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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

MR. ELECTRIC CORP.

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*

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VS.

* CIVIL ACTION NO. W-07-CA-319

*

BRIAN CLARK, ET AL

* March 23 thru March 24, 2009

BEFORE THE HONORABLE WALTER S. SMITH, JR., JUDGE PRESIDING
EXCERPT TESTIMONY OF CROSS-EXAMINATION OF JEFF MYERS

APPEARANCES:

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produced by computer-aided transcription.

1 CROSS-EXAMINATION

2 BY MR. WHITE:

3 Q. Mr. Myers, I was listening to your testimony today
4 and I thought that I heard you say that it was a gross
5 violation of the franchise agreement for people not to wear
6 uniforms and drive logo'd trucks. Did you say that?

7 A. Those words sound familiar. I'm not -- I'd have to
8 relook at the context of those words, but yes.

9 Q. Well, the context of the words were whether you were
10 complaining here about Mr. Clark and his businesses failing to
11 use logo'd trucks or wear appropriate uniforms.

12 A. I do recall. Yes. The context was work that was
13 being submitted to Mr. Electric as Mr. Electric work must be
14 done by personnel wearing Mr. Electric uniforms and driving Mr.
15 Electric trucks. Yes.

16 Q. So you are suing Mr. Clark because his people are not
17 wearing the right uniform or driving the right truck?

18 A. The reasons for the suits have been plainly stated in
19 the lawsuit. I -- I --

20 Q. Do you not know it or do you refuse to answer about
21 it?

22 MR. HAFER: Objection, badgering the witness.

23 THE COURT: Overruled.

24 BY THE WITNESS:

25 A. I don't know all the specifics of every item that's

1 in the lawsuit, but I do know that is part of it. Yes.

2 BY MR. WHITE:

3 Q. This gross violation by not wearing the right outfit?

4 A. Those were my words. Yes.

5 Q. Well, do you need to withdraw them or do you stand by
6 them?

7 A. No. In the context of work that was in the customer
8 was calling Mr. Electric to do Mr. Electric work and having
9 somebody show up without the proper uniform and truck is a
10 violation.

11 Q. And for how long, in your judgment, has this gross
12 violation existed?

13 A. I only know based off of what I've heard from -- or
14 was informed by Mr. Clark and that's since 2007 I believe is
15 what he said.

16 Q. And when you sued in this Court, you sought a
17 preliminary injunction, did you not?

18 A. I believe so. Yes.

19 Q. Did you -- were you the person who provided an
20 affidavit to convince the Court that an injunction was
21 warranted?

22 A. I'm not sure what that means.

23 Q. Declaration of Jeff Myers.

24 A. Okay.

25 Q. Are you familiar with that document?

1 A. If you show it to me, I can look at it. Sure. I'd
2 love to see it.

3 Q. I'll make that happen. Do you recognize the
4 document?

5 A. Yes. I do.

6 Q. Do you recognize your signature at the back of it?

7 A. I do.

8 Q. All right. Do you know what this was prepared for?

9 A. Yes.

10 Q. Was I correct when I said you prepared and presented
11 this affidavit in this Court so that you could convince the
12 Court that an injunction was necessary?

13 A. Yes.

14 Q. Do you remember reciting in this declaration the
15 gross violation of the franchise agreement by not wearing the
16 right outfit?

17 A. No. I don't recall the specifics of it.

18 Q. All right. Do you -- would you like to read it?

19 A. If that's necessary, sure.

20 Q. Okay. Well, here is the franchise section that you
21 said was important. The territorial restrictions. And then at
22 the bottom of this you said, in violation of the agreement
23 Mr. Electric learned that Clark has advertised for electrical
24 services outside of York County, South Carolina.

25 A. Uh-huh.

1 Q. Do you remember saying that that was a violation of
2 the franchise agreement?

3 A. I do.

4 Q. Do you remember disclosing that Mr. Electric, its own
5 people, had devised a marketing plan that called for
6 advertising outside of York County, South Carolina?

7 A. We do not devise the marketing plans. We work with
8 the franchisee to help develop a marketing plan.

9 Q. Do you contend now that you had nothing to do with
10 the decision to advertise outside of his territory?

11 A. We were a party to that decision.

12 Q. All right.

13 A. We were not the primary decision maker.

14 Q. And when you swore to the Court that Mr. Clark was
15 violating the franchise agreement by making advertisements
16 outside of his territory, did you disclose to the Court that
17 Mr. Electric was a party to those advertisements?

18 A. I'd have to review the entire document.

19 Q. Feel free to do so.

20 A. Okay.

21 Q. Tell me when you need to turn the page.

22 MR. HAFER: I'll object that this mischaracterizes the
23 time. Certain of the advertising was done with their consent
24 and this deals with the time when it was not done with their
25 consent.

1 THE COURT: Are you testifying, Counsel?

2 MR. HAFER: No, sir.

3 THE COURT: Well, then sit down.

4 MR. HAFER: I would object it mischaracterizes what this
5 document --

6 THE COURT: Objection is overruled. It's not an
7 objection.

8 BY MR. WHITE:

9 Q. All right. Tell me when you have completed reading
10 what you would like to on Page 2 of your sworn affidavit. And
11 then I'll put Page 3 in front of you because I do not want to
12 keep you from reading whatever you'd like.

13 A. Okay. Go ahead.

14 Q. All right. I'm going to Page 3. Is that showing up
15 all right for you?

16 A. Yes. It is.

17 Q. All right. You disclosed to the Court on Page 2 of
18 Page 3 that you've looked at -- I'm sorry I'm making that
19 shake. I know that's annoying -- that you were a party to the
20 advertising plan or -- that Mr. Clark implemented for his
21 Mr. Electric franchise.

22 A. Yes. We were.

23 Q. You disclosed that to the Court in your sworn
24 affidavit?

25 A. Oh, I don't believe -- I didn't see it in there. No.

1 Q. Well, I'm pretty sure you didn't. Did you instead
2 say that the advertising program that you were a party to was
3 actually a flagrant violation of the franchise agreement?

4 A. No. At the time the -- as I described earlier that
5 the process of going through basic training and we help develop
6 marketing plans and all the other things, at -- that process
7 takes place over the entire life of the -- the entire time the
8 franchisee is in -- under our marks and under our contract, we
9 work with them continually and things change. At some point we
10 were very pleased that Brian was soliciting work and doing work
11 in the Charlotte, North Carolina area. That's common amongst
12 our franchisees. At the time that we have somebody else moving
13 into the territory, then we have to stop that advertising and I
14 believe that's what we're discussing here in this document is
15 after we had a franchisee in that territory.

16 Q. Okay. I have searched in vain for the disclosure
17 that previously this had been permitted but there had been a
18 change that required you to do something about it. Do you see
19 it in this document?

20 A. In this document?

21 Q. Yes.

22 A. No.

23 Q. Do you not think that it tells the Court that this
24 has been over the ten year period that you refer to in
25 Paragraph 5 strictly prohibited by the franchise agreement?

1 A. That's what the language says. Yes.

2 Q. All right. Clark's advertisement, using the
3 Mr. Electric name and doing business as Mr. Electric in North
4 Carolina was and is strictly prohibited by the franchise
5 agreement. That's your words.

6 A. Only if there's another franchisee in the territory.

7 Q. Well, I'm sorry. Does it say only if there's another
8 franchisee in the territory?

9 A. It doesn't have any --

10 Q. Qualifications.

11 A. -- qualifications at all.

12 Q. Was and is strictly prohibited.

13 Now, I'm going to continue to ask you about this
14 contention that advertising by Mr. Clark was strictly
15 prohibited. One of the things you complained about was he was
16 using a 704 area code telephone number. Are you familiar with
17 that?

18 A. Yes. I am.

19 Q. Did you know that that number was his number long
20 before he was a franchisee?

21 A. I personally did not know that.

22 Q. Okay. You know it now?

23 A. I do.

24 Q. Did you know at the time you made this sworn
25 affidavit to the Court?

1 A. No.

2 Q. Was that something that you failed to investigate or
3 something that somebody misled you about?

4 A. I don't know that it has relevance when the number
5 was created.

6 Q. Do you know that phone companies list your number in
7 the phonebook whether you want them to or not?

8 MR. HAFER: Objection, calls for speculation. Lacks
9 foundation.

10 THE COURT: He asked him if he knows. If he doesn't know,
11 he doesn't know. If he knows, he does.

12 BY THE WITNESS:

13 A. I'm not sure of all the Yellow Pages. I know that
14 when I had my business there were often listings that I --
15 because I was a customer of the Yellow Page company that got
16 put in.

17 BY MR. WHITE:

18 Q. Phone companies list your name in the phonebook
19 whether you ask them to or not?

20 A. In the White Pages I would agree with that.

21 Q. Yeah. You have to pay not to be listed, correct?

22 A. That, I don't know.

23 Q. You've never tried to not be listed in the phonebook?

24 A. No, sir.

25 Q. All right. We'll leave that one.

1 Do you know how internet phonebooks work?

2 A. I'm somewhat familiar. Yes.

3 Q. And by that I mean the YellowBook.com, the
4 SuperPages.com and all those crazy names they put on that. Is
5 that numbers that you ask to be listed in?

6 A. My understanding is that those are associated with
7 your Yellow Pages and they're often the freebies, if you will,
8 are included with your paid advertising that you will be listed
9 on internet sites as well.

10 Q. All right. So you understand them to be connected to
11 your paid advertisement but maybe not specifically requested?

12 A. That's correct.

13 Q. All right. Do you know that some of them also come
14 just directly from the phonebook?

15 A. No. I'm not aware of that.

16 Q. You don't think that's true?

17 A. I don't know.

18 Q. All right.

19 A. I don't have the knowledge in that area.

20 Q. When you complained in your affidavit about these
21 strict violations of the franchise agreement, did you complain
22 that he was using Yellow Pages ads?

23 A. I believe we did.

24 Q. In North Carolina?

25 A. I believe so.

1 Q. Did you know for a fact that those Yellow Pages ads
2 had been purchased in a prior year?

3 A. I'm not sure on the dates on the -- when ads were
4 placed or purchased.

5 Q. Well, do you know that Yellow Pages ads are purchased
6 for a full year?

7 A. Yes. I do.

8 Q. And that they don't go out and pick up the phonebooks
9 that they have given to everyone if somebody is displeased with
10 one of the ads? You know that to be true?

11 A. I have heard that to be true. Yes.

12 Q. Okay. And so if the ad were placed in the year 2006
13 for the 2006-'7 phonebook, it could very well be out in 2007
14 even though maybe nobody wanted it out any longer?

15 A. Yeah. Depending on the publishing dates,
16 theoretically I guess that could be true.

17 Q. Well, I suppose that when you provided your affidavit
18 you had made careful examination of the publishing dates to
19 make sure that you contended Mr. Clark was using Yellow Pages
20 ads that he had ordered after you had asked him not to do that,
21 didn't you?

22 A. We did research. Yes.

23 Q. And you found that he had ordered renewals in spite
24 of your request not to?

25 A. What's in the affidavit is correct. I don't have all

1 that backup information in front of me.

2 Q. Well, what's in the affidavit is that he used a
3 compendium of internet advertisements for Clark.

4 A. Uh-huh. I'm not sure on the Yellow Page ads. I
5 don't recall at this time. I don't know the publishing dates
6 or which specific books you're referring to.

7 Q. All right. Well, that's interesting because this
8 lawsuit claims that the telephone book advertisement is a
9 violation of the franchise agreement. Did you know that?

10 A. It was in place when another franchisee owned the
11 territory. That's correct.

12 Q. All right. And are you here to testify that that
13 allegation in this lawsuit is true?

14 A. To the best of my knowledge, yes.

15 Q. And on what do you base that?

16 A. On the Yellow Page books that we've seen the display
17 ads of.

18 Q. Okay. You're going to have to tell me which Yellow
19 Page book.

20 A. I believe one of the exhibits from earlier that
21 Mr. Clark was shown, if I'm not mistaken, was one of them.

22 Q. And that is one of them that you have investigated
23 and determined that the publication date was -- requested
24 publication after you had asked him to cease advertising in
25 North Carolina?

1 A. I believe that's the case. Yes.

2 Q. Did you not hear him say, no, I ceased all Yellow
3 Pages advertising after they asked me not to?

4 A. I did hear him say that.

5 Q. And now you contend he's lying?

6 A. I'm just telling you what I think, sir.

7 Q. All right. But your thinking is directly contrary to
8 his testimony?

9 A. Yes.

10 Q. And you say that there is a Yellow Page ad ordered
11 for North Carolina after we asked him not to do that?

12 A. That's my belief. Yes.

13 Q. All right. And on what do you base the belief?

14 A. Again, sir, I don't have that information with me. I
15 would have to -- I apologize. I don't have that.

16 Q. Is that one of those things that we need to disprove?

17 A. I don't know what that reference is in to, sir.

18 Q. Okay. Well, we'll get to that then. Let me go back
19 to your affidavit. Attached is a compendium of internet
20 advertising done for Clark claiming he operates a Mr. Electric
21 facility out of an address located in Waxhaw, North Carolina.
22 Do you have any clue where Waxhaw, North Carolina is?

23 A. I do not.

24 Q. Do you know -- have you ever heard that that is the
25 exchange where his home is located?

1 A. No.

2 Q. Have you heard that that is the place where that
3 phone number 704 ending in 1900 was originally established?

4 A. I know there's a link between that --

5 Q. Address?

6 A. -- location and the phone number. Yes.

7 Q. All right. And you also know that the phone number
8 was established long ago?

9 A. Now I do. Yes.

10 Q. All right. Are you saying you did not know it when
11 you signed this affidavit?

12 A. I didn't know when the phone number was originated.

13 Q. All right. You understand, though, that you were
14 making an affidavit in this case to convince the Court that you
15 were fully aware of the facts and had investigated them, true?

16 A. Yes.

17 Q. But in fact you had not?

18 A. You don't know what you don't know. At the time I
19 thought that was all the facts.

20 Q. And asking the question of when did we get this phone
21 number? Did we buy that phone number for him or was that his
22 phone number before just seemed a silly question to you?

23 MR. HAFER: Objection, badgering the witness, Your Honor.

24 THE COURT: Overruled.

25 BY THE WITNESS:

1 A. Our franchise agreements ask for their phone numbers
2 that are going to be associated with the Mr. Electric franchise
3 and those phone numbers become ours.

4 BY MR. WHITE:

5 Q. All right.

6 A. That's part of our transfer of service agreement
7 which is included in these franchise agreements. So the origin
8 of the number in my mind isn't a relevant point.

9 Q. It would explain why the phone company listed it as
10 originating in another place, wouldn't it?

11 A. If he had started this phone number many, many years
12 ago, I would imagine the phone company would have had it under
13 his other business name. Wouldn't that be true?

14 Q. Well, I assume you checked into that very carefully
15 before you swore about these facts in this affidavit?

16 A. We found that the phone number was associated with
17 our name.

18 Q. In Waxhaw, North Carolina or in Waco, Texas?

19 A. I'm sorry. I don't understand the question.

20 Q. You --

21 A. I didn't --

22 Q. You investigated it?

23 A. -- go to North Carolina if that's what your question
24 is.

25 Q. Well, my question was you investigated the phone

1 number and found it was associated with your name Mr. Electric?

2 A. That's correct.

3 Q. And you found out that it was associated with your
4 name in what location?

5 A. In North Carolina.

6 Q. And you immediately called the phone company and
7 said, we own that number. Stop showing it as being one in
8 North Carolina?

9 A. No. That's not our job.

10 Q. Okay. I thought it was your phone number.

11 A. If you'd like to read the transfer of service
12 agreement and -- and -- you might have a better understanding
13 of how the phone number is associated with us. I don't have
14 those particulars off the top of my head.

15 Q. Well, I just thought as the president of the company
16 you would know. It's all right if you don't.

17 You also complained about links to a web site for Clark's
18 business in your affidavit, didn't you?

19 A. Yes. I believe so.

20 Q. Who controls the content of the web site?

21 A. The content is shared -- its templates are provided
22 by us on a corporate basis for consistency and the franchisees
23 have the ability to adjust that content specifically to their
24 area.

25 Q. Do you mean to imply that Brian Clark could get on

1 his computer and alter his web site at the MrElectric.com?

2 A. No. He'd have to put that request through us and
3 we -- I believe one of the prior exhibits showed a form that is
4 just an example of one of the forms we use to collect
5 information about the customization from the franchisees.

6 Q. And so if there was something on the web site that
7 offended Mr. Electric at all, it had the ability to change
8 that?

9 A. Yes. We did.

10 Q. Your affidavit does not reflect your ability to
11 remove that offending internet language, does it?

12 A. It doesn't appear to.

13 Q. All right. I'm also curious about the -- I have
14 another question about the web site which may seem like it's
15 not very connected to anything else, but we're on web sites and
16 I want to talk about it. Is that okay?

17 A. That's fine.

18 Q. All right. The web site that was established for
19 Mr. Clark has to start off with an address that's like
20 MrElectric.com, doesn't it?

21 A. I'm sorry. The web site -- I'm sorry. Can you
22 restate the question?

23 Q. I'll try. The web site link for Mr. Clark's business
24 in South Carolina would have to begin with an address that
25 started off MrElectric.com, wouldn't it?

1 A. Yes.

2 Q. And then Mr. Electric has lots of people who are
3 franchisees who have been assigned subaddresses under
4 MrElectric.com, right?

5 A. That's correct.

6 Q. And, I mean, I know I'm being simplistic about the
7 computers, but I have to make sure I don't mess it up.

8 A. All right.

9 Q. So Mr. Clark gets a subaddress under
10 Mr. Electric.com, doesn't he?

11 A. Yes. He does.

12 Q. Is it true that you assigned him the subaddress
13 Mr. Electric.com Union County?

14 A. Yes.

15 Q. Is that because you expected him to be the franchisee
16 in Union County?

17 A. I don't know how those are assigned. They
18 represent -- I know in general they represent the territory
19 that a franchisee works in. I wouldn't tell you that it has
20 direct correlation to what they own.

21 Q. Okay.

22 A. It's the areas they work in.

23 Q. Well, he was in York County, correct?

24 A. That's the territory he owned for specific rights to.
25 Yes.

1 Q. Yeah. Seemed to make sense that he would be
2 Mr. Electric.com York County, wouldn't it?

3 A. No. Not to me.

4 Q. No. Of course not.

5 A. Again, we assign those URLs based on where they do
6 their work and some franchisees have more than one because they
7 do work in multiple locations. It's again not directly tied to
8 the territory they own. It's what's descriptive for the
9 general public.

10 Q. So it would be fair then to assume from that
11 statement that Mr. Electric knew that Brian Clark would get
12 most of his business and would operate most in Union County as
13 compared to York County?

14 A. I wouldn't make that tie. No.

15 Q. All right. Well, the tie that you just told me about
16 was that they get assigned a subaddress based on where they
17 will do most of their work.

18 A. I said where they would do work, and again I don't
19 know specifically if he had other ones or if that's the only
20 one. I didn't do the assigning. So I can't speak for somebody
21 else.

22 Q. All right. Let me ask you. You don't know if he had
23 other ones. What do you mean by that?

24 A. Other URLs.

25 Q. All right.

1 A. MrElectric.com/something else.

2 Q. Well, you were complaining in this affidavit to the
3 Court that his internet stuff was offending Mr. Electric and
4 you're telling me now that you have no idea how many
5 subaddresses he had at your computer system?

6 A. We were explaining the one that was in violation of
7 the agreement once the other territory was sold and that was
8 this one.

9 Q. And you expected him how to change that? How would
10 you have expected Brian Clark to change the internet
11 advertising?

12 A. If he had used that URL in any of his other
13 advertising, he would have had to cease to use it.

14 Q. That's not what you complained about here, was it?
15 You complained about the content of the internet advertising,
16 not where it was being used or what links it was using,
17 correct?

18 A. I believe that's what it said. Yes.

19 Q. Yeah. And the only person that could change the
20 content of the internet advertising at MrElectric.com was
21 Mr. Electric?

22 A. That is correct.

23 Q. Just so that I am clear on your background, I know
24 that at some point you had indicated you have some expertise in
25 electrical work; is that right?

1 A. Yes. I did say that.

2 Q. Coming from what resource? Experience? Education?

3 Licensing?

4 A. All three of those.

5 Q. Okay. Education being?

6 A. Electrical in computer engineering degree.

7 Q. All right. And then you had experience working?

8 A. I was an electrical contractor for over 12 years

9 in --

10 Q. In that field?

11 A. Master license in State of Arizona.

12 Q. All right. And you I guess relied on some of that

13 training and experience to tell Mr. Conroy that you would

14 divide the invoices between Mr. Electric work and non

15 Mr. Electric work, correct?

16 A. My staff and I did that. Yes.

17 Q. Okay. Well, that's the one thing I guess I wanted to

18 be clear on was you do not mean to tell the Court that you have

19 been through all of these invoices?

20 A. Oh, I have been through all those invoices.

21 Q. You have?

22 A. Yes.

23 Q. But you did not make up the reports on them?

24 A. No, sir.

25 Q. All right.

1 A. All I did as I explained earlier was took the
2 invoices that were sent and divide them into two piles.

3 Q. What else was there other than that to do?

4 A. Well, you saw the reports. So everything else in the
5 report other than physically putting them into two piles and
6 sending that information back was what is done by Mr. Conroy.

7 Q. Okay. I guess what I'm curious about is you and your
8 staff.

9 A. Uh-huh.

10 Q. And so I'm -- at one point I'm hearing you say all I
11 did was separate them into two piles, but then I also hear you
12 saying me and my staff did stuff.

13 A. I'll be more specific.

14 Q. Thank you.

15 A. We have one other technical person on our staff, and
16 as you can tell by these multiple notebooks here, there were a
17 substantial amount of invoices to go through. So we sat down
18 together at a table and discussed each one and went through,
19 divided them into two piles. After we divided them into two
20 piles, we had an assistant take those piles and make them all
21 pretty and get them prepared to send back off.

22 Q. Okay. Let me leave the audit for a minute and I want
23 to go back and talk about just a few history matters and I'm
24 going to do my best not to ask you questions that have already
25 been asked. So -- like we've been over a lot of things in this

1 trial and so if I'm asking you something you feel like you've
2 already answered sufficiently, feel free to tell me that I've
3 been over this and over this, sir. Do I need to do it again?
4 Is that all right?

5 A. Sounds good.

6 Q. All right. And let me get a couple of preliminaries.
7 Brian Clark buys a Mr. Electric franchise in 2003. It's for
8 York County, correct?

9 A. Yes.

10 Q. And you are one of the people that were on the staff
11 to train him when he first began, correct?

12 A. Yes.

13 Q. And I only say that -- and I don't mean to test your
14 memory here, but I only say that because I could see in like
15 the program for that training period that you had a lot of
16 roles to play on the program. So that's why I assumed you were
17 there.

18 A. Right. Again, travel and other appointments can
19 sometimes pull you out and there's backup folks to teach the
20 classes. That is why I was a little bit hesitant because I
21 don't recall specifically which of those classes I taught that
22 week.

23 Q. And you bring up an interesting point. As time
24 passes, your memory -- everybody's memory fades just a bit.
25 Would you agree with that?

1 A. I know that that's probably true. That's why we make
2 extensive notes and try to --

3 Q. This is not a trick question. What I'm trying to get
4 at is you're not willing to say exactly what you were doing on
5 a particular day in 2003 because it simply doesn't stick out in
6 your mind?

7 A. Unless there was a significant event, I would agree
8 with that.

9 Q. Right. And here you are in --

10 MR. WHITE: Five minutes?

11 THE COURT: It's 5:00 o'clock I was pointing out.

12 MR. WHITE: Oh, let's stop then, Judge.

13 THE COURT: Unless it's a convenient time.

14 MR. WHITE: Okay. Can I finish just a train of thought
15 and then we'll go home?

16 THE COURT: Sure.

17 MR. WHITE: All right.

18 THE COURT: Don't take more than half an hour.

19 (Laughter.)

20 MR. WHITE: That would be a train of thought, right? I
21 get it. Admonition accepted.

22 BY MR. WHITE:

23 Q. Unless something very notable occurred that long ago,
24 there was no reason for you to, you know, be able to call it
25 back to memory, correct?

1 And so when you're sitting here under oath giving
2 testimony, you do not want to be positive about something that
3 you're not positive about, right?

4 A. I guess if I was unsure, I would answer that way.
5 Yes.

6 Q. And I'm sure there are records from which you could
7 determine whether you were present at this training session in
8 2003, correct?

9 A. Likely, although I wouldn't -- I don't know that.

10 Q. And people you could ask about facts that occurred
11 back then that would help you make a more definite statement
12 about whether you were training people in 2003, correct?

13 A. Possibly. Yes.

14 Q. All of which would help you make a more definitive
15 answer to the question were you at the training session in 2003
16 when Brian Clark attended?

17 A. Are you asking would talking to other people help me
18 determine the answer to that question? I would imagine that
19 would be true.

20 Q. All right. So it's not surprising that under oath
21 with the limited amount of information you have available to
22 you, you're going to do your best you can to answer the
23 question, but it may not be -- you're going to do so with
24 limited facts available to you, right?

25 A. About whether I was at that training week?

1 Q. Yes.

2 A. Yes.

3 MR. WHITE: All right. I'm at a stopping point, Your
4 Honor, and I will spend the evening shortening my examination
5 for the morning.

6 **March 24, 2009**

7 BY MR. WHITE:

8 Q. Mr. Myers, yesterday when you were talking about the
9 training that was being offered, I thought that I heard that
10 part of the training involved financial advice. Is that true?

11 A. We do a lot of financial training and just typically
12 our franchisees that may not be their strength. So bring
13 everybody up kind of a one-on-one level of financial
14 understanding and training on budgeting and whatnot but I --
15 does that answer your question?

16 Q. Yes. I was really just inquiring as to whether you
17 did give some financial advice or training to new franchisees.

18 A. We do give financial training. Yes.

19 Q. Is part of that to advise them on how to keep their
20 records?

21 A. Yes. We do an oversight of ways to keep your
22 records.

23 Q. Do you have, and I did not find, any record that you
24 advised Brian Clark to keep his financial records in any
25 fashion other than what he actually did?

1 A. Throughout our training and through our manuals it
2 describes methods that we would prefer our franchisees to keep
3 their records, and whether Brian -- Mr. Clark walked away with
4 that information or not, I don't know.

5 Q. Did you ever complain --

6 A. It was presented to him.

7 Q. I'm sorry. Finish your answer. I really don't mean
8 to interrupt you.

9 A. That's all right. I just said but it was presented
10 to him.

11 Q. And I understood that part of your answer and I was
12 asking did you ever complain to Mr. Clark that he was not
13 keeping his records in the way you wanted him to?

14 A. Not that I'm aware of.

15 Q. All right. I'm going on to another topic. For the
16 years 2003 to 2005 and going to the end of 2005, Mr. Electric
17 Corporate believed that Brian Clark was doing a great job and
18 building an excellent reputation for Mr. Electric, didn't they?

19 A. Those aren't my words, but we were doing -- we did
20 not have reason to believe he wasn't doing a good job. I
21 didn't have any information that would have indicated he wasn't
22 doing a good job.

23 Q. You know, I don't know if we sat the exhibit books in
24 front of you. And so I'm going to show you an exhibit or a
25 portion of an exhibit. Defendant's Exhibit No. 1 is an entire

1 log that Mr. Electric produces that contains I'm going to say
2 almost all their communications with Mr. Clark. Are you
3 familiar with that log?

4 A. Yes. I am.

5 Q. And is this page that I'm showing you here which has
6 an MRE0082 at the bottom. Do you see that?

7 A. I can see the portion that's showing me. Yes.

8 Q. And what I'm pointing at is this right here.

9 A. Okay.

10 Q. Is this the log that Mr. Electric keeps for its
11 communications and contacts with its franchisees?

12 A. It is.

13 Q. All right. Do you see at the top that Scott Smith,
14 the franchise service manager, in October of 2005 wrote an
15 e-mail to Brian and team that says: Thanks to your
16 organization for doing such a great job, building an excellent
17 reputation for Mr. Electric?

18 A. I do see that.

19 Q. All right. So although you do not personally know
20 whether he was doing that or not, it's clear his franchise
21 service manager believes that to be the case?

22 A. It looks like he was complimenting him on his
23 reputation. Yes.

24 Q. If he -- if Brian Clark left the impression with his
25 franchise service manager that he was doing a great job and

1 building an excellent reputation for Mr. Electric, it would be
2 due in part to the marketing program that he was -- had
3 implemented, true?

4 A. I have no idea what Scott Smith was thinking when he
5 complimented Brian on his reputation. So I can't conjecture
6 whether it was about his marketing plan or anything else. It
7 was his entry, not mine.

8 Q. All right. So you are unprepared to give any kind of
9 explanation as to whether Brian was doing a great job or
10 building a good reputation for Mr. Electric?

11 A. I believe I already stated that as far as I know he
12 was doing a good job. I don't have any information to the
13 contrary.

14 Q. Okay. And as a matter of fact, all the information
15 that you have confirms that?

16 A. The information I have, yes, but again I wasn't privy
17 to all of his financial data. That's what our franchise
18 systems managers do.

19 Q. All right. What you know about the marketing plan is
20 that Brian Clark was putting ads and other Mr. Electric notices
21 throughout Union County, Mecklenburg County and York County,
22 correct?

23 A. I do know that. Yes.

24 Q. That is something that is technically prohibited
25 under the franchise agreement, correct?

1 A. No. I don't believe that's the case.

2 Q. Well, when I've been listening to the testimony, I
3 have heard recitations to Plaintiff's Exhibit 1 the franchise
4 agreement and specifically this Section C that says franchisee
5 may not solicit customers or perform services without prior
6 written consent. Are you familiar with that?

7 A. I am.

8 Q. And so do you say that there is written consent
9 somewhere in this record for Mr. Clark to do that?

10 A. I would contend that the fact that the franchise
11 service manager and Brian put together a marketing plan on a
12 worksheet that we provide that lists these different activities
13 that that is written -- our -- it is written and we were giving
14 consent to do that.

15 Q. Okay. The consent extends, according to this
16 provision of the franchise agreement, franchise expressly
17 agrees that the franchisee shall -- okay. I'm sorry. If you
18 consent to him making the advertisements and soliciting
19 customers outside the territory, then you may do so -- respond
20 to the inquiry. If so, the customer remains the franchisee's
21 customer through completion of the project and until another
22 franchise is granted in which case the franchisee agrees that
23 the franchisee will promptly assign or transfer his customers
24 to the franchisor or its designee upon request.

25 Did I read that correctly?

1 A. I think mostly. Yes. I think you stumbled a little.

2 Q. I'm really trying to get to this point that the idea
3 is that you can give consent for him to work outside the
4 territory. You're in agreement with that?

5 A. Yes.

6 Q. And you can withdraw that consent, correct?

7 A. Yes.

8 Q. Upon request, correct?

9 A. Yes. I agree.

10 Q. All right. That's what happens when lawyers write
11 long documents I guess.

12 Mr. Minkert purchased a franchise in the Charlotte or
13 Mecklenburg County and Union County areas I believe in February
14 of '06. Is that your memory?

15 A. That date sounds accurate, but I --

16 Q. I do not mean to pick with you about the precise day
17 or hour. I mean, that's the time frame?

18 A. That sounds reasonable.

19 Q. Is it also within your memory, correct, that he began
20 operations in August of 2006?

21 A. I know it was during the summer, but I couldn't --

22 Q. Okay. You're not going to dispute --

23 A. I'm not sure it was August.

24 Q. All right. Summer, August sounds within the right
25 time frame?

1 A. Yes.

2 Q. I understand that the process of interviewing and
3 evaluating franchisees for both sides is a time-consuming
4 process; is that true?

5 A. It can be. Yes.

6 Q. And that was the case with respect to Mr. Minkert's
7 acquisition of Union and Mecklenburg Counties, correct?

8 A. Well, I don't know what you mean by time-consuming.
9 I mean, there was a lot of activity. I'm not sure it was any
10 more burdensome than any other.

11 Q. I didn't mean to imply that, but it took more than
12 just a couple of months to get it done, correct?

13 A. To get him to the point of signing a franchise
14 agreement?

15 Q. Yes.

16 A. Yes.

17 Q. All right. And the reason I asked that is if he
18 purchased the franchise agreement and signed up in February '86
19 (sic), you were working on it back at the end of October '05
20 when Mr. Smith is writing Mr. Clark about his excellent work,
21 correct?

22 A. Very possibly. Yes.

23 Q. After Mr. Clark was informed that the franchise had
24 been sold in Union and Mecklenburg County to Mr. Minkert, your
25 log reflects quite a few conversations between Mr. Electric

1 personnel and Mr. Clark, true?

2 A. Yes.

3 Q. All right. I've given you pages of the log and
4 regrettably this one I'm showing you right here when the copy
5 was made it ended up cutting off exactly the page, but do --
6 the page MRE number, but the page that I'm showing you do you
7 recognize it as being part of the log?

8 A. Yes.

9 Q. And that's part of Defendant's Exhibit 1 and I'm
10 going to tell you it's at Page 0086. All right?

11 A. Thank you.

12 Q. Apparently, according to your log, the first notice
13 that Mr. Clark got that Mr. Minkert had purchased Mecklenburg
14 and Union County was in January of 2006 according to your log,
15 true?

16 A. Are you pointing that this note right here is when he
17 got first notice? Is that what you're saying?

18 Q. Yes.

19 A. No, because it indicates he's still very upset. So I
20 would assume he knew prior to that.

21 Q. Okay. Do you have any log entry that you know of
22 that shows he was notified prior to that time?

23 A. Not that I'm aware of, but I -- no.

24 Q. All right. Okay. Is there any reason that somebody
25 would not note a significant event like that?

1 A. Our sales team that works with the prospect prior to
2 purchasing a territory does not enter notes into this log. So
3 any conversations with -- through the sales process wouldn't
4 have been noted. This is just with the operational support
5 team. So I would say yes. It is very likely that they had
6 conversations prior to that date.

7 Q. On January 19th of 2006 -- and I'm reading the first
8 part that I highlighted right in here -- it says -- and it's
9 about the second sentence -- I urged him to wait until he's
10 able to visit with Bob and consider some options, correct?

11 A. Yes. We set up a meeting between -- a face-to-face
12 meeting and we were -- had high hopes as I think we've
13 indicated in other e-mails that you've read that they could get
14 together and work something out.

15 Q. So in January of 2006 you were not telling Mr. Clark
16 to stop doing his advertising outside of York County, were you?

17 A. Not as of this -- not prior to the meeting and I
18 don't know exactly the date that the meeting took place.

19 Q. Well, you don't contend it was on January 19th, 2006,
20 do you?

21 A. That's correct. No.

22 Q. All right. So as of the middle of January you were
23 not telling him to stop. To the contrary you were telling him
24 don't stop?

25 A. That's correct.

1 Q. Now, I go down to the next entry at the bottom of
2 that page in -- I'm sorry -- January 27th of 2006, and again
3 this is a contact between Scott Smith and Brian and Darryl
4 Cloudt I believe is his name, correct?

5 A. Yes.

6 Q. And Scott is telling Darryl, I have told Brian I was
7 aware he was doing calls in the Charlotte area but did not
8 realize it was 75 percent of his business. Tried to reassure
9 him it was not intentional. The parties involved were not
10 aware of the impact of the sale and so on, correct?

11 A. I'm sorry. I don't see exactly where you're reading
12 from.

13 Q. I summarized it.

14 A. Okay.

15 Q. And I guess what I was trying to do is say there's a
16 contact at the end of January of 2006 and nothing in that one
17 is saying we need to tell Brian Clark to stop doing his
18 advertising.

19 A. Not at that time. No. And, again, the e-mails
20 between Brian and Rick were all around that same time also and
21 there was clarification that was done by the president of the
22 company with Brian.

23 Q. Well, you bring up a good point. I'm going to show
24 you what's been marked as Defendant's Exhibit 7 which is a
25 February 3rd e-mail that came from Scott Smith to Rick Cross.

1 Do you recognize that to be e-mails on your system?

2 A. Yes.

3 MR. WHITE: All right. Your Honor, I don't believe this
4 one has actually been offered. So I offer Defendant's Exhibit
5 7.

6 MR. HAFER: I have no objection.

7 THE COURT: It's admitted.

8 (Exhibit(s) admitted: D7)

9 BY MR. WHITE:

10 Q. Scott Smith is writing to Rick Cross, and he says at
11 the beginning, I worked with Brian on his marketing plan during
12 a field visit of May '05. We discussed his current plan
13 marketing activities -- were at that time. I filled out an
14 Excel spreadsheet marketing planner e-mail to him. It does
15 list activities in Charlotte and in the Alltel phonebook in
16 Union County White Page bold listing in Charlotte phonebook,
17 twice a month business card ad in Charlotte Observer Newspaper,
18 Val Pak coupons and so on.

19 Do you agree with me that Scott Smith is telling Rick
20 Cross, I made up a marketing plan for Brian Clark in '05 that
21 included advertisements in Charlotte, Union County and
22 Mecklenburg County?

23 A. I do agree.

24 Q. And that Rick Cross knew that as of February 3rd,
25 2006?

1 A. Yes. I would assume he read his e-mails.

2 Q. Let me show you Plaintiff's Exhibit 14. Have you
3 seen this e-mail before?

4 A. Yes.

5 Q. It's from Rick Cross, isn't it?

6 A. Yes.

7 Q. And in that e-mail Mr. Cross, having just received an
8 e-mail days earlier from Scott Smith saying I wrote a marketing
9 plan that involved advertising outside of the territory,
10 Mr. Cross tells Brian Clark, at no time in the process did we
11 ever agree to allow you to advertise and market in the
12 territory you did not own.

13 Do you see that?

14 A. Yes. And the process he's referring to is the sales
15 process that happened in 2003.

16 Q. Really?

17 A. That's -- that's what it says here. It says, our
18 decision to accept you and your decision to execute the
19 agreement, which is referring to the franchise agreement,
20 offered a process to take several months. Both you and
21 Mr. Electric made the decision to become a franchisee. So it's
22 referring to the early on in the relationship in 2003.

23 Q. So early on in the relationship they must have also
24 agreed to allow you to do -- allow you as we do with any
25 franchisee to respond to service calls in areas outside your

1 territory.

2 A. Correct. In that previous e-mail you showed me the
3 next couple of sentences after that Scott Smith acknowledged
4 that as well.

5 Q. Scott Smith was not talking about the early 2003
6 process, was he?

7 A. No. He was talking about the plan he established in
8 2005.

9 Q. Well, do you see the inconsistency between those two
10 things?

11 A. No. I don't.

12 Q. Well, you're telling me that in one sentence
13 Mr. Cross is saying in 2003 we never told you you could
14 advertise outside your territory and then he skips forward to
15 2005 and says, oh, but we did allow you to work outside the
16 territory.

17 Is that your contention with respect to this e-mail?

18 A. Until we give consent, which I told you that through
19 the spreadsheet in that marketing plan that Scott developed in
20 2005, I acknowledge that as written consent. That's the first
21 written consent that I'm aware of that we acknowledge that he
22 was doing the work and agreed to it. Prior to that I'm not
23 aware of any written consent or acknowledgement that he was
24 doing work.

25 Q. Okay. And what I'm reading in this e-mail, and I

1 understand you don't agree with my reading, but what I'm
2 reading here is Mr. Cross telling Mr. Clark, we never gave you
3 permission to market outside your territory.

4 A. Again, I've told you my interpretation of that
5 paragraph. I didn't write it. I'm just telling you my
6 interpretation, and that's exactly the way I read it because
7 it's referring to Mr. Clark's letter. And if you go back to
8 Mr. Clark's letter, that might help clear it up. I don't know.

9 Q. All right. The second part of Mr. Cross' e-mail
10 February of 2006, do you recognize that to be a continuation
11 that I'm showing you now?

12 A. Yes.

13 Q. Okay. And can I -- I can kind of put them together
14 if you have any doubt.

15 A. No. I got it. Thank you.

16 Q. All right. In the last paragraph of this e-mail he
17 says, again, Brian, I am trying to work out a satisfactory
18 solution.

19 Doesn't he say that?

20 A. He did.

21 Q. Does that not point to the future as opposed to the
22 present? By that I mean he implies by that that he wants to
23 continue to look for a solution.

24 A. We were all working very hard to find a solution. An
25 immediate solution. Yes.

1 Q. He writes on, but I can assure you that the solution
2 will not be to allow you to continue to market and respond
3 outside your territory, right?

4 I didn't read it directly. I'm saying that's the tenor.

5 A. Again, I think I understand that to be the territory
6 that another franchisee owns. Uh-huh.

7 Q. Okay.

8 A. We made that very clear.

9 Q. What I don't see here is "stop what you are doing."

10 A. Okay.

11 Q. Do you see it in there?

12 A. Not those words, no.

13 Q. Okay. Or that message, "stop what you are doing."
14 Do you see that in Mr. Cross' e-mail?

15 A. Not in that e-mail. No.

16 Q. All right. The log then goes on and reports a number
17 of other contacts with Mr. Clark and Mr. Electric personnel.
18 And I'm going forward to January 30th of 2006 where there's --
19 Brian would like to sit down at a conference with Scott, Bob
20 and I to work out Union County, correct?

21 A. Yes.

22 Q. Do you see that one?

23 A. I do.

24 Q. And I'm pointing to Defendant's Exhibit 1, Page
25 MRE0087?

1 A. Okay.

2 Q. And, Mr. Myers, I'm doing that so that the record
3 will reflect what you and I are talking about. I'm sorry.

4 A. I understand.

5 Q. At 2-9-06 there's a report of what Brian's sales are,
6 correct?

7 A. Yes. I see that.

8 Q. Okay. 2-27-06 at the bottom of the page there is a
9 contact with Brian about the Charlotte area and working a deal
10 with Bob Minkert. Brian's willing to do a partnership.
11 Percentage of ownership needs to be worked out. I will contact
12 Bob.

13 Do you see that one?

14 A. I don't think it's on the page you're showing me,
15 but --

16 Q. Wow. Really?

17 LAW CLERK: Slide it up some.

18 BY MR. WHITE:

19 Q. I'm sorry. Can you see it better now?

20 A. Yes.

21 Q. Okay. And that occurred 2-27-2006, correct?

22 A. Yes. That's the date.

23 Q. That does not recite that Mr. Electric has previously
24 made a demand on Mr. Clark to cease his activities in Union or
25 Mecklenburg County, does it?

1 A. I don't think that speaks to that one way or the
2 other.

3 Q. And this is at the end of February '06, correct?

4 A. That's the date. Yes, sir.

5 Q. And at the end of February of '06 apparently we are
6 still trying to get a meeting with Mr. Minkert and Mr. Clark
7 and whatever Mr. Electric people need to attend, correct?

8 A. Yes. We were trying to set up a meeting. Yes.

9 Q. In March of 2006 -- and I'm looking now at
10 Defendant's Exhibit 1 that has MRE0088 at the bottom. Do you
11 see what I'm talking about?

12 A. I do.

13 Q. And in March of '06 there is a reference, spoke with
14 Brian about the meetings later this week, correct?

15 A. Yes.

16 Q. So into March of '06 there have not been any meetings
17 between Mr. Clark, Mr. Minkert and Mr. Electric as anticipated?

18 A. I don't know the date of the first meeting. I'm
19 sorry. I don't know.

20 Q. This log reflects that we are still waiting to hear
21 about a meeting?

22 A. It says that there's going to be a meeting. I'm not
23 sure it says that it would be the first meeting. It may be. I
24 just don't know.

25 Q. Right. In March 21 of '06 there is a reference by

1 Mr. Smith. Do you see that?

2 A. Yes. Now I can. Thank you.

3 Q. All right. Spoke with Brian Clark to get perspective
4 on how the meeting with Minkert and Michael -- I cannot say his
5 last name. I'm sure I'll butcher it. Perhaps you can help me.

6 A. "Schillaci."

7 Q. "Schillaci." Did I do that?

8 A. I think you got it.

9 Q. All right. Bob Minkert, Michael Schillaci and then
10 Brian Clark, and it recites what was going on in that meeting
11 and it was a try to follow up to keep the ball rolling,
12 correct?

13 A. Yes.

14 Q. So as of nearly the end of March of 2006 there has
15 not been finality between the possible solution of Mr. Minkert
16 and Mr. Clark working together in this -- in these areas?

17 A. Yes. That's true.

18 Q. And I'm going to show you the log page that continues
19 on through April, May, September, November and December of '06
20 which is Defendant's Exhibit 1, MRE0089. That's the
21 continuation from the page I just showed you. Do you see any
22 reference in any of those months in '06 where someone noted on
23 the log, "called Brian Clark, told him to stop marketing in
24 Union and Mecklenburg Counties"?

25 A. No. I don't.

1 Q. Matter of fact, we go all the way to June of '07
2 before you have any contact resembling that, true?

3 A. I'll take your word for that. I don't know. I
4 didn't review all those pages in between there.

5 Q. In June of '07 you talked to Brian about doing work
6 in Minkert's area, didn't you?

7 A. Yes. It was as a follow-up to previous letters that
8 discussed the subject.

9 Q. Well, none of them is prior to June of '07, is it?

10 A. If you could slide the page down just a smidge.

11 Q. All right.

12 A. I believe that that 6-12-2007 discusses a letter that
13 he already had in his hands. So it must have been prior to
14 that.

15 Q. All right. Let's look at that letter. I'm going to
16 put on here a letter marked Defendant's Exhibit 3 on
17 Mr. Electric letterhead. Do you see that?

18 A. Yes.

19 Q. You're familiar with that letter, correct?

20 A. Yes.

21 Q. And it's dated May 8, 2007, true?

22 A. Uh-huh. Yes.

23 Q. And I wait for you to answer sometimes just because I
24 know the court reporter is going to take this down and you may
25 nod your head and I may understand it but she actually has her

1 back to you and doesn't know what you responded. Is that all
2 right?

3 A. I understand.

4 Q. All right. I'm going to summarize the content of
5 this letter simply by saying the letter says in May 8 of 2007
6 stop marketing in Union and Mecklenburg Counties. Is that
7 fair?

8 A. Yes.

9 Q. Among other things?

10 A. Yes.

11 Q. But that's certainly one of the messages you intended
12 to communicate in May of '07?

13 A. This was to follow up on prior conversations. This
14 was after we had had reports from our new franchisee Bob
15 Minkert that work was continuing to be done. The items listed
16 in this letter were still not corrected. So we felt the need
17 to send a more formalized letter to explain to Brian what we'd
18 been trying to tell him for some period of time.

19 Q. Do you contend that your log that contains all of
20 your contacts with your franchisees and particularly Brian
21 Clark has some message in it somewhere where you said stop
22 marketing in Union and Mecklenburg County?

23 A. The way you describe the log isn't accurate. It is
24 not a compilation of every conversation that we've ever had
25 with Brian. It is primarily used for our field support folks

1 to track conversations with them and some of our compliance
2 people. Again, our sales folks don't typically use that log.
3 The president of the company doesn't often use that log. It's
4 not a catchall for every communication.

5 Q. Do you contend that there is a letter prior to May of
6 2007 where you demanded or requested that Mr. Clark cease
7 marketing in Union and Mecklenburg Counties?

8 A. I'm not aware of any written correspondence. No.

9 Q. All right. Or any written communication?

10 A. That's correct.

11 Q. What we have seen here is all we have in written
12 form?

13 A. In written form I would agree.

14 Q. Did you not think that demanding that Mr. Clark cease
15 his activities in Union and Mecklenburg County was an important
16 thing to do?

17 A. In the conversation I personally had with Brian I
18 thought he had a clear understanding of the issues and
19 specifically the issue that once a franchisee opened up, once
20 Bob Minkert opened his doors for business, he was no longer
21 allowed to do several things. I personally had that
22 conversation with him and I know others had conversations. We
23 thought he understood it.

24 Q. Yet you never chose to memorialize when that
25 occurred?

1 A. That's correct. Because at the point at that time --

2 Q. You never had anybody --

3 A. I'm sorry. Go ahead.

4 Q. Never had anybody write down, spoke to Brian Clark.

5 Made sure he understood that he must cease advertising in

6 Mecklenburg and Union County?

7 A. I did not see any notes to indicate what you just

8 said. No.

9 Q. And yet there are mundane notes in this log about
10 relatively unimportant events, aren't there?

11 A. I'm not sure I'd characterize them as unimportant,
12 but there's a lot of notes in there. Yes.

13 Q. Well, here's a note from Defendant's Exhibit 1 MRE129
14 that we've looked at previously. There's a note on July 3rd,
15 2007, called to verify phone line for intent. It's a great day
16 at MRE. This is Brian. That's a pretty mundane event to
17 record, isn't it?

18 A. No. I don't think so. That's verifying how their
19 phone was answered when someone was in our -- I don't know
20 who -- I don't see that contact in front of me, but that's when
21 from somebody in our compliance department verifying how he
22 answers his phone if he's following our processes. So I --

23 Q. In June 11th of '07 you left a note in the log, left
24 message at office for Brian to call.

25 A. Uh-huh.

1 Q. Right below that, left message for Brian again with
2 CSR, true?

3 A. Yes. I see those.

4 Q. And you're recording things like when you called and
5 didn't get an answer but are not recording, I called and told
6 Brian to stop his advertising. He is violating the trademark.
7 He is breaking the franchise agreement. Demanded that he stop.
8 None of those entries appear here?

9 A. Yeah. I've agreed to that already. Yes.

10 Q. And you intend for us to rely on your statement that
11 you must have done it some earlier time?

12 A. Yes. I do.

13 Q. When you learned that Mr. Clark did not intend to
14 comply with your demand or that he was going to continue to
15 operate outside of the York County territory, Defendant's
16 Exhibit 1, MRE129 says, on July 3rd of '07 you said, talked
17 with Brian. He does not think he's in violation of the
18 agreement. Tends to -- and claims to have talked with an
19 attorney. Do you see that?

20 A. I do.

21 Q. The next entry is, does Brian owe us any money?

22 A. That's from our compliance officer. Yes.

23 Q. So the response to Brian doing something you do not
24 agree with is to ask whether he owes you money?

25 A. Two completely different processes were going on

1 here. When we are preparing the document that is showed the
2 intent to -- the notice of default, we collect all types of
3 information. Our compliance department does that. They do
4 that autonomous to my conversations.

5 Q. Okay. So pure coincidence that you are having
6 conversations about this and somebody is asking does Brian owe
7 any money?

8 A. No. It's not coincidence because we were having
9 conversation about the notice of default that was sent out. So
10 I think it makes sense that simultaneously we'd be doing our
11 compliance check to see what the status of his business is.

12 Q. And the status of his business is he didn't owe now
13 any money, wasn't it?

14 A. I don't recall the outcome of that particular audit,
15 but I don't believe he ever owed us money that was past due.

16 Q. Defendant's Exhibit 1, MRE130 is a reply to the does
17 Brian Clark owe any money question, isn't it? I'm sorry.

18 A. Where is that? Oh, yes. So in this case he did not
19 owe us money.

20 Q. He actually had \$13.79 worth of credit?

21 A. That's what it says. Yes.

22 Q. The letter that you sent that you're referring to the
23 notice of default and we -- that was Defendant's Exhibit 3, do
24 we need to look at that again? Do you know which one I'm
25 talking about?

1 A. I know which one you're referring to.

2 Q. All right. That came primarily as a result of calls
3 from Mr. Minkert, correct?

4 A. Yes. From -- absolutely.

5 Q. One of his employees?

6 A. Actually, I think I received a call from Bob directly
7 if I'm not mistaken.

8 Q. All right. And you were able I believe to collect
9 verifiable information that on two occasions Mr. Clark sent a
10 Mr. Electric van into Mr. Minkert's territory, true?

11 A. Yes.

12 Q. One of them was a job to install a ceiling fan, true?

13 A. Yes.

14 Q. Garnering a fee of approximately \$150, true?

15 A. That sounds right. Yes.

16 Q. Yeah. I'm not going to pick with you about the
17 amount. You can say whatever amount you want.

18 The other job was to fix an outlet, true?

19 A. Yes.

20 Q. And it also was a relatively small amount?

21 A. Correct.

22 Q. And based on those two things, you sent a letter that
23 you intended to declare Mr. Clark in default?

24 A. That was part of the information we had.

25 Q. That's all the verifiable information that you had?

1 A. It's -- I can't point my finger to anything else, but
2 it seems like we had -- at this point I think I'll have to go
3 with that because I can't recall anything else.

4 Q. Well, I was asking because in your deposition you
5 said, nope. Just those two or words to that effect.

6 All right. After the notice of intent of -- the notice of
7 default, the first letter in May of '07, do you have a name for
8 that? I'm sorry. A shorthand phrase for what you call that
9 letter?

10 A. I'd have to -- whatever the title is at the top.

11 Q. Is there a title on it?

12 A. I believe so.

13 Q. You know, we should do better. I know. But I have
14 it now. Let's see what we call this. This is Defendant's
15 Exhibit 3. And so there's not a shorthand terminology --

16 A. Right.

17 Q. -- for this letter form at your business?

18 A. No. This was not one of our named letters.

19 Q. Okay. Everybody has form letters. And you say send
20 out the default letter and that's not what you call this thing.
21 This is just a letter, right?

22 A. Yes. I think that's true.

23 Q. But you're giving notice of a default under the
24 franchise agreement, true?

25 A. I believe that's the case. Yes.

1 Q. I'm reading the reference line there. That's the
2 only reason I characterize it that way.

3 A. Yeah. I'm not sure it was officially a notice of a
4 default, but it mentions a default. Yes.

5 Q. All right.

6 A. I can read that.

7 Q. We won't pick about that.

8 After that letter there was another letter sent where you
9 demanded an audit, true?

10 A. Yes.

11 Q. That was in July of 2007, true?

12 A. I believe so. Yes.

13 Q. You had never performed an audit on Brian Clark's
14 businesses prior to that demand?

15 A. Not that formal type of audit. No. I mean, the --

16 Q. No on site audit?

17 A. The purpose of our franchise systems managers when
18 they do site visits, which we had done at Brian's location, is
19 to do a general overview of the business, and if a
20 franchisee -- they do kind of a shortcutted audit if you will.
21 That's part of what they do. We have checklists that they go
22 through and make sure things are happening, but this was the
23 first time we asked for a more formal audit. Yes.

24 Q. So as I understand that testimony, people from
25 Mr. Electric had been out to Brian Clark's business and had

1 likely looked at his financial records in the past?

2 A. I would say likely, but I don't know that for sure
3 because I didn't -- I wasn't the one who visited his offices.

4 Q. And I do not intend to ask you -- by my question to
5 ask you to say what actually happened but rather to say what
6 the policy and process --

7 A. Yes.

8 Q. -- for Mr. Electric is.

9 A. Yes. It is for us to do a general overview of the
10 business.

11 Q. And there's no reason to believe that your people
12 that were going out to South Carolina weren't following general
13 policy and procedure?

14 A. That's correct.

15 Q. And so it is not unreasonable to say that they likely
16 reviewed the financial records of Brian Clark in their prior
17 visits to him?

18 A. That's your summary, and I don't --

19 Q. You won't agree to that?

20 A. -- find a lot of fault with it, but I don't know if
21 they did that specifically in Brian's case. Very likely.

22 Q. All right. The purpose -- well, this audit was not
23 done before you sued Brian Clark, was it?

24 A. The one that you're referring to, the more formal
25 audit, no.

1 Q. I should have been more clear. You demanded an audit
2 in July of 2007. That audit was not done before suit was
3 filed?

4 A. That's correct.

5 Q. The audit was done in the context of this litigation?

6 A. That's correct.

7 Q. And the audit was done for the purpose of creating a
8 debt that Brian Clark would owe you?

9 A. No. I think the audit was done so we would be able
10 to know where we stood with Brian, what the facts were in
11 the -- the detailed facts because we didn't have a thorough
12 understanding of all that prior.

13 Q. All right. I want to talk to you about the portion
14 of the audit that was in York County.

15 A. Okay.

16 Q. That was a time when Dan Conroy was sent on site or
17 to go to Brian Clark's business and conduct a review of
18 financial documents on site?

19 A. Yes. And just to be clear, the reason why we keep
20 referring to the York County or the Mr. Electric audit
21 happening in his office and the other part of it away is
22 because of the access to records. They were shipped to us much
23 later. So when we -- when he was on site the only records he
24 had available to him were for his York County Mr. Electric.

25 Q. Okay. Have you ever heard anybody dispute those

1 facts?

2 A. No. I was just -- I thought it might make it simpler
3 for us to proceed knowing that the stuff that -- the audit that
4 was accomplished on site was for the Mr. Electric York area.

5 Q. Okay. And I accept that, agree with that as we
6 always have.

7 A. Okay.

8 Q. The York County audit was for the Mr. Electric
9 portion of Brian Clark's business?

10 A. Correct.

11 Q. And the object here was for Mr. Conroy to review the
12 records of Mr. Electric franchisee in York County, South
13 Carolina?

14 A. No. The hope of the audit was to analyze all of
15 Brian Clark's businesses, but at that time, yes. We did just
16 the Mr. Electric portion.

17 Q. Let me put the hopes aside here for a minute and talk
18 about what happened, and I accept everything you have said
19 about what you wanted to happen in South Carolina. You wanted
20 to look at everything at one time. You wanted to have all the
21 records produced. That didn't happen, but what did happen was
22 he looked at all the Mr. Electric franchisee of York County
23 records, correct?

24 A. That's my understanding. Yes.

25 Q. The object being can we determine whether

1 Mr. Electric of York County has made accurate royalty reports,
2 true?

3 A. That was part of the -- what we were trying to find
4 out from the audit.

5 Q. Okay. And your position in this litigation as I
6 understand it is if the bank deposits do not match the royalty
7 reports, then Mr. Electric is entitled to assume that the --
8 that the variance is operational income on which royalty is
9 due?

10 A. That's one of the ways we verify the numbers. Yes.

11 Q. All right. Is that your position in this litigation
12 that you were entitled to assume any variance is operational
13 income on which royalty is due?

14 A. Yes.

15 Q. You make that conclusion because of part of the
16 franchise agreement, true?

17 A. Yes.

18 Q. And I'm showing you Plaintiff's Exhibit 1 which is
19 marked MRE0009 which is a part of your franchise agreement,
20 right?

21 A. Yes.

22 Q. It's at Paragraph 5G, true?

23 A. I see the G.

24 Q. It doesn't say 5 on there.

25 A. I'll assume 5.

1 Q. Do you need to see the whole thing so you --

2 A. Oh, I'm fine. Go ahead.

3 Q. All right. I've highlighted the part which has been
4 read several times: If the franchisee conducts business which
5 is not subject of this agreement. And you say Brian Clark did
6 that. He had Southeastern Electrical and Mr. Electric, right?

7 A. Yes.

8 Q. So he had a business not subject to the agreement?

9 A. Yes.

10 Q. All records connected with such other operation,
11 Southeastern Electric in this case, right?

12 A. Yes.

13 Q. Shall be kept in a manner necessary to affect a
14 convenient segregation between the franchise and such other
15 business, right?

16 A. Right.

17 Q. Keep Southeastern Electric books and bank accounts
18 separate from Mr. Electric books and bank accounts, right?

19 A. That's what we wanted. Yes.

20 Q. If you don't do that, any sums deposited in the bank
21 accounts are deemed to be gross sales of the franchise, right?

22 A. It says "otherwise," but yes.

23 Q. All right. If you have any dispute with the way I'm
24 summarizing what the agreement says, you know, tell me. I do
25 not mind you doing that, but, I mean, it means the same thing.

1 If you don't segregate conveniently records of the franchisee
2 and his other businesses, then we'll assume that the sums
3 deposited in the bank account are gross sales. Is that how
4 this works?

5 A. Yeah. It's my understanding. Yes.

6 Q. All right. Mr. Clark segregated Southeastern
7 Electric from Mr. Electric, didn't he?

8 A. As far as I know, yes.

9 Q. All right. If I just read this agreement Section 5G,
10 there's no basis on which to -- upon which to make the
11 assumption that sums deposited in the bank account are
12 necessary gross sales, is there?

13 A. Based on the interpretation you described to me, I
14 would agree with you, but again --

15 Q. Well --

16 A. -- I don't know the --

17 Q. Further -- well, it's key to the assumption that
18 variance between bank deposits and royalties are variances that
19 cannot be explained, true?

20 A. I'm sorry. Repeat the question. I was trying to
21 read this again. I'm sorry.

22 Q. Okay. Do you need a minute to do that?

23 A. Well --

24 Q. You're free to.

25 A. You were -- you were -- you were emphasizing this

1 otherwise any sums, and I was just wondering if that meant that
2 if you did not -- I was just trying to get that better in
3 context. So go ahead. I'm ready for your question.

4 Q. Now I'm moving off on to another question. Do you
5 understand that?

6 A. Okay.

7 Q. I don't mean to be unfair to you about your
8 understanding and your contentions about Section 5G.

9 A. Go ahead. I'm ready.

10 Q. All right. I will go ahead then. The assumption
11 that a variance between bank deposits and royalty reports must
12 be gross sales depends on the inability to explain the
13 variance, true?

14 A. Yes. I would think so.

15 Q. If I can explain why I have more bank deposits than I
16 have reported on my royalty, then they're not gross sales,
17 right?

18 A. I think that it's worth looking into what those
19 differences would be.

20 Q. And if I can justify that I had an extra bank deposit
21 in there that had nothing to do with operational income, then
22 there'd be no need to collect royalty on that, true?

23 A. I would agree with that.

24 Q. And to take an extreme example, if I won the lottery
25 and put it in my Mr. Electric account, you would not expect to

1 be paid royalty on that?

2 A. That's correct.

3 Q. But you would want to see the winning lottery ticket
4 because you've not seen one before --

5 A. That's right.

6 Q. -- among other reasons, right?

7 A. Our objective is accuracy. So yes.

8 Q. Exactly. Brian Clark's records do supply financial
9 data explaining why his bank deposits are different from his
10 royalty report, don't they?

11 A. I have not seen that. I did not prepare the audit.
12 So I don't know what Stoddard and Associates used.

13 Q. All right. Let me show you the Stoddard and
14 Associates report with respect to the York County audit which
15 we've understood to be only the Mr. Electric franchise audit.
16 Are you with me?

17 A. Yes.

18 Q. Mr. Conroy reports that I looked at the royalty
19 report and I saw that for instance in the audit period for 2004
20 the royalty reports reported income revenue of 157,928, right?

21 A. Okay.

22 Q. And then further down the net -- non revenue bank
23 deposits were 197,099. Are you with me?

24 A. Yes.

25 Q. And so he says there is a variance of the bank

1 deposit to the royalty report 39,171?

2 A. I see that.

3 Q. And he did that for all these audit periods and said
4 I have no -- I do not -- you should count all that as gross
5 sales, true?

6 A. Yes. That's what the report says.

7 Q. Do you know that Mr. Clark uses the QuickBooks
8 accounting system to keep his books for Mr. Electric?

9 A. I have learned that. Yes.

10 Q. Do you know that that system supplies you with ample
11 tracking for every bank deposit that's been put into the
12 account?

13 A. I understand the software has the ability to do that.
14 Yes.

15 Q. Do you understand that Mr. Clark had bank statements
16 and bank deposit slips that would explain his bank deposits?

17 A. Again, I don't know what Mr. Conroy had access to. I
18 have not seen any of those documents.

19 Q. Those are the kinds of documents that would allow you
20 to explain the variance?

21 A. Okay.

22 Q. Aren't they?

23 A. Could be.

24 Q. And if Mr. Conroy said in his deposition I did not
25 bother to look at any of those, that would be a problem,

1 wouldn't it?

2 A. Again, I don't know what his -- what records he had
3 in front of him. There may have been something that gave him
4 indication he didn't need to look at it. I don't know. I
5 would only be guessing.

6 Q. All right. Well, let's don't guess. I want to show
7 you Defendant's Exhibit 15. Do you see at the bottom of
8 Defendant's Exhibit 15 an e-mail from you to Dan Conroy on
9 October 28, 2008?

10 A. Yes.

11 Q. Do you see that?

12 A. I do.

13 Q. And you are writing to Dan Conroy, correct?

14 A. Correct.

15 Q. And then later at the top of this page -- and that's
16 the way e-mail threads work sometimes -- Dan Conroy is writing
17 back to you, true?

18 A. Correct.

19 MR. HAFER: Your Honor, I'm going to object to this as
20 hearsay as it relates to Mr. Conroy.

21 MR. WHITE: Well, Your Honor, it's -- I can ask him
22 whether this is his e-mail and his business system that he
23 received and relies on and keeps in the normal course of
24 business.

25 THE COURT: I'm sure it is. Objection overruled.

1 MR. WHITE: All right. I offer Defendant's Exhibit 15.

2 MR. HAFER: Same objection.

3 THE COURT: Overruled. Admitted.

4 (Exhibit(s) admitted: D15)

5 BY MR. WHITE:

6 Q. I'm going to read part of this e-mail and point it
7 out to you. Are you ready for that?

8 A. I am.

9 Q. All right. At the top he's writing to you. He
10 doesn't say Jeff, but that's implied. I'm sorry. Mr. Myers.
11 He's saying to you, here is what I have, Mr. Myers. First,
12 Clark is very good at making sure everything matches up between
13 the P&L, the royalty reports and the tax returns. True?

14 A. That's what it says. Yes.

15 Q. Yet what he did was refuse to consider what had
16 matched up and acknowledged that the bank deposit variance and
17 the royalty report could be explained, true?

18 A. Again, I can't speak for Mr. Conroy. I don't know
19 what his conclusions were or what process he went through to --

20 Q. Well, he is telling --

21 A. -- get those conclusions. All I can see is what his
22 conclusions were on that spreadsheet you showed us just a few
23 minutes ago.

24 Q. You cannot explain or justify his conclusions, can
25 you?

1 A. Because I don't know the process he used. No.

2 Q. All right. But he tells you that Clark is very good
3 at keeping records, doesn't he?

4 A. In this tight realm of that everything matches
5 between P&L and royalty reports, he does say that he does a
6 good job with that.

7 Q. He then continues, I think the majority of any
8 underpayment will be generated by your analysis of the sample
9 invoices.

10 Did I read that correctly?

11 A. I think so.

12 Q. He is telling you that if you expect to recover any
13 substantial money from Mr. Clark, it's going to be because of
14 your, Jeff Myers, work on the invoices, true?

15 A. No. I wouldn't characterize it that way.

16 Q. I think the majority of any underpayment will be
17 generated by your analysis of the sample invoices?

18 A. Our analysis of those invoices was to get the actual
19 facts of the matter. There was no predetermined conclusion
20 that we are trying to get to.

21 Q. Your prior e-mail said, I briefly looked through them
22 and am confident of extensive work under SES that should have
23 been done under MRE?

24 A. That's correct.

25 Q. And his response, well, I think the majority of any

1 underpayment you're going to have to be able to collect will be
2 from your analysis?

3 A. So it sounds like I had actually determined there was
4 underreporting before Dan made that statement from what you're
5 showing me.

6 Q. Sounds like to me that the two of you were excited
7 about being able to generate a report that counted for a
8 substantial amount of underpayment.

9 A. I think that's a mischaracterization.

10 Q. Well, I'm looking in the middle of Mr. Conroy's
11 e-mail. He has underlined a sentence for you to review, hasn't
12 he?

13 A. The one about this would be best addressed on site
14 and then the following underlined?

15 Q. Yeah.

16 A. Okay.

17 Q. Depending on the budget for this project, I might
18 suggest letting the underreported amount stand and require him
19 to disprove the amount?

20 A. That was -- I read that.

21 Q. And that's exactly what you did from that point
22 forward?

23 A. That's not the case.

24 Q. All right.

25 A. That was a suggestion by Dan and we discussed it and

1 we reviewed the -- since I had the invoices, I reviewed those
2 and we felt confident that there was underreporting. So that's
3 the strategy we took.

4 Q. The strategy being, we'll make this number up -- and
5 I don't mean fictional likewise at that point. I mean we will
6 set out this number and require Mr. Clark to disprove it?

7 A. No. I don't know about the disprove. We felt
8 comfortable with the underreported sales after reviewing the
9 invoices. So that's the strategy that we went forth with and
10 then we felt very confident that that number is accurate and we
11 moved forward. Dan's opinion here wasn't the deciding factor.

12 Q. All right. But you acknowledge that's Dan's opinion
13 of how you should proceed?

14 A. He wrote the letter. So I would assume it's his
15 opinion.

16 Q. That's Dan's strategy?

17 A. That's Dan's writing. Yes.

18 Q. All right. In coming up with his strategy -- and you
19 have told me that your desire was to get to the true facts
20 about the financial records you were looking at, true?

21 A. That's the case.

22 Q. At the end of his e-mail Mr. Conroy tells you a
23 couple of things. In the next to the last paragraph of his
24 e-mails he says, we combined the individual profit and loss
25 statements we received and compared them to the tax returns.

1 There's no sales account for Savin Electronics, assuming sales
2 are reported in this assertion fashion. There are variances
3 ranging from \$1,200 to \$94,500 during the audit period. These
4 could be due to accounting adjustments. Do you see that he
5 says I don't have a complete picture of the records and cannot
6 come to a conclusion that is any closer than 1,200 to \$94,500?

7 A. Yes. I see where he wrote that.

8 Q. The issues presented in this preliminary audit
9 report, missing invoices, credit card payments being
10 cross-deposited between companies and intercompany transfers
11 could be concluded in another field visit if your review of the
12 invoices warrant additional time. Correct?

13 A. Yes. That's what it says.

14 Q. Getting to the true facts dependent upon your
15 providing additional budget to make another site visit, true?

16 A. That was Dan's opinion. Yes.

17 Q. And you decided no more site visits?

18 A. That's correct. We didn't do any additional site
19 visits.

20 Q. I want to talk to you about your review of the
21 invoices. When you got the box of invoices from Brian Clark's
22 records, they were sent first to Mr. Conroy? Is that true? Or
23 did you get them before you sent them to Dan? Who looked at
24 them first?

25 A. I don't actually know where they -- I believe they

1 were sent to your office first, but I don't know that for sure.

2 I just know they showed up in a box.

3 Q. All right. And you don't know who sent them to you?

4 A. No. Actually I don't recall.

5 Q. Did you ever send them to Dan? Mr. Conroy?

6 A. I believe we returned them to Mr. Hafer's office,
7 but, again, I'm not positive where we shipped them off to.

8 Q. Can you say that you sent any of the invoices to
9 Mr. Conroy to review?

10 A. To review?

11 Q. Yes.

12 A. No.

13 Q. He didn't even look at them?

14 A. I believe he had the invoices and then -- and
15 reviewed them, but I'm -- not for technical. He indicated to
16 us he needed help determining which pile, as I described
17 yesterday, and that was the task I was charged with.

18 Q. You were, at the time you were charged with the task
19 of participating in this audit, suing Brian Clark?

20 A. Yes.

21 Q. You were a litigant against him trying to figure out
22 what you wanted to recover against him?

23 A. We were trying to determine if we had something to
24 recover. I guess that's what the purpose of the audit was.

25 Q. You were engaged in the investigation of both the

1 amount and extent of your damages?

2 A. I believe that was part of the purpose.

3 Q. You were fully cognizant that the more invoices you
4 put in the Mr. Electric pile as opposed to the non Mr. Electric
5 pile the more damage you'd be able to claim?

6 A. I guess I could have -- that's the logical
7 conclusion. Yes.

8 Q. All right. Do you contend that your review was
9 independent?

10 A. My review was based on my experience in the
11 electrical business and I worked for the company. Our audit
12 allows us to have employees of the company do it. So
13 independent, I'm not sure what that means. With no bias at
14 all? I looked at each invoice for what it was -- written on it
15 and placed it accordingly.

16 Q. And so despite the fact that your company had a
17 vested interest in making the Mr. Electric pile as high as it
18 could, you want us to believe that you were absolutely
19 independent and unbiased in your review?

20 A. Well, my review is for accuracy and what bias did or
21 didn't influence me, I don't know at this point. It wasn't a
22 cognizant thing. I was trying for accuracy was my goal.

23 Q. Well, it is impossible to be 100 percent accurate,
24 isn't it, with respect to this determination?

25 A. Well, I mean, I don't know what 100 percent. I took

1 a lot of statistics classes. So I think that I would probably
2 agree that 100 percent accuracy is something that's tough to
3 achieve.

4 Q. Well, the reason I make the point -- and perhaps the
5 question is inartful. But you acknowledge that the
6 determination of which invoice goes in the Mr. Electric pile
7 versus which invoice goes in a non Mr. Electric pile is a
8 matter of opinion?

9 A. No. I don't think that's the case. I mean, we have
10 a pretty detailed definition of what was supposed to go in each
11 of the piles and based off of what's typed on an invoice it is
12 very clear. It's not a guessing game.

13 Q. When your deposition was taken you indicated that
14 trying to determine what heavy commercial work is is evaluated
15 on a case by case basis?

16 A. That's right.

17 Q. You cannot define it beforehand and know then what is
18 heavy commercial and what is not, can you?

19 A. Not 100 percent. No.

20 Q. There is no source you can look at where you'd be
21 able to reach a definition for heavy commercial and industrial
22 work, is there?

23 A. That's correct.

24 Q. There's no technical journal or technical
25 documentation that would allow anyone else to look and see

1 clearly this invoice is heavy commercial or industrial work?

2 A. There's no journal. No.

3 Q. And so there is no standard by which we can measure
4 the accuracy of your determination that this invoice belongs in
5 a non Mr. Electric pile because it's heavy commercial or this
6 invoice is not heavy commercial and therefore belongs in the
7 Mr. Electric pile?

8 A. Again, I agree that you can't be 100 percent
9 accurate.

10 Q. All right. Well, it's rife with opinion, isn't it?

11 A. Again, I don't think so. With years of experience in
12 the trade, the fact that two of us went through and reviewed
13 the invoices, I feel comfortable with the designation between
14 the piles.

15 Q. Well, two of you went through it. Actually three of
16 you went through it, true? Mr. Clark was presented with these
17 invoices at his deposition and asked to do the same job that
18 you did, true?

19 A. Yes.

20 Q. It took you 12 to 15 hours to do the work, true?

21 A. Well, personally I had less than that, but that was
22 an accumulation of all of our time.

23 Q. The project was 12 to 15 hours. Is that fair?

24 A. Yes.

25 Q. Mr. Clark was given an hour to do it?

1 A. I don't know. He had the original --

2 Q. He sat a lunch hour.

3 A. He had the original invoice at the time they were
4 done and he made the decision at that point and I don't know
5 how much time he spent at that point to decide whether he would
6 report that or not.

7 Q. Well, your testimony about your making the two piles
8 Mr. Electric and non Mr. Electric was that you were
9 conservative and gave the benefit of the doubt to the non
10 Mr. Electric pile, true?

11 A. Yes.

12 Q. Mr. Clark's testimony was, I was conservative. I
13 gave the benefit of the doubt to the Mr. Electric pile?

14 A. I heard that.

15 Q. If both of you did precisely that, your piles should
16 match, shouldn't they?

17 A. I guess theoretically. Sure.

18 Q. They do not.

19 A. I don't believe they're off by much. And again I've
20 already indicated that it's not 100 percent accurate.

21 Q. We'll talk about whether they're off much or not.

22 A. Okay.

23 Q. But the -- your theory is that they both should have
24 matched because you both have relatively equivalent education
25 and experience as electrical contractors and both of you should

1 have come to the same conclusion?

2 A. That was not my theory that they --

3 Q. Isn't that true?

4 A. I don't know all of Mr. Clark's experience. Based on
5 my experience and the person that I reviewed it with, we
6 divided the piles for accuracy.

7 Q. Wouldn't you in reality expect two people to be
8 suing -- who are suing -- who are in court over a dispute to
9 come up with wildly different opinions about what the damages
10 should be in the lawsuit?

11 A. I didn't have any expectation on that.

12 Q. Think about that for just a minute because you've
13 been assigned the task of making the pile of invoices which are
14 going to be the foundation for any significant damage you can
15 claim in this lawsuit and you are going to tell us now that
16 that had no bearing whatsoever on how you divided these things?

17 A. No, because at that point we weren't -- we weren't at
18 the point we're at now. We were trying to determine how --
19 where we stood and what, if any, damages we might be entitled
20 to, and once we went through and we felt comfortable with the
21 division of the two piles, we then had some additional data
22 that allowed us to decide if we wanted to continue or not.

23 Q. On December 2nd Mr. Conroy sent you a draft in an
24 e-mail of his report for underreported MRE revenue, didn't he?

25 A. Yes. I see that.

1 Q. I'm looking at Defendant's Exhibit 16. Do you see
2 that?

3 A. Yes.

4 Q. Is that an e-mail you received?

5 A. Yes.

6 MR. WHITE: Offer Defendant's Exhibit 16.

7 MR. HAFER: I have no objection.

8 THE COURT: It's admitted.

9 (Exhibit(s) admitted: D16)

10 BY MR. WHITE:

11 Q. "Jeff, attached is a draft projection," and he
12 explains how he came up with his draft projection. Do you
13 recognize that methodology that he explains in that e-mail?

14 A. Yes. I do.

15 Q. Is that something that you understood he would be
16 doing when he came up with his opinion and report?

17 A. No. I didn't know what method he would use ahead of
18 time.

19 Q. Once he sent the draft to you, you clearly understood
20 what his methodology was?

21 A. Oh, absolutely. Absolutely.

22 Q. All right. I want to show you part of Plaintiff's
23 Exhibit 26 which is a kind of a spreadsheet. Can you see that
24 all right?

25 A. I can.

1 Q. It may not all be on there, but I'm trying to get the
2 numbers reasonably large. There are two categories that he has
3 put there, UPS work, which I guess is shorthand for non
4 Mr. Electric work?

5 A. Yes.

6 Q. And MRE work which is Mr. Electric work?

7 A. Correct.

8 Q. And he's saying that -- Mr. Myers, I added up the
9 invoices or I looked at the totals that you gave me for the
10 invoices and then computed a percentage for each of those. So
11 for the fourth quarter of 2004 I'd say 62 percent of the
12 work -- and I'm rounding -- was non Mr. Electric work and about
13 38 percent of it was Mr. Electric work, right?

14 A. Yes.

15 Q. His methodology then is to take income for that year
16 and multiply it by the percentage, right?

17 A. That's correct.

18 Q. And so he went to Brian Clark's Mr. Electric
19 financial statements and said, I have looked at all their
20 income and the total of income is 536,443, right?

21 A. Yes. I see that number. Yes.

22 Q. And so if 62 percent of it is Mr. Electric and -- I'm
23 sorry -- non Mr. Electric and 37 percent of it -- 38 percent of
24 it is Mr. Electric, then you should be paid royalties on 38
25 percent of the total of the income, right?

1 A. Yes.

2 Q. That was his methodology and you understood it fully?

3 A. Yes.

4 Q. You also, I assume, carefully reviewed this draft

5 that he sent to you?

6 A. I looked at it and reviewed it. Yes.

7 Q. Well, as you have said on numerous --

8 A. Go ahead. I'm sorry.

9 Q. No. You were talking.

10 A. I didn't want to imply that "carefully" meant that I

11 verified all the numbers because I didn't.

12 Q. Okay. But as you have said a number of times during

13 your testimony we were investigating and looking for the truth

14 here, right?

15 A. Yes.

16 Q. And so you would have at least looked at it to say is

17 this consistent within itself, right?

18 A. I guess so. Yes.

19 Q. And to the extent that there were inconsistencies in

20 the report, you would have wanted to have those explained,

21 true?

22 A. If I had noticed inconsistencies, yes.

23 Q. All right. Let me go back to the spreadsheet with

24 the percentages. Are you with me on that?

25 A. Yes.

1 Q. It's part of Plaintiff's Exhibit 26 and it's the last
2 Page 7 of 7, MRE0189. Are you with me?

3 A. I am.

4 Q. All right. Did you see when you looked at this
5 report that the second quarter of 2006 has a precipitous drop
6 in UPS work?

7 A. Yes.

8 Q. Did you inquire, wow. I wonder what changed there so
9 that he only had \$20,000 of UPS work in the second quarter of
10 2006 when every other sample quarter was significantly higher
11 than that?

12 A. No. I did not inquire.

13 Q. The reason I asked about your inquiry is that
14 Mr. Conroy was telling you in the e-mail enclosing the draft,
15 the franchisee will complain that the sampling of invoices was
16 not broad enough to correctly reflect a true underreported
17 income.

18 A. Yes.

19 Q. Right?

20 A. He was expressing some possible complaints about his
21 work.

22 Q. Which is precisely what that precipitous drop in UPS
23 work in the second quarter of 2006 would imply, right?

24 A. No. I don't --

25 MR. HAFER: Objection, calls for speculation. Lacks

1 foundation.

2 THE COURT: Overruled.

3 BY MR. WHITE:

4 Q. I'm going to ask you to agree with -- anything other
5 than the fact that there was this drop would raise a question
6 about whether the sample was fairly reflective of the entire
7 year?

8 A. It didn't raise any reason for inquiry in my mind.

9 Q. Not a red flag at all?

10 A. No.

11 Q. Completely reasonable to believe that the UPS work
12 would go along an upward line and then all of a sudden drop off
13 and then go back up?

14 A. I was reviewing his data, not trying to predict any
15 trends or anything.

16 Q. Well, and I'm not faulting you at this point for
17 looking at the data and I'm not saying you didn't add it up
18 right. I'm saying what did you think when Mr. Conroy reported
19 this sampling might raise an objection that it is not true --

20 A. Oh, I see.

21 Q. -- as to the entire period?

22 A. Well, I assumed what he was referring to in the fact
23 that we didn't actually collect every invoice for all four or
24 five years, that we took specific quarters and used this
25 methodology. I thought he was just kind of questioning that in

1 general and we -- we did discuss that whether we felt this was
2 an accurate way to project sales over the entire time frame and
3 we thought it was.

4 Q. All right. Okay. And I don't doubt that you decided
5 to go down that path. I'm just wondering whether when he sent
6 the draft to you and said, see, here's what sampling sometimes
7 will show, an odd data entry.

8 A. Yeah.

9 Q. We need to think about that, which you've now told me
10 we thought about it?

11 A. Yeah. I didn't -- I was talking about the entire
12 methodology. I didn't -- was not referring to any sort of
13 specific odd data because I did not see that as being odd data.
14 I took his e-mail to be the entire process of verifying the
15 different quarters, not any specific quarter or any specific
16 oddity.

17 Q. All right. Let's go to something else then and I'm
18 going to ask you about the income that Mr. Conroy included in
19 his methodology. Are you with me on that topic?

20 A. Yes.

21 Q. He says -- or what he did was to look at a profit and
22 loss statement for Brian Clark's company Southeastern
23 Electrical and assume that certain categories of income would
24 be categories in which there would be royalty generating
25 revenue, true?

1 A. Yes.

2 Q. And if I'm looking at the 2004 quarter that was
3 sampled which is on Plaintiff's Exhibit 26, MRE No. 0184,
4 Mr. Conroy made the assumption that the category of sales
5 income would have royalty generating revenue in it, didn't he?

6 A. Yes.

7 Q. All these ones on that category that are in -- that
8 are not shaded out are categories that he thought should have
9 royalty producing revenue in them?

10 A. Yes.

11 Q. So sales, service, installation, he assumed freight
12 had royalty generating revenue in it, didn't he?

13 A. Correct.

14 Q. And he assumed miscellaneous income had royalty
15 generating revenue, didn't he?

16 A. He did.

17 Q. But he did not think that sales, tax discount, rent
18 income or gain and loss on investments was royalty generating
19 revenue, right?

20 A. That's correct.

21 Q. No reason for you to disagree with his conclusions
22 there?

23 A. No.

24 Q. You accepted them?

25 A. I did.

1 Q. And I assume agreed with it?

2 A. I accepted them. Yes. I mean, he was -- it was his
3 audit. So I accepted his audit results.

4 Q. Well, I'm going to pick with you for what I think is
5 the first time today. It was part your audit, too?

6 A. Yes.

7 Q. All right.

8 A. That's correct.

9 Q. Don't say it's -- I'm picking with you --

10 A. This spreadsheet that you're referring to was
11 produced and generated by Mr. Conroy on our behalf, but I don't
12 create the report. So I -- he's the person that created it.
13 So he determined what was included and excluded. That was my
14 point.

15 Q. His report is pretty useless without your input about
16 the two piles, Mr. Electric, non Mr. Electric, the percentage
17 of Mr. Electric versus the percentage of non Mr. Electric?

18 A. That part of his report was dependent on our
19 findings.

20 Q. All right. And I'm going to try and go through this
21 report that he first sent fairly rapidly, but in the second
22 sample period in 2005 he again included sales, service,
23 installation, freight, miscellaneous income, did not include
24 sales tax rent or gain and loss in investments, right?

25 A. Yes. That's what it says. Uh-huh.

1 Q. Which again you accepted?

2 A. I did.

3 Q. In 2006 -- and consistent -- sales, service,
4 installation, freight, miscellaneous, do not include sales tax,
5 rent income or discounts?

6 A. That's correct.

7 Q. Same thing in 2007. Sales, service, installation,
8 freight, miscellaneous, do not include sales tax, rent income,
9 gain or loss on sale of assets?

10 A. Correct.

11 Q. You saw all those?

12 A. I did.

13 Q. 2008 he includes sales, service, installation,
14 miscellaneous income, rent income?

15 A. Okay.

16 Q. Wow. That's different, isn't it?

17 A. It is.

18 Q. And I assume that you called him immediately to say,
19 Mr. Conroy, in 2008 it appears that you included rental income
20 in your work. Shouldn't you correct that before you send out
21 your final report?

22 A. No. I did not.

23 Q. Surely you noticed it?

24 A. Actually, no. I did not.

25 Q. Never looked at how he came to his conclusion that

1 was going to support your damage theory in this case?

2 A. I understood the methodology he was using and I
3 relied on Dan for his part of the audit and I relied on myself
4 for my part.

5 Q. But he sent it to you in a draft form so that you
6 could comment on it, didn't he?

7 A. I don't know what his intentions of sending it in
8 draft form were. We were anxious to get the report so we could
9 move forward.

10 Q. Let me go back to Defendant's Exhibit 16. When he
11 sent you the draft projection he says, call me and we can
12 discuss the worksheet.

13 I assume you called him?

14 A. I did not.

15 Q. All right. From the report that is Plaintiff's
16 Exhibit 26 you come to the conclusion that Mr. Clark had failed
17 to report revenues of a million and a half dollars, correct?

18 A. That's what the summary is. Yes.

19 Q. And from that you contend that he owes you
20 approximately \$127,000 in royalty, correct?

21 A. Correct.

22 Q. Was that your estimation of the underreported
23 royalty?

24 A. Yes.

25 Q. And we have seen and heard during your direct

1 testimony that Plaintiff's Exhibit 1, and in this case again
2 Section 5, but it's MRE Page 0001, says that the franchisee
3 will pay the amount due on the understated royalties or the
4 amount which Mr. Electric estimates was due, right? I'm
5 paraphrasing again. So feel free to correct me if it makes a
6 difference.

7 A. Yeah. Okay. Go ahead.

8 Q. Well, what I'm saying is -- I guess what I'm trying
9 to get you to agree with is that the first time you gave him
10 any estimate of your amount was when Mr. Conroy prepared this
11 Plaintiff's Exhibit 26 in -- during the litigation.

12 A. That's the first time I knew the number. I'm not
13 sure who it was communicated to.

14 Q. Well, is there anybody that gave an estimate other
15 than Mr. Conroy?

16 A. Well, they gave it -- no.

17 Q. Okay. And that's Mr. Conroy's first report of the
18 underreported revenue for the Southeastern Electric portion of
19 the audit work he did?

20 A. Yes. I believe so.

21 Q. So the first time that Mr. Electric ever made an
22 estimate of the amount of underreported royalty was when
23 Mr. Conroy prepared this report?

24 A. I believe that's so. Yes.

25 Q. Which we know right now is wrong?

1 A. I don't agree with that statement.

2 Q. Well, I'm going to go back to that rental income
3 thing and say there is no valid reason to include the rental
4 income as a revenue -- as a royalty generating revenue, is
5 there?

6 A. But what I haven't done is gone through and verified
7 all the calculations, if that's a mistype that it's not rental
8 income. I don't know discrepancy. This is the first I
9 actually had it pointed out to me.

10 Q. Well --

11 A. So I don't know where it came from.

12 Q. Let me present this to you. It's an exhibit in court
13 and somebody is sponsoring it as being Mr. Conroy's opinion and
14 he has the rental income in it.

15 A. Yeah.

16 Q. One time, not any other time. There's no contention
17 here that rental income is usually a royalty generating revenue
18 item, is there?

19 A. No. I would agree with that, but I didn't prepare
20 the report. It's probably --

21 Q. I didn't say you did.

22 A. Probably a better -- question better for somebody
23 else.

24 Q. All right. Well, are you going to be the one that
25 says Mr. Conroy's report that he presented which is Exhibit 26

1 is accurate, fair and complete?

2 A. Am I going to be the person who says that?

3 Q. Yeah.

4 A. I think so. I mean, I do agree that the report is
5 accurate based on the portion I had to do with it. I reviewed
6 it and I believed it to be accurate.

7 Q. Even though you know that rental income does not
8 belong in the income category?

9 A. Again, upon my review I didn't know that. Now that
10 you've pointed it out, it does appear there is a discrepancy,
11 but I don't know the reason for that discrepancy.

12 Q. It cannot be explained, can it?

13 A. Not by me.

14 Q. All right.

15 A. But I didn't prepare the report.

16 Q. Do you know of any explanation that Mr. Conroy gave
17 for it?

18 A. No. I'm not aware of any.

19 Q. And during his deposition, which I assume you've
20 read, he did not explain it, did he?

21 A. I don't recall that he explained it. I'm not sure he
22 was asked about it.

23 Q. In March of 2009 there was yet another adjustment to
24 Mr. Conroy's report, wasn't there?

25 A. I believe there was. Again, I don't know the exact

1 date.

2 Q. I'm going to show you Plaintiff's Exhibit 28.

3 A. Okay.

4 Q. Do you see in the box that's right here 3-3-2009
5 adjustments reflected on this summary?

6 A. No. I'm not sure where you're referring to. I'm
7 sorry.

8 Q. Well, this box right here.

9 A. Oh, a good portion on the left side is cut off. So I
10 couldn't read that.

11 Q. Let me do a little better job. I'm sorry.

12 A. There we go. Okay. Got it.

13 Q. All right. And what I'm contending here that Exhibit
14 28 is a revision of Conroy's report that reflects some
15 adjustments made as of 3-3-2009. Do you agree with me?

16 A. Yes.

17 Q. Do you know what the adjustment was?

18 A. Not specifically right now. No.

19 Q. Let me show you Page 7 of that report and ask you to
20 look in the middle of the page where it says third, fourth
21 quarter 2007. Do you see where the boxes are not just three
22 boxes for that column but six boxes?

23 A. Okay.

24 Q. And let me describe this and see if you agree with me
25 that this is what the adjustment was. During the deposition of

1 Brian Clark, Mr. Clark says, hey. Some of these jobs in these
2 invoices that you're talking about are jobs I did not get paid
3 on. I got a bad debt on that one?

4 A. Okay.

5 Q. So he identifies them and that information is then
6 transmitted from that deposition and there's an adjustment made
7 to the invoice stack for that quarter?

8 A. Okay.

9 Q. Does that sound familiar to you?

10 A. Yes.

11 Q. And so they subtracted the bad debt, things he did
12 not get paid for, and that affected the percentages for that
13 quarter?

14 A. Correct.

15 Q. And when you change the percentages, even if you
16 multiply it by the same type of income, you're going to come up
17 with a different number?

18 A. It will affect it.

19 Q. All right. And so the spreadsheets were recalculated
20 for Mr. Conroy's report, came out with slightly different
21 numbers, didn't it?

22 A. Yes.

23 Q. I want to go back and look at 2008. Do you see that
24 for the second time in adjusting the report rental income is
25 included in 2008 and never in any other quarter or year?

1 A. I do see that.

2 Q. Do you have any explanation as to why that was done?

3 A. I don't.

4 Q. Do you agree that it looks to be wrong?

5 A. Rental income should not be included. So if that's
6 what it is, then --

7 Q. So we've gone to the trouble to make a correction
8 over about \$13,000 in bad debt. Didn't bother to correct the
9 \$14,000 on rental income, true?

10 A. Again, I don't know that that's rental income, but if
11 it is, it should be corrected because we're after accuracy.

12 Q. The number that Mr. Conroy's report now reflects is
13 not the 127 figure but the 121,075, right?

14 A. Yes. I see that.

15 Q. So he says now my first report was wrong. Here's my
16 new report and it's a lower number, right?

17 A. That's correct.

18 Q. Is that your estimate of what Mr. Clark owes?

19 A. With the information available, yes.

20 Q. That's not the last adjustment, is it?

21 A. I'm not sure. There may have been -- again, we're
22 trying for accuracy. So if there was additional adjustments,
23 we were trying to make it more accurate.

24 Q. On March -- I'm showing you what's marked as
25 Plaintiff's Exhibit 30 which is a fax that was sent on March

1 13th, 2009. And it has yet another adjustment to Mr. Conroy's
2 report, doesn't it?

3 A. It appears that way. Yes.

4 Q. I'm going to go to the last page of that. This is
5 Plaintiff's Exhibit 30. And at the bottom of that it says
6 MRE0984. Do you see that?

7 A. Yes. I do.

8 Q. Now we have not only the columns for the quarters
9 that were sampled but we have some other lines to this other
10 than the UPS work which is the non MRE work and the
11 Mr. Electric work, right?

12 A. Yes.

13 Q. Would you agree with me that the whole purpose of
14 this adjustment was not only to include the bad debt that was
15 reflected through an examination of all the sampled quarters
16 but also to look at disputed MRE work? Mr. Electric work,
17 right?

18 A. By disputed you mean?

19 Q. Well, I guess I'm reading the row/line that is in
20 this spreadsheet which is Mr. Conroy's report.

21 A. Okay. I believe that's information that was gained
22 through the deposition? Is that --

23 Q. All right.

24 A. -- your understanding?

25 Q. And that is. Let me go through that again. We're

1 making an adjustment because we know that we had bad debt that
2 we should have included in the calculations. Now we've read
3 the deposition of Brian Clark and Mr. Clark says that there are
4 things included in the Mr. Electric pile that should not be in
5 that pile?

6 A. Right.

7 Q. And I'm paraphrasing and --

8 A. Fine. I understand.

9 Q. That's what that contention is. And so all of the
10 figures are reworked to basically give credence to Mr. Clark's
11 contentions, true?

12 A. Yes.

13 Q. When you give credence to those contentions, all of
14 the percentages change, true?

15 A. If there were adjustments to every quarter, then yes.
16 They would.

17 Q. Don't you see that there were adjustments in every
18 quarter?

19 A. It appears to be. I can't see the entire sheet, but
20 yes.

21 Q. Pardon?

22 A. I said it appears to be. I couldn't see the entire
23 sheet, but yes.

24 Q. Is that more helpful?

25 A. Yes. Thank you.

1 Q. All right. There are adjustments in every quarter?

2 A. Yes.

3 Q. Every percentage changed?

4 A. Yes.

5 Q. That had an effect on the total calculation for
6 alleged underreported revenue -- of royalty, wouldn't it?

7 A. It did.

8 Q. Because there would be a different percentage
9 multiplied by the income items that Mr. Conroy had picked out,
10 correct?

11 A. Correct.

12 Q. And once again we have these income categories that
13 Mr. Conroy was using for his calculations and can you confirm
14 for me that none of his income categories changed even though
15 he was making these adjustments for the disputed MRE work and
16 the bad debt?

17 A. It doesn't appear that they have.

18 Q. He is still including freight and miscellaneous
19 income, still in 2008 including rent income?

20 A. Yes.

21 Q. We're doing an awful lot of work to try and get this
22 right and still not fixing an obvious flaw, are we?

23 A. It's only obvious if it's noticed and pointed out and
24 I think that's what we were trying to do. As there was
25 additional information available to us, we were after accuracy.

1 So we made the adjustments.

2 Q. Well, and I guess let's be fair about this. It's not
3 really your job to point that out to Mr. Conroy, is it?

4 A. No. I guess not.

5 Q. I guess it was Mr. Conroy's job to not do it in the
6 first place or fix it?

7 A. It's my job to try to get the best and most accurate
8 information available regardless of the source.

9 Q. All right. So we're going to put the job of
10 ferreting out errors like including rental income on
11 Mr. Conroy's side of the plate, true?

12 A. If that's what it is, it appears that that's an error
13 from a report we received from him.

14 Q. All right. The end result of these adjustments is
15 that the projected royalty would now not be 127,000 or 121,000.
16 It would now be 58,000, right?

17 A. I see that. Yes.

18 Q. Is that now your reasonable estimate --

19 A. It is.

20 Q. -- of the underreported royalty?

21 A. It was. Uh-huh. Yes.

22 Q. That's not the last adjustment, is it?

23 THE COURT: Mr. White, we need to take a recess.

24 MR. WHITE: Okay. I don't have a whole lot more.

25 LAW CLERK: All rise.

1 Court is now in recess.

2 (A break was taken from 10:36 to 10:52.)

3 LAW CLERK: All rise.

4 THE COURT: Be seated, everyone.

5 BY MR. WHITE:

6 Q. Three more areas to talk to you about and then I'll
7 be done.

8 A. Okay.

9 Q. I want to continue what we were talking about
10 beforehand which was the third adjustment to Mr. Conroy's
11 spreadsheets which resulted from taking Brian Clark's
12 deposition testimony about what he thought was Mr. Electric
13 work and not Mr. Electric work and then applying that to
14 recalculating the percentages. Do you remember that being
15 done?

16 A. I do.

17 Q. And after that was done, if you use the recalculated
18 percentages and applied it to the income categories that
19 Mr. Conroy had selected, you come up with new underreported
20 royalty projections, wouldn't you?

21 A. Yes.

22 Q. And that projection was down to \$58,000, wasn't it?

23 A. That sounds correct.

24 Q. Which is less than half what the original projection
25 was?

1 A. Correct.

2 Q. Do you not find that to be a remarkable thing for an
3 accounting report to show?

4 A. No. From my perspective from the very beginning when
5 we first asked for an audit we were after accuracy. We wanted
6 to know what the number was and that was our goal so that the
7 closer we get to an accurate number the better off we are.

8 Q. Well, you would agree now that the first number
9 Mr. Conroy came up with is not the accurate number?

10 A. That does appear to be true.

11 Q. And the second number he came up with is not the
12 accurate number?

13 A. As we gather new information --

14 Q. And the third number he came up with is not the
15 accurate number?

16 A. As we gathered new information we adjusted the
17 number.

18 Q. Well, on March 20th, 2009 he made yet another
19 adjustment after his deposition was taken, didn't he?

20 A. I believe so.

21 Q. And this time he said -- and I'm summarizing and
22 paraphrasing -- maybe I should not have included freight and
23 miscellaneous income and maybe I shouldn't have included
24 royalty income in 2008. So if you take those things out and
25 use the percentages that we have used in the past, you come up

1 with yet another number for underreported royalty, correct?

2 A. It would result in a different number. Yes.

3 Q. Now it's down to like \$50,000?

4 A. Okay.

5 Q. Do you disagree with that?

6 A. I haven't -- it sounds familiar. I haven't seen that
7 report in awhile, but I'll go with your number.

8 Q. All right. Is that your reasonable estimate of the
9 royalty that has been underreported and is now due?

10 A. As we get additional information, we're constantly
11 changing it.

12 Q. You realize the trial is almost over?

13 A. I do understand that.

14 Q. And we are here and I'm wondering whether you believe
15 that your contentions have been sufficiently disproved with
16 respect to Mr. Conroy's report?

17 A. No. Not at all because he continued to make the
18 adjustments as we gained information which was the whole
19 purpose of going through all this audit and the subsequent
20 depositions and everything is to get the most accurate number.
21 That's what we're after is an accurate number.

22 Q. Well, the first number that you got -- and I put this
23 in the context of Mr. Conroy's strategy, his strategy being
24 let's leave them the number and let them disprove it -- that he
25 put out the \$127,000 number and was going to stick by it until

1 somebody showed him it ought to be 121,000 and he was going to
2 stick by 121,000 until somebody showed him that it ought to be
3 58,000 and then he was going to stick by 58,000 until somebody
4 proved to him it ought to be 50,000. Do you disagree with me?

5 A. I don't know if that was his strategy or not.

6 Q. Don't you remember that e-mail we looked at where
7 that is exactly what he said in then underlined section "I
8 would suggest leaving the underreported income and making them
9 disprove it"?

10 A. I saw that underlined in his letter. Yes.

11 Q. Yeah. And although you are not willing to say that
12 was your strategy, it clearly was his strategy?

13 A. Yeah. I've stated what my strategy is. Again, I
14 don't know what his strategy was other than --

15 Q. Well, he underlined it so he would disclose it to you
16 and emphasize it to you. You did not tell him, do not use that
17 strategy, Mr. Conroy. I don't agree with it.

18 A. Well, I think he was explaining what a possible
19 strategy was and I'm not sure that what strategy -- again, I
20 don't know what strategy he had. All I know is from my
21 perspective I'm after accurate numbers, and as additional
22 information became available, we presented that to Mr. Conroy
23 so he could make adjustments.

24 Q. Well, let's talk about some of your math then that
25 you did. This is the last area I'm going to talk to you about.

1 Your math that you did on the stand and sponsored and vouched
2 for during your direct testimony. The question was, isn't it
3 okay to apply an eight percent royalty figure to all these
4 income amounts? And you said yes.

5 Why is it accurate? Because there's a two percent
6 advertising fee that never changes. Right so far?

7 A. Sounds familiar. Yes.

8 Q. The six percent amount should apply to all these
9 years because it's clear that he never -- the Clark figures
10 never come within a lower royalty amount, true?

11 A. I think that was part of my answer. I know we had a
12 discussion about first dollars in as well.

13 Q. First dollars in, but you said because it's over some
14 weeks and we don't want to have to actually go look at which
15 week which happened, we made some estimates about whether there
16 was a weekly average that exceeded any of the brackets for
17 graduated royalty, true?

18 A. We did use estimating. Yes.

19 Q. All right. And for the year 2006 your reports, the
20 royalty reports that are included in Dan Conroy's Mr. Electric
21 report, says that Mr. Clark's company reported -- the
22 Mr. Electric York County reported \$140,114?

23 A. Okay.

24 Q. And that Mr. Conroy said that Mr. Clark's income for
25 Southeastern Electrical was 515,335?

1 A. Okay.

2 Q. Adding those two together comes up with a figure of
3 655,449 divided by 52 weeks is 12,604?

4 A. Okay.

5 Q. That's not six percent royalty, is it?

6 A. It is because we would -- again, we go off first
7 dollar in and we have to do that because it -- franchisees
8 would then be -- have an incentive to cheat. So we always
9 audit and we always have them report on first dollars in at the
10 maximum rate when we estimate their fees due.

11 Q. It's a penalty?

12 A. I don't know that I would characterize it as a
13 penalty. It's just the way we do it.

14 Q. Well, the actual math that you said was that none of
15 the annual reports would have ever reached an amount where he
16 could qualify for a lower royalty. And I'm telling you right
17 now that's not the way the math works. Are you going to
18 disagree with me?

19 A. No. I don't -- which part? I agree that it -- from
20 the numbers you just gave me, they add up to over \$10,000 a
21 week.

22 Q. And the same is true for 2007?

23 A. Okay.

24 Q. And you're saying that despite the fact that they're
25 over 10,000 a week and the royalty figure -- the royalty

1 schedule that Mr. Electric has in its franchise agreement would
2 have said less than six percent royalty. Your position is they
3 owe it at six percent because we say so?

4 A. I do believe that they owe that at that rate because
5 of the items I've discussed about first dollar in and
6 estimating the royalties. Yes.

7 Q. All right. But to be sure, it's not because the math
8 works out that way. It's because you've chosen to characterize
9 the dollars as first dollars in?

10 A. The math then is irrelevant because the first dollars
11 in is the way we do it.

12 Q. All right. That's not what you said yesterday.

13 A. Well, that's what I intended to say yesterday.

14 Q. Actually, yesterday you said -- and you can correct
15 me if I'm wrong. You said, well, all of the income if
16 considered would never reach a level that would be a weekly
17 average in excess of 10,000.

18 A. I'd have to review. I don't know which year we were
19 talking about specifically.

20 Q. Well, you said all.

21 A. I'm glad we fixed it then today.

22 Q. Yeah. So today the position is, doesn't matter what
23 the total income reported was. What matters is I'm going to
24 charge him six percent plus the two percent all the time
25 because I'm counting it as first dollars?

1 A. That's correct.

2 Q. All right.

3 A. None of the -- in yesterday's testimony when we were
4 discussing that, there was no specific year that exceeded the
5 first dollar in of 520,000. So that was my answer.

6 Q. Well, that's not the way the math works if you look
7 at the reports. There are years in which the income exceeds
8 the \$520,000.

9 A. I'm referring to the underreported first dollar in.
10 Underreported never exceeded 520,000.

11 Q. Well, that's not what Mr. Conroy's report reflects.

12 A. I don't think so.

13 Q. All right.

14 A. I disagree.

15 Q. Whatever. Your position is it doesn't really
16 matter --

17 A. That's correct.

18 Q. -- because you're going to charge him eight percent
19 no matter what?

20 A. That's correct.

21 MR. WHITE: All right. Nothing further.

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)

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4 I, Kristie M. Davis, Official Court Reporter for the
5 United States District Court, Western District of Texas, do
6 certify that the foregoing is a correct transcript from the
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8 I certify that the transcript fees and format comply with
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11 Certified to by me this 6th day of March 2009.

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