

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE KIMBERLY J. MUELLER, JUDGE

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. 2:13-CR-00082

MATTHEW KEYS,

Volume 2

Pages 23 through 185

Defendant.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

VOLUME 2

TUESDAY, SEPTEMBER 29, 2015, 8:30 A.M.

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(Appearances continued next page...)

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1 SACRAMENTO, CALIFORNIA

2 TUESDAY, SEPTEMBER 29, 2015, 8:34 A.M.

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4 (Jury not present.)

5 THE CLERK: Thank you. You may be seated.

6 Calling criminal case 13-82, the United States versus
7 Matthew Keys. This is on for jury trial, and this is day two,
8 Your Honor.

9 THE COURT: Good morning. All counsel, all of the
10 parties are present.

11 I have received the redacted Exhibit E now. The
12 government has a copy of that as well?

13 MR. SEGAL: Yes, Your Honor.

14 THE COURT: And the power point for the defense opening
15 has been modified?

16 MR. LEIDERMAN: Has it been modified? Yes, Your Honor.

17 THE COURT: Has the government had a chance to review
18 that? No objections?

19 MR. SEGAL: I haven't seen it actually. I haven't seen
20 the new slides, Your Honor, but --

21 MR. LEIDERMAN: There are no new slides. One slide was
22 removed, the objectionable one. And the one with the clip in
23 the middle, the clip was removed and one line was added that
24 the Tribune -- that the L.A. Times editor found the story.

25 MR. SEGAL: I have nothing to add then, Your Honor.

1 THE COURT: All right.

2 MR. SEGAL: There is -- just very briefly, I'd like to
3 put one thing on the record if that's all right.

4 THE COURT: All right.

5 MR. SEGAL: I disclosed to the defense that there's a
6 witness -- not our first witness -- who has a narcotic-related
7 conviction over ten years old and expunged. And it's my view
8 that that is not Giglio impeachment and, therefore, I'm not
9 going to say what witness it is. I think the defense doesn't
10 have a problem with that.

11 MR. LEIDERMAN: That's correct, I don't.

12 THE COURT: All right.

13 MR. LEIDERMAN: Being a predominantly state court
14 attorney, I would have a lot of trouble admitting that into a
15 state court proceeding or caring about it.

16 THE COURT: Well, this is federal court. I'm --

17 MR. LEIDERMAN: And, yeah, so I have even less of a
18 concern about it going away.

19 THE COURT: All right. Very well.

20 Can we bring the jury in?

21 MR. JAFFE: Your Honor, a couple of objections I'd like
22 to raise at maybe a more convenient --

23 THE COURT: Objections to what?

24 MR. JAFFE: One objection arises from the opening
25 presentation yesterday. And another is with regard to evidence

1 that the government, we believe, seeks to admit today.

2 THE COURT: All right. Are you moving to strike a part
3 of the opening?

4 MR. JAFFE: No, Your Honor. It would be a request
5 regarding -- it would be a request regarding statements that
6 they made in the opening that we would prefer them not to use
7 as they continue.

8 THE COURT: So what statements are those?

9 MR. JAFFE: Your Honor, in the opening statement, there
10 were several references to the Cancer Man e-mails and the other
11 Fox Mulder e-mails, which we continue to state are not relevant
12 to this case. But the specific objection applies to their use
13 of the term "anonymous e-mails." We'll be talking a lot in
14 this trial about Anonymous with the large A, and we did that
15 with the jury yesterday. And Anonymous with a large A -- when
16 the government says anonymous e-mails, that's anonymous with
17 the small A, and it's not a reference to Anonymous the
18 organization.

19 THE COURT: Do you agree with that, Mr. Silver?

20 MR. SILVER: Yes, Your Honor.

21 THE COURT: You used anonymous with a small A?

22 MR. SILVER: The general adjective rather than the
23 descriptor of the collective.

24 THE COURT: Any objection to my letting the jury know
25 there are times they will hear that word and it's referring to

1 the group and times when it's not? And I'd ask counsel going
2 forward to clarify which use they are making of the word.

3 MR. SILVER: No objection, Your Honor.

4 THE COURT: All right. Did the government use
5 anonymous only with a small A during its opening?

6 MR. SILVER: No, Your Honor, both the proper noun and
7 the adjective were used.

8 THE COURT: All right. I'll just alert the jury to
9 that issue and ask counsel to clarify as it uses the word.

10 MR. SILVER: Your Honor, I would just point out that
11 the presence of the word "anonymous" in the sentence in
12 question and its function as a noun or an adjective does a lot
13 of its work inherently. Labeling may be helpful as well, but
14 anonymous e-mails was one use, and the other use was part of a
15 hacker collective called Anonymous. So --

16 THE COURT: I think under the circumstances we have an
17 obligation to clarify for the jury what's being said.

18 MR. JAFFE: Your Honor, the defense does not make any
19 suggestion that the government intentionally meant to
20 mislead --

21 THE COURT: Understood.

22 So on Cancer Man, what's the issue there? I'm not --
23 we've already talked about --

24 MR. JAFFE: That's right. Just a clarification with
25 regard to -- with regard to the opening presentation, we wanted

1 to raise the concern about the use of anonymous.

2 THE COURT: All right. So what about evidence the
3 government you believe will seek to elicit?

4 MR. JAFFE: Yes. The government seeks to introduce a
5 recorded conversation between the witness, Brandon Mercer and
6 Matthew Keys. It was produced to us how long ago? It was some
7 of the evidence that -- I'm sorry -- some of the exhibits that
8 were presented to us and given to us within the last several
9 days, in addition to many others.

10 THE COURT: This conversation, this recorded
11 conversation has been the subject of a motion in limine?

12 MR. LEIDERMAN: Yes.

13 MR. JAFFE: Yes.

14 MR. EKELAND: Yes, Your Honor. It was the subject of a
15 motion in limine where we made the motion in limine to try to
16 preclude it on the basis that it was an illegal recording.

17 THE COURT: But you withdrew --

18 MR. EKELAND: We withdrew that. I mean, Mr. Jaffe
19 wants to make a separate objection.

20 THE COURT: So what's the issue?

21 MR. JAFFE: The objection is not to the admissibility
22 based on an illegal recorded conversation, but on further
23 review of the content itself of the conversation, for which not
24 only does it have no relevant or admissible purpose, but it is
25 also entirely full of inadmissible hearsay and highly

1 prejudicial hearsay.

2 Now --

3 THE COURT: Is there a transcript?

4 MR. JAFFE: Pardon me?

5 THE COURT: Is there a transcript of the recorded
6 conversation?

7 MR. SEGAL: Yes.

8 THE COURT: And when would the government attempt to
9 play that?

10 MR. SEGAL: This morning.

11 THE COURT: At what time during the Mercer -- can it
12 wait till after the morning break?

13 MR. SEGAL: Your Honor, they've had this for weeks, and
14 the idea that this objection is coming now --

15 THE COURT: So when exactly was it disclosed to them?

16 MR. SEGAL: I think it's -- that is the subject of some
17 dispute between us. It's referred to as a recorded
18 conversation in the affidavits. The latest that it was
19 disclosed to them I think was a couple of weeks ago.

20 And --

21 THE COURT: As opposed to a few days? I'm hearing a
22 few days from this side. When --

23 MR. EKELAND: Your Honor, I believe -- I don't know the
24 exact date. It was referenced in the discovery, but we weren't
25 actually provided a copy of it until I believe a couple of

1 weeks ago when it was FedEx'd to our office along with -- you
2 know, we've gotten last-minute discovery in this case. We've
3 gotten 133 pages of handwritten notes from FBI agents
4 referencing witnesses and whatnot we've had to go through. So
5 we weren't able to get a -- to do a very careful review of this
6 record until last night when we were prepping for Mr. Mercer.

7 THE COURT: Well, if I can ask the government to
8 provide the Court with the transcript, and then be prepared to
9 not play that recording until after the morning break.

10 MR. SEGAL: Your Honor, the --

11 THE COURT: Is there any other -- at this point, I'm
12 going to defer further discussion of that issue. We have a
13 jury waiting. Is there any other issue you want to bring to my
14 attention?

15 MR. JAFFE: No. I just wanted to call your attention
16 to the most significant parts of the transcript.

17 THE COURT: Do you have pages?

18 MR. JAFFE: No. They start -- the recording that
19 starts at 6 minutes and 29 seconds for approximately the next
20 15 or 20 minutes are entirely statements based on inadmissible
21 hearsay, each and every one denied by Keys in the transcript.

22 THE COURT: All right.

23 MR. SEGAL: Okay. That's easy because --

24 THE COURT: Well, I need to see it at this point. I'm
25 deferring further conversation, but give me the transcript. I

1 will multi-task while we proceed.

2 Any other issue I need to be aware of? Mr. Jaffe?

3 All right. Let's bring the jury in.

4 MR. SEGAL: Your Honor?

5 THE COURT: Is the defense ready for opening?

6 MR. SEGAL: Your Honor?

7 MR. LEIDERMAN: The defense is ready for opening, Your
8 Honor.

9 MR. SEGAL: As the Court reads that transcript, the
10 objection is hearsay, and this is an admission of a party
11 opponent. It's the defendant's own words. It's never hearsay
12 when offered by us.

13 THE COURT: All right. I need to see it to know what
14 you're talking about. Could you please hand that up to
15 Ms. Schultz so that she can give it to me before we retrieve
16 the jury?

17 MR. LEIDERMAN: May we just have a second, Your Honor?

18 (Defense counsel conferring.)

19 THE COURT: Do you have that copy, Mr. Segal?

20 MR. SEGAL: This has some of Mr. Hemesath's handwritten
21 notes on it, but they're stray --

22 MR. HEMESATH: They're corrections of typos.

23 THE COURT: Not revealing anything you don't want the
24 Court to see? All right. Thank you.

25 Mr. Leiderman?

1 MR. LEIDERMAN: I'm sorry. I missed what the Court
2 said.

3 THE COURT: Are you ready to go?

4 MR. LEIDERMAN: May we just have another minute here?
5 We're talking about this --

6 THE COURT: About the recorded -- we're going to return
7 to that on the break. Any reason to take more time before we
8 begin?

9 MR. LEIDERMAN: Okay. We'll stew on it further.

10 THE COURT: All right. All right. Let's bring the
11 jury in.

12 (Jury present.)

13 THE COURT: All right. You may be seated.

14 Welcome back to the courtroom, Ladies and Gentlemen of
15 the jury. We hope you had a good evening. We know you were on
16 time, so thank you for that. We did have some housekeeping to
17 do, so thank you for your patience while you waited. We're now
18 ready to move on to the defense opening statement.

19 And I understand the defense does wish to provide a
20 statement, Mr. Leiderman?

21 MR. LEIDERMAN: We do, if I may.

22 THE COURT: All right. You may proceed.

23 MR. LEIDERMAN: Thank you.

24 Pardon me.

25 (Pause in proceedings.)

1 THE COURT: As you can see, Mr. Leiderman plans to
2 use -- now can you see that on your screens? All right.

3 (Pause in proceedings.)

4 MR. LEIDERMAN: What a way to start.

5 Okay. Good morning. I'm Jay Leiderman. I am one of
6 three attorneys that represent Matthew Keys. The other two are
7 Tor Ekeland over there and Mark Jaffe, who just helped me out.
8 And I'm going to talk to you briefly about what we believe this
9 case is about.

10 You'll notice in this there is a question mark over the
11 head, and we do have some questions that we believe the
12 evidence is going to present, and the first is who is Sharpie?
13 Sharpie, as Mr. Silver mentioned yesterday, is a person that,
14 it's expected by both sides the evidence will show, actually
15 changed the L.A. Times story. I'll get to that in just a
16 little bit.

17 There's another person named Sabu who we're going to
18 discuss. We're going to ask the same question. What is the
19 evidence going to show about Sabu? Who is he, and what was his
20 role in this case?

21 Some discussion was made about Anonymous, the group
22 Anonymous. We'll call it capital A Anonymous as opposed to
23 being an anonymous person, which is little A. I think we've
24 been discussing it as an adjective versus the noun.

25 And what, if any, is Fox 40's role as compared with the

1 Tribune? And I'm going to discuss that in just a little bit.

2 We believe the evidence is going to show that Matthew
3 Keys didn't know as much as the government states that he
4 knows. We believe that he didn't know the true abilities of
5 Sharpie, Sabu and others that were in this chat room with him.
6 And I'll talk a little bit about the chat room in just a little
7 bit.

8 We assert that the evidence will show that this was all
9 uncertain to Mr. Keys. As of December 2010, these people
10 weren't known, they didn't have reputations such that one would
11 think that they were these high-level hackers. And, again,
12 we're going to come back to that.

13 One sort of caveat emptor warning, you're going to see
14 some chat logs, see some screen captures of chats. These are I
15 think a hundred percent, if not close to a hundred percent,
16 very young people chatting in rooms, the evidence is going to
17 show, little chat rooms. Ah, the language is coarse and rough,
18 oftentimes doesn't mean what it says it's going to mean.

19 For example, I believe, the government's IRC expert
20 will say that certain words don't mean things that they would
21 mean in real life, most notably being the word "fag."
22 Everybody calls each other fag for some reason that maybe the
23 IRC expert can tell us.

24 The next thing we have is this individual Sharpie. We
25 assert that the evidence is going to show that Mr. Keys didn't

1 really know who Sharpie was, had just met him at the time that
2 these activities were occurring, and he certainly didn't know
3 what Sharpie's capabilities were. And there is -- there is
4 Sharpie.

5 And we believe that the evidence is going to show most
6 importantly that Mr. Keys didn't have what turns out to be the
7 legal knowledge regarding what, if any, damage or loss Sharpie
8 could create to a computer.

9 So speaking of damage and loss, those are the two
10 issues in this case. One, was there any intent to cause
11 damage? Two, was there a loss? And if there was a loss, was
12 it \$5,000 or under? Those are the critical questions, and
13 we'll come back to those in closing. And the judge is going to
14 instruct you on those at the end of the case.

15 Burden of proof, the government bears the burden of
16 proof of each and every piece of what we call the elements of
17 the crime. It's not our job to prove anything to you in this
18 case. That's not what the defense function is. The judge will
19 affirm at the end of the trial, I believe she already has, that
20 the prosecution bears the burden of proving their case beyond a
21 reasonable doubt. And that includes each element of their
22 case, and I'm going to discuss what elements are in just a
23 moment. But the two most important elements are what I've
24 already mentioned, and those are damage and loss.

25 I'll talk to you about reasonable doubt. Let me give

1 you a second to read it on the screen because I don't to just
2 simply read it to you.

3 The first we talk about, in fairness to the government,
4 there's always going to be some imaginary or possible doubt.
5 Martians did it. You know, it was -- in this case, it was
6 magic that created the IRC and went into these computers. I
7 don't know, some people that aren't into computers may think it
8 was magic. But that is not what a reasonable doubt is. Magic,
9 martians, those aren't reasonable doubt. It has to be a doubt
10 based on something solid, and that's what the next slide will
11 tell you.

12 I'm sorry. There we go.

13 It's based upon reason and common sense. That's what a
14 reasonable doubt is. So it has to be beyond a doubt based on
15 reason and common sense for you to find a defendant guilty.

16 As I said before, we're going to talk about elements.
17 All cases are made up of elements. I'll go -- again, you have
18 to find in this case both that there was damage to a protected
19 computer, there was some loss suffered by an entity. In this
20 case, I believe the government is asserting it's the Tribune
21 Company, Trib Co as it will be referred to, that's its little
22 nickname.

23 Tribune Company is a company, a media company. They
24 own the L.A. Times, the Chicago Tribune. I don't believe they
25 are own the Chicago Cubs any more, but they did. They own the

1 TV network WGN. So it's a big company.

2 And each element of damage created or loss created or
3 other elements you'll find in these crimes needs to be proven
4 to you all beyond a reasonable doubt. I describe it as like
5 the cookie. Okay. You're going to make a cookie from scratch.
6 You need -- and keep in mind, I don't know how to make cookies,
7 but you need, like, flour, eggs, sugar, chocolate chips.
8 That's what I think -- maybe milk. All of those are elements.
9 If you don't have all of those elements, you don't have a
10 cookie, right? You can't bake a cookie.

11 It's the same thing with proof beyond a reasonable
12 doubt in a criminal case. If you don't have proof beyond a
13 reasonable doubt of all of the evidence, you don't have your
14 cookie, you don't have your conviction.

15 And if, after a careful and impartial consideration of
16 all the evidence, you're not convinced beyond a reasonable
17 doubt, it's your duty to find the defendant not guilty. He is
18 entitled to that verdict. In other words, unless and until the
19 prosecution satisfies every element to their prosecution beyond
20 a reasonable doubt, Mr. Keys comes to you innocent, and it's
21 only through this proof beyond a reasonable doubt that he can
22 be guilty. So he stands before you right now innocent.

23 This is an instruction that the judge has already read
24 to you. All persons stand equal before the law and are to be
25 treated as equals. That means right now, as an equal before

1 the law, Mr. Keys is not guilty like I've just stated.

2 All humans in this nation stand before you not guilty
3 unless and until they are proven guilty beyond a reasonable
4 doubt. There's no speculation that a charge or an
5 investigation or an arrest makes it more likely that Mr. Keys
6 is guilty. The fact that he is charged is not evidence. The
7 fact that he is sitting there is not evidence.

8 There's a difference between the role of the jury and
9 the role of the government. It's the FBI's job to investigate
10 these crimes to provide what they believe will be proof beyond
11 a reasonable doubt. It's the government's job to work that up
12 into a prosecution. It's the jury's job to sift through that
13 evidence and decide whether it's enough to prove beyond a
14 reasonable doubt. It is not your job to investigate, to do
15 separate -- to do tests, to research, to try to put yourself in
16 the shoes of the government such that you say, oh, well, you
17 know, they did this, but maybe they really meant that. Those
18 are not your functions. The function of a jury is to
19 scrutinize the evidence.

20 This is the story. This is what we're here for. This
21 story -- well, I'll get into that.

22 Supposedly credentials were passed from Mr. Keys to
23 this individual Sharpie in a chat room. And I think this is
24 called the title in the byline, that thing below the -- where
25 it says pressure builds in house is called a byline. Both of

1 those were changed just a little bit, and then the author was
2 changed to Chippy's No. 1 fan.

3 Chippy, I believe the evidence is going to show, is a
4 fictitious or made up person. I think the evidence is going to
5 show it's some sort of hacker mascot, but I -- we'll see what
6 the evidence is going to show about Chippy.

7 Chippy -- this is the -- this is the real story. This
8 is what was up. So pressure builds in house to pass tax cut
9 package, house Democrat leader Steny Hoyer. There was
10 something passed in the Senate, there was pressure on the house
11 Democrats, and that's what this story was about. Nothing in
12 the text of the story -- this is just an excerpt of the story.
13 The story goes down and down and down. The evidence will show
14 it's a much bigger story. The only thing that was changed was
15 that top, you know, Chippy 1337 says suck it up. That's what
16 this case is about, and that's where the government asserts
17 that loss and damage came from.

18 The story was online for 40 minutes, December 14th from
19 3:43 p.m. to 4:29 p.m. And that's according to the L.A. Times.
20 And the story was found by an L.A. Times editor.

21 We don't know whether any L.A. Times -- the evidence
22 isn't going to show necessarily that any L.A. Times viewer
23 actually saw the story. This is not a first page, a front page
24 story. This is something that the evidence is going to show
25 was a smaller story, somewhere that you would find deeper in

1 the website. We don't know if it was seen by any Fox -- I'm
2 sorry -- any L.A. Times online viewer.

3 But here we are in federal court, and I want -- even
4 though it's a small matter that you've seen up there, this is
5 to be taken seriously.

6 So one thing is indisputable in this case, the evidence
7 isn't going to be controverted, Mr. Keys is a journalist. And
8 in late November 2010 after resigning, not being fired, after
9 resigning from Fox 40, he gained access to a chat room of
10 hackers that sat around all day talking about hacking. He was
11 invited in as a journalist or as a former journalist. Matthew
12 was, Mr. Keys was writing a story about them, and he was
13 welcomed into the room for that purpose. His personal purpose
14 was to find out who Sabu, Sharpie and others were and what, if
15 any, capabilities they have.

16 Was there an intent to cause damage? The evidence will
17 show that two of Keys' goals as a journalist were to catch a
18 headline-grabbing story and understand Anonymous, capital A
19 Anonymous, something no one had yet done as of late 2010.

20 Some of you have said that you knew or have heard of
21 Anonymous. Those are because of stories that occurred, the
22 evidence will show, after that. At this point, there was no
23 story about that. People didn't know who Anonymous was.

24 Mr. Keys took screen grabs, being basically shots of
25 what your computer screen is showing, to prove for his story

1 that these things were occurring. And Mr. Keys made a complete
2 statement to the FBI about this. He didn't -- the evidence is
3 going to show when this statement is played, he didn't think he
4 was doing a criminal wrong.

5 Now -- pardon me.

6 In 2010, Twitter wasn't what it is now. And so Keys
7 purposely documents these actions because anyone could be
8 anything, the evidence is going to show, on Twitter. In fact,
9 in these chat rooms, which spurn off of discussions on
10 Twitter -- there are co-discussions going on, they happen in
11 private chat rooms, they happen in public on Twitter -- anyone
12 can be anything. Like I said, you'll see nicknames, Sharpie,
13 Sabu. I think you'll hear Kayla. It was said yesterday by
14 Mr. Silver that Mr. Keys used the name AEScracked.

15 It was a purpose of Mr. Keys to find out what was
16 behind these nicknames and who were behind these nicknames and
17 what, if anything -- whether they were real hackers or whether
18 they were just a lot of talk.

19 This case was discussed as potential vandalism, and you
20 saw the site, you saw what happened. For 40 minutes, it said
21 something about Chippy 1337 instead of Steny Hoyer.

22 One of the things you're going to be called on to
23 decide in this case is whether this was low-damage vandalism or
24 high-damage, high-level hacking. And, you know, some of the
25 questions that this is going to raise is what in fact did

1 Sharpie do, and what are the consequences of what he did?
2 What's the difference between hacking and vandalism? And do
3 they fit the elements for Mr. Keys, what essence is the legal
4 dispute about?

5 Well, loss. Here's an e-mail from Brandon Mercer, who
6 is going to be the first witness that you will hear from.
7 There is a \$5,000 threshold, as you've heard, in this case that
8 you're going to have to find. Mr. Mercer says, by the way, if
9 you bill a thousand dollars an hour, that would help us get
10 this prosecuted.

11 Here's another slide from Mercer, another e-mail to the
12 FBI. The first e-mail was from December 2nd or 3rd, the one I
13 just showed you. This is all the way out in April of the next
14 year, and he says the damage as of that point was \$3,583.91.

15 Note that it's not a regular part of Fox 40 employees'
16 jobs to log their time with respect to response time for
17 evidence. They stopped doing it when they assert that \$5,000
18 was reached.

19 Loss numbers then and now, the government --
20 notwithstanding the fact that there's a \$3,500 number, the
21 government is asserting that loss was in excess of \$5,000. And
22 we believe the evidence is going to show that it was in fact
23 not in excess of \$5,000.

24 This is what the statute says. Boring, but I had to
25 tell you. Must be related to a course of conduct affecting one

1 or more protected computers. So it must be from what Sharpie
2 did or other matters that they assert to prove.

3 The last thing, and then you won't have to hear from me
4 until closing, Mr. Keys has an absolute constitutional right
5 not to testify. We don't know at this point if he will or he
6 won't. He may rely, if he wishes, on the state of the evidence
7 as the government provides it. So you're not to draw any
8 inferences if he doesn't testify, and that was the last thing I
9 needed to tell you.

10 I thank you for your time. I look forward to talking
11 to you again at the end of this case. I ask you to just please
12 concentrate on the evidence and keep an open mind while you're
13 listening to this case.

14 Thank you.

15 THE COURT: All right. Ladies and Gentlemen, that
16 concludes the parties' opening statements. As you know, at
17 this point, opening statements are not evidence. They are the
18 attorneys telling you what they believe the evidence will show.

19 Could we get the podium moved back into place, perhaps
20 between Mr. Leiderman and Mr. Segal. Thank you.

21 Also, as you have now figured out, I just wanted to
22 clarify there are times when the parties will use Anonymous
23 with a capital A and at times with a small A. And I can't
24 always do the mental gymnastics to be clear what is an
25 adjective versus a noun. I've asked the parties to, if they

1 can, highlight for you when they're using the word with a
2 capital A to reference the group or in a descriptive fashion
3 with a small A.

4 All right. The government now will begin with the
5 presentation of its case.

6 Mr. Segal?

7 MR. SEGAL: Thank you, Your Honor. Your Honor, the
8 United States calls Brandon Mercer.

9 THE CLERK: Mr. Mercer, please come forward. Before we
10 get started this morning, I need to take your photograph. If
11 you can stand with your back to the witness stand facing me.
12 Thank you.

13 THE COURT: We're taking the photographs so that they
14 can go into a binder for the jury to reference just to help you
15 keep track of witnesses.

16 MR. SEGAL: You don't need to turn to the left.

17 THE CLERK: Please raise your right hand.

18 BRANDON MERCER, GOVERNMENT'S WITNESS, SWORN

19 THE WITNESS: I do.

20 THE CLERK: Thank you. Please step in the witness
21 stand.

22 MR. EKELAND: Your Honor, we have an objection to this
23 witness.

24 THE COURT: To the witness period?

25 MR. EKELAND: To the majority of what the witness is

1 going to testify to, yes, Your Honor.

2 THE COURT: What's the objection?

3 MR. EKELAND: The objection is --

4 THE COURT: Without arguing it.

5 MR. EKELAND: Relevance, Your Honor.

6 THE COURT: That's overruled.

7 THE CLERK: Sir, will you please say and spell your
8 first and last name for the record.

9 THE WITNESS: It's Brandon Mercer. B-R-A-N-D-O-N,
10 M-E-R-C-E-R.

11 THE COURT: All right. You may proceed.

12 MR. SEGAL: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. SEGAL:

15 Q. Good morning, sir.

16 A. Good morning.

17 Q. What business have you been in -- well, in 2010 what did
18 you do for a living?

19 A. I was the news director at the Tribune station in
20 Sacramento.

21 Q. And what was the name of that station?

22 A. We went by a few different names, KTXL or Fox 40.

23 Q. When and how did you get interested in journalism?

24 A. That could be a long answer.

25 Probably starting in sixth grade and went through junior

1 high school when I worked on the paper, high school, college.
2 I was a producer in Tucson upon graduation and kind of went
3 through the different -- moved around markets from Tucson to
4 Phoenix to the Bay Area to here.

5 Q. Okay. Can you just take us briefly through the different
6 jobs you had from Tucson to Phoenix, the Bay Area until 2010.

7 A. Sure.

8 THE COURT REPORTER: Slow down, please.

9 THE WITNESS: I apologize I speak fast. Also I am
10 losing my voice. I hope I make it.

11 I was a --

12 MR. SEGAL: Actually there's water at your right side
13 there behind you if that would be helpful.

14 THE WITNESS: Thank you.

15 I was a producer at KOLD, like cold, which I thought it
16 was clever to call it KOLD. In Arizona it was hot, it was
17 warm. I was then a producer in Phoenix, and I became a
18 producer and later the futures producer kind of planning the
19 next newscast in San Francisco at Tech TV.

20 In 2004, I moved to Sacramento where I was the
21 executive producer of Good Day Sacramento. From there, I got
22 an opportunity to get the job I always wanted and moved across
23 town to be the news director at the Tribune station.

24 BY MR. SEGAL:

25 Q. And when was that?

1 A. That was 2008. And I was there for -- till 2013.

2 Q. And what were your responsibilities as news director at
3 KTXL?

4 A. I smile because it sounds glamorous, but my
5 responsibilities included everything from painting the chroma
6 key wall to hiring people to establishing the direction of a
7 newscast, the content that we would have, overseeing the staff.
8 I mean, it was everything from negotiating gas card contracts
9 for the live trucks to critiquing video we shot. It's a lot of
10 different activities.

11 Q. Okay. Do you want to --

12 MR. SEGAL: May I ask the jury, is it too loud? Do you
13 want to move the microphone away from your face?

14 THE WITNESS: Sure.

15 MR. SEGAL: All right.

16 Q. And what were you trying to accomplish at Fox 40 when you
17 got there?

18 A. It was an interesting time. We were going from a station
19 that was primarily one newscast a night, the 10 p.m. news. We
20 had just launched the morning show. I was brought in to expand
21 that morning show exponentially and kind of change the
22 direction of it.

23 Tribune had acquired the company, and Tribune had new
24 leadership looking to do something different with local news.
25 So we were trying to create an innovative format, a lot of

1 interaction with viewers, create a loyal viewer community,
2 build the website before a new thing called social media
3 because it had just kind of started to be available for the
4 public in 2008. So that's kind of what we were doing.

5 When I first got there in 2008, I had three months to hire
6 25 people and launch the new morning show in September. And it
7 was kind of like that the whole time I was there, building,
8 launching, creating.

9 Q. As part of that, what was Fox 40 rewards?

10 A. Fox 40 rewards was a program to get people to watch the
11 newscast, and we would put a code word on the air. So if you
12 were watching the 10 p.m. news, we would say tonight's code
13 word is snowstorm. And you would go to the website and type
14 that in, and by being a loyal viewer, you would be able to put
15 code words in again and again and build up points to get things
16 like Starbucks gift cards or, you know, Applebee's gift cards
17 or whatever we had in there. And we did an iPad giveaway a
18 week contest through Fox 40 rewards.

19 So it was just a way to interact with viewers. Nielsen
20 ratings are pretty fickle, Nielsen doesn't measure very well
21 what the audience is actually watching, so this was a way to
22 make sure we brought local people back to the newscast every
23 night, and it worked pretty well.

24 Q. And did you get their e-mail addresses as part of that?

25 A. Yeah, we did. There was a lot of personal information that

1 you would get as part of a rewards program.

2 I'm sure all of us have joined various rewards programs at
3 times, and --

4 THE COURT REPORTER: I need you to slow down.

5 THE COURT: And also answer the question and wait for
6 the next question.

7 THE WITNESS: Yes.

8 THE COURT: All right?

9 BY MR. SEGAL:

10 Q. The question was, did you get their e-mail addresses?

11 A. Yes.

12 Q. Okay. What other information did you get?

13 A. We would also get phone numbers, addresses. We could get
14 information about what they were interested in by the cards
15 they chose.

16 Q. Okay. The gift cards?

17 A. Yes.

18 Q. Got it.

19 In December 2010, about how many Fox rewards members did
20 you have at the beginning of the month?

21 A. Ah, I don't recall the exact number.

22 Q. Okay. Do you have an approximate recollection?

23 A. Yeah, I believe -- the number that sticks in my mind was --
24 I know we had 20,000 at one point, and we grew to 40,000. I
25 don't remember when we started and when we grew to that, but at

1 some point we had 40,000 in the program.

2 Q. All right. So tens of thousands at any rate?

3 A. Correct.

4 Q. Okay. Who was your first hire in 2008?

5 A. I was trying to remember this the other day, and I really
6 think my first hire was Matthew Keys.

7 Q. Is he here in the courtroom?

8 A. Ah, I am near-sighted, so I believe he's here.

9 Q. Do you have your glasses today?

10 A. I do. They don't work for me. Yeah, I see Matthew.

11 Q. Okay.

12 A. Yes.

13 MR. SEGAL: Your Honor, may the record reflect that the
14 witness has identified the defendant?

15 THE COURT: Well, can he say how's identified him?

16 BY MR. SEGAL:

17 Q. What's he wearing? Where is he sitting?

18 A. If I can stand. Over there [indicating].

19 THE COURT: Well, I need a little more detail.

20 BY MR. SEGAL:

21 Q. If you can't see, you can walk over there and tell us what
22 he's wearing.

23 MR. SEGAL: If that -- is all right with the Court,
24 Your Honor?

25 THE COURT: Well, how close do you need to get to be

1 able to identify someone?

2 THE WITNESS: If I may, I can recognize Matthew by his
3 haircut.

4 BY MR. SEGAL:

5 Q. And what is his haircut?

6 A. It's the same haircut he had when I hired him, kind of a
7 little longer on the sides.

8 THE COURT: Can you describe where he is sitting in
9 comparison to other persons?

10 THE WITNESS: He's sitting on my farthest left towards
11 the wall.

12 THE COURT: Okay. I think the record is sufficient to
13 reflect, unless there is an objection, Mr. Leiderman --

14 MR. LEIDERMAN: There's no --

15 THE COURT: -- that the witness has identified
16 Mr. Keys.

17 MR. LEIDERMAN: Yeah, we're in agreement.

18 THE COURT: Okay.

19 MR. SEGAL: Okay.

20 Q. Why did you hire him?

21 A. I hired Matthew because he is incredibly intelligent,
22 innovative, a leader in social media. Ah, he showed huge
23 promise and had a different way of looking at things that I
24 needed in the newsroom. I needed someone fresh, an alternative
25 voice that could see things differently. And he was

1 established as an up-and-coming journalist.

2 Q. What were his duties when you did hire him?

3 A. He would oversee the website, launch our social media,
4 build the social media audience on Twitter and Facebook, write
5 articles, convert videos for use on the web.

6 Q. Okay. Now physically where did he work?

7 A. Ah, we had a few different desks. In 2010, I believe the
8 desk he had was right kind of in the middle of the newsroom.
9 It was a very, very small newsroom before we expanded it. You
10 could fit the entire newsroom in this space between the Court
11 Reporter and the jury.

12 Q. So that was the Fox 40 newsroom, the distance between the
13 Court Reporter and the --

14 A. And the wall.

15 Q. And the wall behind the jury?

16 A. Yes.

17 Q. Okay. Is that about 20 feet or so?

18 A. It actually was just about 20 feet, 24 if you included the
19 assignment desk. I measured it a few times.

20 Q. All right. And until when did he work at Fox 40, the
21 Tribune station there?

22 A. Until 2010. I don't remember the exact date.

23 Q. I want to ask you about how the defendant's employment
24 ended.

25 Was there a big news event that you kind of tie this to in

1 the timeline?

2 A. Yes. I believe we were covering the fire at the Roseville
3 Galleria at the time.

4 Q. Okay. Please describe the atmosphere when your station was
5 trying to cover the Roseville mall fire.

6 A. The -- when there's a big news event, obviously it's all
7 hands on deck. Everybody is very involved in covering the
8 news. It's the responsibility of everybody in the newsroom
9 during a story like that to find ways to cover it.

10 We were on the air continuously, ah, covering the
11 fires. Everybody was looking for an element, an angle,
12 information, trying to get sources to give us perspective.
13 It's what you'd see on cable news where you've got a live
14 picture, you know it's a big event, and the story is unfolding
15 in real time. So the atmosphere is very charged, it's very
16 energetic, it's exciting, it's stressful.

17 Q. Did you have a confrontation with Mr. Keys on that day?

18 A. Yes.

19 Q. What did you tell him you were displeased with?

20 A. Ah, if I recall correctly, there was a tweet that he put on
21 his personal account that was criticizing the station's
22 coverage.

23 Q. Do you remember roughly what it was that concerned you?

24 A. I don't remember the exact words, but I believe it said
25 something like I am embarrassed by my station's coverage or

1 something to that effect.

2 Q. And where was he physically when that was going on?

3 A. He was in the middle of the newsroom at his desk if I
4 recall.

5 Q. When you confronted him with that, what was his response?

6 A. I don't remember the words, but it became heated.

7 Q. Heated? At what volume did -- what kind of volume did the
8 conversation reach?

9 A. There were -- I tried to be calm. There were loud words
10 and opinions being exchanged about the -- the incident.

11 Q. Was there any -- were there any kind of words that you
12 wouldn't want to repeat in court?

13 A. Probably. I don't think I recall exactly what was said,
14 but there were probably some explicatives, and it was certainly
15 a conversation that you don't really want to have in the middle
16 of a newsroom during breaking news.

17 Q. Fair to call it an argument?

18 A. I don't know that I was arguing. I was basically trying to
19 make the conversation stop.

20 Q. Oh, all right. And what was Mr. Keys doing?

21 A. If I recall, he wanted to make his point and exert his --
22 what he felt was a right to say his opinions on his Twitter
23 feed. Which, of course -- well, I'll leave it at that.

24 MR. SEGAL: All right. Excuse me.

25 Q. So where did you tell him to go?

1 A. I asked him to go home. I thought the best thing would be
2 to have him leave.

3 Q. What instructions did you give him about whether or not to
4 work?

5 A. I asked him to go home and to not log on and not work over
6 the weekend.

7 Q. What did he say?

8 A. I think I recall the words exactly. I think he said I
9 can't guarantee that.

10 Q. And so what did you do or what did you have done with his
11 Tribune Company user account?

12 A. I changed the -- I had our IT manager change the password
13 to his account so he could not log on.

14 Q. What was his username?

15 A. I believe it was M. Keys.

16 Q. Have you looked at a calendar recently to remember what day
17 of the week that was?

18 A. I did, yes.

19 Q. Do you remember what day of the week it was?

20 A. Yeah, I believe it was -- well, it towards the end of
21 October, and I -- I don't remember exactly. The 28th.

22 Q. Okay. October 28th was -- and do you remember what day of
23 the week that was?

24 A. I don't remember. I think it was towards the end of the
25 week.

1 Q. Okay. So who was your boss at Fox 40?

2 A. My boss at Fox 40 was Jerry Del Core.

3 Q. And he was the highest level of management in Sacramento?

4 A. Yes.

5 Q. Okay. After the fight -- after this whatever we'll call
6 it, this fight in the newsroom, what did you report to Jerry
7 Del Core?

8 A. I'm sorry. What did I report?

9 Q. Yeah, what did you report to Del Core?

10 A. I let him know -- I always kept him in the loop on things
11 that were happening in the newsroom. He liked to be in the
12 loop. He was a good hands-on manager. So I shared what had
13 happened and the incident in case he heard it from someone
14 else. I let him know that I had asked Matthew to go home and
15 not work.

16 And I told him that I had -- I believe I told Jerry I
17 had disconnected Matthew's or changed Matthew's password so he
18 couldn't log on just to make sure there was a cooling off
19 period.

20 Q. And did you guys give Keys any instructions about what to
21 do the following Monday?

22 A. I believe we were asking him to come back to work.

23 Q. For what purpose?

24 A. We wanted to talk to him. I -- we wanted him to come back
25 to work and have a discussion about it after we had sent him

1 home to cool off.

2 Q. And on Monday, was -- were Keys' things in the office?

3 A. If I recall, he had collected them on Sunday.

4 Q. And at that time, by Monday, were there any changes in the
5 the Twitter account used by Fox 40?

6 A. I don't remember the exact moment we discovered it, but I
7 believe it was Monday, and we discovered that our Twitter
8 account of some 8,000 something users had suddenly shrunk to
9 some 2,000 users. Or followers, I should say.

10 Q. How did you get control of the Twitter contact after that?

11 MR. EKELAND: Objection.

12 THE COURT: What's the objection?

13 MR. JAFFE: It's leading, Your Honor, introducing
14 testimony --

15 THE COURT: Sustained. You can rephrase.

16 MR. SEGAL: What did you do -- the objection is
17 leading?

18 THE COURT: Yes.

19 BY MR. SEGAL:

20 Q. What did you do to get control over the Twitter account?

21 MR. JAFFE: Same objection, Your Honor.

22 THE COURT: Sustained. You can lay a foundation if
23 you're able.

24 BY MR. SEGAL:

25 Q. Who controlled the Twitter account up to that time?

1 A. Matthew Keys was in control of the Twitter account.

2 Q. And did you do anything to change that?

3 A. Yes.

4 Q. What did you do?

5 A. In order to regain control of the Twitter account, we had
6 to file an affidavit, have it signed by a notary public and Fed
7 Ex the documentation that we own the account to Twitter, where
8 they could then restore it to a company e-mail.

9 Q. Who controlled the Facebook account at that time?

10 MR. EKELAND: Objection.

11 THE COURT: What's the objection?

12 MR. EKELAND: Leading.

13 THE COURT: Overruled.

14 MR. SEGAL: You may answer, sir.

15 THE WITNESS: Matthew, I believe, was in -- well, if
16 it's okay, I need to explain it.

17 Facebook is not controlled the same way that Twitter is
18 controlled. Ah, there was an administrative e-mail that I
19 guess you could say had control of the Facebook, and that was
20 under Matthew's e-mail.

21 MR. SEGAL: Okay.

22 Q. So what did you do with the Facebook account after that?

23 A. Ah, if I recall, we were able to reset a password to the
24 administrative e-mail for Facebook. I believe it was under
25 Matthew Keys' work e-mail, and we sent a password reset request

1 and were able to get into his work e-mail and regain access to
2 Facebook and then remove his e-mail as an administrator.

3 Q. All right. So you've got control over Facebook and Twitter
4 now.

5 Would you look at -- did you have any contests running
6 around this time?

7 A. I believe we were launching the iPad a day giveaway.

8 Q. Okay. Would you look, please -- there's a binder in front
9 of you. Can you look, please, at Government Exhibit 101.

10 Do you recognize that?

11 A. I do.

12 Q. How do you recognize it?

13 A. I remember getting this e-mail.

14 MR. SEGAL: Your Honor, the United States offers
15 Government Exhibit 101 into evidence.

16 MR. LEIDERMAN: May I have a moment, please?

17 THE COURT: You may.

18 This is five pages?

19 MR. SEGAL: Yes.

20 (Defense counsel conferring.)

21 MR. LEIDERMAN: Yeah, we object on relevance and unduly
22 prejudicial.

23 MR. SEGAL: This is the motion in limine.

24 THE COURT: Overruled.

25 MR. SEGAL: Sir, can you -- so is it admitted, Your

1 Honor?

2 THE COURT: The objection is overruled and, yes, the
3 exhibit is admitted. So 101, five pages, is admitted.

4 (GOVERNMENT'S EXHIBIT 101, e-mail, 12/01/10, 7:05 p.m.,
5 ADMITTED INTO EVIDENCE.)

6 MR. SEGAL: Okay. So let's go --

7 MR. LEIDERMAN: Excuse me. If I may, Your Honor, does
8 the Court want to treat rulings in limine as continuing
9 objections at trial?

10 THE COURT: The Court's order makes clear that you can
11 renew your objection to clarify the record. But we'll discuss
12 this more on a break.

13 MR. LEIDERMAN: I just don't want our objections to be
14 waived.

15 THE COURT: You should renew the objection --

16 MR. LEIDERMAN: Thank you.

17 THE COURT: -- to clarify the record.

18 MR. SEGAL: All right. So could we have it up, please.
19 And let's start at page 4, please.

20 Q. If you look at it, does this e-mail -- it's a reply chain
21 where you have to go to the back to look at the latest one; is
22 that right?

23 A. That's correct.

24 Q. Okay. So let's -- now, sir, if you want to, can you look
25 at your screen and tell me -- I know you have -- it's hard for

1 you to see it. Is that easier for you?

2 A. I prefer to look at this one, but I can do either.

3 Q. Whatever is good for you.

4 THE COURT: Do you have a question, Mr. Segal?

5 MR. SEGAL: And then can we show the jury the next page
6 of the document, please. This e-mail continues. Page 5,
7 please.

8 Q. What -- the e-mail says feel free to look these e-mails up
9 in your content management system.

10 What was the content management system?

11 A. The content management system is how we would store
12 information to be displayed on the website.

13 Q. Who is we?

14 A. Tribune.

15 Q. And who all else used that content management system?

16 A. It was shared by all the Tribune companies. I should say
17 the Tribune business units.

18 Q. Who was supposed to be able to access Tribune's content
19 management system?

20 A. The content management system was meant for content
21 creators to access it. So anybody who would need to write a
22 story for the web or to get a story on the web would access it.

23 Q. Was foxmulder4099 somebody that was supposed to access
24 the --

25 (Interruption in proceedings.)

1 THE COURT: Evidently we're having a fire alarm or a
2 drill. So, Ms. Schultz, you can tell the jury where to go?

3 THE CLERK: Yes.

4 THE COURT: Leave everything, and we'll resume as soon
5 as we can.

6 (Pause in proceedings.)

7 (Jury not present.)

8 THE CLERK: Come to order. Court is back in session.

9 THE COURT: You may be seated.

10 It wouldn't be a fire drill if we did know about it in
11 advance, so a little disruptive.

12 I'm prepared to talk about the recorded conversation.
13 Did you want to revisit that, Mr. Leiderman?

14 MR. LEIDERMAN: Yeah, I'm so sorry that the Court has
15 done work on that. We're going to withdraw the objection
16 except as it relates to the Cancer Man e-mails, which we're of
17 course renewing our objection to, and other matters that we've
18 covered in limine. However, as to the rest of it, we're
19 withdrawing the objection.

20 THE COURT: All right. That's noted. The Cancer Man
21 objection is preserved. Mr. Hemesath's marked up copy is here
22 if you'd like to retrieve that.

23 Let's call the jury back in. And we'll go until just
24 before noon.

25 MR. SEGAL: We'll go to 3:00 or 3:30 today?

1 THE COURT: We can go till 3:00. And I can take a
2 shorter lunch break unless the jury has made other plans. We
3 can take an hour lunch break if that works with the parties.

4 MR. EKELAND: Yes, Your Honor. That's fine.

5 THE COURT: So I'll ask the jury. Unless they've made
6 other plans, then that will be our plan.

7 All right.

8 (Off-the-record discussion with Courtroom Deputy.)

9 THE COURT: All right. Thank you, Ms. Schultz.

10 (Jury present.)

11 THE COURT: You may be seated.

12 Welcome back, Ladies and Gentlemen. That is not how I
13 planned for us to take our midmorning break, but we got some
14 fresh air.

15 As I was sharing with the parties, it would not be a
16 fire drill if we knew about it in advance. None of us knew
17 about it. We have to do these things on occasion. It's good
18 to see you back here.

19 We're going to resume now with the direct exam of
20 Mr. Mercer. We'll go until just before noon. We will be done
21 at 3:00 today.

22 My question to you is, the Court could take a shorter
23 lunch break, so an hour long lunch break, if that works with
24 all of you. Has anyone made plans to go to 1:30?

25 All right. So then we'll take a one-hour lunch break

1 starting right around noon, and then we'll come back at 1:00,
2 and we'll be done by 3:00 today.

3 All right. Mr. Segal.

4 MR. SEGAL: Thank you, Your Honor.

5 So I just want to get back to where we were when the
6 lights started flashing and the siren and all that.

7 Q. Fair to say there was this confrontation in the newsroom,
8 right?

9 A. Yes.

10 Q. You deactivated M. Keys, the Tribune user account for
11 Matthew Keys?

12 A. Yes.

13 Q. You return on -- and his things are cleaned out when you
14 get to work on Monday?

15 A. Yes.

16 Q. Okay. And there are about -- there are some thousands of
17 Twitter users deleted?

18 A. Yes.

19 MR. EKELAND: Objection.

20 THE COURT: What's the objection?

21 MR. EKELAND: Leading, Your Honor.

22 THE COURT: Sustained.

23 MR. SEGAL: I'm done summing up.

24 And let's look at Government Exhibit 101, which is in
25 evidence already.

1 Where we left off, we were at page 4. Can we go there,
2 please.

3 Q. About this one, do you remember talking about that,
4 Mr. Mercer?

5 A. Yes.

6 Q. Okay. So let's look at your response.

7 It begins, does it not, on -- well, the headers are on the
8 next page, right? No, just the headers at the bottom of the
9 page.

10 Is that right? Is that your e-mail account?

11 A. Can you repeat the question, please?

12 Q. Is that your e-mail account, Brandon dot Mercer at Fox 40?

13 A. Yes, it is.

14 Q. So let's go to the text of the e-mail that you sent.

15 We don't need the -- just this, please.

16 Okay. So after you read the e-mail saying to check your
17 CMS, how concerning was it to you that some outsider was
18 claiming to have information from your content management
19 system?

20 MR. JAFFE: Objection to the characterization, Your
21 Honor.

22 THE COURT: Sustained. Ask an open-ended question.
23 Who, what, where, when, why.

24 BY MR. SEGAL:

25 Q. What motivated you -- we just read an e-mail that said that

1 they had data from your CMS.

2 Do you recall that from before the fire drill?

3 A. Yes.

4 Q. What did that make you think about the security of your
5 network?

6 A. It made me very concerned about the security of our
7 network. With access to the CMS, they could take the website
8 offline, or more concerning for us would be to post news that
9 was false.

10 Q. And to whom did you relay these concerns and information
11 about this event?

12 A. Once we realized how serious this was, this was relayed to
13 our corporate teams in Chicago.

14 Q. So how much thought went into the e-mail that's on the
15 screen right now, your reply, your first reply to Fox Mulder?

16 A. I would say a great deal of thought.

17 Q. Who all talked about this before you sent it?

18 A. Most of the e-mails that we sent, we parsed every word. We
19 wanted to make sure we didn't antagonize anybody unnecessarily.

20 Ah, we would have managers in the newsroom, managers at the
21 local level and managers at our corporate team in Chicago,
22 including Tribune legal and the various content managers, look
23 over these e-mails or would discuss them via conference calls
24 with us.

25 MR. SEGAL: Let's look at the response to that one. If

1 we go to page 3, please.

2 Q. Then you received this response.

3 Now it says here, we have obtained the e-mail addresses of
4 hundreds of registrants on your website.

5 Can you read that?

6 A. Yes.

7 Q. Okay. What did it make you think that the claim was that
8 there was a group of people who had obtained these addresses?

9 A. Well, it seemed that there could be a larger threat than we
10 imagined. At first, we assumed this was Matthew Keys trying to
11 get back at us, and then we thought maybe there's a larger
12 group involved in this with greater skills and more nefarious
13 intentions.

14 MR. SEGAL: So let's go up to the top now to your next
15 response. Just the blue text, please.

16 Take a second to read that, Mr. Mercer.

17 And, Your Honor, may I ask if it's big enough for the
18 jury to see?

19 THE COURT: Can the jury read the text?

20 All right. Thank you.

21 BY MR. SEGAL:

22 Q. Now that you've seen that, what were you trying to
23 accomplish in writing this e-mail?

24 A. Well, my first line was, again, trying to defuse whatever
25 motives there were. Ah, I certainly didn't want to be

1 condescending. I didn't try to be that way. I wanted to make
2 sure I apologized, umm, if the person felt like I was not
3 treating them with whatever respect they had expected.

4 I don't remember your -- the press of your question.

5 Q. What -- you answered it.

6 Now, let's look at the response that you received.

7 And still no e-mail has gone out to any of the viewers so
8 far, right?

9 A. Not that we knew of.

10 Q. Let's look at the next one from Fox Mulder, please.

11 By the way, just so we can get this on the record from a
12 witness, Fox Mulder, Cancer Man, Walter Skinner, what show were
13 they all characters on?

14 A. They were all from X Files, I believe.

15 Q. Okay.

16 MR. LEIDERMAN: Objection, speculation.

17 THE COURT: Well, that objection is sustained given the
18 witness's response.

19 BY MR. SEGAL:

20 Q. How many times have you seen the X Files, Mr. Mercer?

21 A. I will be honest, I don't like scary shows, I never watched
22 an entire episode.

23 Q. Okay. Was it a show that your station carried?

24 A. It was a show that the Fox stations had carried prior to me
25 being there.

1 Q. Are you familiar with who the characters were?

2 A. I am familiar with Agent Scully and Fox Mulder, yes.

3 Q. Okay.

4 A. Skinner is a new one for me.

5 Q. Was it -- and did you know who Cancer Man was?

6 A. I had to be told by one of my news managers who Cancer Man
7 was.

8 MR. EKELAND: I'm going to object.

9 THE COURT: Well, the testimony speaks for itself.

10 MR. SEGAL: I'm moving on.

11 Then you get this e-mail. Your viewers can decide for
12 yourselves when to e-mail them. Now let's look at what your
13 response was.

14 And I want to -- after you read it, I want to ask you
15 again the same sort of questions about it.

16 Q. How many people worked on this e-mail?

17 A. How many people had worked on this e-mail?

18 Q. Yeah. How carefully were you choosing your words here?

19 A. I was choosing my words very carefully. I don't recall the
20 exact number of people that had worked on this response.

21 Q. Okay. Was it just you?

22 A. I doubt it. I usually ran it all past at least another
23 person, if not several other people.

24 Q. And why was that?

25 A. Because one smart mind is good, three or four smart minds

1 is better.

2 Q. And let's go to 101, to Fox Mulder's next reply.

3 Were there things in these e-mails that you associated with
4 Matthew Keys?

5 MR. JAFFE: Objection, Your Honor.

6 THE COURT: Overruled. Just yes or no.

7 THE WITNESS: Yes.

8 BY MR. SEGAL:

9 Q. What were they?

10 A. There was information in here that only someone at the
11 station would be aware of. And there was also information in
12 here that echoed sentiments that I had heard Matthew Keys
13 express to me.

14 Q. Would you turn in your book, please, to -- well, what were
15 the sentiments that Matthew Keys had expressed to you?

16 A. This e-mail is basically talking about challenges in the
17 news business, from layouts that happened at most TV stations
18 in the past ten years to the question of, ah, certain elements
19 of running a media business, clicks and ratings and that kind
20 of thing. Those are questions that I had heard addressed
21 before.

22 There's also a reference to Randy Michaels, who was the CEO
23 of Tribune who left in 2010. That's the reference to the
24 hundred dollar waitress line there. That was a rumor about the
25 CEO.

1 Q. Of what company?

2 A. Of Tribune.

3 Q. Okay. Let's take that down, please.

4 Now, you said you spoke to Tribune corporate. Where are
5 they located?

6 A. Chicago.

7 Q. Who is Jason Jedlinski?

8 A. Jason was one of our -- I believe his title was vice
9 president or maybe senior vice president. He was one of our
10 content guys that would help us run the websites.

11 Q. Who is Andy Friedman?

12 A. A person with a very similar title and very similar job,
13 and how they distinguish the two I'm not sure, but they both
14 worked together.

15 Q. Where?

16 A. In Chicago at Tribune.

17 Q. Was communicating with them part of your job when issues
18 were important enough?

19 A. Yes. I had a dotted line reporting to Andy Friedman at one
20 point, and I definitely checked in and was on conference calls
21 with him on several issues, yes.

22 Q. Was e-mail one of the regular ways that you stayed in touch
23 with them?

24 A. Yes.

25 Q. And when you sent an e-mail out of your Outlook, was a

1 record of that e-mail created in your sent box?

2 A. Yes.

3 Q. Were those -- was that an automatic process by Outlook?

4 A. Ah, yes.

5 Q. Okay.

6 MR. SEGAL: Your Honor, I offer Government Exhibit 114
7 into evidence.

8 THE COURT: Any objection?

9 MR. LEIDERMAN: Yes, ma'am. Yes, we have the same
10 objection.

11 THE COURT: All right. That objection is overruled.
12 114, a single page --

13 MR. SEGAL: Yes.

14 THE COURT: -- is admitted.

15 MR. LEIDERMAN: I'm sorry, Your Honor. For the record,
16 we have the same objection that we raised in the in limine
17 motions.

18 THE COURT: Yes, that objection is preserved.

19 (GOVERNMENT'S EXHIBIT 114, e-mail, 12/01/10, 7:18 p.m.,
20 ADMITTED INTO EVIDENCE.)

21 BY MR. SEGAL:

22 Q. So what was P2P? Can you read the exhibit?

23 A. Sure.

24 P2P stood for -- we think it stood for power to the
25 producers. It was the content management system that ran all

1 of the Tribune properties, the digital properties.

2 Q. Okay. And what were you -- why were you worried about
3 passwords here?

4 A. I was worried about passwords because I was concerned
5 someone was using some other username and password to get into
6 our system.

7 Q. When you say our system, you mean what?

8 A. I mean P2P.

9 Q. And what did you mean when you said a compromised account?

10 A. When Jason said a compromised account, I believe what he
11 meant was an account where someone else might have guessed the
12 password or --

13 MR. EKELAND: Objection.

14 MR. SEGAL: This e-mail is from you.

15 THE COURT: What's the objection?

16 MR. EKELAND: Speculation.

17 THE COURT: That's sustained.

18 BY MR. SEGAL:

19 Q. Who wrote this e-mail that we're looking at?

20 A. I'm sorry. I was looking at the top part.

21 Yeah, on the e-mail I wrote -- yeah, I wrote --

22 MR. SEGAL: Speak slowly and clearly, sir.

23 THE WITNESS: The e-mail that is highlighted is an
24 e-mail that I wrote.

25 BY MR. SEGAL:

1 Q. Okay. So what did you mean by compromised?

2 A. What I meant was an e-mail that -- or sorry.

3 When I said compromised, I meant a username whose password
4 may have been guessed or used in some way by someone who was
5 not authorized to use it.

6 Q. Okay. Let's look at the top now, please.

7 This is from Jedlinski with a CC to you; is that correct?

8 A. That's correct.

9 Q. How important was this to you to -- was this a
10 reasonable -- in your view, was this a reasonable response to
11 what had happened?

12 A. Yeah. It could probably be a little bit more even but,
13 yeah, it was reasonable. It got me the answers I needed.

14 Q. Did they identify who the intruder was at this time?

15 MR. LEIDERMAN: Objection, lacks foundation, lacks
16 personal knowledge.

17 THE COURT: Sustained.

18 BY MR. SEGAL:

19 Q. Did you figure out -- at this time, did you know who Fox
20 Mulder was?

21 A. From the beginning of getting the e-mails, we thought we
22 knew who it was.

23 Q. But did you have -- at this time, did you have direct
24 evidence who Fox Mulder was?

25 A. I'm not certain whether we had direct evidence of who Fox

1 Mulder was at this point.

2 MR. LEIDERMAN: I'm going to object as nonresponsive.
3 The question called for did he have knowledge, and he's
4 answering we.

5 THE COURT: Fair enough.

6 Can you answer based on what you know, sir?

7 MR. SEGAL: This is --

8 THE COURT: And just so it's clear, this witness is not
9 testifying as a legal expert, so direct evidence is being used
10 in the lay sense.

11 BY MR. SEGAL:

12 Q. On December 1st -- remember, look at the e-mails. It's
13 December 1st.

14 A. Can you ask me the question again?

15 Q. Let me ask it -- in your mind, was your computer problem
16 solved at this point?

17 A. No.

18 Q. Okay. Let's look at Government Exhibit 102.

19 And why is that?

20 A. We hadn't figured out how someone got into the system.

21 Q. Okay. Let's look -- can you in your book, please, look at
22 Government Exhibit 102. It's a one-page e-mail.

23 Do you recognize that?

24 A. I do.

25 Q. How do you recognize it?

1 A. Ah, I recognize -- I remember reading it very clearly.

2 Q. Okay. Did you receive this e-mail?

3 A. I did.

4 Q. Okay. From whom? Who's the sender?

5 A. I believe the sender to be Matthew Keys.

6 Q. Well, what does it say at the top?

7 A. Fox Mulder.

8 Q. Okay.

9 MR. SEGAL: Offer 102 in evidence, Your Honor.

10 MR. EKELAND: Same objection as always to relevancy.

11 We want to note for the record that foxmulder4099 at dot UK is
12 one of the e-mail addresses that we're referring to as one of
13 the Cancer Man e-mails.

14 MR. JAFFE: Also we move to strike his comment about
15 who he thought it was, which is not responsive to the question.

16 THE COURT: All right. I need one person on objections
17 per witness. Whoever is doing the cross --

18 MR. EKELAND: I'll --

19 THE COURT: -- is the one objecting.

20 All right. So both of those objections are overruled.

21 MR. SEGAL: So could we put -- is 102 in, Your Honor?

22 THE COURT: Yes, it is.

23 (GOVERNMENT'S EXHIBIT 102, e-mail, 12/01/10, 9:05 p.m.,
24 ADMITTED INTO EVIDENCE.)

25 MR. SEGAL: Okay. May we put up 102, please.

1 So it says: We've decided to begin sending e-mails to
2 the first group of people tomorrow morning.

3 Q. Now, could you -- you indicated that the newsroom was about
4 a 20 foot wide room.

5 Did you see other people -- do you know if this e-mail got
6 to other people as well?

7 A. It did. I believe it got to the entire newsroom.

8 Q. How do you know that?

9 A. I believe one of the e-mail addresses it was sent to was
10 the entire newsroom e-mail. But also everyone in the newsroom
11 was talking about it and discussed it.

12 MR. LEIDERMAN: Objection that it's speculative. I'm
13 sorry.

14 MR. EKELAND: Objection, Your Honor, speculative.

15 THE COURT: Sustained.

16 BY MR. SEGAL:

17 Q. What's your best recollection about what e-mail
18 distribution list this was sent to?

19 A. I know some of these e-mails were directly sent to the
20 entire newsroom. I don't know if this one in particular was
21 sent to the entire newsroom.

22 Q. Okay. What was the effect when one of them would go to the
23 entire newsroom?

24 A. It temporarily shut down people from doing their job.

25 Q. Now, at this point where Fox Mulder is saying we're going

1 to send out e-mails to the first group, in your mind, what is
2 the level of crisis at this time?

3 MR. EKELAND: Objection.

4 THE COURT: What's the objection?

5 MR. EKELAND: Leading.

6 THE COURT: Sustained.

7 MR. EKELAND: Calls for speculation.

8 THE COURT: Sustained.

9 MR. EKELAND: He's assuming there's a crisis.

10 THE COURT: Sustained.

11 BY MR. SEGAL:

12 Q. To what degree was this a crisis?

13 MR. EKELAND: Same objection, Your Honor.

14 MR. SEGAL: It's a yes or no question. It's not
15 leading.

16 THE COURT: But you're providing the substantive word.
17 So ask a truly open-ended question.

18 BY MR. SEGAL:

19 Q. How did you feel about this in your -- and its effect on
20 your business?

21 A. This was terrifying to the business. We were at a pivotal
22 point in the renaissance of Fox 40. We had put -- me
23 personally -- blood, sweat and tears for two years into this,
24 and we are at a point now where we were starting to really gain
25 some traction.

1 We had an iPad giveaway coming out. We had a new website.
2 We had new shows. And to have something that would be
3 communicated with the public of the nature seen in the previous
4 e-mails was -- there couldn't have been anything more important
5 at that moment for the station and for Tribune.

6 Q. Can you look at Government Exhibit 103, the second page,
7 please.

8 Who sent that e-mail?

9 A. If I can first confirm, you're referring to page 2 of
10 section 103?

11 Q. Yes, it's 103-002. And I'd like to ask you who those two
12 e-mails are between.

13 A. That was an e-mail between me and I believe to be Matthew
14 Keys.

15 MR. EKELAND: Objection, Your Honor.

16 MR. SEGAL: Just say Fox Mulder for now. All right?

17 THE COURT: The witness is testifying. So, again, it
18 will facilitate the testimony if the witness testifies as to
19 what he knows and what the evidence shows.

20 MR. SEGAL: Okay. Offer 103 into evidence, Your Honor.

21 MR. EKELAND: Same objection as to the Cancer Man
22 e-mails as to relevancy, Your Honor.

23 THE COURT: That objection is overruled. 103 is
24 admitted. That's two pages.

25 /////

1 (GOVERNMENT'S EXHIBIT 103, e-mail, 12/02/10, 12:58 a.m.,
2 ADMITTED INTO EVIDENCE.)

3 MR. SEGAL: Let's look at the second page, please.

4 Your Honor, may I ask if the jury can read this text?

5 THE COURT: I see nodding heads.

6 Generally I've asked the jury to let me know if you
7 can't see an exhibit, so I'm expecting you to speak up or raise
8 your hand if you cannot.

9 All right.

10 BY MR. SEGAL:

11 Q. What did you warn Fox Mulder about here?

12 A. I warned about the kind of situation we're in today.

13 Q. What was your motivation in sending this e-mail?

14 A. My motivation in sending this e-mail -- if I may, this was
15 a very personal e-mail to me. It was one of the hardest
16 e-mails I wrote. And --

17 MR. EKELAND: Objection, Your Honor, nonresponsive,
18 beyond the scope.

19 THE COURT: Sustained.

20 THE WITNESS: Can you repeat the question, please?

21 BY MR. SEGAL:

22 Q. Sir, what were -- what were you thinking and feeling as you
23 sent this e-mail? What was its purpose?

24 A. I was trying to dissuade the person who I believed I had
25 been communicating with from continuing an action that I

1 thought could result in what I would refer to as a tragedy.

2 Q. And in your own mind, who did you think it was when you
3 wrote this e-mail?

4 A. I believed I was sending this e-mail to Matthew Keys.

5 Q. So why did you tell him that it could cost tens of
6 thousands of dollars to deal with the ramifications of his
7 actions?

8 A. I hired Matthew Keys and cared about him. I tried to
9 nurture him as an employee and teach him things and coach him.
10 I think he had huge potential.

11 And I wanted him not to have the problems that I foresaw
12 with what was going on here, ah, potential civil suits, federal
13 prosecution. I really wanted that to go away. At this point,
14 this could have all gone away.

15 Q. Let's go up to the first page, please, to the reply that
16 you received. Let's look at it just a couple of paragraphs at
17 a time so it's legible.

18 So it says: First you have to find out who we are and
19 where we live.

20 Did you think you could do that on your own?

21 A. No.

22 Q. It talks about individuals who live abroad. Did you think
23 you could go overseas to figure out who it was?

24 A. Ah, no.

25 MR. SEGAL: So this whole exhibit will be in evidence,

1 but let's go down -- can we go back out and enlarge this
2 paragraph now.

3 It talks about the cycle of identifying us being a long
4 and painstaking process as ISPs and e-mail providers are
5 reluctant to give out identifying information without a
6 subpoena or warrant unless a lawyer can prove damage.

7 THE COURT: What's the question?

8 BY MR. SEGAL:

9 Q. Do you see that, sir? Can you see that?

10 A. Yes, I do.

11 Q. Was this prolonged and painstaking process something that
12 you thought Fox 40 or Tribune could do on its own?

13 MR. EKELAND: Objection, Your Honor, relevance and
14 calls for speculation.

15 THE COURT: Sustained.

16 BY MR. SEGAL:

17 Q. Who did you -- what law enforcement agency did you end up
18 contacting after this?

19 A. I contacted the FBI.

20 MR. SEGAL: Okay. And let's just go down to the last
21 line here, the last two paragraphs.

22 Q. Is that what Fox Mulder told you to do?

23 A. Is contacting the FBI what Fox Mulder told me to do?

24 Q. Yeah.

25 A. I suppose if you read it that way, the answer is yes.

1 Q. Let's look at the next page, please.

2 What's the relationship between -- well, what's a broadcast
3 license?

4 A. A broadcast license, as my boss defined it, is one of the
5 two most important things the station has.

6 Its broadcast license --

7 MR. EKELAND: Objection.

8 THE COURT: Sustained.

9 MR. EKELAND: Nonresponsive, motion to strike, Your
10 Honor.

11 THE COURT: That motion is granted. The jury shall
12 disregard the response so far.

13 The question calls for what --

14 THE WITNESS: I apologize.

15 THE COURT: -- what is.

16 THE WITNESS: I believe it's a piece of paper.

17 BY MR. SEGAL:

18 Q. What does it let you do?

19 A. It allows us to broadcast.

20 Q. How important is it to your business?

21 A. It is one of the two most important things the business
22 has, as my boss used to say.

23 Q. Why is that?

24 A. Without a license, you have to turn off the transmitter.

25 Q. And who is it that controls broadcast licenses?

1 A. The Federal Communications Commission.

2 Q. And that's the FCC --

3 A. Yes.

4 Q. -- in the e-mail?

5 All right. It talks about your creditors, too. What
6 was -- did Tribune have any relationship with its creditors
7 that was extraordinary at this time?

8 A. Tribune was in bankruptcy at the time.

9 Q. All right. I'd like you to look at Government Exhibit 115,
10 please.

11 Do you recognize that?

12 A. 115?

13 Q. 115, please.

14 A. Yes.

15 Q. Do you recognize that?

16 A. Yes, I do.

17 Q. How do you recognize it?

18 A. I remember getting the Google voice alert that I had set
19 up, and I remember reading it.

20 MR. SEGAL: Offer 115 into evidence, Your Honor.

21 MR. EKELAND: No objection, Your Honor.

22 THE COURT: No objection?

23 MR. EKELAND: No objection.

24 THE COURT: All right. 115 is in without objection.

25 MR. SEGAL: Okay.

1 (GOVERNMENT'S EXHIBIT 115, e-mail, 12/02/10, 4:22 p.m.,
2 ADMITTED INTO EVIDENCE.)

3 BY MR. SEGAL:

4 Q. So what's -- what is Google voice and why -- what is Google
5 voice?

6 A. Google voice is a system that will automatically record a
7 transcript of the audio that is left on its server and e-mail
8 you that transcript to save time.

9 Q. Okay. So who did you call before this Google voice message
10 came?

11 A. I believe I called Steve Dupre, who was the public
12 information officer of the FBI.

13 Q. Okay. What assistance were you hoping to get from the FBI
14 when you called them?

15 A. I was hoping the FBI could track down who was sending us
16 the e-mails and make it stop before it got to the public.

17 Q. Why was it important to figure out who was behind the Fox
18 Mulder identity?

19 A. From the e-mails, it seemed that there was an incursion to
20 our system that had the potential to alter the news that the
21 public was reading or even do worse damage, take down a website
22 entirely. You can't have that kind of, ah, control of, you
23 know, our ability to publish and broadcast in unauthorized
24 hands.

25 Q. Did you meet with Agent Cauthen?

1 A. Eventually I did meet with Agent Cauthen, yes.

2 Q. Did you speak on the phone with him?

3 A. I did first, yes.

4 Q. And were those conversations related to the purposes that
5 you just told us about?

6 A. Yes.

7 Q. Okay.

8 MR. SEGAL: Your Honor, I'm going to -- I intend to
9 offer into evidence a redacted e-mail, and I just want to check
10 to make sure that it's redacted as the Court instructed. I
11 don't think we need a recess. I just want to walk back to
12 counsel table.

13 THE COURT: All right. What's the number?

14 MR. SEGAL: It's 104R.

15 THE COURT: All right.

16 MR. SEGAL: What I'll do is --

17 THE COURT: The defense has a copy of what you actually
18 plan to offer?

19 MR. SEGAL: Yes, they do. And the feed is not coming
20 from our computer, so let's see 104R as it is on the computer.

21 (Pause in proceedings.)

22 MR. SEGAL: Okay. Don't put up the exhibit yet,
23 please.

24 THE COURT: It should not be displayed in any event
25 because it has not been admitted.

1 MR. SEGAL: It's not in evidence.

2 Q. Do you recognize that?

3 A. I do.

4 Q. Okay. Now I don't know what copy you have up there, but I
5 just want to tell you do not talk about --

6 THE COURT: Well, Mr. Segal, provide the witness with
7 the copy that you're referring to so there's no confusion.

8 MR. SEGAL: May I approach, Your Honor?

9 THE COURT: You may.

10 MR. EKELAND: Your Honor, could we get a copy, too?

11 MR. SEGAL: You have a copy. This is --

12 MR. EKELAND: We just want to make sure it matches.

13 (Counsel conferring.)

14 MR. EKELAND: Okay.

15 THE COURT: All right. The witness has the exhibit.

16 MR. SEGAL: Yes, it's --

17 THE COURT: The defense has had a chance to inspect
18 that and agrees it's the exhibit?

19 MR. EKELAND: Yes, Your Honor.

20 THE COURT: All right. It's a four-page exhibit. You
21 may ask questions about it.

22 MR. SEGAL: All right.

23 Q. Between whom is this e-mail chain?

24 A. This e-mail chain was between me and whoever was using the
25 e-mail address Cancer Man.

1 MR. SEGAL: Your Honor, I offer the redacted 104R into
2 evidence.

3 MR. EKELAND: Your Honor, same objection as before as
4 to relevancy as to the Cancer Man e-mails.

5 THE COURT: All right. The objection is overruled.
6 104R is admitted.

7 (GOVERNMENT'S EXHIBIT 104R, e-mail, 12/03/10, 12:50 a.m.,
8 ADMITTED INTO EVIDENCE.)

9 THE COURT: Redacted means that certain parts have been
10 stricken out to eliminate irrelevant information.

11 MR. SEGAL: Let's look at page 3 of this, please.

12 Q. Okay. So this warns you -- what does this warn you about?

13 A. Ah, several claims.

14 Q. What does it say is going to happen to those claims?

15 A. It was an e-mail that was sent to me saying that all of
16 these claims are going to be made public to this list of
17 viewers.

18 Q. Let's look at how you responded. Can we go to the
19 preceding page, please.

20 Now, after you sent that reply -- let's go up one more,
21 please. Do you know if the e-mail went out?

22 A. I don't recall.

23 Q. Okay. This is a yes or no question. Did you get any
24 communications from customers after this? Yes or no.

25 A. Yes.

1 Q. Okay. And yes or no, did they relate to e-mails from Fox
2 Mulder?

3 A. Yes.

4 Q. Okay. Let's go to the first page, please.

5 And did you -- yes or no, did you send an e-mail to the Fox
6 Mulder identity complaining about that?

7 A. Yes, I did.

8 Q. Okay. Is what is now enlarged the reply that you received
9 from Fox Mulder after you complained?

10 A. Yes.

11 Q. Okay. Who is Charles Sennet?

12 A. Charles Sennet was, and I believe still is, a Tribune
13 lawyer that worked with the local stations.

14 Q. What did you infer from Fox Mulder's reference to Charles
15 Sennet?

16 A. Well, I inferred that, again, this was Matthew Keys I was
17 communicating with. And I believed by what was said, what was
18 written to me, that he assumed that Tribune legal was involved
19 at this point and giving me suggestions on what to write to
20 him.

21 Q. Okay. Did you get any other customer complaints around
22 this time? Yes or no.

23 A. Yes.

24 Q. Would you look at Government Exhibit 105, please.

25 Is that one of the customer complaints, sir?

1 A. Yes.

2 MR. SEGAL: Offer 105 into evidence, Your Honor.

3 MR. EKELAND: Same objection as to relevancy as to the
4 Cancer Man e-mails, Your Honor.

5 THE COURT: All right.

6 MR. EKELAND: And also object on hearsay grounds.

7 THE COURT: Overruled. 105 is admitted.

8 (GOVERNMENT'S EXHIBIT 105, e-mail, 12/03/10, 4:13 p.m.,
9 ADMITTED INTO EVIDENCE.)

10 MR. SEGAL: Can we see the first page.

11 Q. As a businessman, what did you think when this customer put
12 the quote -- put quotes secure in that e-mail?

13 A. That was a major liability. Ah, this to me suggested that
14 customers like him could -- you know, could take legal action
15 against Tribune.

16 Q. Please look at Government Exhibit 106.

17 Do you see that?

18 A. I see it here, yes.

19 Q. Okay. Between whom is that e-mail? Is that an e-mail you
20 got from Cancer Man?

21 THE COURT: Which portion of the page are you
22 referencing?

23 MR. SEGAL: This is a --

24 Q. What do you know about this e-mail, Mr. Mercer?

25 A. This e-mail resulted from --

1 MR. SEGAL: Wait.

2 Well, you know what, Your Honor, I offer it into
3 evidence as it comes from Cancer Man, and I'm going to ask him
4 a very short question about it.

5 MR. EKELAND: Objection, Your Honor, on relevancy
6 grounds in relation to all the Cancer Man e-mails. And we
7 would like to note for the record that cancerman4099 at yahoo
8 dot UK is one of the Cancer Man e-mails that we're referring
9 to. And also lacks foundation, Your Honor.

10 THE COURT: On the foundation, but ask a few questions
11 to --

12 MR. SEGAL: Okay.

13 THE COURT: -- see if you can lay a foundation.

14 BY MR. SEGAL:

15 Q. Had you received e-mails from Fox Mulder so far?

16 A. Yes.

17 Q. Had you received e-mails from Walter Skinner so far?

18 A. Yes.

19 Q. And had you received e-mails from this Cancer Man address
20 before?

21 A. Yes.

22 Q. And had they been referring to this incident?

23 A. Yes.

24 Q. Okay. And December 3rd, 2010, how does that relate to when
25 all the rest of these things are going on?

1 A. That was kind of the climax of all of this.

2 MR. SEGAL: Your Honor, I offer 106 into evidence.

3 THE COURT: A little more foundation.

4 MR. EKELAND: Same objection as to relevancy, Your
5 Honor.

6 BY MR. SEGAL:

7 Q. Did this come in to Fox 40?

8 A. Yes.

9 MR. SEGAL: Offer 106.

10 MR. EKELAND: Same objection.

11 THE COURT: One step further, just --

12 BY MR. SEGAL:

13 Q. How do you know that?

14 A. This e-mail was brought to my attention, ah, by one of my
15 employees who sent it to me. I don't recall if it was sent to
16 me directly or forwarded to me.

17 Q. And are these e-mails automatically created when an
18 employee sends -- forwards something on to you?

19 A. Yes.

20 Q. Was it an employee in your reporting chain?

21 A. I believe so, yes.

22 MR. SEGAL: Your Honor, I offer this as a business
23 record.

24 THE COURT: All right. The objection is overruled.
25 106 is admitted.

1 (GOVERNMENT'S EXHIBIT 106, e-mail, 12/03/10, 4:32 p.m.,
2 ADMITTED INTO EVIDENCE.)

3 MR. SEGAL: Would you look at Government's Exhibit 107,
4 please.

5 Q. Do you recognize that?

6 A. Yes.

7 Q. How do you recognize it?

8 A. Well, it came to me at some point. I don't recall exactly
9 how it got to me.

10 Q. During these events?

11 A. Yes.

12 Q. Okay. And what is it?

13 A. I believe this was an e-mail that was sent to a group of
14 Fox 40 viewer registered e-mails.

15 MR. EKELAND: Objection, Your Honor.

16 THE COURT: Sustained.

17 BY MR. SEGAL:

18 Q. What was your responsibility in dealing with the e-mails
19 that were going out to the Fox 40 viewer list?

20 A. I was responsible for managing all aspects of this crisis.

21 Q. How did you get e-mails that had gone out on this list?

22 A. It came through a number of ways, and it's one of the
23 reasons I can't recall without seeing if my name is in it, if
24 they were sent to me by employees. They could have been sent
25 to a station group e-mail like news at Fox 40 dot com. They

1 could have come in from a viewer. Ah, occasionally they were
2 printed out also.

3 I got a lot of -- I had a large newsroom, and they would
4 all bring me whatever they saw on this. This didn't all go
5 through my e-mail address directly.

6 Q. Was this one of the e-mails that you got during the
7 situation?

8 A. Yes.

9 MR. SEGAL: Your Honor, I offer 107 into evidence.

10 MR. EKELAND: Same objection as to relevancy in
11 relation to the Cancer Man e-mails, Your Honor.

12 THE COURT: The objection is overruled. 107 is
13 admitted.

14 (GOVERNMENT'S EXHIBIT 107, e-mail, 12/03/10, 3:54 p.m.,
15 ADMITTED INTO EVIDENCE.)

16 BY MR. SEGAL:

17 Q. So now it's December 3rd. Can you look at -- and another
18 e-mail has gone out; is that right?

19 A. Yes.

20 Q. Okay. Look at 108, please.

21 Do you recognize that?

22 A. I do.

23 Q. How do you recognize that?

24 A. This was an e-mail sent directly to me.

25 Q. Okay. From who, from what address?

1 A. From the Cancer Man address.

2 MR. SEGAL: Offer 108 into evidence, Your Honor.

3 MR. EKELAND: Same objection as to relevancy as to the
4 Cancer Man e-mails, Your Honor.

5 THE COURT: That objection is overruled. 108 is
6 admitted.

7 (GOVERNMENT'S EXHIBIT 108, e-mail, 12/03/10, 3:03 p.m.,
8 ADMITTED INTO EVIDENCE.)

9 BY MR. SEGAL:

10 Q. What, if any, concerns did this raise in your mind, when
11 Fox Mulder said you Fox people make it incredibly easy to gain
12 access?

13 A. If I recall the timeline correctly, I believe this is the
14 point where we thought we had changed passwords and made things
15 more secure, and there was still possibly a way someone was
16 getting unauthorized access to the servers.

17 Q. And how important was that to you?

18 A. It elevated it to a new level. As I said earlier about the
19 nature of this crisis, this meant that it wasn't over.

20 Q. Okay. Can you look at 111, please.

21 Do you recognize that one?

22 A. I do recognize this e-mail.

23 Q. How do you recognize that one?

24 A. If I recall, on some of these the e-mail was sent with a
25 blind carbon copy to me. I believe that is how I got this one.

1 Q. And from whom does it come?

2 A. The person using the Walter Skinner e-mail address.

3 MR. SEGAL: Your Honor, I offer Government 111 into
4 evidence.

5 MR. EKELAND: Your Honor, same objection as to
6 relevancy as to the Cancer Man e-mails. And we would like to
7 note that walterskinner5099 at yahoo dot UK is one of the
8 Cancer Man e-mails to which the defense refers.

9 THE COURT: All right. That objection is preserved.
10 The objection is overruled. 111 is admitted.

11 MR. SEGAL: Okay.

12 (GOVERNMENT'S EXHIBIT 111, e-mail, 12/06/10, 4:25 a.m.,
13 ADMITTED INTO EVIDENCE.)

14 MR. SEGAL: Let's just look at the date.

15 And will you look at 109, please, Mr. Mercer.

16 Q. Do you recognize that one?

17 A. I do.

18 Q. How do you recognize that one?

19 A. I believe, like the other ones, it was sent to me with a
20 blind carbon copy field from the person using the Cancer Man
21 e-mail.

22 MR. SEGAL: Offer 109 into evidence, Your Honor

23 MR. EKELAND: Your Honor, same objection as to
24 relevancy as to the Cancer Man e-mails.

25 THE COURT: All right. That objection is preserved.

1 109 is admitted.

2 (GOVERNMENT'S EXHIBIT 109, e-mail, 12/05/10, 4:36 a.m.,
3 ADMITTED INTO EVIDENCE.)

4 MR. SEGAL: I'm just going to let the jury read that,
5 Your Honor.

6 Q. So did you respond to this one?

7 A. I believe I did.

8 Q. Would you look at 110, please, while the jury is reading
9 109.

10 THE COURT: Can you clarify the reasons you're offering
11 these exhibits, Mr. Segal?

12 MR. SEGAL: Yes. These are -- so going one by one.

13 The relevancy -- I can say but I don't want to -- does
14 the Court want me to say that in front of the jury or do you
15 want me to approach?

16 THE COURT: Well, is it offered for the truth of the
17 matter?

18 MR. SEGAL: This is. This is an adverse party
19 admission.

20 THE COURT: All right. So the Court is not -- that is
21 the government's intent in offering this, that it's contingent
22 on other proof coming in.

23 MR. SEGAL: Yes.

24 THE COURT: So at this point, so that it's clear, the
25 Court has not allowed the admission of these e-mails for the

1 truth of the contents.

2 MR. SEGAL: Actually this is not even for the truth.
3 This is -- but it is admissible for all purposes because --
4 under 801(d)(2).

5 So let's look at 110.

6 Q. You respond to that?

7 A. Yes, I did respond to the e-mail.

8 Q. Is 110 your response?

9 A. Yes, it is.

10 Q. Okay.

11 MR. SEGAL: Offer 110, Your Honor.

12 MR. EKELAND: Same objection as to the relevancy of the
13 Cancer Man e-mails, Your Honor.

14 THE COURT: Overruled. 110 is admitted.

15 (GOVERNMENT'S EXHIBIT 110, e-mail, 12/05/10, 6:56 p.m.,
16 ADMITTED INTO EVIDENCE.)

17 THE WITNESS: Is it okay if I grab some water?

18 THE COURT: You may.

19 (Pause in proceedings.)

20 MR. SEGAL: All right.

21 Q. So now here on December 5th, you say stop sending e-mails
22 to our secure database, and Cancer Man says, first, your
23 database is not secure.

24 What concerns, if any, did that put in your mind as a
25 businessman?

1 A. It -- it made me realize we needed to have another Sunday
2 morning conference call.

3 Q. Why was that?

4 A. There was still a major threat to our ability to, ah, run a
5 public facing news website. And I mean run all the public
6 facing news websites that Tribune operated.

7 Q. And now I'd like you to look at 123, please.

8 THE COURT: This is behind the 120 tab?

9 MR. SEGAL: Government Exhibit 123.

10 THE COURT: I understand. It's behind the Court's 120
11 tab.

12 MR. SEGAL: Oh, sorry about that, Your Honor.

13 THE COURT: That's all right.

14 BY MR. SEGAL:

15 Q. Do you see that, Mr. Mercer? It's a one-page e-mail?

16 A. Yes.

17 Q. Who did you get this e-mail from?

18 A. I got it from the person using the Cancer Man e-mail.

19 MR. SEGAL: Offer 123 into evidence, Your Honor.

20 MR. EKELAND: Same objection as to relevancy as to the
21 Cancer Man e-mails, Your Honor.

22 THE COURT: That objection is overruled. 123 is
23 admitted, one page.

24 (GOVERNMENT'S EXHIBIT 123, e-mail, 12/06/10, 5:44 a.m.,
25 ADMITTED INTO EVIDENCE.)

1 BY MR. SEGAL:

2 Q. Mr. Mercer, what effect on your attention did these e-mails
3 have?

4 A. They were very effective in getting my attention, that's
5 for sure.

6 Q. Why is that?

7 A. These, again, came at a pivotal time in the company and
8 threatened so much of what we did.

9 Q. Did you have a meeting about this?

10 A. About this e-mail here?

11 Q. Or about the going rogue. You said you had to have another
12 meeting?

13 A. If I recall, we had a meeting on Sunday morning after the
14 first e-mail on the previous exhibit, and we had another
15 meeting on Monday about this.

16 Q. Would you look at Government Exhibit 127.

17 Did you keep a spreadsheet to keep track of some of your
18 time?

19 A. I did.

20 Q. And what is Government Exhibit 127 and the next page?

21 A. That is part of the spreadsheet that I kept.

22 Q. Okay. Who wrote this? You kept it? You made it?

23 A. I kept it, and I made it. I believe everything in here I
24 wrote.

25 Q. And for what purpose did you -- did you keep this?

1 A. We wanted to keep track of our time and the, you know,
2 amount of resources being exhausted dealing with this.

3 Q. While your recollection was fresh?

4 A. Yes.

5 Q. Who all was in that meeting on the 6th?

6 A. Are you referring to the first one?

7 Q. Well, first let me ask you, do you have an independent
8 recollection of who was in the Sunday morning meeting?

9 A. I believe on Sunday morning I talked to Jason Jedlinski. I
10 know I talked to him. I believe Jerry Del Core would have been
11 on the phone with me as well. I don't remember how many others
12 joined that call. We had so many calls about this, it's hard
13 to remember exactly who was and wasn't on every call. But we
14 had people we usually tried to keep in the loop on every one of
15 these.

16 Q. I see. All right. Then I'm not going to do that exhibit
17 right now then.

18 MR. SEGAL: Let's look at Government Exhibit 125, and
19 we're going to be just about done offering e-mails into
20 evidence, Your Honor, two more.

21 Q. Do you see 125?

22 A. Yep.

23 Q. Okay. From whom did you receive that e-mail?

24 A. Are you referring to the e-mail on the top?

25 Q. The one on December 8th.

1 THE COURT: Can you ask a foundational question?

2 BY MR. SEGAL:

3 Q. Whose e-mail account was this to, the December 8th e-mail?

4 MR. EKELAND: Objection, Your Honor.

5 THE COURT: What are --

6 MR. EKELAND: It's not clear which December 8th e-mail
7 counsel is referring to.

8 MR. SEGAL: Well, that's true. Excuse me, Your Honor.
9 Let me withdraw that.

10 Q. Looking at Government Exhibit 125, this is an e-mail chain;
11 is that correct?

12 A. That's correct.

13 Q. Are you in every entry on this e-mail chain?

14 A. I am.

15 Q. Okay. Let's start with the one that you sent.

16 To whom did you -- the bottom, to whom did you send that,
17 what address?

18 A. I sent it to the Cancer Man address.

19 Q. Did you receive a reply?

20 A. I did.

21 Q. And to whom did you relay that reply from Cancer Man?

22 A. I relayed that reply to the FBI, Jason Jedlinski, Andy
23 Friedman and the general manager and vice president, Jerry Del
24 Core.

25 Q. Okay.

1 MR. SEGAL: Your Honor, I offer 125 into evidence.

2 MR. EKELAND: Your Honor, same objection as to
3 relevancy as to the Cancer Man e-mails.

4 THE COURT: All right. Overruled. Exhibit 125, a
5 single page, is admitted.

6 (GOVERNMENT'S EXHIBIT 125, e-mail, 12/08/10, 4:44 p.m.,
7 ADMITTED INTO EVIDENCE.)

8 BY MR. SEGAL:

9 Q. On December 8th, did you think that you had the problem
10 solved?

11 A. No.

12 Q. Why?

13 A. We still hadn't figured out how they were getting into our
14 server.

15 Q. So were you bluffing here?

16 A. In what I wrote was I bluffing?

17 Q. Yeah.

18 A. No.

19 Q. What reply did you receive, and what concerns did it raise
20 to you as a businessman?

21 A. The reply I received was that they were going to continue,
22 quote, gathering information in the same manner.

23 Q. Could you stop spending time on this after Cancer Man had
24 said we will continue to gather information in the same manner
25 that we did last week and the week before?

1 MR. EKELAND: Objection, Your Honor.

2 THE COURT: Sustained.

3 BY MR. SEGAL:

4 Q. In your own view, what care did you have to take to address
5 this?

6 A. We needed to continue investigating. The e-mail I sent was
7 kind of probing to try to figure out whether what we had done
8 so far had worked or not and whether the problem really was
9 resolved. By the response, we knew that we might not be done
10 dealing with this.

11 Q. Okay. Who -- after -- who got Keys' job after December --
12 after October 28th?

13 MR. EKELAND: Objection, leading.

14 THE COURT: Overruled.

15 THE WITNESS: I changed the job. Ah, I gave a
16 different title to it, but --

17 THE COURT: Okay. So next question.

18 BY MR. SEGAL:

19 Q. Who did -- who was assigned Matthew Keys' responsibilities?

20 A. Sam Cohen.

21 Q. Did she work in that small newsroom you described?

22 A. She did. She sat probably three feet away.

23 Q. Did you see her having -- what problems, if any, did you
24 see her having with her computer around this time?

25 MR. EKELAND: Objection, leading.

1 THE COURT: Sustained. Sustained.

2 BY MR. SEGAL:

3 Q. What problems did she have at the time?

4 MR. EKELAND: Objection, Your Honor.

5 MR. SEGAL: What is not leading.

6 MR. EKELAND: He's assuming that there's --

7 THE COURT: You're assuming problems.

8 BY MR. SEGAL:

9 Q. What, if any, problems is she having at this time?

10 MR. EKELAND: Objection.

11 MR. SEGAL: And that's just not -- excuse me, Your
12 Honor.

13 THE COURT: Well, I'll allow you to answer the
14 question.

15 THE WITNESS: Sam Cohen was having issues accessing the
16 P2P content management system along with other password issues.

17 MR. EKELAND: Objection, Your Honor. The government is
18 calling Ms. Cohen as a witness. She can testify to what, if
19 any, problems she had on the --

20 THE COURT: I'm assuming that Mr. Mercer has testified
21 to what he observed. More precise questions in a clear, linear
22 fashion would facilitate the process here.

23 MR. SEGAL: Right.

24 Q. So, sir, how -- in the small newsroom, what, if any,
25 problems did you see Samantha Cohen experience?

1 A. If I may demonstrate, I watched her do this
2 [demonstrating].

3 Q. What was going on in her computer when that was happening?

4 A. She was having trouble logging in.

5 Q. Okay.

6 A. Sorry.

7 Q. I'm going to show you -- would you look, please, at
8 Government Exhibit 124.

9 THE COURT: This is a five-page exhibit?

10 MR. SEGAL: This is a two-page exhibit, Your Honor.
11 Excuse me. Five pages, yes. It has attachments.

12 Q. Can you see the first page there, sir?

13 A. Yes.

14 Q. Okay. What was Matthew Keys' -- do you recognize the
15 e-mail address that this is coming from here, the Matthew at
16 sactown media dot com?

17 A. I do.

18 Q. How do you know whose e-mail that was?

19 A. If I recall, I believe that as an e-mail Matthew had for a
20 long time, and I used it when I sent e-mails to his personal
21 e-mail.

22 MR. SEGAL: Offer into evidence 124, Your Honor.

23 THE COURT: All five pages?

24 MR. SEGAL: Yes.

25 THE COURT: Pages 3, 4 and 5 are not legible to the

1 Court.

2 MR. SEGAL: Or to me, but it purports attachments. I'm
3 not going to ask the jury --

4 THE COURT: So you're not relying on the content of the
5 attachments?

6 MR. SEGAL: Not at all.

7 THE COURT: Do they need to come in?

8 MR. SEGAL: Only that they exist.

9 THE COURT: All right. Objection to 124, five pages,
10 Mr. Ekeland?

11 MR. EKELAND: Your Honor, only to the last two, the
12 illegible pages. I don't know what the government means by
13 saying that they exist. They're illegible. But besides
14 that -- and they're also irrelevant. But besides that, we
15 don't object.

16 THE COURT: All right. They are referenced on the
17 second page of the exhibit. I'm going to allow all five pages
18 in, but the jury, if it inspects 125, will see that the last
19 three pages are not legible. I'm not allowing them in for any
20 content in these attachments. So 124 is admitted.

21 (GOVERNMENT'S EXHIBIT 124, e-mail, 12/12/10, 6:42 a.m.,
22 ADMITTED INTO EVIDENCE.)

23 MR. SEGAL: Okay. Let's go to the second page, please.

24 Now, once the jury has finished with this, I'll go to
25 the covering one.

1 Let's go to the first page, please, and look at the
2 bottom.

3 Q. What's gawker dot com; do you know?

4 A. As far as I recall, Gawker is a website that covers news
5 and information.

6 Q. And as a newsman, how interesting to you was this
7 information?

8 A. The information was interesting primarily because it
9 contained addresses that looked to be legitimate government
10 addresses, that kind of thing.

11 Q. Here it predicts some operations.

12 Are any of the entities related to the -- part of the
13 Tribune Company?

14 A. Yeah. As a Tribune employee, the mention of the Los
15 Angeles Times was obviously a huge concern.

16 Q. All right. Did the FBI ask you to make any recordings
17 around this time?

18 A. Yes.

19 Q. Of what?

20 A. Of the -- they asked me to try to record a phone call with
21 Matthew Keys.

22 Q. Did you succeed?

23 A. I did.

24 Q. Have you listened to a recording offered by -- by the
25 government to you?

1 A. Yes.

2 Q. Is it a fair and accurate recording of the conversation?

3 A. Yes, it is.

4 Q. Okay.

5 MR. SEGAL: Your Honor, I'd like to offer into evidence
6 and seek to publish Government Exhibit 201.

7 MR. EKELAND: Objection, Your Honor, for the grounds
8 previously stated to the Court on relevancy.

9 THE COURT: All right. That objection is overruled.
10 (GOVERNMENT'S EXHIBIT 201, recording of 12/12/10 phone
11 call between Keys and Mercer, ADMITTED INTO EVIDENCE.)

12 THE COURT: Are you asking to play that entire
13 recording at this time?

14 MR. SEGAL: Yes, Your Honor.

15 THE COURT: And what's the length?

16 MR. HEMESATH: 47 minutes, Your Honor.

17 THE COURT: All right. I don't believe we'll be able
18 to complete it by our lunch break, but you may begin.

19 So are you asking -- you're not going to stop and ask
20 questions, you simply want to play the recording?

21 MR. SEGAL: I mean, if things need explanation, I may
22 from time to time, but we're going to play the recording pretty
23 quickly.

24 THE COURT: All right. The Court is going to allow the
25 playing of the recording. The witness will remain in the

1 stand. If at any point you can't hear the recording, let me
2 know.

3 It's all audio, correct?

4 MR. SEGAL: There's a scroll that's not -- that we're
5 not submitting as evidence, but there are words that scroll at
6 the bottom to assist in listening. We can include it with that
7 or without it. We're not offering the transcript into
8 evidence.

9 THE COURT: All right. Then without the scrolling --

10 MR. SEGAL: Okay.

11 THE COURT: -- simply playing the audio. It's the
12 audio that is being admitted.

13 MR. SEGAL: Right. May I be seated while this is
14 happening, Your Honor?

15 THE COURT: You mean the scrolling?

16 MR. SEGAL: No, the playing if I'm not asking
17 questions. I might want --

18 THE COURT: Oh, are you asking if you can be seated?

19 MR. SEGAL: Yes.

20 THE COURT: Yes, you may.

21 MR. SEGAL: Thank you, Your Honor.

22 THE COURT: And can we stipulate that the Court
23 Reporter does not need to transcribe?

24 MR. SEGAL: Yes, Your Honor.

25 MR. EKELAND: Yes, Your Honor.

1 THE COURT: All right. Let me just ask the jury,
2 recognizing that for about 35 minutes you're likely to be
3 listening, would you like to just take a stretch break in place
4 before we start that? Let's just stretch in the courtroom.

5 Does anyone need a more full break assuming we go till
6 just before noon? Yes? I'm hearing some. Let's take a short
7 break before we start playing the audio.

8 During that break, please remember my admonitions.
9 Don't discuss the case. Don't think about where it's going.
10 Don't do any research of any kind. If anyone does attempt to
11 contact you during the break or if anyone violates my
12 admonition to not discuss the case, please let me know.

13 Let's take as quick a break as possible, and when
14 you're ready we'll come back to start listening.

15 All right. You can sit at the counsel table.

16 MR. SEGAL: Thank you, Your Honor.

17 THE COURT: Or stand at the counsel table.

18 (Jury not present.)

19 THE COURT: You can step down. Just be back in your
20 seat in 10 minutes.

21 THE WITNESS: Thank you.

22 THE COURT: Just briefly, counsel. I would just like
23 to give a short clarifying instruction to the jury. The Court
24 has not -- the government's position can't be that has proved
25 that Cancer Man, Walter Skinner is Matthew Keys at this point

1 in time.

2 MR. SEGAL: We're going to tie that up with a
3 confession at the end.

4 THE COURT: Well, I'm going to clarify the Court has
5 not admitted those because the Court is endorsing the position
6 that they came from Mr. Keys, that the government has to prove
7 that.

8 MR. SEGAL: That they're offered conditionally on
9 subsequent testimony?

10 THE COURT: Yes.

11 MR. SEGAL: All right. Thank you, Your Honor.

12 THE COURT: Yes.

13 MR. SEGAL: Do you --

14 THE COURT: And if I need to entertain a motion to
15 strike at some point, I will.

16 MR. SEGAL: What I wanted to ask before the jury went
17 out is, I'm -- and I don't know if it pleases the Court and
18 everybody else, but it may make sense to take an early lunch to
19 do that hour now and play the recording when we're all back.

20 THE COURT: It's a pretty long recording. So I think,
21 assuming we can get half of it done before lunch, that's not a
22 bad way to break it up.

23 MR. SEGAL: Okay. Thank you.

24 THE COURT: So we'll do that.

25 All right. Ten minutes.

1 (Recess taken.)

2 THE CLERK: Come to order. Court is back in session.

3 THE COURT: All right. Is the recording all teed up?

4 All right. Let's bring the jury in.

5 (Jury present.)

6 THE COURT: All right. You may be seated.

7 Welcome back, Ladies and Gentlemen.

8 We'll turn to the first part of this recording in just
9 a few seconds. I just want to make certain that you're clear,
10 in allowing the e-mails in, the e-mails to or from Cancer Man,
11 Walter Skinner, Fox Mulder, the Court is not saying that those
12 came from Mr. Keys. The government has to prove that, and
13 you'll get further instructions as to the proof. I'm letting
14 them in conditionally on the representation that additional
15 evidence is coming in. Ultimately it's for you to sort that
16 out with my further instructions at the end of trial.

17 All right. Mr. Segal?

18 MR. SEGAL: All right. Your Honor, I'd like to play
19 the recording, please.

20 THE COURT: All right.

21 MR. SEGAL: Let's do it, please.

22 (Government's Exhibit 201 played, not reported.)

23 THE COURT: All right. Let's stop there.

24 All right. We can start over with that, with
25 Mr. Mercer's full statement.

1 So, Ladies and Gentlemen, that brings us to the time
2 for our lunch break. We'll take a one-hour lunch break.
3 During the break, remember all of my admonitions not to discuss
4 the case amongst yourselves, not to do any research. If anyone
5 attempts to contact you, let me know.

6 We'll see you back here at 1:00 o'clock. Have a good
7 lunch.

8 (Jury not present.)

9 THE COURT: All right. Just briefly, we'll finish the
10 recording, another 25 minutes or so. How much longer then
11 would you have with Mr. Mercer, Mr. Segal?

12 MR. SEGAL: Maybe 25 minutes, Your Honor.

13 THE COURT: All right.

14 MR. SEGAL: So after this, we play the recording, and
15 then we're going to go on to a little bit of the documentation
16 of his time. And then I'd say about 20 minutes or half an hour
17 after the recording, but not more, in direct.

18 THE COURT: All right. So we should get to cross
19 before the -- before our break. I think we could run 1:00 to
20 3:00 unless the jury needs an additional break. So be ready
21 for cross.

22 MR. EKELAND: We absolutely are, Your Honor.

23 THE COURT: All right. Back at 1:00 o'clock. Back in
24 your seat, sir, at 1:00 o'clock.

25 All right.

1 MR. SEGAL: Thank you, Your Honor.

2 (Lunch recess taken.)

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1 SACRAMENTO, CALIFORNIA

2 TUESDAY, SEPTEMBER 29, 2015, 1:03 P.M.

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4 (Jury not present.)

5 THE CLERK: Come to order. Court is back in session.

6 THE COURT: You may be seated.

7 I need to discuss with the parties just briefly,
8 Ms. Haness, our current alternate No. 1, reported to
9 Ms. Schultz -- based on what I've heard so far, no intent to
10 violate court orders. But I gather she went to Starbucks over
11 the lunch break and was sitting reading and overheard some
12 people talking about what might have been the case, wasn't
13 certain; then heard more of the discussion and realized it was
14 a discussion about this case, and then she got up and left.

15 So no one approached her, it's more that she was
16 sitting in a place where she could overhear. Some of what she
17 overheard, as reported to me by Ms. Schultz -- and Ms. Haness
18 said she hasn't mentioned this to any other juror. Some of
19 what she overheard was a discussion where she believes someone
20 was saying I was sitting next to the defendant's mother, and we
21 were listening to a recording, and we're going to hear the rest
22 of the recording after lunch.

23 MR. SEGAL: So it's a spectator.

24 THE COURT: That's what we've heard.

25 So my question is, based on what I've heard, I think

1 the juror acted appropriately. I don't -- she was not
2 approached based on her report. She was sitting reading, and
3 the minute she realized it was about this case, she got up and
4 left.

5 So the question is, do you want to question her
6 further? Do you have concerns?

7 MR. EKELAND: I think we're okay, Your Honor. It
8 sounds like she honestly reported what occurred and that it's
9 really just that she overheard somebody talking about what was
10 already played in open court. The defense doesn't have an
11 issue with that, Your Honor.

12 THE COURT: All right. All right. She is the first
13 alternate. If we want to revisit it at some point, if she ends
14 up on the jury, we can do that.

15 All right. Did I accurately report the substance of
16 what you told me, Ms. Schultz?

17 THE CLERK: Yes, Your Honor.

18 THE COURT: All right. Let's bring the jury in.

19 (Jury present.)

20 THE COURT: All right. You may be seated.

21 Welcome back, Ladies and Gentlemen. We hope you had a
22 good lunch.

23 We're ready to pick up now and continue playing that
24 recording. So, Mr. Segal, you have it teed up where we are
25 with the beginning of Mr. Mercer's --

1 MR. SEGAL: Yes, Your Honor. I'd like to back it up
2 just a few seconds. I'm not sure if I can hit it exactly when
3 he starts talking.

4 All right.

5 (Government's Exhibit 201 played, not reported.)

6 MR. SEGAL: Thank you, Your Honor.

7 THE COURT: Do you have a question, Mr. Segal?

8 MR. SEGAL: I do.

9 THE COURT: Resuming now the direct examination in the
10 courtroom.

11 MR. SEGAL: Thank you, Your Honor.

12 BRANDON MERCER, GOVERNMENT'S WITNESS, PREVIOUSLY SWORN

13 DIRECT EXAMINATION (Continued)

14 BY MR. SEGAL:

15 Q. What did -- what kind of measures did you take to keep
16 track of your time as you were responding to this incident in
17 December 2010?

18 A. I wrote notes to myself and occasionally e-mailed myself,
19 ah, how much time I had spent at something. And then -- that
20 was for my time.

21 Q. What did you ask other people in the newsroom to do?

22 A. I asked them to do the same, usually e-mail me how much
23 time they spent working on this talking to viewers or in
24 meetings or, you know, dealing with the -- the content
25 management system.

1 Q. What did you do with those e-mails that you received?

2 A. I kept them all in a folder to keep a record. I wanted to
3 have a good legal document in case we needed it. And then I
4 also entered the times into a spreadsheet.

5 Q. Do you recall -- going back to the phone call, do you
6 recall the date when you made that call when you finally
7 succeeded in talking to him?

8 A. I don't recall the exact date. I think it was a Sunday
9 because I remember going back to the newsroom and telling my
10 wife I was then going to work.

11 Q. A Sunday.

12 So let me -- is there -- do you recall you were talking
13 about an e-mail that he had sent to you about the group? Would
14 looking at that help you place the phone call?

15 A. Yes.

16 Q. Okay. Would you look at Government Exhibit 124, please,
17 which is -- actually let's put it up. It's in evidence. Put
18 124 up, page 1.

19 Okay. So the e-mail is dated Sunday, December 12th. Is
20 that the Sunday when you think this happened?

21 A. Yeah. I believe I was checking e-mail on a Sunday and saw
22 this and came in and made the phone call.

23 Q. Okay. Let's look at -- instead of your e-mail to the FBI,
24 let's look at Mr. Keys' e-mail to you at 5:45 p.m. on Sunday.

25 So relative to that, would the call have been before or

1 after the call?

2 A. I believe the call was after that.

3 Q. Okay.

4 A. Yeah.

5 Q. Now, getting back to how you documented your time, once
6 people followed your instructions and e-mailed things to you,
7 what did you do with the information in those e-mails?

8 A. I took the e-mail and put it into a spreadsheet.

9 Q. Okay. Let's look at -- can you look, please, at Government
10 Exhibit 117, please.

11 Is that the e-mail that you sent?

12 A. That is an e-mail I sent about tracking hours.

13 Q. Okay. And at the bottom there, what do you give as an
14 example?

15 A. Would you like me to read it?

16 Q. Well, just is that your example of recording your time?

17 A. Yes.

18 Q. And have you considered whether the dates on that are
19 correct recently?

20 A. I -- I believe they're correct.

21 Q. Okay. Did you write those things down at or about the time
22 that they were occurring?

23 A. The things in the e-mail here?

24 Q. Yeah.

25 A. I don't recall when I wrote them down.

1 Q. Well, look at the date on the e-mail.

2 A. I believe I wrote those the day that I sent this e-mail.

3 I -- I may have tracked some of the hours the day before. I
4 don't recall for sure.

5 Q. Okay. Was your recollection fresh in your mind at the time
6 you wrote these?

7 A. Yes.

8 Q. Okay. And so how many hours do you think you spent on
9 November 30th?

10 A. Well --

11 Q. Is this when the first e-mail happened?

12 A. I believe it was.

13 Q. So if the first e-mail happened December 1st, is it
14 possible these are all a day off?

15 A. That is possible. I don't remember the --

16 Q. Okay.

17 A. -- exact days on this.

18 Also, I believe there were different time zones.

19 Q. Oh, all right.

20 As a recorded recollection, would you read to the jury your
21 entry for November 30th.

22 A. Yeah. 4:00 p.m. to 6:00 p.m. e-mailing back, coordinating
23 with Chuck, Troy, Andy, Jason and Sam.

24 Q. All right. Can you tell the jury, please, who those people
25 are that you've indicated by first name.

1 A. Yeah. Chuck Sennet, S-E-N-E-T.

2 Q. That's in-house counsel for Tribune Company?

3 A. Yes. Troy Conhain, executive producer.

4 Q. In Sacramento?

5 A. Yes.

6 Q. Okay.

7 A. Andy Friedman, part of the digital team at Tribune.

8 Q. At Tribune in Chicago?

9 A. Yes.

10 Q. All right.

11 A. Jason Jedlinski, same. And Sam Cohen was my executive
12 producer for digital.

13 Q. Okay. And what about after that?

14 A. The next entry, 10:00 p.m. to 11:45 e-mailing back and
15 coordinating with the newsroom.

16 Q. And after that?

17 A. 10:00 a.m. to 10:30 clearing e-mails and sorting them.

18 Q. Related to these incidents?

19 A. Yes.

20 Q. Okay. And after that?

21 A. 4:00 p.m. to 5:00 p.m. talking with FBI and Jason
22 Jedlinski.

23 Q. Would you look at Government Exhibit 119, please.

24 A. Okay.

25 Q. How much time did Jason Jedlinski e-mail you he put in?

1 MR. EKELAND: Objection, hearsay, Your Honor.

2 THE COURT: Sustained.

3 BY MR. SEGAL:

4 Q. Would you look at Government Exhibit 129, please. I'm
5 sorry. 121.

6 A. Okay.

7 Q. Do you see that?

8 A. Yes.

9 Q. Who wrote that e-mail?

10 A. That was an e-mail I sent to myself as a reminder to put in
11 the spreadsheet when I got to work.

12 Q. While your recollection was fresh?

13 A. Yes.

14 Q. What does the subject line say?

15 A. Subject line, Fox Mulder, two hours last night, 10:30 p.m.
16 to 12:30 a.m. And another 30 this morning responding to
17 e-mails.

18 Q. Okay. Did you kind of drop off in documenting these
19 specifically?

20 A. Yes.

21 Q. Well, in December, who was the point person in dealing with
22 this issue?

23 A. At the local level or --

24 Q. At the local level.

25 A. I was the point person at the local level.

1 Q. Okay. And do you have -- do you have an estimated range,
2 the most and the least, that you could have worked on this
3 issue in December?

4 MR. EKELAND: Objection, calls for speculation.

5 THE COURT: Just yes or no to that question.

6 THE WITNESS: Can you repeat the question?

7 BY MR. SEGAL:

8 Q. What's your best recollection?

9 THE COURT: That wasn't the question.

10 BY MR. SEGAL:

11 Q. Do you have an estimated range of the most and the least
12 time that you could have worked on this issue in December of
13 2010?

14 A. Yes.

15 Q. What is the least amount of time that you think you put
16 into this?

17 A. In December --

18 MR. EKELAND: Objection, Your Honor, speculation.

19 THE COURT: Overruled. You may answer.

20 THE WITNESS: In December, I spent a great deal of time
21 actually physically working the problem and also a great deal
22 of time thinking about the problem. For you lawyers, I call
23 those billable hours, so there's a range on it.

24 I know I spent easily 25 or 30 hours when it first
25 happened. Ah, I didn't keep good documentation after that

1 initial wave of all of us spending all of our energy on it, so
2 later in December I don't have as good a documentation on it.

3 But I believe anywhere from, you know, as high as 40 or
4 even 60 --

5 MR. SEGAL: It's -- I'm sorry. The question is what's
6 the least amount of time you could have spent.

7 THE COURT: I think that's been answered, so next
8 question.

9 MR. SEGAL: Okay.

10 Q. So in 2010, what was your -- what was your salary, sir?

11 A. I don't recall my exact salary. It was around 130,000. I
12 had gotten a raise at some point. I don't remember when the
13 raise triggered.

14 Q. Okay. Did they give you a couple weeks of vacation a year?

15 A. Yes.

16 Q. So a hundred -- and how many hours a week were you expected
17 to work?

18 A. I was a news director, so --

19 Q. How much did the salary count for supposedly?

20 A. Well, the salary just counted for the year. It didn't
21 count for the hours.

22 Q. Okay. So technically a 40-hour week?

23 A. For mathematical purposes, yes.

24 Q. Okay. And have you -- did you get benefits as well?

25 A. Yes.

1 Q. Health?

2 A. Yes.

3 Q. Okay. Did you guys have 401(k) matching or anything like
4 that?

5 A. Yes.

6 Q. Okay. So -- but without all the benefits, 130,000 divided
7 by the 50 weeks that you didn't have vacation, divided by 40
8 hours a week would be a fair formula?

9 MR. EKELAND: Objection.

10 THE COURT: Sustained.

11 BY MR. SEGAL:

12 Q. What's your time worth, sir?

13 A. That's hard to answer as a simple question. But as far as
14 Fox 40 was concerned, I would say it's about sixty -- 63 or 64
15 dollars an hour was what I used.

16 Q. How did you come up with that?

17 A. I divided my salary by 2080, which was a number we used
18 internally for computing hourly salaries for salaried
19 employees.

20 Q. Okay. All right. Thank you.

21 Now when you were working this case, when you were working
22 the response to the e-mail, which of your job
23 responsibilities -- which of your ordinary job responsibilities
24 were you not tending to?

25 A. I did not have my normal time to look over the rundowns. I

1 missed several newsroom meetings. This was -- this was my job,
2 you know, 24/7 from when it began to when we felt like the --
3 I'm not sure the best way to characterize this -- the e-mails
4 and agenda from this Cancer Man had waned. It was really my
5 job 24/7. I tried to do some of my normal duties, but I didn't
6 get to do that.

7 Q. Okay. Would you look at Government Exhibit 126, please.

8 A. Okay.

9 Q. The e-mail at the bottom, is that an e-mail you received?

10 A. It is.

11 Q. From whom did you -- from what e-mail address did you
12 receive it?

13 A. From the Cancer Man e-mail address.

14 MR. SEGAL: Offer 126 into evidence. This is my last
15 exhibit, Your Honor, with this witness.

16 THE COURT: Mr. Ekeland?

17 MR. EKELAND: Same objection as before as to the
18 relevancy as related to the Cancer Man e-mails, Your Honor.

19 THE COURT: All right. The objection is overruled.
20 126 is admitted.

21 (GOVERNMENT'S EXHIBIT 126, e-mail, 12/20/10, 1:15 p.m.,
22 ADMITTED INTO EVIDENCE.)

23 BY MR. SEGAL:

24 Q. Had the major Cancer Man e-mails stopped by December 20th?

25 A. I believe they had, yes.

1 Q. What was the only effect that this had?

2 MR. EKELAND: Objection.

3 THE COURT: What's the objection?

4 MR. EKELAND: Leading, Your Honor.

5 THE COURT: Overruled. You may answer if you're able.

6 THE WITNESS: The effect this had was to, ah, basically
7 signify we weren't done. The issue was still going on.

8 MR. SEGAL: May I have a moment, Your Honor?

9 THE COURT: You may.

10 (Government counsel conferring.)

11 BY MR. SEGAL:

12 Q. In your opinion, was your response to this reasonable?

13 A. Ah, my response --

14 MR. EKELAND: Objection, Your Honor, calls for
15 speculation.

16 THE COURT: Sustained.

17 MR. SEGAL: He's -- this was covered in the motions in
18 limine hearing, Your Honor. He's -- I'm asking if his own work
19 was reasonable.

20 THE COURT: I understand that, but I'm sustaining the
21 objection.

22 MR. SEGAL: Okay.

23 Q. What was at stake for you as you dealt with these?

24 A. Dealing with the e-mails in general, what was at stake was
25 basically the reputation of our company. We were building, you

1 know, everything was kind of new and reset at Fox 40, so some
2 of the allegations in these e-mails were, ah, spreading what
3 were untrue or gross exaggerations about key initiatives that
4 we had spent hundreds, thousands of man hours putting together.

5 Ah, the e-mails discussed journalistic practices and
6 didn't paint the full story. The e-mails described promotional
7 activities. The e-mails described what is today a standard
8 practice of having viewers log onto our website, and did it in
9 such a way as to terrify our viewers who were in the system.

10 The e-mails reference the million dollar cash grab,
11 which was an event we did. You know, we spent a lot of money
12 and a ridiculous amount of time doing this. It's a typical May
13 sweep stunt. You know, it references all of those things that
14 we were doing to build the station, so this was very critical.

15 Q. And how, if at all, did it relate to the security of your
16 network?

17 A. That was a scary lingering issue. It -- it meant that the
18 security of our network -- the network was not secure and that
19 at any point -- we felt that at any point somebody could take
20 over our website and put up whatever message they wanted,
21 create fear, create panic or take over other entities' websites
22 like the L.A. Times that has a bit more traffic than Fox 40 dot
23 com.

24 MR. SEGAL: Nothing further on direct, Your Honor.

25 Thank you.

1 THE COURT: All right. We'll turn now to
2 cross-examination. Would the jury be all right going to our
3 3:00 o'clock break time for today or do you want to break
4 before 3:00 o'clock? Anyone who will need a break before 3:00,
5 let me know. And it's entirely your choice on this.

6 So we could go till 3:00? All right. Let's go
7 straight into cross, then, and see how far we get with that.

8 Mr. Ekeland, you're doing the cross-exam?

9 MR. EKELAND: Yes, Your Honor.

10 THE COURT: All right.

11 If anything changes, and you find yourself needing a
12 break, let me know. But we'll try to power through.

13 MR. EKELAND: So, Your Honor, I'm having problems with
14 my video here.

15 (Pause in proceedings.)

16 THE COURT: Is this admitted?

17 MR. EKELAND: May I proceed, Your Honor?

18 THE COURT: You may.

19 CROSS-EXAMINATION

20 BY MR. EKELAND:

21 Q. Mr. Mercer, my name is Tor Ekeland. You probably know at
22 this point, I represent the defendant Matthew Keys along with
23 Jay Leiderman and Mark Jaffe.

24 So I want to start by asking you a few questions about your
25 relationship with the government. And when I say the

1 government, I mean the Federal Bureau of Investigation and the
2 United States Attorney's office.

3 Now you testified that you essentially started talking to
4 the FBI in relation to the matters you're testifying about here
5 today in the beginning of December 2001, correct?

6 A. I -- I don't remember the first -- I may have contacted the
7 FBI earlier. I know I did talk to them in the early part of
8 December also.

9 Q. Okay. I'm showing you what is in evidence as Government's
10 Exhibit 115.

11 MR. EKELAND: Ms. Schultz, could we please publish to
12 the jury as well.

13 Q. That is the Google voice mail message that you testified
14 you received, correct?

15 A. Correct.

16 Q. And that is a message from John Cauthen, FBI Special Agent
17 John Cauthen, correct?

18 A. Correct.

19 Q. It says -- you see where it says, hello, Brandon, my name
20 is John from the FBI, and I am calling you at the request of
21 Steve Dupre, and there is the phone number?

22 That's a reference to Special Agent John Cauthen, correct?

23 A. Yes.

24 Q. And Steve Dupre is a special agent for the FBI as well,
25 correct?

1 A. I don't know his title. I believe he was the public
2 information officer. He may have been an agent as well.

3 Q. Okay. But Steve Dupre is somebody at the FBI that you
4 talked to, correct?

5 A. That's correct.

6 Q. And the date of this e-mail is December 2nd, 2010, correct?

7 A. Correct.

8 Q. Right.

9 So -- and it's safe to say that's when you received that
10 e-mail, correct?

11 A. Correct.

12 Q. And this is in response to you calling the FBI about these,
13 quote/unquote, Cancer Man e-mails that Fox 40 had received,
14 correct?

15 A. Yes. I contacted the FBI at this point about that.

16 Q. Right.

17 And after you received this e-mail, it's fair to say that
18 you cooperated with the FBI in the investigation that has led
19 us to this court case today, correct?

20 A. Yes.

21 Q. Okay. And as part of that investigation, you participated
22 in recording that phone call we all just listened to in court
23 at the request of the FBI, correct?

24 A. I don't recall.

25 Q. You don't recall?

1 You don't recall whether the FBI asked you to record the
2 phone call with Mr. Keys that we just heard here?

3 A. I don't recall if it was the FBI's idea or my idea.

4 Q. Right.

5 But regardless, you did give the FBI a copy of that phone
6 call, correct?

7 A. Yes.

8 Q. All right. And as part of your cooperation with the
9 government, you have met with the United States Attorney's
10 office at least once to go over this case, correct?

11 A. Correct.

12 Q. And as part of your meetings with the United States
13 Attorney's office, you've reviewed documents related to this
14 case, correct?

15 A. Yes.

16 Q. And as part of your meetings with the United States
17 Attorney's office, you've discussed the fact that you would be
18 testifying in court today, correct?

19 A. Yes.

20 Q. Okay. And how many times did you meet with the United
21 States Attorney's office to discuss your testimony?

22 A. I -- how would you describe meeting?

23 Q. Either by talking to the government on the telephone,
24 meeting in person, or communicating via e-mail, chat or any
25 other forms of communication.

1 A. Okay. About the testimony?

2 Q. About the testimony, your testimony here today.

3 A. Ah, probably four times maybe.

4 Q. Four times. Okay.

5 And isn't it true at one point when you were communicating
6 with the government, you told the government that you would
7 like to see Mr. Keys convicted in this case?

8 A. Yes.

9 Q. Okay. I want to move on from this subject area, and I want
10 to just start with your -- back up a little bit. Some of this
11 was covered in the testimony, but I want to start with your
12 interaction with Mr. Keys and Fox 40. Okay?

13 And I want to just go back to 2010. Or actually let me
14 back up before -- no, let's go to 2010.

15 A. I'm sorry. May I correct something?

16 The earlier question about the number of meetings, e-mails,
17 phone calls about testimony may have been higher than four if
18 we include e-mails. I don't recall exactly how many e-mails
19 were exchanged planning this. But there were some meetings,
20 some e-mails, and some phone calls.

21 Q. The long and short of it is, though, you discussed your
22 testimony here today with both the FBI and the United States
23 Attorney's office, correct?

24 A. Yes.

25 Q. Okay. Is there anything else you would like to say about

1 that?

2 A. No. I just wanted to make sure that the number four --

3 Q. Appreciate that.

4 A. -- wasn't --

5 Q. Appreciate that.

6 I just want to switch to your interaction with Mr. Keys at
7 Fox 40.

8 You were the -- you testified you were the news director at
9 Fox 40, correct?

10 A. That's correct.

11 Q. And that's the Fox 40 KTXL station here in Sacramento?

12 A. That's correct.

13 Q. And as part of your job as the news director, you were
14 involved in hiring and firing people at Fox 40, correct?

15 A. Yes.

16 Q. And one of those people that you hired is Mr. Keys; is that
17 correct?

18 A. Yes.

19 Q. And you also hired several other people. And during --
20 sorry. Withdrawn.

21 During the first two years of your tenure at Fox 40, you
22 fired other people besides Mr. Keys, correct?

23 MR. SEGAL: Objection, relevance.

24 THE COURT: Overruled.

25 THE WITNESS: I don't know what you characterize by the

1 word "firing." I'm not sure how to answer the question.

2 BY MR. EKELAND:

3 Q. But during your first two years -- or during your tenure at
4 Fox 40 and in your role as news director, you terminated people
5 from their employment other than Mr. Keys?

6 A. Yes. Terminating somebody from their employment for
7 whatever reason was part of my duties.

8 Q. Right. That was part of your duties.

9 So Mr. Keys wasn't the only person that -- well, withdrawn.

10 So -- and also as part of your tenure there, several
11 journalists left the station during your tenure there
12 voluntarily because they no longer wanted to work there?

13 A. What's the question?

14 Q. The question is whether, during your tenure as a news
15 supervisor at Fox 40, did journalists leave Fox 40 voluntarily
16 because they no longer wanted to work at Fox 40?

17 A. I don't -- I don't know. I can speculate why they left.
18 But, yes, some journalists left.

19 Q. There are journalists that did leave during your tenure?

20 A. For various reasons, yes.

21 Q. Yes.

22 And those were journalists you supervised, correct, in your
23 capacity as a news director?

24 A. Yes.

25 Q. Okay. And just drawing your attention to -- you've already

1 testified about this briefly. Drawing your attention to
2 October 2010.

3 Mr. Keys was working for you then?

4 A. Yes.

5 Q. And on or about October 21st, 2010, you testified that
6 there was a fire at a local shopping mall, which I believe you
7 said was the Roseville Galleria; is that correct?

8 A. I don't recall the exact date, but it was in October, yes.

9 Q. So say the last part of October, there was a fire at the
10 Roseville Galleria.

11 And Fox 40 covered this fire as breaking news, correct?

12 A. Yes, we did.

13 Q. And you were -- this news coverage -- you were on the air
14 continuously covering this fire; is that correct?

15 A. No.

16 Q. No.

17 But you did cover it as part of a breaking news story?

18 A. Yes.

19 Q. And --

20 A. We covered it continuously, then we took a break when the
21 fire was out, and then continued again when the fire flared
22 back up.

23 Q. But fair to say it was a big story for Fox 40, correct?

24 A. Yes.

25 Q. All right. And isn't it true that Mr. Keys provided Fox 40

1 with the name of a suspect who potentially was involved in the
2 starting of that fire?

3 A. I don't know if he provided us with the name of a suspect.
4 I know he was involved in us tracking down the details of it,
5 including who the suspect was. I don't know if the name came
6 from him or another source.

7 Q. Okay. But Fox 40 did publish on the air the name of a
8 suspect in -- who may have caused the fire; is that correct?

9 A. I believe we did. Well, certainly at some point, and I
10 believe that day also.

11 Q. Uh-huh.

12 And Fox 40 did -- attributed Mr. Keys as one of the sources
13 for the name of that subject?

14 A. I don't recall what was said on the air.

15 Q. But, regardless, Mr. Keys became upset about the publishing
16 of that suspect's name on air, correct?

17 A. Yes.

18 Q. And that's what precipitated that loud discussion in the
19 newsroom, as you said, because he was upset because he felt
20 that it wasn't professional for Fox 40 to --

21 MR. SEGAL: Objection, hearsay.

22 MR. EKELAND: Effect on the listener, Your Honor.

23 THE COURT: Overruled.

24 BY MR. EKELAND:

25 Q. So Mr. Keys was -- the heated discussion in the newsroom

1 was precipitated by the fact that Mr. Keys felt that you had,
2 ah, improperly and unprofessionally published the name of the
3 arson subject related to the Roseville Galleria fire, correct?

4 MR. SEGAL: Objection, relevance to those words effect
5 on this listener.

6 THE COURT: Overruled. You may answer.

7 THE WITNESS: The question is whether Keys was upset
8 about us naming the suspect on the air?

9 MR. EKELAND: Yes.

10 THE WITNESS: Yes.

11 BY MR. EKELAND:

12 Q. Okay. And then that's what precipitated Mr. Keys leaving
13 the station, correct? Leaving Fox 40 that day, correct?

14 A. I asked him to leave.

15 Q. Right.

16 You asked him to leave, and he did, correct?

17 A. I'm sorry. I asked --

18 Q. I'm sorry.

19 You asked Mr. Keys to leave, correct?

20 A. Yes.

21 Q. And Mr. Keys did leave Fox 40 that day, correct?

22 A. Yes.

23 Q. And then Mr. Keys tweeted something on Twitter to the
24 effect that he felt Fox 40's coverage as a news station was
25 unprofessional, correct?

1 A. Your order is incorrect on that.

2 Q. Oh, Mr. Keys tweeted before your newsroom altercation, but
3 he did so. So Mr. Keys tweeted that he felt that Fox 40 had
4 been unprofessional in publishing the name of the arson subject
5 before your heated discussion in the newsroom?

6 A. I don't recall exactly the words of the tweet, but
7 something about our coverage was tweeted before we had the
8 discussion.

9 Q. But we -- you'd agree that Mr. Keys did tweet something to
10 the effect that Fox 40 was unprofessional in its coverage by
11 releasing the name of the arson suspect, correct?

12 A. I don't know about the last part of that. I -- my memory
13 is that he tweeted something about, ah, we have the worst
14 coverage or something like that. I'm embarrassed about my
15 station, something to that effect.

16 Q. Right.

17 And so that's what upset you and -- that's what upset you,
18 correct?

19 A. No.

20 Q. No, it didn't upset you.

21 The tweet -- the fact that Mr. Keys had, ah, tweeted that
22 the station was -- he was embarrassed by what the station was
23 publishing or reporting about the fire didn't upset you?

24 A. I don't think upset is the right word. It wasn't -- it was
25 improper and didn't follow our policy.

1 Q. Okay. But, regardless, after this heated conversation and
2 after this tweet, you asked Mr. Keys to leave, to go home for
3 the day, correct?

4 A. That's correct.

5 Q. And he did.

6 A. That's correct.

7 Q. And I think you testified that this was, like, later in the
8 week.

9 Do you recall what day of the week this was?

10 A. I don't remember exactly. Maybe Thursday.

11 Q. But I think you testified that you -- Mr. Keys came in on
12 Sunday and took his personal belongings out; is that correct?

13 A. That's correct.

14 Q. And that was -- that was the last time Mr. Keys was
15 actually at the station physically?

16 A. I -- I don't know when he accessed the station. He may
17 have gone back Sunday. But on Monday morning I knew that he
18 was at the station on Sunday.

19 Q. Okay. But after he grabbed his personal belongings after
20 this altercation, you don't recall him being back at the
21 station after that?

22 A. That's correct.

23 Q. And then Mr. Keys' employment with Fox 40 ended, correct?

24 A. His employment ended, yes.

25 Q. Okay. Excuse me for one moment.

1 I want to just turn again to your interaction with the FBI,
2 particularly Special Agent John Cauthen, in December of 2010.

3 Towards the end of your direct testimony with the
4 government, the government showed you some exhibits where you
5 essentially said you sent -- you essentially sent an e-mail to
6 the Fox 40 newsroom stating that everybody needed to track
7 their time, and that you needed to get an amount over \$5,000 in
8 costs related to your response to the Cancer Man e-mails in
9 order for the FBI to prosecute; is that correct?

10 A. Yes.

11 Q. Uh-huh.

12 And it's fair to say that from the moment that the FBI told
13 you that or Special Agent Cauthen told you that you needed to
14 reach this \$5,000 threshold to prosecute, you were anxious to
15 reach that threshold, correct?

16 A. Well, we wanted to make sure that we were counting our
17 hours. And, yeah, we knew we had already reached that
18 threshold early on, but we, you know, counted our hours.

19 Q. Uh-huh.

20 And --

21 MR. SEGAL: That's not in evidence.

22 THE COURT: Is this exhibit --

23 MR. EKELAND: I want to publish to the jury. Is
24 that -- that was -- can we --

25 THE CLERK: There's a witness binder up here.

1 MR. EKELAND: Okay. That's fine. Yes, you can hand
2 him the witness binder.

3 THE CLERK: There's a different exhibit binder, so he
4 can refer you to the exhibits in there.

5 (Pause in proceedings.)

6 MR. EKELAND: Okay. Mr. Mercer, I apologize. There's
7 a number of tabs in there, even though the exhibits are
8 lettered. But if you could take a look at what is Exhibit E,
9 which I believe is tab 4 or 5.

10 THE COURT: Tab 5 in the Court's binder.

11 THE WITNESS: I went too far.

12 Okay. It's tabbed, it just wasn't sticking out far
13 enough.

14 MR. EKELAND: Sorry. I know. That's me not having a
15 legal assistant. I'm sorry.

16 THE WITNESS: I'll be faster next time.

17 MR. EKELAND: Could you just take a look at that
18 e-mail. Do you see -- part of it is redacted, but I just want
19 to draw your attention to the top of it.

20 Q. You see it's dated December 2nd, 2010, at 5:31 p.m.?

21 A. Yes.

22 Q. And that is an e-mail from Charles Sennet, who I believe
23 you previously identified as Tribune's -- one of Tribune's
24 lawyers, correct?

25 A. One of many, yes.

1 Q. One of them.

2 And that's to you, and the subject matter is re: FBI,
3 right?

4 A. Correct.

5 Q. And you have no reason to believe that that's not an e-mail
6 chain to you -- between you and Mr. Sennet; is that correct?

7 A. I remember this e-mail chain very well.

8 Q. You remember this e-mail chain very, very well.

9 MR. EKELAND: So, Your Honor, at this point in time
10 we'd like to move Defendant's Exhibit -- what's been marked as
11 Defendant's Exhibit E into evidence.

12 THE COURT: Any objection?

13 MR. SEGAL: I don't think so, but my copy is earlier
14 from the redaction, so I just want to make sure that I see what
15 Mr. Ekeland is working with.

16 MR. EKELAND: Oh, I'm sorry. I apologize.

17 (Counsel conferring.)

18 MR. SEGAL: No objection, Your Honor.

19 THE COURT: All right. Exhibit E is admitted.

20 (DEFENDANT'S EXHIBIT E, Brandon Mercer e-mail re:
21 loss amount, ADMITTED INTO EVIDENCE.)

22 MR. EKELAND: Can we -- Ms. Casey, may we publish this?

23 THE COURT: You may. Once an exhibit is --

24 MR. EKELAND: Oh, it is on. I'm sorry. I didn't -- my
25 apologies, I didn't realize.

1 Q. So directing your attention to the e-mail in the middle
2 that is dated December 2nd, 2010, at 7:10 p.m. Do you see
3 that?

4 A. Yes.

5 Q. Okay. And this is part of a larger chain that we've
6 redacted part of for attorney-client privilege, but you said:
7 By the way, if you bill a thousand dollars an hour, that would
8 help us get this prosecuted.

9 Is that correct, that's you saying that?

10 A. Yes.

11 Q. And you're saying that to one of the lawyers for Tribune
12 Company, correct?

13 A. Yes.

14 Q. And essentially it's fair to say that what you're saying
15 there is run up the bill on this so we can get this prosecuted,
16 correct?

17 A. No.

18 Chuck and I used to send jokes back and forth, or actually
19 we have even after I left Tribune. He used to talk to me for a
20 very, very long time about a simple legal matter, so I would
21 give him a hard time about how much he bills per hour because I
22 feel like he needs to spend his time on other --

23 Q. So it's your testimony that bill a thousand dollars an hour
24 that would help us get this prosecuted is a joke?

25 A. Yes.

1 Q. And it's -- and it has nothing to do with this
2 investigation into the Cancer Man e-mails; is that your
3 testimony?

4 A. What do you mean by it?

5 Q. By this -- by that sentence, by the way if you bill a
6 thousand dollars an hour, that would help us get this
7 prosecuted, that's just a joke to you?

8 A. Yes.

9 Q. So it's a joke to you, Mr. Mercer, that somebody is going
10 to be investigated by the federal government and potentially
11 charged with felonies? That's something you joke about?

12 A. No. This was a joke about how much Chuck bills an hour and
13 I think he's overpaid. Still do, by the way.

14 Q. Uh-huh. So -- moving on.

15 So you understand, it's your understanding that at this
16 point, very early on -- this is December 2nd, 2010, you've just
17 had contact with the FBI. You're joking with general counsel
18 to Trib Co about bill a thousand dollars an hour to reach a
19 \$5,000 threshold, and you're also sending e-mails out to the
20 newsroom to tell everybody to track their time, correct?

21 That's a fair assessment of what's happening on December 2nd,
22 2010?

23 A. This was -- this was before I realized that you should
24 probably not put jokes in e-mails.

25 Q. Right. But is the question I just asked you a fair

1 assessment of what was happening at that time?

2 MR. SEGAL: Objection, compound.

3 THE COURT: Overruled.

4 THE WITNESS: I think so.

5 MR. EKELAND: Okay.

6 Q. So -- excuse me for one moment.

7 So you sent out these e-mails asking everybody to track
8 their time. But at this point in time, nothing had happened to
9 the Fox 40 website, correct?

10 A. I -- I wouldn't have any way of knowing exactly what
11 happened to the website. It's monstrously complex, so I don't
12 know the answer to that.

13 Q. So you don't know -- you can't tell me at this point in
14 time whether or not there was any say defacement of the
15 website?

16 A. What I can answer, if it's okay, is -- your question was
17 did anything happen to the website. I don't know. Did we
18 notice anything happening to deface the Fox 40 website? The
19 answer is no.

20 Q. Okay. So it's your testimony essentially that there -- let
21 me be more specific.

22 To the best of your recollection in December 2010, were you
23 aware of any hacking to the Fox 40 website?

24 A. At this time, no.

25 Q. Okay. And -- all right. One moment.

1 So --

2 A. Wait. I'm sorry. Let me clarify.

3 When you said website, I was thinking of the public facing
4 part of it. I don't know if you're referring to the back end
5 of the website or the public facing. I was referring to the
6 public facing part of the website.

7 Q. Okay.

8 A. I apologize for that.

9 Q. No, that's okay.

10 So it's your testimony that there was -- you were aware of
11 no hacking to the public facing side of the website; is that
12 correct?

13 A. It would be easier if I could explain more about how the
14 website works. I was not aware --

15 THE COURT: Just answer the question. The attorney
16 will ask you questions.

17 THE WITNESS: Okay. I was not aware of any hacking on
18 the public facing part of the website.

19 MR. EKELAND: Uh-huh.

20 THE WITNESS: By hacking, I mean changing it.

21 MR. EKELAND: About -- so you're not aware of any
22 changes to the Fox 40 website.

23 Q. And I think this brings up the fact that I think you
24 testified, you said something about there was an e-mail
25 database that had been -- with Fox 40 subscribers that had been

1 copied, correct, that somebody had downloaded?

2 A. That was what we were being told. I don't remember when
3 that e-mail came through, but --

4 Q. But that's what you were told.

5 But you actually never looked at server logs at the time to
6 establish whether or not this e-mail address list of Fox 40
7 viewers had been done downloaded, correct?

8 A. I -- I did not look at server logs myself.

9 Q. Uh-huh.

10 And you testified that -- sorry. Let me back up since
11 we're going to be talking about this.

12 This was the -- I believe this was referred to as the Green
13 Links database, e-mail database; is that correct?

14 A. There's a few different databases. I'm not sure where the
15 Green Links database and this intersected.

16 Q. But the iPad contest where you were giving away iPads for
17 people who registered with the Fox 40 news site, that was a --
18 you used the Green Links vendor to register subscribers for
19 that contest; is that correct?

20 A. They were a vendor, yes.

21 Q. They were a vendor.

22 And so if I wanted to enter the Fox 40, you know, iPad
23 contest, I would register through an interface that Green Links
24 had set up; is that correct?

25 A. It's -- it's more complex than that.

1 Q. It's more complex than that. How so?

2 A. There are various registrations. This was a part -- this
3 was at a point in the company where we were adapting different
4 registration means, some of them referenced in the e-mails.
5 There was single sign-on registration, which means using your
6 Facebook or other social network to log onto the website. And
7 in the website, there's also registration into some of the
8 reward systems. There's a lot of complexity to it. It's a
9 little bit hard to explain without a flow chart.

10 Q. Okay. To the best of your knowledge, nobody ever deleted
11 e-mails in the e-mail database for the iPad registration
12 contest, correct?

13 MR. SEGAL: Objection, no foundation.

14 THE COURT: Overruled.

15 THE WITNESS: I don't know if they were deleted or not.
16 I don't recall ever checking whether or not they were deleted.

17 BY MR. EKELAND:

18 Q. So essentially it's your testimony that you don't know
19 whether or not any e-mail addresses were -- were deleted from
20 the Green Links e-mail address database, correct?

21 A. I don't -- I don't have any knowledge of whether they were
22 deleted from that database.

23 Q. Okay. So -- okay.

24 Now I want to just turn back to, ah, your tracking of your
25 time and the things that you did when you recorded your time.

1 And some of this, forgive me, is a little redundant, but I
2 think it's important so I'd like to go over it.

3 So if you could turn your attention to Exhibit H, which is
4 tab 8.

5 A. I got it this time.

6 Q. You got it?

7 You see that that is an e-mail that is from you to
8 yourself -- I think the government showed this to you as
9 well -- on December 3rd, 2010, at 8:32 a.m., correct?

10 A. That's correct.

11 Q. And you could see the -- you have no reason to doubt that
12 that is your e-mail that you sent to yourself, correct?

13 A. I remember sending it.

14 MR. EKELAND: Your Honor, at this point in time the
15 defense would like to move what's been marked for
16 identification as Exhibit H into evidence.

17 MR. SEGAL: No objection.

18 THE COURT: All right. H is admitted.

19 Is this in fact identical to a government exhibit?

20 MR. SEGAL: It is, but I didn't move this one in, Your
21 Honor. I used it as recollection. I didn't move it in.

22 THE COURT: All right. So H is in now.

23 (DEFENDANT'S EXHIBIT H, Brandon Mercer e-mail re:
24 loss amount, ADMITTED INTO EVIDENCE.)

25 MR. EKELAND: Okay.

1 Q. So this is -- again, we're at -- can you see that,
2 Mr. Mercer?

3 A. Yes.

4 Q. So this is, again, early December, Friday, December 3rd,
5 2010, at 8:32 a.m. It says, subject, Fox Mulder, two hours
6 last night, 10:30 p.m. to 12:30 a.m. and another 30 this
7 morning responding to e-mails.

8 So that is you recording your time because the FBI asked
9 you -- well, because the FBI told you that you needed to reach
10 a \$5,000 threshold in order for this case to be prosecuted,
11 correct?

12 A. Yes.

13 Q. But none of that time that you spent, none of that two
14 hours were spent in the Green Links database or any computer
15 database. This is purely you responding to e-mails and maybe
16 communicating about it, correct?

17 A. I don't know what the two hours were referring to.

18 Q. But you don't have a background in computer forensics, do
19 you, Mr. Mercer?

20 A. I do not.

21 Q. You don't have any certifications in any type of Internet
22 technology, do you?

23 A. I do have a computer certification. It depends what you
24 mean.

25 Q. Well, what is your computer certification, Mr. Mercer?

1 A. I'm a certified system administrator for Avid iNews.

2 Q. For what?

3 A. For Avid iNews.

4 Q. Avid what?

5 A. A-V-I-D.

6 Q. Oh, Avid. Like Avid video systems?

7 A. It a newsroom computer system made by them.

8 Q. Right.

9 You weren't using any of those skills on December 3rd,
10 2010, were you?

11 A. I don't remember if I looked at the P2P database that night
12 or not.

13 Q. And you don't recall, because I believe you testified you
14 don't recall at this point in time, you don't recall there
15 being any sort of alteration or damage to the Fox 40 publicly
16 facing website at this point, correct?

17 A. That's correct.

18 Q. And you also testified earlier that you couldn't recall or
19 you didn't know if any e-mail addresses had been deleted,
20 correct?

21 A. I do not know if they had been deleted.

22 Q. Right.

23 And isn't it true that you won't see, upon reviewing any of
24 your e-mails from this period in relation to the Fox 40
25 newsroom and the Fox Mulder e-mails, there was any damage to

1 the publicly facing Fox 40 website, correct?

2 MR. SEGAL: Objection, no foundation, best evidence.

3 THE COURT: Overruled.

4 THE WITNESS: I don't know that we'd ever have a way of
5 knowing if there was any damage to the public facing website
6 because someone could go in and modify an old article just to
7 see if they could do it. So I don't know if there was any
8 change to the public facing website. I was not aware of it at
9 that time.

10 BY MR. EKELAND:

11 Q. So it's your testimony that you're not aware -- you don't
12 have any knowledge of any damage to the Fox 40 publicly facing
13 website, correct?

14 A. That's correct, yes.

15 Q. Okay. One moment, please.

16 And you're aware of why we're in this courtroom today,
17 correct?

18 MR. SEGAL: Objection, vague.

19 THE COURT: Overruled. You can answer if you're able.

20 THE WITNESS: I don't know the charges or I don't
21 recall the charges that we're dealing with. I know I'm here as
22 a witness to tell the truth.

23 MR. EKELAND: Uh-huh.

24 Q. But you're aware that one of the things that Mr. Keys has
25 been accused of is being involved in an edit to the L.A. Times

1 website on December 14th, 2010, correct?

2 A. I'm not very familiar with the charges.

3 Q. You're not familiar with the charges.

4 Are you familiar with the edit, the alleged edit to the New
5 York Times -- I'm sorry -- the L.A. Times website story on
6 December 14th, 2010?

7 A. I -- I believe I had heard about it. I may have read
8 something about it in some of the charging documentation, but
9 I'm not very familiar with it.

10 Q. So it's fair to say that you actually had nothing to do
11 with the response to the L.A. Times website edit; is that
12 correct?

13 A. No, that's not correct.

14 Q. That's not correct? But so -- I'm sorry. I'm not clear
15 here.

16 You heard about the L.A. Times website edit, correct?

17 A. I heard about it, yes.

18 Q. You heard about it.

19 And your testimony is you heard about it after the fact,
20 correct?

21 A. Yes, I didn't hear about it before it happened.

22 Well, I heard about the Gawker, ah, attempt to get at the
23 L.A. Times. I don't remember when that discussion was. I'd
24 have to check the timeline.

25 Q. I believe that was -- and you're referring to the -- when

1 Mr. Keys sent you the e-mail, I think, mentioning that --

2 A. I don't recall the date on that. So if that date was
3 before December 14th, then I guess I did know about it in
4 advance. If that date was after December 14th, I didn't know
5 about it.

6 Q. So it's your testimony that you knew about or you
7 potentially knew about the edit to the L.A. Times before it
8 happened?

9 A. May I check the time on the e-mail about Gawker?

10 Q. Which government -- I'll change the line of questioning
11 slightly. Let's go back to -- let's go back to your ordinary
12 job duties at Fox 40.

13 As part of your job duties, you didn't ordinarily log your
14 time in hourly increments, did you?

15 A. I did not.

16 Q. All right. So this was an unusual -- it's fair to say that
17 this was an unusual circumstance where you were logging your
18 time, correct?

19 And as part of the ordinary duties of people you
20 supervised, it wasn't their job to -- it wasn't part of their
21 responsibilities to log their time responding to e-mails and
22 whatnot in hourly increments?

23 A. I believe to the first part of that the answer was yes, if
24 I recall. But the second part, some of the employees did have
25 to log their time. And if they spent it responding to e-mails,

1 they would have indicated on their timecard if it was unusual
2 as in overtime.

3 Q. But -- so it would be fair to say that you would
4 characterize the situation of having to log time responding to
5 e-mails as unusual and not something that employees at Fox 40
6 would do in the normal course of business; is that correct?

7 A. For the majority of the employees, they didn't do it. For
8 the hourly employees, sometimes they did.

9 THE COURT REPORTER: Hang on. I need you to both slow
10 down, please, and one at a time. Thank you.

11 MR. EKELAND: Okay. Are we good?

12 Q. All right. I just wanted to show you a few more quick
13 e-mails on the employees logging the time. And I'd like you to
14 turn in the exhibit binder to Defendant's Exhibit D, which I
15 believe is tab 4.

16 A. Okay.

17 Q. You see that?

18 That's an e-mail from Troy Conhain to you, again, on
19 December 2nd with the subject line saying time spent dealing
20 with Mulder.

21 And do you have any reason to believe that that is not an
22 e-mail that was sent to you regarding Mr. Conhain's time on
23 this matter?

24 A. No, I recall the e-mail. It was --

25 Q. You recall the e-mail?

1 MR. EKELAND: Your Honor, at this point in time the
2 defense would like to move what's been marked for
3 identification as Defendant's Exhibit D into evidence.

4 MR. SEGAL: No objection.

5 THE COURT: All right. D is admitted and may be
6 published.

7 (DEFENDANT'S EXHIBIT D, Brandon Mercer e-mail re:
8 loss amount, ADMITTED INTO EVIDENCE.)

9 MR. EKELAND: Okay. There we go.

10 Q. So as you can see, Mr. Mercer, the subject matter says time
11 spent dealing with Mulder.

12 And you would agree with me that's a reference to what
13 we've been calling the Cancer Man e-mails?

14 A. Yes.

15 Q. And those were the series of e-mails that -- and so it
16 says:

17 11:00 to 11:30 p.m. dealt with calls from viewers who were
18 receiving e-mails from Fox Mulder and wrote e-mail to the staff
19 explaining how to handle further calls. Cathy Paiz and
20 Bhavisha Patel also fielded calls during this time period.

21 Do you have any reason to believe that that's not true?

22 A. No.

23 Q. So essentially what Mr. Conhain is saying here is that he
24 was logging time to reach the \$5,000 threshold that the FBI had
25 told you they needed to prosecute by responding to viewers; is

1 that correct?

2 A. He was logging time because I asked him to.

3 Q. Right.

4 But what he was doing -- what he was saying he was doing
5 when he was logging his time, recording his time as we would
6 colloquially say, was that he taking calls from Fox 40 viewers,
7 right?

8 A. Right.

9 Q. And there's nothing in this e-mail that leads you to
10 believe that Mr. Conhain was doing anything related to computer
11 forensics or system administration or anything. This is purely
12 Mr. Conhain saying that he is responding to viewers, correct?

13 A. Yeah. In this instance, he was not looking at passwords or
14 P2P.

15 Q. Okay. And this is on December 2nd. Okay.

16 So I'd like to have you take a look at Exhibit F, which is
17 tab 6. Do you have that?

18 That is a -- well, the top e-mail is from Sam Cohen dated
19 Thursday, December 2nd, 2010, and it's to you, correct?

20 And do you have any reason to believe that that is not an
21 e-mail that was sent to you by Sam Cohen on that date?

22 A. No.

23 Q. No.

24 MR. EKELAND: Your Honor, at this point in time the
25 defense would like to move into evidence what's been marked as

1 Defendant's Exhibit F.

2 MR. SEGAL: No objection.

3 THE COURT: All right. F is admitted, and it may be
4 published.

5 (DEFENDANT'S EXHIBIT F, Brandon Mercer e-mail re:
6 loss amount, ADMITTED INTO EVIDENCE.)

7 THE COURT: Again, I would just remind the jury that
8 the language that Mr. Mercer is using is not as an attorney.
9 So there are some terms in the e-mail that are just being used
10 as a layperson's vocabulary.

11 You may publish, if you wish.

12 MR. EKELAND: Okay. May I proceed, Your Honor?

13 THE COURT: You may.

14 BY MR. EKELAND:

15 Q. So just directing your attention to the top of this e-mail.

16 It says: November 30th, 4:00 to 4:30, initial dealings and
17 meetings about the letter with Greg and Brandon.

18 What's your interpretation of that? Is Brandon -- excuse
19 me. Withdrawn.

20 Is the Brandon referred to in that line you?

21 A. Yes.

22 Q. And Sam Cohen was you said, I believe, an executive
23 producer or producer in the newsroom?

24 A. She was an executive producer.

25 Q. She was an executive producer.

1 And it wasn't part of her duties to do any kind of computer
2 forensics or Internet technology work for Fox 40, correct?

3 A. No, that's not correct.

4 Q. What -- what sort of Internet technology work did she do
5 for Fox 40?

6 A. She ran our Internet website and all of the social media
7 accounts.

8 Q. Did she --

9 A. I don't remember the exact date she took over that, but I
10 believe she was doing that at this point.

11 Q. Okay. But as far as you're aware, she doesn't know how to
12 do computer coding?

13 A. Well, it depends what type of coding you're referring to.

14 Q. Okay. We'll move on. We will question her about that.

15 But this initial dealing and meetings about the letter, do
16 you know what letter is being referred to there?

17 A. I don't know which letter. Ah, I'd have to go back and
18 check the e-mails.

19 Q. Okay.

20 A. I assume it was the first one.

21 Q. You see that the date is November 30th. I'd like to direct
22 your attention to the bottom of this e-mail.

23 I believe the government elicited testimony from you that
24 these November 30th dates were incorrect, and you possibly
25 could have meant December 1st or December 2nd; is that correct?

1 A. Yes.

2 Q. And -- but you also say at the top there that this is your
3 example, right? So it's possible that you actually -- this may
4 not have been time that you're recording, you're just giving an
5 example?

6 A. The time that -- the time that I submitted was in a
7 different document.

8 Q. Uh-huh.

9 A. I don't recall if this was an example or was, you know,
10 actual time. All of my actual time was recorded in a different
11 document.

12 Q. Uh-huh.

13 But just by way of example, you're giving this -- assuming
14 arguendo, assuming for sake of argument this is just an example
15 that you're sending to the newsroom on how to, ah, record your
16 time in relation to these Cancer Man e-mails.

17 You -- you're saying there, looking at the top there on
18 November 30th, 4:00 to 6:00 p.m. e-mailing back, coordinating
19 with Chuck, Troy, Andy, Jason and Sam, e-mailing back and
20 coordinating with the newsroom, clearing e-mails and sorting
21 them, and talking to the FBI and Jason Jedlinski.

22 Those are what you consider to be proper things to record
23 your time on in dealing with this matter; is that correct?

24 A. As best I know, yes.

25 Q. Uh-huh.

1 And this is -- again, this is on December 2nd.

2 Okay. I would like to show you one more tab, which is
3 defense exhibit -- what's been marked for identification as
4 Defendant's Exhibit G, which is at tab 7.

5 If you can -- have you had a chance to look at it?

6 A. Yes.

7 Q. And so this is essentially an e-mail from Jason Jedlinski
8 to you on December 2nd, 2010.

9 Is that -- and do you have any reason to believe that this
10 is not an e-mail that was actually sent to you?

11 A. No.

12 Q. Okay.

13 MR. EKELAND: Your Honor, at this point in time we'd
14 like to move what's been marked for identification as
15 Defendant's Exhibit G into evidence.

16 THE COURT: Any objection?

17 MR. SEGAL: No. They -- no. They objected when I
18 tried to offer this, so I will not now.

19 THE COURT: All right. G is admitted.

20 (DEFENDANT'S EXHIBIT G, Brandon Mercer e-mail re:
21 loss amount, ADMITTED INTO EVIDENCE.)

22 MR. EKELAND: May I publish this to the jurors?

23 THE COURT: You may.

24 MR. EKELAND: Thank you, Your Honor.

25 Q. So this is another -- just another example of somebody --

1 Jason Jedlinski worked for you; is that correct?

2 A. No.

3 Q. No.

4 He was in Chicago, correct?

5 A. Yes.

6 Q. Okay. And so he's sending his time from Chicago, and he is
7 saying put me down for two hours yesterday and an hour today.

8 And, again, this is on December 2nd, 2010, correct?

9 A. Yes.

10 Q. And when you got all these -- when you got these e-mails,
11 you would, you know, collect and log all of the time and send
12 it to the FBI; is that correct?

13 A. I put these into a spreadsheet. I don't recall if Jason's
14 were on my spreadsheet or that was added to a master document.
15 I didn't total up all the Tribune time, just the people I
16 supervised and people that I worked with directly there. I
17 don't recall if Jason was on that list or not.

18 Q. One moment. I think I --

19 A. I can look at it and check.

20 Q. Well, let's take a look at that spreadsheet.

21 MR. EKELAND: Well, this is already in evidence, so let
22 me just check.

23 Is Government's 127 in evidence?

24 MR. SEGAL: No, it's not.

25 (Counsel conferring.)

1 THE COURT: Do you want the witness to look at 127?

2 MR. EKELAND: Yeah. Could --

3 THE COURT: So this would be in a separate binder.

4 THE WITNESS: Okay.

5 THE COURT: This is a three-page exhibit?

6 BY MR. EKELAND:

7 Q. Did you have a chance to look at it?

8 A. I did. Thank you.

9 Q. And that is -- just looking at the top e-mail, that's an
10 e-mail from you to Special Agent John Cauthen on April 18th,
11 2013, correct?

12 A. That's correct.

13 Q. And it has a spreadsheet attachment to it, correct?

14 A. It was a PDF, but yes.

15 Q. Excuse me, a PDF.

16 And you testified earlier that you had compiled that PDF,
17 correct?

18 A. I did compile this, yes.

19 Q. And so you have no reason to believe that you didn't send
20 this e-mail and that you didn't create that PDF, correct?

21 A. Correct.

22 Q. Okay.

23 MR. EKELAND: Your Honor, at this point in time the
24 defense would like to move what's been marked for
25 identification as Government Exhibit 127 into evidence.

1 MR. SEGAL: No objection.

2 THE COURT: Three pages?

3 MR. EKELAND: What?

4 THE COURT: Three pages?

5 MR. EKELAND: It's three pages, Your Honor, yes. I
6 think the third page looks like the PDF has been cut off a bit
7 from the second page.

8 THE COURT: But no objection, Mr. Segal?

9 MR. SEGAL: No objection, Your Honor.

10 THE COURT: So 127 is admitted and may be published.

11 (GOVERNMENT'S EXHIBIT 127, e-mail, 4/18/13, 11:35 a.m.,
12 ADMITTED INTO EVIDENCE.)

13 MR. EKELAND: Let's take a look at this.

14 Q. The second page here, Mr. Mercer, this is basically just a
15 spreadsheet of your -- the hours that you compiled, correct?

16 A. Those are some of the hours.

17 Q. Right.

18 And this is -- at this point, it's April 13th, right, is
19 when you sent this? Let me go back to the first page.

20 What was the date we said -- this is on April 18th, 2013,
21 correct?

22 A. That's when I sent it, I believe.

23 Q. Yeah.

24 So it would be fair to say that this is a -- what you would
25 consider to be a complete accounting of your response to -- the

1 hours that Fox 40 spent responding to the Cancer Man e-mails;
2 is that correct?

3 A. No, that's not correct.

4 Q. That's not correct.

5 This is not a complete accounting --

6 A. No.

7 Q. -- on April 18th, 2013?

8 A. I said in the subject line here the Fox 40 hours so far.
9 It's the information I was able to get that I --

10 Q. So --

11 A. -- forwarded --

12 Q. Okay. So it's your testimony --

13 MR. SEGAL: Your Honor, I'd ask that the witness be
14 allowed to finish his answers.

15 THE COURT: Well, one person at a time. That works
16 both ways I think with these two individuals. If you can
17 continue to try to make certain the other person stops before
18 you start.

19 MR. EKELAND: Absolutely, Your Honor. My apologies to
20 the Court.

21 THE COURT: All right.

22 THE WITNESS: What I was going to add -- I apologize.
23 A different style of questioning, and I'm just getting used to
24 it.

25 What I was going to add is I knew there was another

1 document being created with our corporate team in Tribune, and
2 this was just part of the overall documentation. I was trying
3 to say what I had so far.

4 MR. EKELAND: Uh-huh.

5 Q. But you're not -- your testimony isn't that on April 18th,
6 2013, you were still responding to the Cancer Man e-mails?

7 A. No, that's not my testimony.

8 Q. So when you sent this here, this is -- it's your testimony
9 that this isn't a complete accounting of all of the time spent
10 on the Cancer Man e-mails?

11 A. It -- what I'm saying is that this is what I had recorded.
12 There were other people recording other times, and it wasn't
13 the master document. It was just what I had.

14 Q. So you're saying there were other people who were recording
15 their time at Fox 40 who weren't sending you their time after
16 you requested them to send it to you? Is that --

17 A. No, that's not correct.

18 Q. I'm sorry. I don't understand.

19 So you sent an e-mail out to the Fox 40 newsroom to tell
20 everybody to record their time, correct?

21 A. Yes. If I may just explain.

22 There was -- Tribune was also recording time. You said Fox
23 40 in your question.

24 Q. That's correct, but the Cancer Man e-mails were sent to the
25 Fox 40 newsroom, correct?

1 A. Correct. They were sent --

2 Q. They weren't sent to Chicago Tribune's newsroom, correct?

3 A. I don't know where else they were sent.

4 Q. Right.

5 But as far as you know, they were just sent to the Fox 40
6 newsroom, correct?

7 A. I'm not sure if I can answer correct or incorrect. They
8 were sent to viewers. They were sent to the newsroom. I don't
9 know who else was on there. And they may have been sent to an
10 alias that also included Tribune. I don't know where they all
11 went to.

12 Q. Okay. So it's your testimony that you don't know where
13 they went to, but you know that you received them in the Fox 40
14 newsroom?

15 A. It's my testimony I don't know where all of them went to.
16 I know that I received them in the Fox 40 newsroom. I know
17 viewers received them.

18 Q. Okay. Just drawing your attention just to your spreadsheet
19 here.

20 You don't -- there's nothing on this spreadsheet that
21 indicates that Fox 40's publicly facing website was damaged or
22 altered in any way, is there?

23 A. No, I don't believe there is.

24 Q. And there's -- well, I'm done with that.

25 Just really quick, drawing your attention to what is on

1 this exhibit as page 3, but looks like it's just sort of page 2
2 printed out bad.

3 Do you see that reference to the Green Links vendor?

4 A. Yes.

5 Q. And that's the Green Links vendor that was involved with
6 your iPad giveaway contest, correct?

7 A. That's correct.

8 Q. And that's the Green Links vendor who you testified that
9 you didn't know if any -- excuse me. Withdrawn.

10 That's the Green Links vendor that maintained the e-mail
11 address database that you don't know if any of the e-mails were
12 deleted from; is that correct?

13 A. That is correct.

14 Q. Okay. I would now like to turn to the exhibits that the
15 government showed you. And let us go to -- excuse me for one
16 moment.

17 MR. EKELAND: Excuse me one moment, Your Honor. I just
18 need to go to counsel table. I want to make sure I know what
19 has been admitted into evidence.

20 THE COURT: All right. We have 15 minutes. We'll use
21 that time. If during this short interlude you want to stand
22 and stretch, feel free to do that just to tide you over till
23 3:00.

24 (Pause in proceedings.)

25 THE COURT: All right.

1 MR. EKELAND: All right. Sorry, Your Honor. May I
2 proceed, Your Honor?

3 THE COURT: You may.

4 MR. EKELAND: Mr. Mercer, are you ready?

5 THE WITNESS: Uh-huh.

6 MR. EKELAND: Okay. So I am going to show you what
7 has -- what is in evidence as Government's Exhibit 101. And I
8 believe at the end of this, we talk about -- well, excuse me.

9 So you see -- directing your attention to page 5 where
10 it's referencing your content management system.

11 Q. Can you see that?

12 A. Yes, I can.

13 Q. And that's the -- now, that content management system is
14 not the same thing as --

15 UNIDENTIFIED JUROR: We can't see it.

16 THE COURT: All right. Is nothing displayed?

17 (Off-the-record discussion with Courtroom Deputy.)

18 THE COURT: So you're saying you can't read the text?

19 UNIDENTIFIED JUROR: It's tiny.

20 THE COURT: All right. Expand it. Fair enough. I was
21 leaning so closely to my paper copy.

22 Now can you read it?

23 THE JURY: Yes.

24 THE COURT: All right. Very good. Thank you.

25 MR. EKELAND: May I proceed, Your Honor?

1 THE COURT: You may.

2 MR. EKELAND: So the government elicited testimony from
3 you about your content management system, so I just wanted to
4 get clear on that.

5 Q. It's the Green Links database that these e-mail addresses
6 were in. They weren't part of your content management system?

7 A. I'm not sure where they intersected. I wasn't involved
8 with the Green Links as much as I was the content management
9 system.

10 Q. Okay. So it's your testimony that you don't know where the
11 Green Links database integrated with the -- if at all, with the
12 content management system?

13 A. That's correct.

14 Q. Okay. And then I just want to go to the -- this e-mail is
15 to you, if you look at the header, right? Well, there's one
16 from Fox Mulder to you on December 1st, 2010, at 7:05 p.m.,
17 correct?

18 A. The question is, is it correct that I got an e-mail --

19 Q. Yeah.

20 A. -- sent to me?

21 Q. I believe you testified to this earlier because it's in
22 evidence.

23 A. Yes.

24 Q. Now you use, what, Microsoft Outlook on your computer?

25 A. I did, yes.

1 Q. And so you would have gotten this in your in-box, and you
2 would have opened up this e-mail and read it?

3 A. Some of the e-mails I got on my iPhone. Ah --

4 Q. Well, you could say you read it on Outlook on your computer
5 or on your iPhone. You read this e-mail on some type of
6 computer, correct? And -- is that correct?

7 A. I'm not trying to be argumentative, but I may have read it
8 on my iPhone or I may have read it on my computer. Or if you
9 call an iPhone a computer, then the answer is yes.

10 Q. Yeah, I would include an iPhone as a protected computer and
11 your laptop or your desktop or any kind of computer device.

12 You read this e-mail on your computer, on some sort of
13 computer, correct?

14 A. Yes, I did.

15 Q. And when you read this e-mail, there was no virus attached?

16 MR. SEGAL: Objection, no foundation.

17 THE COURT: Overruled. You can answer if you are able.

18 THE WITNESS: I don't know -- well, when I read it, was
19 there a virus attached? I don't know if it was sent with a
20 virus or not. There would be things that would clean that out
21 when I read it. As far as I know, there was no virus.

22 BY MR. EKELAND:

23 Q. So your computer functioned normally after you read this
24 e-mail, correct?

25 A. Yes.

1 Q. And you're aware of no virus or any kind of malware that
2 was attached to this e-mail, correct?

3 A. That's correct.

4 Q. And at no point in time did anybody from Tribune Company's
5 Internet technology department or any kind of computer
6 forensics person come and tell you that there was any kind of
7 malware or any kind of virus on this e-mail, correct?

8 MR. SEGAL: Objection, calls for hearsay.

9 THE COURT: Just answer yes or no.

10 MR. SEGAL: And that --

11 THE WITNESS: The question was whether someone from the
12 IT department at Tribune contacted me about whether or not
13 there was malware on this e-mail?

14 MR. EKELAND: Yes.

15 THE WITNESS: The question is did they or did they not?

16 BY MR. EKELAND:

17 Q. At any point in time, did anybody from the Internet
18 technology department from any branch of Tribune Company
19 contact you and tell you that there was any kind of malware or
20 virus attached to this e-mail that was sent to you?

21 MR. SEGAL: That calls for hearsay, Your Honor.

22 THE COURT: Well, what's the exception? Is there an --
23 are you saying there's an exception to hearsay or it's not
24 hearsay?

25 MR. EKELAND: I'm not -- well, its effect on the

1 listener, Your Honor.

2 THE COURT: All right.

3 MR. SEGAL: Effect on the listener is not relevant.

4 THE COURT: I'm going to allow the answer.

5 MR. SEGAL: Will the Court instruct that it's not for
6 the truth if it's only for effect on listener?

7 THE COURT: Yes. The answer is not being offered for
8 whatever truth it otherwise might convey. It's being offered
9 for the effect on Mr. Mercer when he heard whatever he heard.

10 So do you remember the question?

11 THE WITNESS: That's very complex.

12 THE COURT: Do you remember the question?

13 THE WITNESS: I believe the question was whether
14 Tribune IT contacted me saying there was malware attached to
15 this e-mail. I never was told there was malware attached to
16 the e-mail.

17 BY MR. EKELAND:

18 Q. And when you -- just to reiterate, when you opened this up,
19 it didn't cause any damage to your computer or your iPhone or
20 anything else, any other type of computer that you're aware of,
21 correct?

22 MR. SEGAL: Objection, no foundation. Move to strike
23 the last answer because it wasn't for its effect on the
24 listener. It's trying to establish whether there was actually
25 malware on this e-mail.

1 MR. EKELAND: I'm asking a question whether he was
2 aware of any damage to his computer after he opened up this --

3 THE COURT: I'm going to allow the question. Objection
4 overruled. You may answer if you're able.

5 THE WITNESS: I was not aware of any damage to my
6 computer after -- or a device, whatever I read it on, after
7 getting this e-mail.

8 MR. EKELAND: And, again, this was on December 1st.
9 And as you've testified, the Fox 40 publicly facing website,
10 you weren't aware of any kind of hacking to it or anything like
11 that. Okay.

12 THE WITNESS: Well, you said hacked into it. I wasn't
13 aware of anything changing on the website facing the public.
14 That's what I testified to.

15 MR. EKELAND: Right. Right. Okay.

16 I'm going to move on to -- let's take a look at --
17 let's take a look at what's been moved into evidence as
18 Government's Exhibit 114.

19 THE WITNESS: Sorry. Okay.

20 MR. EKELAND: I'm going to publish this to the jury
21 because I believe this has been --

22 MR. SEGAL: It's in.

23 THE COURT: It is in evidence, yes.

24 MR. EKELAND: It is in evidence.

25 Q. Okay. So I'm just -- this is another -- this is another

1 December 1st -- we're in the early part of December here --
2 e-mail between you and Jason Jedlinski and Andy Friedman. And
3 you're asking them to see basically who has logged into the P2P
4 server at KTLX in the past 24 hours.

5 And that's correct, right?

6 A. KTXL, yes.

7 Q. And KTXL, that's a reference to Fox 40, correct?

8 A. Yes.

9 Q. And when you -- and Jason Jedlinski answers you that
10 they've pulled the 5,000 pages of server logs. And then you
11 see a list of names there, and you do not see Mr. Keys' name on
12 that list, do you?

13 A. I do not.

14 Q. And you testified also previously that you had -- as soon
15 as Mr. Keys had left Fox 40, you had revoked his basically
16 username and password and his access to the CMS; is that
17 correct?

18 A. We revoked his username and password. As for access to the
19 CMS, there's a lot of passwords Matthew had access to.

20 Q. Okay. But you did take steps to revoke everything that you
21 were aware of when Mr. Keys left Fox 40?

22 A. No, I did not.

23 Q. You did not.

24 So you just -- the only steps you took were just to revoke
25 his username and password to -- to, what, the Fox 40 computer

1 system or the CMS?

2 A. When he left after our newsroom discussion, I had told him
3 I didn't want him to work. I wanted him to not work. He said
4 I can't guarantee that, so I changed the password so he
5 couldn't log into some of the work servers. As you recall, he
6 still had access to Twitter and Facebook and maybe other
7 things. I only changed one password.

8 Q. Right.

9 But the Twitter account, he registered that initially from
10 his -- in his own name. He controlled that as well as the
11 Facebook account, correct?

12 A. Yes.

13 Q. Because I believe when you -- the Facebook account has to
14 be linked to somebody's own personal Facebook account in order
15 to get a corporate account, correct?

16 A. I don't know the answer to that.

17 Q. Okay.

18 A. And it has probably changed quite a bit since 2010.

19 Q. Right.

20 And you testified just one moment ago about the Twitter
21 account. I believe you testified that -- and correct me if I'm
22 wrong -- that several thousand Twitter followers had been
23 deleted from the account; is that correct?

24 A. I recall somewhere around 6,000 had been deleted.

25 Q. Right.

1 But do you use Twitter?

2 A. Yes.

3 Q. So you're aware that you can't delete followers from a
4 Twitter account, correct?

5 A. That's not correct.

6 Q. Oh, really? How do you delete a Twitter follower from your
7 account?

8 A. If I wanted to delete a Twitter follower from my account, I
9 would install a third party widget, a third party piece of
10 software that plugs into Twitter and uses the API, alpha papa
11 India, to connect with Twitter. You can then manage a Twitter
12 account at a macro level using some of those systems.

13 Q. But you're not aware of any evidence that that was used on
14 the -- Mr. Keys' Twitter account that he used for Fox 40,
15 correct?

16 MR. SEGAL: Objection, no foundation.

17 THE COURT: Sustained. You can ask a foundational
18 question.

19 BY MR. EKELAND:

20 Q. As we discussed, the Twitter account Mr. Keys had set up
21 personally for Fox 40, correct?

22 A. Yes. I mean, is it correct that the Twitter account was
23 set up personally for Fox 40, that Matthew set it up
24 personally? The answer is yes, he set it up himself for Fox
25 40.

1 Q. So Fox 40 let him have control of the Twitter account?

2 A. Yes.

3 Q. And you went later and you got control of the Twitter
4 account by going -- I believe you said you went on Twitter with
5 an affidavit swearing that it was a Fox 40 account, correct?

6 A. That's correct.

7 Q. And then after you got control of the Twitter account, you
8 examined the Twitter account, and you maintain that a few
9 thousand followers were deleted, correct?

10 A. I -- you said maintained --

11 THE COURT REPORTER: I didn't understand what you just
12 said.

13 THE WITNESS: I was asking for clarification about the
14 question. I didn't catch what the question was. I couldn't
15 tell what word you used.

16 Did I maintain --

17 MR. EKELAND: No.

18 THE COURT: I think what we can do at this point is
19 break for the afternoon and pick up here in an attempt to
20 follow up on this exchange and perhaps think about the
21 formulation of questions.

22 So it is 3:00 o'clock. I told you we would adjourn at
23 3:00 o'clock. We're going to adjourn until 1:30 tomorrow
24 afternoon. We have a short session tomorrow of 1:30 to 4:30.

25 Given that we're adjourning for almost a full day, just

1 please do keep in mind all of those admonitions I gave you
2 earlier. Don't talk about the case with anyone. Don't do any
3 research of any kind. Resist the temptation to look up any
4 definitions. If anyone attempts to contact you in any way,
5 please let me know first thing tomorrow, and we'll address
6 that.

7 And for now you are free to go, not think about the
8 case until 1:30 tomorrow afternoon. Have a good evening. Just
9 leave your notebooks on your chair. They'll be safe there.

10 (Jury not present.)

11 THE COURT: You may step down, and just be back in your
12 seat at 1:30 tomorrow afternoon.

13 All right. Just briefly. We'll finish with Mr. Mercer
14 tomorrow most likely?

15 MR. EKELAND: Yes, Your Honor.

16 THE COURT: And then will we be able to move on to --
17 is it still Del Core?

18 MR. SEGAL: Del Core and then Samantha Cohen and -- who
19 is the next witness after Cohen?

20 Tomorrow we want to roll into all those current -- we
21 may change it up a little bit. We've got some out-of-town
22 witnesses who have flights scheduled in, and I want to be able
23 to get them on and off tomorrow. I'll tell the defense who
24 they are.

25 THE COURT: All right.

1 MR. SEGAL: There is one issue I wanted to take up.

2 THE COURT: Well, here's my -- I just had -- can you
3 tell me at this point which witnesses you aren't going to call?

4 Do you know of the list of 30 --

5 MR. SEGAL: Oh.

6 THE COURT: -- of any that you are definitely not going
7 to call?

8 MR. SEGAL: I think a lot of them. It may take a
9 while --

10 THE COURT: If you could just let me know tomorrow. It
11 helps me think about --

12 MR. SEGAL: Length of trial?

13 THE COURT: Yes.

14 MR. SEGAL: I mean, I can tell -- what I've told the
15 defense is that I'll give them -- you know, basically the night
16 we wrap up, I'll tell them who we're calling the next day so
17 they can prepare their crosses. But if I'm telling the Court
18 for its planning, as long as it's not viewed as a waiver, I'll
19 give the Court my whole -- what I really think my --

20 MR. LEIDERMAN: It's not tied to a waiver.

21 MR. SEGAL: Okay. I will send Casey or Ms. Schultz
22 what we think our entire list is.

23 THE COURT: All right.

24 MR. SEGAL: May I take up one thing, Your Honor?

25 THE COURT: You may.

1 MR. SEGAL: Trial goes fast, there are slips of the
2 tongue. And I don't mean to raise a dust-up about this, but in
3 our motions in limine, we moved to preclude any mention of the
4 penalty. The defense agreed not to mention felonies or
5 misdemeanors, but the word "felony" did come up in the
6 cross-examination. So I'd ask that people use more care and
7 not use the testimony that was elicited from that question in
8 their closing.

9 MR. LEIDERMAN: I don't intend to use it in closing.

10 THE COURT: Fair enough. All right. I think it was
11 used very generally.

12 MR. SEGAL: I know.

13 THE COURT: But rather than draw attention to it, we
14 should avoid any reference to even category of crime.

15 MR. LEIDERMAN: And I think it also happened in a
16 fairly excitable moment, and I don't think it was --

17 THE COURT: My observation so far is both sides could
18 use more care in crafting precise questions. That would move
19 things more quickly. So I can't require that you script, but
20 you might think about exactly what it is you need to --

21 MR. SEGAL: When I narrow it down to exactly what I
22 need, I draw a leading objection.

23 THE COURT: Well --

24 MR. SEGAL: So that's where -- I'll do my best, Your
25 Honor.

1 THE COURT: Feel free to study the transcript, and I
2 think --

3 MR. SEGAL: I'm not contesting the Court's ruling. I
4 was trying to move us along, but those are valid objections.

5 THE COURT: You can lay the foundation quickly without
6 drawing that objection.

7 Also, if there's a series of exhibits, if it's possible
8 to object to a series of exhibits, if the government is going
9 to go into another series, I'd accept a standing objection to a
10 series.

11 MR. EKELAND: Okay, Your Honor.

12 THE COURT: That's one thing to think about.

13 I also understood, I believe it was Mr. Hemesath who
14 expressed a concern about Ms. Babchuk's ability to see the
15 screen. We haven't -- she hasn't said anything to us, and
16 she's equidistant compared to at least three or four other
17 jurors in the back row. So I don't -- if she doesn't raise it
18 to us --

19 MR. HEMESATH: Fair enough.

20 THE COURT: I assume she is not confiding in you,
21 Mr. Hemesath.

22 MR. HEMESATH: No, no, no. It just strikes me she is a
23 little more off to the side, and I see her craning her head a
24 little bit, and there's an open seat. But it's up to Your
25 Honor's --

1 MR. LEIDERMAN: I did notice the same thing, and I had
2 a similar concern. But I'm mindful of what the Court said, she
3 hasn't said anything. And I imagine she sees the empty seat
4 right in front of her if it was that -- I don't know.

5 THE COURT: Once I've been observing her, she appears
6 to be looking at the screen. And she is equidistant when you
7 compare her -- there are other jurors facing the same
8 circumstances without an empty seat. So until she raises it,
9 my plan isn't to do anything about it unless I really notice
10 unique craning of the neck.

11 Anything else before we adjourn for the evening,
12 Mr. Segal?

13 MR. SEGAL: No, Your Honor. Thank you.

14 THE COURT: Mr. Ekeland, Mr. Leiderman, Mr. Jaffe?

15 MR. LEIDERMAN: No, Your Honor.

16 THE COURT: All right. We'll see you at 1:30.

17 I do have criminal calendar in the morning, but the
18 courtroom will be open in the afternoon. At this point, I
19 don't think we need to talk about anything before we start. I
20 would just like to start to hear what the schedule is going to
21 be like in the --

22 MR. SEGAL: We'll send it up, and we'll strike the set
23 now so we have it good for calendar.

24 THE COURT: All right.

25 MR. EKELAND: Should we remove our stuff from the

1 courtroom or --

2 THE COURT: Ms. Schultz can let you know. There are
3 attorney rooms out in front. You might want to think about
4 storing there for complete security.

5 MR. EKELAND: Thank you, Your Honor.

6 THE COURT: All right. Thank you.

7 (Proceedings were adjourned at 3:06 p.m.)

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1 I certify that the foregoing is a correct transcript from
2 the record of proceedings in the above-entitled matter.

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4 /s/ Kathy L. Swinhart
5 KATHY L. SWINHART, CSR #10150
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