

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. DAVID A. BANKS;
2. DEMETRIUS K. HARPER, a/k/a KEN HARPER;
3. GARY L. WALKER;
4. CLINTON A. STEWART, a/k/a C. ALFRED STEWART;
5. DAVID A. ZIRPOLO; and
6. KENDRICK BARNES,

Defendants.

REPORTER'S TRANSCRIPT
(Jury Trial Day 11)

Proceedings before the HONORABLE CHRISTINE M. ARGUELLO, Judge, United States District Court, for the District of Colorado, commencing at 8:32 a.m. on the 11th day of October 2011, Alfred A. Arraj United States Courthouse, Denver, Colorado.

A P P E A R A N C E S

FOR THE PLAINTIFF:

MATTHEW T. KIRSCH and SUNEETA HAZRA, U.S. Attorney's Office - Denver, 1225 17th St., Suite 700, Denver, CO 80202

FOR THE DEFENDANTS:

Pro Se

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No.REFUSED

OCTOBER 11, 2011

2 (Proceedings commence at 8:32 a.m.)

(The following is had in open court, outside the hearing and presence of the jury.)

5 THE COURT: All right. Good morning. I received
6 the briefing on both sides, and I have orders actually as
7 to both the experts, because I just want to move forward
8 with respect to where we are going to go with respect to
9 Mr. Thurman. Anything to add?

10 MR. BANKS: No, Your Honor.

11 MR. KIRSCH: Your Honor, just very briefly in the
12 nature of a reply. In the defendants' response, they
13 appear to be suggesting that, in fact, they do want to
14 offer additional opinions from Mr. Thurman beyond those
15 that were contained in his report. We think that that
16 raises all of the same issues that were raised with
17 respect to the other experts in terms of both lack of
18 notice, lack of ability to determine without even knowing
19 what those opinions are, whether Mr. Thurman's qualified
20 to give those.

21 So I just want to make it clear that we are
22 objecting to those for all of the same reasons we
23 previously did.

24 THE COURT: Mr Banks?

25 MR. BANKS: Your Honor, as we mentioned in the

1 briefing, to talk about the general practices of the
2 staffing industry is all the defense seeks in this
3 particular case. We don't think that's outside the bounds
4 of any expert as it relates to general testimony, for a
5 non-scientific type of expert that can talk on general
6 practices of the staffing industry, and Mr. Thurman is
7 clearly qualified to do so.

8 And we also would like to put on the record that,
9 as we did in the briefing, all of the witnesses that were
10 brought forward did somewhat opine on many of the issues
11 and general things with regard to the staffing industry.
12 Thank you.

13 MR. WALKER: And, Your Honor, we also feel that
14 this would not be prejudicial to the Government. Of
15 course, that is our opinion. Given that we do have
16 several more days of testimony from our witnesses, we can
17 give the Government plenty of time to provide a rebuttal
18 witness to go over any admission that we will have
19 Mr. Thurman also testify to.

20 We would also submit that many of the Government
21 witnesses were from staffing agencies and, therefore, may
22 likely be considered expert witnesses in the eyes of the
23 jury. And so we would just feel that to meet the ends of
24 justice, that we would have the opportunity to have our
25 own expert witnesses be able to speak to some of the

1 things that they spoke to with their own opinions with
2 those people looking at it from a different light,
3 basically being companies, representing companies who we
4 engage with.

5 They obviously have self-serving motives, and would
6 have a different opinion of staffing, or at least
7 represent that in the case, than ours would represent. So
8 we feel that best meets the end of justice and gives us
9 the opportunity to present a full, well-rounded view of
10 the staffing industry and how it operates.

11 THE COURT: All right. I will say, I went back and
12 read through some of the transcripts. First, I want it
13 clear that the Government has tendered no expert
14 witnesses. Every witness they've tendered was a factual
15 witness.

16 Second, I did not see any opinion testimony by any
17 of these witnesses. They were testifying as to the facts
18 with respect to their interactions with the defendants.

19 That being said I am ready to rule. This matter is
20 before this Court on the Government's motion in limine
21 concerning the testimony of Joseph Thurman, Document No.
22 465. The Government moves to exclude as inadmissible
23 Mr. Thurman's opinion as to standard types of
24 informational technology, consulting engagements under 402
25 and 403 of the Federal Rules of Evidence. The Government

1 also moves to exclude any opinions not contained in
2 Mr. Thurman's report under Rule 16(b)(1)(C) of the Federal
3 Rules of Criminal Procedure.

4 As I read the defendants' response, the defendants
5 do not object to the exclusion of the fixed price contract
6 information, which the Government objects to as being
7 irrelevant to this case. And the Court agrees with the
8 Government that the fixed price contract information
9 provided in Mr. Thurman's report is irrelevant.

10 Thus, because defendants do not object, and the
11 Court finds that there is a basis for irrelevancy, the
12 Court grants the Government's motion in limine, insofar as
13 it excludes Mr. Thurman's opinion concerning fixed price
14 information.

15 With respect to any opinions not contained in
16 Mr. Thurman's report, the Government moves to exclude
17 those because they were not disclosed in accordance with
18 Rule 16(b)(1)(C) of the Federal Rules of Criminal
19 Procedure.

20 That rule requires the defendants, upon request by
21 the Government, provide a written summary of any expert
22 testimony. That summary must describe the witness'
23 opinions, the bases and reasons for those opinions, and
24 the witness' qualifications. And if the party fails to
25 comply with Rule 16, the Court may order the party to

1 permit the discovery or inspection, grant a continuance,
2 or prohibit that party from entering any undisclosed
3 evidence, or enter any order that is just under the
4 circumstances.

5 The Tenth Circuit has held that it would be a rare
6 case where absent bad faith a district court should
7 exclude evidence rather than continue the proceedings.
8 However, in this case, we are in the middle of trial, and
9 it is not feasible to continue these proceedings because
10 the jury has been sitting for two weeks. This is the
11 beginning of the third week.

12 As the Court has already noted, the Government has
13 repeatedly requested disclosure of the Rule 16 materials,
14 beginning with the initial discovery conference, and again
15 after opening statements in this trial. And the only
16 notice of potential opinion testimony from Mr. Thurman is
17 contained in his expert report on staffing industry
18 standards and best practices.

19 Although the Court has noted that Mr. Thurman's
20 expert report did not comply with Rule 16 disclosure
21 requirements, the Court has found that the report was
22 sufficient to put the Government on notice that
23 Mr. Thurman might be called to provide expert testimony.

24 And in that light, the Government did have
25 knowledge that the defendants sought to introduce

1 Mr. Thurman as an expert, and the Court found that
2 exclusion was not warranted under Rule 16. The Government
3 now moves to exclude any additional opinions from
4 Mr. Thurman that were not contained in his expert report.

5 The defendants assert that they are only interested
6 in expert testimony related to industry practices of the
7 staffing industry regarding staff augmentation,
8 payrolling, opinions of contractors working multiple
9 projects, staffing agency approaches to dealing with small
10 businesses, the relevance of representations made by
11 defendants, reporting of hours, how the staffing industry
12 views credit and risk, the motivations of the staffing
13 industry professionals, and other general practices within
14 the staffing industry related to this case.

15 Some, but not all of these topics are addressed in
16 Mr. Thurman's report. However, defendants also state that
17 they intend to elicit testimony concerning "other general
18 practices within the staffing industry related to this
19 case." That statement is simply too vague and open-ended
20 to provide the Government with any notice whatsoever.

21 The court would note that staff augmentation,
22 opinions of contractors working multiple projects,
23 staffing agency approaches, and dealing with small
24 businesses, reporting of hours, how the staffing industry
25 generally views credit and risk, and the motivations of

1 staffing industry professionals are addressed, to a
2 limited extent, in the report. And, as such, the Court
3 will not exclude testimony related to those areas.

4 What was not included was payrolling, relevance of
5 representations made by defendants, and general practices
6 within the staffing industry related to this case, which,
7 as I have indicated, is much too vague.

8 The Government contends that if any additional
9 opinions from Mr. Thurman are offered by defendants at
10 this point on these areas, such an action would be in bad
11 faith. The Court, while it's not clear from the
12 Government's argument, the Court presumes that the
13 Government is arguing that such finding of bad faith would
14 be predicated on the fact that the defendants have not
15 submitted or sought to augment Mr. Thurman's expert report
16 since it was submitted.

17 The contours of Rule 16 disclosure is not well
18 settled. It's not clear how much detail must be provided
19 to satisfy Rule 16. And Rule 16 requires only a written
20 summary of an expert's testimony, it does not require a
21 complete statement of the expert's opinion, as in civil
22 cases.

23 In addition, the Court has found that the expert
24 report provided at least some notice to the Government
25 and, thus, it would not -- thus, it does not result in

1 exclusion of Mr. Thurman's testimony as a whole.

2 Defendants, especially in light of their pro se status,
3 based on the vagueness of Rule 16, would not have been put
4 on notice that they needed to augment any report to comply
5 with Rule 16.

6 The Government also contends that the prejudice to
7 the Government created by having to respond mid-trial to
8 any previously undisclosed opinions is both obvious and
9 severe. However, as already noted, it appears that the
10 vast majority of Mr. Thurman's expected testimony was at
11 least touched upon in his expert report.

12 Although the Court agrees with the Government that
13 defendants have not done things by the book, and
14 acknowledges that as a result the Government has suffered
15 some prejudice, exclusion of testimony is a harsh sanction
16 that should only be applied in rare circumstances. The
17 defendants assert that Mr. Thurman's undisclosed opinions
18 all involve areas that were covered by the Government's
19 witnesses.

20 Thus, it appears that to the extent Mr. Thurman is
21 intending to opine on matters not covered in his report,
22 such opinions are offered in rebuttal to the Government's
23 witnesses. These opinions thus concern subject matters
24 that the Government is already familiar with, and the
25 Government would still be able to effectively

1 cross-examine Mr. Thurman on his opinions not covered in
2 his report.

3 The Court thus finds that Mr. Thurman's opinion on
4 matters that have been made relevant by the Government's
5 witnesses would not severely prejudice the Government.
6 However, to the extent that the defendants seek to have
7 Mr. Thurman opine on any matters not contained within his
8 report, they shall submit to the Government, no later than
9 24 hours prior to Mr. Thurman's testimony, a supplement
10 containing such statement of opinions and the basis for
11 such opinions. And nothing in this ruling will preclude
12 any objections based on the Rules of Evidence.

13 All right. So the defendants understand, if you
14 want to go beyond what has already been proposed, you have
15 to give notice to the Government.

16 MR. BANKS: Yes, Your Honor.

17 THE COURT: And that means directly to Mr. Kirsch
18 and Ms. Hazra.

19 All right. In their response, the defendants also
20 move the Court to reconsider exclusion of defense expert
21 witnesses Kelly A. Baucom and Andrew Albarelle, who were
22 tendered to provide testimony related to staffing industry
23 practices. As previously noted in this Court's ruling,
24 the defendants provided no Rule 16 disclosures for these
25 witnesses. They did not list them as expert witnesses.

1 And despite the Government's repeated request for Rule 16
2 disclosures, the defendants offered no indication that
3 these witnesses were intended to be offered as expert
4 witnesses until the prosecution had already rested.

5 Although Ms. Baucom and Mr. Albarelle sent letters
6 of support on behalf of the defendants to the Government,
7 such letters were sent directly to John Walsh, the United
8 States Attorney, as opposed to being submitted to the
9 attorneys actually prosecuting this case; Mr. Kirsch and
10 Ms. Hazra.

11 Further, there was no indication in these letters
12 that Ms. Baucom or Mr. Albarelle were intending to testify
13 at trial, let alone as experts. In their response to the
14 Government's motion, defendants point to an August 22,
15 2011, letter. That's Defense Exhibit 320, relating to
16 confidential settlement communications. In that letter,
17 defendants claim that, "One of our staffing experts who
18 owns multiple businesses will testify that he bills
19 himself at \$250 an hour when providing services to his
20 businesses."

21 Although the defendants did not identify this
22 staffing expert by name, they now claim that this staffing
23 expert was clearly a reference to Mr. Albarelle as, "He is
24 the only expert that actually owns a staffing company."
25 The defendants' assertions are unconvincing. First,

1 nowhere in Mr. Albarelle's letter does he claim to own a
2 staffing company. Rather, he is currently the principal
3 executive officer of the staffing company.

4 Moreover, the defendants' August 22, 2011, letter
5 does not assert that the "staffing expert" owns a staffing
6 company, rather only that the expert owns "multiple
7 businesses." Thus, the August 22, 2011, letter did not
8 provide the Government with any notice that Mr. Albarelle
9 and Ms. Baucom was expected to provide any expert
10 testimony at trial.

11 The Court reaffirms its finding that expert witness
12 testimony by Mr. Albarelle or Ms. Baucom should be
13 excluded for failure to meet the requirements of both Rule
14 16 of the Criminal Rules of Procedure and Rule 702 of the
15 Federal Rules of Evidence.

16 In addition, in light of this Court's lenient
17 ruling regarding the scope and admissibility of
18 Mr. Thurman's proffered expert testimony, the defendants
19 will not be prejudiced by the exclusion of such testimony
20 due to the fact that such testimony would be duplicative
21 and cumulative to that of Mr. Thurman. All right. That
22 is with respect to that expert.

23 Now I want to address Mr. Vilfer. On October 8,
24 2010, the defendants filed a joint expert disclosure
25 statement, pursuant to which they disclosed a summary of

1 the planned testimony of Donald E. Vilfer JD, CFE, ACE,
2 whom they plan to tender as an expert in the area of
3 computer software and law enforcement investigative
4 techniques, and the use of computer software as it
5 pertains to law enforcement.

6 According to the CV that was tendered, Mr. Vilfer
7 is the president of Califorensics, a firm that "emphasizes
8 fact-finding and computer forensics in support of complex
9 litigation or referral for prosecution." From 1996 to
10 2001, Mr. Vilfer was the Supervisory Special Agent for the
11 White Collar Crime and the Computer Crimes Squad. He has
12 ten additional years of service with the FBI, and one year
13 of service as a prosecutor.

14 In his report, Mr. Vilfer stated that the
15 defendants asked Califorensics to use the forensic images
16 produced in discovery to re-create and analyze CILC,
17 C-I-L-C, as it was when the FBI executed a search warrant
18 and imaged the computers used by the defendants. In
19 conducting that analysis, Mr. Vilfer performed a number of
20 procedures. And his report discusses four findings that
21 he reached after performing these procedures.

22 First, that the CILC software did not appear to be
23 "vaporware," but included a large amount of complex coding
24 that would have required significant development. Second,
25 the CILC software was functional at the time of the search

1 warrant. Third, the software contained many notable
2 features, making it a functional product for the intended
3 consumer. And, fourth, a market exists for software that
4 has CILC's functionality.

5 On November 15, the Government filed a motion to
6 exclude testimony, asserting that most of Mr. Vilfer's
7 opinions were inadmissible as expert opinion under Federal
8 Rule of Evidence 702, and that all of his opinions were
9 irrelevant under Federal Rule of Evidence 402 and 403.

10 Now, during the final trial preparation conference
11 held on September 1, 2011, the Court informed the parties
12 that it would reserve ruling on the relevance of
13 Mr. Vilfer's opinion. In that written order, the Court
14 provided guidance as to what evidence it would find
15 relevant in this case. The Court found that Mr. Vilfer's
16 opinions concerning the viability of defendants' software
17 and the market demand for that software did not appear
18 relevant, as defined under Federal Rule of Evidence 401.

19 However, the Court advised that the Government
20 risked opening the door to such evidence by introducing
21 evidence questioning the viability of defendants'
22 software, the legitimacy of their companies, or the
23 ability to repay the staffing companies.

24 The Court finds that while the Government did not
25 open the door by introducing evidence questioning the

1 viability of the defendants' software, the legitimacy of
2 the defendants' companies and their ability to repay the
3 staffing companies are interlinked with the viability of
4 the software, and such information could be relevant to
5 the jury in its deliberations.

6 As such, the testimony of Mr. Vilfer regarding the
7 viability of the software as it existed on or prior to
8 February 2005 may be relevant to this case, and should be
9 admissible unless the Government prevails on its argument
10 that Mr. Vilfer's testimony is inadmissible under Federal
11 Rule of Evidence 702, Daubert and its progeny.

12 Now, the admission of expert evidence is left to
13 the Court's discretion. However, under Rule 702 and
14 Daubert and its progeny, this Court must act as a
15 gatekeeper to prevent the admission of irrelevant and
16 unreliable expert evidence, and that is a two-step process
17 which requires this Court to determine whether the expert
18 is qualified to render the proffered opinion, and the
19 second step requires the Court to determine whether the
20 opinion, itself, is reliable.

21 And in determining whether the witness is
22 qualified, the Court looks at the witness' knowledge,
23 skill, experience, training or education. And any of
24 those qualifications would be sufficient to support a
25 finding that the expert is qualified.

1 The Court must then determine whether the proffered
2 opinion is relevant and reliable. And I am not going to
3 go through the ins and outs of those tests, because it
4 doesn't really appear to be -- this isn't your typical
5 scientific evidence. And so the test, the non-exclusive
6 factors that the Court should consider, are whether the
7 expert's theory or technique can be and has been tested.
8 Whether the theory or technique has been subjected to peer
9 review and publication. The known or potential rate of
10 error of the technique or theory. And the general
11 acceptance of the theory or technique.

12 That doesn't appear to apply in this particular
13 case, because we're not talking about your typical medical
14 or scientific evidence. And Daubert, additionally,
15 recognizes that these factors are not determinative, and
16 that trial court has broad discretion in determining other
17 factors in determining the reliability.

18 With respect to Mr. Vilfer's opinions, number one,
19 the first opinion is summarized as "The CILC software did
20 not appear to be vaporware, but included a large amount of
21 complex coding that would have required significant
22 development." The Government does not object to this
23 opinion on Rule 702 grounds, instead contending that this
24 opinion should be excluded as irrelevant. For the reasons
25 previously stated, the Court finds that it could be

1 relevant to issue in this case and, therefore, it will be
2 admissible.

3 The second opinion was that the CILC software was
4 functional at the time of the search warrant. It appears
5 to this Court that there are several versions of the CILC
6 software. Califorensics was able to run a stand-alone
7 version of the CILC software called CILC Basic. After
8 testing the CILC Basic program, Mr. Vilfer opines that
9 CILC Basic program was functional.

10 The Government does not challenge the expert
11 foundation for Mr. Vilfer's opinion concerning CILC Basic.
12 However, the Government challenges Mr. Vilfer's opinion to
13 the extent that his opinion extends to other versions of
14 CILC. The basis for the challenge is that Mr. Vilfer was
15 unable to operate any version of CILC other than CILC
16 Basic, because Califorensics "did not have access to a
17 working product key and were not able to continue to test
18 the 2005 client server version of the product."

19 Now, Mr. Vilfer does state that he was able to
20 install and run non-Basic CILC on a test machine
21 because -- that he was not able, rather. He states that
22 he was not able to install and run non-Basic CILC because
23 of his lack to the security key.

24 Now, I guess Mr Banks or Mr. Walker or anyone else,
25 I need to ask you why was it Mr. Vilfer was not provided

1 with the working product key so that he could test?

2 MR. WALKER: Well, Your Honor, Mr. Vilfer was
3 confined to the software that was on the image computers.
4 And on those image computers, there was no product key to
5 be made available to him. And in operation of the
6 company, naturally we would ship licensed keys to anyone
7 who was an interested party. That was done on several
8 computers, than the servers that Mr. Vilfer had access to.
9 So there was no way for us to provide him with a product
10 key.

11 Mr. Vilfer was, however, able to run the servers
12 that constitute the CILC client server application. He
13 got all of those servers up. He verified that they were
14 running, and saw that they were inter-operating. What he
15 did not have, is the front end of that because of the
16 product key limitation that I just mentioned.

17 In our conversations with him and his investigation
18 of the software, he determined that the front end for CILC
19 Basic was the same front end used for the CILC client
20 server, which he was investigating, and he was able to
21 infer that it worked as the CILC Basic front end worked.
22 So the only omission was the license key.

23 THE COURT: All right. And there was no way he
24 could have been provided with any key to test CILC Basic?

25 MR. WALKER: No, Your Honor. We do not have that

1 capability any more, since we moved on to another version
2 of the software.

3 MR. KIRSCH: Your Honor, I just wanted to point out
4 that every computer that was on site that day was imaged.
5 The defendants had access to every one of those images.
6 If there was a product key in existence at that time, and
7 it was on one of those computers, they had access to it.

8 MR. WALKER: Your Honor, in reference to that, the
9 license keys that we produced in-house were time dated.

10 THE COURT: But I am sure you could have produced
11 -- I mean, it is your product. Why couldn't you have
12 produced a security key that would have given him access
13 to that?

14 MR. WALKER: Your Honor, all of our security keys
15 expired after a certain number of days to protect the
16 intellectual property.

17 THE COURT: I understand that. But you are in
18 control of that.

19 MR. WALKER: We could have done that, but the only
20 way to do that would be to alter the product that he was
21 evaluating.

22 THE COURT: By providing access to it?

23 MR. WALKER: No, Your Honor. We would have had to
24 go into the code to say do not implement the time dating
25 of the license key. That is the only way we could have

1 overcome that particular security constraint on the
2 system.

3 THE COURT: All right. Well, because Mr. Vilfer
4 was not able to install non-Basic CILC, any opinion he
5 might have regarding such software would not be based on
6 sufficient facts or data, rather it would be on pure
7 speculation. As such, the Court rules that Mr. Vilfer's
8 testimony will be limited to his testing of the Basic CILC
9 program, and he is precluded from giving any testimony or
10 rendering any opinions as to the functionality of the
11 non-Basic CILC software.

12 MR. WALKER: Your Honor, my request would be that
13 Mr. Vilfer also be able to comment on what he did see and
14 experiment on, which was the bringing up and running of
15 all of the servers associated with that version of the
16 software. That provides valuable information to the jury
17 that there was a system running that had a server
18 component which was substantial, and Mr. Vilfer was able
19 to inspect that, get it up and running, and see that it
20 worked as advertised.

21 The only part that he would not be able to testify
22 to, given your rationale there, is the front end or the
23 GUI component of that client server.

24 THE COURT: Right. He can't testify to anything
25 that he did not test.

1 MR. WALKER: Yes, Your Honor. And that is what I
2 am saying. He did test and get the servers, themselves,
3 running, which is a substantial part of the CILC client
4 server application.

5 THE COURT: All right. Well, I will leave it to
6 the Government to object if you exceed the bounds. But he
7 will not give any opinions as to anything he did not test.

8 MR. WALKER: I understand.

9 THE COURT: Mr. Vilfer's third opinion is
10 summarized as "The software containing many notable
11 features, making it a functional product of the intended
12 consumer." Mr. Vilfer explains why he found the product
13 to be functional, and describes many features of the
14 software.

15 The Court finds that Mr. Vilfer's testimony might
16 be helpful in explaining to the jury how the program
17 worked. However, once the defendants opened that door,
18 they also opened up the Government's ability to inquire on
19 cross-examination as to Mr. Vilfer's opinion, to the
20 effect that the search feature of the CILC Basic program
21 did not search across multiple cases, and thus could limit
22 the program's usefulness to large agencies.

23 I just wanted to point that out, that was a
24 disclaimer in his report as to the functionality opinion.
25 Mr. Vilfer's supposition that "presumably" the non-Basic

1 CILC version had such search capabilities is based purely
2 on conjecture and is not based on any facts or data.
3 Thus, Mr. Vilfer may not opine as to whether non-Basic
4 versions had such search capabilities.

5 MR. WALKER: Your Honor, we did send a response to
6 Mr. Vilfer's original findings and told him that there was
7 a certain piece of functionality that he would have had to
8 enter data into to get a cross case search. He had
9 stopped his evaluation at that time. But I believe he did
10 make an amendment in saying that we provided that
11 information, that he wasn't able to make a verification of
12 that. So, basically, it was basically information about
13 how to use the program that would enable that
14 functionality to work.

15 THE COURT: Well, if he has not opined on it, he is
16 not going to opine on it here today.

17 MR. WALKER: Yes, Your Honor. We would not bring
18 that in. And I would assume that the Government would not
19 be able to bring that in, as well.

20 THE COURT: Well, to the extent that you open the
21 door to argue about the functionality of this product,
22 they are going to be allowed to inquire into that.

23 MR. BANKS: Your Honor, I guess -- I think I would
24 say we are okay with that. We have other Government
25 witnesses that will attest -- or defense witnesses that

1 will be able to attest to the functionality of the
2 software.

3 THE COURT: Who have actually seen it. Exactly.
4 And that is where you would need to do that. But keep in
5 mind, if you open that door, the Government will be
6 allowed to inquire. All right.

7 Further, as to his assessment of the 2010 software
8 of CILC, that has no relevance to this case and, thus,
9 Mr. Vilfer cannot testify concerning his findings with
10 regard to the 2010 version of CILC.

11 The Government asserts also that Mr. Vilfer's third
12 opinion and fourth opinion should be excluded because of
13 the lack of expertise and sufficient facts or data and
14 unreliable principles or methods.

15 The fourth opinion being that there is a market for
16 software that has the functionality of CILC.

17 Mr. Vilfer's CV demonstrates a long history in the
18 field of computer forensics. Nothing in his resume
19 demonstrates that he has any background, however, in
20 software analysis or in market analysis. So although the
21 Court agrees with the Government that there is nothing in
22 Mr. Vilfer's CV that would suggest a background in market
23 analysis, government purchasing, or any other field that
24 would provide him with knowledge about the existence of a
25 commercial market, the Court is going to allow Mr. Vilfer

1 to render an opinion as to both functionality and
2 marketability, and allow the Government to address in its
3 cross-examination the issues it raises regarding lack of
4 expertise, insufficient facts or data and methodology.

5 So I'm being very lenient, actually, in allowing
6 this, because I don't think it is fair, but that is
7 because this isn't your typical scientific opinion. And I
8 think there has to be some leeway granted with respect to
9 that.

10 So do the parties understand the boundaries of my
11 rulings with respect to both of these expert witnesses?

12 MR. WALKER: Yes, we do, Your Honor.

13 MR. BANKS: I would like to make one comment, Your
14 Honor. With regard to the marketability of the software,
15 and I would like to put that on the record, is even what
16 Mr. Vilfer viewed in the CILC Basic product, it's an
17 investigative product. I think we responded in like
18 fashion in our motions, that Mr. Vilfer, being a 20-year
19 veteran of the FBI, understands the investigative process,
20 and can opine on the features that the CILC Basic product
21 covered, as far as investigative process actually goes.

22 And that, right there, would align well with
23 marketability and things along those particular lines, as
24 far as the actual features that an investigator can use
25 out in the field in actually doing their job.

1 THE COURT: I am allowing you to do that, but you
2 have to realize that it is going to be subject to
3 cross-examination by the Government.

4 MR. BANKS: Very well.

5 THE COURT: All right. What witness do we
6 anticipate calling today?

7 MR. WALKER: Your Honor, we have six witnesses we
8 expect to call today.

9 THE COURT: Who are they?

10 MR. WALKER: They are Mike McKinley, Paul Pinkney,
11 Collin Reese, Daniel Shull, Sunny Ackerman -- actually
12 seven. Last, Jim West, and Abhay Natu.

13 THE COURT: Okay. And do you anticipate these
14 witnesses will take the full day.

15 MR. WALKER: Yes, Your Honor, we do.

16 THE COURT: And if they don't, do we have witnesses
17 ready to come in?

18 MR. WALKER: We could line up additional witnesses.

19 THE COURT: All right. Because I am going to
20 expect to go full days. We're not going to have the
21 breaks we have had the last few days.

22 MR. WALKER: Yes, Your Honor.

23 THE COURT: All right. Is there anything further?

24 MR. KIRSCH: No, Your Honor, thank you.

25 THE COURT: All right. Ms. Seeman, do you know if

1 the jury is all here?

2 COURTROOM DEPUTY: I don't, Your Honor.

3 THE COURT: All right. Why don't we go ahead and
4 take a brief recess, and Ms. Seeman will call me when the
5 jury is ready to go.

6 (A break is taken from 9:02 a.m. to 9:11 a.m.)

7 THE COURT: You may be seated.

8 All right. Ms. Seeman, you may bring in the jury.

9 (The following is had in open court, in the hearing
10 and presence of the jury.)

11 THE COURT: You may be seated. Welcome back,
12 ladies and gentlemen. Hope you had a restful weekend.

13 All right. The defense may call their next
14 witness.

15 MR. WALKER: Your Honor, defense calls Mike
16 McKinley.

17 COURTROOM DEPUTY: Your attention, please.

18 **MICHAEL MCKINLEY**

19 having been first duly sworn, testified as follows:

20 COURTROOM DEPUTY: Please be seated.

21 Please state your name, and spell your first and
22 last names for the record.

23 THE WITNESS: My name is Michael McKinley,
24 M-I-C-H-A-E-L M-C-K-I-N-L-E-Y.

25 **DIRECT EXAMINATION**

1 **BY MR. WALKER:**

2 Q. Mr. McKinley, what is your profession?

3 A. My profession is I am a senior software or systems
4 engineer -- computer systems engineer.

5 Q. Can you describe what type of work systems
6 engineering entails?

7 A. Systems engineering, from the aspect that I am
8 working right now, entails administration of servers, IT
9 departments, infrastructures, that sort of thing.

10 Q. And who do you currently work for?

11 A. Currently I'm unemployed.

12 Q. Did you work for a company called Benesight in the
13 past?

14 A. It was called Benesight originally, and then became
15 Fiserv Health.

16 THE COURT: How do you spell that?

17 THE WITNESS: Benesight, B-E-N-E-S-I-G-H-T.

18 Q. (BY MR. WALKER) And subsequently Fiserv bought out
19 or acquired Benesight?

20 A. That's correct.

21 Q. Did you work with anyone at those companies named
22 Shaun Haughton?

23 A. That's correct. He was one of the -- I was the
24 manager of the unit system infrastructure there. He was
25 one of my system administrators.

1 Q. And do you remember the time frame that you worked
2 with Mr. Haughton?

3 A. I believe I started there in September 2000. Shaun
4 was already there at that time. And he worked until, I
5 believe, 2007. So about 6-and-a-half years, somewhere in
6 there.

7 Q. And what was the relationship, work wise, between you
8 two?

9 A. I was manager. He was one of my administrators.

10 Q. And what role was Mr. Haughton in at that time?

11 MS. HAZRA: Objection, Your Honor, relevance.

12 THE COURT: Approach.

13 (A bench conference is had, and the following is
14 had outside the hearing of the jury.)

15 THE COURT: What is the relevance of this witness'
16 testimony?

17 MR. WALKER: Your Honor, he is going to testify he
18 supervised Shaun Haughton at the time, and Shaun Haughton
19 was working with this company and getting his work done.
20 And it's clear -- it's been brought to the attention of
21 the jury that he was working also at IRP Solutions at that
22 time. So we want to highlight the fact that he was
23 working and getting his work done at his full-time job, as
24 well.

25 THE COURT: What relevance is that to the issues in

1 this case?

2 MR. WALKER: That goes to the issue of staffing
3 companies reporting that people were not able to do work
4 for multiple companies.

5 MS. HAZRA: Your Honor, the staffing companies just
6 would have wanted to know if their people had been working
7 for multiple staffing agencies while at IRP. The question
8 of the work performance is not relevant, and the
9 relevance --

10 MR. KIRSCH: Your Honor, I was going to say it is
11 particularly irrelevant whether he was able to complete
12 his work outside of the IRP. The relevant question is
13 whether he was completing the work at IRP. This witness
14 will have no ability to testify about that.

15 MR. WALKER: Your Honor, the staffing company
16 witnesses also said that the clients on either end would
17 have wanted to know and wouldn't have allowed, in some
18 cases, an employee to do that work.

19 THE COURT: Well, the issue is not whether or
20 not -- it is whether the clients that were contracted with
21 were informed of that. Are all your witnesses going to be
22 this type of witness?

23 MR. WALKER: No, Your Honor.

24 THE COURT: I will give you a little leeway here,
25 but I am being real generous with you. I should just

1 strike this testimony because it is not relevant.

2 MR. BANKS: Your Honor, the FBI did interview him
3 and ask him questions about Shaun Haughton.

4 THE COURT: Is Mr. Haughton going to testify?

5 MR. WALKER: We haven't determined that yet, Your
6 Honor.

7 THE COURT: I don't know why his testimony would
8 even be relevant if Mr. Haughton is not going to testify.

9 MR. WALKER: That is something we will determine
10 later.

11 THE COURT: I will give you leeway on this, but I
12 don't expect to have any other witnesses be brought in
13 that are merely going to testify as to whether or not he
14 was doing his work on the other end, because it is
15 irrelevant to this case.

16 MR. WALKER: He is the only one.

17 THE COURT: I will give you some leeway, but I
18 don't want to spend a lot of time, because I don't think
19 his testimony is relevant.

20 (The following is had in the hearing of the jury.)

21 THE COURT: You may proceed.

22 Q. (BY MR. WALKER) I will repeat my question,
23 Mr. McKinley. What relationship -- we'll go back to what
24 was the relationship between yourself and Shaun Haughton?

25 A. I was the manager of the unit system administrators,

1 and Shaun was one of the system administrators.

2 Q. He was one of the system administrators?

3 A. That is correct.

4 Q. Okay. And the system administrator work, was that
5 the work he did the entire time that you supervised him?

6 A. That is right.

7 Q. And Mr. Haughton's work was done satisfactorily
8 according to your tasking?

9 A. Correct.

10 MR. BANKS: Can I have one minute, Your Honor?

11 THE COURT: You may.

12 Q. (BY MR. WALKER) Mr. McKinley, was there a
13 telecommute policy in place at Benesight?

14 A. Toward the end of the Fiserv Health era, we had
15 there -- it had been bought out, I believe, or started
16 transferring around, we were allowed to telecommunicate, I
17 guess, the last couple of years.

18 Q. And that means someone could work remotely?

19 A. That is right.

20 Q. And as far as Mr. Haughton and submitting his times,
21 he submitted his time sheets for his work done on a weekly
22 basis; is that correct?

23 A. I don't believe we even did time sheets there. It
24 has been a long time, so I don't quite recall. I don't
25 recall any time sheets.

1 Q. So was there any type of online system that employees
2 reported their times into?

3 A. I don't recall.

4 Q. So how would you track the comings and goings of the
5 employees, as far as getting their tasks done?

6 A. We were there on certain days, and generally had
7 general work times. We were on call 24 by 7, which is the
8 reason that we were real flexible and we had flex time.

9 Q. And so you had flex times, meaning -- can you relate
10 how that impacted 8:00 to 5:00 or 8:00 to 6:00 work when
11 you had flex time?

12 A. Didn't really have any set hours, as long as we got
13 the job done. And that's pretty much it. The systems are
14 pretty -- redundant, that sort of thing. They're also set
15 up so that they would let us know -- they would notify us
16 if there were problems and things like that. So it didn't
17 really matter where you were. If you got a call, you took
18 care of it.

19 Q. And Mr. Haughton was able to get his work done to
20 your satisfaction?

21 A. Absolutely.

22 MR. WALKER: Could I have one minute, Your Honor?

23 THE COURT: You may.

24 Q. (BY MR. WALKER) Mr. McKinley, were you aware of any
25 other work Shaun Haughton did on the side?

1 A. Well, Shaun, from the time that I met him --

2 MS. HAZRA: Objection, Your Honor, hearsay.

3 THE COURT: Sustained.

4 Q. (BY MR. WALKER) Mr. McKinley, would it have mattered
5 to you if Mr. Haughton had another job or other work on
6 the side?

7 MS. HAZRA: Objection, Your Honor, relevance.

8 THE COURT: Overruled.

9 THE WITNESS: Not really. I had had other
10 employees, as well, that had like military jobs, as well,
11 and would work for us. Shaun seemed to be very reasonable
12 to work with. And he was responsible. So I didn't really
13 care, as long as it didn't interfere with his work and
14 when we needed him on call.

15 MR. WALKER: No further questions for this witness,
16 Your Honor.

17 THE COURT: All right. Cross?

18 MS. HAZRA: Yes, Your Honor.

19 **CROSS-EXAMINATION**

20 **BY MS. HAZRA:**

21 Q. Good morning, Mr. McKinley?

22 A. Good morning.

23 Q. Mr. McKinley, you didn't supervise Shaun Haughton
24 anywhere other than Fiserv or Benesight; is that correct?

25 A. That's correct.

1 MS. HAZRA: No further questions, Your Honor.

2 THE COURT: May this witness be excused?

3 MR. WALKER: Sorry, Your Honor?

4 THE COURT: May this witness be excused?

5 MR. WALKER: Yes, he may.

6 THE COURT: Thank you Mr. McKinley, you are

7 excused.

8 Defendants may call their next witness.

9 MR. WALKER: Your Honor, the defense calls Paul
10 Pinkney.

11 COURTROOM DEPUTY: Your attention, please.

12 **PAUL PINKNEY**

13 having been first duly sworn, testified as follows:

14 COURTROOM DEPUTY: Please be seated.

15 Please state your name, and spell your first and
16 last names for the record.

17 THE WITNESS: My name is Paul Pinkney. First name
18 P-A-U-L. Last name P-I-N-K-N-E-Y.

19 **DIRECT EXAMINATION**

20 **BY MR. WALKER:**

21 Q. Mr. Pinkney, what is your occupation?

22 A. I am what is called a user experience designer.

23 Q. And could you explain what type of work that entails
24 for the record?

25 A. User experience design has to do with designing

1 software so that it is very usable for people. So,
2 basically, when you are looking at a screen and using a
3 piece of software, somebody like me designed it. That is
4 the short version.

5 Q. Okay. So in doing that user experience design, do
6 you also write software code?

7 A. Yes. I have done software engineering in the past,
8 as well.

9 Q. And what is your educational experience or
10 background?

11 A. I have a BS and MS in computer science.

12 Q. And did you work for a company called IRP Solutions
13 in the past?

14 A. Yes, I did.

15 Q. And what work did you do while you were at IRP
16 Solutions?

17 A. I worked on a criminal investigation web based
18 application called CILC. And the work I did was the front
19 end web design.

20 Q. And how did you come to be introduced to IRP
21 Solutions?

22 A. I have been racking my brain trying to remember if
23 the consulting agency called or you called. I don't
24 honestly remember. I remember speaking to you at some
25 point a couple of times. And then somewhere along the way

1 I got introduced to Idea Integrations and went through
2 them. And wound up talking with them downtown, and then
3 coming to work with you guys down in Colorado Springs.

4 Q. And did you work for IRP Solutions or did you work
5 for the staffing company?

6 A. I worked for the staffing company.

7 Q. Did you know me or had you -- did you have any
8 knowledge of me -- did we have a relationship before you
9 started working at IRP Solutions?

10 A. No.

11 Q. Did you have a relationship with any of the
12 co-defendants; Clinton Stewart, Demetrius Harper, David
13 Banks, David Zirpolo or Ken Barnes before you started
14 working at IRP Solutions?

15 A. No.

16 Q. You mentioned that you began your work at IRP
17 Solutions through a staffing company?

18 A. Uh-huh.

19 Q. Did you work as a W2 employee to the staffing
20 company?

21 A. No, I believe I was a 1099.

22 Q. You were a 1099?

23 A. Yeah. I had my own company, and I just 1099'd
24 through them, if I remember correctly.

25 Q. Can you explain what 1099 means?

1 A. That basically means that I worked basically for my
2 company, which was Tiger Interactive Software Solutions,
3 but I went through the staffing firm for -- and they just
4 paid me, without taking taxes out or anything like that.
5 I am responsible for all of the taxes and that sort of
6 thing.

7 Q. And in that engagement, how did you report your time
8 that you worked at IRP Solutions?

9 A. If memory serves, I believe while with Idea
10 Integrations, I created basically a time sheet that I
11 think either you or David signed off on, then I faxed that
12 to Idea Integrations if I remember correctly.

13 Q. And so you were responsible for personally filling in
14 some time report and then having that approved?

15 A. Yes.

16 Q. Did you report all hours worked?

17 A. Yes.

18 Q. Did you accurately report all of your time into the
19 time system?

20 A. Yes.

21 Q. At any time were you asked by anyone at IRP Solutions
22 to change or modify those hours you reported?

23 A. There was a time when I was working for Hudson, I
24 think there were maybe one or two time sheets where
25 somebody said, no, I went 15 minutes over or something

1 like that, and we had to back it up. Then I had to
2 resubmit.

3 Q. And for doing your time report, was that a
4 requirement of the staffing company?

5 A. I believe so, yes.

6 Q. And you were required to fill out a time sheet on a
7 regular basis by the time -- by the staffing company in
8 order for you to get paid; is that right?

9 A. Yes.

10 Q. And is that the typical relationship or would you
11 have reported time when you did up the contract work?

12 A. Yes.

13 Q. Now let's go back to the work that you did. You
14 worked on a computer system. You said that you did
15 usability coding and design. Can you classify that as
16 what part of the system that would be for a user?

17 Let me clarify a little bit. Sorry. Trying to
18 help the jury here. In a large computer system, what part
19 of the work did yours constitute? Was it what the people
20 at the desk would see, or was it something that was in the
21 back end, so to speak?

22 A. Yeah, it was all front end work. It was all --
23 everything I designed was stuff that the user would
24 actually see when they are using the software. Does that
25 answer your question?

1 Q. Yes. And that work that you did for the front end,
2 did you work with others who would tie it together and
3 connect it to what is called a back end?

4 A. Yes. There were other developers there who would
5 take basically the HTML and JavaScript and CSS that I put
6 together, and I would give it to them, and then they would
7 take and run with it and turn it into a full length
8 system.

9 Q. In doing that work, how were you informed of what you
10 were to design and code?

11 A. Mostly working quite a bit with David, we would
12 iterate -- for example, I remember just a couple times
13 working on conference calls with the NYPD, trying to
14 understand how they do business, what they do, what tasks
15 they perform on a regular basis to help, you know, refine
16 the usability of the system. And then David and I would
17 agree on how we go about designing that, and I would
18 iterate also with David on that.

19 Q. And so in doing those meetings, what type of things
20 would you be looking -- or would be conveyed to you from
21 the NYPD?

22 A. Just sort of scenarios. You know, what they do day
23 to day. When they are -- if they're investigating a
24 criminal, you know, what sort of activities they perform
25 for the most part. And, you know, some of the politics

1 surrounding that. Like found out, you know, law
2 enforcement tends to be very territorial, for example. So
3 we had to have a lot of security around cases and those
4 sorts of things.

5 So just understanding how they do their day-to-day
6 business so we can make this tailored to how they do
7 things.

8 Q. Following that meeting, what would your, if you can
9 get a little more concrete, what task would you do in
10 response to those meetings to gain that information?

11 A. I would go back and either create or, you know,
12 modify HTML and CSS. You know, web technologies, and
13 refine the screen so that they are more tailored. Is that
14 what you are looking for?

15 Q. Yes. And in the course of doing that tailoring and
16 additional computer coding, what would you do if you had
17 questions about what you were to code?

18 A. Most of the time I would go back to David, and either
19 he would know the answer or he would, you know, get the
20 answer for me or something like that.

21 Q. And do you recall if you attended meetings with the
22 NYPD on one occasion or more than one occasion?

23 A. It was either once or twice, I think, at most.

24 Q. And on occasions where you were directed to do other
25 work for the NYPD, were there written instructions or

1 requirements for you to follow?

2 A. Nothing that comes to mind.

3 Q. So how were you informed of follow on work, was that
4 verbal instructions?

5 A. What do you mean by "follow on"?

6 Q. Basically, requirements. Requirements for work that
7 you need to do in response to NYPD instructions?

8 A. Again, as I recall, I just remember working with
9 David on, you know, these are the things that we want to
10 make sure we accommodate in the product, and that sort of
11 thing, and go from there.

12 Q. So David Banks gave you instruction on what to do?

13 A. Most of the time. And I worked with you, as well.
14 Usually it was David.

15 MR. WALKER: May I have one minute, Your Honor?

16 THE COURT: You may.

17 Q. (BY MR. WALKER) Mr. Pinkney, if you can recall, can
18 you describe the security that was employed at IRP
19 Solutions, security measures?

20 A. Yeah. Each day, basically I went into the office,
21 and there was an open kind of foyer in the front, through,
22 I believe, two security guards that had to search through
23 my bag and that sort of thing. I remember I had to give
24 up my camera phone because cameras weren't allowed inside
25 the office, so I had to give up my phone.

1 But they would make sure no software entered the
2 facility of any kind. If I had any designs I had from
3 home, I had to have them on a CD, for example, and then
4 the project manager would take it and approve it and let
5 me bring it in.

6 Like I said no cameras. I remember the computers
7 had USB ports disabled so that no software could get into
8 -- onto the systems either inadvertently or illicitly.
9 Basically, I seem to recall at lunch having to check out
10 and check in with the security guards. And I think they
11 even had wands and that sort of thing, if I remember
12 correctly.

13 Q. Why were those security measures in place?

14 MS. HAZRA: Objection, Your Honor, lack of
15 foundation.

16 THE COURT: If he knows. Overruled.

17 THE WITNESS: My understanding was that because
18 this is criminal investigation software that could
19 eventually be used by some pretty formidable agencies and
20 so forth, that they didn't want any back ends to the
21 software or just anything that wasn't -- you want a really
22 strict process for what actually ends up in the software,
23 which made a lot of sense to me.

24 Q. (BY MR. WALKER) And following the cycle of meetings
25 with the NYPD doing additional code, were you informed of

1 the results of any meetings?

2 A. As far as like reviewing the designs?

3 Q. No, let me clarify. Were you given the results of
4 any trips that the executives made to demo the code you
5 were working on?

6 MS. HAZRA: Objection, Your Honor, hearsay.

7 THE COURT: Sustained.

8 MR. WALKER: No further questions from me, Your
9 Honor.

10 THE COURT: All right. Anybody else?

11 MR. BANKS: I have a few, Your Honor.

12 **DIRECT EXAMINATION**

13 **BY MR. BANKS:**

14 Q. Mr. Pinkney, how did you track your software
15 development activities within IRP Solutions?

16 A. You mean the specific things I did?

17 Q. Well, as far as track, did you have any sort of
18 method that the company had you do or retain the work that
19 you actually did; any process?

20 A. I believe there was, but it is eluding me. I believe
21 I had to check software in using some sort of tool. I
22 honestly can't remember.

23 Q. Do you recall any software development notebooks that
24 you had to maintain?

25 A. I can't remember. I'm sorry.

1 Q. Okay. Who -- do you recall who you communicated with
2 with regards to some of the NYPD meetings?

3 A. As far as the NYPD personnel, themselves?

4 Q. Yes.

5 A. No, I don't remember names.

6 Q. Now, the software you were working on, would you say
7 that was for a small agency or a large agency?

8 A. I would say it could be used for many different kinds
9 of agencies, honestly. And I think with, given another
10 year or two maturity, I think it could have been used for
11 very large agencies, yes.

12 MR. BANKS: Okay. I don't have anything further --
13 may I have one moment, Your Honor?

14 THE COURT: You may.

15 THE WITNESS: I think I remember something about
16 the notebooks, by the way. I seem to recall -- my memory
17 is kind of vague on this.

18 THE COURT: There is no question out there.

19 THE WITNESS: Okay.

20 Q. (BY MR. BANKS) Could you describe any sort of
21 software notebooks that you may have maintained during
22 that period you worked at IRP.

23 A. Right. Because of security, if I remember this
24 correctly, anything even written couldn't leave the
25 office. So anything, in terms of designs or notes we took

1 down, had to be put into notebooks and left in the office.

2 Q. And for the purpose -- would you say that was for the
3 purpose of maintaining or protecting intellectual
4 property?

5 A. Yes.

6 MR. BANKS: I have nothing further, Your Honor.

7 THE COURT: Anyone else?

8 All right. Cross-examination.

9 MS. HAZRA: Thank you, Your Honor.

10 **CROSS-EXAMINATION**

11 **BY MS. HAZRA:**

12 Q. Good morning, Mr. Pinkney.

13 A. Good morning.

14 Q. I just want to clarify a few points. You stated the
15 software needed another year for maturity. Did you work
16 at IRP in 2004?

17 A. I am sorry.

18 Q. Did you work at IRP in 2004?

19 A. Yes.

20 Q. And you said you worked for Hudson?

21 A. I worked for actually two different contract
22 companies. One was Idea Integration, and the other one
23 was Hudson.

24 Q. You didn't work for those two at the same time you
25 worked at IRP?

1 A. No. No.

2 Q. And you didn't bill more than 24 hours a day at the
3 time you worked for Idea Integrations, did you?

4 A. No.

5 Q. All right. Mr. Pinkney, given the security measures
6 you have just described, you couldn't take work home with
7 you, could you?

8 A. Correct.

9 MS. HAZRA: Can I have one moment, Your Honor?

10 THE COURT: You may.

11 MS. HAZRA: I have nothing further.

12 **REDIRECT EXAMINATION**

13 **BY MR. BANKS:**

14 Q. Mr. Pinkney, do you recall the policy for actually
15 taking work home?

16 A. The exact policy? Couldn't physically take anything
17 home. I often -- you know, when I had a design kind of
18 going in my head, I often would work on it in my head, but
19 that was about it. Occasionally, I had -- like I think
20 like once I brought in, like I said, a CD because I had a
21 design I wanted to discuss with you guys. But that was
22 about it.

23 Q. So you were not authorized to take work home, you
24 personally; correct?

25 A. No, not as far as I recall.

1 MR. BANKS: Okay. Thank you very much.

2 THE COURT: All right. May this witness be
3 excused?

4 MR. BANKS: Yes, Your Honor.

5 THE COURT: All right. Thank you very much
6 Mr. Pinkney, you are excused:

7 Defendants may call their next witness.

8 MR. WALKER: Your Honor, defense calls Sunny
9 Ackerman.

10 Your Honor, that witness is not here at this time.

11 THE COURT: Call your next witness.

12 MR. WALKER: Your Honor, we would call Collin
13 Reese.

14 COURTROOM DEPUTY: Your attention, please.

15 **SUNNY ACKERMAN**

16 having been first duly sworn, testified as follows:

17 COURTROOM DEPUTY: Please be seated.

18 Please state your name, and spell your first and
19 last names for the record.

20 THE WITNESS: Sunny Ackerman S-U-N-N-Y
21 A-C-K-E-R-M-A-N.

22 THE COURT: Mr Banks, you may proceed.

23 MR. BANKS: Thank you, Your Honor.

24 **DIRECT EXAMINATION**

25 **BY MR. BANKS:**

1 Q. Hello, Ms. Ackerman.

2 A. Good morning.

3 Q. Can you tell us a little bit about your background
4 and what you do for a living.

5 A. Sure. I am vice president/general manager for a
6 company called Manpower. And I manage the Mountain
7 Central Division for the organization, which has about 92
8 branches in the U.S.

9 Q. And prior to that, did you -- where else did you work
10 prior to your work with Manpower?

11 A. Prior to Manpower, a company named Westaff, and a
12 company called Creative Assets, as well.

13 Q. Okay. Do you recall some interactions you had with
14 IRP Solutions in 2004 through a Theresa?

15 A. I do.

16 Q. What do you recall about that interaction with IRP?

17 A. I recall --

18 MS. HAZRA: Objection, Your Honor, relevance.

19 THE COURT: It is overbroad. Sustained.

20 MR. BANKS: Okay.

21 Q. (BY MR. BANKS) Did you have an opportunity to meet
22 with representatives from IRP?

23 A. Yes.

24 Q. And do you recall what that was regarding?

25 A. I recall it was about probably temporary staffing of

1 some nature.

2 Q. Okay. Did you provide -- your office provide IRP
3 Solutions with a credit application?

4 A. I don't recall if we did, but that would have been a
5 standard process.

6 MR. BANKS: Can I have a moment, Your Honor?

7 THE COURT: You may.

8 Q. (BY MR. BANKS) Ms. Ackerman, do you remember a
9 November 24, 2003 e-mail that you sent to David Banks of
10 IRP Solutions?

11 A. No.

12 MR. BANKS: Your Honor, may I refresh her
13 recollection of that e-mail?

14 THE COURT: Have it marked by Ms. Seeman.

15 MS. HAZRA: Your Honor, I don't think I have seen
16 it.

17 THE COURT: I am sorry, Ms. Hazra.

18 What number are we marking this?

19 COURTROOM DEPUTY: D323.

20 THE COURT: 324?

21 COURTROOM DEPUTY: Shouldn't this be part --

22 THE COURT: It is only for identification. We are
23 only marking it for identification, I need to make sure we
24 have a full record.

25 COURTROOM DEPUTY: We can do 401.

1 THE COURT: All right. So D401?

2 COURTROOM DEPUTY: Yes.

3 THE COURT: All right. Mr Banks, you may proceed.

4 Q. (BY MR. BANKS) Ms. Ackerman, do you recall ever
5 engaging in business with IRP after receiving that credit
6 application?

7 A. No.

8 Q. And what reason would you have to not engage with IRP
9 after the credit application was filled out?

10 MS. HAZRA: Objection, Your Honor, relevance.

11 THE COURT: It's close, but I am going to allow it.
12 Overruled.

13 THE WITNESS: I would say if we received a credit
14 application that didn't have proper bank or trade
15 information for us to validate, we would not be able to
16 engage in the partnership.

17 Q. (BY MR. BANKS) Was that standard operating procedure
18 for Westaff to review a credit application?

19 A. Yes.

20 MS. HAZRA: Objection, Your Honor, relevance.

21 THE COURT: Overruled.

22 Q. (BY MR. BANKS) And did -- was that Westaff's -- not
23 only with IRP, but -- I will withdraw that, Your Honor.

24 Now, do you recall IRP Solutions looking for a
25 staffing partnership with Westaff?

1 A. Yes.

2 Q. And any sort of staffing partnership -- let me
3 rephrase that. Let me ask a question.

4 So would you say IRP was denied credit with
5 Westaff?

6 MS. HAZRA: Objection, Your Honor, leading.

7 THE COURT: Sustained.

8 Q. (BY MR. BANKS) Why was IRP not permitted to do
9 business with Westaff?

10 A. Again, the only thing I could assume was because
11 there was not a valid credit application.

12 Q. Okay.

13 MR. BANKS: Can I have one moment, Your Honor?

14 THE COURT: You may.

15 Q. (BY MR. BANKS) Ms. Ackerman, do you recall receiving
16 a staffing prospectus from IRP Solutions?

17 A. No.

18 Q. And do you have any recollection that IRP Solutions
19 told you that we had a contract with a law enforcement
20 agency?

21 MS. HAZRA: Objection, Your Honor, hearsay.

22 THE COURT: Overruled.

23 THE WITNESS: No.

24 MR. BANKS: I have nothing further, Your Honor.

25 THE COURT: Anybody else?

1 Cross?

2 MS. HAZRA: Yes, Your Honor.

3 **CROSS-EXAMINATION**

4 **BY MS. HAZRA:**

5 Q. Good morning, Ms. Ackerman.

6 A. Good morning.

7 Q. Were either of those insufficient references that IRP
8 provided to you companies known as SWV or DKH Enterprises?

9 A. I don't recall.

10 MS. HAZRA: I have no further questions, Your
11 Honor.

12 THE COURT: All right. May this witness be
13 excused?

14 MR. BANKS: Yes, Your Honor.

15 THE COURT: Thank you very much, Ms. Ackerman, you
16 are excused:

17 Defense may call its next witness.

18 MR. WALKER: Your Honor, the defense -- can we
19 approach?

20 THE COURT: You may.

21 (A bench conference is had, and the following is
22 had outside the hearing of the jury.)

23 MR. WALKER: Our next witness is scheduled at
24 10:30. We anticipated -- it's going quicker.

25 THE COURT: That is unacceptable. I told you to

1 have witnesses here. We are not going to recess again
2 until 10:30. That is 40 minutes away. I told you to be
3 prepared. They need to be here. Your witnesses are not
4 taking long. We are going to go. The eight you named,
5 you still have time. So you better get them here. So
6 call your next witness.

7 MR. WALKER: Yes, Your Honor.

8 (The following is had in the hearing of the jury.)

9 MR. WALKER: Your Honor, we would like to check to
10 see if Mr. Reese is in the witness room.

11 THE COURT: You may.

12 MR. WALKER: Your Honor, defense calls Ken Barnes.

13 COURTROOM DEPUTY: Your attention, please.

14 **KENDRICK BARNES**

15 having been first duly sworn, testified as follows:

16 COURTROOM DEPUTY: Please be seated.

17 Please state your name, and spell your first and
18 last names for the record.

19 THE WITNESS: Kendrick Barnes, K-E-N-D-R-I-C-K
20 B-A-R-N-E-S.

21 **DIRECT EXAMINATION**

22 **BY MR. WALKER:**

23 Q. Mr. Barnes, please state your occupation.

24 A. Software engineer, software architect. I do database
25 administration also.

1 Q. And how long have you been working as a software
2 engineer, architect and database administration?

3 A. I would say roughly probably 15-years plus.

4 Q. And did you work previously at a company called
5 Leading Team?

6 A. Yes, I did.

7 Q. And what was your role there, and what work did you
8 do?

9 A. It was a few roles. At Leading Team, there was not
10 that many people assigned toward infrastructure. Most of
11 the work was -- a lot of the work was developing headings,
12 left a lot of gap when it came to supporting anything from
13 desktop to servers to the website, code the website, to
14 the mail service. So there was a lot of things that I
15 basically filled in the gaps. So a lot of the technology
16 roles that were kind of, you know, left for support, I
17 kind of filled those gaps in and did those roles.

18 Q. So would you say your primary roles were for support
19 and infrastructure maintenance?

20 A. Yeah, I would say so.

21 Q. And in doing that work, did you work -- did you work
22 as an employee of Leading Team?

23 A. No, I always worked as a contractor, or sometimes I
24 did like just help out and do work volunteer stuff.

25 Q. So there were times you worked as a volunteer at

1 Leading Team?

2 A. Correct.

3 Q. Working as a volunteer meaning you weren't paid?

4 A. Correct. If I had -- for instance, sometimes I was
5 working at another job, and once I was filling if they
6 needed help. I would also do some help at Leading Team,
7 also.

8 Q. Did you do work for Leading Team part time when you
9 were doing your volunteer work?

10 A. I don't know if you call it "part time," because at
11 that time I wasn't tracking, like, the hours I was doing.
12 I just know if they needed something completed, most of
13 the times -- for instance, a lot of the systems would
14 e-mail and alert if something was wrong. And depending on
15 when I got the alert, or whatever, I would handle that
16 issue. Pretty much I would do the work as if I was full
17 time. But when I was volunteering, it was when it needed
18 to be done, I would do that work.

19 Q. And why were you volunteering at Leading Team?

20 A. Well, at the time, I didn't need a job. I had a
21 job -- a day job, what I was doing. So, to me it was
22 like, no problem. Just if I had some free time I would
23 help out and do it.

24 Q. And did you ever do any work at Leading Team when you
25 didn't have a full-time job -- another full-time job?

1 A. Yes, I did.

2 Q. And at any time when you worked at Leading Team full
3 time, was there ever a time where you were volunteering on
4 a full-time basis?

5 A. Say it one more time.

6 Q. Was there ever a time you were volunteering on a
7 full-time basis at Leading Team?

8 A. I would say so. It depends how you look at it. It
9 is basically if there was a need I would be available to
10 do that work.

11 Q. So you would be available on an 8:00 to 5:00 schedule
12 as a volunteer, as well?

13 A. Yeah. 8:00 to 5:00, even after that. If
14 something -- for instance, if disk space filled up when we
15 were doing backup, if that happened at 11 o'clock at
16 night, I was there. If it happened 8:00 to 5:00, if it
17 happened during the daytime or evening, I was available.

18 Certain jobs you couldn't do during an 8:00 to
19 5:00, you know, time frame, because you would be
20 disrupting the people working. So certain jobs you could
21 do 8:00 to 5:00 if you could do it at that time.

22 Sometimes you had to do it after hours because you didn't
23 want to basically disrupt, you know, the progress of what
24 was going on for that day.

25 Q. And was it necessary for you to go into the office

1 each time you needed to do work at Leading Team?

2 A. Not all of the time. If there was something I
3 physically had to do -- for instance, if, just say, a tape
4 drive needed to be changed, we didn't have like an
5 automated system. I would actually have to go in and
6 actually physical remove tape, put the new one in and
7 catalog. You know, the whole tape work, you had to do a
8 recovery.

9 Some work you could do remote. If it's, you know,
10 reconfigure a system, making sure -- like I say, if you
11 have an alert, and some job stopped, you could do that
12 remote. Restart -- correct the error and remotely restart
13 the job. So there are certain jobs you had to come in,
14 and certain jobs you could do it remote.

15 Q. And were you authorized to do some of your work
16 remotely, then?

17 A. Yeah. Most -- I was authorized to do work, because
18 you really had to be available to do that, depending on,
19 for instance, if you were backing up, like, source code or
20 something like that, well, I was like one of the people
21 that came in and was authorized to deal with the source
22 code. And that was something that was pretty sensitive.

23 So there were a few people -- actually, I think
24 only two, if I remember, that were able to come in and
25 really do any sort of backup of any source servers. Or if

1 there was a build, that build went overnight, that was an
2 issue that I was able to come and try to address those
3 issues after hours.

4 Q. At some point did you work for a company called IRP
5 Solutions?

6 A. Yes, I did.

7 Q. Did you work there as a W2 employee or as a
8 contractor?

9 A. I was a contractor at IRP Solutions, also.

10 Q. And what type of work did you do at IRP Solutions?

11 A. Very similar. Since a lot of the work was support, I
12 did a lot of development support. For instance, once
13 developers need access to a system -- for instance, say
14 they were doing software development, and most of them had
15 their own, like we would call a database scheme, which
16 basically they had all the tables that they would need to
17 do their development on.

18 And it basically was the full actual database
19 scheme for each one of the developers. So they each had
20 their small area where they could do work without stepping
21 on each other. So my job was, one, to make sure when they
22 were doing development with the database, that they were
23 able to have data each day.

24 If they needed to refresh data, I could get that
25 done for them. If they needed, you know, another scheme

1 built so they could do testing on it, I did a lot of that
2 for them. And, also the systems that those database set
3 on, a lot of those systems I would help, you know,
4 maintain. For instance, if you had disk space issues,
5 memory issues, users account, I would do that there.

6 I also was responsible for the corporate website.

7 The website first was a static HTML. And we basically
8 wanted to make that system dynamic, so that, for instance,
9 when law enforcement agents go to the website, they can
10 actually either enter their information and they could be
11 scheduled for a web demo, or they could be scheduled for a
12 sales call, or they could be scheduled to get IRP
13 Solutions to contact them.

14 So we had to automate that system, which had its
15 own database. So, basically, I was responsible for
16 building the code so that there was a way to handle all of
17 that system, automated wise. And also we were trying to
18 streamline the process of changes to the website, because
19 they changed quite often when we went to update new
20 features or content on the site.

21 Instead of having me every time take out the page
22 and then type it in, we built a competent management
23 system so that if someone in the sales team wants to
24 change a certain area of the website, they could basically
25 log in, enter the changes, and have that update the site

1 without having to do any actual HTML code.

2 Q. In addition to the roles you just talked about, did
3 you ever have to respond to IT troubles reported by other
4 employees -- other employees?

5 A. All of the time. Since there is -- like, a lot of
6 the systems support was mostly -- most of the focus of the
7 work was development, it left very few of us to handle
8 support. So, for instance, if -- everything from we've
9 got a virus, which I remember the big one at the time was
10 Ninda (phonetic), which was saved through an e-mail, and
11 everybody on the contact list. So if you had viruses, you
12 could have slow running PCs. If they needed software
13 installed that they didn't have on their system, that was
14 one of the purviews of what I do.

15 That is part of system administration, if that you
16 are also administering the desktops that are connecting to
17 the main -- the main, all of that good stuff. Any problem
18 they had, basically that was me. Also they did, every
19 once in awhile, if one of the clients that had, like, at
20 the time CILC Basic software, if they had an issue with
21 install, if they had issue with the license or whatnot, I
22 fielded those calls to help them understand how to get the
23 software installed. If they were running into any issues
24 that were like, you know, PC specific, if they were having
25 issues on installs, so quite a bit.

1 Q. And so you just mentioned work with CILC Basic
2 installs. Who would you be working with to troubleshoot
3 those problems and solve those problems?

4 A. Usually, whoever the customer was. So usually, when
5 they got sent their license, if they happened to call in
6 and have problems installing the license, I was working
7 with that customer to fulfill the license issue. And if
8 that issue was just anything else, if they had issue with
9 CILC, as -- you know when they were trying to use it, if
10 there was an issue, basically I would field that call.

11 Q. So would that work be called typically, customer
12 support?

13 A. Yeah. That's pretty much customer support.

14 Q. And you mentioned awhile ago that in some cases you
15 would do work -- you would have work to do that may
16 potentially impact others in the company. When would that
17 work be done?

18 A. Most of that work had to be done after hours.
19 Whenever you do backups, whenever you are doing --
20 especially backing up the code. Because what would happen
21 is you would have multiple developers working on the code
22 base. And they would all check the coding. And what they
23 would do is you would also do a general nightly build to
24 make sure that all of the code that you checked in for
25 that evening didn't break something else that someone else

1 was working on.

2 So you would have to wait until everyone was
3 checked in, you have a stable non-volatile system, where
4 no one is still checking in, that is usually during the
5 evening, and then you basically run that build of that.
6 You let that build run, and make sure that everything ran
7 without any errors. If there was an error, either I would
8 report that error, or if there was something I could fix,
9 I would fix it.

10 Then, once the build is completed, then we would do
11 a general backup of the total system, of all of the code
12 and the system, and make sure that was pushed off the
13 tape. And then there was also backups. We would
14 backup -- like, the main test system had pretty much -- we
15 tried to keep that data pristine, so that when they were
16 running tests, there were -- the data was predictable.

17 Because if they are doing development, they are
18 kind of trying out stuff. But when you went to test, you
19 wanted to make sure that everything is stable and ready to
20 go. So that system needs to be backed up every night, so
21 you make sure that each morning, if something happened,
22 they would have, you know, clean, pristine data.

23 And sometimes you would do a refresh, if developers
24 were actually working on their systems and, basically, as
25 they are testing, they dirty their data up quite a bit.

1 During the evenings when they are not there, they
2 requested a refresh. We would make sure we would pretty
3 much rebuild their scheme so that they have fresh clean
4 data. And usually we would pull that from the test
5 environment, push it over to development environment, so
6 that anything that they did kind of mess up, it would be
7 pretty much brand new each day.

8 So really what you are trying to do is get all your
9 backups done, make sure everything, you know, kind of
10 worked that evening, and then make sure that tomorrow
11 everyone had pretty much a clean, stable system to start
12 work with, without having to, you know, impact their day
13 when they started.

14 Q. And that work that you just described was necessarily
15 done at night after hours?

16 A. Yeah. That is done after hours.

17 Q. And you also mentioned that you worked with nightly
18 builds and the code bases. What product did you work on?

19 A. For the code bases?

20 Q. Yes.

21 A. Basically, we had one, what they called Configuration
22 Management System, and it is basically called CBS. That
23 the one I use, CBS. And, really, all of the code bases
24 went into -- every code base; CILC Basic, Precinct. And
25 there was CILC Federal, and then they had to be branched

1 off into CILC NYPD. They all went to one system, and they
2 all basically got built separately.

3 Q. And then, again, going back to your work with
4 customers and helping out on support, how did you -- what
5 equipped you to be able to do that work in customer
6 support?

7 A. Well, prior to working at IRP, I had worked support
8 before -- software support for Oracle Corporation. And,
9 basically, I was the dba support. So, basically, if an
10 Oracle database administrator ran into a problem with the
11 Oracle product, for instance, if it crashed, needed
12 patching, they just didn't know what they were doing,
13 whatever, they would call Oracle support. So I worked
14 there for about almost 2 years on the support.

15 So what you learn is good customer service and how
16 to basically, you know, get issues from clients and convey
17 the answers to them so that they can understand how to do
18 that. So a lot of times, when you are doing software
19 support, you can't come across as, you know --

20 MR. KIRSCH: Your Honor, I am going to object to
21 the narrative at this point.

22 THE COURT: Sustained.

23 THE WITNESS: Yeah, I worked at Oracle, exactly.

24 Q. (BY MR. BANKS) And in the other roles that you
25 worked while you were at Leading Team and IRP Solutions,

1 did you have previous experience in those roles?

2 A. Say that one more time.

3 Q. In the other work that you did at IRP Solutions and
4 Leading Team, did you have previous experience in that
5 technical work?

6 A. Yes, I did.

7 Q. Where had you worked other than Oracle before Leading
8 Team and IRP Solutions?

9 A. I had worked at ICG. I remember I worked at -- I
10 can't remember. I know I worked at Compaq. I want to say
11 AT&T Broadband. Various others. I can't remember right
12 now.

13 Q. All of those positions were for technical positions?

14 A. They were all technical.

15 Q. In your work, you mentioned CILC, you mentioned CILC
16 Basic, and you mentioned CILC Precinct. Could you
17 describe the nature of CILC Precinct?

18 A. CILC Precinct was basically a multi-user version of
19 CILC Basic, to put it simply. It could handle -- CILC
20 Basic is really for one desktop. CILC Precinct was for
21 multiple users, basically working on the same system.

22 Q. And the capability of CILC Precinct, were those
23 suitable for a large agency such as DHS?

24 A. Because I never really talked to DHS, I would say it
25 could handle --

1 MR. KIRSCH: Objection, lack of foundation.

2 THE COURT: Sustained.

3 Q. (BY MR. WALKER) And you mentioned that CILC Precinct
4 was a multi-user version of CILC Basic?

5 A. Correct.

6 Q. What capability did that give a larger agency than
7 CILC Basic?

8 A. Well, CILC Basic, basically when a person is working
9 on their case, they pretty much were in a silo, basically
10 just knew what they were doing. CILC Precinct allowed,
11 since you have multiple users, that they could basically,
12 if they needed to, access other cases, and could --
13 because you are all on the same database, you could share
14 data. So it allowed you to be more collaborative.

15 Q. Was CILC Precinct a completed project?

16 A. What I saw, it was. It was installed, running. It
17 worked.

18 Q. And that worked for multi users?

19 A. Correct.

20 Q. Going back to your work with providing predictable
21 data, is that a test function?

22 A. Well, yeah. Because, really, the testers -- you
23 really need data to kind of start out with when you are
24 doing the testing, so that you can have some sort of
25 ability to change. Because you are testing everything

1 from entering data to changing data to validating data to
2 searches. So you kind of need a baseline to start from
3 when you do the testing.

4 Q. And so you mentioned several different types of
5 tasking that you had. They encompass -- did they
6 encompass support test and coding?

7 A. Say it one more time.

8 Q. In the different tasks that you just named, did those
9 incorporate roles within support, test and software
10 development areas?

11 A. Yeah. It covered basically all of them.

12 Q. And in your support function, were you ever required
13 to be available on-call after hours?

14 A. It depended. Usually, if the client's support
15 contract warranted it. If someone just had basic support,
16 if they wanted longer support, then either I or someone
17 else was available.

18 MR. WALKER: May I have one moment, Your Honor?

19 THE COURT: You may.

20 MR. WALKER: Your Honor, I have no further
21 questions.

22 THE COURT: All right. Mr Banks?

23 MR. BANKS: Thank you, Your Honor.

24 **DIRECT EXAMINATION**

25 **BY MR. BANKS:**

1 Q. Mr. Barnes, during your work at IRP Solutions and
2 Leading Team, did you have occasion to work for multiple
3 contract staffing agencies?

4 A. Yes, I did.

5 Q. Additionally, do you remember the process IRP used
6 when needing a person or needing to fill a role at IRP, do
7 you remember that process?

8 A. I just knew that there was -- if there was a need for
9 a particular type of -- you know, for instance, if you
10 needed a developer, you know, they would identify that
11 need, and then look for someone who wanted -- if you had
12 the skills, you know, they would consider you for that
13 position.

14 Q. So would you say they checked in-house before they
15 went outside?

16 A. I would say so, yes.

17 Q. And as a contractor, can you explain how you would
18 handle multiple job roles as a contractor at IRP?

19 A. Okay. So basically, how I would handle it, if you
20 have a job -- usually jobs -- for instance, if I was doing
21 database administration, I would basically do that job and
22 keep track of when, basically, I started working on that
23 job for that day. And if I had more -- another job I was
24 doing, basically I could keep track of when that job
25 happened.

1 Sometimes, if I had to do work on a particular job
2 that may take up more time or I couldn't do, like
3 development, you basically finish that work for that
4 moment, and then basically time manage, and come back and
5 do the work that you need to finish. Say I was doing
6 development for a website. So, really, you manage your
7 time to make sure all of that stuff is done.

8 Especially if things were done, like the backups in
9 the evening, really I was there as insurance, to make sure
10 if anything happened, I was available. I mean, did I go
11 to sleep? Yes, I did. But, basically, if I got alerted;
12 via e-mail or on the phone or on my computer, basically,
13 it is my job to basically get up and figure out what the
14 problem was. Usually I have to drive down to the office
15 and correct it.

16 Q. Now, during your contract work at IRP and fulfilling
17 multiple roles -- let me ask you this first. How did
18 working at IRP, a small business, differ than working for
19 a large company?

20 MR. KIRSCH: Objection, relevance.

21 THE COURT: Sustained.

22 Q. (BY MR. BANKS) Can you explain the environment, the
23 work environment at IRP?

24 A. From my perception, there was a lot of stuff that
25 needed to be done. And it was difficult at times, because

1 it was -- you basically were working with little. You
2 didn't have a lot of resources to do what you would like
3 to do. We didn't have a lot of the automated, you know,
4 tape drive machines or big tape drive backups. So a lot
5 of the work did, at least, need to have a human available
6 to finish it.

7 So I think a lot of the work, you know, if they had
8 money to buy a lot of the equipment, backup equipment, you
9 probably wouldn't need a lot of people, you could have
10 automated a lot of the processes. But a lot of the work I
11 was doing was trying to get it to the point where it was
12 automated as best as it could, so you didn't need an
13 actual warm body available every time something happened.

14 Q. So you were staffed at multiple companies at IRP?

15 A. Correct.

16 Q. And in accepting a new role when presented to you
17 from IRP management, how would you evaluate whether or not
18 you were going to take that new role -- take on that new
19 role?

20 A. Really, if I could do the job and effectively time
21 manage. For instance, I would not take on two development
22 jobs at one time, because development takes a lot of -- it
23 takes a lot of thought, and it takes -- sometimes it takes
24 meetings and whatnot. So two development jobs would have
25 been difficult. But if it is a job where you can, you

1 know, set the system moving and get it, you know, pretty
2 much predictable, and then be there to handle any issues,
3 then that's one way to evaluate that.

4 Another was, I knew as far as security and source
5 code, I knew there was a lot of security behind that, and
6 maybe some of that could be trusted, and I felt that was
7 probably a role I could fill. So a lot of times that is
8 why for a lot of system administration and backup and care
9 and e-mail of the source code repository, that is why I
10 felt that is something I could do.

11 Q. Okay. And as a contractor you're paid hourly;
12 correct?

13 A. Correct.

14 Q. You are not paid on a salary basis; correct?

15 A. Correct.

16 Q. And you -- do contractors get paid for every hour
17 they work?

18 A. Yes, they do.

19 Q. How many products did you support at IRP?

20 A. Here is the question. At one, there was CILC Basic
21 and CILC Precinct were initially single-plus applications.
22 And then there was the move to move CILC Federal and then
23 CILC NYPD. And then to kind of move CILC Basic into a
24 whole different architecture, which is the job
25 architecture. So you can say I kind of supported probably

1 five or six, depending on what state of development they
2 were in and kind of transition some of those. We did have
3 Legacy -- what I would call the Legacy system, because
4 some of the C++ ran on different architecture than the
5 Java.

6 Q. Let's try to limit the technical details there. As
7 far as -- would you say you were extremely busy at IRP?

8 A. At times, yes. At times, not.

9 Q. And as a contractor -- what are you typically paid as
10 a contractor, or how many hours do you typically work as a
11 contractor on a weekly basis?

12 MR. KIRSCH: Objection, unless it is related to his
13 work at Leading Team or IRP.

14 THE COURT: Sustained.

15 Q. (BY MR. BANKS) In your work at IRP and Leading Team,
16 what was the standard work week on each role provided by
17 the staffing company?

18 A. I don't think I can really give a standard, because
19 it really depended on what the demand was for that day.
20 So there really wasn't like -- I at least got 40 hours.
21 But there really wasn't like, you know, a standard, I
22 would say. It really depends on the workload.

23 Q. Okay. Can you explain, again, the position/title
24 that you filled at IRP?

25 A. I did systems administration. I did database

1 administration. I did software support. I did software
2 development. I guess that's about it.

3 Q. Did IRP identify those needs?

4 A. Yes.

5 Q. IRP management, rather? Did IRP management ask you
6 if you could fulfill that role?

7 A. Yes.

8 Q. If you could not -- let me ask you with regards to --
9 are you familiar with the general operations of IRP and
10 Leading Team?

11 A. What do you mean?

12 Q. The general business operations, as far as filling of
13 roles of multiple assignments and things like that?

14 A. I would say so, yes.

15 Q. Okay. Explain the -- explain how you, as a
16 contractor, explain to the jury how you as a contractor
17 would accept -- why you would accept multiple roles?

18 MR. KIRSCH: Objection, Your Honor, this has
19 already been asked and answered.

20 THE COURT: Overruled.

21 THE WITNESS: I would say why is, one, that as a
22 contractor, if I was offered any role, I'm going to see
23 what type -- is there competition for the role? If there
24 is not -- I've worked salary before. A lot of these roles
25 do take demanding times and hours. And sometimes you are

1 having to get up after hours and whatnot.

2 So, as a contractor, I just -- if you give me a
3 role, and there is payment for the role, I just require to
4 be paid for what I am doing.

5 Q. (BY MR. BANKS) Okay. Let's talk about --

6 MR. BANKS: Could I have one moment, Your Honor?

7 THE COURT: You may.

8 Q. (BY MR. BANKS) Mr. Barnes, if you were staffed and
9 authorized to work overtime, how would you handle the
10 logging of the time worked?

11 A. Put it on my time sheet.

12 Q. Okay. How could you go over 24 hours in a single
13 day? Can you explain that?

14 A. If your work is simultaneous. Because there are
15 certain jobs, like I said, that you can do at the same
16 time. So if you are doing both jobs, and you are there --
17 because on contracts, you are there from -- if your client
18 requires you to be there from a certain time, and then
19 they let you work afterwards. So if you are working both
20 jobs, you are there at a certain time. You know, if you
21 are doing two jobs, you bill simultaneously for the jobs.

22 Q. Now, was there a maximum overtime policy at IRP?

23 A. I don't remember.

24 Q. Now, did you have occasion to attend end-of-week
25 meetings at IRP?

1 A. Yes.

2 Q. Can you explain a little bit about what those
3 meetings were about?

4 A. Basically, they were just status report meetings and
5 what got accomplished for that day. Sometimes, you know,
6 just really what was accomplished. Any issues that may be
7 coming up for the next week or whatever. Sometimes you
8 will get information on sales, demos, because there was a
9 lot of -- most of the departments were there. So you hear
10 things about sales progress. You hear testing progress.
11 You hear just about anything. So, yeah.

12 Q. Now, do you remember corporate activity reports?

13 A. I do remember those.

14 Q. What was the purpose of the corporate activity
15 reports?

16 A. Just, again, to basically supplement your status.
17 So, basically, a corporate activity report was a summary
18 of what you talked about in the meeting pretty much or
19 what happened for that week.

20 Q. Okay. And what was the time element associated with
21 those corporate activity reports? Were they weekly,
22 monthly?

23 A. I believe they were weekly.

24 Q. Let me ask you something regarding minimum hours for
25 a support issue. For example, typically a 15-minute issue

1 would result in the billing of how many hours?

2 A. Not really sure, because really, usually you don't
3 bill per minute or second or anything. So, usually,
4 all -- as a contractor, I bill per hour. So if the call
5 took 30 minutes, if the call took 2 hours, you really just
6 bill per hour as you were working. So, plus the time
7 sheets really didn't have like, you know, a per minute
8 calculation. You just billed hourly how long you were
9 there.

10 MR. BANKS: One moment, Your Honor.

11 I have nothing further.

12 THE COURT: All right. How long do you think,
13 Mr. Harper, how long do you think your examination will
14 take.

15 MR. HARPER: Five minutes.

16 THE COURT: All right. You may proceed.

17 **DIRECT EXAMINATION**

18 **BY MR. HARPER:**

19 Q. Mr. Barnes, you mentioned on-call. Could you
20 describe your experience -- you had 15 years of experience
21 being a dba; database administrator and system admin.
22 Could you describe briefly what on-call means, what that
23 entails?

24 A. Well, on-call basically means that pretty much you
25 are available whenever an issue happens. That is pretty

1 much 24-hours a day. So, really, if something happens,
2 and you are responsible for a system, and you either got
3 called for an issue, or basically e-mailed, whatever, you
4 were responsible to be there and available to fix that
5 issue.

6 Q. So, in your experience, being on-call, regardless of
7 if you got a call or not, did you bill for being on-call?

8 MR. KIRSCH: Objection to the relevance, unless it
9 relates to Leading Team or IRP.

10 THE COURT: Sustained.

11 Q. (BY MR. HARPER) At IRP or Leading Team, did you bill
12 hours for being on-call?

13 A. Yes. You basically -- if it was my responsibility to
14 be available, then you are basically there. So you bill,
15 and you are actually working at the time that you sit
16 around.

17 MR. HARPER: No further questions, Your Honor.

18 THE COURT: Anybody else?

19 MR. WALKER: No, Your Honor.

20 THE COURT: All right. Mr. Barnes, do you wish to
21 make any further statement beyond what has been asked of
22 you.

23 MR. BARNES: No.

24 THE COURT: We are going to take a break at this
25 point because we have been going for almost an hour and a

1 half. We will reconvene at 10:50. Court will be in
2 recess.

3 (A break is taken from 10:34 a.m. to 10:51 a.m.)

4 (The following is had in open court, outside the
5 hearing and presence of the jury.)

6 THE COURT: You may be seated. Ms. Seeman, you may
7 bring in the jury.

8 MR. KIRSCH: Could I ask one thing before the jury
9 comes back? I was wondering if the Court could just make
10 it clear on the record, I think all of the parties had
11 every reason to believe that Mr. Barnes intended to
12 testify no matter what happened in this case. But given
13 the change in the timing, I was just wondering if the
14 Court could clarify that he did intend to do that,
15 regardless of the fact that the defense otherwise ran out
16 of witnesses earlier this morning.

17 THE COURT: Well, I assume that because they put
18 him on the stand that that was his intent to testify.

19 MR. KIRSCH: So did we, Your Honor.

20 MR. BANKS: Actually, Your Honor, it was something
21 we felt like we had to do, to be honest with you. So we
22 made that decision in an ad hoc type of fashion. So, just
23 for the record.

24 THE COURT: You were told last week, both days when
25 we ran out of witnesses, that you better have your

1 witnesses ready to go. I never told you you had to put
2 anybody on the stand today other than you needed a
3 witness. So you made the decision to put Mr. Barnes on
4 the stand. He is listed as a may-call witness. That is
5 my understanding, it was your intent, it was Mr. Barnes'
6 intent to testify.

7 MR. WALKER: Well, Your Honor, at this point --

8 THE COURT: And I will expect, as we move forward,
9 we are going to have this day filled with witnesses. So
10 you better get your witnesses lined up.

11 MR. WALKER: Yes, Your Honor. We have a witness
12 running late now. He should already be here. He is
13 running late. In fact, we have two who are running late.
14 Our intention is not to put any other defendants on the
15 stand, and so we would be forced to wait for them.

16 THE COURT: No. We are not waiting. I told you,
17 you have your witnesses here ready to testify, and if you
18 don't have them filled, I will not continue.

19 MR. WALKER: Well, Your Honor, it probably is best
20 we don't continue because the other 5 co-defendants do not
21 plan to testify at this point in time. We feel it would
22 be coerced at this point.

23 THE COURT: So are you telling me you are not
24 testifying? None of you are going to testify?

25 MR. WALKER: We were reserving that right to make

1 that decision.

2 THE COURT: Well, then you better have your
3 witnesses here, because we are either going forward -- and
4 if you don't go forward, that means you are not going to
5 testify. I am not going to recess. The jury has been
6 inconvenienced twice now, having to go home early, having
7 to be excused for lunch, to come back for a 5-minute
8 witness, and then going home for the rest of the day. So
9 your witnesses, you better get them here.

10 MR. WALKER: Yes, Your Honor.

11 THE COURT: I am not going to be satisfied with
12 this witness wasn't scheduled to come in. You have a list
13 of people here who worked for your company and who, I
14 assume, those that didn't, have been subpoenaed. Call
15 them and you get them here.

16 MR. WALKER: All right, Your Honor.

17 THE COURT: I will not put up with this sort of
18 manipulation of the time frame.

19 MR. WALKER: Yes, Your Honor, so we have one who
20 should be here already. He is running late. We haven't
21 been able to contact him.

22 THE COURT: Who is that?

23 MR. WALKER: That is Collin Reese.

24 THE COURT: And is Collin Reese a subpoenaed
25 witness?

1 MR. WALKER: Yes, he is.

2 THE COURT: Why is he not here on time? What time
3 was he subpoenaed to appear.

4 MR. WALKER: Your Honor, I believe that was 11
5 o'clock.

6 THE COURT: Who else?

7 MR. WALKER: And Abhay Natu. He is also a
8 subpoenaed witness.

9 THE COURT: What time was he told to be here?

10 MR. WALKER: Your Honor, he was told to be here at
11 noon.

12 THE COURT: All right. And have you told him to
13 get here otherwise.

14 MR. WALKER: We tried to reach him and couldn't
15 reach him on the phone, so we left him a message. We have
16 others who are not in the Court attempting to reach them.

17 THE COURT: From now on, you have them be here at 9
18 o'clock in the morning. I don't care what time they are
19 going to be put on, because we will not have these delays.

20 MR. WALKER: Yes, Your Honor.

21 THE COURT: Who do you have for this afternoon?

22 MR. WALKER: This afternoon, we have Jim West.

23 THE COURT: What time was he told to be here?

24 MR. WALKER: He was told to be here at 1:30.

25 THE COURT: And have you gotten a hold of him?

1 MR. WALKER: No, we haven't spoken to him today,
2 but he did acknowledge that he would be here.

3 THE COURT: All right. Who else?

4 MR. WALKER: Daniel Shull.

5 THE COURT: All right. What has Mr. Shull been
6 told?

7 MR. WALKER: We spoke with him last night. He was
8 told that he would probably be getting on the stand around
9 1 o'clock, but to be here early.

10 THE COURT: He is supposed to be here by 1:00?

11 MR. WALKER: Yes.

12 THE COURT: Who else?

13 MR. WALKER: That is it for today, Your Honor.

14 THE COURT: Well, let's go through your list
15 tomorrow. And you better call them and have them come,
16 because we are going to get through those witnesses, I
17 assume, as quickly as we are now, they are taking 15, 20
18 minutes.

19 MR. WALKER: Yes, Your Honor. Well, the other
20 witnesses that we have, the majority of them would have
21 longer times to testify. They will be on the stand
22 longer.

23 THE COURT: Who else? Who are your next witnesses?

24 MR. WALKER: For tomorrow?

25 THE COURT: No, for today.

1 MR. WALKER: For today, the ones I just mentioned.

2 THE COURT: You have them scheduled for tomorrow.

3 If we finish early, they are coming in today to testify.

4 We are not going to recess just to meet their schedules.

5 Who else is on your list of witnesses?

6 MR. WALKER: Let's see, Your Honor. Out of the
7 people scheduled for tomorrow, one is out of state. They
8 are on their way in.

9 THE COURT: Who is that?

10 MR. BANKS: John Shannon.

11 THE COURT: Okay. He is not here yet?

12 MR. WALKER: No. He is not here yet. He is
13 scheduled to arrive --

14 MR. BANKS: -- around 4 this evening.

15 THE COURT: All right. Who else?

16 MR. WALKER: -- later this afternoon. We also have
17 Dwayne Fuselier and Gary Hillberry. They are in state.

18 THE COURT: Okay. So call them and tell them they
19 better be here this afternoon.

20 MR. WALKER: We also have Lorne Cramer, who is in
21 Southern Colorado.

22 THE COURT: Meaning Colorado Springs?

23 MR. WALKER: I believe so. I believe Colorado
24 Springs.

25 THE COURT: So she is scheduled. You better call

1 her, tell her to get herself up here.

2 MR. WALKER: And there is also Tiffany Zellenbaba.

3 THE COURT: Where is she located?

4 MR. WALKER: I believe she is in Colorado Springs.

5 THE COURT: What is the relevance of her testimony
6 of Robert Half? Did she work for IRP or any of the
7 defendant companies?

8 MR. BANKS: Yes. She was the recruiter or account
9 manager for Robert Half.

10 THE COURT: Robert Half did contract --

11 MR. BANKS: Did business with Leading Team.

12 THE COURT: Okay. Tell her -- call her and tell
13 her she better get up here.

14 MR. WALKER: Your Honor, may I have a moment to
15 relay those messages so we have somebody calling them?

16 THE COURT: Yes, you may. I expect a full day of
17 testimony today, and I don't care how you do it, and we
18 will get a full day of testimony. You better tell your
19 witnesses that you scheduled out that they are to be here
20 at 9 o'clock tomorrow morning. I don't care when you have
21 them scheduled, they are to be here, because we are going
22 to have full days of testimony.

23 So make sure whoever is helping you with this,
24 tells them they are to be here. We are not going to have
25 these delays.

1 MR. KIRSCH: Your Honor, if I could just add one
2 other thing to the record. The defendants have also
3 re-subpoenaed Special Agent Smith for their case in chief.
4 Obviously, he was here and available this morning, and
5 they could have called Special Agent Smith instead of
6 calling Mr. Barnes this morning.

7 THE COURT: All right. Thank you.

8 Ms. Seeman, would you go see if you can find
9 Mr. Walker.

10 COURTROOM DEPUTY: Yes. He is in the attorney
11 conference room, and I asked him to come back in.

12 THE COURT: All right. Thank you, Ms. Seeman. All
13 right, Ms. Seeman, you may bring the jury in.

14 MR. WALKER: Your Honor, we made several calls.
15 Collin Reese, who was scheduled for 11 o'clock, still is
16 not here. We have not been able to reach him. We still
17 are trying to bring people in. Due to constant changing
18 of schedules, we have people who are evading our service.
19 We just cannot get them in. We can't get them in, we
20 can't reach them. They are not answering our phone calls.

21 So these are mostly people who would not be
22 considered IRP employees. They might be considered
23 adversarial. And we are having problems reaching them.
24 We scheduled -- we had to change some of these schedules
25 three times because the time has changed for the

1 Government's closing its case in chief. And that is
2 giving us problems getting people in, getting them to
3 respond to our phone calls, and not to evade our service.

4 THE COURT: All right. Let's go through your list
5 of witnesses.

6 Michele Harris, what is her role in this case?

7 MR. WALKER: She was a former IRP Solutions'
8 employee.

9 THE COURT: All right. Why can't she be here?

10 MR. WALKER: We have chosen not to call her, Your
11 Honor.

12 THE COURT: Don Vilfer?

13 MR. WALKER: Don Vilfer is the expert witness that
14 we discussed this morning. And so we were awaiting your
15 determination on that and clarifications. Now we will
16 schedule him to come in, in the next few days.

17 THE COURT: Is he local?

18 MR. WALKER: No, he is out of California.

19 THE COURT: Ming Cong Lee?

20 MR. WALKER: Ming Cong Lee, we haven't been able to
21 find him to serve him.

22 THE COURT: Mr. Jim West?

23 MR. WALKER: Jim West is scheduled to appear this
24 afternoon, Your Honor.

25 THE COURT: Lam Ha?

1 MR. WALKER: We were just able to find him. I
2 believe he has been served for later. But we spent
3 several days trying to track him down.

4 THE COURT: You have only done this in recent,
5 like, week?

6 MR. WALKER: No, Your Honor, that has been several
7 days. Probably going on 10 days for this individual.

8 THE COURT: Sam Thurman?

9 MR. WALKER: Sam Thurman will be called at a later
10 time.

11 THE COURT: Did you need to subpoena him?

12 MR. WALKER: No, Your Honor, he would be favorable
13 to our side.

14 THE COURT: Then call him and have him come in?
15 Barbara McKenzie?

16 MR. WALKER: Barbara McKenzie, we have chosen not
17 to have her testify, Your Honor.

18 THE COURT: Willie Pee?

19 MR. WALKER: Willie Pee, we've chosen not to have
20 testify.

21 THE COURT: Shaun Haughton?

22 MR. WALKER: Shaun Haughton is scheduled for a
23 later time, Your Honor.

24 THE COURT: And is he someone you need to subpoena
25 to come in?

1 MR. WALKER: No, Your Honor.

2 THE COURT: Then have him come in.

3 Craig Simmons?

4 MR. WALKER: Craig Simmons, we chose not to have
5 him testify.

6 THE COURT: I take it Steven Cooper and William
7 Witherspoon, have you served them?

8 MR. WALKER: William Witherspoon has been served,
9 but he has refused to come in until he has gotten --

10 THE COURT: -- 48-hours notice?

11 MR. WALKER: No, he has more than 48-hours notice.
12 He says he needs to talk with his counsel before he comes
13 in. But he was served several days ago, Your Honor. He's
14 being very difficult and evasive. We were wondering if
15 the Court could take any action to have him respond.

16 THE COURT: Well, if he has been properly served
17 and he doesn't show up when you tell him to show up, we
18 can address that at that time.

19 Steven Cooper, has he been served?

20 MR. WALKER: Steven Cooper has not yet been served.

21 THE COURT: Who is Shankar Krishnan?

22 MR. WALKER: Shankar Krishnan is with a company we
23 were attempting to establish a partnership with.

24 THE COURT: So, similar to Ms. Ackerman?

25 MR. WALKER: I am sorry?

1 THE COURT: Similar to Ms. Ackerman's testimony.

2 MR. WALKER: No, Your Honor, he would have
3 different testimony.

4 THE COURT: All right. Has he been served?

5 MR. WALKER: He has not been served.

6 THE COURT: Tom Francesconi?

7 MR. WALKER: Tom Francesconi and the next two
8 witnesses are in the same position as Mr. Krishnan.

9 THE COURT: And what is the relevance of their
10 testimony for this case?

11 MR. WALKER: Their relevance would be our proposal
12 to them to partner with us on large government business.

13 MR. BANKS: We are actually engaged with them, Your
14 Honor, contractually, to deliver -- specifically deliver
15 capabilities to the NYPD.

16 THE COURT: Now at this point?

17 MR. BANKS: No, at the time, we were contracted
18 with the Deloitte, a large consulting company, and we were
19 working together to deliver the capability to the NYPD.

20 THE COURT: All right. And their relevance to this
21 case is what?

22 MR. BANKS: The relevance to this case, Your Honor,
23 the Government has asserted that we were not actively
24 engaged in obtaining a contract with the NYPD. The fact
25 that we were teaming with the company to do that is

1 relevant, as well as John Shannon will support a lot of
2 these activities that we were engaged in to do business at
3 the NYPD.

4 THE COURT: I don't know that the Government has
5 ever asserted that you were not actively engaged in trying
6 to get a contract. I think the allegations and the
7 testimony was that you had no active contract with the
8 NYPD.

9 MR. BANKS: Right.

10 THE COURT: All right. So I'm not seeing the
11 relevance on that. I will not rule on that at this point,
12 but I am telling you right now, I don't see the relevance
13 in that to the issues in this case.

14 MR. BANKS: Well, Your Honor, the Government has
15 said that we asserted that we were -- had current or
16 impending, I think is the term. John Shannon will testify
17 significantly to those types of issues, as well as our
18 interactions with some of these other companies, as far as
19 our positioning within the NYPD.

20 THE COURT: All right. Frank Pisciotta?

21 MR. BANKS: He is with Deloitte Consulting.

22 THE COURT: And what is his relevance, and has he
23 been served?

24 MR. BANKS: Has he been served?

25 MR. WALKER: Not that I am aware of.

1 THE COURT: All right. Are you going to plan to
2 have MaryAnn McLaughlin testify on behalf of Westaff as
3 Ms. Ackerman did?

4 MR. BANKS: Yes. Not as Ms. Ackerman. Your Honor,
5 there is an issue with regards to -- we just discussed
6 this last night -- some discovery that the Government has
7 not turned over related to Randstad and Westaff. That
8 information, what we are finding is bits of information,
9 but e-mail communications that were during 2004 for
10 companies that were favorable to us that denied doing
11 business with us that we sent a staffing prospectus, has
12 somehow disappeared and is not a part of discovery when we
13 were going back through discovery last night.

14 THE COURT: So what is the relevance of
15 Ms. McLaughlin's testimony?

16 MR. BANKS: She received a staffing prospectus from
17 IRP Solutions, and she was one of the companies that would
18 testify that, no, we never told anybody that we had a
19 contract. There is a number of --

20 THE COURT: Well, you never told them that you
21 didn't have a contract.

22 MR. BANKS: Correct.

23 THE COURT: Not anybody, but them.

24 MR. BANKS: Them, correct.

25 THE COURT: And has she been subpoenaed?

1 MR. BANKS: Yes, I believe so.

2 THE COURT: When does she plan to testify?

3 MR. WALKER: I am not certain she has been
4 subpoenaed, Your Honor, Ms. McLaughlin.

5 THE COURT: Well you do understand that there is a
6 certain window of time within which you must subpoena them
7 if you expect them to appear to testify. They have rights
8 also.

9 MR. WALKER: Yes, Your Honor. We understand it is
10 48 hours.

11 THE COURT: You knew last week -- middle of last
12 week, that you were going to have to start putting
13 witnesses on on Thursday. You knew months ago that you
14 were going to, sometime during this window of 6 weeks, you
15 were going to have to have these people subpoenaed.

16 MR. WALKER: Yes, Your Honor, that's correct. But
17 in the recent weeks, with the change in the completion of
18 the Government's case in chief --

19 THE COURT: That is no excuse. You need to have
20 people subpoenaed ready to go weeks ahead of time. You
21 can work out with them when they come in, but the
22 subpoenas should have been served weeks ago.

23 MR. BANKS: It was our understanding from the
24 clerk's office, Your Honor, that if we had the change,
25 they still required another 48-hour notice.

1 THE COURT: It doesn't matter, you would have at
2 least subpoenaed them.

3 MR. BANKS: Right.

4 THE COURT: Tiffany Zellenbaba, she has been
5 subpoenaed. I take it from what you told us that she was
6 supposed to be here this afternoon?

7 MR. WALKER: Yes, Your Honor. She is supposed to
8 be here -- correction, that is tomorrow afternoon.

9 THE COURT: All right. Has she been reached?

10 MR. WALKER: Yes, she has, Your Honor.

11 THE COURT: So she will be here today?

12 MR. WALKER: Has she been reached today in order to
13 come in today? No, she hasn't. I was making those phone
14 calls --

15 THE COURT: You have people sitting in the back
16 there. Why aren't they taking care of this?

17 MR. WALKER: I guess she could take care of that.

18 THE COURT: Because we have a trial to go forward
19 with. That is what I assumed you were doing when you went
20 out; contacting your supporters here who are helping you
21 with this to get this done, not having us sitting here
22 with the jury out there waiting to come in.

23 MR. WALKER: Right, Your Honor. I was in contact
24 with the support.

25 THE COURT: All right. So how many of these other

1 witnesses have you actually subpoenaed?

2 MR. WALKER: Let's see --

3 THE COURT: We are at the bottom of page 2.

4 MR. WALKER: Bottom of page 2.

5 THE COURT: You said Mel Castleberry was scheduled
6 to testify tomorrow. He has been subpoenaed, I take it.

7 MR. WALKER: No, Your Honor, he is not on the list
8 for tomorrow.

9 THE COURT: I thought you had mentioned
10 Mr. Castleberry.

11 MR. WALKER: No, Your Honor, that was Hillberry.

12 THE COURT: I am sorry, Mr. Hillberry. So,
13 Mr. Rosales and Mr. Castleberry of Idea Integration, have
14 you subpoenaed them?

15 MR. WALKER: No, we haven't subpoenaed. We are not
16 going to call Mr. Castleberry.

17 THE COURT: What about Mr. Rosales?

18 MR. WALKER: Mr. Rosales, he is scheduled to be
19 subpoenaed today.

20 THE COURT: For when?

21 MR. WALKER: For Friday or Thursday. I don't have
22 that list with me.

23 THE COURT: Mr. SanAgustin?

24 MR. WALKER: We decided not to use Mr. SanAgustin.

25 THE COURT: Ms. Bowden?

1 MR. WALKER: We are not going to use Ms. Bowden.

2 THE COURT: Mr. Ponzi?

3 MR. WALKER: We will not call Mr. Ponzi.

4 THE COURT: Mr. Beltran?

5 MR. WALKER: He has been subpoenaed.

6 THE COURT: But hasn't yet been served?

7 MR. WALKER: No, he has not yet been served.

8 THE COURT: Mr. Reese.

9 MR. WALKER: Mr. Reese is the individual who should
10 have been here by now.

11 THE COURT: And when was he subpoenaed?

12 MR. WALKER: He was subpoenaed, I believe it was
13 three days ago.

14 THE COURT: You have spoken to him?

15 MR. WALKER: Someone has. We haven't. None of the
16 defendants have spoken with him directly.

17 THE COURT: Who is the someone that would have
18 spoken with him.

19 MR. WALKER: The support.

20 THE COURT: Who would that be?

21 MR. WALKER: That would be Lisa.

22 THE COURT: Lisa who?

23 MR. WALKER: Lisa Stewart.

24 THE COURT: And what did she tell you when she said
25 she spoke with him?

1 MR. WALKER: That he would appear this morning.

2 THE COURT: All right. Mr. Shannon, you indicated
3 will be flying in tonight.

4 MR. WALKER: Yes, Your Honor.

5 THE COURT: Mr. Belrose?

6 MR. WALKER: Mr. Belrose, he has not yet been
7 subpoenaed, Your Honor.

8 THE COURT: Mr. Gianelli?

9 MR. WALKER: Mr. Gianelli, we are in --

10 MR. BANKS: Well, he has been subpoenaed, Your
11 Honor. We received a phone call back from some assistant
12 from the NYPD -- he has retired from the NYPD. For some
13 reason, after that phone call, we have not heard anything
14 else from Mr. Gianelli.

15 THE COURT: When you say he was subpoenaed, was he
16 subpoenaed personally? Was he served personally?

17 MR. BANKS: He was served personally, yes, Your
18 Honor.

19 THE COURT: Why would the NYPD, then, be the one to
20 respond?

21 MR. BANKS: I am not sure what the process is.

22 THE COURT: Do you have a return of service on him?

23 MR. BANKS: Yes.

24 MR. WALKER: Yes, Your Honor.

25 THE COURT: You need to have that submitted. You

1 need to be ready to go with that if he doesn't show.

2 Mr. Hillberry?

3 MR. WALKER: Mr. Hillberry has been subpoenaed. He
4 has been served. But he was evading service for several
5 days, and someone just served him.

6 THE COURT: When?

7 MR. WALKER: I believe that was this morning, when
8 we intended to serve him earlier for tomorrow to testify
9 for tomorrow.

10 THE COURT: So less than 48-hours' notice?

11 MR. WALKER: Yes, Your Honor.

12 THE COURT: Mr. Fuselier?

13 MR. WALKER: We have not been able to contact him
14 to serve him.

15 THE COURT: Ms. Broerman from Mr. Allard's office?

16 MR. WALKER: We are in the process of contacting
17 her to determine her recollection of events to determine
18 if we will actually be calling her.

19 THE COURT: Mr. Perry?

20 MR. WALKER: He has not been served.

21 THE COURT: What is his relevance? Is it the same
22 as Ms. Baucom and Albarelle, as an expert?

23 MR. WALKER: No, Your Honor. He worked at a
24 staffing company that we were engaged with.

25 THE COURT: And what is his relevance to this case?

1 MR. BANKS: Again, Your Honor, staffing companies,
2 as far as subsequent acts are concerned, that we engaged
3 with certain staffing companies, with numerous staffing
4 companies, they were not told in like fashion, as the
5 other ones have asserted, that there was a contract.

6 THE COURT: Which company did he work for?

7 MR. BANKS: Momentum Resources.

8 THE COURT: And which company did he contract with?

9 MR. BANKS: It was IRP.

10 THE COURT: All right. Has he been subpoenaed?

11 MR. KIRSCH: Your Honor, just to clarify, it is my
12 understanding that Momentum Resources didn't contract with
13 IRP. So the Government believes his testimony would be
14 irrelevant.

15 THE COURT: Is this testimony as Ms. Ackerman gave?
16 Because I gave you a lot of leeway with Ms. Ackerman.

17 MR. BANKS: Your Honor, I have to tell you, the
18 question is, if we contacted so many staffing companies,
19 and the Government has asserted that we said there was a
20 contract, and there are staffing companies that said we
21 never told them that in the course of doing business --

22 THE COURT: But did you or did you not do business
23 with Momentum?

24 MR. BANKS: No, we did not. But we were engaged
25 with them to do business. And the process of -- during

1 the process -- if the Government has asserted that our
2 modus operandi was to continuously tell these companies
3 that we had a contract, when, in fact, many companies
4 would tell you we did not tell them that.

5 THE COURT: Okay. I understand that. Now, have
6 you served Mr. Perry?

7 MR. WALKER: No, Your Honor, we have not.

8 THE COURT: So no subpoena?

9 MR. WALKER: No subpoena for Mr. Perry.

10 THE COURT: Mr. Hale?

11 MR. BANKS: Your Honor, after -- I think we have
12 enough on cross-examination with Mr. Hale. We won't need
13 him any more.

14 THE COURT: Ms. Holland?

15 MR. BANKS: Same with her. We got what we need.

16 THE COURT: Mr. Cockett?

17 MR. BANKS: Same with him.

18 THE COURT: Mr. Beebe?

19 MR. BANKS: He was out of town when we tried to
20 serve him. We expect him to get served. His relevance to
21 the case is --

22 MR. WALKER: We need to have an initial
23 conversation with him and determine if his testimony would
24 be relevant to provide.

25 THE COURT: All right.

1 MR. WALKER: He has been unreachable.

2 THE COURT: You have not done that in the last two
3 years?

4 Government, would you please stop. This is not
5 professional.

6 MR. WALKER: Thank you, Your Honor. I agree, that
7 is not professional.

8 THE COURT: So you have not spoken to him at all in
9 the last two years?

10 MR. WALKER: No, Your Honor, we have not.

11 THE COURT: And you have not reached him yet?

12 MR. WALKER: No, Your Honor.

13 THE COURT: And he has not been subpoenaed?

14 MR. WALKER: He has not. We need to make a
15 determination upon the value of his testimony based upon
16 his recollection.

17 THE COURT: All right. Ms. Kurland?

18 MR. BANKS: The rest of them, Your Honor, were
19 witnesses that we were going to call from the City of
20 Philadelphia. The next few on the list are from the City
21 of Philadelphia. You still have reserved ruling on them
22 based on our interaction with them after 2005.

23 THE COURT: These are all post-2005?

24 MR. BANKS: Post-2005.

25 THE COURT: I already made my ruling with respect

1 to anything happening after the dates which are at issue
2 in this case. Have you even tried to subpoena them?

3 MR. WALKER: No, Your Honor.

4 MR. BANKS: For that reason, we did not try to
5 subpoena them.

6 THE COURT: You can't -- if you want to have
7 witnesses appear, you need to proceed in that fashion. If
8 I exclude them, then that's going to be it. But you don't
9 wait until I rule to try to get witnesses here. So none
10 of the next five witnesses have even been subpoenaed?

11 MR. WALKER: That's right, Your Honor.

12 THE COURT: Lorne Cramer you indicated was going to
13 appear tomorrow?

14 MR. WALKER: Yes, Your Honor. He was served, and
15 we plan to have him appear tomorrow.

16 MR. BANKS: Your Honor --

17 THE COURT: David Shull?

18 MR. WALKER: David Shull -- Daniel Shull is
19 scheduled --

20 THE COURT: I am sorry, Daniel Shull.

21 MR. WALKER: -- for this afternoon, Your Honor.

22 THE COURT: He has been served?

23 MR. WALKER: Yes, Your Honor.

24 THE COURT: Theo Gregory?

25 MR. WALKER: He had no recollection of events, so

1 he will not be called.

2 THE COURT: Michael Brown?

3 MR. WALKER: Michael Brown, I am not certain if he
4 has been subpoenaed or not, Your Honor.

5 THE COURT: What is his relevance?

6 MR. WALKER: He was a customer of IRP Solutions.

7 THE COURT: And when you say "customer," what do
8 you mean?

9 MR. WALKER: He purchased the product.

10 THE COURT: He purchased the CILC software?

11 MR. WALKER: Yes, Your Honor.

12 THE COURT: But he has not been subpoenaed?

13 MR. WALKER: He was on our list to subpoena. I
14 don't know if he has actually been served.

15 THE COURT: Rick Gonzales?

16 MR. WALKER: Rick Gonzales is likewise to
17 Mr. Brown, a customer of IRP Solutions for the CILC
18 product.

19 THE COURT: Has he been subpoenaed?

20 MR. WALKER: He was on the list to be subpoenaed.
21 I am not certain if he has.

22 THE COURT: John Smith?

23 MR. WALKER: John Smith will be called.

24 THE COURT: Robert Moen?

25 MR. WALKER: Robert Moen will be called.

1 THE COURT: Have they all been subpoenaed?

2 MR. WALKER: John Smith has been subpoenaed.

3 THE COURT: Mr. Moen?

4 MR. WALKER: I am not certain about Mr. Moen.

5 THE COURT: Mr. Black?

6 MR. WALKER: No, Your Honor, we won't be calling

7 Mr. Black.

8 THE COURT: Mr. Powers?

9 MR. WALKER: Yes, Your Honor, we'll be calling

10 Mr. Powers.

11 THE COURT: Have you subpoenaed him?

12 MR. WALKER: I know there have been attempts to

13 subpoena him. I am not certain if he has been served.

14 THE COURT: Mr. Anderson.

15 MR. WALKER: Mr. Anderson is in the same position

16 as Mr. Powers.

17 THE COURT: When were these attempts made?

18 MR. WALKER: Those were made last week, Your Honor.

19 THE COURT: All right. Of your may-call witnesses,

20 who has been subpoenaed.

21 MR. WALKER: Subpoenaed?

22 THE COURT: Yes.

23 MR. WALKER: None of those, Your Honor.

24 MR. BANKS: We don't intend to call -- subpoenas

25 are out to --

1 MR. WALKER: Your Honor, none of them will be
2 subpoenaed.

3 THE COURT: None will be called unless they come in
4 willingly?

5 MR. WALKER: That's right, Your Honor.

6 THE COURT: Ms. Cherry, is she a willing witness?

7 MR. WALKER: Your Honor, she testified previously.

8 THE COURT: Which one was she?

9 MR. BANKS: She is with Analysts International.

10 THE COURT: Okay. So you will not be calling Rose
11 Banks?

12 MR. WALKER: No, Your Honor.

13 THE COURT: You are not going to call her?

14 MR. WALKER: No, Your Honor.

15 THE COURT: Sylvia McGhee.

16 MR. WALKER: No, Your Honor.

17 THE COURT: Lisa Stewart?

18 MR. WALKER: No.

19 THE COURT: Any of these others here willing
20 witnesses?

21 MR. WALKER: No, Your Honor.

22 THE COURT: So do you have any intention of trying
23 to subpoena them?

24 MR. BANKS: No, Your Honor, not at this time. We
25 had anticipated wrapping up this week all of the people

1 that were going to testify. The key witnesses being John
2 Shannon, Gianelli, and Sam Thurman, would be the key
3 witnesses, and those will take quite some time. Those are
4 the witnesses we anticipate to wrap up the majority of our
5 time in our case.

6 THE COURT: All right. And while they will take a
7 majority, I can hardly envision that they will take a full
8 day.

9 MR. BANKS: Sam Thurman could take a few hours.
10 John Smith, we suspect a couple hours with him, as well,
11 as well with Robert Moen, who will be stepping through FBI
12 reports and things of that nature, search warrants.

13 THE COURT: All right. Well, let's proceed.

14 MR. KIRSCH: Your Honor, just for planning
15 purposes, I'm not sure what questions Mr. Moen is going to
16 be asked. Mr. Moen conducted interviews of some of the
17 witnesses that have testified to date, but it would be
18 improper to call him to testify about those interviews for
19 the purposes of impeaching the Government's witnesses.

20 Mr. Moen didn't even participate in the search
21 warrant. So I don't know how it is that Mr. Moen's
22 testimony is going to take several hours. I don't know
23 how Mr. Smith's testimony is going to take several hours,
24 either. I don't know what it is that they intend to ask.

25 And I also, Your Honor, just wanted to apologize.

1 I wasn't attempting to be unprofessional earlier. It was
2 just difficult for us to believe that so little of this
3 work appeared to have been done with this much time into
4 the case.

5 THE COURT: All right. Well, at this point I told
6 you all last week you needed to have your witnesses lined
7 up and ready to go. I am not going to waste this jury's
8 time. I have already done that two days where I had to
9 send them home early because your witnesses have not been
10 ready to go.

11 So I'm giving you fair warning now, one last time,
12 we are going to go this afternoon. You need to get in
13 touch with your witnesses; those you subpoenaed, those --
14 if you haven't subpoenaed them, I don't know what we are
15 going to do, because the rules do require at least
16 48-hours notice.

17 But we will move forward with this trial. I am not
18 continuing it.

19 MR. WALKER: Yes, Your Honor, we understand.

20 THE COURT: All right.

21 MR. WALKER: Your Honor, given the status we just
22 provided, without having Mr. Reese here, we're not certain
23 what his status is. They are making calls trying to
24 determine where he is. But he has not been responsive.
25 They reached him. He said he would be here tomorrow.

1 THE COURT: You need to do what you need to do if
2 he was subpoenaed.

3 MR. WALKER: All right, Your Honor. Given that,
4 and given the instruction to the jury to either put one of
5 those people on or to put one of us on, we put Mr. Barnes
6 on, who we had not --

7 THE COURT: No, I gave no instruction to the jury.

8 MR. WALKER: I am sorry, to us.

9 THE COURT: Privately at the bench, I said you need
10 to call your next witness.

11 MR. WALKER: And you also said if one of them
12 wasn't available, we had to put one of us on.

13 THE COURT: I didn't say you had to put one of you
14 on. I said if you intended to testify, then one of you
15 should take the stand, because we weren't going to
16 continue.

17 MR. WALKER: Your Honor, with all due respect, I
18 don't remember the phrase, "if one of us was going to take
19 the stand."

20 THE COURT: I don't know what my exact phrasing
21 was, but the fact of the matter is, I did not direct you
22 to do anything, Mr. Walker. You chose to put a witness on
23 the stand. He has freely testified. You can make your
24 record for whatever you want. But you all gave opening
25 statements saying you were going to put this -- you were

1 going to have this information on there, so you chose to
2 call him.

3 That's fine. You can make whatever record you want
4 for appeal, but I never told you you had to put one of you
5 on the stand. I said we are moving forward, call your
6 next witness.

7 MR. WALKER: I would like to make this statement
8 for the record. When we approached the bench, your words
9 to us were "Put one of your witnesses on or one of the
10 defendants will have to testify." In response to those
11 statements and our understanding, we put Mr. Barnes on,
12 who we had not made a decision on whether or not he would
13 testify at this point.

14 And at this point we are not -- we are not -- have
15 not made a decision for any of the other 5 co-defendants
16 to testify. And at that point we had not made a decision
17 for Mr. Barnes to testify. So at this point --

18 THE COURT: Now, earlier, as I recall in this
19 trial, you said all six of you intended to testify.

20 MR. WALKER: Your Honor, we were evaluating that,
21 and had not made a final decision.

22 THE COURT: You told me you all intended to
23 testify.

24 MR. WALKER: Well, Your Honor, I don't remember
25 when we made that statement, but we said we were on the

1 may-call.

2 THE COURT: At the time, I will just say, if your
3 understanding was that I directed you to put one of you
4 on, you should have made that on the record before you put
5 Mr. Barnes on the stand.

6 MR. WALKER: Well, Your Honor, I am saying for the
7 record that at that point, we felt compelled to put
8 Mr. Barnes on the stand, given your instruction. That was
9 not our free will decision at that point. And that's for
10 the record. And we would also motion the Court that we
11 withdraw that testimony and prevent cross-examination --

12 THE COURT: Denied.

13 MR. WALKER: -- by the Government.

14 THE COURT: Denied. All right.

15 Ms. Seeman, please bring in the jury.

16 (The following is had in open court, in the hearing
17 and presence of the jury.)

18 THE COURT: You may be seated.

19 Mr. Kirsch, you may proceed.

20 MR. KIRSCH: Thank you, Your Honor.

21 **CROSS-EXAMINATION**

22 **BY MR. KIRSCH:**

23 Q. Good morning, Mr. Barnes.

24 A. Good morning.

25 Q. When you were testifying before the break, you were

1 asked a question about how the billing would work if you
2 spent 15 minutes doing a support issue?

3 A. Correct.

4 Q. I didn't understand what your answer was about how
5 long you would have billed a client for doing that 15
6 minutes worth of support work.

7 A. Well, usually, if that was the only thing I was
8 doing -- you never bill on any contract -- you never bill
9 by the minute. It is basically, I am there from whatever
10 period -- basically, if it falls within an hour, it is
11 under that hour of billing. It doesn't mean that I bill
12 exactly for the 15 minutes.

13 Q. So you would have billed an hour for that 15 minutes
14 worth of work?

15 A. If I was doing support and there were no other calls,
16 yes.

17 Q. Okay. You would have billed an hour if you did 30
18 minutes of work, as well?

19 A. Correct.

20 Q. How about if you did 5 minutes?

21 A. If I did 5 minutes, and my job was to man the phone,
22 and I had a 5-minute call, and that is all I had for the
23 hour on that particular, I would bill an hour.

24 Q. An hour that 5 minutes?

25 A. If nothing happened in the hour, and my job was to

1 sit there for an hour, I would bill for an hour.

2 Q. All right. Your testimony is some of the staffing
3 companies were hiring you to sit there for an hour and
4 bill for an hour if you did 5 minutes of work?

5 A. No. What the staffing companies hired me for were to
6 do whatever agreement they had between them and IRP
7 Solutions. They usually -- I don't recall ever being
8 hired just to do software support. That was one of the
9 jobs I took as part of my -- any work I was doing at IRP
10 Solutions, you can encapsulate that under the system
11 administration piece, because the support I handled was in
12 the event that they were doing installs and there was an
13 issue, that was encapsulated under that systems
14 administration.

15 Q. You were doing customer support work for the staffing
16 companies even though you hadn't been hired to do that?

17 A. Correct.

18 Q. And billing the staffing companies for that work?

19 A. I was billing for, basically, systems administration.
20 And as I said before, that software support encapsulated
21 that systems administration, because any work that I was
22 doing, if they were doing installs of the software or had
23 issues with the software and the operating systems.

24 Anything else, I didn't handle on the support side.
25 But if it was an issue with the installed software and how

1 it integrated with the operating system they were using,
2 that is what I handled, because that would fall under
3 systems administration.

4 Q. So you would have billed 15 minutes of time as an
5 hour for software administration when you were doing
6 customer support?

7 A. For that, and you take up the fact that I was also
8 doing other things, I was systems administration, that was
9 just one of them that encapsulated that position.

10 Q. The other tasks you were doing, though, that would
11 have been billed to one of the other staffing companies?

12 A. No.

13 Q. It would have all been billed to the same?

14 A. Systems administration -- I was hired by that company
15 to do systems administration, and any work that
16 encapsulated systems administration would be billed to
17 that staffing company.

18 Q. Which included customer support?

19 A. It included customer support, correct, because it was
20 also internal customers and external customers. If one of
21 the developers or testers had an issue with their software
22 on their desktop, that was my job, also, to support those
23 people also. That is part of systems administration.

24 Q. And that was part of the customer support you were
25 billing for, then?

1 A. It was either internal or external. So any
2 customer -- inside IT shops, you consider whoever you were
3 supporting, that is your customer, also.

4 Q. So Sharon Parks, for example, could have been one of
5 your customers?

6 A. From that perspective; correct.

7 Q. All right. So what you are saying is that you -- if
8 Sharon Parks had called you and said, hey, I need some
9 help with my computer, then you would have spent time
10 doing that, and then you would have billed that time to
11 IRP and charged that to the staffing company; right?

12 A. For any work I was doing on systems administration,
13 correct.

14 Q. Okay. That would have been just -- that would have
15 been part of customer support?

16 A. That would have been part of systems administration,
17 which customer support is part of that.

18 Q. Maybe that answers one of my other questions, then,
19 because I was going -- I wondered who it was that was
20 giving you the client calls?

21 A. What do you mean, giving client calls?

22 Q. You said you answered calls from clients.

23 A. Correct.

24 Q. Now, am I to understand that all of those calls that
25 you answered from clients were from other people who were

1 working for IRP?

2 A. If we had -- internally, there is a customer support
3 line. If you were internal and you called that line, it
4 rang my number. If a client called the IRP support line,
5 it would round robin, and could ring my number. So,
6 basically, if my phone rang, I picked it up, and basically
7 handled an issue for them.

8 Q. And which outside clients was it that you were
9 handling customer support calls for?

10 A. Any client that bought the CILC Basic product.

11 Q. Who was that, Mr. Barnes?

12 A. I know there was -- right off hand, I know there was,
13 I think a Southwest University. I can't remember right
14 off hand.

15 Q. Some sort of university?

16 A. I know a university.

17 Q. Might have bought one copy?

18 A. If I am not mistaken, correct.

19 Q. One copy. How much would that have cost?

20 A. I do not know.

21 Q. What other outside companies were you doing customer
22 support for?

23 A. A few sheriff agencies that bought the CILC Basic
24 product also.

25 Q. Which ones?

1 A. I don't know.

2 Q. You don't remember?

3 A. I wasn't sales.

4 Q. You don't remember who -- which agencies called you?

5 A. No, I don't.

6 Q. Am I correct that, relatively speaking, the number of
7 client support calls that you would have gotten from
8 people outside of IRP was much smaller than the number of
9 clients support calls that you would have gotten from
10 inside IRP?

11 A. I would agree with that statement.

12 Q. Okay. But despite that fact, you have no memory of
13 any of the particular law enforcement agencies that called
14 you to get client support?

15 A. No, because we didn't get calls, like, every day.
16 And it was -- that was a while ago.

17 Q. I take it that wasn't a very big part of your job,
18 then?

19 A. You are correct.

20 Q. Even though you were on call 24/7?

21 A. Customer support was not a big part of my job for
22 outside clients, that's correct.

23 Q. All right. Now, you also testified that you had
24 worked for at least periods of time as a volunteer?

25 A. Correct.

1 Q. And you did that at Leading Team?

2 A. Correct.

3 Q. And did you also volunteer at IRP?

4 A. It's a possibility. I don't really remember.

5 Q. Don't remember that?

6 A. Correct.

7 Q. When you were volunteering there, you weren't
8 reporting any of that time to the staffing companies, were
9 you?

10 A. No. If I were volunteering there, it was probably
11 when I didn't have a contract. So I wouldn't have had
12 anyone to bill it towards anyway.

13 Q. All right. And if you were -- during these periods
14 of time when you were volunteering, I think you said that
15 during some of those periods of time you had other jobs?

16 A. At Leading Team, correct.

17 Q. Okay. So while you were at Leading Team, you were
18 sometimes working at other companies?

19 A. Correct.

20 Q. Okay. Now, what if something came up for Leading
21 Team while you were working -- in the middle of the day,
22 while working in the other job. I think you said you
23 could get those calls at any time.

24 A. No. When I was at Leading Team, I wasn't doing,
25 like, support calls for customers or anything like that.

1 Q. So that never happened?

2 A. No.

3 Q. So while you were at Leading Team, the only time you
4 were working was when you weren't working at your other
5 job?

6 A. That's not accurate. If there was an issue that I
7 could handle from the other position, I could deal with
8 it. You can't PB into the system. But for the most part
9 at Leading Team, if I remember correctly, it was once I
10 was done for that day, I would go in to see if there was
11 any work that needed to be done, I could call, and I would
12 go back to Leading Team and complete whatever tasks.

13 Q. There were times, then, when you were working at your
14 regular job where you would stop doing the work at your
15 regular job and take care of something for Leading Team?

16 A. Correct.

17 Q. And you wouldn't bill your regular job for that time
18 while you were helping Leading Team, would you?

19 A. If I was sitting there and I was doing help for
20 Leading Team, I would still -- I'm still billing my other
21 job.

22 Q. Because you are still sitting there?

23 A. I am still sitting there.

24 Q. Okay. You also testified that you did a lot of work
25 -- there was some work that you were required to do in the

1 evenings.

2 A. Correct.

3 Q. And that included system maintenance kind of tasks;
4 is that right?

5 A. You could encapsulate development maintenance;
6 correct?

7 Q. You said you were doing some sort of data repair or
8 replenishment during that time, as well?

9 A. It's a refresh.

10 Q. A refresh, I am sorry. So that kind of -- those kind
11 of tasks you would do after hours?

12 A. Correct.

13 Q. And the reason you would do those tasks after hours
14 is because other people weren't using the system at that
15 time; right?

16 A. Correct.

17 Q. Because if other people were using the system at that
18 time, that would have prevented your ability to do those
19 kinds of tasks?

20 A. Correct.

21 Q. So whenever you were doing any of those kinds of
22 tasks outside business hours, nobody else could have been
23 working on the software at IRP, could they?

24 A. Not a hundred percent true. But most of the time,
25 you would make sure that no one was on the systems before

1 you did those. If someone was still around, you waited
2 until they were done, and then you did your maintenance or
3 whatever.

4 Q. All right. And that kind of work that you would do
5 overnight, for example, were you billing any of that work
6 to the staffing companies?

7 A. Yes, I was.

8 Q. Okay. But that, then, clearly wasn't any of the time
9 that you were reporting to staffing companies that you
10 were working during the day?

11 A. That work, yeah, if it wasn't during the day, it
12 wasn't during the day.

13 Q. You remember that you reported some of your time to
14 staffing companies as taking place during the day.

15 A. Correct.

16 Q. So are we clear that that time couldn't have been
17 this overnight kind of work that you have been describing?

18 A. Well, if you've ever seen on the time sheets, not all
19 of the time sheets specify exact time.

20 Q. I am not asking you about the ones that don't
21 specify, Mr. Barnes, I am asking you about ones that do
22 specify a time.

23 A. If they do specify a time working during the day,
24 that was the time I reported.

25 Q. If they specify a time, those were the hours that you

1 worked?

2 A. Correct.

3 Q. Okay. Now, you may have been working on something
4 else at the same time, but you definitely worked those
5 hours for that company; is that right?

6 A. Correct.

7 Q. Okay. And that overnight work, some of that
8 overnight work was when you were doing customer support,
9 as well?

10 A. No.

11 Q. No?

12 A. No. If I had a call, I was to be available for
13 overnight work. It was rare that I had to do that. But
14 if someone, for instance, if someone was doing work on the
15 system -- like, for instance, if they were checking out
16 code and backup was happening, and they were, like, hey, I
17 can't reach the repository, I would sometimes stop that
18 back up, let them get to what they need to do to finish
19 it. But, most of the work I tried to make sure I was
20 doing when no one was, you know, on the system.

21 Q. Okay. And is that, then, the work that you were also
22 able to do while you were sleeping?

23 A. Most of the work, yeah, you could do. Because if I
24 am starting up a backup, unless the backup had an issue or
25 whatnot, it would finish completely, it never would alert

1 me and let me know any problems were going on.

2 Q. If you would do that, say, overnight, and that would
3 take 8 or 10 hours to run over the course of the night.
4 Let's say you ran it from 10:00 p.m. to 6:00 in the
5 morning while no one else was on the system. Am I
6 understanding your testimony right that you would have
7 billed that 8 hours to whatever company had hired you to
8 do database administration?

9 A. Correct.

10 Q. Okay. While you were sleeping?

11 A. Correct.

12 Q. Now, while you were at Leading Team, you also worked
13 through DKH, by the way; right?

14 A. Correct.

15 Q. So you worked three companies, not just Leading Team
16 and IRP?

17 A. If I remember correctly, yes.

18 Q. All right. And in fact, you worked for 11 different
19 staffing companies; right?

20 A. If that number is correct, yes.

21 Q. Well, I am asking you.

22 A. I don't remember the exact number, but if it was
23 11 --

24 Q. You don't remember?

25 A. No.

1 Q. Do you remember the first one?

2 A. No.

3 Q. Adecco in November of 2002?

4 A. I worked for Adecco.

5 Q. And you started that the beginning of November of
6 2002; right?

7 A. I don't remember the dates, honestly.

8 Q. And you billed time to MSX International through the
9 middle of February of 2005; does that sound right?

10 A. It sounds correct.

11 Q. Okay. And nine others in between there, you don't
12 know, you can't remember?

13 A. It was, as you say, it was a few staffing agencies.
14 So I don't remember all of them.

15 Q. Which others do you remember?

16 A. Really, I don't remember too many, because I worked
17 contract most of my career. I've worked for a lot of
18 staffing agencies; some I worked twice. I worked for
19 Adecco twice.

20 Q. Do you remember any of those agencies telling you why
21 the contract was ending?

22 A. I remember one agency, but the contract didn't end,
23 and that was before IRP. They never gave me any reason
24 for the contract getting ready to --

25 Q. Someone just fired you without giving you any

1 explanation?

2 A. Usually, they will just tell you the contract is
3 over. You rarely get any explanation as to -- unless you
4 did something really bad, they wil tell you your
5 performance is bad. But if a contract is ending, it is
6 over.

7 Q. Did you ever ask?

8 A. Not really.

9 Q. You weren't curious about that, at all?

10 A. No.

11 Q. Wasn't surprising to you that you needed to work for
12 11 different companies to get paid over that period of
13 time?

14 A. Not really.

15 Q. Why was it that when you were getting hired by a new
16 staffing company that you didn't tell them that you had
17 previously worked there for another staffing company?

18 A. If they asked, I did tell them. If there were
19 issues -- if it didn't appear to be an issue or they
20 didn't ask --

21 Q. You didn't tell Mr. Hayes.

22 A. Mr. Hayes, I don't remember if he ever asked me.

23 Q. He said he asked you.

24 A. Who is Mr. Hayes.

25 Q. Randy Hayes from Technisource.

1 A. I don't recall him ever asking me.

2 Q. You don't recall him asking you?

3 A. No.

4 Q. Well, why was it that you would actually take
5 affirmative steps to prevent the staffing companies from
6 knowing that you worked at IRP before?

7 A. Explain "affirmative"?

8 Q. Like changing name plates around, for example.

9 A. I don't recall. Because, to me, that is not
10 affirmative. To me there were many reasons in the company
11 why they would turn name plates around.

12 Q. I am asking you why you would do it, Mr. Barnes.

13 A. If I was asked to turn my name plate around, I would
14 turn my name plate around.

15 Q. Without question?

16 A. Without question.

17 Q. You didn't think there was anything wrong with that?

18 A. No.

19 Q. You didn't think there was anything suspicious at all
20 about that?

21 A. No.

22 Q. What did you think was the reason for that?

23 A. One of my name tags had on there CIO, and I was never
24 getting paid to be a CIO. But a lot of times when they
25 even had customers/clients in, when they needed to

1 represent the company, I would be CIO. Most of the time I
2 am not in that role, name tag down.

3 Q. All right.

4 MR. KIRSCH: Can we publish 158.01?

5 THE COURT: You may.

6 Q. (BY MR. KIRSCH) So, Mr. Barnes, when you got --

7 first of all, you got this message, right?

8 A. I believe so, yes.

9 THE COURT: I am sorry, Ms. Seeman?

10 MR. KIRSCH: Thank you, Your Honor.

11 Q. (BY MR. KIRSCH) So you think you did get this
12 message; right?

13 A. Correct.

14 Q. And so what was your interpretation, then, of "This
15 will be their official start date, so act accordingly"?

16 A. That these are the people's first start date, and act
17 accordingly.

18 Q. That wasn't Mr. Walker's start date, was it, in
19 October of 2003?

20 A. For being a contractor for that contracting agency,
21 it was.

22 Q. Okay. But he had obviously been there before; right?

23 A. Correct.

24 Q. Was his name plate one of the ones that got turned
25 around?

1 A. My office is not near his, I wouldn't know.

2 Q. You never saw it?

3 A. No, my office is on the other side of the door, far
4 end of the building.

5 Q. You never happened to go by Mr. Walker's office while
6 you were there?

7 A. No.

8 Q. Never went by the office of your good friend?

9 A. I never went by his office -- very rarely did I go by
10 his office to see anything. Most of the day I was in my
11 office working.

12 Q. For more than one staffing company; correct?

13 A. Correct.

14 MR. KIRSCH: Can I please publish 608.01, Your
15 Honor?

16 THE COURT: You may.

17 Q. (BY MR. KIRSCH) All right. Now, you got this e-mail
18 too, right, Mr. Barnes? Look on cc line?

19 A. Most likely did.

20 Q. Most likely?

21 A. Yes. I'm cc'd on there.

22 Q. Did you get e-mails that were addressed to Ken Barnes
23 while you worked there?

24 A. Sure did.

25 Q. Okay. So apparently November 21st, apparently, was

1 going to be your official start date --

2 A. Correct.

3 Q. -- for that company?

4 A. Correct.

5 Q. You, of course, were already working there; right?

6 A. I worked there before, yes.

7 Q. Okay. You had a name plate?

8 A. I had a name plate.

9 Q. You had an access badge?

10 A. I had an access badge.

11 Q. That gave you 24-hour access?

12 A. Yes, gave me 24-hour access.

13 Q. Okay. But how is it that you acted accordingly when
14 the folks from Above the Rest Staffing came?

15 A. Well, actually, I wouldn't have acted accordingly,
16 because I'm coming in as staff. I'm the staff coming in.
17 So there was no reason for me act accordingly, at all.

18 Q. How did you act, then, with Above the Rest Staffing?

19 A. I don't recall the exact staffing agency, but most
20 likely I came in. If they had paperwork to fill out,
21 filled out the paperwork, and then at that point would
22 have worked.

23 Q. Would you have acted like you had never worked at IRP
24 before?

25 A. No.

1 Q. You wouldn't have?

2 A. No.

3 Q. You would have been saying hello to everybody? You
4 would have been saying hello to Mr. Walker and Mr. Banks,
5 calling them by their first names, acting like you were
6 friends?

7 A. If they came by me, I would probably say, hey, Gary,
8 how are you doing? Because they sent them my name --

9 MR. WALKER: Your Honor, I'm going to move that
10 Mr. Barnes plead the Fifth Amendment, and ask for a
11 retrial based on our --

12 MR. KIRSCH: Objection, Your Honor. Can we
13 approach the bench, please?

14 THE COURT: Overruled.

15 MR. WALKER: -- being forced to testify.

16 THE COURT: Overruled. Approach.

17 (A bench conference is had, and the following is
18 had outside the hearing of the jury.)

19 MR. WALKER: Your Honor, I would state our previous
20 statement, that we failed to have control over this; to
21 put Mr. Barnes on the stand by your statement that if we
22 didn't have other witnesses here one of us would have to
23 testify.

24 THE COURT: You made your record on that. I don't
25 want you talking in front of the jury in this fashion. I

1 already ruled on this. You can take it up on appeal.

2 MR. WALKER: Your Honor --

3 THE COURT: You cannot advise him of anything. You
4 are not his lawyer.

5 MR. WALKER: I understand he can plead the Fifth.

6 THE COURT: He can plead the Fifth, but you cannot
7 advise him.

8 MR. KIRSCH: He can't take the Fifth now that he
9 started to testify. He can't take the Fifth in the middle
10 of his testimony.

11 THE COURT: I think he can.

12 MR. WALKER: He can.

13 MR. KIRSCH: If I could ask for time so I can get
14 direction about that.

15 THE COURT: I'm not sure what it is, but I think he
16 testified, and if he wants to plead the Fifth, I am not
17 going to force him to testify. If you want to take a
18 recess, it is almost lunch, we can take this up after
19 lunch.

20 MR. KIRSCH: I would like to investigate if that is
21 something to be -- that the Court is going to potentially
22 allow.

23 THE COURT: Then we need to have this after lunch.
24 I will let the jury go. I want you back here at 1:00. We
25 have a 1:00.

1 COURTROOM DEPUTY: Your Honor, we have a change of
2 plea hearing at 1:00.

3 THE COURT: Okay. Changes of plea take 40 minutes.
4 I will have to let the jury go until 2:30.

5 MR. KIRSCH: Your Honor, can I have one moment?

6 THE COURT: You may.

7 I don't want any more speaking objections like that
8 in front of the jury.

9 MR. WALKER: Yes, Your Honor.

10 MR. KIRSCH: Your Honor, I would ask the Court to
11 tell the jury now that any Fifth Amendment privilege is
12 Mr. Barnes' to assert on his behalf, not Mr. Walker's, and
13 that the jury should disregard any statement made by
14 Mr. Walker about another defendant's constitutional
15 rights.

16 THE COURT: I will not instruct them as to anything
17 until I rule on this matter.

18 MR. KIRSCH: Thank you, Your Honor.

19 (The following is had in the hearing of the jury.)

20 THE COURT: Ladies and gentlemen, at this time we
21 are going to take a recess, and I have a 1 o'clock. I
22 have a 1 o'clock, then we have some legal matters we need
23 to take care of. So I am not going to require you to be
24 back until 2:45, because I don't want you to have to sit
25 in the jury room waiting. So you all can take a long

1 lunch. I'll expect you back at 2:45.

2 Court will be in recess.

3 (Lunch break is taken from 11:57 a.m. to 1:49 p.m.)

4 (The following is had in open court, outside the
5 hearing and presence of the jury.)

6 THE COURT: You may be seated.

7 All right. Immediately before the break for lunch,
8 we had an objection made by Mr. Walker to any testimony by
9 Mr. Barnes on the basis of his right against
10 self-incrimination.

11 First, the Court would say that the privilege is an
12 individual one which can only be exercised by the
13 defendant, himself. At this point, I have not heard any
14 objection from Mr. Barnes.

15 Mr. Barnes?

16 MR. BARNES: I would like to object. Basically, I
17 didn't have a right to not incriminate myself while on the
18 stand.

19 THE COURT: So you are asserting the privilege?

20 MR. BARNES: Yes.

21 THE COURT: All right. The other issue that came
22 up prior to trial -- you may be seated -- or prior to the
23 break, was whether or not the defendant could be required
24 to testify, and could be deemed, essentially to have
25 waived his Fifth Amendment privilege by taking the stand

1 and testifying.

2 And the Court has done some research over the lunch
3 hour and has found case law which indicates that a
4 defendant who takes the stand waives any Fifth Amendment
5 privilege regarding cross-examination relevant to the
6 issues raised by his or her direct testimony. And that if
7 the defendant has testified, the Government may comment on
8 the defendant's refusal to answer proper questions during
9 closing argument.

10 We recessed because I have not had this issue arise
11 before. Mr. Walker also moved for mistrial. And I will
12 tell you now, on the record, Mr. Walker, if you ever blurt
13 out something like that again in front of the jury, we
14 will have to have some further proceedings.

15 It is my indication or my perception that the
16 defendants are attempting to get a mistrial in this case,
17 and I will not condone or allow that type of behavior on
18 the part of the defendants in order to obtain a mistrial.

19 At this point, I am going to go ahead and make my
20 statements, and then -- actually, I will allow the
21 Government to make its argument. We recessed with respect
22 -- it was actually the issue of the cross-examination, and
23 I did have one of the cases, I did not have the other.

24 So, Mr. Kirsch, Ms. Hazra, who wishes to go?

25 MR. KIRSCH: Your Honor, I will do that. And I'll

1 be brief given the Court's ruling. We found two
2 authorities quickly. One was the United States Supreme
3 Court case of Mitchell v. United States, found at 526 U.S.
4 314, on page 322. That opinion indicates "It is well
5 established that a witness in a single proceeding may not
6 testify voluntarily about a subject and then invoke the
7 privilege against self-incrimination when questioned about
8 the details."

9 That is in accordance with the Tenth Circuit
10 authority on this issue, including United States v.
11 Cockett, 435 F.3d 1305, specifically at pages 1312 and
12 1313. There is a discussion that indicates, as the Court
13 already indicated, that once a defendant takes the stand,
14 that does constitute a waiver against his privilege
15 against self-incrimination, and that that subjects him to
16 cross-examination on all relevant facts.

17 So the Government's position is that, in fact, that
18 is what has happened here, and agrees with the opinion
19 expressed by the Court that the Government ought to be
20 allowed to continue with its cross-examination of
21 Mr. Barnes.

22 I did have one other point to make, and I don't
23 know if the Court would want me to make it now or want me
24 to wait until after --

25 THE COURT: What is it?

1 MR. KIRSCH: I had another suggested procedure that
2 we had discussed in the event that Mr. Barnes clearly
3 belatedly decided, as he apparently has, to invoke his
4 Fifth Amendment privilege against self-incrimination.
5 That is, Your Honor, if Mr. Barnes wants to persist in
6 that, then one alternative that we believe that the Court
7 could consider and that would address any issues that had
8 been raised by Mr. Barnes' testimony so far, would be that
9 if Mr. Barnes chose this, that the Court could instruct
10 the jury that all of Mr. Barnes' testimony, both on direct
11 and on cross, should be stricken; that the jury should not
12 consider it, they should put it out of their minds, and we
13 would propose that this would be an opportune time for
14 Court to again remind the jury of the non-testifying
15 defendant Tenth Circuit Pattern Jury Instruction, 1.08.01.

16 If Mr. Barnes makes that election, the Government
17 would not oppose that procedure, and that would certainly
18 address any prejudice. And as the Court noted, any
19 prejudice that has occurred, will have occurred with
20 respect only to Mr. Barnes, not with respect to any of the
21 other defendants.

22 The one other thing I had, Your Honor, was that we
23 proposed, and I provided copies, I believe, to the Court
24 and to the defense, a very brief additional limiting
25 instruction that we were thinking was appropriate given

1 Mr. Walker's inappropriate objection made in the presence
2 of the jury prior to trial, and that brief -- that brief
3 instruction that we captioned "Proposed limiting
4 Instruction" would help address any prejudice that might
5 have been generated by Mr. Walker's comment.

6 THE COURT: All right. Mr. Walker?

7 MR. WALKER: Your Honor, Mr. Barnes was not
8 advised.

9 THE COURT: This is not for you to argue. It is
10 for Mr. Barnes to argue.

11 Mr. Barnes?

12 MR. BARNES: I was not advised of my Fifth
13 Amendment rights prior to testifying to the stand.
14 Neither was I advised prior to my testimony of my Fifth
15 Amendment rights. The only reason I took the stand, Your
16 Honor, was I was basically -- when we approached, we were
17 told that someone needed to from us if we can't get our
18 witnesses to testify, and that is the reason why I took
19 the stand. It is on the premise that I had to. If we
20 don't have a witness, one of us is going to have to take
21 the stand. So I took the stand.

22 THE COURT: You volunteered to take the stand.

23 MR. BARNES: It wasn't volunteering, I was
24 basically --

25 THE COURT: You have four or five other

1 co-defendants. Why were you the one that took the stand?

2 MR. BARNES: Someone had to take the stand. You
3 said one of us has to take the stand.

4 THE COURT: I didn't tell you that. Why did you
5 decide to take the stand, Mr. Barnes?

6 MR. BARNES: I was compelled to take the stand from
7 our discussion up at the bench, as we approached the
8 bench.

9 THE COURT: All right.

10 MR. WALKER: Your Honor, I would like to make a
11 statement for the record.

12 THE COURT: On whose behalf?

13 MR. WALKER: On my behalf.

14 THE COURT: What is the prejudice to you?

15 MR. WALKER: Your Honor, there is extreme prejudice
16 caused against myself, defendant Gary Walker. It is
17 caused by the compelling of one of my co-defendants to
18 testify. And so I move for a mistrial on the grounds of
19 improper evidence being admitted, and for the violation of
20 the a defendant's constitutional rights.

21 THE COURT: Your constitutional rights? What were
22 your constitutional rights that were violated?

23 MR. WALKER: Your Honor, I am talking collectively
24 of the co-defendants' rights.

25 THE COURT: No, you have no right to talk

1 collectively. I told you that when you decided not to
2 have counsel, that you each have to represent yourselves.
3 So speak on your own behalf.

4 MR. WALKER: And, Your Honor, I join Mr. Barnes'
5 objection of not being advised of his Fifth Amendment
6 right.

7 THE COURT: That is not your right to raise.

8 MR. WALKER: Your Honor, I would restate the
9 statement by Mr. Barnes.

10 THE COURT: What I need to know is what is the
11 prejudice to you, Mr. Walker?

12 MR. WALKER: Your Honor, extreme prejudice caused
13 by the lack of being -- one of my co-defendants not being
14 advised of his rights. Extreme prejudice. Improper
15 introduction of evidence by his being compelled to
16 testify.

17 THE COURT: He wasn't compelled. He got on the
18 stand voluntarily. You asked him questions, he answered
19 questions. This was not an issue that was raised until
20 after he had finished giving all of his direct testimony.

21 MR. WALKER: Your Honor, with all due respect, we
22 would like to review the transcript where we approached
23 the bench and you advised us.

24 THE COURT: I understand that was provided to you.
25 I understand a copy of that was provided, because I asked

1 for one to be produced immediately.

2 MR. WALKER: We did review that. That was not the
3 proper side bar. The side bar where that comment was made
4 was the previous side bar. We need to see the transcript
5 of that side bar to verify.

6 THE COURT: That's the only side bar that took
7 place at 9:55 before Mr. Barnes was called up.

8 MR. WALKER: Your Honor, we did approach, and there
9 was a side bar immediately prior to him beginning his
10 testimony.

11 THE COURT: That was the side bar.

12 MR. WALKER: Your Honor, that has not been
13 transcribed in its entirety.

14 THE COURT: That is all we have, according to
15 Ms. Martinez. That is what was stated, and that is what
16 was transcribed.

17 MR. BANKS: We would like to see the transcript of
18 the prior side bar to verify that entire context of that
19 conversation is captured.

20 THE COURT: All right. You can get that from
21 Ms. Martinez at the end of day.

22 MR. WALKER: Yes, Your Honor.

23 THE COURT: Mr. Banks?

24 MR. BANKS: With regard to -- this is a conspiracy
25 case. And we are not here to try to get a mistrial.

1 After the conference up front, we came back and we huddled
2 and said somebody has to testify. That was based on the
3 information provided at the side bar. We didn't feel like
4 we had any alternative. We started discussing which one
5 of us is going to have to testify. Somebody is going to
6 have to testify. So that is the process we went through.

7 THE COURT: Why did you wait until after his direct
8 testimony to raise any of these issues?

9 MR. BANKS: We didn't like to do it in the first
10 place.

11 THE COURT: That wasn't my question. My question
12 is why did you not raise this objection prior to his
13 giving his entire direct testimony?

14 MR. BANKS: We had time to consult about it. Right
15 then, there was no --

16 THE COURT: When did you have time to consult?

17 MR. BANKS: We consulted a little bit at the table
18 before Mr. Barnes testified. And then when we left, we
19 were not happy with him having to testify.

20 THE COURT: And why didn't you raise that as an
21 issue on the record before you put him on the stand and
22 have him give his entire direct testimony.

23 MR. BANKS: Because we felt we didn't have a choice
24 but to have him testify.

25 THE COURT: Why didn't you not object at that time?

1 At least state for the record -- you have known all along
2 how to make a record for appeal. Why did you not do that
3 until after you had gotten the testimony you wanted him to
4 give on the stand.

5 MR. BANKS: To be honest, Your Honor, the Court is
6 angry.

7 THE COURT: I am not angry.

8 MR. BANKS: I am telling you, you asked me what I
9 felt at the time. The Court was angry at the defense.

10 THE COURT: No, the Court has never been angry in
11 this case. The Court has told you what it expected of you
12 numerous times, and you all tell me every time, yes, you
13 understand, your witnesses will be here, there will be no
14 further delays. And we get 45 minutes into this testimony
15 today, and all of a sudden you don't have a witness
16 available.

17 MR. BANKS: But, Your Honor, you are asking me with
18 all due respect what I felt coming from the bench.

19 THE COURT: No, I didn't ask you what you felt. I
20 said why did you not object until after you got whatever
21 you wanted from Mr. Barnes out in front of the jury.

22 MR. BANKS: We didn't want to direct Mr. Barnes.
23 We felt forced and compelled.

24 THE COURT: Why did you not make an objection on
25 that basis for the record?

1 MR. BANKS: Honestly, because we didn't feel it
2 would do any good, given what -- the side bar that had
3 taken place in the front of the courtroom. We were not
4 going to come back and argue again with the Judge. We
5 felt like -- I felt like -- I will not speak for we. I
6 felt like it was a tongue lashing. Okay, somebody has to
7 testify. We had witnesses subpoenaed, they didn't show
8 up. So what do we do in that particular situation?

9 It is not as easy to go up against a Judge in her
10 courtroom. You do make objections as you know as relevant
11 when you know you have some justification.

12 THE COURT: You made those arguments after you
13 elicited the favorable testimony that you wanted from
14 Mr. Barnes, and only after you had elicited the favorable
15 testimony.

16 MR. BANKS: I didn't think anything was favorable
17 about Mr. Barnes' testimony to begin with. It was not a
18 process we wanted to engage in in the first place,
19 especially without proper preparation if one of us was to
20 testify.

21 And if we were to testify, we would have
22 definitely -- a lot of our information, as far as
23 Mr. Barnes, can be substantiated by expert testimony.
24 That was our goal in this particular trial, because the
25 workings of the staffing industry will substantiate

1 Mr. Barnes' work activity, and that is what our ultimate
2 goal and strategy was.

3 When Mr. Barnes had to take the stand, and now we
4 are in sort of a different position, and that's the way --
5 and when we huddled, that is what the conversation was
6 about. Somebody is going to have to testify. According
7 to the Court, somebody will have to testify.

8 THE COURT: What is the prejudice to you?

9 MR. BANKS: The prejudice to me, Your Honor, is
10 irrespective, the jury has heard testimony from
11 Mr. Barnes. In addition, they have heard
12 cross-examination from Mr. Barnes. And in a conspiracy
13 case, there is a lot of people tied up, and I'm one of
14 them, in a conspiracy case, that is on the record, with
15 information the Government has admitted into evidence,
16 certain e-mails that jurors can draw inferences from, and
17 then based on Mr. Barnes' testimony, which was not
18 something we wanted, prejudiced me as a defendant in a
19 conspiracy-type case.

20 THE COURT: How? The e-mails are already in
21 evidence. How did Mr. Barnes' testimony, which you all
22 decided to put on, prejudice you?

23 MR. BANKS: Because we were not prepared to put
24 Mr. Barnes on the stand as a part of our defense. We felt
25 like --

1 THE COURT: Regardless of your preparation, you
2 chose to put him on. How did his testimony prejudice you?

3 THE DEFENDANT: Because we did not choose to put
4 him on, we were compelled to put him on.

5 THE COURT: Put that aside.

6 MR. BANKS: I can't put that aside, Your Honor.

7 THE COURT: Yes. You can tell me what testimony he
8 gave that prejudiced you.

9 MR. BANKS: Any testimony that he gave that the
10 jury can infer from, whether it be direct or
11 cross-examination from the Government, the jury can infer
12 his responses to be prejudicial to the entire group of
13 people that are alleged -- that are accused in this
14 conspiracy.

15 So if I got up there and testified, if I said
16 something wrong or improper on cross-examination, when I
17 didn't really want to be up there, it could prejudice all
18 of the defendants in a conspiracy case.

19 THE COURT: And in this case, what did Mr. Barnes
20 testify to that you believed prejudiced you in that
21 regard.

22 MR. BANKS: His testimony -- not being able to
23 fully explain, because an expert can explain what is going
24 on, and Mr. Barnes had a tough time explaining the
25 staffing industry; how things work, how things work with

1 him. Those type things are not clear as far as the jury
2 is concerned.

3 And they can infer from Mr. Barnes' testimony, if
4 they deemed his testimony to be -- if they deemed his
5 testimony to be suspect, to be attributed to me as another
6 defendant.

7 And all I will say, Judge, with the greatest of
8 respect for this Court, we did not want to put anybody on
9 the stand, especially today. Have we been perfect in
10 trial management? No, we have not. But we did send out
11 subpoenas. We had a full day of people that should have
12 been here. The afternoon people are here. For some
13 reason, the morning people did not come through.

14 Is part of that our fault? Yes, it is. Because in
15 retrospect, like you said, we would call everybody on one
16 day, and if they can't testify, go home, we have to call
17 you back another day.

18 THE COURT: That is what I told you last week when
19 we had to convene early -- we had to recess early because
20 you all didn't have your witnesses here. I told you to
21 tell them they needed to be here and we were going to
22 proceed.

23 MR. BANKS: Yeah, and we did tell them to be here
24 at the time they would testify. You mentioned today to
25 get everybody here at 9 o'clock, then we don't have any

1 sort of issues if somebody rolls in late.

2 THE COURT: You should have known that yourselves.

3 MR. BANKS: I'm just putting on the record as you
4 asked, Judge.

5 THE COURT: All right.

6 MR. BARNES: I think I would like to demand a
7 mistrial for extreme prejudice caused by court compelling
8 me to testify, and on the grounds of improper -- and on
9 grounds of improper evidence being admitted and abolishing
10 my constitutional rights. I was not advised of my Fifth
11 Amendment rights prior to being ordered to take the stand.
12 Neither was I advised prior to giving my testimony.

13 I do feel I was prejudiced. I did not understand I
14 had the right to remain silent when I took the stand. And
15 from that last side bar, I was under the understanding
16 when we left there, that I was the one that needed to
17 testify, because we needed a witness, somebody to testify
18 because we didn't have a subpoenaed witness here.

19 THE COURT: Mr. Kirsch?

20 MR. KIRSCH: I am sorry, Your Honor, but just on
21 the issue of compulsion, I didn't address that issue
22 before. And for the purposes of the record with respect
23 to compulsion, the Court as indicated -- did make
24 available the transcript of the side bar. And the
25 transcript of that side bar does not contain any reference

1 by the Court to the defendants that one of them needed to
2 testify.

3 Second, as we pointed out before, I just want to
4 make sure the record is absolutely clear about this,
5 Special Agent Smith is under subpoena. He has been here
6 in the courtroom the entire morning. He was here at the
7 time of that side bar when the Court instructed the
8 defendants that they needed to call their next witness.

9 The defendants have since indicated that they still
10 plan to call Special Agent Smith, and they further
11 indicated that they thought his testimony would have taken
12 several hours.

13 There was no compulsion by the defendants in order
14 to have to call one of their own. And Special Agent Smith
15 was sitting right here, and by the defendants' own
16 testimony, could have filled the entire gap that remained
17 in the morning until their next set of witnesses arrived.

18 So the Government simply believes that there is no
19 evidence of compulsion. None of the defendants have
20 offered any evidence of prejudice. Mr. Banks' argument
21 about prejudice was that he didn't get enough testimony
22 out of Mr. Barnes. If that was true, then he could have
23 asked Mr. Barnes more questions while he was up there.

24 The last thing that I point out with respect to the
25 compulsion, Your Honor, is that there is no right -- there

1 is no right under the federal system to be advised about a
2 defendant's Fifth Amendment rights prior to testifying.

3 That is a right that exists in the State Court system.

4 Sometimes judges give that sort of advisement as
5 prophylactic measure, and there is certainly nothing wrong
6 with that, but it is also not required. So there has been
7 no demonstration that Mr. Barnes was either compelled to
8 testify in any way or that he or any of the other
9 defendants have been prejudiced.

10 And, particularly, if the Court adopts the
11 Government's suggestion, then there will be absolutely no
12 way that any of the defendants can demonstrate prejudice.

13 THE COURT: Mr. Walker?

14 MR. WALKER: Well, Your Honor, it is not just a
15 matter of who testified but when they testify. We were
16 not prepared to put on any other witnesses other than the
17 ones we called today -- that we expected to come and
18 testify on our behalf. As we said earlier, some showed,
19 some did not show. So there was no time to prepare to
20 have any other witnesses testify other than the ones who
21 were on the schedule for today.

22 THE COURT: Why didn't you put Agent Smith on. He
23 was sitting here in the courtroom, and you have subpoenaed
24 him.

25 MR. WALKER: Your Honor, as I said, there was no

1 preparation for Mr. Smith to be -- for direct
2 examination of Mr. Smith today. We would not have been
3 prepared to do that today in a manner that would be
4 advantageous for us.

5 THE COURT: So you made the decision who to call.

6 MR. WALKER: Your Honor, that decision was made
7 based on us being compelled to put someone on the stand at
8 the side bar. That was very clear to us, that we were
9 compelled to put someone on. And we feel it would be
10 questionable for -- in all due respects, for you to
11 continue as the Judge when you make that affirmation, and
12 now recant on the fact that we had to put someone on the
13 stand.

14 THE COURT: I don't recant. That is exactly my
15 words. You will call your next witness.

16 MR. WALKER: Our understanding of your words, "If
17 one of your witnesses is not available, one of you
18 defendants will have to take the stand."

19 THE COURT: I do not recall ever making such a
20 statement.

21 MR. WALKER: Your Honor, that is why I am
22 requesting the transcript of previous side bar.

23 THE COURT: We will give you a transcript of any
24 side bar we have. We will have a transcript of any side
25 bar we have. That is the only one I recall with respect

1 to the discussion as to not having any witnesses, because
2 you called that side bar, because you said you had no
3 further witnesses until 10:30, and it was 9:45 or 9:50.

4 MR. WALKER: Yes, Your Honor. So we want to ensure
5 that all of the contents and the entire context of that
6 side bar and the previous are captured for us to inspect
7 that record.

8 THE COURT: That will be provided to you, although
9 I believe it already has been, will be provided to you at
10 the end of today.

11 MR. WALKER: Yes, Your Honor.

12 THE COURT: All right. In this case, I am prepared
13 to rule. A mistrial should be granted only where the
14 defendant's fundamental rights to a fair and impartial
15 trial has been impaired. That is pursuant to United
16 States v. Kravchuk, 335 F.3d 1147, Tenth Circuit, 2003.
17 "Whether circumstances have arisen which require the
18 declaring of a mistrial rests largely in the discretion of
19 the trial judge, but whenever possible the judge should
20 seek to avoid a mistrial by appropriate corrective action,
21 such as a curative instruction which will minimize any
22 potential prejudice." United States v. Bender, 290 F.3d
23 1297, Eleventh Circuit, 2002.

24 In this case, the defendants have moved for a
25 mistrial on the grounds that the Court coerced defendant

1 Barnes into testifying and, thus, violated his Fifth
2 Amendment privilege against self-incrimination. The Fifth
3 Amendment states that "No person shall be compelled in any
4 criminal case to be a witness against himself." This is
5 an individual's privilege, rooted in our society's
6 traditional respect for the individual. United States v.
7 Rivas-Macias, 537 F.3d 1271, Tenth Circuit, 2008.

8 Now, the privilege is now self-executing, and it
9 may be waived or lost if an individual fails to assert it
10 in a timely fashion. That is also from Rivas-Macias at
11 page 1277. In this case, the defendants made the decision
12 to proceed pro se in this matter. Despite repeated
13 inquiries by this Court, the defendants declined the
14 appointment of advisory counsel, and represented to the
15 Court that they had an attorney with whom they were
16 consulting.

17 The Court in no way coerced Mr. Barnes to take the
18 stand in this case. Rather, only 45 minutes into the
19 proceedings for the day, the defendants requested a bench
20 conference and informed the Court that their next witness
21 would not be appearing until 10:30, to which the Court
22 responded, quote, and this is the transcript that the
23 court reporter prepared. "That is unacceptable. I told
24 you to have witnesses here. We are not going to recess
25 again until 10:30. That is 40 minutes away. I told you

1 to be prepared. They need to be here. Your witnesses are
2 not taking long. We are going to go. The eight you
3 named, you still have time. So you better get them here.
4 So call your next witness."

5 Now, the defendants contend that the Court forced
6 Mr. Barnes onto the witness stand. This is simply untrue.
7 The defendants, themselves, created this situation at the
8 trial. After two days late last week, in which the jurors
9 had to be sent home early because the defendants had no
10 further witnesses for the day, the Court several times
11 warned the defendants that it expected the defendants to
12 have their witnesses lined up and ready to go, and that it
13 was not going to continue the trial merely because
14 defendants had not lined up their witnesses.

15 Each time the defendants stated that they
16 understood and would have witnesses available. All the
17 Court directed was that the defendants should call their
18 next witness, at which time defendants called Mr. Barnes,
19 and Mr. Barnes voluntarily took the stand.

20 In this case, the defendants' objection or claim of
21 this privilege was not asserted until after he had
22 concluded his direct testimony. Thus, it was not asserted
23 in a timely fashion. Defendant Barnes chose to testify.
24 He waived his privilege against self- compulsory -- I'm
25 sorry, self-incrimination with respect to the testimony he

1 gave. That is from Harrison v. United States, 392 U.S.
2 219, a 1968 Supreme Court case.

3 Moreover, defendant Barnes had not ever asserted
4 his privilege up until the hearing a few minutes ago.
5 Rather, Mr. Walker, one of his co-defendants asserted it
6 for him. As this is an individual privilege, Mr. Walker
7 cannot assert the rights on his behalf. It does appear to
8 this Court that the defendants wish to have a mistrial
9 declared in this case, and this Court will not condone or
10 allow the defendants to perpetrate chaos at their own
11 trial and then obtain a mistrial on the basis of
12 prejudice.

13 Mr. Kirsch, could you propose once again what it is
14 you are suggesting as a curative measure in this case?

15 MR. KIRSCH: Your Honor, we are proposing two
16 separate curative instructions. One, assuming that we are
17 correctly understanding that Mr. Barnes, again, is now
18 belatedly asserting his Fifth Amendment right, then what
19 the Government proposes in order to deal with that issue
20 is to ask the Court to instruct the jury that the
21 testimony of Mr. Barnes is being stricken in its entirety,
22 and that they should not consider it as evidence in this
23 trial in any way.

24 We would then propose segueing into the Tenth
25 Circuit Pattern Criminal Jury Instruction about a

1 non-testifying defendant, with something along the lines
2 of, rather than beginning, "The defendant did not
3 testify --" something along the lines of, "I instruct you
4 that you should treat the evidence as if the defendant
5 Barnes did not testify," and then read the rest of that
6 Pattern Jury Instruction.

7 The other curative instruction that we proposed is
8 the one that we tendered to the Court and the parties, and
9 that is the one that we propose to deal with the objection
10 by Mr. Walker that should have been made outside the
11 presence of the jury. And I can read that into the record
12 if the Court would like, or I don't know if the Court is
13 going to make that part of the record. It is brief.

14 THE COURT: Go ahead read the proposed limiting
15 instruction.

16 MR. KIRSCH: Your Honor, that is, "I remind you,
17 again, that statements or objections made by attorneys or
18 defendants who are not testifying are not evidence and
19 should not be considered by you in any way."

20 THE COURT: All right. Response from the
21 defendants as to that proposed curative?

22 MR. WALKER: Well, Your Honor, again, we would ask
23 to see the transcript before proceeding; the transcript of
24 the entire side bar before Mr. Barnes took the stand.

25 THE COURT: All right.

1 MR. WALKER: And, in any event, we not waiving our
2 right and reserve this matter for appeal, and it is based
3 on or violation of our Fifth Amendment rights.

4 THE COURT: Your Fifth Amendment rights were not
5 violated.

6 MR. WALKER: Yes, Your Honor. So that would be
7 Mr. Barnes. And we will file for immediate appeal, Your
8 Honor. But my request is in place. We would like to see
9 the transcript.

10 THE COURT: All right. We will take a recess until
11 2:45, which is when the jury was instructed to be back.

12 Mr. Kirsch, if you could draft up the proposed
13 language for the curative instruction with respect to the
14 striking of the testimony, and provide that to the
15 defendants and to the Court.

16 And, in the meantime, Ms. Martinez, if you could
17 give them the entire transcript, if there is any more, of
18 that side conference beginning with when Mr. Walker, I
19 believe it was -- I believe it was Mr. Walker said, "Your
20 Honor, the defense, can we approach?" I said "You may."
21 Then we had the entire side bar.

22 So, Ms. Martinez, can you type up and provide an
23 entire summary transcript of that entire bench conference,
24 beginning with Mr. Walker's request to approach.

25 MR. BARNES: Is there an audio recordings along

1 with those transcripts?

2 THE COURT: There is no audio recording of the side
3 bars.

4 MR. BARNES: I want to make sure I am not waiving
5 my right to -- I am not waiving any right to reserve this
6 issue for appeal based on violation of my Fifth Amendment
7 right, which I still maintain, and I'm going to file for
8 immediate appeal on this issue.

9 THE COURT: All right. Mr. Kirsch?

10 MR. KIRSCH: Your Honor, just -- I just want to
11 make sure the Court is aware, I don't believe I will have
12 time to type up that processed instruction, but I can hand
13 write it.

14 Perhaps this is my problem. It is still not clear
15 to me how the defendants have responded to our proposal;
16 whether they are accepting that proposal or whether they
17 want to instead have Mr. Barnes finish his
18 cross-examination.

19 THE COURT: That is something, yes, they never did
20 respond to. So the proposed curative measure for this is
21 to go ahead and strike all of Mr. Barnes' testimony, give
22 an instruction to the jury, or we can proceed with the
23 cross-examination of Mr. Barnes, and can testify as he
24 sees fit.

25 MR. WALKER: Your Honor, may we have a moment?

1 THE COURT: You may.

2 MR. KIRSCH: And, Your Honor, our position would be
3 that that is Mr. Barnes' decision, not the decision of the
4 other defendants.

5 THE COURT: I agree.

6 MR. BARNES: I will finish my cross-examination.

7 THE COURT: You do not want a curative instruction?

8 MR. BARNES: No, I don't want a curative.

9 THE COURT: That solves that.

10 MR. KIRSCH: So can I just ask the Court, in that
11 case, Your Honor -- that is not the response that I
12 suspected. In that case, can I ask the Court to make it
13 clear, I think the Court has already done this, but to
14 instruct Mr. Barnes that he will be required to answer the
15 remaining questions posed by the Government during the
16 cross.

17 THE COURT: Well, I have no obligation to advise.
18 Although, I will say for the record that I asked numerous
19 questions of the jury about the right not to incriminate
20 during voir dire. And the defendants were well aware of
21 their rights not to have to testify.

22 Under federal law, there is no requirement. And,
23 actually, I have the Tenth Circuit case here that says
24 that, Nguyen v. Archuleta, 369 Fed. Appx. 889, a Tenth
25 Circuit, Colorado, case 2010, in which the Tenth Circuit

1 has stated and re-affirmed that the trial court does not
2 have an obligation to advise the defendant of his right to
3 maintain silence.

4 That is the responsibility of the counsel for the
5 defendant. And in this case, as I indicated, the
6 defendants have waived their right to counsel.

7 Now, there was a gentleman sitting in the back of
8 the courtroom in a peach-colored shirt. Who was he? He
9 had a suit on with a peach-colored shirt, and he was
10 sitting next to one of your people back there.

11 MR. BANKS: I think that might have been a family
12 friend, an attorney.

13 THE COURT: All right. So I assumed it was. And
14 when we took the break, you came back with this objection.
15 But, at any rate, that is not the responsibility of this
16 Court. I will not advise as to that. The defendants have
17 been advised by counsel, I assume, based on their motions.
18 But they have the Fifth Amendment right against
19 self-incrimination.

20 And, Mr. Barnes, I hope you do understand that
21 because you have testified and you choose to go forward
22 under cross-examination, under the case law, then you have
23 been deemed to have waived your Fifth Amendment privilege
24 regarding any direct examination matters that were raised
25 in your testimony, and you will be required to answer

1 those on cross, or if you assert your Fifth Amendment
2 privilege, the Government may comment on your refusal to
3 answer those questions.

4 I can't force you to give an answer. You can plead
5 the Fifth, I believe, but the Government will be able to
6 make that argument during its closing.

7 MR. BARNES: I understand.

8 THE COURT: All right. Anything further?

9 MR. KIRSCH: Your Honor, I take it that that means
10 that I don't need to do the proposed jury instruction.

11 THE COURT: You don't need to do the proposed jury
12 instruction. I will read the curative limiting
13 instruction with respect to Mr. Walker's outburst, with
14 respect to a mistrial in this case. I'm not going to
15 reference the mistrial. I am just going to give them the
16 instruction as you proposed.

17 MR. KIRSCH: Your Honor, just so the Court is
18 aware, Ms. Hazra and I will talk about this a little bit
19 more. If Mr. Barnes does, in fact, take the Fifth in
20 response to additional cross-examination questions, it may
21 be that we may, at that point, ask for his entire
22 testimony to be stricken.

23 So I just wanted the Court to be aware that that
24 was a possibility that we will discuss a little bit
25 further, understanding now how it is that he intends to

1 proceed.

2 THE COURT: All right. I told the jury not to be
3 back until 2:45 I anticipate you may need to discuss these
4 matters. And when you come back, you can let me know how
5 you will proceed.

6 MR. KIRSCH: Thank you, Your Honor.

7 MR. BARNES: I request a little time to basically,
8 you know, think this over and make sure --

9 THE COURT: We have until 2:45 until the jury gets
10 back. And if you decide not to go forward, we need to
11 have a witness ready to go on the defendants' case. All
12 right.

13 So, yes, Mr. Barnes you may take whatever time you
14 need up until the time that the jury was instructed to do
15 that.

16 MR. BANKS: For the record, Your Honor, the
17 attorney, he was gone long before we took that break. So
18 that was --

19 THE COURT: He was sitting here the entire morning.

20 MR. BANKS: No, I am talking about when we had our
21 discussion, he was not involved in that discussion.

22 THE COURT: Okay. Well, I don't know. I just know
23 that you've had an attorney here. You told me that you
24 have attorneys advising you.

25 MR. BANKS: Thank you.

1 THE COURT: All right. Court will be in recess.

2 (A break is taken from 2:25 p.m. to 2:45 p.m.)

3 MR. BARNES: So I will reserve the right to plead
4 the Fifth. And, basically, even if you strike -- have
5 everything stricken from the record, the testimony has
6 already been heard by the jury. They are already tainted.
7 And I don't think it will remedy anything. But I do
8 believe that in our jury instructions we did, you know,
9 say that we had a Fifth Amendment right. The Court knew
10 that we didn't waive our right by saying we were going to
11 testify at all. And, again, I want to reserve the right
12 for immediate appeal on this issue.

13 THE COURT: All right. Mr. Kirsch?

14 MR. KIRSCH: Does that mean Mr. Barnes is going to
15 continue cross-examination, Your Honor?

16 THE COURT: That is my understanding; is that
17 correct?

18 MR. BARNES: That's correct.

19 THE COURT: You want no curative instruction?

20 MR. BARNES: No curative instruction.

21 MR. KIRSCH: Thank you, Your Honor.

22 THE COURT: And did I understand correctly,
23 Mr. Barnes, that despite the testimony you gave on direct,
24 that if a question is asked to which you believe you need
25 to plead the Fifth, you intend to plead the Fifth, as

1 opposed to answering the question?

2 MR. BARNES: Yes, Your Honor.

3 THE COURT: I want to make it clear that this is
4 Mr. Barnes' right. None of the defendants have a right to
5 assert an objection to it on the bases of his Fifth
6 Amendment privilege. Do you understand?

7 MR. WALKER: Yes, Your Honor.

8 THE COURT: So, Mr. Barnes, that will be up to you.

9 All right. Anything further?

10 THE COURT: Go ahead, take the stand.

11 Ms. Seeman, you may bring in the jury.

12 (The following is had in open court, in the hearing
13 and presence of the jury.)

14 THE COURT: You may be seated. Welcome back,
15 ladies and gentlemen.

16 Immediately before the break, there was an
17 objection, and I just wish to remind you again that
18 statements or objections made by attorneys or the
19 defendants while not testifying are not evidence, and they
20 should not be considered by you in any way.

21 All right. Mr. Kirsch, you may proceed.

22 MR. KIRSCH: Thank you, Your Honor.

23 Q. (BY MR. KIRSCH) Mr. Barnes, when we left off, I
24 think that you were answering some questions about the
25 idea about acting like a new employee when you got hired

1 by a staffing company. Do you recall those series of
2 questions?

3 A. I will be asserting my Fifth Amendment privilege
4 under the Constitution.

5 MR. KIRSCH: Your Honor, could I please ask to
6 publish --

7 THE COURT: Well, there is no question before you
8 with respect to that. The question was did you testify to
9 that. It is premature.

10 THE WITNESS: Okay. So, yes to that question.

11 Q. (BY MR. KIRSCH) Okay. Do you recall signing in as a
12 new employee when you were being hired by staffing
13 companies?

14 A. I will assert my Fifth Amendment privilege.

15 MR. KIRSCH: Your Honor, can I please publish
16 Government Exhibit 608.76, page 43?

17 THE COURT: You may.

18 MR. KIRSCH: Expand that and highlight the names,
19 please.

20 Q. (BY MR. KIRSCH) Mr. Barnes, is that your signature
21 signing in on the same day that Kathy Olson, from
22 Staffmark, signed in to see Ken Harper?

23 A. In addition, I will assert my Fifth Amendment
24 privilege on that question.

25 Q. Is that your handwriting where it says -- where your

1 name is printed and where, in the visiting column, it says
2 Mr. Harper?

3 A. I will assert my Fifth Amendment privilege on that
4 question.

5 Q. During your direct testimony, you were asked about --
6 in response to some of the answers, you said that you got
7 your directions from the IRP management. Do you recall
8 that testimony?

9 A. I will be asserting my Fifth Amendment privilege on
10 that answer.

11 Q. Who was it in IRP management that gave you direction?

12 A. I will be asserting my Fifth Amendment privilege.

13 Q. Mr. Barnes, while you were working at IRP and Leading
14 Team and DKH, you were also playing a role in helping to
15 find potential new staffing companies, weren't you?

16 A. I will be asserting my Fifth Amendment privilege.

17 MR. KIRSCH: Can I please publish, Your Honor,
18 Government 608.02?

19 THE COURT: You may.

20 MR. KIRSCH: Can you enlarge just the message
21 please, there.

22 Q. (BY MR. KIRSCH) Mr. Barnes, you received this
23 message on December 10th of 2003, didn't you?

24 A. I will be asserting the Fifth Amendment.

25 Q. Do you know what Mr. Harper meant when he referred to

1 companies that might be willing to "play ball" because
2 they were located in California?

3 A. I will be asserting the Fifth Amendment.

4 MR. KIRSCH: Your Honor, can I please publish
5 Government Exhibit 608.60?

6 THE COURT: You may.

7 Q. (BY MR. KIRSCH) Mr. Barnes, this is another instance
8 in which Mr. Harper was sending you a list of staffing
9 companies so that you could follow up with them to try to
10 find more staffing companies that IRP or DKH could use;
11 right?

12 A. I will be pleading the Fifth.

13 MR. KIRSCH: Can I please publish, Your Honor
14 Government Exhibit 418.01?

15 THE COURT: You may.

16 MR. KIRSCH: Can you expand both of those messages,
17 please, Special Agent Smith?

18 Q. (BY MR. KIRSCH) Mr. Barnes, why did you need to
19 provide an appropriate number to Clint for the Talent Tree
20 people to call you?

21 A. I will be pleading the Fifth.

22 Q. Why isn't it that the Talent Tree people couldn't
23 just call you at your number there at IRP?

24 A. I will assert my Fifth Amendment privilege.

25 MR. KIRSCH: Your Honor, could I please publish

1 Government Exhibit 608.57?

2 THE COURT: You may.

3 MR. KIRSCH: Special Agent Smith, can you please
4 expand the top quarter of that exhibit.

5 Q. (BY MR. KIRSCH) Mr. Barnes, why did this
6 spreadsheet, found on a computer at IRP, list your name as
7 an alias for Gary Walker?

8 A. Assert my Fifth Amendment privilege.

9 MR. KIRSCH: Your Honor, can I have just one
10 moment, please?

11 THE COURT: You may.

12 MR. WALKER: Your Honor, could we have Mr. Kirsch
13 restate the exhibit number for the exhibit currently
14 published?

15 MR. KIRSCH: The number currently being published
16 is 608.57.

17 Your Honor, I now ask to publish Government Exhibit
18 901.01.

19 THE COURT: You may.

20 Q. (BY MR. KIRSCH) Mr. Barnes, your testimony is that
21 you worked all of the hours that were reported, both to
22 Analysts International and to Ciber during these
23 overlapping periods of time reflected on the screen; is
24 that right?

25 A. I'm invoking my Fifth Amendment privilege.

1 MR. KIRSCH: Your Honor, could I please publish
2 901.04?

3 THE COURT: You may.

4 Q. (BY MR. KIRSCH) Mr. Barnes, your testimony, again,
5 is that you also worked -- legitimately worked all of the
6 hours reported to Ciber and Professional Consulting
7 Network at the same time; is that right?

8 A. I'm going to plead the Fifth.

9 MR. KIRSCH: Your Honor, could I please publish
10 Government Exhibit 901.11?

11 THE COURT: You may.

12 MR. KIRSCH: Start with that page 2 of that
13 exhibit, please, Special Agent.

14 Q. (BY MR. KIRSCH) Mr. Barnes, your testimony is that
15 from the period of August 16th, 2004, through August 24th
16 of 2004, that you were legitimately working over 24 hours
17 a day for three different staffing companies; is that
18 right?

19 A. I will plead the Fifth Amendment.

20 MR. KIRSCH: Could I please publish the next page
21 of that exhibit?

22 THE COURT: You may.

23 Q. (BY MR. KIRSCH) And, again, Mr. Barnes, your
24 testimony is that between August 25th and September 14th
25 of 2004, that with the exception of three Saturdays, that

1 you were legitimately working and reporting 24 or more
2 hours a day to three different staffing companies; is that
3 right?

4 A. I will plead the Fifth.

5 MR. KIRSCH: Thank you, Mr. Barnes.

6 No other questions, Your Honor.

7 THE COURT: All right. Mr. Barnes, do you wish to
8 make any further statements?

9 MR. BARNES: No, I don't.

10 THE COURT: All right. You may step down.

Defendants may call their next witness.

12 MR. WALKER: Your Honor, defense calls Daniel

13 Shull.

14 COURTROOM DEPUTY: Your attention, please.

DANIEL SHULL

16 having been first duly sworn, testified as follows:

18 Please state your name, and spell your first and
19 last names for the record.

20 THE WITNESS: Daniel Shull. D-A-N-I-E-L. And the
21 last name, Shull, S-H-U-L-L.

22 THE COURT: You may proceed.

23 MR. WALKER: Thank you, Your Honor.

DIRECT EXAMINATION

25 BY MR. WALKER:

1 Q. Mr. Shull, what do you currently do for a living?

2 A. I am retired.

3 Q. And what was the last job that you held?

4 A. I was the Chief of Police, Canon City, Colorado.

5 Q. Would you repeat that please?

6 A. I was the Chief of Police of Canon City, Colorado.

7 Q. Thank you. And while you were in that position of
8 Canon City Chief of Police, do you recall being approached
9 by someone at IRP Solutions?

10 A. Yes, on two occasions.

11 Q. On two occasions. And do you recall the nature of
12 your conversation with that individual on the first
13 occasion?

14 A. Well, it was in probably in 2003 was the first time I
15 was approached. And the individual wanted to show me some
16 information on a software package that his company was
17 developing. I took him to my conference room at the
18 police department, and he set up -- I think it was a
19 computer with a Power Point presentation, and went through
20 this presentation of what the software would do and what
21 it was for, and spent some time looking at what he had.

22 I told him at the time that my budget was pretty
23 much set, and I did not have extra money to be spending on
24 any kind of software for my department at that point.

25 Q. And upon making that statement to him, did he ask for

1 a follow-up meeting from you?

2 A. No. But it was about -- well, I don't know how many
3 months later, but in August of 2004, I was contacted by
4 phone and asked if I would write a letter on the company's
5 behalf supporting the idea of the software that they were
6 involved with. And I told them that I would.

7 Q. And do you recall the statements that you made in
8 your letter to that individual?

9 A. Not all of it. I refreshed my memory, but I did not
10 memorize it. But I wrote the letter, and basically made a
11 statement that I liked the idea of what they were putting
12 together. It was a major case investigation software that
13 would help detectives make sure that they checked all of
14 the items that they needed to check.

15 For instance, in a homicide, you want to know
16 whether or not there is snow on the ground. What time of
17 day or night it is. Is it cloudy? Is it raining? The
18 temperature of the body when the body was found. And with
19 a checklist like that, the detectives can go down through
20 that checklist and virtually answer all of the questions
21 as they are going, and not leave something out of their
22 report.

23 Q. Do you recall seeing a demonstration of the actual
24 software package prior to writing that letter?

25 A. No, I don't think so.

1 Q. And you said you did write them a letter of
2 recommendation to be used by the company?

3 A. I did.

4 MR. WALKER: May I have one moment, Your Honor?

5 THE COURT: You may.

6 MR. WALKER: Your Honor, request that Defense
7 Exhibit D352 be admitted. Your Honor, that is in the D400
8 evidence book under tab H, for hotel.

9 THE COURT: Any objection?

10 MR. KIRSCH: Just a moment, please, Your Honor.

11 THE COURT: You may.

12 MR. WALKER: A letter on the City of Canon City
13 Police Department letterhead.

14 THE COURT: I have two letters.

15 MR. WALKER: Your Honor, it is the one from the
16 City of Canon City.

17 THE COURT: Okay. All right. So the second page
18 of this August 23, 2004?

19 MR. BANKS: That's correct.

20 THE COURT: All right. Could you show it to
21 Mr. Shull so he can confirm that is a letter he wrote?

22 MR. WALKER: Yes, Your Honor.

23 THE COURT: Do we have this marked?

24 COURTRoom DEPUTY: It is.

25 THE COURT: What is it marked as?

1 THE DEFENDANT: D352.

2 THE COURT: All right. D352.

3 Q. (BY MR. WALKER) Mr. Shull, if you could read that
4 letter to refresh your memory. Mr. Shull is that the
5 letter you, indeed, provided to IRP Solutions?

6 A. Yes, it is.

7 MR. WALKER: Your Honor, I ask that be published to
8 the jury.

9 THE COURT: Let's first admit it. Any objection?

10 MR. KIRSCH: No objection.

11 THE COURT: So D352 is admitted, and it may be
12 published.

13 (Exhibit No. D352 is admitted.)

14 Q. (BY MR. WALKER) Mr. Shull, you said this is the
15 actual letter you did provide?

16 A. Yes.

17 MR. WALKER: Your Honor, no further questions.

18 THE COURT: All right. Anybody else?

19 MR. BANKS: Nothing else, Your Honor.

20 THE COURT: All right. Cross-examination?

21 MR. KIRSCH: Thank you, Your Honor.

22 **CROSS-EXAMINATION**

23 **BY MR. KIRSCH:**

24 Q. Mr. Shull, you told the IRP representative at the
25 very first meeting you had that your department didn't

1 have the money to buy the software; is that right?

2 A. That's correct.

3 Q. And did your department ever change its mind and buy
4 the software later on?

5 A. Not while I was there, no.

6 MR. KIRSCH: Thank you, sir.

7 THE COURT: All right. May this witness be
8 excused?

9 MR. WALKER: Yes, Your Honor.

10 THE COURT: All right. Thank you very much
11 Mr. Shull, you are excused.

12 THE WITNESS: Do you want me to leave that exhibit
13 here?

14 THE COURT: Yes. Just leave it.

15 Defendants may call their next witness.

16 MR. WALKER: Your Honor, defense calls Jim West.

17 COURTROOM DEPUTY: Your attention, please.

18 **JIM WEST**

19 having been first duly sworn, testified as follows:

20 COURTROOM DEPUTY: Please be seated.

21 Please state your name, and spell your first and
22 last names for the record.

23 THE WITNESS: Jim West, J-I-M W-E-S-T.

24 THE COURT: You may proceed.

25 **DIRECT EXAMINATION**

1 **BY MR. WALKER:**

2 Q. Mr. West, what is your occupation?

3 A. I am a principal software engineer.

4 Q. And what does that job entail; principal software
5 engineer?

6 A. I'm a senior level software engineer. I design and
7 control technology.

8 Q. And who do you currently work for?

9 A. Hewlett Packard.

10 Q. And how long have you been in that position?

11 A. With Hewlett Packard, in this position, 3 months.

12 Q. How long have you been a software engineer?

13 A. Over 30 years.

14 Q. And had you previously worked for a company called
15 Leading Team?

16 A. Yes.

17 Q. What did you do at Leading Team?

18 A. I worked on database software for the project.

19 Q. And can you describe the project that you worked on?

20 A. It was based on criminal life cycle processing. From
21 start of case to end of case was the idea behind the
22 application. And we worked on -- or at least my portion
23 of the job was the database, actually the persistent
24 storage of data.

25 Q. And just for the Court's benefit, would that include

1 being able to take what's typed on the screen and making
2 sure that gets saved to a database; is that accurate?

3 A. Yes, that is accurate.

4 Q. And would that entail all of the necessary middleware
5 to get it from the front end to the database?

6 A. Yes.

7 Q. And do you recall the name of the product that you
8 worked on?

9 A. I believe it was called CILC.

10 Q. CILC. And was that product completed during your
11 time there?

12 A. It was not.

13 Q. Okay. And so can you explain what was completed and
14 what was -- first, explain what was completed.

15 A. We had a lot of pieces, parts completed, a lot of
16 little modules that we were working with. But it wasn't
17 as a cohesive -- it was not an end, end product yet; what
18 we call not ready for prime time.

19 Q. How much time was required to get it ready for prime
20 time?

21 A. I would have to speculate, but I knew --

22 MS. HAZRA: Objection, Your Honor, speculation.

23 THE COURT: Sustained.

24 Q. (BY MR. WALKER) How much work would have been needed
25 for you to get your piece ready for prime time?

1 A. At the time I left, it would probably have needed
2 another 6, 9 months worth of work easy.

3 Q. And in the course of doing that work at IRP
4 Solutions, did you work for the company?

5 A. No, I was a contractor hired in from a contracting
6 company.

7 Q. Do you remember the name of the contracting company
8 you worked for?

9 A. At this time, I do not.

10 Q. And were you a W2 employee of the contract company,
11 or were you an independent contractor?

12 A. I was a W2 employee.

13 Q. And as a W2 employee for the contract company, how
14 did you report your time?

15 A. Weekly time sheets. So we had daily reported time,
16 submitted each Friday.

17 Q. And in reporting your time on time sheets, were they
18 actual paper time sheets, or was it a computer system?

19 A. Paper time sheets, if I recall correctly.

20 Q. And was that a requirement of the staffing company?

21 A. Yes, it was.

22 Q. So you needed to be able -- you needed to submit time
23 sheets in order to get paid as a requirement by the
24 staffing company?

25 A. Correct.

1 Q. And in completing those time sheets, would you just
2 fill in the time and then send them to the staffing
3 company?

4 A. No. I required somebody from Leading Team or IRP to
5 actually sign them before faxing them over to the
6 contracting company.

7 Q. And then in doing that, were you recording your
8 actual hours worked on the time sheets?

9 A. I was.

10 Q. Did anyone at Leading Team ever ask you to make
11 changes to your time sheets?

12 A. No.

13 Q. While you were at Leading Team, you said that you
14 were doing software development.

15 A. Yes.

16 Q. Were there any other duties that you did while at
17 Leading Team?

18 A. No. It was primarily just design and implementation
19 of software.

20 Q. What do you mean by design of software?

21 A. Actually, take the problem as described in words, and
22 actually translate it to code to make that happen.

23 Q. Okay. So you had one role there?

24 A. Yes.

25 Q. In your other work, did you ever have more than one

1 role?

2 A. In other jobs?

3 Q. Yes.

4 A. Yes, I have.

5 MS. HAZRA: Objection, Your Honor, if we are not
6 talking about Leading Team or IRP.

7 THE COURT: Clarify your questions, and limit them
8 to IRP or Leading Team.

9 Q. (BY MR. WALKER) So you said earlier you had one role
10 at Leading Team.

11 A. Correct.

12 Q. And you only had one position to fill at Leading
13 Team?

14 A. Correct.

15 Q. While you were at Leading Team, in addition to
16 writing software, what other processes or steps were
17 necessary in order to get your software approved --
18 approved, so to speak?

19 A. Could you be more specific? I don't understand what
20 you are asking.

21 Q. Sure. After writing code, which you believe met your
22 requirements, what would you do then to have the code be
23 certified?

24 A. Well, we would have to go through a testing phase.
25 Actually test out the modules, write wrapper code around

1 it to actually test the functionality and make sure it
2 behaved the way it was intended to behave. And, if not,
3 that is where bugs get introduced, and we go find the
4 problem and fix the problem and retest.

5 Q. And did you have any responsibilities related to
6 testing?

7 A. Yes.

8 Q. And what were those?

9 A. Basically to ensure that the requirements, as stated,
10 were met properly.

11 Q. Was that an official role or unofficial role, or
12 assumed to be part of the software development?

13 A. It was assumed to be part of the software development
14 role.

15 Q. While at Leading Team, that was your only role, was
16 to do software development?

17 A. Yes.

18 Q. And in doing your development tasks, did you interact
19 with other software engineers?

20 A. Yes.

21 Q. And why did you have to interact with others?

22 A. Well, as we have different modules, they have to be
23 able to communicate with each other. So we have to agree
24 upon what we call a program interface, and API. We have
25 to agree upon how the application modules talk to each

1 other; communicate, send their data back and forth.

2 And so if I am working in one area and someone else
3 is working on a different module, we need to talk to each
4 other. We have to agree upon how that interaction is to
5 occur, so that one module can send data to the other and
6 agree properly without having any problems.

7 Q. And you mentioned earlier that there was still some
8 work to be done; is that right?

9 A. Yes.

10 Q. What percentage of your work for your module would
11 you consider to be completed when you left Leading Team?

12 A. I would say 70 to 80 percent complete.

13 Q. Were you able to run your particular module when you
14 left Leading Team?

15 A. With some wrapper code, yes. But not as a full
16 application at that time.

17 Q. Can you explain what you mean by "with some wrapper
18 code"?

19 A. It is a piece of software that you write that
20 emulates the outside user of that particular module. So
21 if it were a user interface, for instance, and they enter
22 data in the fields, it would have to get passed into the
23 database module, being persisted to disk. If the front
24 end is not working and not ready, then you write code that
25 emulates an actual user interface. But it just makes the

1 calls necessary to the module to send the data down,
2 persists in database, and then you can go into the
3 database and verify the data is there and it is correct.

4 Q. And so at the time that you left Leading Team, would
5 you say that your module was ready to go to its next
6 steps?

7 A. Yes.

8 Q. Were you aware of -- well, let me change the
9 question.

10 Were there any dependencies on the other code that
11 you mentioned, that you were aware of, that were being
12 taken to complete the bridging of that gap.

13 A. Yes. There were a lot of dependencies necessary.

14 Q. And would you say that there was work going on to
15 satisfy those dependencies?

16 A. Yes.

17 MR. WALKER: Your Honor, may I have one moment?

18 THE COURT: You may.

19 Q. (BY MR. WALKER) So you said earlier that you worked
20 for a staffing company; is that right?

21 A. Yes.

22 Q. How did it come to be that you were contacted by the
23 staffing company?

24 A. Over the course of my career, I have made contact
25 with several of the staffing companies in the Colorado

1 Springs area with my resume. So they have me on file. If
2 they have any job openings, they will contact me to let me
3 know the position is available, and if I am interested.
4 And if I am, we would proceed to the next step.

5 Q. So to the best of your knowledge, the staffing
6 company went out and found your resume, rather than being
7 presented by Leading Team?

8 A. Correct.

9 Q. And, if you recall, how long did you work for Leading
10 Team?

11 A. Six months, I believe.

12 Q. And in that 6 months, did you ever remember doing
13 more than one job?

14 A. No.

15 Q. Do you remember doing more than one job previously
16 with working with other companies?

17 MS. HAZRA: Objection, Your Honor, relevance.

18 THE COURT: Sustained.

19 MR. WALKER: Your Honor, I have no further
20 questions.

21 THE COURT: Anybody else?

22 MR. BANKS: Nothing from me, Your Honor.

23 THE COURT: All right. Cross.

24 MS. HAZRA: Thank you, Your Honor.

25 **CROSS-EXAMINATION**

1 **BY MS. HAZRA:**

2 Q. Good afternoon, Mr. West.

3 A. Good afternoon.

4 Q. You were asked about your work at Leading Team. I
5 wanted to clarify. You worked at Leading Team through one
6 staffing company?

7 A. Actually two. There was one for the first 3 months,
8 and then came back in through another one.

9 Q. Was that both with Leading Team, or was the later one
10 with IRP?

11 A. Both with Leading Team.

12 Q. You didn't work for both of those companies at the
13 same time?

14 A. No, I did not.

15 Q. So you only worked for one staffing company at a
16 time?

17 A. Correct.

18 Q. Why did you leave the one staffing company and switch
19 to the other?

20 A. We were asked to leave. Basically, there was a
21 problem with the contract. But we were not provided
22 reasons or details on that.

23 Q. Who asked you to leave?

24 A. The contracting company.

25 Q. So the staffing company --

1 A. The staffing company, yes.

2 Q. -- asked you to leave the first time --

3 A. Yes.

4 Q. -- because there was a problem with the contract?

5 A. Yes.

6 Q. But you don't know more about the problem?

7 A. Correct.

8 Q. How about the second time? The second staffing
9 company you worked with, why did you leave that one?

10 A. Same circumstances.

11 Q. The staffing company told you there were problems
12 with the contract and asked you to leave?

13 A. Yes.

14 Q. Did you then later go back to work for IRP?

15 A. Yes. It was sometime later. They changed the name.
16 It was no longer Leading Team, it was IRP Solutions. And
17 everything looked above board. Everything looked good.
18 So I had no issues going back.

19 Q. Okay. And were you still working on the same
20 software project? Were you working on a different
21 project?

22 A. Same project.

23 Q. So the software still wasn't completed when you went
24 back for IRP?

25 A. That is correct.

1 Q. Would that have been in 2004?

2 A. I believe that's the right time frame, yes.

3 Q. Did you work for IRP directly, or did you work for a
4 staffing company?

5 A. A staffing company.

6 Q. And only one staffing company at a time this time?

7 A. Yes.

8 Q. Why did you leave that staffing company?

9 A. Pretty much for the same reason; something about not
10 being paid.

11 Q. Who told you?

12 A. The recruiter did at the staffing company.

13 Q. Told you that you were not being paid, or they were
14 not being paid?

15 A. They were not being paid by IRP.

16 Q. Is that why you had to leave?

17 A. Yes.

18 MS. HAZRA: I have nothing further, Your Honor.

19 THE COURT: Redirect?

20 MR. BANKS: One moment.

21 MR. WALKER: One moment.

22 **REDIRECT EXAMINATION**

23 **BY MR. WALKER:**

24 Q. Mr. West, you just stated that you worked with IRP
25 Solutions, as well?

1 A. Yes.

2 Q. And what work were you doing at IRP?

3 A. More the same. When I left, it was still some more
4 database work. The project had definitely progressed
5 since the last time I had left. There was progress being
6 made on it, but pretty much doing the same role; moving
7 back in to do some more database work.

8 Q. So it had progressed from the time since you had
9 worked for LTI?

10 A. Correct.

11 Q. And were you aware of other work to complete -- to
12 complete the work that you said still needed to be
13 completed?

14 A. In discussions with the other developers there, yes,
15 there were still some things that needed to be done. I
16 did not have specific detail on those though.

17 MR. WALKER: One moment, Your Honor.

18 THE COURT: You may.

19 Q. (BY MR. WALKER) You mentioned the work you were
20 doing was database related for the CILC application; is
21 that right?

22 A. Correct.

23 Q. Was this application centered for large agencies?

24 A. It was.

25 Q. It was designed to serve large agencies?

1 A. It was.

2 MS. HAZRA: Objection, Your Honor, lack of
3 foundation, and beyond the scope of the cross.

4 THE COURT: Sustained.

5 MR. WALKER: No further questions, Your Honor.

6 THE COURT: All right. May this witness be
7 excused?

8 MR. WALKER: Yes, he may.

9 THE COURT: Thank you very much, Mr. West, you are
10 excused.

11 THE WITNESS: Thank you.

12 THE COURT: Defendants may call their next witness.

13 MR. WALKER: Your Honor, defense calls Abhay Natu.
14 Mr. Natu.

15 COURTROOM DEPUTY: Your attention, please.

16 **ABHAY NATU**

17 having been first duly sworn, testified as follows:

18 COURTROOM DEPUTY: Please be seated.

19 Please state your name, and spell your first and
20 last names for the record.

21 THE WITNESS: My name is Abhay, A-B-H-A-Y, last
22 name spelled N, as in Nancy, A-T, as in Tom, U.

23 THE COURT: Mr. Natu, if you could move forward and
24 speak into the microphone.

25 You may proceed, Mr. Walker.

1 **DIRECT EXAMINATION**2 **BY MR. WALKER:**

3 Q. Mr. Natu, what is your occupation?

4 A. I am a software developer.

5 Q. And can you tell us what that means for the laymen in
6 the computer world?7 A. Certainly. In my day-to-day job, I take the
8 requirements, as set down by a business analyst, which
9 is -- which tells me to do certain things, and then I lay
10 computer code that makes those things happen.11 Q. Okay. And how long have you been doing this type of
12 work?

13 A. Since 1992.

14 Q. And who do you currently work for?

15 A. I work for a company called Awesome Insight, which is
16 a part of United Health Bill.17 Q. At some point did you work for a company called IRP
18 Solutions?

19 A. I worked there, yes.

20 Q. And if you recall, how long did you work there?

21 A. May I refer to a note I made?

22 THE COURT: You may.

23 THE WITNESS: Thank you. I believe it was about 8
24 to 10 weeks. So summer -- from middle of April to middle
25 of June, or maybe late June. I don't have the exact

1 dates.

2 THE COURT: Of what year?

3 THE WITNESS: Sorry, 2004.

4 Q. (BY MR. WALKER) So April to approximately June of
5 2004. And were you an employee of IRP Solutions?

6 A. I was not. I was working for a company called Idea
7 Integrations, which is a contracting company, and I was a
8 contractor at IRP Solutions.

9 Q. And how did you come to become -- how was it you
10 became aware of IRP Solutions?

11 A. I am not exactly sure. It has been awhile. But my
12 resume was on the job board. And so it was possible that
13 I either contacted this company, which had put out a
14 request, or the company may have contacted me based on my
15 resume that was present on the job board at that time.

16 Q. When you say "the company," do you mean Idea
17 Integration?

18 A. Yes, I do.

19 Q. And prior to being presented to IRP Solutions through
20 Idea Integration, did you know myself, Gary Walker or any
21 of the people at this table, named Clinton Stewart,
22 Demetrius Harper, David Banks, David Zirpolo, Ken Barnes?

23 A. Prior to working at IRP, no, I did not know any of
24 these people.

25 Q. And what -- at a high level, what type of skills was

1 IRP looking for when they determined that it would bring
2 you on as a contractor?

3 A. Somebody who new Java, C++ and Cobra. Last thing is
4 C-O-R-B-A.

5 Q. And what was it -- what was your understanding of the
6 job, again, at a high level to be done?

7 A. Essentially, it was understanding and analyzing
8 existing code, looking at the new requirements and the new
9 interface that was being developed, and I think creating
10 code after making communication between the two pieces
11 possible.

12 Q. And so in making the communication for the two pieces
13 possible, would it be safe to say that when you came on,
14 that communication wasn't in place?

15 A. Pieces of it were. Some more needed to be there.
16 Some needed to be devised and made better, so to speak.

17 Q. And were you able to do that work successfully?

18 A. Not all of it. While I was there, I did work on that
19 part of the code. I created code. And some of it worked,
20 some of it did not. I don't think that we had a through
21 and through communication.

22 Q. And that's as you understand it at the time that you
23 were there?

24 A. That's correct.

25 Q. And in doing your work at IRP for the staffing

1 company, how did you report your time?

2 A. I had to fill out a time sheet. And I believe it was
3 faxed to the staffing company.

4 Q. And was that a requirement of the staffing company
5 for you to do that on a regular basis?

6 A. Yes, it was.

7 Q. And in submitting your time, would you just fill in
8 your time and then send it to the staffing company?

9 A. I do not recall exactly. I had to figure -- fill out
10 a sheet of paper. I honestly cannot recall if I had to
11 get it signed by somebody at IRP or if it was just a
12 matter of faxing it to that company and that company would
13 come back and get it signed or approved. That process I
14 am not entirely sure of.

15 Q. And in filling out your time sheets and submitting
16 the time, were you ever asked by IRP Solutions to change
17 the time that you had submitted?

18 A. I do not recall that happening, no.

19 Q. Were you ever asked to fill out a time sheet with
20 somebody else's name on it?

21 A. No.

22 Q. Were you ever asked to do work that someone had
23 submitted on your time sheet?

24 A. No.

25 Q. Were you ever asked to report more hours than you

1 actually worked?

2 A. No.

3 Q. And in doing your technical work, how was your work
4 evaluated and approved?

5 A. Again, I don't remember the specifics of it, but the
6 code that I created, being the straddling code at first --
7 between the two pieces of code, and the automatic approval
8 of it working, would be that we were able to exchange
9 messages or data between the two pieces.

10 Q. And in doing that testing, did you work with other
11 groups other than software development?

12 A. There were business analysts. But that's all I think
13 I interacted with, and it was software developers.

14 Q. So you worked with the business analysts and software
15 developers -- other software developers?

16 A. That's correct.

17 Q. Did you ever work with the testing group?

18 A. Not directly. I don't recall.

19 Q. And in the process of developing this straddling
20 code, as you say, did you work with others to help to
21 build that software?

22 A. Yes. There were other developers working with me.

23 Q. So the developers would do the build of the software?

24 A. I am sorry?

25 Q. Would the development team do the builds of the

1 software, as well?

2 A. On local machines, yes.

3 Q. And in the course of doing your day-to-day software
4 development work, what would you do if you ran into a
5 problem with infrastructure or your personal computer?

6 A. I would ask one of the support persons -- and I don't
7 remember their names, -- for any kind of technical help.
8 And if I had any problems with the requirements, I would
9 ask the business analyst or another developer as to how it
10 was supposed to work.

11 Q. And do you recall -- I know this is a stretch for
12 you. Do you recall the names of any business analysts you
13 worked with?

14 A. I do remember being in several meetings with Clint --
15 Clint Stewart. I don't know if that was as a business
16 analyst or as a project manager, but I do recall being in
17 meetings with him.

18 Q. Do you recall ever being in meetings with David Banks
19 for business requirements?

20 A. I do recall it being business requirements, but
21 probably for database-related issues perhaps.

22 Q. And in doing your work, did you ever interact with
23 any potential customers from law enforcement?

24 A. I did not.

25 Q. While you were at IRP Solutions, was software

1 development your only job?

2 A. Yes, it was.

3 MR. WALKER: May I have one moment, Your Honor?

4 THE COURT: You may.

5 Q. (BY MR. WALKER) And you said earlier that your
6 tasking was to write straddling code between different
7 versions. Do you recall the name of the application you
8 were working on?

9 A. I tried to remember, and I think it was CILC. I
10 don't recall the full name of it.

11 Q. Do you remember what type of software that was; what
12 industry it was related to?

13 A. Law enforcement. And I believe something to do with
14 Homeland Security. But I can't -- I don't even know if
15 Homeland existed under that name. But it was something to
16 do with connecting, you know, different pieces of cases or
17 investigations.

18 Q. And when you say you wrote straddling code between
19 different systems, can you describe the two systems that
20 you were trying to straddle, in your words?

21 A. One part was a C++ system that interacted with the
22 database, and business logic was an indication there. The
23 other part was a presentation layer, and it was mostly
24 Java.

25 MR. WALKER: May I have one second, Your Honor.

1 THE COURT: You may.

2 Q. (BY MR. WALKER) Since you just mentioned that one
3 part of that was a database system, is it true that this
4 was a system intended for multiple users?

5 A. Probably. I don't recall the exact specifics of how
6 it interacted with the database.

7 MR. WALKER: I have no further questions, Your
8 Honor.

9 THE COURT: Anyone else?

10 MR. BANKS: Just a couple of questions, Your Honor.

11 THE COURT: All right. Mr. Banks?

12 **DIRECT EXAMINATION**

13 **BY MR. BANKS:**

14 Q. Mr. Natu, was the software you were working on, how
15 many users would you say that type of software will
16 support?

17 A. The way I saw it and analyzed it, it could be
18 multiple users.

19 Q. When you say multiple; hundreds, thousands?

20 A. I could not size it.

21 Q. Could not size it. Okay.

22 MR. BANKS: No further questions, Your Honor.

23 THE COURT: Anyone else?

24 Cross?

25 MR. KIRSCH: Thank you, Your Honor.

1 **CROSS-EXAMINATION**2 **BY MR. KIRSCH:**

3 Q. Good afternoon. Is it Mr. Natu?

4 A. Natu.

5 Q. I'll try to get it right.

6 A. Thank you.

7 Q. Mr. Natu, am I correct that when you first were going
8 to try to work at IRP, you were going to try to do that
9 through a different staffing company called I-Cube
10 Solutions?

11 A. That's correct.

12 Q. And I-Cube Solutions ultimately didn't -- your
13 understanding was ultimately they didn't do business with
14 IRP; is that right?

15 A. That's correct.

16 Q. And after you -- now, you had -- you had quit your
17 other job so you could go work at IRP; right?

18 A. Yes.

19 Q. And after I-Cube Solutions told you that you weren't
20 going to be able to work at IRP, you called IRP, didn't
21 you?

22 A. I did.

23 Q. Do you remember who you talked to then?

24 A. I believe I talked with David Banks, and talked to
25 him.

1 Q. Do you remember what he told you?

2 A. There are other companies, and that to keep my eyes
3 open, and I may be contacted by somebody.

4 Q. Okay. And it was after that call, when Mr. Banks
5 told you that you might be contacted by somebody, that you
6 got placed with Idea Integration; right?

7 A. As a matter of fact, yes.

8 Q. Okay. So, in fact, does that help you remember
9 whether or not you contacted Idea Integration or you got
10 sent over that way?

11 A. Yes, I do. And I remember that now.

12 Q. Okay. Now, Idea Integration, that is the only
13 company you worked for when you were placed at IRP; right?

14 A. Yes.

15 Q. Okay. And you weren't billing time to any other
16 companies while you were billing time to Idea Integration,
17 were you?

18 A. That's correct.

19 Q. Because you were -- as you testified before, you were
20 billing only the time you actually worked; right?

21 A. Yes.

22 Q. Now, I am going to ask you a little bit about the
23 other people that you remember at IRP. Do you remember
24 noticing any of the vehicles that the people who worked at
25 IRP drove?

1 MR. BANKS: Objection, Your Honor, relevance.

2 THE COURT: Sustained. I am not sure what the
3 vehicles have to do with anything. Ask about the people.

4 MR. KIRSCH: Can I ask a more specific question
5 about that, Your Honor?

6 THE COURT: You may.

7 Q. (BY MR. KIRSCH) Mr. Natu, do you remember any of the
8 people who worked there driving a Cadillac Escalade?

9 A. I do not recall.

10 Q. All right. Let me ask you about the time while you
11 were there. Did you have an access badge to get into the
12 offices?

13 A. Again, I don't remember specifics, but I don't think
14 I had one. I had to go through the main door all of the
15 time. There was somebody guarding the door.

16 Q. You had to go through security; right?

17 A. That's right.

18 Q. And you were not allowed to take anything with you
19 when you left the office; right?

20 A. Yes.

21 Q. So you weren't doing any work when you weren't
22 actually on the premises of IRP, were you?

23 A. Yes. I was not doing any work away from IRP.

24 Q. In fact, you wouldn't have been able to; right?

25 A. Well, I could be thinking about that thing, but

1 nothing that I could bill for.

2 Q. Nothing you could bill for?

3 A. Yes.

4 Q. Now, do you remember that -- I think you said you
5 worked sort of mid-April, mid-June 2004; is that right?

6 A. Yes.

7 Q. Do you remember when you learned that you were not
8 going to be able to work through Idea Integration any
9 more?

10 A. Sometime around June 20th, I think.

11 Q. Do you remember who told you that?

12 A. I don't. But I had an e-mail exchange with Idea
13 Integration around June 20th with a Rosdale or Rosedale,
14 about me not being able to work and my benefits. I
15 remember this distinctly, because my daughter was sick
16 that day, and I had to verify whether or not I could take
17 her to the doctor and how benefits would play out.

18 Q. All right. Do you remember around the time that you
19 found out you weren't going to be able to work through
20 Idea Integration any more, talking to either Mr. Banks or
21 Mr. Walker about the possibility of continuing to work
22 there?

23 A. I don't recall having that conversation.

24 Q. Okay. So you don't remember anything about them
25 attempting to get you to come back to work, and that if

1 that happened, that eventually you would be picked up by
2 another staffing company?

3 MR. WALKER: Objection, Your Honor, he is leading.

4 THE COURT: Overruled. It is cross-examination.

5 THE WITNESS: There may have been. But after the
6 end of contract, I had almost made up my mind not to go
7 back there. And there may have been a conversation, but I
8 don't recall that.

9 MR. KIRSCH: All right. Thank you, sir.

10 THE COURT: Mr. Banks?

11 **REDIRECT EXAMINATION**

12 **BY MR. BANKS:**

13 Q. Mr. Natu, what reason did I-Cube Solutions give for
14 you not going to work at IRP?

15 A. They did not give me any specifics, except they are
16 not going to do business with them. And that is the
17 reason they could not hire me or take me on as a
18 contractor on their staff.

19 Q. So it was their determination not to work with IRP;
20 correct?

21 A. As I recall the conversation, yes.

22 Q. Okay. Now, you said you didn't take any work home.
23 Were you authorized to take work home?

24 A. I was not specifically told, and I believe I was not.

25 Q. Did you maintain any sort of workbook or notebook for

1 software development that you did?

2 A. I am sorry?

3 MR. KIRSCH: Objection, beyond the scope, Your
4 Honor.

5 THE COURT: Sustained.

6 Q. (BY MR. BANKS) And you were a contractor at IRP;
7 correct?

8 A. That's correct.

9 Q. And contracts do come and go; correct?

10 A. That is correct.

11 Q. And have you ever had another time where a contract
12 ended prematurely?

13 MR. KIRSCH: Objection, relevance, and beyond the
14 scope.

15 THE COURT: Sustained.

16 MR. BANKS: No further questions, Your Honor.

17 MR. WALKER: Your Honor, I have brief --

18 THE COURT: Mr. Walker.

19 **REDIRECT EXAMINATION**

20 **BY MR. WALKER:**

21 Q. You were asked a minute ago about your access to the
22 IRP Solutions' building by the Government. Do you recall
23 that? And you said you had no outside access?

24 A. I meant I did not -- I don't recall having a badge to
25 get inside the building.

1 Q. And so with no badge, how did you actually get into
2 work each day?

3 A. I went up to the counter or desk at the front door,
4 and I had to submit my bag or whatever I was carrying that
5 day, which was most of the time searched. And then
6 somebody opened the door for me. Somebody buzzed me in.

7 Q. Okay. And you also said that you were not able to do
8 any work outside the office; is that right?

9 A. For IRP Solutions, no, I was not able to.

10 Q. Do you recall others having that type of access? Do
11 you know if others had the ability to work outside the
12 office?

13 A. I don't know anybody -- I don't know.

14 Q. Do you know if there was a policy in place that
15 prohibited all employees from working remotely or outside
16 the building?

17 A. Yes. I was aware that you could not -- you could not
18 work from -- if you were not in the building.

19 Q. Were you aware of a policy that allowed people to get
20 a waiver to do that?

21 A. I was not aware. I never tried. I didn't have
22 reason to.

23 MR. WALKER: No further questions.

24 THE COURT: May this witness be excused?

25 MR. WALKER: Yes.

1 THE COURT: Thank you very much, Mr. Natu, you are
2 excused.

3 THE WITNESS: Thank you.

4 THE COURT: Defendants may call their next witness.

5 MR. WALKER: Your Honor, the witness we were
6 mentioning earlier said they wouldn't be able to get in
7 today. They had an issue and wouldn't be able to come in,
8 and they were our last witnesses for the day. That
9 testimony was anticipated to take quite a bit of time.

10 THE COURT: We have no other witnesses for today?

11 MR. WALKER: That's right, Your Honor.

12 THE COURT: All right. Well, ladies and gentlemen,
13 you are going to be able to go home early today. I
14 anticipate that your witnesses will be here at 9:00 a.m.
15 tomorrow morning.

16 MR. WALKER: Yes, Your Honor. We, at your
17 direction, have been calling them and telling them to be
18 in at 9 o'clock.

19 THE COURT: All right. So the jury is excused
20 until 9 o'clock tomorrow morning.

21 Counsel and parties, if you would remain. Jury is
22 excused.

23 (The following is had in open court, outside the
24 hearing and presence of the jury.)

25 THE COURT: All right. You may be seated. Once

1 again, I just want to make it clear on the record and make
2 sure the defendants understand that we are not going to
3 have any more of these early recesses. Your witnesses are
4 to be here tomorrow. I expect to go straight through. We
5 are not going to recess early, bringing the jury in and
6 then recess early. So you need to do what you need to do
7 tonight to contact all of your witnesses and have them
8 here ready to go, with no gaps in the testimony. Do I
9 make myself clear?

10 MR. WALKER: It is understood, Your Honor.

11 THE COURT: All right. Anything further?

12 MR. KIRSCH: Your Honor, I will affirm that Special
13 Agent Smith will be here and available tomorrow, as well.

14 THE COURT: All right. So if we have any gaps, you
15 have a witness, and you need to be prepared.

16 MR. BANKS: Very well, Your Honor.

17 THE COURT: All right. Court will be in recess
18 until 9 o'clock tomorrow morning.

19 (Court is in recess at 3:46 p.m.)

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1 **R E P O R T E R ' S C E R T I F I C A T E**

2

3 I, Darlene M. Martinez, Official Certified
4 shorthand Reporter for the United States District Court,
5 District of Colorado, do hereby certify that the foregoing
6 is a true and accurate transcript of the proceedings had
7 as taken stenographically by me at the time and place
8 aforementioned.

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12 Dated this 10th day of November, 2011.

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17 s/Darlene M. Martinez

18 RMR, CRR

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