zone on the performance gage is actually the bad place to be, correct?

A Yes.

Q You would like to be on the high end where it's green so that your performance is high, correct?

A Yes.

Q Okay. In your one hour of replicating normal user behavior, do you believe that those actions crippled your computer's performance to the extent that your computer would be performing at its minimal level?

A Well, in this case it's not a matter of what I believe, as I have screen shots here that show after cleaning we freed up significant amounts of memory, significant amounts of performance improvement. So it's measurably proven that, yes, my simulation did enough to reduce performance and that the PC Cleaner Pro corrected that.

Q But based on your experience as an expert with computers, a normal user running their computer for one hour under normal circumstances, would that be sufficient to bring their computer from maximum level productivity down to minimum

level of productivity?
A Certainly can be. A lot depend on factors.
For example, if you tend to use Internet Explorer as your browser instead of Chrome, Internet Explorer leaves lots of junk.
If you did as I did and installed certain tools, some tools, like iTunes, come with a lot of extra junk, others don't.
So, yes, an hour of use could really dramatically reduce the performance you're getting out of your PC.
Q And the things that you did in that one hour where you were replicating that experience, you feel like those were things that would have crippled the productivity of the computer to this extent?
A Well, I don't know if I'd use the word "crippled," but, yes, they did reduce the productivity. And, again, that's not a matter of opinion. It's measured in my report. It's a fact.
Q But most consumers, you would agree, use their computer for many, many hours without running any sort of cleaner or optimizer. Not even hours, but days, weeks, years without doing so, correct?
A Well, I think a lot of people don't run optimizers, but I know from personal experience with not so computer savvy relatives, such as my mother who I'm going to see next week,

that by the time I see their computer it's in terrible condition, and a large part of my holiday is spent cleaning it up. So maybe they should.

Q So would you recommend that someone run a program like PC Cleaner on an hourly basis to ensure that their computer stays at optimal levels?

A I don't know if I would say hourly, but after conducting these tests, I am actually considering installing this very product on my mother's computer next week.

Q Under security defense in that same paragraph, you see that there it identifies 982 problems?

A Yes, I see that.

Q Did you look any deeper to see how that number was generated?

A No.

Q Would this -- do you believe that this is where the software would check to see whether certain pieces of malware were blocked?

A Well, it's going to check several things, and it's actually defined in that paragraph there.

Active X components are a big problem because they're so easy to subvert for some malicious purpose. Flash Player has been hit so many times with malware that subverts it to transmit spyware or virus or something of that nature.

It also mentions in here checking for general

Windows vulnerabilities.

Something interestingly enough I was just telling to a security class last week. Microsoft Windows has some very good recommendations, but their default configuration for their product is horribly un-secure (sic), and usually you need to change that and fix it. And this section is checking, in addition to spyware and adware and Active X, it's checking for some of those Windows issues.

Q Just to clarify. Wouldn't spyware and adware fall into the malware category, or would it be double counted in both of these?

A It's not a double count. It's two different issues you have. You have general malware that could cause a problem. Then you have Active X who could be behaving or supporting the activity of malware.

As I mentioned, Flash is a great example. The Flash Player is not malware. You can't watch Flash animations without it. But because of the way it's built, and it's vulnerable to various scripting attacks, it becomes a springboard for malware. So you could look at the malware that infects it as being one problem, and its own vulnerability as being yet a second separate problem.

Q But in this section, if it were to search for blocks of malware, for example, that isn't active anymore and hasn't been for many years, would it be important for a customer to

know that their computer doesn't block malware that is not active or out there at all?

A Well, active and out there are two different issues. If it's on your computer, it's obviously out there by definition.

As far as inactive malware, I would absolutely find that important.

Q So is it your opinion that in order to accurately count these numbers, PC Cleaner Pro should actually search for every piece of known malware, make sure that the registry is blocking every single piece of known malware since the beginning of time?

A Well, you've conflated two issues. The registry doesn't block malware. That's a separate issue, the registry.

As far as blocking malware, that's not what it's saying here. It's saying there are vulnerabilities to make it possible for the malware to operate.

Give you a really great example. Windows 2000, when it shipped, the web server, if you installed Windows 2000 server, whether you knew it or not, the web server was turned on, running and allowing anonymous access.

Now, whether anyone used that or not, it's still a very serious problem that you needed to correct. So that's an example of a vulnerability that may be currently dormant, no one's using it.

To make a nontechnical example, if someone checked out your home and discovered that your backdoor didn't really lock and was opened, just because no one's burglarized you yet doesn't mean it's a good idea to leave that door unlocked.

Q But if there were no burglars to burglarize you, would you still need to know that your backdoor was unlocked?

A If no burglars exist in the entire world, in that utopia world, no.

Q Thank you.

In the version you used of Norton Utilities 16 and Windows Registry Power Cleaner, were these also paid versions?

A I went out and bought them the day of the testing.

Q Okay. And when you purchased those, how did you purchase them, online?

A I went online and filled out a form, gave them my credit card, and they downloaded the product.

Q And before you purchased those products, did they run a scan in advance of you purchasing it, or did you purchase it and then it ran the scan that you had purchased?

A Well, Norton actually gives you the option of downloading a free trial and using it. Since I previously used that, I didn't in this case.

Q You did not?

A Not in this case.

But, yes, you can download a free and run a scan, and it will work for X number of days before you have to pay for it.

With the McAfee product, they don't give you that option. You just pay for it. You don't get a chance to even try it and see if it will work. You just pay for it and take your chances.

Q So those results are not given to you until you've actually purchased the product, correct?

A With McAfee.

Q With McAfee.

When you used Norton Utilities, you did not run the free scan, you simply purchased the product first?

A That's correct, because I previously used the free scan and was very familiar with it.

Q Can you look at page 26?

Seems to be a screen shot of the results screen for the Norton tool.

A Yes.

Q And it says: Your system has been cleaned.

Did you run the Norton Utilities program to clean it?

A Well, if you -- the paragraphs before this explain what I'm doing. Essentially, I've already checked and tested the

PC Cleaner Pro, and now what I would like to do is to rerun both of these machines, and my question is very simple. If they still say there's a lot of stuff wrong but PC Cleaner Pro says it cleaned them, then we have a problem.

Q Right.

A And, yes, this screen shot here on page 26 is running Norton Utilities after having run the other tool, and it showed that it found everything was pretty well clean with four very minor issues.

Q But it says your system has been cleaned, which indicates to me that the Norton program is what cleaned it?

A That's just the message they give me when I ran the scan.

Q So you ran the scan but -- and this is the screen that popped up?

A Yes.

Q Was the scan fixing the problems?

A No.

Q So --

A That's why you have the "continue" button at the bottom, to continue if you wanted to check everything. I am guessing, because I'm not privy to the source code of Norton in this case, that your system has been cleaned is their indication that it's already clean, there's nothing on there, we're good to go.

Put another way, prior to running PC Cleaner Pro,

Norton Utilities found a bunch of problems. After running PC Cleaner Pro, Norton Utilities found only four tiny privacy issues to do with website cookies.

Q But is there any way that the Norton program would know that the PC Cleaner program had been run and had cleaned the computer?

A Well, perhaps I'm misunderstanding.

We wouldn't want it to.

Q Right.

A The idea of this second test is if PC Cleaner Pro really cleaned things up --

Q Right.

A -- then Norton should look and go, yes, it looks pretty clean.

If, on this second run, Norton had found all the same errors it did the first time, then that would indicate PC Cleaner Pro did not clean those errors.

Q And I guess my confusion here is that it seems to indicate that Norton Utilities somehow knows that the computer has been cleaned, and it seems unlikely that it knew that PC Cleaner did the cleaning. So I'm just asking you, are you certain that Norton did not do any cleaning to get you to this result, saying your system has been cleaned?

A Now I understand your question.

Yes, I'm absolutely certain. And, again, I find

analogy is the easiest way to explain things.

If I hired someone to detail my car and they looked at it, it was pristine, they might very well, if they were honest, look at me and say your car is already cleaned, you don't need me to clean it.

Q Your interpretation of this screen is this is Norton saying you don't have any problems, and so I'm not going to do anything more?

A That's correct.

Q But you're confident that Norton did not run any sort of fix prior to this screen?

A Yes, I'm confident.

And unfortunately, there's a limit to how much detail I can give, but in a patent case many years ago I actually got to read the Symantec code in detail. I know exactly what Symantec does. So I'm very confident, but because of protective orders in that case I can't give any more detail.

Q Okay. When -- let's go to paragraph 52.

You conclude that you found no evidence of fake or exaggerated results; is that correct?

A That's correct.

Q And by that, do you mean that the numbers were an accurate report of things that it searched?

A I mean that and more.

The source code review clearly showed that there was no mechanism in the code to register fake or inflated numbers. On top of that, it didn't exaggerate the severity. As we talked about earlier on that main screen, it's letting you know that this particular problem, like in my test, the malware was probably adware, and it even let me know this isn't that serious, don't worry about it, but other issues are serious. If it had made everything seem extremely important, that might have been exaggerated.

So there were several things that made me conclude that there was no evidence that any results were either faked or inflated or exaggerated in any way.

Q By that, you simply mean that it counts everything it says it is counting and provides an accurate number at the end of that process?

A Well, that's one of the things I mean. But the second one is, as we were just discussing, with that screen that's color coded, it doesn't inflate the severity. In other words, it doesn't tell you, well, there's only two problems, but you have to fix these right now or your computer will explode in the middle of you using it or some silliness like that. It gives you an indication that some things are really serious and some things not so much.

Q So in paragraph 43, that screen shot, where, after one hour of doing normal things on a computer, it indicates that

your computer is running at its minimal level of performance and that its security is in the red zone --

A Well, as you notice, there's only one area, the PC optimizer, that gave the maximum. Two areas gave on the minor, and the others gave medium, that didn't seem exaggerated.

And my analysis from my years of experience would indicate this is pretty accurate. As we discussed, the malware was probably spyware, which would be minor. But the performance, as my testing showed, was pretty badly compromised, and that would be pretty serious, at least to me. I'd like to get the most out of my computer.

Q So you think that it is accurate to say that the computer that was tested, its performance was running at a minimal level, and its security was in the red zone?

A Yes.

Q That is not an inflated result in your opinion?

A No, that's very accurate.

Q Let's go to -- why didn't you include any screen shots from the 2015 testing that you said you did?

A There is a screen shot in here I believe at one point.

Q Oh, I'm sorry, there is a "Congratulations, your PC is in good shape" shot, but there is no results screen shot, correct?

A Well, actually, that is the results screen. It's the

same screen we've been looking at, only if you don't have any problems, it says congratulations, your PC is in good shape.

Q So you never tested the 2015 version on a non-cleaned computer, correct?

A I believe I actually discussed this at some detail in the report.

Q And what's the answer to the question? You did -- you ran the 2015 version -- you ran a scan?

A Yes.

Q On the computer before it was cleaned; is that correct?

A Yes.

Q But you did not produce a screen shot of that result, did you?

A Yes.

If you look at the very next page, you're seeing -- now, this was done after a cleaning, I'm sorry, but it changes~-- the only difference is, essentially, to answer your question, in 2014, it says damage level and 2015 it says concern level. That was the only difference I could detect in my testing.

Q So just to be clear, in paragraph 58, you include a screen shot of the 2014 version that says congratulations, your PC is in good shape?

A Yes.

Q In the next paragraph you include the PC Cleaner Pro

screen shot that says congratulations, your PC is in good shape?

A Yes.

Q But you do not discuss the results or include a screen shot of the corollary to what's in paragraph 43, which is running it on a computer that has issues, or, you know, that's been operated for an hour, to see how many issues are identified, correct?

A Well, I have to identify the specific paragraph. And pardon me, I don't have it committed to memory. But I believe there is a place where I do state that the results were pretty much the same.

Q Right.

And what I'm trying to get from you is do we have any way of knowing what those results were? Do you have actual numbers, screen shots, anything for us to look at?

A Well, since they were virtually identical, there didn't seem a need to put the screen shots in there.

Q Is that your testimony, that they're virtually identical?

A In my testing, yes.

Q That the actual number that was produced was basically the same between the 2014 and the 2014 version?

A Any differences were statistically insignificant. They were very similar.

Q Okay. Paragraph 58. You say: After having cleaned the

problems on the test machine -- and I just want to clarify -- is that cleaned it with PC Cleaner Pro or cleaned it with some other product?

A I'm sorry, where are you at?

Q Paragraph 58, second sentence: "Therefore, after having cleaned the problems from the test machine."

A Yes.

Q Is that cleaning with PC Cleaner Pro or some other product?

A Well, as you had seen in the previous report, I had cleaned it with PC Cleaner Pro and ran other tools to see if they found any problem, they didn't. And then I came back to run PC Cleaner Pro again. As detailed in this paragraph, the hypothesis there is that PC Cleaner Pro is some sort of scareware. Even if I just clean this machine, it will tell me there's something wrong; and it did not. Said everything was fine.

Q And just to be clear, in both of these circumstances you believe you are running the full paid version and not a prepurchase free trial scan version, correct?

A That's correct.

Q Did you have to register it and input a license key in any of this process, or were you just given a prepurchased version?

A No, I had to give a license key.

Q In paragraph 64 you talk about how a new fresh out of the box machine might already have issues.
A In which paragraph?
Q Paragraph 64.
A I'm sorry, I was one too soon. Yes.
Q A new machine might have existing issues, even a new virtual machine.

If a scan like PC Cleaner Pro routinely finds performance and security issues on brand new machines, how reliable and helpful is that to a typical consumer?
A Well, you kind of omitted what I talked about here in my report. A new computer typically comes with a whole bunch of stuff on it, and unfortunately, there is a unflattering term for that in industry.
Q We've heard it before. Feel free.
A They call it crapware.

And one of the first things you want to do is get all the junk off your computer. So I would expect almost any computer out of the box is going to have all these sorts of issues because of all the junk that people pay the vendors like Dell and HP to put on the computer.

In addition, as I detail in this and the subsequent paragraphs, Microsoft's own service packs frequently cause havoc with their systems, particularly XP Service Pack 3 actually caused terrible, terrible problems on the systems.

So the only way to really have a clean system is to have just cleaned it.

Q So is it your opinion, then, that a brand new fresh out of the box computer comes to the consumer with massive security and performance issues already on it?

A Well, that's not only an opinion, that, again, is a fact. Aside from the junkware that we indicated a while ago, Microsoft's default settings --

For example, they recommend that all passwords be a minimum of eight characters. The default setting is you can have it blank. They recommend you change your password every 42 days. The default setting is you could leave it on forever.

So, yes, out of the box it's in terrible security position. And I have publicly stated many times I have no idea why they don't ship it with all of their own recommendations already implemented.

Q And so your advice to consumers is they should purchase a registry cleaner the instant they purchase their computer and run it?

A Depends on their technical abilities. If they're really savvy they might make the configuration change themselves. I would also add it's probably a mistake to say this is a registry cleaner. As I point out in my report, that's one subsection of one heading it checks. It checks a bunch of

other stuff that have nothing to do with the registry, like the Active X vulnerabilities and things like that, that, yes, you absolutely should scan for, whether you use this, or Norton or McAfee, you should check for.

Q So other than a person who has just run a product like PC Cleaner, every other computer user in the country needs to be running one immediately?

A Whether you need to be running it immediately or not depends on how satisfied you are with the computer. A mechanic would tell you you need to have oil changes every 2000 miles, but we can all let it go five or six. It may perform a little less well, but it's good enough for going to the grocery store.

Q But would a mechanic tell you that the day you purchase your car you need to get an oil change?

A Not an oil change, but he might say if you want maximum performance, you might change certain things. I know people that like high performance sports cars will usually make modifications to get the best performance.

Q Turning to paragraph 72.

A Yes.

Q You looked at the code, and it looks like you looked at the code specifically for the registry cleaner portion of PC Cleaner; is that right?

A Well, that's only part.

Paragraph 73 mentions the file responsible for CP usage. Paragraph 74 starts with the main function that launches several other sub functions. Paragraph 75 talks about functions that scan for shared DLLs, scan services, scan un-install. I looked at quite a bit.

Q So did you analyze the source code -- sorry.

Did you analyze the code for the entire program?

A Yes.

Q Okay. And did you include your results for every part of the code in this report? Does this reflect all of the code analysis that you performed?

A Well, the issue here is it's hard to display a negative.

What I was looking for was does this program do something other than what it says? Does it inflate numbers? Does it report a problem that's not there? And despite having looked through all the code, there was absolutely zero evidence of that. So it's kind of hard to put nothing into a report.

So what I did instead is I put in various key parts, like the scan un-install function in paragraph 76 and various similar things to indicate what the code actually did do. But to answer your question more directly, the only way to do what you just suggested would be to have replicated every line of code into this report, which would have made this report about seven or 8000 pages long.

Q So you did that analysis, though?
A Absolutely.
Q Is that what you're saying?
Okay. And you say in paragraph 81 that the question at hand is whether the software performed as it should. Is that an accurate summary of what you were asked to do by the -- by counsel for the Defendants?
A Yes.
Q But you did not -- you were not asked to review the free scan portion of either PC Cleaner Pro 2014 or 2015, correct?
A Well, I think you're missing a point here.
The source code, for example, is the same for both products.
Q And how do you know that?
A There's not a different product.
Q How do you know that?
A Well, you can see in the source code where there are what are called "if then" statements or checks to see is this the full version, then run these extra things. If not, don't. So it's obviously the same source code.
So, yes, I looked at both versions.
Q For the source code?
A Yes.
Q But for running the scans you did not do that, correct?
A I think you asked that earlier and I said, yes, I have.

MS. BURTON: Thank you very much. That's all I have, I think. Wait. Hold on.

BY MS. BURTON:

Q Okay. Just a couple of clarifications.

So there's nothing in this report that talks about the free scan that you analyzed, you said kind of on your own after the report?

A No, I didn't say after the report, I said after the initial analysis. And as I've indicated already, there was no significant difference, and the source code is exactly the same. To try to differentiate the two products is inaccurate.

Q Okay. But we don't have any screen shots of your results from that examination, correct?

A That's correct.

Q And --

MS. BURTON: That's all. Thank you.

THE COURT: How much do you think you have?

MR. NICHOLSON: Very brief.

THE COURT: Okay.

MR. NICHOLSON: Partly because I realize the time of the day.

Redirect Examination

BY MR. NICHOLSON:

Q Mr. Easttom, I just have a couple of questions.

You testified that the full version of PC Cleaner Pro looks for other items or additional items, let me clarify that, additional items than what the free scan did, correct?

A That's correct.

Q As a consequence, is it a fair statement that, generally speaking, the free scan would identify less issues than the full scan?

A It would almost have to.

Q Is it true that a freshly installed version of Windows ships optimized?

A No, not at all.

Q So is it fair to say that all of the items that PC Cleaner Pro found when you ran the test against the fresh install were created in that one hour of usage?

A Not necessarily.

As I had mentioned earlier, Windows has a number of default settings that just aren't secure. They're not safe. And this is one of the complaints many computer scientists have about the Windows operating system in general. So I wouldn't say they were created. They were in addition to whatever vulnerabilities Windows already had.

Q So, for instance, if you did the fresh install, as you did, and did an hour's worth of work and ran PC Cleaner Pro, you came up with whatever number it was, right?

A Yes.

Q And if you clicked "fix" and then you ran the computer another hour, simulating usage, would you expect to see it come back with that same list of items?
A No, it would be a much smaller list.
Q Why is that?
A Because, as we've been discussing throughout my testimony, Microsoft Windows ships with a lot of vulnerabilities, and those would have been fixed.

In a subsequent run, all you're hitting are the issues you created in that hour, two hours or whatever timeframe.

Q Thank you.

One last area.

As between the current versions -- well, let me ask it a different way.

Active X controls. You were asked about that. Do they remain an issue today, a security concern?
A Very much so. And the Flash one I've used as an example is still an Active X control, still embedded in many web pages and still vulnerable to a host of attacks.
Q Is there a variation between the threat level of these malicious Active X programs or controls over different versions of the Microsoft operating systems?
A Well, what Microsoft has done for the programs you install on the machine is they've tried to move to the new

dot net framework and tried to force all programmers to do that. And the more programs that are written in that framework, the less vulnerabilities there are to Active X.

We have a couple of issues still existing. Older programs, they're everywhere. Lots of people have software that's 10 years old which would still be written the old way.

Secondly, Active X controls are frequently embedded in websites. So even if everything on your computer is not using Active X controls, when you visit certain websites that are, well, now you have the same issues come up.

So I would say that perhaps today, say Windows 8 may have a little less vulnerability to this issue, but it's not nonexistent, it's still a significant problem.

Q Final question.

Are the Active X blockers that PC Cleaner Pro does relevant to the typical consumer?

A Very much so.

Q Why is that?

A Because the Active X issue, it's hard to describe without getting very, very technical. It is not simply -- if you get a virus, you've got a virus, you take care of it, it's gone. If you have an Active X vulnerability, you're now vulnerable to perhaps dozens of different types of viruses and spyware.

A popular way to create spyware is to latch onto one of these Active X vulnerabilities and read all of your

activity. So an Active X vulnerability actually opens you up to many, many vulnerabilities.

So I would say that's probably more serious than a simple virus infection.

MR. NICHOLSON: Fair enough. I said that was the last question. I'll stick to it.

Oh, maybe not.

No further questions.

THE COURT: Thank you.

Anything else?

MR. FERGUSON: Not from here, Your Honor.

MS. BURTON: I just have one additional question.

Recross-examination

BY MS. BURTON:

Q Just now, was it your testimony that the first time a consumer would run this scan they would likely get probably the highest number they would ever get, and then because none of the fixes had been made, none of -- but then after purchasing it, in subsequent runs, it's already fixed a lot of the issues, and so the numbers are going to be lower?

A Well, that wasn't actually the question he asked me. He asked me if there was an hour gap after running it, I would expect a lower number. If there's a six-month, or 12-month or two-year gap, then that number could get quite high again, perhaps even higher.

But the point was that even before you have installed or surfed the Web or anything, there are some issues that ship with Windows.

Q But a consumer who's never used a product like PC Cleaner before, the first time a scan is run, it's likely to find far more issues than it will after they have used PC Cleaner or another product at very -- you know, for some -- on a regular basis thereafter; is that correct?

A Well, the key issue will be the interim between usage. If they're running this weekly, I would expect the number subsequently to be much smaller. If they're running it annually, well, maybe not.

MS. BURTON: Okay. Thank you.

THE COURT: Thank you, sir.

MR. NICHOLSON: Thank you, sir.

THE COURT: All right. Seems like a good time to break.

Are we going to finish tomorrow?

MR. FERGUSON: Just so you know what we've got, Your Honor --

THE COURT: Can we do this off the record?

MR. FERGUSON: Yes, absolutely.

THE COURT: Okay.

(Discussion held off the record.)

THE COURT: All right. We'll see you tomorrow at

9:00 o'clock.

(The evening recess was taken at 5:24 p.m.)

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CERTIFICATE

I, Stephen W. Franklin, Registered Merit Reporter, and Certified Realtime Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 2nd day of JANUARY, 2015.

/s/Stephen W. Franklin

Stephen W. Franklin, RMR, CRR

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