

presumably Nationwide's related counterclaims, which are not addressed in the motions for summary judgment) are for trial. City Grill's motion for summary judgment and for suppression of Nationwide's expert reports is DENIED.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The court relates the facts in the light most favorable to City Grill. The court notes that the facts are vigorously contested and Nationwide disputes much of City Grill's version of events. City Grill owns a Miami Subs restaurant in Fayetteville, North Carolina, which was partially destroyed in a fire on January 24, 2012. After an investigation, Nationwide denied coverage on the policy for two reasons: (1) it determined the fire was intentionally set; and (2) one of City Grill's individual owners, Dimitrios Diamantopoulos, allegedly made material misrepresentations during the investigation. City Grill thereafter initiated this suit, alleging claims for, *inter alia*, breach of contract, breach of the covenant of good faith and fair dealing, and breach of North Carolina's unfair and deceptive trade practices act.

On the morning of January 24, 2012, Diamantopoulos arrived at the restaurant at approximately 8:15 a.m. According to Diamantopoulos, he collected the previous night's cash proceeds and promptly left to meet a friend for coffee and deposit the money at the bank. The first 911 call reporting the fire came in at approximately 8:40 a.m. The primary dispute in this case is whether Diamantopoulos intentionally set the fire during the period of time between 8:15 and 8:40 or whether an electrical failure caused the fire. Although Diamantopoulos's precise whereabouts after leaving the restaurant are contested, he apparently returned to the restaurant after receiving a call that the building was on fire.

The Fayetteville Fire Department arrived and promptly extinguished the fire. Because the Fayetteville Police Department does not employ fire investigation specialists, the police department contacted the State Bureau of Investigation (SBI) to investigate the fire for possible arson. Special Agent Chadwick Royal of the SBI initially found that the cause of the fire was undetermined. Royal based his conclusion in part on two printed circuit boards (“PCBs”)² found near the origin of the fire, which he concluded could not be ruled out as a possible ignition source.

Nationwide, City Grill’s insurer, also investigated the fire and it hired Donan Engineering to complete the fire origin and cause investigation. Donan assigned Hunter B. Lacy as the primary investigator and the investigation took place from January 26, 2012 through February 2, 2012. Although Lacy informed Diamantopoulos that Lacy was in charge of the premises during the investigation, Diamantopoulos had access to the building throughout the investigation. In fact, Diamantopoulos met Lacy each morning to unlock the building. Lacy determined that an electrical engineer should investigate possible electrical causes and Nationwide hired Henry B. Martini, also an employee of Donan Engineering, for that purpose.

After ruling out all other potential causes, Martini and Lacy determined that the fire was intentionally set. Although Special Agent Royal notified Martini and Lacy that the PCBs were a potential ignition source, Martini and Lacy allegedly ruled out all possible electrical sources.³

² The printed circuit boards were found inside a wireless communication device known as an Ion IQ wireless transmitter. For purposes of simplicity, the court refers to the circuit boards and the transmitters as “PCBs.”

³ When Lacy and Martini notified Agent Royal that they had ruled out electrical causes, he changed his finding to arson. However, the Fayetteville Police Department determined that they did not have sufficient evidence to move forward with charging Diamantopoulos (or anyone else) with arson.

Martini and Lacy's claim reports to Nationwide did not address the PCBs as potential ignition sources of the fire, though Martini's report did include a photograph of the PCBs. After City Grill initiated this lawsuit and raised the possibility that the PCBs caused the fire, Martini and Lacy submitted litigation reports noting that they investigated the PCBs and ruled them out as possible ignition sources.

The PCBs have disappeared. Both Martini and Lacy have submitted sworn statements that they left the PCBs in the custody and control of City Grill after completing their investigations. City Grill's principals do not know what happened to the PCBs after the investigation, though there is some indication in the briefing that the restaurant was cleaned out before City Grill's experts had an opportunity to investigate the fire. *See* Nationwide's Mem. in Opp'n to Pl.'s Mot. for Summ. J. [DE-46] at 6 ("The first time that Nationwide or its experts knew that the PCBs were missing was November 2012, during a subsequent visit to the loss site after this lawsuit had been filed. City Grill had allowed the entire building to be stripped clean, which included the destruction or loss of the PCBs."). City Grill's experts all opine that they cannot determine the precise cause of the fire without physically examining the PCBs. Although City Grill's experts cannot rule out arson as a potential cause, they also cannot rule out the possibility that the PCBs caused the fire.

Because Lacy and Martini's reports indicated the fire was intentionally set and (in Nationwide's view) Diamantopoulos likely started it, Nationwide denied the claim. Nationwide's denial notice rested on two independent grounds: (1) the policy exclusion for dishonest or criminal acts and (2) the policy exclusion for concealment, misrepresentation, or fraud. As to the second ground, Nationwide maintains that Diamantopoulos made material

misrepresentations regarding his whereabouts and conduct immediately prior to the fire during the course of Nationwide's investigation. City Grill's position is that Nationwide failed to properly investigate and rule out the PCBs and, as such, improperly denied the claim based on an incomplete investigation. After the denial, the parties were unable to resolve the dispute and this lawsuit followed.

DISCUSSION

A. Standard of Review

On a motion for summary judgment, the court must examine the evidence presented by both parties and determine if there is a need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 283 (4th Cir. 2013). The court examines "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-53 (1986). Where the moving party shows that the evidence is so one-sided that it should prevail as a matter of law, the burden shifts to the nonmoving party to come forward with affidavits, depositions, answers to interrogatories, or other evidence demonstrating that there is a genuine issue of material fact that requires trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986); *Matsushita*, 475 U.S. at 587; *Pension Ben. Guar. Corp. v. Beverly*, 404 F.3d 243, 246-47 (4th Cir. 2005). An issue of fact is genuine if a reasonable jury could find for the nonmoving party. *Liberty Lobby*, 477 U.S. at 248. A fact is material if proof of the fact might affect the outcome of the case under the substantive law. *Id.* The facts should be viewed in the light most favorable to the nonmoving party and all reasonable inferences should be made in favor of the

nonmoving party. *Id.* at 255; *Smith v. Va. Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996).

B. Spoliation

City Grill's motion for summary judgment is predicated solely on its allegation of spoliation of the PCBs. City Grill alleges that Martini and Lacy had a duty to preserve the PCBs once they were identified as potential ignition sources and that the failure to preserve this evidence deprives City Grill of any opportunity to prove its case. As a sanction, City Grill requests that the court strike the expert reports and deposition testimony of Martini and Lacy or enter judgment in its favor.

“Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). The duty to preserve extends to the period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation. *Id.* at 591; *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). However, in the event a party cannot fulfill his obligation to preserve because he does not own or control the evidence, “he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.” *Silvestri*, 271 F.3d at 591. Although the Fourth Circuit has not definitively adopted the following factors, a number of district courts in this circuit approach spoliation motions by analyzing three factors: (1) the party with control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a “culpable state of mind;” and (3) the evidence that was destroyed or altered

was relevant to the claims or defenses of the opposing party. *Goodman v. Praxair Servs. Inc.*, 632 F. Supp. 2d 494, 509 (D. Md. 2009); *see also Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 520-21 (D. Md. 2010) (noting that district courts in the Second, Fifth, Sixth, Seventh, and Ninth Circuits have identified these factors).

Here, there is sworn, uncontradicted testimony in the record that Martini and Lacy left the PCBs in City Grill's possession when they completed their investigation. This fact precludes any finding of spoliation in this case.⁴ First, it cannot be said that Nationwide failed to preserve evidence when it left the relevant evidence in the custody and control of the opposing party. *See Silvestri*, 271 F.3d at 591 (finding spoliation where the relevant evidence was not preserved and Defendant was given no notice of possible products liability claim and existence of relevant evidence). City Grill was indisputably on notice that any evidence related to the fire needed to be preserved, as City Grill itself initiated this lawsuit. As Nationwide notes, it cannot be held responsible for City Grill's own failure to preserve the evidence.

City Grill argues at length that Diamantopoulos could not have known the importance of safeguarding the PCBs. According to City Grill, Martini and Lacy were the fire investigation

⁴ The court notes that it came across one sentence in City Grill's brief that suggests it might dispute Martini and Lacy's testimony that they left the PCBs in the restaurant: "but plaintiff has also raised the issue of whether or not Lacy deliberately destroyed probative evidence prior to the filing of its action and/or apparently made material misstatements in Lacy's Claims Report for the purpose of hiding the existence of the PCBs." City Grill's Mot. for Summ. J. [DE-32] at 12. The sentence is not accompanied by any citation to the record and the argument is not developed in any of the voluminous briefing in this case. Because City Grill is the moving party, it bears the initial burden of proof on the spoliation issue. *Celotex Corp.*, 477 U.S. at 323. It has failed to carry that burden with respect to any allegation that Martini and Lacy intentionally destroyed the PCBs. *See id.* (explaining moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the evidentiary record] which it believes demonstrate the absence of a genuine issue of material fact."). The court also considers any argument regarding intentional destruction waived. *See Long v. Teachers Ret. Sys.*, 585 F.3d 344, 349 (7th Cir. 2009) ("Unsupported and undeveloped arguments are waived.").

experts and they should have at a minimum notified Diamantopoulos that the PCBs should have been preserved. While it is true that a party “has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence[,]” *Silvestri*, 271 F.3d at 591, that principle only applies when the evidence is not actually in the possession or control of the opposing party. *See id.* (finding spoliation where plaintiff failed to notify defendant of existence and location of evidence and evidence was not in the custody or control of defendant); *King v. Am. Power Conversion Corp.*, 181 F. App’x 373, 377-78 (4th Cir. 2006) (same); *Victor Stanley*, 269 F.R.D. at 523 (“And, in [the Fourth Circuit], as well as the First and Sixth Circuits, the preservation duty applies not only when the evidence is in the party’s control; there is also a duty to notify the opposing party of evidence in the hands of third parties.”).

Thus, in this particular case the fact that Lacy and Martini failed to alert Diamantopoulos of the potential significance of the PCBs is largely beside the point. The legal standard for spoliation does not contemplate weighing the parties’ respective understandings of what relevant evidence needs preservation. Instead, each party is charged with preserving evidence that it has in its custody and control. There is no evidence in this record that Martini and Lacy ever took custody or maintained control of the PCBs. Thus, no duty to preserve ever attached.

The court also agrees with Nationwide that even assuming Martini and Lacy had custody and control over the devices, they did not fail to preserve the evidence “with a culpable state of mind.” *See Victor Stanley*, 269 F.R.D. at 520-21 (explaining that party must destroy or lose evidence with a culpable state of mind to find spoliation). As City Grill’s own rebuttal expert opined, the accepted standard of care among fire investigation officials is that low voltage

devices such as the PCBs are not competent ignition sources. *See* Small et al. *Low Voltage: The Incompetent Ignition Source, Dispelling the Myth* [DE-21-8] at 4-5 (“This behavior is understandable as no definitive science, testing, or training has yet been offered to the fire investigation community that would familiarize investigators with the more subtle failure modes and fire causes of, and within, small scale electronic assemblies.”). Thus, Martini and Lacy’s failure to collect and preserve this evidence did not occur with a negligent state of mind. As City Grill’s own expert admits, the scientific consensus in the fire investigation community is that low voltage devices are not competent ignition sources. Accordingly, Martini and Lacy’s alleged failure to preserve this evidence did not fall below the standard of care.⁵ *See Victor Stanley*, 269 F.R.D. at 529 (noting negligence “is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.” (internal quotation marks omitted)).

To summarize, the court finds that this is simply not a case of spoliation. The uncontradicted evidence in the record is that Martini and Lacy left the PCBs with City Grill. At that point, the duty to preserve the devices rested solely with City Grill, not Nationwide. In addition, there is simply no evidence that Martini and Lacy negligently failed to preserve the evidence. Thus, City Grill’s motion for summary judgment [DE-31] and its request to suppress

⁵ As City Grill notes, Martini testified that he was aware of Small’s paper when he completed his investigation in this case. However, the existence of a single theoretical paper addressing the possibility that low voltage devices can cause fires hardly establishes the standard of care in the fire investigation community.

the Martini and Lacy reports, which are predicated solely on City Grill's spoliation theory,⁶ are DENIED.

C. Breach of the Covenant of Good Faith and Fair Dealing

Under North Carolina law, a covenant of good faith and fair dealing is implied in every contract. *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985). As the North Carolina Supreme Court has explained, “[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.” *Id.* (internal citation omitted). Accordingly, “[a]ll parties to a contract must act upon principles of good faith and fair dealing to accomplish the purpose of an agreement, and therefore each has a duty to adhere to the presuppositions of the contract for meeting this purpose.” *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005).

The court finds that most of the parties' arguments on this claim are largely irrelevant because the breach of contract claim in this case will proceed to trial. Because the covenant is an “implied term” of the contract between the parties, *see Bicycle Transit*, 314 N.C. at 228, 333 S.E.2d at 305, City Grill may present evidence regarding the alleged breach of the covenant and argue to the jury that Nationwide breached the contract by breaching the implied covenant. Of course, City Grill will not be entitled to a double recovery in these circumstances because the same factual allegations make out the breach of the covenant and breach of contract claims.

⁶ In its summary judgment brief, City Grill also suggests it is entitled to partial summary judgment on the issue of coverage. City Grill did not move for summary judgment on its breach of contract claim. The issue of whether Nationwide properly denied coverage is the basic dispute in this case and the parties agree that material issues of fact preclude summary judgment on this issue. City Grill is not entitled to summary judgment on the issue of coverage.

Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 19-20, 472 S.E.2d 358, 368-69 (1996).

Nor can the covenant be used in a way that negates the express terms of the contract.

Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 726 (M.D.N.C. 2012). Within these parameters, however, City Grill can pursue its allegation that the covenant has been breached.

However, because the same factual allegations support both claims, the court has decided to dismiss the stand-alone breach of the covenant claim in these circumstances.⁷ See *B. Lewis Prods., Inc., v. Angelou*, No. 01Civ.0530MBM, 2005 WL 1138474, at *11 (S.D.N.Y. May 12, 2005) (“[T]he weight of North Carolina authority holds also that a claim for breach of the covenant of good faith and fair dealing based on facts identical to those supporting a breach of contract claim should not be pursued separately.”); *Bicycle Transit*, 314 N.C. at 228, 333 S.E.2d at 305 (describing covenant as contract term implied by law). As noted above, City Grill may still present evidence, argue to the jury, and present jury instructions on its theory of breach of the covenant. However, it will have to confine its arguments within the context of how the breach of the covenant constitutes a breach of the contract. Thus, the parties’ proposed jury instructions should not separately identify breach of the covenant as one of the claims at issue in this case. But within the proposed instructions regarding the breach of contract claim, the parties may present language explaining the covenant is an implied term of every contract and how breach of the covenant constitutes a breach of the contract.

⁷ The court does not hold that a stand-alone claim for breach of the covenant can never be brought in North Carolina. See *Robinson v. Deutsche Bank*, No. 5:12-CV-590-F, 2013 WL 1452933, at *11 (E.D.N.C. April 9, 2013). It is only in these particular circumstances—where the same facts make out the breach of contract and breach of the covenant claims and the breach of contract claim is proceeding to trial—that the court finds the stand-alone claim duplicative of the breach of contract claim.

D. Unfair and Deceptive Practices Act Claim

City Grill concedes that Nationwide is entitled to summary judgment as to most of the allegations supporting this claim.⁸ However, City Grill maintains that Nationwide's denial of coverage constitutes an unfair and deceptive settlement practice. This allegation reads "[Nationwide's] investigation and judgment of [City Grill's] insurance claim, its intentionally erroneous interpretation of the policy, and its refusal to comply with applicable statutes and regulations, and its refusal to provide additional benefits due under the terms of the policy constitute unlawful, unfair, and deceptive trade practices under [N.C. Gen. Stat. § 75-1.1 *et seq.*]." Compl. [DE-1] ¶ 36. It appears City Grill's evidentiary support for this allegation is Martini and Lacy's alleged failure to properly investigate and preserve the PCBs. *See* City Grill's Resp. to Nationwide's Mot. for Summ. J. [DE-43] at 4 ("In the case at bar, Plaintiff has consistently complained of Defendant's incomplete investigation of this . . . claim. Defendant was all too willing, in the name of 'savings' to jump to the conclusion that Plaintiff or an agent burned the Miami Subs premises.").

To establish an unfair and deceptive practice in violation of the act, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to the plaintiff. *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). "When an insurance company engages in conduct manifesting an inequitable assertion of power or position, including conduct which can be characterized as unethical, that conduct constitutes an unfair trade practice." *Johnson v. First*

⁸ This includes the claims arising out of Martini and Lacy's alleged conversion of the surveillance DVR.

Union Corp., 128 N.C. App. 450, 458, 496 S.E.2d 1, 6 (1998) (internal quotation marks omitted). Although not required to maintain an unfair and deceptive practices act claim, courts often look to North Carolina's insurance law statutes to determine if a particular practice is unfair or deceptive within the meaning of the act. *Country Club of Johnston Cnty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 243-44, 563 S.E.2d 269, 277-78 (2002). As relevant here, North Carolina General Statute 58-63-15(11)(d) makes it unlawful for an insurance company to refuse "to pay claims without conducting a reasonable investigation." *Id.*

There is simply nothing unfair or deceptive about Nationwide's investigation in this case. As Nationwide notes, the record indicates Nationwide conducted a relatively extensive investigation of this claim. It hired third-party experts, interviewed multiple witnesses, took examinations under oath, discussed the case with law enforcement, and reviewed surveillance video. City Grill's only fault with the investigation is that Martini and Lacy failed to sufficiently investigate the PCBs. But, as explained above, City Grill's own rebuttal witness noted that the scientific consensus at the time of the investigation was (and is) that low voltage devices such as the PCBs are not competent ignition sources. *See Small et al. Low Voltage: The Incompetent Ignition Source Dispelling the Myth* [DE-21-8] at 4-5. Thus, Martini and Lacy's alleged failure to inspect those devices in detail and Nationwide's continued refusal to pay the claim based on Martini and Lacy's findings, while potentially giving rise to a breach of contract claim based on wrongful denial of coverage, are not sufficient to support a claim for unfair and deceptive trade practices. *See Dalton v. Camp*, 353 N.C. 647, 657, 548 S.E.2d 704, 711 (2001) (explaining a practice is only unfair or deceptive where "some type of egregious or aggravating circumstances" are present (internal quotation marks omitted)). Accordingly, Nationwide's motion for summary

judgment as to the unfair and deceptive practices act claim is ALLOWED and that claim is DISMISSED.

E. Bad Faith Refusal to Settle

The court reiterates that “bad faith refusal to settle” is not a separate claim for relief listed in the complaint. For some reason, the parties brief and argue the bad faith refusal to settle tort despite the fact that it is not part of the claims in this case. The court presumes the parties are referring to the allegations contained in paragraph thirty-three of City Grill’s complaint, which alleges Nationwide’s conduct in refusing to pay the claim was sufficiently malicious to state a claim for punitive damages under North Carolina law. However, that allegation is contained under City Grill’s breach of the covenant of good faith and fair dealing claim and it does not even contain the words “bad faith refusal to settle.” In future cases, counsel must clearly set out each claim for relief.

The tort of bad faith refusal to settle allows a party to recover punitive damages, in addition to compensatory damages, when an insurance company denies a valid claim in bad faith. *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 394-95, 331 S.E.2d 148, 153-54 (1985). Refusals to pay “based on honest disagreement or innocent mistake” do not constitute bad faith. *See id.* at 396, 331 S.E.2d at 155.

Largely for the same reasons discussed above, the court finds that there is no evidence of bad faith on this record. Nationwide completed a relatively comprehensive investigation and denied the claim. City Grill has come forward with experts suggesting the PCBs were competent ignition sources, which contradicts the findings of Martini and Lacy. However, there is no scientific consensus in the fire investigation community that low voltage devices like the PCBs

are potential ignition sources. Furthermore, Martini and Lacy both now assert that they examined the PCBs and ruled them out as potential ignition sources. There is no evidence that this dispute is anything more than an honest disagreement between both parties' experts. As the court and counsel are painfully aware, expert disputes are routine in federal civil litigation. There is simply nothing in this record suggesting Nationwide denied the claim, as City Grill alleges, "maliciously, fraudulently, [and] with conscious disregard of [City Grill's] rights."⁹ Compl. [DE-1] ¶ 33.

CONCLUSION

Nationwide's motion for summary judgment [DE-27] is ALLOWED in its entirety. Except for the primary breach of contract claim and Nationwide's counterclaims, all of the claims in this case are DISMISSED. However, City Grill may pursue its breach of the covenant of good faith and fair dealing allegation as part of its breach of contract claim. City Grill's motion for summary judgment [DE-31] is DENIED.

The court reminds the parties that the pretrial conference order has been issued, *see* docket entry 63, and the parties must read and follow the instructions in that order carefully in preparation for the pretrial conference. The parties should also familiarize themselves with the undersigned's practice preferences, which may be found at <http://www.nced.uscourts.gov/judges/preferences.aspx>. After the pretrial order is finalized, the

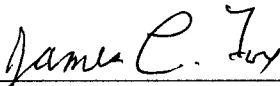
⁹ The court also rejects City Grill's argument that Nationwide's continued refusal to pay the claim after City Grill's experts raised the possibility that the PCBs caused the fire constitutes bad faith refusal to settle. Nationwide has sufficient evidence in this record to raise a triable issue of fact on the question of whether Diamantopoulos intentionally set the fire, thereby precluding coverage. Accordingly, Nationwide's refusal to award coverage after City Grill raised the possibility that the PCBs caused the fire constitutes at most an honest disagreement between the parties regarding coverage, not bad faith refusal to settle the claim.

court will issue a new order setting a hearing for ruling on evidentiary objections pretrial (to the extent possible) and addressing any *Daubert* matters. The order will also notify the parties of the deadline for submitting their proposed jury instructions.

The court also takes this opportunity to remind the parties of its procedure for scheduling civil trials. The trial in this matter is set for the May 12, 2014 term of court. However, because the undersigned does not hold separate civil and criminal terms, each term of court begins with approximately one week of criminal matters (*e.g.* arraignments, sentencings, etc.). This means civil trials typically do not begin until approximately one week after the term begins, which in this case is May 19. In the event a criminal defendant elects to plead not guilty at his scheduled arraignment, the court must complete the criminal trial before reaching any civil trials, due to statutory and constitutional speedy trial requirements. For this reason, the court will not know the definitive date that the trial will begin until approximately one week before the scheduled May 12 term. Due to the anticipated length of this trial, the court has been attempting to keep the last two weeks of May open for this trial. However, the court reiterates that it cannot predict with certainty the precise date the trial will begin until approximately one week before the term. If the parties must have a date certain before that time, they are free to consent to magistrate judge jurisdiction.

SO ORDERED.

This the th14 day of April, 2014.



JAMES C. FOX
Senior United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

Civil Action No.:5:12-CV-610-F

<p>CITY GRILL HOSPITALITY GROUP, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>NATIONWIDE MUTUAL INSURANCE COMPANY</p> <p style="text-align: center;">Defendant.</p> <hr style="width: 40%; margin-left: 0;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR RELIEF DUE TO DEFENDANT’S SPOILIATION OF RELEVANT EVIDENCE</p>
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NOW COMES Plaintiff City Grill Hospitality Group, Inc. (“Plaintiff”), and respectfully submits this Memorandum in Support of Plaintiff’s Motions for Partial Summary Judgment and for Relief due to Defendant’s Spoliation of Relevant Evidence.

STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiff is entitled to summary judgment on any and all the issues of whether or not Nationwide’s policy was in full force and effect on the date of a fire which occurred in Plaintiff’s restaurant on January 24, 2012, and whether Defendant can exclude said fire from coverage and thereby deny the claim based upon a origin and cause investigation which determined the fire to have been intentionally set and determined that agents of Plaintiff were directly involved with the setting of the fire.

2. Whether or not the Defendant is guilty of spoliation of crucial evidence in this case and whether or not Plaintiff is entitled to have the Court strike Defendant’s origin and cause

experts thereby allowing summary judgment as it relates to whether Defendant can exclude said fire from coverage and thereby deny the claim based upon a origin and cause investigation which determined the fire to have been intentionally set and determined that agents of Plaintiff were directly involved with the setting of the fire.

STATEMENT OF THE CASE

This lawsuit arises from a fire casualty claim brought by Plaintiff on a policy of insurance underwritten by Defendant. Plaintiff was the owner and operator of a Miami Subs restaurant which suffered extensive damage due to a fire which occurred on January 24, 2012. Plaintiff's claim was denied by Defendant in May 2012 allegedly on two separate grounds. First, Defendant determined that the fire was intentionally set and that Plaintiff and/or its agents were involved in the setting of the fire. Second, Defendant determined that Plaintiff and/or its agents had made material misrepresentations in the claim process. During the initial claim investigation, Defendant retained the services of two fire investigation experts. They were Hunter B. "Terry" Lacy ("Lacy"), who is Plaintiff's primary fire origin and cause investigator, and Henry B. Martini, P.E. ("Martini"), who is Defendant's electrical engineer. At the time of the initial claim investigation, both were employees of Donan Engineering, Inc. ("Donan").

Subsequently, Plaintiff brought this action to enforce its rights under the terms of the policy. In accordance with the rules of the Court, Plaintiff and Defendant created a discovery plan and obtained a Court Scheduling Order (the "Order") and promptly engaged in extensive discovery. The Order contained a time for fact discovery and a staggered time for service of expert reports. During discovery, Plaintiff tendered the expert reports of Steven Booth ("Booth"), who is Plaintiff's origin and cause expert; Steven Stone ("Stone"), who is Plaintiff's electrical engineer; and, subject to pending motions already before the Court, James Small

(“Small”), who is a proposed rebuttal electrical engineer. Also during discovery, Defendant tendered the federal expert reports of both Lacy and Martini, and both experts modified their federal reports in comparison to their claim reports in response to the criticisms and analyses of Booth and Stone. Finally, during discovery, Plaintiff discovered that Defendant and/or its agents utterly failed to preserve important, relevant evidence examined during the claim investigation.

Plaintiff and Defendant have timely complied with the Order and have completed discovery and impasse at mediation. The parties are now tendering to the Court their dispositive motion. Additionally, Plaintiff, in conjunction with its motion for partial summary judgment is also moving the Court to impose appropriate relief against Defendant due to the failure of Defendant and/or its agent to properly preserve relevant evidence examined as a part of Defendant’s investigation of Plaintiff’s claim.

STATEMENT OF THE FACTS

On or about January 12, 2012, Defendant issued to Plaintiff a renewal comprehensive business casualty loss policy (the “Policy”) with policy number ACP BPFM 2214526608. (Ex. A - Aff. of Diamantopoulos: ¶ 4). A fire occurred in Plaintiff’s Miami Subs restaurant (the “Premises”) on January 24, 2012, at approximately 15 minutes or so before 9:00 a.m. and was reported at approximately 8:42 a.m. on that Tuesday morning, authorities were alerted and firefighters came and suppressed the fire promptly. There was extensive smoke damage to the structure. At that time, all premiums were current and the Policy was otherwise in full force and effect. (*Id.* at ¶ 5). Accordingly, Plaintiff notified Defendant of its loss and the claims process began.

Within one day of the fire occurring, Nationwide retained Donan as its origin and cause investigators to conduct its origin and cause investigation of the fire, and Donan assigned one of

its employees, Lacy, as the primary fire origin and cause investigator for Plaintiff's claim. On January 25, 2012, Lacy contacted Mr. Dimitrios Diamantopoulos ("Jimmy"), an officer of Plaintiff to meet him at the restaurant at 9:00 a.m. on the next morning for him to begin his fire investigation and Jimmy complied. (Ex. C – Lacy Dep. 30:23). On or about January 26 or 27, 2012, Lacy recommended that Defendant retain the services of an electrical engineer to review all electrical systems and appliances in the restaurant to determine whether or not it could have been a cause of the fire in Plaintiff's restaurant and he recommended Martini, who also worked for Donan. (*Id.* at 129:18-136:8).

The fire investigation by Lacy continued from January 26, 2012 through February 2, 2012. At the initiation of the investigation, Lacy, in no uncertain terms, informed Jimmy that he represented Defendant and that Lacy and Lacy alone was in charge of the Premises during the entirety of the investigation. (Ex. B – Jimmy's Dep. 130:13-131:19). During this period, Lacy collected samples to test for accelerants and these tests could not find any evidence of accelerants in the area of the supposed origin of the fire. (Ex. C – Lacy's Dep. 138:21-139:13). Jimmy has testified that, during this investigative period, he discussed the current video surveillance system (the "DVR") for the Premises with Lacy and discussed how to potentially access the information contained on the DVR. (Ex. B – Jimmy's Dep. 174:15-178:6). Lacy also documented and removed certain evidentiary exhibits from the Premises. (Ex. C – Lacy's Dep. 170:22-173:6).

Prior to Lacy investigating the fire, Special Agent Chad Royal ("Royal") of the North Carolina State Bureau of Investigations ("SBI") also investigated the fire and his report initially concluded that the fire was from an undetermined origin based in part to the presence of three electrical printed circuit boards (the "PCBs") in the vicinity where Mr. Royal determined the

origin of the fire to have occurred. (Ex. I- Royal Dep. 88:13-25, 89:1-25). Royal testified that, after he concluded his initial investigation, he had discussions with Lacy and discussed his findings with him, including the discovery of the PCBs. (Ex. I - Royal Dep. 90:8-11). Lacy admits that Royal told him about the PCBs. (Ex. C - Lacy Dep. 76:19-77.6).

It has since been determined that these PCB's were part of an electrical appliance now identified as an HME Ion IQ wireless transmitter (the "Ion IQ") used as part of the drive-thru system. (Ex. F - Martini Dep. 114:16-25, 115:1-10). The Ion IQ was on the wall to the upper right hand corner of the first drive-thru window before the fire occurred and after the fire occurred all that was left to indicate its location was a rectangular shaped pattern on the wall. (*Id.*)

Incredibly, while Lacy took custody of several evidentiary items during his investigation, he claims that he did not label or tag and did not take custody of the PCBs, and Lacy's initial pre-litigation report ("Lacy's Claim Report") did not mention the Ion IQ or the presence of these PCB's (nor the video surveillance system for that matter). (Ex. C – Lacy's Dep. 169:25-170:24). In fact, Lacy's Claim Report states the following: "The rear drive through window was not in active use; thus, no electrical appliances were located in that area. No electrical, mechanical, or otherwise heat processing equipment was located in that area" (Ex. D– Lacy's Claim Report, Pg 8-9; authenticated as Exhibit 35 in Lacy's Dep.). Lacy further declares that he there was nothing on the floor of any evidentiary value. (*Id.* at 9). Lacy goes on to state in his deposition that the first time that he ever saw the PCBs was on a table in the restaurant. (Ex. C- Lacy Dep. 209:14-210:3).

Lacy's investigative reports and his testimony are directly contradicted by Agent Royal's testimony that he found the PCBs in the rubble below the first drive-thru window, in the area of

the supposed origin of the fire, placed them against the baseboard below the window without moving them further and discussed the PCBs and their importance with Lacy. (Ex. I – Royal Dep. 88:12-15, 94:16-19, and 118:12-20). Lacy’s testimony is further contradicted by Jimmy’s testimony that that, on one of the occasions that he met Lacy at the Premises, Lacy placed a flashlight beam on the electrical component remnants below the drive-thru window near the supposed origin of the fire and which appeared to come from a come from something installed above the drive-thru window, as indicated by marks left on the wall. (Ex. B – Jimmy’s Dep. 191:18-192:21).

As stated above and even though Lacy maintained that there were no electrical components in the area, Lacy, during his investigation, determined that he needed the services of an electrical engineer and asked Defendant to retain the services of Martini, who was and is also employed with Donan. (Ex. C – Lacy Dep. 129: 23, 130:1-10). Thereafter, Lacy met Martini at the premises on Monday, January 30, 2012, for the purposes of Martini conducting his analysis of electrical components in the restaurant. *Id.* Interestingly, Martini apparently did not take any notes during this initial examination, and he even had to later reconstruct sketches that he believed, but cannot prove, he made on January 30, 2012. (Ex. F - Martini Dep. 27:12-19). After concluding his examination, Martini detailed his findings and conclusions in his own letter report (“Martini’s Claim Report”) and stated that he had ruled out all electrical items but failed to specifically mention anything about the Ion IQ or the PCB’s; however, the PCB’s were shown, but not specifically described or named, in photograph #33 of Martini’s Claim Report. (Ex. G– Martini’s Claim Report, authenticated as Exhibit 46 and 46A in Martini’s Dep. 68:8-17). Lacy and Martini further informed Royal of their findings, which prompted Royal to change his initial determination of an undetermined cause, with this original determination being a direct result of

finding the PCBs in the area of supposed origin, to a final determination of incendiary (i.e. arson) as a result of Martini presumably ruling out all potential electrical causes of ignition. (Ex. I - Royal Dep. 114:21-116:11).

Based upon the dates of Lacy's Claim Report and Martini's Claim Report, they were provided to Defendant in late May of 2012. Lacy, as the origin and cause investigator, found that all electrical causes were excluded, that, by means of the process of elimination, the cause of the fire was some sort of open flame and that the fire was intentionally ignited. (Ex. D – Lacy's Claim Report Pg. 10). Almost immediately thereafter, Defendant denied Plaintiff's claim through a letter (the "Denial Letter"), dated May 31, 2012. (Ex. A – Jimmys Aff. ¶ 8). The Denial Letter set forth two primary bases for allegedly excluding Plaintiff's claim from coverage under the Policy. (*Id.*). As the first basis, the Denial Letter states that "[a]s a result of this investigation [the investigation conducted, in part, by Lacy and Martini], it appears that the fire of January 24, 2012 was intentional, not accidental, in origin and that one of the owners of City Grill Hospitality Group, Inc. participated in the intentional setting of this fire" and thus the fire was the result of an intentional dishonest act by an agent of Plaintiff. (*Id.*). The Denial Letter goes on to declare that separate claims misrepresentation was the second basis for denial. (*Id.*).

After initiating this litigation, Plaintiff retained its own fire investigator, Steven C. Booth ("Booth") to examine Defendant's alleged evidence, to conduct his own independent fire investigation and to write a report with his findings and opinions ("Booth's Federal Report"). (Ex. K – Booth's Federal Report, which was served on Defendant and included among Booth's files and materials which were generically identified and made exhibits to his deposition). After conducting his own examination, Booth's Federal Report took Lacy's investigation to task and directly contradicted Lacy's statement that there were no electrical components in the area

supposed origin of the fire. (*Id.*) Booth's Federal Report then clearly and conclusively identified the Ion IQ along with the PCBs as being in the area of origin. (*Id.*).

Booth further concluded that it was inappropriate for an investigator complying with the guidelines of NPFA 921, to which Lacy and Martini claimed to adhere, to determine that the fire resulted from an open flame (an incendiary cause) without ruling out the Ion IQ/PCBs as a potential ignition source. (*Id.*) NPFA 921 requires an investigator to rule out all potential causes before that investigator can utilize what is known as a process of elimination, which 921 generally discourages. *Id.* Lacy has now admitted that his report to Defendant on May 21, 2012 was not true. (Ex. C - Lacy Dep. 208:13-22). Nevertheless, was only after Plaintiff's experts proved the presence of the Ion IQ in the area of supposed origin of the fire that Defendant's experts even felt compelled to discuss its presence.

Upon the provision of proof of a electrical component being located in the area of supposed origin of the fire, Plaintiff, at Booth's request, retained a separate electrical expert, Steven Stone, ("Stone"). Thereafter, Stone prepared an expert report ("Stones Federal Report") and further stated that, in order for him to be able to rule out the Ion IQ device and the residual PCBs as an ignition source for the fire, he would need access to the actual devices and evidentiary remnants for purposes of an in depth analysis. (Ex. L, Stone Dep. 113:9, 114:9-21; see also Ex. M – Stone's Federal Report).¹

Booth, as Plaintiff's origin and cause investigator and based upon information acquired from Stone and others, testified in his deposition that, unless Plaintiff and its experts have physical access to the PCBs for the purpose of further investigation and study [beyond examining the few photographs produced by Defendant and others), the Ion IQ and residual PCBs remain a potential electrical ignition source which cannot be eliminated and which

¹ Stone's Opinions are the subject of a pending motion to allow supplementation filed by Plaintiff.

precludes a finding of an incendiary fire. (Ex. J – Booth’s Dep. 27:11-30:17 and 39:1-25; *see also* Booth’s Federal Report). Unfortunately, after the Ion IQ electrical appliance was allegedly examined by Lacy and Martini, the Ion IQ and the PCBs disappeared. (*Id.*). For that reason Stone has been unable to give any other further definitive conclusions regarding the PCB’s and their potential to have been the ignition source of the fire. Consequently, Booth cannot rule out the Ion IQ as a potential ignition source. (*Id.*).

Based upon their later federal reports (“Lacy’s Federal Report” and “Martini’s Federal Report,” respectively), both Martini and Lacy appear to take the position that because this was a low voltage device the likelihood that it could be the ignition source of the fire was virtually nil. (Ex. E – Lacy’s Federal Report and Ex. H – Martini’s Federal Report). After being confronted with the reports of Booth and Stone, Lacy and Martini both miraculously “remembered” information regarding the ion IQ and the PCB’s without ever having inquired about the existence of the ion IQ or its pre-fire location. (Ex. C - Lacy Dep. 146:1; 147:13). Inexcusably, Martini did not even make notes of his alleged investigation of the ion IQ (Ex F - Martini Dep. 28:9). Nevertheless, both Martini and Lacy appear to causally dismiss the Ion IQ and the PCBs as low voltage devices, which were unlikely to start a fire in the first instance and which were excluded via an on-site “naked-eye” visual examination allegedly performed by Martini. Martini, however, concedes that low-voltage electrical devices can be the ignition sources for fires. (*Id.* at 127:17-25). Martini further concedes that if the PCBs had been collected² by either himself or Lacy the normal and proper procedure would have been for the PCBs to have been sent to a lab and examined in a laboratory setting. (*Id.* at 100:2-10).

² Incredibly, it appears to be both Martini’s and Lacy’s argument that they did not “collect” (i.e. take custody) of the PCBs and send them off for testing because they were leaving them in place for further investigation and were concerned with spoliation [even though they readily removed other items without much concern]; nevertheless, Lacy testifies that he never discussed with Jimmy the PCBs or that they were allegedly being left in his possession. (Ex. C – Lacy’s Dep. 170:4-24200:14-20; *see also* Ex. F – Martini’s Dep. 96:20-97:4).

ARGUMENT

-Standard of Review-

The Court may grant summary judgment on the “Pleadings, Depositions, Answers to Interrogatories, and Admissions of Record, together with the Affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of the law. *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 519 (4th Cir.2003) (quoting Fed.R.Civ.P. 56(c)). When a party files a motion for summary judgment, that party bears the initial burden of proof to demonstrate the absence of a material issue of fact.

Celotex Co. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party meets this initial burden, then the burden shifts to the nonmoving party to prove the existence of material issues of fact. *Bouchat*, 346 F.3d at 519. Nevertheless, in determining whether there is a genuine issue of material fact, the Court must use the facts, and all reasonable inferences to be drawn from them, in the like most favorable to the non-moving party. *Cleveland Const., Inc. v. Fireman's Fund Ins. Co.*, 819 F.Supp.2d 477, 480-481 (2011).

-Plaintiff is entitled to summary judgment on the issue of coverage of the Nationwide Policy-

Plaintiff is not aware of any dispute between the parties as to whether or not there was initial coverage under the Policy which would have covered the loss sustained by Plaintiff by virtue of the fire which occurred on January 24, 2012. Under North Carolina law, an insurance policy is contract and the principals of contract apply to allege breaches. *Cleveland Const., Inc.*, 819 F.Supp.2d at 481 (quoting *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 606, 630 S.E.2d 221, 229 (2006)). Pursuant to these principles, Plaintiff has the burden of

proving that there was indeed a policy in existence and that all the conditions precedent to coverage were complied with by Plaintiff, and, once said proof has been made, the burden then shifts to Defendant, as the insurance company, to prove that a “policy exclusion excepts the particular injury from coverage.” *Nelson*, 177 N.C. App. at 606, 630 S.E.2d at 229. Attached to this Memorandum is an Affidavit of Jimmy Diamantopoulos in which he states that the Policy was in effect from January 12, 2012 until January 11, 2013, that all of the premiums have been properly paid on the policy up through the date of the loss and that he had complied with all other conditions precedent to insure coverage under the terms of the Policy. Moreover, attached Jimmy’s affidavit also includes the pertinent portions of the Policy which define initial coverage and the exclusions. Therefore, Plaintiff is entitled to partial summary judgment on the issue of coverage and that issue should not be one to be litigated should the trial.

**-Defendant should not be allowed to offer testimony of it experts and/or from Royal as to
cause and origin of the fire-**

It is well settled that “[a] litigant has a duty to preserve evidence that he knows or should know is relevant to imminent or ongoing litigation.” *Jordan F. Miller Corp. vs. American AM. Eagle, Inc. Co*, 139 F.3d 912, 1998 WL 68879 (10th Cir 1998). The preservation cannot be “selective.” *Workman v. AB Electrolux Corp.*, 2005 WL 1896246, at 5. The obligation to preserve evidence may arise with respect to potential litigation, *Id.* at 6, and indisputably arises upon notice of litigation, *Kronisch v. Young Estates*, 150 F.3d 112, 126 (2nd Cir. 1998).

In the case at bar, origin and cause investigator Lacy was retained by Defendant to investigate the fire which occurred at the Premises, and, upon the conclusion of that investigation stated that he concluded that the fire at Plaintiff’s restaurant was incendiary in nature and not caused by any other ignition source. Moreover, Martini, an electrical engineer was retained by

Defendant to inspect electrical appliances and electrical outlets in Plaintiff's restaurant to rule in or rule out any of those appliances located in the area of the fire that might or could have been an incendiary cause of the fire in Plaintiff's restaurant, and, for the reasons set out, Plaintiff asks the Court to preclude the admission into evidence of the reports of Lacy, Martini and Royal, who admitted that his final conclusions were based upon the investigation of Lacy and Martini, together with their testimony or, alternatively, impose an adverse-inference instruction against Defendant, consistent with the common sense and well established principle that party who has notice that evidence is relevant to litigation and who fails to preserve and/or to destroy that evidence is more likely to have been threatened by that evidence than the party in the same position who does not destroy the evidence.

As shown the preceding facts, Defendant's agents violated the clear legal requirements to preserve relevant evidence. The Court has "inherent power" to impose sanctions to address the spoliation of evidence. *Miller*, 1998 WL 68879 at 3. "When deciding whether to sanction a party for the spoliation of evidence, Court have considered a variety of factors, two of which generally carry the most weight: (1) The degree of the culpability of the party who lost or destroyed the evidence,; and (2) he degree of actual prejudice to the other party. *Id.* at 4. In the light most favorable to Defendant, Lacy, who was investigating the Premises fire for Defendant and upon whose report, Defendant based its Denial Letter, probably failed to take proper care to prevent the accidental destruction of probative evidence, the PCBs, but Plaintiff has also raised the issue of whether or not Lacy deliberately destroyed probative evidence prior to the filing of its action and/or apparently made material misstatements in Lacy's Claims Report for the purpose of hiding the existence of the PCBs. If that be so, the facts of this case would establish the high degree of culpability on the part of Defendant.

In any event and whether or not Defendant authorized or sanctioned any actions by Lacy, Plaintiff would argue that Defendant should be precluded from offering the testimony of Lacy, Martini and Royal under either standard. All three experts ultimately base their conclusions that the fire was incendiary, due to a process of elimination, in that they cannot find any evidence of any other logical cause. This conclusion, in and of itself, is based upon the exclusion of the Ion IQ and the remnant PCBs as a potential ignition source. Royal and Lacy, after he admitted to the existence of the PCBs, base their cause determination upon the alleged examination of the PCBs on January 30, 2012, by Martini. After this examination, the PCBs have disappeared, and it is clear that the last persons to have knowledge of its location were Lacy and Martini.

This circuit has recognized its litigants have a duty to preserve material evidence not only during litigation but also in the period before litigation if the party should know that the evidence may be relevant to anticipated litigation. *Silvestri v. General Motors Corporation*, 271 F.3d 583, 590 (4th Cir. 2001). This circuit has also recognized a duty to notify potential parties of the existence of the evidence so that the party has an opportunity to investigate the matter and shape its defense. *Id.* Both of these duties would apply in this case, since Defendant, by and through Lacy had sufficient and primary access to the evidence. *See Hodge v. Walmart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004), (“quoting from *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995)”). Here Defendant’s agents had access to the PCBs and failed to preserve the evidence and failed to Plaintiff any notice of the existence of the evidence and that they would not be preserving said evidence.

Additionally, Defendant had an affirmative duty to notify Plaintiff about the location of the PCBs and gives its investigators an opportunity to examine the PCB’s to determine if there was indeed any defect in the circuit boards that could have caused the fire in Plaintiff’s

restaurant. Lacy in his testimony acknowledged that he had responsibility to preserve the PCBs but he did not take them into possession nor tag them because he wanted to leave them for other investigators to examine. When Plaintiff retained its own experts, the PCBs were missing and Defendant's experts were the last to have had any knowledge of the whereabouts of the printed circuit boards. Apparently, Defendant takes the position that since the photographs were available that they should be sufficient to make a proper examination of the PCBs; however, according to Plaintiff's experts they are not sufficient to make a determination of whether or not there was any defect in the PCBs and that only a determination in a laboratory setting could make that determination. Martini, in his deposition, agreed generally that a laboratory analysis would be appropriate.

National Fire Protection Association §921, which both Lacy and Martini followed in their investigation of this fire, defines spoliation as the [“loss, destruction, or material alteration of an object or a document that is evidence or is potential evidence in a legal proceeding by one who has responsibility for its preservation.”] NFPA 921, §3.3162. A fire scene can be fairly described as a collection of “objects”, all of which have at least the “potential” of evidentiary value in a case involving around the cause of the fire.

The importance of preserving the fire scene is also discussed in NFPA 921 §16.3.1 NFPA 921 also discusses how spoliation of the fire scene may occur. NFPA 921, §11.3.5 cautions that, “[s]poliation of evidence may occur when the movement, change or destruction of evidence, or the alteration of the scene significantly impairs the opportunity of other interested parties to obtain the same evidentiary value from the evidence as did any prior investigator.” It would be extremely difficult in this case for Nationwide to argue that the investigators for Plaintiff, relying upon photographs, had the same ability to fully investigate the fire, and in this case the PCB's (a

component of the Ion IQ), as did Defendant's investigators, who were given the opportunity to visit the scene to review all of the available evidence, take photographs and measurements and to collect such evidence as it deemed necessary for their conclusions.

Finally, NFPA 921 offers a simple and clear method for avoiding claims of spoliation. NFPA 921, §11.3.4 instructs that again: "[c]laims of spoliation of evidence can be minimized by notices given to all known interested parties and investigation of the site is going to occur so as to allow all known interested parties the opportunity to retain experts and attend the investigation." A spoliation motion in this case could have been avoided had agents for Defendant notified Plaintiff concerning information which they had concerning the PCB's found at the fire scene in the area of origin of the fire. Instead, Lacy, in Lacy's Claim Report, initially denied the existence of the PCBs and/or the Ion IQ and Martini did not specifically mention them in his analysis. It was only after Plaintiff hired its experts that it discovered that the PCBs were missing since Lacy and Martini's pre-litigation reports were devoid of any mention of them.

Defendant may also argue that NFPA 921 applies only to its fire investigators and not to their client; however, it is clear in the Denial Letter that Defendant relied upon Lacy and Martini in supporting its decision that the fire claim was excluded from coverage. It would be highly inequitable to insulate Defendant from the repercussions of the actions of its agents while simultaneously allowing it to reap the benefit of these same acts. Remedying the prejudice is the very essence of spoliation sanctions. Moreover, Lacy was very attuned to the issue of spoliation and was very aware of the issue of spoliation guidelines on how spoliation can be avoided.

Another available option for spoliation is the issuance of jury instruction permitting the jurors to make adverse inference from a parties' destruction of evidence. *See Silvestri v. General Motors Corporation* , 271 F.3d 583, 590 (4th Cir. 2001). Evidence of bad faith or fraudulent

intent is not required to obtain this instruction. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995). Courts have held that three elements should be shown to warrant an adverse inference instruction for spoliation. [1] The party having control over the evidence had an obligation to preserve it when it was destroyed; [2] The destruction or loss was accompanied by “culpable state of mind,” and [3] The evidence that was destroyed was relevant to the claims or defenses of the party that sought discovery of the spoliated evidence, to the extent that a reasonable fact finder could conclude that the lost evidence would have supported the claims or defenses of the parties that sought it. *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 107-108 (2d Cir 2002). “A culpable state of mind” could include bad faith/known destruction; gross negligence, and/or nil or negatives. *Id* at 108.

If the Court finds in the present case that Defendant had an obligation to preserve the PCBs which its agents recovered from the fire scene because they contained evidence relating to Plaintiff’s claims that the Ion IQ from which the PCB’s came could or might have been an ignition source for the fire that occurred at Plaintiff’s restaurant on January 24, 2012, sanctions should be imposed as a matter of course. As admitted by Lacy in his deposition, he left the PCB’s without tagging them or taking them into possession for safekeeping and left them on a table from which disappeared. At that point in time he and Defendant would have reasonably suspected that litigation might arise from Defendant’s initial denial of Plaintiff’s claims. Under those circumstances there is enough evidence that Defendant’s agents discarded the PCB’s with a “culpable state of mind” and any information that might have been obtained from the PCB’s were clearly relevant to Plaintiff’s claims and certainly to the defenses of the Defendant.

The facts in this case are somewhat similar to the facts in *King v American Power Conversion Corp.*, 181 Fed. Appx. 373 (2006) where Plaintiff operated a traveler’s store and gas

station and owned a surrounding strip mall. Two employees of Plaintiff arrived at the store on the morning that the fire broke out. *Id.* Steve Booth, investigating the fire on behalf of Cumberland County Arson Task Force, determined that the fire began in the store office beneath the desk where a UPS unit was located. He concluded that the origin of fire was in the area of the UPS and concluded that he was unable to determine that the power supply caused the fire and turned the UPS power supply over to Mark Kissel of FTI/LWG Consulting at the request of Nationwide Insurance Company, the King insurer. *Id.* He also turned over the electrical outlet into which the UPS power cord was inserted and another UPS unit that was not damaged. Nationwide retained Mark Kissel and Christopher Elrod to investigate the fire and its cause and Elrod concluded that the exact source of ignition was unknown and concluded that probability of the ignition of the ordinary combustible materials due to the electrical malfunction of the location of the battery backup power pack could not be eliminated. *Id.* Kissel also reported to Nationwide that while the damage to the UPS “may indicate incendiary failure within the UPS, further investigation was needed.” *Id.* Thereafter counsel for King visited Kissel’s office where he took photographs of the UPS and learned that no one from APC had inspected the evidence. *Id.* It appears that the UPS unit remained at Kissel’s facility until several months after the fire and then FTI/LWG sent a letter to Nationwide asking Nationwide to pay storage of the unit or authorize its destruction. *Id.*

Accordingly, a representative from Nationwide signed an authorization to destroy or dispose of the UPS unit and thereafter the evidence was destroyed without notice to Plaintiff or its attorneys. *Id.* Plaintiff then brought suit against APC and in that litigation two engineers at APC testified that an examination of the UPS unit would have enabled them to determine whether the fire started inside or outside of the unit but without notice of the fire or access to the

evidence they could not conduct an investigation and had no opportunity to investigate any crucial pieces of evidence in the case. After further discovery APC moved for summary judgment. The District Court agreed concluding that [without] the UPS (American Power) suffered irreparable prejudice in attempting to defend itself against Plaintiff's claim and a lesser sanction, such as excluding any reports or testimony of the Nationwide consultants would totally destroy Plaintiff's case. *Id.* The Court decided that the only appropriate remedy was dismissal and the Court of Appeals for the 4th Circuit affirmed.

In this case, as in *King*, attention was focused on the electrical components (i.e. the PCBs) almost immediately after the fire by SBI agent Royal, and Lacy, the independent investigator for Defendant also was aware of the PCBs. Nevertheless, no notice was given to Plaintiff of the presence of the PCBs at a time when it could have inspected the PCBs and the wiring for that unit. As in *King* and *Silvestri*, the Court stated that the failure of Plaintiffs in those case to notify potential Defendants of the availability of material evidence can also be a breach of the duty not to spoliage evidence. *Silvestri*, 271 F.3d 592.

In this case there is no question but that Defendant and its agents aware that litigation might ensue as a result of its denial of Plaintiffs' claim and *Silvestri* makes it clear that the duty is on the party who discovers crucial evidence, not law enforcement, not investigators, not insurance claim personnel; only the parties who discovers the evidence has a duty to notify the other party. *Id.* 271 F.3d, 595 and the quote went on to conclude that King was at least negligent for failing to notify APC of the fire to allow APC an opportunity to examine the fire scene and all of the accompanying physical evidence. The Court in *King* went on to observe that whether Plaintiffs failed to notify APC after learning that no one from APC had inspected the evidence in

January 2002 was intentional or really negligent need not be decided since that failure is a direct cause of APC's inability to construct a defense. *King*, 181 Fed. Appx. at 377-378.

The Plaintiffs in *King* did not actively destroy evidence [the destruction was actually performed by an independent 3rd party]; however, because of the extreme harm to Defendant and the fact they were in the position to at least give notice to the Defendant, the Court still found that the Plaintiffs were at some fault and allowed the extreme sanction of dismissal. *Id.* Whether a party acts intentionally or negligently, as in *Silvestri* and in this case, dismissal may be the appropriate sanction for spoliation." *Id.* Indeed, the court notes that even if dismissal may be extreme, lesser sanctions such as exclusion of evidence and adverse inferences can be considered. *Id.* at 376-378. Also, as in *King*, these remedies can be considered even if the adverse party argues that there is other evidence that can take the place of that which has been lost or irrevocably destroyed. *Id.* at 378.

Defendant's failure to preserve was so prejudicial that it is denied that Plaintiff had been able to defend the conclusion of Defendant's experts. To protect itself in this case the Plaintiff must defend against the conclusion of Plaintiff's electrical expert, Martini that he made a visual inspection of the PCBs and found nothing that would indicate that they could have been the cause of ignition for the fire. To prove that the conclusion of Martini's flawed and has no merit would be futile and the only evidence that he has to go on would be the incomplete investigation made by Lacy and Martini and Martini's visual impressions which, at best, would be unreliable. Both Lacy and Martini wrote pre-litigation reports to Defendant in which neither of them discussed the presence of the Ion IQ or PCBs having been present in the area where Lacy concluded was the origin of the fire and consequently did not specifically discuss them as being ruled in or ruled out as a potential ignition source for the fire. Martini admitted that he had no

notes, other than a few photographs of his investigation and alleged examination of the PCBs and was simply relying upon memory that the fire that had consumed the Ion IQ unit appeared to have been from an outside source and not from the inside source. As stated by all of Plaintiff's experts, there is no way that Plaintiff can refute the testimony of Lacy and Martini without their experts having been given an opportunity to physically investigate the PCBs and not simply view Martini's pictures.. Now that the physical evidence is gone the only evidence left are the statements of Lacy and Martini and there is no question that the Plaintiff would be highly prejudiced by the PCB's not being produced for their experts to review.

CONCLUSION

For the reasons herein stated, Plaintiff requests that the Court grant partial summary judgment on the initial applicability of the Policy. Plaintiff also respectfully maintains that the only appropriate sanction in this case is for the suppression of any evidence may be sought or offered by Defendant or its experts Lacy and Martini and/or even Royal in ruling out the PCB's as being a potential ignition source for the fire. Accordingly, if the Court so suppresses this evidence, Defendant no longer meets the requirements for a "process of elimination" conclusion that the fire is incendiary and therefore was ignited by a dishonest act of Plaintiff or its agents and the same, therefore, cannot be the basis of an exclusions. As such, Plaintiff would also be entitled to partial summary judgment on this issue as well.

**MCCOY WIGGINS CLEVELAND
& O'CONNOR PLLC**

/s/ Richard M. Wiggins

Richard M. Wiggins, Esq.

N.C. Bar No. 4722

James A. McLean, III

N.C. Bar No. 27966

Attorney for Plaintiff

City Grill Hospitality Group, Inc.

P.O. Box 87009

Fayetteville, NC 28304-7009

Telephone: (910) 483-8104

Facsimile: (910) 483-0094

Email: rwwiggins@mccoywiggins.com

jmclean@mccoywiggins.com

**UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

Civil Action No.:5:12-CV-610-F

**CITY GRILL HOSPITALITY GROUP,
INC.,**

Plaintiff,

v.

**NATIONWIDE MUTUAL INSURANCE
COMPANY**

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2013, I electronically filed the foregoing PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR RELIEF DUE TO DEFENDANT’S SPOILIATION OF RELEVANT EVIDENCE with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following parties, addressed to:

Gemma L. Saluta, Esq.
Rachel E. Daly, Esq.
% Womble Carlyle Sandridge & Rice, LLP
One West Fourth Street
Winston-Salem, NC 27101

/s/Richard M. Wiggins

Richard M. Wiggins, Esq.

N.C. Bar No. 4722

James A. McLean, III

N.C. Bar No. 27966

McCoy Wiggins Cleveland & O’Connor PLLC

P.O. Box 87009

Fayetteville, NC 28304-7009

Telephone: (910) 483-8104

Facsimile: (910) 483-0094

Email: rwiggins@mccoywiggins.com

jmclean@mccoywiggins.com

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:12-CV-00610-F

CITY GRILL HOSPITALITY GROUP, INC.,

Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant.

**DEFENDANT'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MOTION FOR
RELIEF DUE TO DEFENDANT'S
SPOILIATION OF RELEVANT
EVIDENCE**

COMES NOW the Defendant, Nationwide Mutual Insurance Company (“Nationwide”) and respectfully submits this Memorandum in Opposition to Plaintiff’s Motion for Partial Summary Judgment and Motion for Relief Due to Defendant’s Spoliation of Relevant Evidence [D.E. 31].

ISSUES PRESENTED AND BRIEF ANSWER

1. Whether Plaintiff is entitled to partial summary judgment on the issue of coverage?

No. There are material disputes of fact as to whether Nationwide was entitled to deny coverage under the insurance contract, based on Plaintiff’s dishonest or criminal acts and failure to cooperate in the claims process.

2. Whether Nationwide “spoiled” relevant evidence and whether, as a sanction, this Court should strike Defendants’ expert witnesses and grant summary judgment to Plaintiff?

No. First, this is simply not a spoliation case. Second, any failure of Nationwide to collect evidence available to it – but not in its possession – does not rise to spoliation. Third, Nationwide never had a duty to collect evidence from the Plaintiff, and preserve it for the Plaintiff. Fourth, any prejudice to the Plaintiff is minimal. Fifth, even if this Court concludes that there was spoliation, a sanction of dismissal would be unwarranted because there is no evidence of malice, bad faith, or other wrongful conduct. Finally, Plaintiff’s spoliation motion is untimely.

STATEMENT OF THE CASE

After intentionally setting fire to the Miami Subs restaurant in Fayetteville, North Carolina, Plaintiff sued Nationwide in an attempt to collect insurance proceeds. Plaintiff cannot make out a prima facie case of coverage because there are disputed issues of fact as to whether Nationwide was entitled to deny coverage based on the Plaintiff (or its agents) intentionally setting the fire, or because Plaintiff (or its agents) made material misrepresentations during the claims process.

Regarding spoliation, there is no evidence that Nationwide did anything other than hire experts to investigate the cause and origin of the fire. Nationwide's experts retained, photographed, and examined the Ion IQ wireless headset device's printed circuit boards ("PCBs") and left them at the scene of the fire, which was always in the control and possession of Plaintiff. There is no evidence of bad faith, malice, concealment, or intentional destruction. There was no duty for Nationwide's experts to preserve the PCBs, as they did not believe it was a cause of the fire and because, at all times, the PCBs were physically possessed by Plaintiff.

Plaintiff has lost or destroyed the PCBs, and now blames Nationwide and its experts for the loss. City Grill Hospitality Group, Inc. ("City Grill") asks the Court to strike Nationwide's expert witnesses, who will testify at trial that the fire which destroyed the Miami Subs restaurant was incendiary; it was caused by an open flame and was intentionally set. Plaintiff has waited until discovery closed to bring this spoliation motion. Plaintiff never mentioned spoliation, nor given Nationwide any notice at any time that a particular piece of evidence should be preserved. Because Plaintiff waited until after discovery, this spoliation motion is based on Plaintiff's subjective speculation; not undisputed facts developed in discovery. Finally, Plaintiff had

plenary access, control, and possession of all the physical evidence in this case. As a result, it would be error to grant a spoliation motion or impose a sanction in this case.

In summary, Plaintiff incorrectly moves to strike all of Nationwide's expert witnesses and have judgment entered in its favor, because Nationwide's experts did not take charred debris out of Plaintiff's possession, seal Plaintiff's debris in evidence bags, and maintain safe custody of Plaintiff's evidence for it. Instead, Nationwide's experts – Mr. Lacy and Mr. Martini – left the PCBs with Plaintiff and Mr. Diamantopoulos (an officer of Plaintiff City Grill). This is simply not spoliation.

STATEMENT OF THE FACTS

Nationwide retained Donan Engineering to conduct an origin and cause investigation of the fire that occurred at the Miami Subs on 552 North McPherson Church Road in Fayetteville, North Carolina. Mr. Hunter Lacy was assigned as the primary fire origin and cause investigator. [Lacy Dec. ¶ 3]. Mr. Lacy first attempted to contact Mr. Dimitrios Diamantopoulos on January 25, 2012 to schedule a time to inspect the premises, but was only able to leave a voice mail message. [Lacy Dec. ¶ 4]. Mr. Diamantopoulos did not return Mr. Lacy's telephone call. *Id.* Mr. Lacy again called Mr. Diamantopoulos on the morning of January 26, 2012, had a telephone conversation with him, and made arrangements to meet him at the fire scene that same morning. [Lacy Dec. ¶ 5].

Mr. Diamantopoulos had keys to the building; each morning he unlocked the building before Mr. Lacy and Mr. Martini entered it and each evening he locked the building. [Lacy Dec. ¶ 7, 15; Martini Dec. ¶ 13]. Nationwide's experts' investigation took 3 days.

Mr. Lacy first examined the fire scene on January 26, 2012. *Id.* As part of his fire investigation, he observed damage on the walls, soot, and other damage caused by the fire.

[Lacy Dec. ¶ 11]. The damage often indicates a fire pattern that an investigator can examine. *Id.* As described in Mr. Lacy's Federal Report, the fire patterns indicated that the fire started on the ground. [Lacy Dec. ¶ 12]. Mr. Lacy also observed a rectangular shaped pattern on the wall called a protective area. [Lacy Dec. ¶ 13]. This pattern tended to eliminate the HME Ion IQ wireless transmitter as a competent ignition source for the fire. *Id.* If the fire had originated from the HME Ion IQ wireless transmitter, the fire pattern on the wall would have been different. *Id.* Therefore, Mr. Lacy eliminated the wireless transmitter as a competent ignition source. [Lacy Dec. ¶ 14].

Mr. Lacy never told Mr. Diamantopoulos that he or Nationwide was in charge of the building or the investigation. [Lacy Dec. ¶¶ 7-8]. Instead, Mr. Lacy was always let into the building by Mr. Diamantopoulos and the building was always locked by Mr. Diamantopoulos. Furthermore, the SBI and Fayetteville police department also conducted their own independent investigation in the building at the exact same time.

Mr. Lacy decided that there were various electrical issues that needed to be inspected and contacted an electrical engineer. *Id.* Mr. Henry Martini, an electrical engineer employed by Donan Engineering, conducted his initial investigation of the fire scene on January 30, 2012. [Martini Dec. ¶¶ 2, 4]. Mr. Martini was assigned to identify all potential electrical sources of ignition for the fire and to determine if any of those electrical sources played a role in causing the fire. [Martini Dec. ¶ 3]. He inspected the electrical service components, electrical circuits, and fixtures. [Martini Dec. ¶¶ 5-8]. He concluded that none of these items caused or contributed to the fire. *Id.*

Mr. Martini also examined the debris reported to have been recovered from the area of the rear drive through window which was determined to be the origin of the fire. [Martini Dec. ¶

9]. Some of the debris had been relocated to the counter. *Id.* In the debris, Mr. Martini observed and examined one large and several smaller printed circuit boards (“PCBs”). [Martini Dec. ¶ 10]. It was later discovered that the PCBs were part of an HME Ion IQ or wireless base station. *Id.* Mr. Martini eliminated the inspected debris and PCBs as competent ignition sources for three reasons. *Id.* First, there was no evidence of an electrical failure that would have been indicated by localized or isolated heat damage to the PCB material. *Id.* Second, there was no evidence of either a large scale or small scale failure in the device. [Martini Dec. ¶ 11]. Third, he examined the PCBs on both sides and found no holes in the boards. *Id.* The absence of holes was significant because typically when a PCB is the cause of a fire, there is a hole in the board. *Id.* Because Mr. Martini ruled out the PCBs as a potential source of the fire, he did not take the PCBs into his custody. [Martini Dec. ¶ 12].

Mr. Martini completed two reports, a Claim report and a Federal Report. [Martini Dec. ¶ 14]. Although the Federal Report was more detailed, both reports addressed all of the inspected electrical items (including the PCBs) that were eliminated as sources of ignition for the fire. *Id.* Both the Claim Report and the Federal Report specifically included photographs of the PCBs that were identified as photographs 33, 34, and 35. *Id.*

Both Mr. Lacy and Mr. Martini conducted their investigations in accordance with Section 921 of the National Fire Protection Association’s National Fire Codes [D.E. 37-11, p. 25; D.E. 37-13, p. 94]. Under Section 921, if an appliance or other type of equipment is not believed to be part of the ignition scenario, then the provisions recommending that the entire appliance or item be collected as physical evidence do not apply. [D.E. 37-11, p. 190].

During his investigation, Mr. Lacy saw fire patterns that indicated to him that the fire did not originate anywhere other than the floor below drive through window number one. [D.E. 37-

11, pp. 190-191]. On January 30, 2012, Mr. Martini eliminated the multiple electrical components in the area of drive through window number one including the PCBs. *Id.* Consistent with the provisions of Section 921, if Mr. Martini was able to rule out a potential electrical source of ignition, he left the item intact in the building. [Martini Dec. ¶ 13]. Mr. Lacy did not collect or discard any of the items on the counter at any time during or after his investigation. [Lacy Dec. ¶ 16].

At all times during Mr. Martini's investigation, Mr. Diamantopoulos had access to and control of the building. [Martini Dec. ¶ 13]. At all times during Mr. Lacy's investigation, if he wanted to access the building, he had to do so through Mr. Diamantopoulos. [Lacy Dec. ¶ 15]. Mr. Lacy initiated the fire scene examination on January 26, 2012 and continued on January 27, 2012. [Lacy Dec. ¶ 6]. Mr. Lacy also examined the fire scene on January 30, 2012. *Id.* Each day during the investigation, Mr. Diamantopoulos unlocked the restaurant for Mr. Lacy in the morning and locked the building back each evening. *Id.* Mr. Lacy did not have a key to the building. [Lacy Dec. ¶ 7]. Mr. Diamantopoulos had full access to the building during and after Mr. Lacy's investigation. *Id.* Neither Mr. Lacy nor Mr. Martini has any knowledge of when or how the PCBs were discarded. [Martini Dec. ¶ 13; Lacy Dec. ¶ 16]. The PCBs and all other electrical items eliminated as potential sources of fire were left in the building when Mr. Lacy's and Mr. Martini's respective investigations were concluded on January 30, 2012. *Id.*

Nationwide had no way of knowing that City Grill would not preserve the contents of the Miami Subs, including the PCBs. The first time that Nationwide or its experts knew that the PCBs were missing was November 2012, during a subsequent visit to the loss site after this lawsuit had been filed. City Grill had allowed the entire building to be stripped clean, which included the destruction or loss of the PCBs.

ARGUMENT

I. City Grill is not entitled to partial summary judgment on the issue of coverage because there exist disputes of material fact as to whether the insurance contract was breached by City Grill's own conduct.

Under the insurance policy at issue, Nationwide was entitled to deny coverage for a variety of reasons. There remains a material dispute between the parties, which will have to be resolved by a jury, as to whether the insurance contract requires Nationwide to indemnify City Grill.

City Grill conflates the burden at trial – as explained by *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 606 (2006) (quoting the earlier case of *Hobson Const. Co. v. Great American Ins. Co.*, 71 N.C. App. 586, 590 (1984)) – with the movant's burden at summary judgment under Rule 56 of the Federal Rules of Civil Procedure. At trial, the policyholder must establish a prima facie case of “bringing itself within the insuring language of the policy.” *Hobson*, 71 N.C. App. at 590. The burden then shifts to the insurer “to prove that a policy exclusion excepts the particular injury from coverage.” *Id.* At summary judgment the moving party – here, City Grill – bears the burden proving that there is no dispute of material fact. That includes both proving that City Grill was within the insuring language of the policy *and* proving that there are no disputes of material fact regarding Nationwide's coverage defenses (such as the dishonesty and criminal acts exclusion). Because the parties remain in disagreement over whether the dishonesty and criminal acts exclusion applies, summary judgment is not proper.

First, under the terms of the insurance contract, there is no coverage for “[d]ishonest or criminal acts.” [D.E. 39-1, p. 47]. Nationwide concluded that Mr. Diamantopoulos, the owner of City Grill, committed a dishonest or criminal act when he intentionally burned the Miami Subs restaurant. This determination was also made by the investigating law enforcement officers

[D.E. 37-2, p. 123; D.E. 37-17, pp. 16, 114-16] and supported by Donan Engineering's employees [D.E. 37-11, pp. 161-62; D.E. 37-13, pp. 135-36].

Plaintiff's own cause and origin expert, Mr. Booth, stated that there was an equal chance that Mr. Diamantopoulos intentionally set the fire, versus the chance that the Ion IQ device set the fire. [D.E. 37-9, pp. 207-09].

Second, City Grill was required to "cooperate with [Nationwide] in the investigation or settlement of the claim." [D.E. 39-1, p. 51]. Nationwide denied coverage because Mr. Diamantopoulos made material misrepresentations of fact regarding the property, and its condition, during the claims process. For example, he gave differing accounts of where he was on the morning of the fire. Detective House believed that Mr. Diamantopoulos was lying. [D.E. 37-2, p. 114]. City Grill's own expert noted that Mr. Diamantopoulos "has not said the same story every time." [D.E. 37-9, p. 115].

Plaintiff has continually denied intentionally setting the fire, and continually asserted that there is coverage under the policy. As a result, there are material disputes of fact as to whether there was coverage under the policy. Further, if a jury concludes that Mr. Diamantopoulos' conduct rose to the level of material misrepresentations during the claims process, Nationwide was separately entitled to deny coverage and there is no claim for breach of contract.

II. Failure to collect evidence available to Nationwide, but not in possession of Nationwide, does not constitute spoliation.

Plaintiff's spoliation motion fails on the very first element: there is no proof that Nationwide had control of the PCBs when they went missing.

To prove spoliation, Plaintiff must prove three elements:

- (1) The party having control over the evidence had an obligation to preserve it when it was destroyed or altered;

- (2) The destruction or loss was accompanied by a “culpable state of mind;” and
- (3) The evidence that was destroyed or altered was “relevant” to the claims or defenses of the party that sought the discovery of the spoiled evidence.

In re Jemsek Clinic, P.A., 2013 WL 3994666 (Bkrcty. W.D.N.C. Aug. 2, 2013) (quoting *Goodman v. Praxair Servs., Inc.*, 632 F.Supp.2d 494, 509 (D. Md. 2009)).

City Grill’s brief gets the facts flatly wrong when it states “the PCBs have disappeared, and it is clear that the last persons to have knowledge of its location were Lacy and Martini.” [D.E. 32, p. 13]. First, there is no factual support for this statement. Second, both Lacy and Martini have declared that the PCBs were left inside the Miami Subs building on January 30, 2012 when their on-site investigation was completed. [Lacy Dec. ¶ 14; Martini Dec. ¶¶ 12-13]. As Mr. Martini states, after eliminating these items as a potential cause, he chose not to take the PCBs into custody. Instead, he left them on the counter of the Miami Subs, under the custody and control of Mr. Dimitrios Diamantopoulos.

Plaintiff has failed to come forward with conclusive evidence that the PCBs were in the possession of Nationwide, or Nationwide’s experts, when they went missing or were destroyed. Instead, the evidence shows that during Nationwide’s loss investigation, Nationwide’s experts photographed and examined the PCBs at the Miami Subs. At the end of each day, Nationwide’s experts would leave and Mr. Diamantopoulos would re-lock the doors to the building. [Lacy Dec. ¶¶ 6, 7, 15]. When Nationwide completed its on-site investigation on January 30, 2012, the PCB boards remained in the building. [Lacy Dec. ¶¶ 14-16].

Plaintiff’s brief also reveals the tenuous nature of its speculative claim of spoliation:

In the light most favorable to Defendant, Lacy, who was investigating the Premises fire for Defendant and upon whose report, Defendant based its Denial Letter, **probably** failed to take proper care to prevent accidental destruction of probative evidence, the PCBs, but Plaintiff has also raised the issue of whether or not Lacy deliberately destroyed probative evidence prior

to the filing of its action and/or apparently made material misstatements in Lacy's Claims Report for the purpose of hiding the existence of the PCBs. *If* that be so, the facts of this case *would* establish the high degree of culpability on the part of the Defendant.

[D.E. 32, p. 12] (emphasis added). This is only City Grill's speculation – *probably, if, would* – which is unsupported by facts in the record. Lacy's own sworn declaration indicates that he left the PCBs at the scene on January 30, 2012. Mr. Diamantopoulos then locked the building. [Lacy Dec. ¶¶ 14-15].

In short, Plaintiff's spoliation argument cannot succeed because it cannot establish even the first element of spoliation. The Sixth Circuit was confronted with a similarly stretched spoliation argument just two months ago. It quickly concluded that "a failure to collect evidence that may or may not have been available for collection is very different from the intentional destruction of evidence that constitutes spoliation." *United States v. Greco*, 2013 U.S. App. LEXIS 17264 (6th Cir. Aug. 20, 2013). The evidence which City Grill claims was "spoiled" – the PCBs – were not even in Nationwide's possession, "as it must be in spoliation cases." *Id.* Finally, City Grill never asserts, nor advances any evidence, that Nationwide or its experts' conduct was motivated by a culpable or malicious state of mind – the state of mind "that is a prerequisite for the application of the spoliation presumption." *Id.*

III. Faced with a nearly identical factual situation, in *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, the Sixth Circuit found no spoliation by Nationwide.

The Sixth Circuit Court of Appeals reversed a district court, remanded a case, overturned a jury verdict, and ordered a new trial, when the trial judge abused his discretion ruling on a spoliation motion and struck Nationwide's experts from testifying at trial. *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801 (6th Cir. 1999) (overruled regarding choice of law only). There, the Sixth Circuit concluded that even when Nationwide's fire investigators

intentionally removed a wiring harness from a car, this was not the type of “intentional destruction” required for spoliation, and there was minimal prejudice to Ford because Ford had sufficient notice and an opportunity to inspect. Following the reasoning of *Ford*, this Court should decline to find spoliation here because Defendant Nationwide (1) never took possession of the PCBs, (2) never destroyed them, (3) Plaintiff had access and control of them at all times, and (4) Plaintiff could have examined them at any time.

In *Ford*, a one-day old Lincoln Town Car was stored in a family’s garage when a fire caused damage to the garage and house. *Id.* at 802. Nationwide provided fire insurance coverage and paid the family for the fire damage. It then brought a subrogation action against Ford. Nationwide alleged that the Lincoln’s defective wiring caused the fire. *Id.* at 803.

Nationwide’s first expert arrived three days after the fire and inspected the remains of the burnt car inside the garage. Nationwide’s second expert arrived four days after the fire. On the same day, Nationwide alerted Ford that its vehicle may have been the source of the fire and invited Ford’s expert to inspect the vehicle. On the fifth day, Nationwide removed the car to another location, which was disclosed to Ford. Approximately two months later, Nationwide sent a third expert to inspect the car. This third expert removed part of the car’s wiring harness for the purpose of preservation. Ford was not notified of this.

Ford moved to exclude all of the third expert’s testimony as a sanction for removing the wiring harness, “an act Ford characterized as ‘spoliation’ of evidence at the fire scene.” The district court incorrectly agreed that this was spoliation and, while letting the witness testify, severely limited the witness’s testimony. *Id.* at 803. The Sixth Circuit reversed these rulings as an abuse of discretion and found that the conduct of Nationwide’s experts was not spoliation.

The Sixth Circuit recognized that there was no evidence in the record that suggested Nationwide intentionally altered or destroyed the evidence before Ford had an opportunity to inspect it. The Sixth Circuit defined “intentional destruction,” for the purposes of spoliation, not as the knowing and willful removal of evidence, but as removal with the “purpose of rendering it inaccessible or useless to the defendant in preparing its case; that is, spoiling it.” *Id.* at 804. It found that while Nationwide’s experts had intentionally removed the wiring harness from the car to inspect it, this was not the type of intentional destruction which gave rise to a spoliation inference. The reason for removal was not to spoil or prevent the defendant from gaining access to the wiring harness. *Id.*

Defendant Nationwide currently has a stronger case against spoliation here than it did in *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801 (6th Cir. 1999). There is ***no sworn evidence*** that Nationwide destroyed the PCBs. Instead, the evidence shows that City Grill had the opportunity to inspect the PCBs at any time after the fire. At no point in time did Nationwide or its experts have keys to the building. City Grill had complete control and access both before Lacy and Martini arrived, and every day afterwards. City Grill had adequate time – before, during, and after Nationwide’s inspection – to inspect the PCBs.

There is no evidence that moving the PCB boards from the floor to a table, photographing them, and doing a visual inspection caused any damage to the PCBs. Furthermore, there is no evidence that Lacy and Martini’s decision not to place the PCBs into preservation bags was a decision to purposefully spoil or prevent City Grill from gaining access to them. In fact, Nationwide’s experts left the PCBs in the possession of City Grill so that City Grill would have complete access to the PCBs to conduct its own examination. [Lacy Dec. ¶¶ 14-16; Martini Dec. ¶¶ 12-13].

City Grill had sufficient notice and control of the Ion IQ boards. Nationwide's expert's choice not to place the boards in preservation bags, and instead leave the boards with City Grill, was not simply not spoliation. In short, spoliation is the intentional destruction of evidence that is presumed to be unfavorable to the party responsible for the destruction. *U.S. v. Boxley*, 373 F.3d 759 (6th Cir. 2004). Defendant Nationwide did not destroy the PCBs, and instead left them in the custody, care, and control of City Grill. Because there is no evidence of intentional destruction, City Grill's spoliation motion must be denied.

IV. Nationwide had no duty to preserve the PCBs.

Prior to litigation commencing, the duty to preserve only adheres when "a party reasonably should know that the evidence may be relevant to anticipated litigation." *Evans v. Medtronic, Inc.*, 2005 WL 3547240 at *13 (W.D.Va. Dec. 27, 2005) (quoting *Silvestri v. General Motors, Corp.*, 271 F.3d 583, 591 (4th Cir. 2001)). "If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence." *Silvestri*, 271 F.3d at 591.

Mr. Martini conclusively ruled out the Ion IQ device as a potential source of the fire. [Martini Dec. ¶¶ 9-13]. As a result, the PCBs which were part of the Ion IQ – like light fixtures and other evidence which Mr. Martini eliminated as a cause of the fire – were not placed in preservation bags. At that point, the PCBs were left with City Grill. [Lacy Dec. ¶¶ 14-15; Martini Dec. ¶ 12]. Nationwide had no duty to preserve evidence which it had determined did not cause the fire and which it left in the custody of Mr. Diamantopoulos and City Grill.

Nationwide's experts left the evidence in the control of Mr. Diamantopoulos and City Grill, and had no way of knowing that City Grill would not preserve the contents of the building.

The first time Nationwide's experts learned that the interior of the Miami Subs restaurant had been stripped clean was in November 2012, after the lawsuit had been filed, and they visited the scene for a further investigation. Thus, City Grill's spoliation motion should be denied.

V. Even if this Court finds evidence of spoliation, under the Fourth Circuit's test in *Silvestri v. General Motors*, Nationwide's conduct does not warrant the sanction City Grill requests.

Even if this Court concludes that Nationwide spoiled evidence, there is no evidence of bad faith. An adverse inference or the drastic sanction of striking Nationwide's experts is therefore inappropriate. Although Plaintiff correctly identifies *Silvestri v. General Motors, Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) as establishing the correct test in this circuit, *Silvestri* is inapposite because the spoliating conduct there arose where the plaintiff had both (1) sole possession of the evidence and (2) that piece of evidence was indisputably the most important piece of evidence in the case.

a. *Silvestri v. General Motors* established a two-prong test applicable to dismissal or striking evidence: this Court must consider both the egregiousness of the conduct and the effect of the conduct on the litigation.

As a threshold matter, the Court must first conclude that spoliation actually occurred. Here, Nationwide did not destroy the PCBs, thus there was no spoliation of any evidence. If the Court determines that there is spoliation, it must then consider the proper sanction.

"[T]o justify the harsh sanction of dismissal, the district court must consider both the spoliator's conduct and the prejudice caused and be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the

ability to defend the claim.” *Silvestri v. General Motors, Corp.*, 271 F.3d 583, 593 (4th Cir. 2001).

In *Silvestri*, the plaintiff’s attorney retained two accident reconstructionists to inspect the damage to plaintiff’s car prior to filing suit against General Motors for failure of an airbag to deploy during a collision. *Silvestri*, 271 F.3d at 586. One of the experts specifically told the plaintiff’s attorney that the car needed to be preserved so that General Motors would have an opportunity to inspect it. *Id.* Despite the advice, neither the plaintiff nor his attorney made any attempt to preserve the vehicle or notify General Motors until almost three years later when the lawsuit was filed. *Id.* at 587. During the intervening three years, the car was repaired to its original, pre-wreck state. *Id.*

The Fourth Circuit emphasized that the plaintiff’s attorney knew that the vehicle was a central piece of evidence in the case against General Motors. Further, the plaintiff was reminded that the evidence should be preserved or that General Motors should have been notified of the car’s existence. *Id.* at 593. The panel stated that it could not determine whether the spoliator’s conduct was deliberate or negligent, because it could not conclude that plaintiff’s attorney simply ignored his preservation responsibility through carelessness. *Id.* at 594. Therefore, the Court turned to the second prong of the analysis and considered the effect of the spoliator’s conduct on General Motors’ ability to defend the claim. *Id.* In concluding that the spoliation was “highly prejudicial,” the Court considered that it denied General Motors access to the *only* evidence from which it could develop defenses. *Id.*

Plaintiff’s conduct prevented General Motors from developing a “crush” model of the car to determine the speed of impact and the direction of the forces on the car, both important factors in determining whether the airbag should have deployed. *Id.* Further, only one of plaintiff’s

experts took a crush measurement and he did not write it down; General Motors needed more than one crush measurement and the one that plaintiff's attorney took was "unreliable." *Id.* The Court determined that, of the evidence that was preserved, it was incomplete and indefinite. *Id.* Therefore, the Court would not require General Motors to rely on the evidence collected by the plaintiff's experts because it would result in "irreparable prejudice." Notably, the Fourth Circuit considered the practical effect of allowing the plaintiff's claims to proceed:

short of dismissal, the district court would have been left to formulate an order that created facts as established or that created presumptions. But when Silvestri presents vehicle data as his only evidence of a product defect and that data is incomplete and perhaps inaccurate, *the court would have no basis for determining what facts should be taken as established.* On the other hand, *if the court denied Silvestri's experts from testifying, as would be an alternative, then Silvestri would have no case at all.*

Id. at 594-595.

b. *Silvestri* establishes the test, but is inapplicable because Nationwide did not exclude City Grill from possession of the PCBs.

Silvestri is largely inapplicable because Mr. Silvestri had sole access and control of the wrecked automobile, and waited over three years to give notice to General Motors. Here, Plaintiff had sole custody and control of the Miami Subs premises before Nationwide's expert witnesses visited the scene, each night after the experts visited, and after Nationwide's inspection. Unlike in *Silvestri* – where General Motors was totally excluded from examining the evidence – here the movant had nearly complete control and ownership of the PCBs, and could have inspected them at any time.

Even if this Court finds spoliation, an adverse inference instruction is improper. That is because spoliation is concerned with policing misbehavior of the parties. *See, e.g., Bolling*, 930 F. Supp. at 238 (“[T]he spoliation doctrine applies only to misbehavior by parties.”); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446 (4th Cir. 2004) (declining to find spoliation because of lack

of evidence that alleged spoliator abused judicial process). An adverse inference “cannot be drawn merely from [a party’s] negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.” *Hodge*, 360 F.3d at 450 (4th Cir. 2004). Nationwide’s experts left the PCBs in the Miami Subs building that was secured by Plaintiff. Nationwide’s experts did not remove the PCBs from the scene, nor did they destroy any evidence. As a result, no adverse inference is proper.

c. *Silvestri* was recently applied by a neighboring district court, which declined to enter judgment for the movant because there was no evidence of bad faith and because there was no undue prejudice.

A district court in Virginia has recently been confronted with a similar spoliation motion and applied the *Silvestri* analysis. *Musick v. Dorel Juvenile Group, Inc.*, 2011 WL 5029802 (W.D.Va. Oct. 24, 2011). There, the plaintiff was a child who was riding in a child-safety seat inside of a Ford Windstar van. The child was injured during an automobile wreck, and sued the maker of the child-safety seat that she was riding in. The child-safety seat was preserved, but the wreckage of the Ford Windstar van had been destroyed. The court noted that the plaintiff (who was resisting a spoliation motion) did not instruct that the vehicle be destroyed, nor try to hide the van’s post-accident condition. Instead, the plaintiff had preserved the car seat and she willingly shared her photographs of the van with the defendant. The court also distinguished the circumstances from *Silvestri*, a products liability lawsuit against General Motors, where “[t]he plaintiff’s attorney unquestionably knew that the vehicle was the ‘central piece of evidence’ and had been reminded that it should be preserved.”

Here, as in *Musick*, photographs of the missing device were willingly shared between the parties. Nationwide’s experts had no reason to believe that the PCBs should have been

specifically placed in preservation bags because they were photographed, examined, and determined not to be the ignition source of the fire. Nationwide's experts did not retain every piece of evidence from the building, such as light fixtures, which had been ruled out by Nationwide's experts as potential causes. Plaintiff did not request that the PCBs be preserved or specifically bagged by Nationwide. If Plaintiff believed that the PCBs were potential causes of the fire, Plaintiff had physical possession of the PCBs and the building for an extended period of time, during which time its experts could have examined them.

Turning to the second prong of the *Silvestri* test, the district court in *Musick* considered that there remained sufficient evidence for the product manufacturer to build a "vigorous defense." *Id.* at *3. Dorel had access to post-accident photographs of destroyed evidence and was "able to secure favorable opinions from expert witnesses." *Id.* Because of the availability of other evidence to the moving party, it would be inappropriate to enter judgment on the ground of spoliation. *VFI Assocs., LLC v. Lobo Mach. Corp.*, 2010 WL 4868110 at *1-2 (W.D.Va. Nov. 22, 2010).

d. City Grill's reliance on *King v. American Power Conversion Corp.*, 181 Fed. Appx. 373 (4th Cir. 2006) (unpublished, per curiam) is also misplaced because, unlike in *King*, City Grill always had custody and possession of the Ion IQ PCB boards.

Plaintiff argues on brief that this case is factually similar to an unpublished, per curiam Fourth Circuit opinion. [D.E. 32, pp. 16-17]. The critical difference between this case and *King v. American Power Conversion Corp.*, 181 Fed. Appx. 373 (4th Cir. 2006) is that here, Plaintiff maintained physical possession of the PCBs. Because neither Nationwide, Mr. Lacy, nor Mr. Martini took custody of the PCBs, and instead left them inside the Miami Subs restaurant, *King* is inapplicable.

In *King*, after a fire event, an expert witness took physical possession of an electrical power supply unit, which could have been a potential cause of the fire in question. *Id.* at 375. The *King* plaintiff knew this, and the plaintiff's attorney contacted the expert regarding inspections of the device. *Id.* This conversation was reflected in a follow-up letter, where plaintiff's counsel offered to take possession of the physical evidence in question. *Id.* On multiple other occasions, plaintiff's counsel sought to inspect the evidence which was indisputably in the custody of the expert, and repeatedly offered to take custody of the evidence. *Id.* Nonetheless, the expert witnesses disposed of the evidence instead of preserving it or returning it to the plaintiff or plaintiff's counsel. *Id.* at 375-76. Defendant, nor any of defendant's experts, ever had any opportunity to examine the power supply unit. *Id.* In that circumstance, the Fourth Circuit found that the ultimate sanction of dismissal was appropriate.

The facts of *King* are nearly the opposite of the facts present here. In *King*, an expert witness took possession of the device. *Id.* at 375. Here, both Mr. Lacy and Mr. Martini left the PCBs in the custody of City Grill and Mr. Diamantopoulos. [Lacy Dec. ¶¶ 14-15; Martini Dec. ¶ 12]. In *King*, dismissal was appropriate because American Power, the defendant, never had an opportunity to examine the power supply. *Id.* at 376. Here, City Grill had possession of the PCBs before Mr. Lacy and Martini arrived, during their examination, and after they left.

VI. Plaintiff's spoliation motion – filed after discovery has closed – is untimely.

District courts regularly deny spoliation motions as untimely. *See, e.g., Goodman v. Praxair Servs. Inc.*, 632 F.Supp.2d 494, 506 (D. Md. 2009) (denying plaintiff's spoliation motion which was filed with summary judgment brief and by summary judgment deadline). Arguments of spoliation should be made by "appropriate discovery motion" and not in "opposition to summary judgment." *Ferrone v. Onorato*, 2007 WL 2973684 (W.D.Pa. Oct. 9, 2007). Indeed,

the “[k]ey to the discretionary timeliness assessment” is “how long after the close of discovery” the motion is made. *Goodman*, 632 F.Supp.2d at 506.

When a plaintiff fails to raise any concerns “during the discovery phase or bring them to the attention of the” Court, a finding of untimeliness is proper. *Glenn v. Scott Paper Co.*, 1993 WL 431161 (D.N.J. Oct. 20, 1993).

Spoilation motions should “be filed as soon as reasonably possible.” *Goodman*, 632 F.Supp.2d at 506. There has been no explanation by Plaintiff of why it waited until summary judgment to bring this spoliation motion when, based on its own argument, it allegedly knew this evidence was relevant and necessary *over a year and a half ago* in February 2012. That is because “resolution of spoliation motions [is] fact intensive.” *Id.* at 508. Such motions require a court to weight several factors:

- “when the duty to preserve commenced,”
- “whether the party accused of spoliation properly complied with its preservation duty,”
- “the degree of culpability involved,”
- “the relevance of the lost evidence in the case,”
- “and the concomitant prejudice to the party that was deprived of access to the evidence because it was not preserved.”

Goodman, 632 F.Supp.2d at 508.

Often, “before ruling on a spoliation motion, a court may have to hold a hearing.” *Id.* at 508. Additionally, the “court may order that additional discovery take place either to develop facts needed to rule on the motion or to afford the party deprived of relevant evidence an additional opportunity to develop it from other sources.” *Id.* “The least disruptive time to

undertake this is during the discovery phase, not after it has closed.” *Id.* As a result, “[c]ourts are justifiably unsympathetic to litigants who, because of inattention, neglect, or purposeful delay aimed at achieving an unwarranted tactical advantage, attempt to” bring spoliation motions after the close of discovery. *Id.*

Here, granting City Grill the relief it requests would require reopening discovery. New discovery would be needed as to what happened to the PCBs after January 30, 2012. This would delay trial, which is currently set to begin in approximately eight weeks. City Grill has asked for the drastic remedy of striking all of Nationwide’s expert witnesses and awarding summary judgment to Plaintiff. If City Grill had timely made this motion during discovery, additional discovery from other sources could have been developed. There would have also been extensive discovery of exactly what happened to the Ion IQ PCBs; were they lost, were they destroyed, and who was last in possession of them. Perhaps an employee from Riddle Properties – the landlord – actually destroyed the Ion IQ PCBs sometime between January 30, 2012 (the day Mr. Martini and Mr. Lacy left them with City Grill) and November 9, 2012 (the day that plaintiff’s expert entered the premises but could not locate the Ion IQ boards) when the inside of the building was stripped clean. The parties do not know, because no discovery was done on this topic. Instead, Plaintiff has sought an unwarranted tactical advantage by waiting until discovery has closed to file its motion. This Court should resist Plaintiff’s attempt at obtaining a judgment via a late-filed spoliation motion.

CONCLUSION

For the forgoing reasons, Defendant Nationwide respectfully requests that the Court deny Plaintiff's spoliation motion, deny Plaintiff's request to strike Nationwide's expert witnesses, and deny Plaintiff's motion for partial summary judgment.

Respectfully submitted, this the 9th day of October, 2013.

/s/ Gemma L. Saluta _____
Gemma L. Saluta
N.C. State Bar No. 37032
Rachel E. Daly
N.C. State Bar No. 27777
Womble Carlyle Sandridge & Rice, LLP
One West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 721-3600
Facsimile: (336) 721-3660
Email: GSaluta@wcsr.com
RDaly@wcsr.com

*Attorneys for Defendant Nationwide
Mutual Insurance Company*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 13th day of September, 2013, she filed and served a copy of this **DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR RELIEF DUE TO DEFENDANT'S SPOILIATION OF RELEVANT EVIDENCE** by using the CM/ECF system which will send notification of such filing to the parties below.

Richard M. Wiggins
James A. McLean, III
McCoy Wiggins Cleveland & O'Connor, PLLC
Post Office Box 87009
Fayetteville, NC 28304
rwiggins@mccoywiggins.com
jmclean@mccoywiggins.com

Attorneys for Plaintiff

/s/ Gemma L. Saluta
Gemma L. Saluta
N.C. State Bar No. 37032
Rachel E. Daly
N.C. State Bar No. 27777
Womble Carlyle Sandridge & Rice, LLP
One West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 721-3600
Facsimile: (336) 721-3660
Email: GSaluta@wcsr.com
RDaly@wcsr.com

*Attorneys for Defendant Nationwide
Mutual Insurance Company*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:12-CV-00610-F

C O P Y

CITY GRILL HOSPITALITY GROUP, INC.,)
)
Plaintiff,)

vs.)

) D E P O S I T I O N

NATIONWIDE MUTUAL INSURANCE COMPANY,)
)
Defendant.)

-----)

STEVEN CLAY BOOTH

202 Fairway Drive
Fayetteville, North Carolina

Friday, August 16, 2013
10:13 o'clock a.m.

Atlantic Professional Reporters
Winston-Salem, NC 27116-1672

NOTES

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APPEARANCES OF COUNSEL

Richard M. Wiggins, Esq., and
James A. McLean, III, Esq.
McCOY WIGGINS CLEVELAND & O'CONNOR, PLLC
202 Fairway Drive
Post Office Box 87009
Fayetteville, North Carolina 28304-7009

Rachel E. Daly, Esq.
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
One West Fourth Street
Winston-Salem, North Carolina 27101

OTHER APPEARANCES

Justin Mann
Peter Gillen

I N D E X

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STIPULATIONS

Pursuant to notice and/or consent of the parties, the deposition hereon captioned was conducted at the time and location indicated before Cassandra J. Stiles, Notary Public in and for the County of Forsyth, State of North Carolina at Large.

The deposition was conducted for use in accordance with and pursuant to the applicable rules or by order of any court of competent jurisdiction.

Reading and signing of the testimony was requested prior to the filing of same for use as permitted by applicable rule(s).

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1 The witness, STEVEN CLAY BOOTH, being
2 first duly sworn to state the truth, the whole truth
3 and nothing but the truth, testified as follows:

4 (10:13 o'clock a.m.)

5 EXAMINATION

6 BY MS. DALY:

7 Q. Good morning, Mr. Booth.

8 A. Good morning.

9 Q. My name is Rachel Daly and I've been
10 retained by Nationwide.

11 Just a few rules, since you've been
12 deposed before.

13 If you need a break, let me know. If you
14 don't understand my question, please let me know and
15 I'll rephrase it. Okay?

16 A. Okay.

17 Q. Will you state your full name for the
18 record?

19 A. Steven Clay Booth.

20 Q. I have a copy of your CV. And I'm going
21 to ask you just to quickly take a look at it to tell
22 me if this is your most recent version.

23 It is the one I will tell you that was
24 submitted to us along with your expert report.

25 A. Okay. I think there's an updated version.

1 I don't think that it has anything other to do --
2 yeah, I -- no. That's -- this is updated.

3 Q. Okay.

4 A. This is updated.

5 Q. Perfect. Let's quickly walk through your
6 background.

7 After high school it looks like you went
8 to Elon College?

9 A. Uh-huh.

10 Q. Did you graduate with any type of degree
11 from Elon?

12 A. No, ma'am.

13 Q. Did you -- how long did you attend Elon
14 College?

15 A. It was a -- a year.

16 Q. And then when you left after a year, it
17 looks like you went to the Police Academy ---

18 A. --- Uh-huh.

19 Q. --- For Fayetteville. Is that correct?

20 A. That's correct.

21 Q. Okay. It looks like your training -- when
22 did your training for fire investigations start?

23 A. I believe it was in 1997.

24 Q. And was that on-the-job training at the
25 Fayetteville ---

1 A. --- That and ---

2 Q. --- Police department?

3 A. That and in various law enforcement
4 training that we had as far as from the Justice
5 Academy or the National Fire Academy.

6 Q. Will you go through your training
7 specifically to fire investigation for me?

8 A. Okay. It's outlined in my CV. Have you
9 got a copy of it? I'll go through it with that. I
10 can't remember exactly every one of them. They're
11 all in there.

12 Q. Okay. Were any of these training for fire
13 investigation -- did any of them deal with electrical
14 failure?

15 A. I think several of them did discuss ---

16 Q. --- Okay.

17 A. --- Excuse me -- electrical failures.

18 Q. Okay, they discussed it. But did you
19 actually have training in electrical failure?

20 A. As far as?

21 Q. Specific to electrical failures.

22 A. Electrical sources of ignition?

23 Q. Uh-huh.

24 A. I don't think I've had a class that
25 specifically related to electrical failures other

1 than on-the-job training with the engineers that I
2 work with.

3 Q. Okay. And so that we're clear, you're not
4 an engineer.

5 A. No, ma'am.

6 Q. And you're not a mechanical engineer.

7 A. No, ma'am.

8 Q. You're not an electrical engineer.

9 A. No, ma'am.

10 Q. Am I correct that you are not qualified --
11 that -- strike that.

12 Was Mr. Stone retained by plaintiff in
13 this case to determine whether there was an
14 electrical failure?

15 A. He was retained to examine the evidence
16 that was re -- recovered or was present.

17 Q. And was he specifically to focus on
18 whether or not there was an electrical failure in
19 this case?

20 A. If there was an electrical failure there,
21 yes. If there was some other type of issue ---

22 Q. --- Okay.

23 A. --- Then he would be looking at that. But
24 it was specifically to examine the evidence that was
25 collected.

1 Q. Okay. And are you qualified to determine
2 whether or not there was an electrical failure?

3 A. I'm qualified to determine the origin and
4 cause of a fire. And if there's a source of
5 electrical ignition that I believe is the cause, then
6 I would hire someone else to do that.

7 Q. Okay. You would make -- not make that
8 determination.

9 A. No, ma'am.

10 Q. Is that correct?

11 A. I would not make the final determination,
12 no.

13 Q. Okay. And so in this case would Mr. Stone
14 make that final determination?

15 A. Yes. If he was the engineer that we had
16 hired to do that, he would be the one to make the
17 final determination, yes.

18 Q. Well, not if. He was.

19 A. He was one of them, yes.

20 Q. Okay. Are you saying ---

21 A. Well, and ---

22 Q. --- There's another?

23 A. There's -- there was a article that we
24 found, a -- a ---

25 Q. --- Now, let's answer my question first

1 and then we can get to that.

2 Was Mr. Stone the expert who was retained
3 in this case to determine whether or not there was an
4 electrical failure?

5 A. Yes.

6 Q. Okay. And if you want to add something to
7 it -- you were talking about an article.

8 A. There was an article, a report that we
9 found. And it was my understanding that that expert
10 that wrote that report was consulted by the counsel.

11 Q. Okay.

12 A. And that there is a report that he wrote
13 that is included in these documents here.

14 Q. Okay, and what is the name of -- you're
15 saying two different things. You're saying that
16 someone wrote an article and someone wrote a report.

17 A. There is a study that was an article that
18 I found. The individual that wrote that, his name is
19 Jim Small. And it's my understanding from the
20 documents that I have in there a report -- or a
21 letter was written to counsel for this case in
22 regards to that report and low-voltage ignition of
23 electronics.

24 Q. Okay, a letter written to counsel
25 regarding the report or a letter written to counsel

1 regarding the article? You just said regarding the
2 report, so I'm wondering what you're saying.

3 A. There's -- there's two actually. There's
4 a letter in there that was regarding his report and
5 then there's also questions answered about photos
6 that he reviewed from this case.

7 Q. Okay, and when were you given that letter?
8 Is this your original file here?

9 A. This is, yeah.

10 Q. Okay.

11 A. All of this is. These are documents that
12 I was provided during discovery. They're all things
13 that you all had provided. And this is stuff here
14 that is already in the documents that were provided,
15 the fire report, the CAD report, the emails.
16 Everything that's in here from this has already been
17 copied and included. It's not in that.

18 Q. Okay.

19 A. It is in those doc ---

20 Q. --- Then let me go ahead and have this,
21 please. Thank you.

22 Okay, so let's finish up with this
23 question and then I'll go through these documents.

24 So you said there was a letter written to
25 counsel.

1 A. Uh-huh.

2 Q. Okay, and it references first an article
3 that was written by Mr. Small. Is that correct?

4 A. Yeah. It's a report that he did about
5 electrical -- it's low-voltage electrical ignition.

6 Q. Okay. A report for this case or a report
7 that he has written for another case?

8 A. Mr. Small did a study ---

9 Q. --- Uh-huh.

10 A. --- On electrical ---

11 Q. --- Okay. You keep calling it an article
12 and a report. So I'm trying to differentiate. A
13 report has a specific meaning under the federal
14 rules. So it's a federal expert report. So if we
15 can call -- if he did a federal expert report in this
16 case, it has not been produced to us, if we can
17 reference that as a report. If we can reference a
18 letter that was simply a letter written to either you
19 or to counsel, or if it's a article that was written
20 on a study that he did -- so that I am clear as to
21 what you're referencing.

22 A. There is a study that he did for another
23 organization.

24 Q. Okay.

25 A. Okay.

1 Q. And what was the name of that
2 organization?

3 A. I'd have to look at the report to tell
4 you.

5 Q. Okay, and do you have a copy of the report
6 in your file?

7 A. It's in that right there.

8 Q. It's in this one. Okay.

9 A. Okay. What was your next question?

10 Q. You said -- okay, so he did an arti -- he
11 wrote an article. And that's what's in here. And so
12 that's how you found his name. You came across this
13 individual's name in an article.

14 A. Yes.

15 Q. Okay, and so you read this article. And
16 what did you do after you read the article?

17 A. I consulted with counsel and told them
18 what I had found.

19 Q. Okay, and what did you tell them that you
20 found?

21 A. I told them that I found a document on the
22 Internet that was written by Jim Small from Kodiak
23 Consulting that was specifically about low-voltage
24 electrical ignition. And I provided them a copy of
25 the document.

1 Q. And when did you do this?

2 A. I'd have to go back through my emails
3 exactly to tell you. But it was within the past
4 couple of weeks ---

5 Q. --- Okay.

6 A. --- Before this deposition.

7 Q. So it was in the past couple of weeks.

8 A. Yes.

9 Q. Okay. What made you search for this
10 article?

11 A. The reports, the rebuttal reports written
12 by Mr. Martini and Mr. Lacy.

13 Q. Okay. Well, do you mean their federal
14 expert report?

15 A. Their second report that they wrote, yes.

16 Q. Okay. Well, they've only filed one
17 federal expert report in this case.

18 A. Okay. Well, there are two reports, one
19 submitted to Nationwide ---

20 Q. --- Okay.

21 A. --- And then another one that's submitted
22 for this.

23 Q. Right. Okay, so their federal expert
24 report would have been the report that was submitted
25 in this litigation ---

1 A. --- That's the one that I got that
2 information off of, yes.

3 Q. Okay, so they submitted that report. And
4 then after -- and then at that point in time was Mr.
5 Stone already retained?

6 A. Yes.

7 Q. Okay. Okay, and what are the credentials
8 of Mr. Small?

9 A. He's an electrical engineer.

10 Q. Okay. Okay, and so within the past couple
11 of weeks you were searching the web and you found
12 this article.

13 A. It may have been three weeks ago ---

14 Q. --- Okay.

15 A. --- But yes.

16 Q. And what caught your eye is that it was an
17 article written about low-voltage electrical engine
18 -- ignition.

19 A. Yes.

20 Q. Okay, and then you brought that to Mr.
21 Wiggins' attention.

22 A. That's right.

23 Q. Is that correct? Okay, and so what did
24 you tell Mr. Wiggins?

25 A. I told him that I had found an article

1 that related to low-voltage ignition of printed
2 circuit boards and that I thought that it would be
3 interesting for him to take a look at it.

4 Q. Okay, and then what happened?

5 A. And then he read it and we talked about
6 consulting with Mr. Small.

7 Q. And where is Mr. Small located?

8 A. I believe he -- it's Illinois.

9 Q. Okay. And when you say you consulted with
10 him, did you actually go to Illinois or did you meet
11 him in person?

12 A. No, I did not.

13 Q. Okay. So what happened after -- did you
14 actually make the phone call? Were you with counsel
15 when you made the phone call?

16 A. No. I called him to talk to him about the
17 study and find out what it was all about as far as
18 the -- you know, how he -- whether it was peer
19 reviewed first.

20 Q. Uh-huh.

21 A. And then, second, to find out what it is
22 that he did, that I didn't understand, and to kind of
23 get it in layman's terms as to what it was that he
24 had done. And that was about it. And then I
25 contacted counsel and let them know and let them go

1 from there with it, to contact him themselves.

2 Q. Okay. So when you read the article, so
3 that I'm clear, you had to contact him and to get a
4 clarification of exactly what he was talking about in
5 this article.

6 A. Yeah. It -- it ---

7 Q. --- Is that correct?

8 A. Yes. My understanding was is that it was
9 discussion of class-two power supplies which had been
10 referenced in Mr. Martini's report.

11 Q. Uh-huh.

12 A. That's how I found it, was with -- by
13 searching that. And the title of the report was
14 Low-Voltage Ignition. The -- it's -- what -- what
15 did he say -- the -- the incompetent ignition source
16 and common misconception, or something like that. I
17 don't remember exactly what the -- the title of it
18 was. But that's how I found it. And then I
19 contacted them, contacted him, and they went from
20 there.

21 Q. Okay. So before we get into any more
22 discussions with him, did you also let Mr. Stone, who
23 is the engineer that's already retained in this case
24 -- did you already let -- did you let him know about
25 this article?

1 A. I did.

2 Q. Did he speak with Mr. Small?

3 A. No, not that I'm aware of.

4 Q. Did you have Mr. Stone explain to you the
5 article?

6 A. We talked about it but he didn't go into
7 any further detail about it. He actually suggested
8 at that point that we consult with Mr. Small.

9 Q. Okay, and why did he suggest you consult
10 with Mr. Small?

11 A. I don't know. You'll have to ask him.
12 That's what he suggested. I didn't ask him why.

13 Q. Okay. And that's all I'm asking, is your
14 conversations with Mr. Stone about this article.

15 So what exactly was said about this
16 article?

17 A. What I have said or what he have said?

18 Q. Both of you.

19 A. Umm, that it was an interesting arti --
20 article, it may have had some merit, that we needed
21 to talk with the actual person that wrote it.

22 Q. Okay. And you mentioned earlier you
23 wanted to find out if it was peer reviewed. Was the
24 article peer reviewed?

25 A. Not in the -- not in the fire community,

1 not that I'm aware of. But it was written for an
2 organization or manufacturer of small electronics.

3 Q. Okay, so to your knowledge, it has not
4 been peer reviewed.

5 A. To my knowledge.

6 Q. Okay. Any other discussion with Mr. Stone
7 regarding ---

8 A. --- No.

9 Q. --- This article?

10 A. No.

11 Q. And did you ever talk to Mr. Stone after
12 you contacted Mr. Small?

13 A. Yes. I believe we've talked about ---

14 Q. --- And....

15 A. I believe we've talked about my
16 conversation with Mr. Small and Mr. Small indicating
17 that -- that a class-two power supply and the PCB
18 don't always operate in the parameters that are
19 outlined and that there is a potential for ignition.
20 And that's all that I got from Mr. Small.

21 Q. Okay. So when you say there's a potential
22 for ignition -- have you read Mr. Stone's report?

23 A. Mr. Stone's? I don't actually think that
24 I have a -- a copy of his report, to tell you the
25 truth. I don't -- I don't have a copy of that. It

1 -- it's not in my -- I don't -- I don't think I have
2 a copy of his report.

3 Q. Okay. So it's your testimony that you've
4 never read Mr. Stone's report?

5 A. No, I haven't read his report.

6 Q. Okay. Have you talked to Mr. Stone about
7 his opinions in this case?

8 A. I have.

9 Q. Okay, so are you aware of his opinions in
10 this case?

11 A. Yes.

12 Q. Okay. So -- and what did Mr. Stone tell
13 you that his opinions were in this case?

14 A. That we didn't find any source of ignition
15 on the branch circuitry or any of the evidence that
16 we were -- we examined at Mr. Cavarock's office.

17 Q. Okay, let's stop there and I'm going to --
18 I'll break it up.

19 A. Okay.

20 Q. Do you have any evidence or any reason to
21 disagree with Mr. Stone's finding?

22 A. No.

23 Q. With what he just said. Okay, so continue
24 to your next....

25 A. Okay. After the evidence exam, anything

1 outside of that would include the overhead branch
2 circuitry that was not included, meaning the lights,
3 the fluorescent lights ---

4 Q. --- Uh-huh.

5 A. --- And the circuit board, printed circuit
6 board that is in some of the photographs. He had
7 indicated that he could not eliminate it because he
8 could not examine it.

9 Q. Okay. Have you read Mr. Stone's
10 deposition?

11 A. I have not.

12 Q. Okay. If Mr. Stone testified that he
13 ruled out the lighting as a potential source of
14 ignition ---

15 A. --- Uh-huh.

16 Q. --- Do you have any reason to disagree
17 with his testimony?

18 A. No, ma'am.

19 Q. And really what I'm trying to do right now
20 is try to figure out kind of where your bucket is and
21 where Mr. Stone's bucket is. So if Mr. Stone has an
22 opinion regarding an electrical source of ignition
23 for this fire, do you have any evidence to disagree
24 with Mr. Stone's findings or would you rely on Mr.
25 Stone's findings for anything regarding an electrical

1 failure, an electrical source of ignition? Would
2 that be what -- would you use Mr. Stone's opinions to
3 rely on?

4 A. I would.

5 Q. Okay. Then that will cut out a whole lot
6 of questioning, then, today.

7 Okay, so please continue with what else
8 Mr. Stone told you regarding his opinions, if
9 anything. You might have covered it.

10 A. I think I've covered it.

11 Q. Okay.

12 A. However, just to -- to recap, we've
13 already -- we've just discussed the overhead
14 lighting.

15 Q. Uh-huh.

16 A. We've discussed this -- the collection --
17 their collected items at Mr. Cavarock's office.

18 Q. Uh-huh. And that was all ruled out.

19 A. Yes, ma'am.

20 Q. That there was -- that was not a source of
21 ignition.

22 A. None of the items ---

23 Q. --- Correct?

24 A. --- That we looked at there.

25 Q. Okay.

1 A. That's correct. And ---

2 Q. --- Continue.

3 A. And we discussed the presence of the
4 printed circuit board that belonged to -- or what we
5 believe belonged to the Ion IQ intercom system.

6 Q. Uh-huh. Okay, I'm going to ask you to
7 take a moment and read Mr. Stone's report ---

8 A. --- Okay.

9 Q. --- Since you've not done so thus far and
10 tell me if there is anything in Mr. Stone's report
11 that you disagree with.

12 A. Okay.

13 Q. Okay.

14 (Witness examined document)

15 MS. DALY: We can go off the record.

16 (10:33-10:36 a.m. - recess)

17 MS. DALY: Okay, we can go back on
18 the record.

19 Q. (Ms. Daly) Mr. Booth, did you have an
20 opportunity to read Mr. Stone's report in this case?

21 A. Yes, ma'am.

22 Q. Is there anything contained in this report
23 that you disagree with?

24 A. No.

25 Q. Okay. So Mr. Stone testified that the

1 printed circuit boards were visually consistent with
2 an appearance with a base containing multiple circuit
3 boards comprised of a single large board and several
4 smaller boards. I assume you agree with that.

5 A. Yes.

6 Q. And that that -- those shapes and
7 dimensions were consistent with the HME Ion IQ.

8 A. Yes.

9 Q. Okay. And for ease today, if we can call
10 that the wireless device during this deposition, if
11 that works for you.

12 A. You name it and that will be fine.

13 Q. Okay. So Mr. Stone's first opinion is
14 that the circuit boards were consistent with this
15 wireless device. Correct?

16 A. Yes.

17 Q. And then his second was -- one of his
18 other opinions was that his examination of the
19 electrical wiring components contained with exhibits
20 presented did not reveal any discernible evidence of
21 a potential fire-causing failure or defect. And you
22 agree with that.

23 A. Yes.

24 Q. And Mr. Stone said -- testified that the
25 wireless device -- well, actually, strike that.

1 In his report Mr. Stone did not state
2 anything about whether or not this wireless device
3 caused the fire. Is that correct?

4 A. Yes.

5 Q. Did Mr. Stone ever talk to you about
6 whether or not he believed the wireless device caused
7 the fire?

8 A. No.

9 Q. Did you ever ask him?

10 A. Yes.

11 Q. Okay, and what did he tell you?

12 A. He said that he could not say whether or
13 not it started the fire.

14 Q. Okay. Are you able to testify that the
15 wireless device caused the fire?

16 A. No.

17 Q. Okay. Are you able to testify that the
18 wireless device -- strike that.

19 Are you able to testify that it is more
20 likely than not that the wireless device caused the
21 fire?

22 A. No.

23 Q. If you are asked under oath to testify
24 regarding the wireless device, what is your opinion
25 regarding whether or not it was the ignition source

1 for this fire?

2 A. Now you're -- okay, just to be clear,
3 you're asking me to answer that question as to
4 whether or not I believe it could be the cause of the
5 fire or could not?

6 Q. No. I'm asking you as the
7 cause-and-origin expert -- right now what I'm trying
8 to figure out is where does your testimony end and
9 Mr. Stone's pick up.

10 A. Oh.

11 Q. So for you, as the cause-and-origin
12 expert, when you are called to testify in this case,
13 what is your testimony regarding whether the wireless
14 device was the ignition source for this fire?

15 A. I would say that I don't know whether it
16 was or not.

17 Q. Okay. And is that because you would rely
18 on Mr. Stone's evaluation of whether or not the
19 wireless device was the ignition source or is it
20 because based on your own experience you can't
21 determine whether or not the wireless device was the
22 ignition source for the fire?

23 A. It would be both.

24 Q. Both. Okay, is it your opinion that it is
25 more likely than not that there was an electrical

1 failure that was the ignition source to this fire?

2 A. No.

3 Q. Other than the wireless device, do you
4 have any other theory regarding a possible electrical
5 fire that was the -- failure that was the ignition
6 source for this fire?

7 A. No.

8 Q. I'd like to go through each of your
9 theories regarding how this fire started and to talk
10 about your supporting evidence to each of these
11 theories.

12 A. Okay.

13 Q. And before that I'd like to just kind of
14 walk through just a few short questions.

15 First, is it your opinion that there was
16 an electrical failure with the base station?

17 A. No. I don't -- no.

18 Q. Is it your opinion that there was an
19 electrical failure with its power supply?

20 A. I don't know.

21 Q. Is it your opinion that there was an
22 electrical failure with the power supply?

23 A. I don't know.

24 Q. Okay. So if you don't know, then you're
25 -- are you going to testify in front of the jury that

1 there was a power failure ---

2 A. --- I can't ---

3 Q. --- Excuse me -- electrical failure.

4 A. I can't, because we don't have it to look
5 at and I just don't know.

6 Q. Okay. Is it your opinion that there was
7 any electrical failure?

8 A. Outside of the base station or ---

9 Q. --- Yes.

10 A. No, I don't have an opinion to that
11 effect.

12 Q. So is it your opinion that this wireless
13 device was a potential for ignition?

14 A. Yes.

15 Q. And is it your understanding that that is
16 Mr. Stone's opinion, that the wireless device was a
17 potential source for ignition?

18 A. That's my understanding.

19 Q. Is there anything different from what you
20 just told me, that there's this poten -- that this
21 wireless device is a potential for an ignition source
22 -- is there anything different between your opinion,
23 Mr. Stone's opinion, and Mr. Small's opinion?

24 A. Is there any different between those?

25 Q. Right.

1 A. No.

2 Q. Because I wrote down earlier that when you
3 spoke with Mr. Small ---

4 A. --- Uh-huh.

5 Q. --- He told you that the wireless device
6 is a potential for ignition. Did I write down that
7 correctly?

8 A. Yes.

9 Q. Okay. Other than that, did Mr. Small tell
10 you anything else regarding his opinion?

11 A. No. I read his -- read his report but I
12 -- we haven't talked about it other than the first
13 conversation.

14 Q. Okay, and in his report is there anything
15 different besides the fact that there was a potential
16 for ignition?

17 A. No.

18 Q. Thank you for going through those
19 questions. Now, I'd like to go back to a question I
20 asked you earlier.

21 I'd like you to talk to me about all the
22 possible theories you have or you have discussed ---

23 A. --- Uh-huh.

24 Q. --- Regarding how the fire started.

25 A. Discussed that we had a missing potential

1 source of ignition that I can't eliminate, and we
2 have discussed the potential that this fire was
3 incendiary.

4 Q. Okay. Let's first start with this missing
5 source of ignition.

6 A. Uh-huh.

7 Q. Okay, so that we can exhaust that topic.
8 And you can go ahead and tell me everything that --
9 all the evidence that you have regarding the missing
10 source of ignition and then we'll get to your second
11 theory. Okay?

12 A. Okay.

13 Q. What are you referencing when you state
14 that there was a missing source of ignition?

15 A. The surveillance photographs taken by the
16 Fayetteville police department, the photographs taken
17 by Mr. Lacy, and the photographs taken by Mr. Henry
18 Martini, as well as the documents that the insured
19 provided for electronic equipment that was installed
20 in the building.

21 Q. And when you say the photographs, are you
22 specifically referencing the photographs that show
23 the printed circuit boards?

24 A. Yes, ma'am.

25 Q. Okay. I just want to make sure that the

1 record's clear.

2 When were you first contacted about this
3 case?

4 A. November of 2012.

5 Q. And in November of 2012 did you go to the
6 scene of the fire?

7 A. I did.

8 Q. And what did you find when you went to the
9 scene of the fire?

10 A. I'm -- the scene had been changed
11 tremendously since the -- the fire. There were
12 missing furniture. There's cooking equipment that
13 was no longer there. There was a small debris pile
14 in the back. There were metal -- some metal
15 components were missing. All the contents of the
16 freezer and refrigerator were gone. So any --
17 anything that you can imagine that would be
18 perishable or -- or cleaned up ---

19 Q. --- Or salvageable.

20 A. --- Or salvageable was taken out,
21 including the overhead fixtures that were in those
22 photographs and so forth.

23 Q. Did you ask anyone where all the contents
24 went to?

25 A. I asked Mr. -- our insured, Mr. ---

1 Q. --- Diamantopoulos?

2 A. Diamantopoulos. Excuse me. I can't
3 pronounce his name. Sorry.

4 Q. Uh-huh.

5 A. Where it was and he -- he -- he understood
6 that it had been collected for salvage and that it
7 had been moved out.

8 Q. By whom?

9 A. I don't know.

10 Q. Was it by him?

11 A. I don't know.

12 Q. Okay.

13 A. I didn't ask him.

14 Q. So that's your limited knowledge ---

15 A. --- Yeah, that -- that was it, yeah.

16 Q. --- Of where all of that went to.

17 A. Yes, ma'am.

18 Q. Did you ever ask to see if, for example,
19 the light fixtures, if they were still ---

20 A. --- I actually ---

21 Q. --- In existence?

22 A. I actually thought that they were
23 collected by the -- at the -- the experts. And
24 that's when -- I was looking forward to seeing all
25 that evidence when we came for the joint exam,

1 because I ex -- expected those to have been collected
2 by them.

3 Q. Okay. That wasn't my question.

4 A. Okay.

5 Q. My question is did you ever ask your
6 client ---

7 A. --- Uh-huh.

8 Q. --- Mr. Diamantopoulos, whether or not any
9 of the stuff that was collected from or removed from
10 the fire scene, if that was still in existence.

11 A. I asked him if he had taken any of it and
12 he said no.

13 Q. Okay.

14 A. But I don't know whether or not it was
15 still in existence. I -- I ---

16 Q. --- Okay.

17 A. --- I -- he said that it had been
18 collected by -- for salvage or that it had been
19 removed by someone. And -- and as a matter of fact I
20 think he told me that he didn't know where some of it
21 had gone.

22 Q. Okay.

23 A. Okay.

24 Q. Did you ever ask Mr. Wiggins, the attorney
25 who has retained your services, to find out where all

1 of the items that were collected were taken to?

2 A. No.

3 Q. Okay.

4 A. It was a year afterwards. I just didn't
5 think that it was still in existence at that point.
6 Most of my experience is that once the -- the metal
7 and things like that are collected, they're salvaged
8 and gone.

9 Q. Okay.

10 A. After -- especially after a year.

11 Q. I understand that. But specifically in
12 this case you did not ask.

13 A. No.

14 Q. Okay. So in November of 2012 you went
15 into the building, and it had been cleaned out, for
16 lack of a better term.

17 What else did you do besides going into
18 the building and looking around the building?

19 A. I photographed -- or examined the branch
20 circuitry that was in the area of origin, which I
21 identified as the area around the rear drive-thru
22 window.

23 Q. Uh-huh.

24 A. I also went through what was left of the
25 debris pile in that area to see if I could locate any

1 items in there that would be of interest. And I
2 diagramed the building. And I, of course, discussed
3 the loss facts with Mr. Diamantopoulos on the -- that
4 day.

5 Q. Okay, so photographed -- are all your
6 photographs in -- on one of these two disks?

7 A. Yes, ma'am.

8 Q. Okay.

9 MS. DALY: If we can mark this as
10 Exhibit 1 and 2.

11 (* Exhibit 1 was marked *)

12 (* Exhibit 2 was marked *)

13 Q. (Ms. Daly) Did you interview anyone?

14 A. Just Mr. Diamantopoulos.

15 Q. And is he the only person you've
16 interviewed relating to this case?

17 A. Yes. I wasn't asked to interview anyone
18 else.

19 Q. Were you asked to interview Mr.
20 Diamantopoulos?

21 A. I was.

22 Q. And who asked you to do so?

23 A. Mr. Wiggins.

24 Q. Okay. And so I understand how your
25 services work, you are asked to do certain tasks by

1 Mr. Wiggins. And are those the only tasks that you
2 do?

3 A. Yes, ma'am.

4 Q. Okay. When did you first interview Mr.
5 Diamantopoulos?

6 A. My first day on the scene at the
7 restaurant.

8 Q. Okay.

9 A. I'd have -- to tell you the exact date
10 I'll have to go and look at my notes. But you have
11 those.

12 Q. Okay. Did you interview Mr.
13 Diamantopoulos again after this November 2012 date?

14 A. No, ma'am.

15 Q. Okay, so the record is clear, you've only
16 interviewed Mr. Diamantopoulos one time?

17 A. Yes, ma'am.

18 Q. Is that correct?

19 A. That's correct.

20 Q. Okay. Anything else that you did
21 regarding your investigation of this fire?

22 A. As far as that day or overall?

23 Q. Overall.

24 A. Well, we did the joint scene exam -- or --
25 joint scene exam the one day. We did the evidence

1 exam at Mr. Cavarock's office. And I've done some
2 Internet research on the power supply that we found
3 at the joint exam that was unplugged. I checked on
4 that.

5 And I -- once I got the two expert
6 reports, I -- once I read those and they indicated
7 that a class-two power supply and that low-voltage
8 circuit board could not ignite, I did some research
9 on that. And that's when I found the document that
10 Mr. Small had written.

11 Q. Well, is it your understanding that he
12 said that it could not or that in this specific case
13 it did not?

14 A. It -- Mr. Lacy -- I -- my understanding,
15 in his report said that it's not possible because
16 it's -- it -- it can't generate enough energy.

17 Q. Okay. And you've read Mr. Martini's
18 report as well?

19 A. I have.

20 Q. Okay.

21 A. And in his it indicates that it's -- that
22 it was -- the class-two power supply was designed to
23 lessen or minimize the potential for ignition.

24 Q. Okay, so let's back up to the original
25 question.

1 Your one theory is that it surrounds this
2 base station wireless device?

3 A. It's a potential possibility, yes.

4 Q. Okay. And so that it's very clear, you
5 are not testifying that it was the ignition source.
6 Correct?

7 A. That's correct.

8 Q. And you are not testifying that it was
9 more likely than not the ignition source.

10 A. That's correct.

11 Q. So your testimony is solely that the
12 wireless device is a potential source of ignition.

13 A. Yes.

14 Q. Tell me everything that you base that
15 statement on.

16 A. I base it on its presence, its location
17 and orientation to the fuel load or fuel package
18 there.

19 Q. Uh-huh.

20 A. And the fact that it -- it's not available
21 to be eliminated forensically by anyone else other
22 than Mr. Lacy and Mr. Martini, and that I believe it
23 is potential -- it could potentially ignite because
24 of the information that I read and discussed with Mr.
25 Stone and Mr. Small.

1 Q. Okay. And when you say that it could
2 potentially ignite and that's what you've discussed
3 with Mr. Stall -- Small and Mr. Snow -- Stone.

4 A. Yes.

5 Q. Did you discuss that aspect, the fact that
6 it could potentially ignite, with Mr. Small and Mr.
7 Stone because they are both engineers?

8 A. Yes.

9 Q. Anything else that supports your opinion
10 that the wireless device is a potential source of
11 ignition?

12 A. No.

13 Q. Okay. So I'm going to walk through these
14 statements. So you said based on its presence alone,
15 it's your testimony that it's a potentially source of
16 ignition. So what do you mean by based on its
17 presence?

18 A. Any -- if it's an electrical device that
19 could conceivably fail and produce heat, it must be
20 con -- included in the potential theories or
21 hypotheses that are developed. And that's why it's
22 in there on its mere presence.

23 Q. Anything else?

24 A. About its mere presence?

25 Q. Correct.

1 A. No.

2 Q. Okay, and second, you said that the
3 location of it ---

4 A. --- Yes.

5 Q. --- Supports your opinion that it could be
6 a potential ignition source.

7 A. Right.

8 Q. What are you referring to when you say its
9 location?

10 A. Its proximity to the fuel package, the EUO
11 by ---

12 Q. --- If you -- if you'll just -- forgive
13 me.

14 A. No problem.

15 Q. When you say proximity to fuel package,
16 are you basically saying its proximity to the origin
17 of the fire?

18 A. To the fuel package or -- and when I say
19 fuel package I'm talking about ---

20 Q. --- Because what are you referring to when
21 you say ---

22 A. --- The ---

23 Q. --- Fuel package?

24 A. The metal shelves ---

25 Q. --- Okay.

1 A. --- Which included the plastic plates,
2 plastic cups ---

3 Q. --- Uh-huh.

4 A. --- And foam containers.

5 Q. Okay. I didn't mean to interrupt you ---

6 A. --- No.

7 Q. --- But thank you for explaining that to
8 me.

9 A. No problem.

10 Q. You were getting ready to say something
11 about an EUO.

12 A. Yes. Mrs. Moon ---

13 Q. --- Uh-huh.

14 A. --- Her EUO.

15 In her EUO she indicated that the top
16 shelf or the upper section of that shelf contained
17 foam products, foam carry-out containers and so
18 forth, which are easily ignitable.

19 Q. Okay. The third factor you mentioned to
20 support your opinion is that it's not available to be
21 eliminated.

22 A. Yes.

23 Q. And what do you mean by the fact that it's
24 not available to eliminate at first?

25 A. Well, I haven't been able to look at it

1 other than in photographs. Mr. Stone hasn't been
2 able to look at it, nor has Mr. Small, only by the
3 photographs that we've been provided. They're
4 limited photographs.

5 Q. What do you mean, they're limited?

6 A. I think I counted a total of 10
7 photographs of this particular item. That's all that
8 I've seen.

9 Q. Okay.

10 A. Four -- four by Fayetteville police
11 department, two that are included in Mr. Lacy's that
12 are of where the item originally was left by Chad
13 Royal.

14 Q. Uh-huh.

15 A. And then the -- I think there's four that
16 Mr. Martini has, two from a distance showing up a
17 table with other items on it, and the front and back
18 of the printed circuit board on the table.

19 Q. Okay, and you've seen all of those
20 photographs. Correct?

21 A. I have.

22 Q. Okay. Since you have read the reports of
23 Mr. Martini and Mr. Lacy ---

24 A. --- Uh-huh.

25 Q. --- You are aware that Mr. Martini

1 inspected these printed circuit boards. Correct?

2 A. Yes.

3 Q. And that he eliminated these printed
4 circuit boards as a potential source of ignition for
5 this fire.

6 A. Yes.

7 Q. Do you have any evidence to contradict Mr.
8 Martini's finding?

9 A. No.

10 Q. Okay. Have you ever spoken to Mr. Martini
11 regarding his examination and elimination of the
12 printed circuit boards ---

13 A. --- No.

14 Q. --- As an ignition source?

15 A. No.

16 Q. So that I understand your bucket and Mr.
17 Stone's bucket, if you were going to examine printed
18 circuit boards for an electrical failure, would you
19 have Mr. Stone present to inspect and eliminate the
20 printed circuit boards as a potential source of
21 ignition?

22 A. He or another electrical engineer or
23 another engineer, yes.

24 Q. Okay, but in this case -- I understand we
25 could have a hundred people come in and look at it.

1 I'm talking about in this case.

2 A. Yes, I would have.

3 Q. Would that be your -- what you would do?

4 A. That's exactly what I would do.

5 Q. Okay. And is there something that Mr.
6 Small could do in his evaluation and elimination of
7 the printed circuit boards that Mr. Stone would not
8 be able to do?

9 A. I don't know. I can't answer that
10 question.

11 Q. Are you testifying that the fluorescent
12 lighting is a potential source of ignition?

13 A. No.

14 Q. How did you rule that out?

15 A. I ruled it out by the photographs in the
16 origin area. It did not -- the fire did not appear
17 to have originated above ceiling level and it did not
18 appear that there was a fuel load for ignition above
19 ceiling level. And I didn't see anything on the
20 lights that would indicate either way, and I don't
21 think that Mr. Stone did either.

22 Q. Anything else about your first theory that
23 the wireless device is a potential source of ignition
24 that we haven't covered today?

25 A. Not that I'm aware of.

1 Q. Okay. But as you sit here right now, is
2 there any evidence that you have that we haven't
3 covered?

4 A. No.

5 Q. And is there anything about your theory
6 that we have not discussed?

7 A. Not about my theory, no, or in the
8 potential hypothesis, no.

9 Q. Okay. And have you spoken to anybody
10 regarding this theory about the base station? Have
11 you spoken to anyone?

12 A. Mr. Stone and Mr. Wiggins ---

13 Q. --- Okay.

14 A. --- And Mr. Small.

15 Q. Anyone else?

16 A. No. I think I mentioned to Chad Royal
17 when I talked to him that that -- that that circuit
18 board was there and it looks pretty hard to
19 eliminate. I think that's all I said to him.

20 Q. Okay. Anything else you remember about
21 the discussion with Chad Royal?

22 A. Umm, that it was -- that he identified
23 that -- the circuit board as being in the origin
24 area, in that corner.

25 Q. Anything else?

1 A. Not that I can recall at the moment. My
2 notes have more information about my discussion with
3 Chad. And that's -- that's all that I can recall at
4 the moment. He -- we discussed other things in
5 relation -- relation to the case but not ---

6 Q. --- What are the other things, just while
7 we're discussing your conversation with Mr. Royal?

8 A. May I review my notes?

9 Q. Sure.

10 A. Okay.

11 Q. Of course.

12 (Witness examined document)

13 A. It looks like I spoke to him on November
14 13th. I think we had an appointment at three
15 o'clock.

16 Q. Give me one moment to get there, please.

17 A. I think it's on my fourth page of notes.

18 Q. Mr. Booth, can you look at these notes and
19 make sure that I'm not missing any pages of your
20 notes?

21 (Witness examined document)

22 A. No, ma'am.

23 MS. DALY: Please mark this as
24 Exhibit 3.

25 (* Exhibit 3 was marked *)

1 THE WITNESS: Are you ready?

2 MS. DALY: Yes.

3 THE WITNESS: Ready to go? Okay.

4 Q. (Ms. Daly) November 13th, 2012, page ---

5 A. --- It's the ---

6 Q. --- Four of your handwritten notes?

7 A. Yes, ma'am.

8 Q. And this relates to your discussion with

9 Mr. ---

10 A. --- Chad Royal.

11 Q. --- Chad Royal -- or Agent Chad Royal?

12 A. Uh-huh.

13 Q. Walk me through your notes so that I can
14 have a better understanding of what you discussed
15 with Agent Royal.

16 A. Sure.

17 Q. I'm not saying ---

18 A. --- I'm sorry. Well, it's ---

19 Q. --- Your writing is terrible.

20 A. It's not great. I apologize.

21 He said -- first of all, I have on here
22 that he was unaware of who or if the window was
23 broken on the drive-thru window.

24 Q. Uh-huh.

25 A. He talked about the dumpsters being

1 missing. He said that he had received a call from
2 the IRS in regards to the insured, something about
3 not being able to pay for the water bill or gas and
4 it was cut off. He also discussed a sewage runoff
5 issue.

6 I -- this is -- my notes following this
7 are my -- my review of the photographs that he had.
8 He let me view his CD of photographs.

9 Q. Uh-huh.

10 A. I noted that there was heavy soot on the
11 drive-thru window with a little bit of heat on the
12 frame of the window.

13 Q. And what is the significance of that fact?

14 A. Umm, my first determination or my thought
15 on it was is that it broke during the fire and that
16 it was sooted for that reason.

17 Q. Any other significance or potential
18 significance to the fact that there was heavy soot on
19 the drive-thru window?

20 A. No. That -- I mean, it was -- it was cool
21 on the outside and soot accumulated on the window
22 because the fire was on the inside of it.

23 Q. Okay. And the fact that there was heat on
24 the frame ---

25 A. --- That it vented at some point.

1 Q. --- What is the significance?

2 A. That it vented ---

3 Q. --- Okay.

4 A. --- Or the window broke at some point and
5 that we had heat escaping from the window.

6 Q. Okay.

7 A. He said they were using the front
8 drive-thru as opposed to the rear.

9 Q. Have you ever had anyone tell you
10 differently, that they were using the back drive-thru
11 window?

12 A. Umm, I believe Mr. Diamantopoulos said at
13 one point they had used it but they weren't at the
14 time, not at the time of the fire.

15 Q. Okay.

16 A. It says something about a camera was over
17 the vent for the bread oven, bread storage to the
18 left of the rear drive-thru window. And we talked
19 about that rack -- storage rack that was there.

20 Q. Did you ever ask Mr. Diamantopoulos if he
21 moved the bread storage rack from the front
22 drive-thru window to the back drive-thru window on
23 the day of the fire?

24 A. No. I found out about the -- the
25 discussions about that after my initial interview

1 with him by reading the EUO's.

2 Q. Okay.

3 A. And I -- so I haven't spoken to him about
4 that since.

5 Q. Have you asked Mr. Wiggins or talked to
6 Mr. Wiggins about that fact?

7 A. I have. I discussed that with him. And
8 -- and my understanding is is that -- that he didn't
9 move them, is my understanding. But I don't know.
10 Mrs. Moon says that it wasn't there in that location
11 the night before.

12 Q. Right. Anything else regarding the bread
13 storage rack? Any other discussions?

14 A. Huh-uh.

15 Q. So your only discussion is limited to Mr.
16 Wiggins when you mentioned the bread storage rack.

17 A. Yeah. I think I discussed with him that
18 there was a -- there was a demarcation line that
19 appeared in the photographs that -- and at the scene
20 that indicated that the bread storage rack was very
21 close, if not right in front of the drive-thru
22 window.

23 Q. Okay. When you spoke with Mr. Wiggins, I
24 want to know everything that was discussed regarding
25 either the significance that it had been moved, the

1 significance of where it was located.

2 A. I don't recall discussing anything about
3 the significance of whether or not it had been moved
4 or not.

5 Q. Okay.

6 A. It didn't -- I did not use it for my cause
7 determination.

8 Q. Okay. Especially since you are a former
9 detective with the police department ---

10 A. --- Uh-huh.

11 Q. --- So obviously your brain is going to
12 work in a -- you know, having thoughts run through
13 it.

14 A. Right.

15 Q. So I'd like to know your thoughts when you
16 were putting together this -- you know, how this
17 piece of evidence -- what were your thoughts
18 regarding this piece of evidence, the fact that it
19 was moved.

20 A. Well, if it had been moved -- and that's
21 what I don't know.

22 Q. Okay.

23 A. Okay, if it ---

24 Q. --- If it had been moved.

25 A. If it would -- had -- had been moved, I --

1 you know, I really can't say, because I don't know
2 whether it had been moved or not.

3 Q. I understand that.

4 A. Okay. If ---

5 Q. --- Let's assume the jur -- how about
6 this? The jury believes the testimony from Ms. Moon
7 and Ms. Ravere -- I believe was her name -- the other
8 manager on duty -- that when they left at four a.m.
9 the bread rack was in drive-thru window one.

10 A. Uh-huh.

11 Q. And they locked up.

12 A. Uh-huh.

13 Q. They did not go back into the premises.
14 And when the fire started the bread rack was at
15 drive-thru window two.

16 A. Uh-huh.

17 Q. What were your thoughts -- what are your
18 thoughts regarding the fact that it was moved to
19 drive-thru window two? And I understand you're not
20 accepting it had been moved to drive-thru window two.
21 Be very clear for the record that if the jury finds
22 that it was moved between four a.m. and the time this
23 fire started, what were your thoughts as a
24 cause-and-origin expert ---

25 A. --- Well, if they didn't ---

1 Q. --- And former detective.

2 A. If they didn't move it, and the only
3 person that had occupied that structure before the
4 fire, then I would have thought that maybe Mr.
5 Diamantopoulos may have moved it.

6 Q. Okay, and what would be the significance
7 of its location if Mr. Diamantopoulos moved it?

8 A. It would be speculative. And I don't know
9 that I can answer that. It is -- it is blocking the
10 window.

11 Q. Okay, that -- so that's not speculative.
12 It was blocking the window. Correct?

13 A. There's -- there is physical evidence to
14 support that, yes.

15 Q. Okay, so that's not speculative. The one
16 is that the location of this bread rack was blocking
17 the window from the -- and when you say blocking the
18 window, you mean someone from the outside could not
19 see into the restaurant?

20 A. See, that's -- that I don't know, exactly
21 how much it was blocking it.

22 Q. Okay.

23 A. In fact there is -- there is an area on
24 the wall that's a demarcation line ---

25 Q. --- Uh-huh.

1 A. --- That suggests that that's where it
2 was.

3 Q. Right.

4 A. I don't know how much it would have
5 blocked view.

6 Q. Okay.

7 A. It does appear that it would have blocked
8 a significant amount of view into the interior of the
9 building, yes.

10 Q. Okay. So that's one significant point of
11 it.

12 The other -- what other significance does
13 it have?

14 A. It could have blocked view.

15 Q. Okay. Would it also have had the fuel
16 source?

17 A. Oh, no, I don't believe it would have been
18 fuel source.

19 Q. Okay.

20 A. It's -- it's an aluminum, very difficult
21 to ignite.

22 Q. I'm not talking about the aluminum bread
23 rack. I'm talking about the contents on the aluminum
24 bread rack.

25 A. I don't know.

1 Q. Okay. Well, you said earlier -- this was
2 your ---

3 A. --- Uh-huh.

4 Q. --- Your statement, that it was the
5 proximity to the fuel package.

6 A. Uh-huh.

7 Q. And I said what do you mean by fuel
8 package.

9 A. Uh-huh.

10 Q. And you said, well, there was this bread
11 storage rack ---

12 A. --- I -- no, I did not ---

13 Q. --- With the ---

14 A. --- No.

15 Q. --- With the plastic foam plates that Ms.
16 Moon testified to.

17 A. It was not the bread rack.

18 Q. Okay. So tell me, then, what was the fuel
19 package?

20 A. The -- the metal shelves, the slatted
21 shelves ---

22 Q. --- Uh-huh.

23 A. --- That were located along the wall ---

24 Q. --- Uh-huh.

25 A. --- In that corner that stored those

1 items.

2 Q. Okay, so you're talking about two
3 different, then, shelves.

4 A. Yeah. There's a set of shelves ---

5 Q. --- Uh-huh.

6 A. --- That were in that corner and then
7 there was the bread rack.

8 Q. Okay, so the bread rack, the significance
9 of the bread rack, if it was located in the
10 drive-thru window, the only significance to you is
11 that it could have potentially blocked the view.

12 A. Yes.

13 Q. Okay. Did it have anything on it that
14 could have fueled the fire?

15 A. I don't know what was in it.

16 Q. Okay.

17 A. I don't know what was in it. I'd -- it
18 was adjacent to the origin. It was -- in other
19 words, if you have a corner ---

20 Q. --- Uh-huh.

21 A. --- You know, use a piece of paper for the
22 corner, you have a window, and you have the bread
23 rack, and then you have the shelves here, and this is
24 your origin area, it was adjacent to that.

25 Q. Okay, thank you.

1 Anything else regarding this bread rack?

2 A. Not that I can think of.

3 Q. Okay, thank you. You can go -- continue
4 down your notes.

5 A. I noticed -- noted in the photographs that
6 there was heat damage to the DVR that was located on
7 the upper corner of that office shelf. I noted that
8 Mr. Royal said he believes that it was corrupted,
9 according to Mr. Lacy.

10 Q. Did Mr. Royal tell you his discussions
11 with Mr. Diamantopoulos about their surveillance
12 system?

13 A. I don't have any notes to that effect.

14 Q. Okay. And have you read Mr. -- Agent
15 Royal's deposition?

16 A. I have not.

17 Q. Okay.

18 A. Just to be clear, I haven't read any of
19 those depositions.

20 Q. Okay, thank you.

21 Before we continue, while I think about
22 it, have you ever worked with Agent Royal?

23 A. On other fires, yes.

24 Q. On other fires. And is there anything
25 regarding Agent Royal's reputation -- as a

1 cause-and-origin expert, is there anything about his
2 history that you would say would support you
3 contradicting anything that Agent Royal says or you
4 questioning his credibility?

5 A. Credibility, no.

6 Q. Okay.

7 A. Questioning a cause determination, that
8 happens on a -- on a, you know, fairly -- not
9 consistent basis, but it happens. I mean, when two
10 different experts look at something, there -- there's
11 times when we don't -- we differ on opinion.

12 Q. Uh-huh.

13 A. But his credibility, no. He's a great
14 guy.

15 Q. Okay. And if Agent Royal testifies that
16 Mr. Diamantopoulos told him that the surveillance
17 system fed into two computer towers, would you have
18 any reason to refute what Agent Royal testified to?

19 A. Only that the installer of the video
20 surveillance system said that it did not.

21 Q. Okay. I understand that -- let me --
22 first I want to talk about what Mr. -- Agent Royal's
23 credibility. Would you have any reason to -- or any
24 evidence to refute what Agent Royal testified to that
25 Mr. Diamantopoulos told him?

1 A. No.

2 Q. Okay. And, then, now you can -- you had a
3 follow-up statement regarding a conversation that you
4 had with Mr. Dowlat. Is that correct?

5 A. Yes.

6 Q. Okay.

7 A. My understanding is is that they're the
8 ones who installed the system, that ---

9 Q. --- Mr. Dowlat.

10 A. Yeah, yes. That -- that it was located in
11 that upper corner ---

12 Q. --- In the office?

13 A. --- In the office. It's photograph -- it
14 -- it has been photographed, and that there are other
15 -- the feeds for the cameras go to that location.

16 Q. Okay.

17 A. Now, whether or not Mr. Royal and the
18 local police department believed they had the DVR
19 hard drives or not I can't say. They may have
20 believed that they had them.

21 Q. Okay. Did you ever have a conversation
22 with Mr. Diamantopoulos about the DVR hard drives?

23 A. Yes. We discussed that the first day.

24 Q. Okay. We'll get to everything you
25 discussed with Mr. Diamantopoulos when we go through

1 your notes. So we'll just put that to the side. And
2 let's go ahead and continue going down your notes and
3 what you talked to -- discussed with Mr. Royal.

4 A. Okay. There was a -- in his photographs
5 there was a container labeled gas, a plastic
6 container -- the CO2 bottles in the photographs. He
7 said that ---

8 Q. --- What was the significance for you
9 writing ---

10 A. --- That there was ---

11 Q. --- That statement down?

12 A. There was a photograph of a container
13 that's labeled gas.

14 Q. Okay. Did you find any significance about
15 that? I mean ---

16 A. --- Well, I would be ---

17 Q. --- Was it a potential ---

18 A. --- I would be surprised that it was in a
19 restaurant. And I think that that was of interest to
20 me and that's why I noted that.

21 Q. Okay, and why was it in the restaurant?

22 A. Well, there would be follow-up to that at
23 that day. I mean, he -- I was told that it was there
24 because he had ran out of gas and they filled up gas
25 for him and brought him the container and it was

1 brought back. And it was labeled that way so nobody
2 would do anything with it.

3 Q. Okay.

4 A. That's what I was told.

5 Q. And who told you that?

6 A. Mr. Wiggins. And I believe that it's in
7 Ms. -- Ms. Moon's EUO.

8 Q. Okay. Did you ever ask Mr. Diamantopoulos
9 ---

10 A. --- Like I said ---

11 Q. --- The veracity ---

12 A. --- I didn't know about that until after
13 that ---

14 Q. --- Okay.

15 A. --- Interview, my first interview with
16 him.

17 Q. And so is it your understanding that Mr.
18 Wiggins went and asked Mr. Diamantopoulos why there
19 was this container labeled gas and then he reported
20 back to you?

21 A. Yes.

22 Q. Okay. Did he already have the answer when
23 you asked him or did he have to go talk to Mr.
24 Diamantopoulos and report back to you?

25 A. He had the answer already is my

1 understanding.

2 Q. Okay.

3 A. Yeah. That's what I recall.

4 Q. Anything else significant about that
5 statement?

6 A. About which statement?

7 Q. The statement that we're talking about ---

8 A. --- That there was gas there? You -- you
9 know, I -- like I said, I thought it was unusual that
10 it was in a restaurant.

11 Q. Right. And did you have any other
12 discussions regarding it?

13 A. With?

14 Q. Anyone.

15 A. Not that I'm aware of, no.

16 Q. Okay.

17 A. I -- I -- I -- I think I told Mr. Wiggins
18 that I thought it was odd that it was in a
19 restaurant.

20 Q. Okay.

21 A. I didn't get ---

22 Q. --- Anything else?

23 A. No.

24 Q. Okay. Did you have a discussion with
25 Agent Royal about it?

1 A. I told him that I thought it was odd that
2 it was in a restaurant.

3 Q. And did he have any comment?

4 A. I asked him if he collected it and he said
5 no.

6 Q. Okay. Anything else?

7 A. I asked him if he took samples and he said
8 no.

9 Q. Anything else?

10 A. No.

11 Q. Okay. You're next -- you can go on to the
12 next ---

13 A. --- Okay. It says safety glass inside the
14 drive. Debris on top of the glass was what he was
15 explaining to me. What -- and my significance for
16 that was that it -- that it broke earlier in the fire
17 and debris fell on top of it.

18 Q. Okay.

19 A. There were pictures of the circuit board
20 heavily damaged discovered by Chad during excavation
21 of the origin area. And so I -- circuit board may
22 have been from the headset communication system. And
23 I knew about that because of my initial interview
24 with Mrs. -- Mr. Diamantopoulos.

25 Q. Okay. So I want to break this down. You

1 saw the pictures of the circuit board. Correct?

2 A. Uh-huh.

3 Q. Had you already seen pictures of the
4 circuit board prior to going to Agent Royal's office?

5 A. No.

6 Q. Okay. Had you had discussions regarding
7 the wireless device prior to going to Agent Royal's
8 office?

9 A. One moment. I'm going to read some of my
10 notes at the beginning when I spoke to Mr.
11 Diamantopoulos, because if I recall correctly, there
12 was a mention of it on that first day.

13 (Witness examined document)

14 A. Yeah, I have it noted in my first diagram.
15 When I was talking to Mr. Diamantopoulos, he noted --
16 I was asking him what was in the area and he noted
17 that the drive-thru wireless headset system was
18 there. And that's on my second page of my notes.

19 Q. Second page of Exhibit 3.

20 How did this wireless headset come up in
21 discussion?

22 A. I asked him what was in the area of fire
23 origin. And that's why we drew this diagram. I
24 wanted to know what was where at the time of the
25 fire.

1 Q. Okay. Anything else?

2 A. No. The next item on there is I said that
3 I needed to identify the brand, model, age, and check
4 for recalls on the headset system.

5 Q. Okay, and were you able to do that?

6 A. Yes.

7 Q. Okay. How were you able to identify the
8 brand?

9 A. It was documented in the documents that --
10 exhibits that were provided for items that were
11 destroyed during the fire is my understanding.
12 That's -- that's what I think those documents were.
13 It's listed in there as the -- as an HME Ion IQ on
14 the -- on a receipt or a bill of -- a bill of sale or
15 a PO that's in the documents.

16 Q. Okay. So that I understand what you're
17 referencing, is this something that Mr.
18 Diamantopoulos provided?

19 A. It -- all I can tell you is it's in the
20 documents that I was provided by Nationwide as -- I
21 -- and I believe they're Mr. Jezierski's --
22 Jezierski's documents.

23 Q. Uh-huh. I'm a -- it -- I'm a little
24 unclear. How was it determined what brand the
25 wireless device was? Did you ever talk to Mr.

1 Diamantopoulos and ask him ---

2 A. --- No. I asked ---

3 Q. --- The brand?

4 A. I asked Mr. Wiggins following the
5 discovery of the circuit board ---

6 Q. --- Okay.

7 A. --- And knowing that it was there ---

8 Q. --- Uh-huh.

9 A. --- I asked what brand it was. I later
10 found in the discovery documents a ---

11 Q. --- Okay. Well, first, did Mr. Wiggins
12 tell you what brand it was?

13 A. Yeah.

14 Q. Okay, so he told you. So you talked to
15 Mr. Wiggins ---

16 A. --- Uh-huh.

17 Q. --- And he told you what brand it was?

18 A. That's right.

19 Q. And how did Mr. Wiggins know the brand?

20 A. I believe he was told by the installer.

21 Q. Okay. And that's what I'm trying to
22 figure out ---

23 A. --- Mr. Dowlat. That ---

24 Q. --- Is it -- so Mr. Dowlat supposedly told
25 Mr. Wiggins the brand.

1 A. Yes.

2 Q. Okay. And, then, please continue.

3 A. And then after that it was -- I found in
4 those documents a -- it's either -- it's a receipt
5 that indicates on there HME Ion IQ.

6 Q. And were you able to determine the age?

7 A. I believe it was installed that date. I
8 don't know what -- if the date is on the -- on the
9 piece -- on the receipt. But I don't know how old it
10 was prior to installing it, no.

11 Q. Is it your understanding that was
12 installed after the alleged vandalism?

13 A. Yes.

14 Q. Okay. You also mention in here about
15 checking recalls. Did you check the recalls?

16 A. I did.

17 Q. And what did you find?

18 A. None, no recalls and no complaints.

19 Q. What were you looking for when you were
20 checking for recalls or complaints?

21 A. The HME Ion IQ.

22 Q. Okay. Were you looking to see
23 specifically whether or not this device had ---

24 A. --- I checked with ---

25 Q. --- Been in a fire?

1 A. I'm sorry. I checked with the CPSE,
2 Consumer Products Safety Commission ---

3 Q. --- Uh-huh.

4 A. --- To find out if there were any recalls.
5 And if there were any recalls, I would have checked
6 to see why.

7 Q. Okay.

8 A. I also searched the Internet and
9 specifically fire-related problems or complaints and
10 found none.

11 Q. Anything else? Did you have any
12 discussion with Agent Royal regarding the wireless
13 headset?

14 A. I told him that it was in the area of
15 origin and that -- that I wondered how it had been
16 eliminated. And he said, well, that was specifically
17 the reason that he felt uncomfortable making the
18 initial call and why he initially called it as an
19 undetermined fire.

20 Q. And Agent Royal is not an electrical
21 engineer. Correct?

22 A. No.

23 Q. So he is like you.

24 A. No.

25 Q. He's solely a cause-and-origin expert.

1 A. That's right.

2 Q. Correct?

3 A. That's right.

4 Q. So he would not be qualified to eliminate
5 an electrical ---

6 A. --- No.

7 Q. --- Fire source.

8 A. --- He made a good choice. No.

9 Q. Is that correct?

10 A. That's correct.

11 Q. Okay. And did he -- well, you haven't
12 read his testimony.

13 Did he tell you that he relied on Henry
14 Martini's -- who is an electrical engineer -- his
15 determination regarding whether or not there was an
16 electrical failure in order to determine whether the
17 fire was incendiary or undetermined?

18 A. I recall Chad saying that -- that he
19 discussed it with Terry Lacy. And I would -- based
20 on that I would have been under the im -- impression
21 that Martini had relayed -- through Mar -- through
22 Lacy, he had been under the impression that Martini
23 had eliminated electrical sources of ignition and
24 that was why he changed his determination.

25 Q. To?

1 A. Incendiary.

2 Q. Okay. Okay, we can go on to the next
3 statement.

4 A. Okay. It says that I discussed with Mike
5 Winesette and advised he re -- I reviewed the
6 photographs. I asked him to check on the headset
7 system for an exemplar and discussed getting
8 assistance on examination of the evidence by an
9 electrical engineer.

10 Q. Okay.

11 A. And then I said ---

12 Q. --- And so that we're clear, Mike
13 Winesette, is he an attorney?

14 A. Yes.

15 Q. For plaintiff?

16 A. He was -- he was the attorney that I was
17 initially contacted by, yes.

18 Q. Okay.

19 A. For this case.

20 Q. Okay. Were you ever provided an exemplar?

21 A. No.

22 Q. What was told to you when you asked about
23 obtaining a headset system for an exemplar?

24 A. That they would discuss that.

25 Q. And what was the outcome?

1 A. We have not purchased an -- an exemplar.

2 Q. Why?

3 A. I don't know why. I didn't ask.

4 Q. Were you told that they were not going to
5 purchase an exemplar?

6 A. No, ma'am, huh-uh.

7 Q. Has the discussions ever come back up?

8 A. It -- yes.

9 Q. And what was said then?

10 A. We just didn't buy one. We didn't -- they
11 didn't buy one. So I don't know why they de --
12 determined not to purchase one. It was my
13 recommendation that we purchase one and examine it.

14 Q. Okay. And then you state discuss getting
15 assistance of examination of evidence by an
16 electrical engineer.

17 A. I did.

18 Q. And why did you discuss getting assistance
19 of an examination of evidence by an electrical
20 engineer?

21 A. Because I'm not qualified to eliminate it.

22 Q. How did it come about that Mr. Stone was
23 retained?

24 A. I spoke with one engineer and he declined
25 the case.

1 Q. Why?

2 A. Because it was a Nationwide case.

3 Q. Okay. And what was the name of that
4 engineer?

5 A. Mark Cassell with LWG Consulting.

6 Q. Okay.

7 A. Okay.

8 Q. Anything else?

9 A. And then I tried ---

10 Q. --- Was there any other discussion with
11 Mark Cassell?

12 A. No, no.

13 Q. Okay, so you called him?

14 A. Uh-huh.

15 Q. You said I have a case, it's against
16 Nationwide, and he said I'm going to decline?

17 A. He did.

18 Q. Anything else?

19 A. No. That's all.

20 Q. Okay. Go ahead.

21 A. And then I called John Cavarock, and he
22 had already been retained by PWC.

23 Q. Okay.

24 A. And at that point, since Randy Down, who
25 is with ---

1 Q. --- And what else did you discuss with Mr.
2 Cavarock?

3 A. He said he has already been retained by
4 PWC, and I let it go at that.

5 Q. Okay. Did he tell you how it came about
6 that he was retained by PWC?

7 A. I didn't ask.

8 Q. Okay.

9 A. I just cut it -- cut it at that, because I
10 didn't want to discuss any more -- thing more with
11 him.

12 I -- I -- at that point when -- because
13 Mark had declined, Randy Down, who is also employed
14 with LWG Consulting, which is another engineer I use,
15 I couldn't use him. And Steve Stone is another
16 engineer that I find highly qualified and reputable
17 and so forth. So I contacted him and he agreed to
18 take the case.

19 Q. Okay, so you contacted Mr. Stone directly.

20 A. I did.

21 Q. What did you tell him about the case?

22 A. I told him that there was a case involving
23 a -- at a restaurant fire, and that I had been hired
24 by a law firm in Fayetteville to take a look at it,
25 and that I wondered if he would be willing to be --

1 be involved and take a look at the evidence.

2 Q. Okay.

3 A. Because -- I didn't ask him to go to the
4 scene. I had already been to the scene and I had --
5 at that point was highly hopeful that this particular
6 circuit board was going to be present at the joint
7 scene exam -- or joint evidence exam, I should say.
8 And that's why he was hired, was to look at that, the
9 evidence including the circuit board.

10 Q. Okay. And then did he also look at the
11 photographs as well?

12 A. He did.

13 Q. Okay. Did you supply all the documents to
14 Mr. Stone or did Mr. Wiggins do that?

15 A. Umm, I provided to Mr. Stone anything --
16 anything that I found, in other words, the -- the
17 document from Mr. Small, anything that I found on the
18 Internet that -- I think everything that I supplied
19 to him he provided to you, but nothing as far as
20 discovery documents. All of those documents would
21 have been provided by Mr. Wiggins.

22 Q. So your Internet researches you supplied
23 to Mr. Stone.

24 A. Yes.

25 Q. Anything else?

1 A. No.

2 Q. Okay. How about your photographs?

3 A. Umm, yes, yes, he has got my photographs.

4 Q. How about any of the other photographs
5 from any other expert in this case?

6 A. Anything that Mr. Wiggins had provided
7 him. I don't -- I don't know exactly ---

8 Q. --- But you didn't provide it to him?

9 A. No, no, no.

10 Q. Okay, so just your photographs and
11 anything that you found on the Internet.

12 A. Right. I think that I -- I think at one
13 point he didn't have a set of photographs. And I did
14 -- and I provided him a link to download those
15 photographs. In other words, I had them, and I had
16 them on my computer in a cloud server, and I provided
17 him a link to download them just to make sure that he
18 had those photographs.

19 Q. And did you recommend using Mr. Stone
20 because you -- in your opinion he was competent to
21 give an opinion regarding whether or not there was an
22 electrical failure or the source of ignition for this
23 fire was electrical?

24 A. Yes. His background includes small
25 circuitry in airplanes and -- and so forth. And I

1 felt like that he was perfectly capable of rendering
2 an opinion on that if we had the evidence.

3 Q. The rest of these notes, is this still
4 relating to your discussion with Agent Royal?

5 A. Umm, the only thing that's left of my dis
6 -- discussion with Chad Royal was this phone call on
7 November 16th ---

8 Q. --- Uh-huh.

9 A. --- At 9:35 at the bottom of the page.

10 Q. Uh-huh.

11 A. I discussed the DVR hard drive with Chad
12 Royal, asked if he was told by Terry Lacy it had been
13 collected -- a DVR. And he says he's not sure but he
14 believes not.

15 Q. Okay. Anything else?

16 A. No, ma'am. At that point I don't think I
17 spoke to Chad Royal again about this case.

18 Q. So anything else regarding your first
19 theory that the wireless headset was a potential
20 source of ignition?

21 A. No, ma'am.

22 Q. Okay. So your second theory is that it
23 was incendiary in nature.

24 MS. DALY: And before we get on
25 that, let's go ahead and take a break.

1 (11:36-11:45 a.m. - recess)

2 MS. DALY: We can go back on the
3 record.

4 Q. (Ms. Daly) So let's talk about the second
5 theory that it was incendiary in nature.

6 If it is determined that there was no
7 electrical ignition source to the fire, then would
8 the fire be classified as incendiary in this case?

9 A. It's my opinion that it's difficult to
10 make a cause determination on the absence of
11 accidental causes unless the -- the origin is clearly
12 defined, as far as very clearly defined.

13 Q. Okay.

14 A. I'm -- I'm going to answer your question,
15 I promise.

16 In -- in this case, I'm not -- I do not
17 believe that the origin is as clearly defined as --
18 in other words, a clearly defined origin to me might
19 be different than a clearly defined origin to an
20 individual unfamiliar with fire patterns and so
21 forth.

22 In my opinion, the origin, like I said in
23 my report, could be from an upper level to lower
24 level in the same area that Mr. Lacy has identified.
25 If we could eliminate all potential sources of

1 ignition then, yes, it would be an appropriate
2 determination.

3 Q. What would be an appropriate ---

4 A. --- An incendiary fire cause would be an
5 appropriate determination.

6 Q. Okay, so you just said if you could
7 eliminate all sources of ignition ---

8 A. --- Uh-huh.

9 Q. --- Then it would be appropriate to
10 determine the fire was incendiary.

11 A. Yes, ma'am.

12 Q. Okay, so what are all the sources of
13 ignition that you would need to eliminate before you
14 ruled that it was incendiary?

15 A. The branch circuitry including the lights
16 from above ---

17 Q. --- Okay.

18 A. I'm including all of the things that would
19 have been there, not the things that we've already
20 discussed that have been eliminated.

21 The branch circuitry, the lights from
22 above, and the Ion IQ.

23 Q. So you've read Mr. Stone's report where he
24 eliminated the branch circuitry. Correct?

25 A. Yes.

1 Q. And do you agree with his opinion that the
2 branch circuitry was not the ignition source?

3 A. Yes.

4 Q. Do you agree that the lights were not the
5 ignition source?

6 A. Yes.

7 Q. Okay, so the only thing that we are left
8 with is this wireless device. Correct?

9 A. Yes, ma'am.

10 Q. Okay, so if the wireless device is
11 eliminated, then the fire would be classified as
12 incendiary in nature. Is that correct?

13 A. It could be, yes. I don't know that I
14 would make that determination.

15 Q. Okay. Would it be reasonable for a cause
16 and origin expert and an SBI agent to determine that
17 the cause was incendiary after the ION IQ has been
18 eliminated?

19 MR. WIGGINS: Objection.

20 Go ahead and answer if you can.

21 THE WITNESS: The -- the
22 determination of an incendiary fire based on the
23 elimination of potential ignition sources, all
24 potential ignition sources, is an appropriate
25 determination under certain circumstances. I agree

1 with that.

2 Q. (Ms. Daly) Is it your testimony that in
3 this case there would be circumstances that exist
4 that would make it inappropriate for a cause and
5 origin expert to determine the fire incendiary after
6 the Ion IQ wireless system was eliminated?

7 A. If it was competently eliminated, yes.
8 Yes, it would be appropriate if it was competently
9 eliminated.

10 Q. Okay. Well, we're assuming everybody --
11 you said competently.

12 Is there any evidence that you have that
13 you're saying someone did something incompetently in
14 this case?

15 A. My answer to that would be that I don't
16 believe that all of the steps that were necessary to
17 eliminate that were taken.

18 Q. Okay, so let's walk through those steps
19 ---

20 A. --- Okay.

21 Q. --- You're testifying were not taken.

22 A. Okay.

23 Q. Okay, so in general -- let's talk general
24 and then we'll go specific. In general what steps
25 would need to have been taken to determine that the

1 printed circuit boards was not the ignition source?

2 A. It would need to be visually inspected.

3 Q. Okay.

4 A. Which it was. It would need to be
5 collected and inspected under magnification. At
6 least in -- I would not be doing this.

7 You understand that?

8 Q. Right, exactly, and that was -- is my
9 point.

10 A. Okay.

11 Q. You would not be doing this. Correct?

12 A. Right. That's correct.

13 Q. So you are not the expert that is
14 qualified to determine what is the competent
15 evaluation of the PCB -- B's.

16 That would have been Mr. Stone. Correct?

17 A. That's right.

18 Q. And if Mr. Stone testified that he had no
19 evidence that they were -- that they were not
20 examined in a competent way, would you have any
21 reason to disagree with Mr. Stone?

22 A. Are you asking me do I believe that Mr.
23 Stone thinks that it was not competently eliminated?

24 Q. Well, no, but I can ask you that.

25 Did Mr. Stone ever tell you that the PCB's

1 was not competently eliminated?

2 A. He said to me that he didn't believe all
3 the steps that should have been taken to eliminate it
4 were taken.

5 Q. Okay, and what steps did he tell you were
6 not taken?

7 A. It should have been collected and examined
8 under magnification for -- and I think he talked
9 about color distemperation or something of that
10 nature, but I'm -- that's his ball of wax, not mine.

11 Q. Okay, so under -- when you're testifying
12 in front of the jury, you are not qualified to
13 testify regarding the appropriate steps that should
14 have been taken to eliminate the PCB's. Is that
15 correct?

16 A. I would not agree with that statement.

17 Q. Okay, and why not?

18 A. Because in my experience, the process is
19 to determining a fire -- let's say -- when you make a
20 cause determination that a fire is incendiary ---

21 Q. --- Uh-huh.

22 A. --- And you have other potential sources
23 of ignition that you've eliminated, an investigator
24 that does this job knows that there are the potential
25 for alternative theories.

1 When we have the potential for alternative
2 theories, meaning that evidence or items need to be
3 eliminated, that someone else may ask to see those
4 items, it's incumbent upon me to make sure that those
5 items are in safe keeping so that they can be
6 eliminated by someone else if necessary because
7 inevitably an alternative theory will come up

8 Q. Okay, so -- so that I understand your --
9 your complaint, is it -- are you actually ---

10 MR. WIGGINS: --- Objection.

11 That's not a complaint.

12 MS. DALY: Oh, okay.

13 Q. (Ms. Daly) Let me understand what you are
14 saying was done inappropriately.

15 Are you saying that -- because there's two
16 different things.

17 A. Uh-huh.

18 Q. One thing is that the evidence, when it
19 was collected by Agent Royal and set aside ---

20 A. --- Uh-huh.

21 Q. --- For a further evaluation by an
22 electrical engineer. Correct?

23 A. Well, he set it aside because he couldn't
24 eliminate it. He didn't know what was coming,
25 whether it be an electrical engineer or not. But he

1 set it aside because he could not eliminate it. Yes.

2 Q. Okay, and then Mr. Martini inspected that
3 evidence that had been collected.

4 A. Uh-huh.

5 Q. Right?

6 MR. WIGGINS: Object.

7 He said he inspected it. He doesn't know
8 what kind of inspection he did.

9 MS. DALY: Okay.

10 MR. WIGGINS: That's his point, I
11 think.

12 Q. (Ms. Daly) To your knowledge, Mr. Martini
13 inspected -- or to your understanding, what you've
14 been told, Mr Martini inspected the PCB's. Correct?

15 A. His report indicates his -- his first
16 report to Nationwide indicates that all electrical or
17 mechanical source -- potential sources of ignition
18 were examined and eliminated.

19 Q. Okay.

20 A. And in his second -- his expert report, he
21 indicates that the circuit board was examined and
22 eliminated.

23 Q. So let's stop there.

24 In general, what is your opinion that an
25 electrical engineer should have done, what steps

1 should an electrical engineer have done, in order to
2 inspect the PCB's ---

3 A. --- In my ---

4 Q. --- To eliminate?

5 A. In my experience ---

6 Q. --- No, in your -- I want to know, in your
7 expert opinion, what you are going to testify to
8 under oath and what you are qualified to testify to
9 under oath, I want to know that list that you are
10 qualified to give to the jury of what should be done
11 in an inspection for electrical failure of PCB
12 boards.

13 A. We've discussed the fact that I'm not an
14 electrical engineer.

15 Q. Okay, I understand that.

16 A. Okay.

17 Q. But are you testifying that you are
18 qualified to give, in your expert opinion, what needs
19 to be done in order to inspect for the electrical
20 failure?

21 A. No.

22 Q. Okay, so under oath, do you plan on
23 testifying to the jury what steps should have been
24 done in order to inspect the PCB's for an electrical
25 failure or is that something Mr. Stone would be

1 testifying to?

2 A. Certainly Mr. Stone ---

3 Q. --- Okay.

4 A. --- Would be the one.

5 Q. Are you qualified to testify in your
6 expert opinion, what steps need to be done to inspect
7 the PCB's for electrical failure?

8 A. I'm only qualified or able to testify
9 about my experience with other processes that I've
10 been through.

11 Q. Okay, and when you say other processes,
12 are you testifying what other experts need to do, but
13 not what you're qualified to do?

14 A. I'm just telling you what I have
15 experienced from other experts.

16 Q. Okay, what you've experienced other
17 experts to do?

18 A. Yes, ma'am.

19 Q. But not what you're qualified to do?

20 A. No, ma'am.

21 Q. Okay, and are you qualified to determine
22 that an electrical engineer did not perform his or
23 her duties as an expert, as an electrical engineer
24 expert?

25 A. I'm only qualified to say that I don't

1 know whether or not a person has done their job other
2 than by my experience with other people, other
3 experts.

4 And you know, whether or not there's a set
5 way that every engineer does their job or not, I
6 can't testify to that. I can only testify to what my
7 experience has been in the past.

8 Q. Okay, maybe so that we're not talking past
9 each other -- so let's give the example.

10 If a cardiac surgeon is being sued for
11 medical malpractice ---

12 A. --- Uh-huh.

13 Q. --- Lawsuit, and the attorney hires
14 another cardiac surgeon to say that that cardiac
15 surgeon didn't do X, Y, Z, so that cardiac surgeon
16 would be an expert and qualified to testify because
17 he or she would be able to do the exact tasks that
18 the cardiac surgeon is being sued.

19 So in your situation, I'm trying to be --
20 have you be clear as to what your testifying to
21 because you're not an electrical engineer.

22 A. No.

23 Q. So you're not, in this case, the cardiac
24 surgeon that's being sued or that -- and you're not
25 the cardiac surgeon who's being retained to say that

1 this person did something incorrect. And so I'm
2 trying to figure out where -- what you are qualified
3 to testify to in front of the jury.

4 So you're not an electrical engineer and
5 you're not a mechanical engineer. So you would not
6 be qualified to look at these PCB's and determine
7 whether there was an electrical failure or that it
8 was the source of ignition. Is that correct?

9 A. Yes.

10 Q. Okay, so what is your testimony today that
11 you are qualified to do in regards to whether or not
12 the PCB's were inspected and eliminated as the
13 ignition source of the fire?

14 A. I would have to leave that up to Steve
15 Stone.

16 Q. Okay, thank you. That's all I was trying
17 to be clear about.

18 So in your experience, watching other
19 experts do the elimination of electrical sources,
20 what has been your experience watching others?

21 A. My experience with others is that even
22 branch circuitry in the area of origin that may be
23 easily eliminated is still recovered and stored for
24 further examination.

25 We spoke about Mr. ---

1 Q. --- Okay, and you're saying further
2 examination. Are you saying further examination by
3 someone else ---

4 A. --- No.

5 Q. --- Or further -- further examination by
6 the electrical engineer?

7 A. No. I was going to finish that.

8 Q. Okay.

9 A. I was going to say we just spoke about Mr.
10 Cassell.

11 Q. Uh-huh.

12 A. And in my experience with him, he has
13 taken branch circuitry that we have examined at the
14 scene that has been eliminated at the scene and gone
15 back and gone over under magnification, and has been
16 unable to eliminate it following those exams.

17 Mr. Cavarock, and I have worked before on
18 other cases either together or on separate sides and
19 he's collected items that even he believed could be
20 eliminated at the scene but have kept them and gone
21 back and examined them in the office.

22 Q. And you spoke with Mr. Stone about this
23 case specifically?

24 A. Yes, ma'am.

25 Q. And did he identify to you any -- the

1 steps that he said should have been taken regarding
2 the PCB's?

3 A. Yes, ma'am.

4 Q. And what were those steps?

5 A. He said that they should have been
6 collected and looked at under magnification for ---

7 Q. --- Anything -- okay.

8 A. --- For the items that he did -- that he
9 felt like were necessary. He discussed temper
10 discoloration, and with an exemplar, the heat flux or
11 transfer of heat inside the -- the board and the
12 enclosure.

13 And other than that, I don't recall what
14 other -- what else he said but he did say that it
15 would be -- he should -- if -- he would have
16 collected it and examined it under magnification.

17 Q. Anything else?

18 A. No.

19 (12:01-12:03 p.m. - recess)

20 MS. DALY: We can go back on the
21 record.

22 MR. WIGGINS: Back on the record.

23 Q. (Ms. Daly) So let's go back to the second
24 theory, that it was incendiary in nature. What facts
25 did you consider that would lead a cause-and-origin

1 expert to determine that this fire was incendiary?

2 A. Well, that if all of the electrical
3 sources of ignition were eliminated.

4 Q. Right.

5 A. And the time frame. And that was all that
6 there is there as far as evidence.

7 Q. Okay, and what do you mean by time frame?

8 A. The time in which the insured last left
9 the building until the time the fire was called in.

10 Q. And what about that is relevant to you?

11 A. It's relevant -- there's a time frame
12 between 8:25 and 8:41 and when -- when the call came
13 in.

14 Q. Okay. In general, if the fire started
15 sometime between 8:25 and 8:41 -- and 8:25 is roughly
16 the time that Mr. Diamantopoulos left the restaurant?

17 A. Uh-huh.

18 Q. Is that the time frame you're using?

19 A. Yes, ma'am.

20 Q. And then 8:41 is the first time that it
21 was called in.

22 A. Uh-huh.

23 Q. So that means that the smoke was visible
24 enough ---

25 A. --- Uh-huh.

1 Q. --- Or the fire was visible enough ---

2 A. --- Uh-huh.

3 Q. --- For a passerby to call it in. Is that
4 correct?

5 A. Yes, ma'am.

6 Q. In general, if there was an electrical
7 failure and there was -- the ignition source was
8 electrical, would you expect there to be smoke or a
9 scent associated with an electrical failure detected
10 prior to 16 minutes?

11 A. I don't know. In circum -- the -- this --
12 the -- there are ultimate -- there are many variables
13 on that.

14 Q. Okay.

15 A. There's ventilation. There's -- there's
16 ---

17 Q. --- Well, let's talk about the variables
18 as it relates to this restaurant.

19 A. Okay.

20 Q. Okay. If there was an electrical failure,
21 or the source of ignition was this wireless device.

22 A. Uh-huh.

23 Q. What theories do you have that make it
24 plausible that Mr. Diamantopoulos was in the
25 restaurant until at least 8:25 ---

1 A. --- Uh-huh.

2 Q. --- Without detecting any type of scent or
3 smoke prior to leaving the restaurant?

4 A. Food odors, cleaning supplies. I don't
5 know -- ventilation.

6 Q. Did you check the ventilation to this
7 building?

8 A. For? If -- if there's -- I mean, it has
9 an AC system. I would imagine that it was
10 functioning.

11 Q. Okay.

12 A. Or a heating system that would circulate
13 the air.

14 Q. So are you saying because of the specific
15 ventilation system in this building, that would have
16 masked any odor of ---

17 A. --- No, only -- only that it would
18 circulate.

19 Q. Well, if it would circulate -- and this is
20 just someone speaking from common sense. I mean, if
21 it would circulate, then it would have circulated it
22 throughout the building and then it would have been
23 more detected.

24 Is there....

25 A. I don't know that that's necessarily true.

1 Q. Okay. So that's what I'm trying to get
2 you to explain to me. What about this specific
3 building would have masked any odor or smoke if there
4 was this electrical failure of this wireless device?

5 A. There are food odors. There are cleaning
6 supplies odors that could mask it. I don't know
7 what's ---

8 Q. --- Which ones? What ---

9 A. --- We're cooking break.

10 Q. Okay. Were -- was there anything being
11 cooked at this time?

12 A. I -- I don't know if there was or not.

13 Q. So I'm assuming you did not ask Mr.
14 Diamantopoulos.

15 A. I did not ask.

16 Q. If there was nothing being -- if he has
17 testified that there was nothing being cooked at this
18 time, would that eliminate the potential of food odor
19 masking the odor from the electrical failure of this
20 wireless device?

21 A. I don't know if it would not -- mask it or
22 not.

23 Q. Okay.

24 A. What -- I'm just -- no, he did not dis --
25 he did not smell anything. He said that.

1 Q. Right.

2 A. And I don't know why he didn't smell it if
3 it was happening. Whether it was happening or not I
4 don't know. I don't know what could have masked it
5 other than the potential that there was a food
6 product that masked it. I walked in -- I -- I worked
7 in a restaurant as a kid. There were always odors in
8 a restaurant. I don't know if it was enough to -- to
9 mask a -- a -- smoke or not, or the odor. I just
10 don't know.

11 Q. Okay. So if there was a food odor, then
12 that would have masked the odor. What would mask
13 smoke?

14 A. Visual smoke?

15 Q. Uh-huh.

16 A. I don't know that you could mask visual
17 smoke.

18 Q. Okay. And did you ask Mr. Diamantopoulos
19 if he saw ---

20 A. --- Yes.

21 Q. --- Any smoke?

22 A. No.

23 Q. And what did he say?

24 A. He said no.

25 Q. In general, if there was an electrical

1 failure, would you have expected there to be smoke?

2 A. If there was -- if -- if pyrolysis was
3 incurring and -- yes, I would expect there to be some
4 smoke. I don't know how much. I have had -- I have
5 personally set fires in -- in cars which have -- and
6 in the beginning of them there's very, very little
7 visible smoke. I just don't know what would have
8 been there.

9 Q. Okay.

10 A. Or what....

11 Q. Have you ever set fire -- have you ever
12 purposefully had an electrical fire?

13 A. Yes.

14 Q. Okay, and when you purposefully set an
15 electrical fire, did you see smoke?

16 A. Yes.

17 Q. So you said food odor and the ventilation.

18 A. Or cleaning supplies. I just don't know.

19 Q. Okay. What cleaning supplies, in your
20 experience, masks ---

21 A. --- I don't know that they're masking ---

22 Q. --- An electrical ---

23 A. --- I don't know that they mask them or
24 not. I just know that they're there and that
25 cleaning supplies have odors. I know that people

1 have sensitive noses for certain things and not
2 others. And I just don't know what he could or could
3 not have detected. I just don't know.

4 Q. Well, so that we're clear on your
5 testimony, is it your testimony that -- it's not your
6 testimony that this wireless device was on fire.
7 Correct?

8 A. That's right.

9 Q. Okay. It's just one of your
10 hypotheticals.

11 A. It's a hypothesis, yes, that -- it's my hy
12 -- it is a hypothesis, that it could be potentially
13 failing, yes. I don't know whether it did or not.

14 Q. Uh-huh.

15 A. But it is part of something that I needed
16 to consider.

17 Q. Okay. So in considering whether or not
18 this wireless device caught on fire, one common-sense
19 thing would be to ask was there smoke ---

20 A. --- Uh-huh.

21 Q. --- Was there an odor. Correct?

22 A. Yes.

23 Q. Okay. So you asked Mr. Diamantopoulos if
24 there was an odor.

25 A. Uh-huh.

1 Q. And he said no. Correct?

2 A. That's right.

3 Q. And you asked him if there was smoke and
4 he said no. Correct?

5 A. That's right.

6 Q. And it's not your testimony that cleaning
7 supplies eliminated the odor of an electrical
8 failure. Is that correct?

9 A. No, it's definitely not.

10 Q. And it's not your testimony that the food
11 odor masked the odor from an electrical failure.

12 A. No.

13 Q. And it's not your testimony that the
14 ventilation system masked any smoke or odor from an
15 electrical failure.

16 A. No. It's only something that I would
17 consider ---

18 Q. --- Okay.

19 A. --- As to whether or not it was or could
20 be detected.

21 Q. Okay, so you considered it.

22 A. Uh-huh.

23 Q. And so what did you find about the food
24 odor?

25 A. I don't know that it could or could not

1 have masked the odor.

2 Q. And what did you find about the cleaning
3 supplies?

4 A. The same. I don't know whether or not it
5 could or could not have masked the odor.

6 Q. And what did you find about the
7 ventilation system?

8 A. I don't know whether it could or could not
9 have masked the odor.

10 Q. So when you say that you don't know
11 whether or not it could or could not have masked the
12 odor ---

13 A. --- Uh-huh.

14 Q. --- Are you testifying that it's more
15 likely than not that the food odor masked the odor
16 from the electrical failure?

17 A. No. I'm only testifying that it was not
18 detected. And I don't know whether or not it could
19 have been detected or not.

20 Q. Okay. So you say the time frame. Have
21 you -- you said that he left at 8:25.

22 A. Uh-huh.

23 Q. If there is testimony that he left at 8:35
24 ---

25 A. --- Uh-huh.

1 Q. --- And the fire was called in at 8:41 ---

2 A. --- Uh-huh.

3 Q. --- Does -- if you accept that fact as
4 true ---

5 A. --- Uh-huh.

6 Q. --- That he left at 8:35 and the fire was
7 called in at 8:41 ---

8 A. --- Uh-huh.

9 Q. --- Does that increase the likelihood that
10 Mr. Diamantopoulos set this fire?

11 A. It increases the likelihood that he was
12 very intimate to the ignition, yes, ma'am, in other
13 words, very intimate at the inception of the fire,
14 very close, or would have known that it was ignited,
15 yes, ma'am.

16 Q. Okay.

17 A. Does that make sense? That's a -- that's
18 a phrase that we've used in the past, very intimate
19 to -- and has intimate knowledge of the ignition of
20 the fire. Does that make sense?

21 Q. Yes, it does.

22 A. Okay.

23 Q. So that I can break it down to my terms,
24 instead of saying that he was very intimate with the
25 fire -- I'm going to repeat my question.

1 If the testimony that Mr. Diamantopoulos
2 was seen at the restaurant at 8:35 and the fire was
3 called in at 8:41 ---

4 A. --- Uh-huh.

5 Q. --- Does that fact make it more likely
6 that Mr. Diamantopoulos was present when the fire was
7 started?

8 A. It would increase the likelihood, yes,
9 ma'am.

10 Q. Would it make it more likely than not that
11 Mr. Diamantopoulos was present when the fire started?

12 A. Yes, ma'am.

13 Q. So you mentioned the time frame.

14 A. Uh-huh.

15 Q. The fact that the fire started at 8:25 --
16 excuse me. I apologize.

17 The fact that the fire -- that Mr.
18 Diamantopoulos was in the restaurant at 8:25 ---

19 A. --- Uh-huh.

20 Q. --- And the fire was called in at 8:41 ---

21 A. --- Uh-huh.

22 Q. --- If you take Mr. Diamantopoulos'
23 version of the facts as true ---

24 A. --- Uh-huh.

25 Q. --- That there was no odor, there was no

1 smoke, there was no detection of a fire at the time
2 that he left the building ---

3 A. --- Uh-huh.

4 Q. --- What is the probability that Mr.
5 Diamantopoulos was in the restaurant at the time of
6 the inception of the fire?

7 A. Well, it's either probable or not. And I
8 don't know whether or not that time frame is
9 sufficient for him -- for a fire to develop to that
10 point or not. His time frame allows a little bit
11 more time. I don't know whether it's sufficient
12 enough to develop that fire to the point that -- when
13 it was discovered or not. It's possible. But I
14 don't know that it's probable.

15 Q. Is it more likely than not that the fire
16 was started before Mr. Diamantopoulos left the
17 building at 8:25?

18 A. I don't know. It's either -- it -- it's
19 possible or probable.

20 Q. Right.

21 A. And it's -- I don't have enough data to
22 say that it's probable.

23 Q. So if we start at 50-50, is it a 50-50
24 shot that Mr. Diamantopoulos was in the building at
25 the time the fire was started if he left at 8:25?

1 A. Yes. There's two theories. One is that
2 and one is the other.

3 Q. Okay.

4 A. And we're at 50-50.

5 Q. We're at 50-50.

6 A. Uh-huh.

7 Q. Okay. So we have a 10-minute window. Mr.
8 Diamantopoulos claims he left the building at 8:25 --
9 or roughly -- I mean, he has testified, so we can use
10 whatever he says. But let's go with 8:25, which
11 seems to be -- is that from your notes ---

12 A. --- It's from my notes, yeah.

13 Q. --- Of what he told you? Okay.

14 A. And from the -- I -- I believe the EUO
15 says that ---

16 Q. --- Okay.

17 A. --- Yeah.

18 Q. Okay. And 8:35 is the testimony from a
19 witness that puts Mr. Diamantopoulos at the
20 restaurant.

21 A. Yes.

22 Q. Okay.

23 A. And Mr. Lacy's notes from his
24 investigation as well.

25 Q. Okay, have you interviewed, Mr. Lapene,

1 the manager of Cycle Gears?

2 A. No, ma'am.

3 Q. Were you aware that Mr. Lapene has
4 testified that Mr. Diamantopoulos was at the
5 restaurant at 8:35?

6 A. I was aware initially that he was
7 interviewed. And then after seeing Mr. Lacy's expert
8 report I did -- I was aware that he was deposed, yes.

9 Q. Okay, and did you see that it was at 8:35
10 that he said that Mr. Diamantopoulos -- excuse me.
11 Strike that.

12 So if Mr. Diamantopoulos left the
13 restaurant, the scene of the fire, at 8:25 and the
14 fire was such that a passerby could see it from the
15 road at 8:41 ---

16 A. --- Uh-huh.

17 Q. --- You said it's about a 50-50 shot that
18 Mr. Diamantopoulos was in the building at the set of
19 the fire.

20 A. I -- that's not exactly what I ---

21 Q. --- Start of the fire. Okay.

22 A. What I meant was is that they're 50-50
23 between two different potential ignition sources.

24 Q. And the two different potential ignition
25 sources, what would they be?

1 A. They would be an incendiary fire or the
2 Ion IQ, which has not been eliminated, or which I
3 have not -- or the electrical on -- or excuse me --
4 which I have not or Steve Stone has not been able to
5 eliminate.

6 Q. Okay. If Mr. Diamantopoulos was in the
7 building at 8:35 ---

8 A. --- Uh-huh.

9 Q. --- And left the building at 8:35, is it
10 more likely than not that the fire was incendiary in
11 nature?

12 A. Yes.

13 Q. And explain to me why that is.

14 A. Because it's unlikely that the fire would
15 develop within the time frame that it would take to
16 be observed by passersby.

17 Q. And when you say it's unlikely that it --
18 the fire would have been developed for a passerby to
19 notice ---

20 A. --- Uh-huh.

21 Q. --- If it was from the Ion IQ.

22 A. I think any ignition source.

23 Q. Or any ignition source.

24 A. Right.

25 Q. Okay. Other than incendiary.

1 A. No. I think that if -- if -- I think the
2 fire could not have developed in that seven minutes.

3 Q. Okay. Without Mr. Diamantopoulos noticing
4 it if he was in the building.

5 A. Yes, ma'am.

6 Q. Okay. So I want to step -- I want to walk
7 back minute by minute ---

8 A. --- Uh-huh.

9 Q. --- And you explain to me where -- at what
10 point in time could Mr. -- could this fire have
11 started and Mr. Diamantopoulos not been aware of it
12 and him get out of the building. If it's 50-50 at
13 8:25, once he leave -- once -- if it's 8:26, it's
14 obviously more likely than if it was at 8:25. Is
15 that....

16 A. My answer to that is is that how quickly
17 this fire developed is subjective ---

18 Q. --- Uh-huh.

19 A. --- Because of the fuel packages and their
20 orientation. I don't know how long it would take
21 from the actual ignition of the first fuel package to
22 the secondary fuel package -- would take. They're
23 very high-heat-release-rate fuels. They could
24 produce a fire that developed very quickly.

25 Christmas trees -- very -- you know, I

1 don't know if it's similar or not to the heat release
2 rate, because I can't answer that question. But I
3 have seen in studies of Christmas trees a room going
4 to full-room involvement and flashing over in 90
5 seconds.

6 So I don't know how quickly that fire
7 progressed. All I -- all I have said is is that we
8 have two potential ignition sources that could
9 develop a fire with -- and it would be very difficult
10 for it to develop in seven minutes. It's not
11 impossible but it would be very difficult for it to
12 develop within seven minutes to where it would be
13 visible by the outside. We don't -- it's not
14 ventilation limited and it's not fuel limited. So it
15 would have been a free-burning fire.

16 Q. Even if Mr. Diamantopoulos left at 8:25,
17 would it have still been very difficult for the fire
18 to get to the point that it was visible to passerbys
19 between 8:25 and 8:41?

20 A. I don't know that that's the case, no.

21 Q. Okay. How about between -- okay, so you
22 say in six minutes, 8:35 to 8:41, it would be very
23 difficult.

24 A. It'd be difficult, not ---

25 Q. --- How about -- I know not impossible ---

1 A. --- Uh-huh.

2 Q. --- But difficult. I get that.

3 So how about between 8:30 and 8:41? In 10
4 minutes to 11 minutes, would that be difficult?

5 A. I don't know.

6 Q. Okay.

7 A. I'm ---

8 Q. --- So your opinion changes sometime
9 between 8:30 and 8:35?

10 A. It's not an opinion change. I'm just
11 telling you that it's more difficult with the less of
12 a time frame.

13 Q. Okay.

14 A. Okay. The shorter the time frame gets,
15 the more difficult it is.

16 Q. Okay.

17 A. The longer the time frame, the greater the
18 possibility that something else occurred. The reason
19 that I feel the way that I do is because I don't know
20 the exact time frame. And we have something that the
21 engineer that I dealt with and myself have not been
22 able to look at and eliminate. And we have a time
23 frame that is short but we have a poss -- we have
24 possibilities of something else. And that is all I
25 can say.

1 Q. Did you ever watch the Walmart video?

2 A. I did.

3 Q. And you watched it since you wrote your
4 report?

5 A. Yes, ma'am.

6 Q. Okay. What did you find significant about
7 the Walmart video?

8 A. That the engine arrived as described at --
9 what was it? It was 8:46.

10 Q. Uh-huh.

11 A. And I noticed that at 9:07, which was
12 listed in Ms. Locklear's notes, that I can't see any
13 emergency vehicle arriving at that time. So I don't
14 know where she came up with that. But -- but the
15 engine did arrive at 8:46. And it is consistent with
16 the CAD report. It is consistent within a short
17 period of time in the video's time stamp.

18 Q. And what else was significant about the
19 Walmart video to you ---

20 A. --- That Mr. ---

21 Q. --- As an investigator?

22 A. That Mr. Diamantopoulos drove in front of
23 the building at -- I believe it was 8:42.

24 Q. Had Mr. Diamantopoulos ever told you
25 during his interview that he had driven in front of

1 the Walmart ---

2 A. --- No, ma'am.

3 Q. --- At 8:42?

4 A. No, ma'am.

5 Q. Did you ever see in any of his testimony
6 under oath that he had driven in front of the Walmart
7 building ---

8 A. --- Not that ---

9 Q. --- At 8:42?

10 A. Not that I recall.

11 Q. Are you familiar with that -- the
12 geographical location?

13 A. Oh, yeah.

14 Q. Okay.

15 A. I'm from here.

16 Q. Okay. In the video were you able to see
17 the smoke or fire from the building?

18 A. I was not, no.

19 Q. Okay. When you saw the video, what did
20 you do after watching the video?

21 A. I think I sent an email to Mr. Wiggins and
22 Trey McLean indicating that the time frame on Mr.
23 Lacy's report and the time stamps were correct.

24 Q. Okay. Did you ever have a discussion with
25 Mr. Wiggins?

1 A. Actually, I think that after I sent the
2 emails I did not get a return call, which I was
3 pretty surprised about. But other than that ---

4 Q. --- Okay.

5 A. --- I don't -- I -- I did discuss the fact
6 that I felt like that the times were right on and
7 that narrows the time frame from my report with the
8 time discrepancy that appeared to be there. It
9 eliminated that.

10 Q. Okay. What other significance did the
11 video have for you?

12 A. That I thought that it was interesting
13 that Mr. Diamantopoulos was in front of Walmart
14 within minutes of the fire engine arriving.

15 Q. And why is that significant to you?

16 A. Because he said he was elsewhere.

17 Q. Does that -- did you ever have a
18 discussion with anyone -- other than the email --
19 with anyone about the Walmart video and what you saw
20 in it?

21 A. Yes. I told Mr. Wiggins and Mr. McLean
22 that that -- I thought that it was odd that he was in
23 front of the building within minutes of the engine
24 arriving.

25 Q. Anything else?

1 A. Maybe ---

2 Q. --- Was that your choice word, was that it
3 was odd?

4 A. Uh-huh.

5 Q. That's a....

6 A. I think I said that. I think I said odd.
7 But it's -- it -- it would be contrary to his
8 testimony.

9 Q. Okay, so you explained that it'd be
10 contrary to his testimony.

11 A. Uh-huh.

12 Q. Because obviously in your report you said
13 something different.

14 A. Yes.

15 Q. Okay. So what you're saying today is more
16 accurate because you reviewed the video yourself.

17 A. Yes, ma'am.

18 Q. Okay. So I'm not going to go through your
19 report.

20 And your choice word was that it was odd?

21 A. Uh-huh.

22 Q. And interesting.

23 A. Uh-huh.

24 Q. Anything else?

25 A. I don't think I said anything else.

1 Q. Did you say anything else?

2 A. I don't think that I did.

3 Q. Okay. What was the comments back to you?

4 A. I think Trey said something like I don't
5 know why he was in front of the building either. And
6 I felt like that we needed to have an answer to that.

7 Q. Did you ever talk to Mr. Diamantopoulos?

8 A. I did not. I was not asked ---

9 Q. --- Do you know whether or not the
10 attorneys ever talked to Mr. Diamantopoulos?

11 A. I don't know.

12 Q. Did you ask them to talk to him?

13 A. I told them that it would be a good -- a
14 good idea to talk to him and find out why he was in
15 front of the building, yes, ma'am. I think -- I
16 think we discussed that earlier on, was to find out
17 why he had been in front of the building, because it
18 was pretty -- I think it was absolutely clear from
19 the beginning that there was a video of the Walmart
20 parking lot and we needed to have the information as
21 to what that included.

22 Q. What is the significance of the time frame
23 that Mr. Diamantopoulos was at the Walmart parking
24 lot at 8:42? What's significant of that fact? What
25 is the -- strike that.

1 What is the significance of that fact to
2 you as an investigator?

3 A. That he was in close proximity to the
4 building when the fire was called in, and that it
5 would support the fact that he had been in the area
6 since he left as opposed to driving away immediately.
7 I don't know where he went, but it would suggest
8 that.

9 Q. Does it also support -- strike that.

10 Does it make it more likely -- that fact
11 make it more likely that the fire was incendiary?

12 A. I don't think it makes it more likely that
13 it was. I think it makes it more like -- I think it
14 makes -- I think it makes it likely that he has not
15 communicated this -- I'm -- well, that's -- excuse
16 me. Let me step back. I think that he has not said
17 the same story every time.'

18 Q. Uh-huh. Are you aware of -- strike that.
19 I'll get back to that when I get to your report.

20 Okay, what other facts were significant in
21 your investigation when you were trying to determine
22 whether or not the cause and origin of this fire was
23 incendiary versus the electrical wireless device?

24 A. Any other circumstantial ---

25 Q. --- Catching on fire.

1 A. Any other circumstantial facts or evidence
2 would be considered following a cause determination.

3 Q. Okay, and what -- and that's what I want
4 to get from you.

5 A. Uh-huh.

6 Q. What other circumstantial facts were
7 important to you?

8 A. Financial information would be -- if I was
9 doing the entire investigation, which I did not -- I
10 did a origin-and-cause investigation. I did not do
11 the follow-up investigation. In other words ---

12 Q. --- Can -- yeah. Can you explain that to
13 me?

14 A. In other words, I isolated my
15 investigation to the examination of the evidence at
16 the scene and the collected evidence and the EUO's to
17 determine the time frame, to determine what he had
18 done in the building prior to leaving, and how long
19 he was there. And that was the scope of my
20 investigation.

21 Q. Would it have been appropriate for you to
22 do a follow-up investigation into financials or any
23 other circumstantial evidence that could help in
24 determining the cause and origin of the fire?

25 A. I think that that's outside of the

1 forensic evidence and it's not part of the actual
2 cause determination. It's only supportive of a cause
3 determination.

4 Q. Okay. And it's supportive but it's ---

5 A. --- It's an indicator.

6 Q. An indicator.

7 A. It's an indicator.

8 Q. Okay. But you did not do that part of the
9 investigation. Correct?

10 A. No, ma'am.

11 Q. And was that because of financial reasons
12 based on the plaintiff's financial status?

13 A. I have no idea. I was not asked to do it.

14 Q. Okay. And you would have only done it if
15 -- if they would have asked you to have done it,
16 would you have done it?

17 A. Absolutely.

18 Q. Okay. So if they would have asked you to
19 do a full investigation into the cause and origin of
20 this fire, what is everything else you would have
21 done if you were asked to do so?

22 A. I would have -- I would have checked
23 records. I would have checked the ---

24 Q. --- What records?

25 A. Criminal records, civil records. I would

1 have checked the -- followed -- I would have followed
2 up on any complaint that had been made.

3 Q. By whom?

4 A. By Mr. Lapene, in other words, his
5 statement. I would have interviewed him. I would
6 have interviewed the employees. I would have -- I
7 would have checked on -- or I would have gone to
8 interview every fire official that was involved. I
9 would have interviewed Chad Royal. I would have done
10 a more -- I would have done more as far as the video
11 goes. I would have attempted to review that earlier
12 on. I would have done a -- a number of things to --
13 to just collect data.

14 Q. Talked to the IRS?

15 A. I would have.

16 Q. Talked to the waste services?

17 A. I would have.

18 Q. Anything else?

19 A. Not that I can think of at the moment, but
20 I'm sure there something. It depends on what I was
21 told by each one of those individuals, how -- if they
22 told me something that I needed -- that I felt like
23 was important and I needed to follow up on, I would
24 have.

25 Q. For a lay person's -- you know, not a lot

1 of people have heard of cause-and-origin experts but
2 they have heard of detectives.

3 A. Uh-huh.

4 Q. You know, that's a common term.

5 A. Uh-huh.

6 Q. Common thing you see in movies.

7 Your investigation as a -- a fire
8 investigation, is it similar to what you did as a
9 detective when you were investigating the cause and
10 origin of a fire?

11 A. The origin and cause portion ---

12 Q. --- Uh-huh.

13 A. --- Is very similar.

14 Q. Uh-huh.

15 A. The rest of it is not.

16 Q. Okay. So what rest of it's not?

17 A. In other words, the follow-up that I've
18 just discussed there.

19 Q. Okay.

20 A. That is only done at the request of my
21 clients.

22 Q. Right. And so that's your limitation.

23 A. Yes, ma'am.

24 Q. Is only if you are requested.

25 A. That ---

1 Q. --- Because then you won't get paid for it
2 if you do it without the request.

3 A. Well, yeah. I ---

4 Q. --- Okay.

5 A. But, I mean, I'm -- I do what I'm told.

6 Q. Right. And I get that.

7 A. Okay.

8 Q. Okay. Why didn't you review the
9 depositions?

10 A. I wasn't given the depositions.

11 Q. Have you ever been told any of the
12 testimony given by Mr. Diamantopoulos in his
13 subsequent deposition?

14 A. No, ma'am.

15 Q. Were you aware of any of the statements
16 Mr. Diamantopoulos gave outside of his EUO?

17 A. To whom?

18 Q. To anyone.

19 A. No.

20 Q. Have you ever read his statement to the
21 investigating police officer on the scene?

22 A. No, ma'am.

23 Q. Did you see the police report in this
24 case?

25 A. Yes.

1 Q. Okay. But you have not seen the interview
2 with Mr. Diamantopoulos.

3 A. No, ma'am.

4 Q. Did you ever have a conversation with
5 Detective House in this case?

6 A. No. I called and left a message and he
7 didn't return my call.

8 Q. Any other facts about this case or
9 circumstantial evidence that would lead a
10 cause-and-origin expert to determine the fire to be
11 incendiary?

12 A. Any other facts about this case?

13 Q. Uh-huh.

14 A. Not that I can think of that we haven't
15 discussed.

16 Q. I know we discussed earlier the fact that
17 Ms. Moon testified about the relocation of the bread
18 rack.

19 A. Uh-huh.

20 Q. Would that have been something you would
21 have considered?

22 A. I would have considered it as a -- as
23 contrary to Mr. Diamantopoulos' statement, yes.

24 Q. And so that the record's clear, did you
25 ever talk to Mr. Michalos, the other owner of the

1 building?

2 A. No, ma'am.

3 Q. Okay. And did you ever look into the
4 financial records of this company?

5 A. No. Only what was discussed in the EUO's.
6 I just read that.

7 Q. Okay. I just have a few questions about
8 your report.

9 A. Okay.

10 Q. Did you talk to any of the firefighters
11 who were present at the scene of the fire ---

12 A. --- No.

13 Q. --- Regarding the origin of the fire?

14 A. No.

15 Q. Why?

16 A. I wasn't asked to interview them.

17 Q. Do you know where the firefighters
18 determined the origin of the fire to be located?

19 A. In the area of the rear drive-thru window.

20 Q. And is that all you know ---

21 A. --- Yes.

22 Q. --- About the placement?

23 A. Uh-huh. The -- Mr. Lacy's report
24 describes clearly what they saw coming in and I have
25 no reason to dispute that.

1 Q. We'll go through Mr. Lacy's report ---

2 A. --- Okay.

3 Q. --- In detail to determine what you do
4 dispute ---

5 A. --- Okay.

6 Q. --- And what you don't dispute.

7 A. All right.

8 Q. Let's start with your summary of cause and
9 origin on page two of your expert report.

10 You state that the fire originated in the
11 area around the set of metal shelves located along
12 the wall separating the restaurant office and the
13 hallway connecting the two drive-thru windows.

14 Is that still your opinion?

15 A. Yes, ma'am.

16 Q. The set of metal shelves you're
17 referencing, are those the metal shelves that housed
18 the styrofoam plates and cups that you referenced
19 earlier?

20 A. Yes.

21 Q. Okay. How did you determine that that was
22 the origin of the fire?

23 A. Based on the patterns and fire progression
24 in that -- from that area.

25 Q. Okay. Were you able to determine from the

1 fire patterns whether or not the fire -- where along
2 the wall, the spectrum of the wall the fire started?

3 A. I don't feel like there was enough data to
4 make that determination based on the fuel package.

5 Q. So it's your opinion you cannot determine
6 where on the wall the fire started.

7 A. I don't believe that I can determine
8 whether it was floor level or above. It could have
9 been above. It could have been at floor level. I
10 just don't know that there's enough data to tell
11 that.

12 Q. Okay. So that I'm clear, when you say
13 above, are you saying above floor level?

14 A. Uh-huh.

15 Q. Okay.

16 A. Yes, ma'am.

17 MS. DALY: I'm going to mark this as
18 Exhibit 4.

19 (* Exhibit 4 was marked *)

20 MS. DALY: Do you need me to go
21 through this and get you a copy, Mr. Wiggins?

22 MR. WIGGINS: No, that's okay.

23 Q. (Ms. Daly) So we're looking at Exhibit 4,
24 which is photograph 16.

25 When you say that the origin was in this

1 rear drive-thru window, can you mark with this blue
2 pen the possibility of where it started.

3 You say it's above floor level, so it's at
4 floor level or above. And you testified earlier that
5 it was below the ceiling.

6 A. Uh-huh.

7 Q. So mark on this picture where you believe
8 the origin of the fire was.

9 A. I can give you an ---

10 Q. --- The ---

11 A. --- I can give you an area.

12 Q. Okay.

13 A. And that's the best I can do.

14 Q. Then give me the area.

15 (Witness marked document)

16 Q. So in your opinion it's -- it could not
17 have started anywhere above the wireless device.

18 A. Don't believe so. There wasn't even any
19 fuel above that.

20 Q. Okay. And it didn't start under the
21 floor.

22 A. No, clearly not. You're right.

23 Q. Okay. So you -- well, you have it on the
24 floor.

25 A. I do.

1 Q. So I want to be very clear.

2 A. Okay.

3 Q. So can you write what this area is
4 indicating? And if it's okay, I'm going to go over
5 this area with a black marker so that we can see it a
6 little better.

7 And write on the side what that box
8 indicates.

9 A. Okay. And -- well, it's only a portion of
10 the area of origin but I'm going to write area of
11 origin because that depicts a portion of it. The
12 area of origin includes that shelf.

13 Q. Okay.

14 A. Okay.

15 Q. Well, then you can circle the shelf as
16 well if you ---

17 A. --- I can't see the shelf. It's only a
18 vertical picture.

19 Q. Okay.

20 A. So if we had an -- you know, if you had a
21 picture showing the wall from the other direction, we
22 would ---

23 Q. --- Okay.

24 A. It -- it -- what I'm trying to explain is
25 this -- the area includes the entire shelf.

1 Q. Okay.

2 A. Okay.

3 (Witness marked document)

4 MR. WIGGINS: Let me see what you've
5 got on here.

6 Q. (Ms. Daly) So that we are clear, the fire
7 could have started on the shelf itself.

8 A. Could have.

9 Q. Or it could have started on the floor, or
10 it could have started anywhere along that wall, all
11 the way up above the wireless device.

12 A. Yes, ma'am. To the wireless device.

13 Q. To the wireless device.

14 I want you to explain to me what about
15 this fire pattern supports -- the first support I
16 want you to give me is what supports that this fire
17 started at the floor level.

18 What about this fire pattern in all the
19 pictures that you've looked at in addition to this
20 picture?

21 And if you need to look at your pictures,
22 please feel free to do so.

23 Give me all the evidence that supports,
24 based on the fire pattern and anything else that you
25 would use, to determine where this fire started.

1 A. There's a fire pattern of fire damage from
2 floor level upward to include the dimensions of the
3 shelf in that area and patterns on the floor of pla
4 -- what appears to be plastics that puddled on the
5 floor.

6 Q. Okay, and why does that support that the
7 fire started on the floor?

8 A. Okay. What it supports is is that we had
9 a fire at floor level of great intensity.

10 Q. Okay.

11 A. That's what it supports.

12 Q. In general, is the intensity level of the
13 fire greater at its ignition source or somewhere
14 else?

15 A. Sometimes it is. Sometimes it's not. It
16 de ---

17 Q. --- Okay.

18 A. Okay. Sometimes it is. Sometimes it's
19 not. It depends on what the secondary fuel package
20 is and how it develops from there.

21 Q. Okay. So in this picture explain -- you
22 say that -- or at this fire scene -- that the --
23 there's great intensity at the floor level.

24 A. Uh-huh.

25 Q. Based on your review of the scene, what

1 area had the greatest intensity?

2 A. Right in the corner. And the -- the only
3 -- the only way ---

4 Q. --- Okay. When you say right in the
5 corner, I want you to be very precise.

6 A. Okay.

7 Q. Where in the corner?

8 A. The corner of the wall separating the
9 office from the drive-thru area and the exterior
10 wall, so in other words, the exterior wall where the
11 drive-thru window is, headed towards the rear of the
12 building and the office -- office wall, that corner.

13 Q. Okay, and is that as precise as you can
14 be?

15 A. That's as precise as I can be. And that's
16 based on the degree of damage -- well, the fact that
17 the tile grout was so loose in that area and I was
18 able to remove so much more of the tile in that area
19 would indicate that it had a higher heat
20 concentration in that area. And that's why I would
21 say that received the most amount of heat.

22 Q. Okay.

23 A. The walls were -- excuse me -- were
24 covered with -- with fiberglass board and sheetrock.
25 So a majority of the combustible materials in the

1 wall were -- were undamaged ---

2 Q. --- Uh-huh.

3 A. --- Because they were protected.

4 Q. So going back to my original question,
5 what other evidence from the fire scene supports that
6 the fire started at floor level?

7 A. The evidence that I'm describing doesn't
8 necessarily say that it started at floor level. It's
9 saying that we had a fire on the floor level of great
10 intensity. I don't know -- I don't have enough data
11 to say that it started at floor level.

12 Q. Okay. My question to you is I want to
13 know what about the fire pattern and any other
14 evidence would -- from your investigation supports
15 the fire starting at floor level.

16 A. The fact that it's in that corner, in that
17 area, and that we have eliminated the electrical
18 sources of ignition midway up on the wall. In other
19 words, the -- the receptacles and the branch circuits
20 in that area that are potential sources of ignition
21 have been eliminated. That would indicate that it
22 would either be below that or above that.

23 And so my evidence would be the degree of
24 damage and heat intensity at floor level and the fact
25 that we've eliminated the electrical sources of

1 ignition midway in the wall.

2 Q. Anything about the fire pattern itself ---

3 A. --- The fire ---

4 Q. --- That would indicate that the fire
5 started at floor level?

6 A. The majority of the fire patterns were
7 destroyed by overhaul. The -- the -- the fiberglass
8 wall covering was taken away from the wall. So -- so
9 the intensity that it received on the base of the
10 floor was -- was -- it was removed. Now, the
11 aluminum cart shows damage at floor level, or lower
12 level, I should say, and -- and that would be where
13 it received its most heat.

14 Now, whether or not that indicates that
15 the fire started at floor level or that that's where
16 the greatest heat occurred I can't say.

17 Q. All right. But that's a piece of
18 circumstantial evidence that you would have to
19 consider.

20 A. It -- well, it's physical evidence.

21 Q. Right. I'm sorry.

22 A. And it's that ---

23 Q. --- Physical evidence.

24 A. It's physical evidence that's there and
25 it's observable and it would have to be taken into

1 account. But also the fuel load would have to be
2 taken into account and how the fuel load would have
3 burned.

4 Q. Okay, and what about the fuel load and how
5 it burned would support that the fire started at
6 floor level?

7 A. I don't know that there's enough data to
8 say.

9 Q. Okay. What would you consider?

10 A. I don't -- I don't have anything that I
11 would consider. There's not enough data to make a
12 determination on that, the reason being is because
13 there are plastics and they're -- when they combust,
14 when they -- they melt, they melt and puddle.

15 Q. Uh-huh.

16 A. And this is an open shelf with a lot of
17 ventilation and slats in it which can -- that just
18 drip right through, which means that once it starts
19 to drip right through, everything can ignite. And at
20 that point the greatest heat development will be at
21 low level whether the fire started up higher or not.
22 And that's why I don't have enough data to say one
23 way or another.

24 Q. And then what evidence -- anything else?
25 Anything else you considered to -- in your

1 determining -- because -- and correct me if I'm
2 wrong. You do consider whether or not the -- the --
3 where the fire started, not just the general
4 location.

5 A. Yes, ma'am.

6 Q. You're looking to see did it start on the
7 wall, did it start above ceiling, did it start below
8 ground.

9 A. Yes, yes.

10 Q. That's something you do consider.
11 Correct?

12 A. Yes, ma'am, yes.

13 Q. Okay, so I want to know every single fact
14 you considered when you were trying to determine
15 whether -- where this fire started. And so I'm going
16 to break it up because I'm going to get -- I'm going
17 to keep going higher. So I want to start at the
18 floor level.

19 What facts, physical evidence, anything
20 that you looked at did you put under, okay, the
21 origin of this fire started at ground level?

22 A. I considered whether it had started at --
23 at floor level. I did not believe there was enough
24 data to support that determination because of the
25 fuel package and what it could do during its fire

1 progression.

2 Q. But what data did you look at?

3 A. I looked at the floor patterns and I
4 looked at the wall. And there wasn't enough data to
5 support that.

6 Q. Anything else?

7 A. No.

8 Q. So you just looked at those and then you
9 moved on.

10 A. I looked at the branch circuitry.

11 Q. Okay.

12 A. And we eliminated that. I didn't see
13 anything that would say that the fire started there.

14 Q. Okay. Anything else when you were trying
15 to determine did the origin of the fire start at
16 ground level?

17 A. No, I don't think so.

18 Q. Okay. How about the metal shelf?

19 A. Uh-huh.

20 Q. Did you consider whether or not the fire
21 started on this metal shelf?

22 A. I did.

23 Q. Okay, and tell me what evidence you
24 reviewed and how you were either able to eliminate it
25 or how you were not able to eliminate it.

1 A. I was not a label -- I -- I was not able
2 to eliminate it, because it was not there at the time
3 of my examination. And it is only photographed. And
4 it is not in such an orientation to -- to examine the
5 fire patterns on the shelf itself.

6 Q. So on the metal shelf, you were not able
7 to do any -- do a forensic examination of the
8 photographs to determine whether or not the origin of
9 the fire was on the metal shelf. Is that correct?

10 A. I was not able to determine that at all,
11 because there wasn't enough data to do so.

12 Q. Okay. So in your opinion, did the fire
13 either start at floor level, on the metal shelf, or
14 at the wireless device?

15 A. Could have, yes, ma'am.

16 Q. Okay. Is there anywhere else that you're
17 saying it could have?

18 A. No.

19 Q. Okay, so it's these three specific origins
20 that you're saying are potential.

21 A. When you say specific are you ---

22 Q. --- That -- the three I'm looking at are
23 ground level, the -- or floor level, the bread shelf,
24 or the wireless device.

25 A. I haven't said that the bread shelf was an

1 origin area.

2 Q. Okay, so -- but you're saying it could --
3 it could have been.

4 A. No.

5 Q. Okay, so you're saying there's no way that
6 the fire started on that bread shelf.

7 A. I'm saying that ---

8 Q. --- Or on the metal shelf. Excuse me.
9 The metal shelf. Strike the question.

10 There are three potential origins for this
11 fire, in your opinion.

12 A. Well, okay. Well, let me just understand
13 your question, because we're talking about points of
14 origin ---

15 Q. --- Uh-huh.

16 A. --- Or areas of origin?

17 Q. No. I'm talking about the point of
18 origin. I want to know specifically ---

19 A. --- Well, a point of origin would -- when
20 -- when I define a point of origin ---

21 Q. --- Okay.

22 A. --- We're talking about a -- a point.

23 Q. Okay.

24 A. An item. Okay?

25 Q. Uh-huh.

1 A. And a floor level, if it's -- if -- if you
2 have a puddle ---

3 Q. --- Uh-huh.

4 A. --- Or a large area of origin, it is an
5 area of origin ---

6 Q. --- Okay.

7 A. --- Whether it's -- and -- and what we're
8 talking about when you talk about a point of origin
9 is where the first fuels ignited in that position.

10 Q. And that you cannot determine.

11 A. I cannot determine.

12 Q. Okay. So then let's broaden it up for --
13 and can you even give a hypothetical about the point
14 of origin?

15 A. Not about a point, no.

16 Q. Okay.

17 A. I don't have enough data to do so.

18 Q. Okay, so can you give a hypothetical about
19 the area of origin?

20 A. And -- and what I had said earlier was is
21 that the area of origin in my report could be from
22 floor to ceiling, anywhere between that area
23 involving that shelf or surrounding components.

24 Q. Okay, and that's what I'm trying to narrow
25 down so I am very precise about where you think the

1 potential or possibility of the area of origin. So
2 you've mentioned the wireless device.

3 A. Uh-huh.

4 Q. So that's one.

5 A. Uh-huh.

6 Q. You mentioned at floor level.

7 A. And now, let's clarify.

8 Q. Okay.

9 A. You asked me what evidence there was ---

10 Q. --- Right.

11 A. --- To say that it was at floor level. I
12 have never said that it started at floor level or ---

13 Q. --- I understand that.

14 A. Okay. What I have said is it could start
15 anywhere in that shelf area and create the patterns
16 that are developed on the floor. I can only tell you
17 that that's my area. I do not have a point other
18 than that.

19 Q. Okay. I want you to tell me all the
20 evidence based on your investigation that supports
21 that it was the wireless device that had an
22 electrical failure and caught on fire.

23 A. There is no direct physical evidence that
24 the -- the Ion IQ actually failed and caused that
25 fire.

1 Q. Okay. Tell me about the fire pattern that
2 supports your testimony that the wireless device
3 could have caused this fire.

4 A. It is in the area of origin.

5 Q. Okay, and ---

6 A. --- I -- I'm going to elaborate. It's in
7 the area of origin and there is an easily-ignitable
8 fuel in close proximity. And because the fuel
9 package orientation and the shelf itself would allow
10 burning material to reach the bottom level, the
11 floor, I can't tell you whether or not it started at
12 the Ion IQ level or anywhere between that and the
13 floor.

14 Q. Is there anything about this pattern, the
15 burn pattern that supports your theory that the
16 wireless device is what caught on fire?

17 A. No.

18 Q. Other than the area of origin, the fact
19 that there was this wireless device in the area where
20 the fire started, and that there was an
21 easily-ignitable fuel source in close proximity.

22 A. Uh-huh.

23 Q. Other than those two facts, do you have
24 any other evidence that supports your theory that the
25 wireless device was the ignition source to this fire?

1 A. I don't have any other evidence at all.
2 We -- and as I mentioned earlier, we don't have it.
3 I haven't been able to look at it nor has Steve
4 Stone. So developing a theory as to how it failed or
5 whether or not it failed for sure we can't do.

6 Q. Right. But I'm talking about everything
7 else that you would do ---

8 A. --- Uh-huh.

9 Q. --- As a cause-and-origin expert,
10 everything else would -- that you would look at. So
11 you said you looked at the -- you would look at fire
12 patterns.

13 A. Uh-huh.

14 Q. Or burn patterns. What else would you
15 look at?

16 A. I would look at the -- the -- clearly, you
17 -- this is the protected area where this item was.
18 Okay?

19 Q. Right.

20 A. And you keep put -- pointing to that. So
21 where you're headed with that is is this protected
22 area. That's what you want to know about. Right?

23 Q. Well, actually I'll get to that question.

24 A. Okay.

25 Q. But right now I'm trying to figure out the

1 evidence that supp ---

2 A. --- Well, that's one of the things that I
3 would ---

4 Q. --- That supports this theory.

5 A. Well, that's one of the things that I
6 would look at, is to determine whether or not another
7 item was there. And that was there.

8 Q. You said another item that ---

9 A. --- Yeah. Any other electrical source of
10 ignition being present in that or any other potential
11 source of ignition, that's what I would look for.
12 And that was physical evidence that there was
13 something there.

14 Q. Right.

15 A. That was ---

16 Q. --- That the wireless device was on the
17 wall.

18 A. Yes. That would be what I would consider.

19 Q. Okay, so you would look at that. Is there
20 evidence that there was an item on the wall?

21 A. Yes.

22 Q. Okay.

23 A. If I had been there originally in the
24 beginning, I would have considered that and its
25 location and I would have sifted through the debris

1 to find anything else that was a potential source of
2 ignition. I would have considered that with the fuel
3 package that was present and the fire patterns.

4 Q. Do you know whether or not there was any
5 type of metal base plate on the wall?

6 A. I don't.

7 Q. Is there any evidence that there was a
8 base plate on the wall?

9 A. Not that I'm aware of. I don't know.

10 Q. Okay. Anything else besides fire patterns
11 and evidence of an item on the wall?

12 A. No.

13 Q. Nothing else you would look at as a
14 cause-and-origin expert.

15 A. I would look for the associated
16 peripherals for that to find out if they were
17 present, in other words, a power cord for it and its
18 power supply if it had one.

19 Q. Okay.

20 A. To make sure that all of that was
21 available for inspection.

22 Q. By an electrical engineer.

23 A. Yes.

24 Q. What was this power supply to this
25 wireless device?

1 A. I don't know. I haven't seen it.

2 Q. Okay

3 A. All I know is is what the specs ---

4 Q. --- Were you told?

5 A. Yeah. The specs in the reports provided
6 by Mr. Martini and the -- the specs of the item
7 provide that it's the class-two, 24-volt power
8 supply.

9 Q. And did you find that during your research
10 on this wireless device?

11 A. Yes.

12 Q. Okay, so do you have any reason to refute
13 that evidence that it was -- of what Mr. Martini
14 found?

15 A. That that's what it requires, no.

16 Q. Okay, so you're both saying the same
17 thing.

18 A. I'm saying that that's what it requires,
19 yes.

20 Q. Okay, and did you ask Mr. Diamantopoulos
21 about it -- the power supply?

22 A. No. He -- I asked him if he had that
23 thing there and he said yes.

24 Q. And did you ask Mr. Dowlat, the person who
25 installed it?

1 A. He said that the power supply was above
2 the ceiling level.

3 Q. And did he tell you what type of power
4 supply it was?

5 A. That it was a 24-volt power supply.

6 Q. Okay, so the evidence is consistent in
7 this case.

8 A. The statements are all consistent about
9 what it had, yes, ma'am, absolutely.

10 Q. Anything else you would have considered?

11 A. As far as?

12 Q. To determine that it was the -- that the
13 fire started at this wireless device up on the wall.

14 A. I would have inspected it. I would have
15 had it inspected. That's all ---

16 Q. --- Okay.

17 A. --- That I can say.

18 Q. Okay.

19 A. I mean, it -- because -- because it is in
20 the origin area it would absolutely have to be
21 inspected.

22 Q. Okay. But as I understand, an electrical
23 engineer would have -- or a mechanical engineer would
24 have inspected it. But I'm talking about with you as
25 the cause-and-origin expert who looks at fire

1 patterns, and you said evidence on the wall.

2 Anything else that you would do?

3 A. No.

4 Q. Okay. So let's start with the fire
5 patterns. Can you tell me what about the fire
6 pattern, based on looking at the photographs ---

7 A. --- Uh-huh.

8 Q. --- And your visit to the scene, supports
9 your theory that it was the wireless device that was
10 the origin of the fire?

11 MR. WIGGINS: I object, because he
12 hadn't said that.

13 Q. (Ms. Daly) Or that it could have been.

14 MR. WIGGINS: There you go.

15 Q. (Ms. Daly) Could have been the origin.

16 A. It could have been the origin, because
17 there's not enough data to support that the fire
18 originated anywhere else on that rack. There's not
19 enough data to support that it's below that or above
20 -- or it -- or at that level on that shelf. I do not
21 have enough data to support any of those. So it
22 would have to have been included as a potential.

23 Q. So am I accurate in saying you do not have
24 any evidence based on the fire pattern that the
25 ignition source was the wireless device?

1 A. No, no.

2 Q. Is that correct?

3 A. That is correct.

4 Q. Okay. Because I think I did a double
5 negative, I'm going to make sure that I have this
6 clear.

7 Isn't it true that there's nothing about
8 the fire pattern that supports the theory that the
9 wireless device was the ignition source of the fire?

10 A. The fire pattern itself only says that it
11 was present and that it was within a column or an
12 area that I believe could be the origin. There is no
13 evidence on the wall that supports that it failed.

14 Q. And there's -- there is no evidence based
15 on the fire pattern that it failed. Is that correct?

16 A. I see no evidence on there that says that
17 it failed.

18 Q. You state in the last sentence of your
19 report under summary of cause and origin that without
20 the examination and elimination of this potential
21 source of ignition, referring to the wireless device,
22 and the absence of evidence supporting ignition
23 sequence, no forensically-based cause determination
24 can be made and the cause classification is
25 undetermined.

1 If the wireless device is ruled out as a
2 potential source of ignition, if the jury finds that
3 Mr. Martini's inspection and elimination of the
4 wireless device was competent, then what would your
5 classification of the fire be?

6 A. That it was most probably incendiary.

7 Q. On the second page of your report you talk
8 about your examination and you mention that you had a
9 meeting with several people. One is Mr.
10 Diamantopoulos. Did you take notes from your meeting
11 with him?

12 A. Uh-huh, yes.

13 Q. And are those notes included in Exhibit 3?

14 A. On the top page and the second page.

15 Q. You mention a Mr. Lewis Hardin. Who's Mr.
16 Hardin?

17 A. He was the contractor that was hired to do
18 the remodel.

19 Q. After the vandalism ---

20 A. --- Yes, ma'am.

21 Q. --- Or for after the fire?

22 A. It was my understanding after the
23 vandalism.

24 Q. Okay. Did you have a -- did you interview
25 Mr. Hardin?

1 A. No. He was just there. And I documented
2 who was there.

3 Q. Okay. Did you have a conversation with
4 him?

5 A. Huh-uh.

6 Q. Okay. Is he significant to your
7 investigation at all?

8 A. No, ma'am.

9 Q. Okay. Mr. Bob Dowlat ---

10 A. --- Uh-huh.

11 Q. --- Of Creative Computers.

12 A. Uh-huh.

13 Q. Did you have a discussion with Mr. Bob
14 Dowlat?

15 A. Yeah. The -- at the scene that day we
16 discussed the DVR system and he was indicating where
17 the DVR was and that he had talked to Mr.
18 Diamantopoulos about the DVR and -- and they -- they
19 had indicated that they had talked -- or that Mr.
20 Diamantopoulos had contacted him on the day that
21 Terry was out there doing his scene exam. And that's
22 the limit. That was what it was all about.

23 Q. Okay. Did you make notes of your
24 discussion with Mr. Bob Dowlat?

25 A. No. It was in -- that was just a very,

1 very short comment about that. And it was -- it was
2 immaterial at the time to the ---

3 Q. --- Okay. On page three you have some
4 handwritten notes that mention Bob Dowlat and his
5 telephone number. Did you ever follow up with him?

6 A. No, I did not.

7 Q. And then you have some stuff underneath
8 that, install memory ---

9 A. --- Just ---

10 Q. --- Menu board, etcetera.

11 A. Uh-huh.

12 Q. Is that taken at the time that you ---

13 A. --- Yeah, I think that was ---

14 Q. --- Were present with Bob Dowlat?

15 A. That was with Mr. Diamantopoulos.

16 Q. Okay.

17 A. He identified Bob Dowlat and was telling
18 me what he had done.

19 Q. Okay. I would like for you to walk me
20 through your initial interview -- actually your only
21 interview with Mr. Diamantopoulos and walk me through
22 your notes, only because I'll never be able to read
23 these later.

24 A. Okay. On January 24th, at 8:42 in the
25 morning, I spoke with Mr. Diamantopoulos.

1 Q. Okay, and can I stop you there?

2 A. No, that's not correct. I apologize.
3 That was 11-9. He was telling on January 24th at
4 8:42 in the morning. Let's see. That's when he was
5 -- the fire was. He opened the -- opened the day
6 before. They closed at three a.m. Assistant manager
7 Tori Moon was -- was there. She -- she closed.

8 Q. Before you go, it says 8:42 Tuesday
9 morning.

10 A. Uh-huh.

11 Q. So is that what time ---

12 A. --- That's when the ---

13 Q. --- He's telling you the fire ---

14 A. --- No. That's when the fire occurred,
15 yeah.

16 Q. That's what he's telling you?

17 A. Uh-huh.

18 Q. And then what is the next word?

19 A. Umm, it says vehicle. But I don't know
20 what that means. It says open the day before. I
21 don't re -- recall what that is.

22 Q. Okay.

23 A. I think we star -- very likely we started
24 on -- on something else and -- and headed down
25 another direction.

1 Q. Okay. Please continue.

2 A. It says they were open the day before and
3 closed at three a.m. Assistant manager Tori Moon
4 closed. She has been working for him for seven to
5 eight years. He said he couldn't remember what
6 employees were there at that time to -- it says they
7 turn off the equipment, the cooking equipment.
8 Nothing done in the breaker panel to shut it off.
9 The exhaust is off. Tori's job is to turn off the
10 exhaust, which was the -- the cooking exhaust.

11 He said there was no problems with the
12 electrical system. The breakers weren't tripping.
13 No one was allowed to smoke on the property. They
14 used to be required to smoke outside the back door
15 but then they moved off the lot because of trash.

16 Q. What did he tell you about why he had no
17 dumpsters?

18 A. Umm, I don't -- well, I recall reading
19 about it. And it's not in -- it's not there in the
20 notes. You kind of caught me off guard. I was
21 headed down -- let's see here.

22 Q. Did you find it odd or interesting that a
23 restaurant wouldn't have dumpsters in the back?

24 A. I thought it was interesting that that one
25 didn't have dumpsters in the back. I would be

1 surprised if Fayetteville would allow them to do
2 that. I -- I was -- I was told that an employee was
3 picking up the trash. But, yes, I found it odd that
4 there weren't any dumpsters there.

5 Q. Did you ever ---

6 A. --- The -- the -- see, the -- the day that
7 I went out there originally, it was a year
8 afterwards. So at first I didn't think about the
9 dumpsters. It was only after reading the EUO's that
10 it was of interest.

11 Q. And did you learn why the dumpsters had
12 been ---

13 A. --- I ---

14 Q. --- Removed from the property?

15 A. I don't know exactly why. There was some
16 speculation it was because of -- of -- of payment.
17 But -- but I don't know.

18 Q. You can continue.

19 A. Okay. They ---

20 Q. --- Was there anything else about that
21 paragraph that was significant to you?

22 A. Which paragraph?

23 Q. The one you just finished reading.

24 A. Umm, they moved off the lot because of
25 trash. That was because of the cigarettes at the

1 back door or the trash at the back door.

2 Q. Okay.

3 A. Okay. He said they did not clean their
4 own linen. That was shipped out to clean. PWC had
5 the power. Time Warner had the cable, phones, and
6 Internet. Piedmont Natural Gas did the -- had the
7 gas. And no work had been done recently on the
8 building.

9 He said there -- he was not aware of any
10 storms in the area. He said during construction a --
11 a power pole caught fire. The fire department had to
12 call PWC to shut it off before -- and they ended up
13 shutting off the power to the block. He changed the
14 computer system also. The AC was damaged after this.
15 And a bunch of light bulbs were replaced apparently.

16 I asked him about problems with the
17 employees. He said he had a problem with one
18 employee that was fired but then he rehired the
19 individual. He said he had five stores at the time
20 of the fire. He said that no one stands out from the
21 other stores as being fired. No issues with the
22 family. There weren't any other general con --
23 contractors involved.

24 He said the business was -- business was
25 all secured at the time of the fire and the alarm was

1 set and it never went off. He said Crossroads
2 Security did not log the set -- the setting of the
3 alarm or deactivation. But clearly we know that --
4 that it -- it -- when it -- it -- it goes off that it
5 -- it's recorded.

6 Q. And you've seen those recordings?

7 A. Yes -- well, not the recordings. I've
8 seen the paperwork.

9 Q. Okay.

10 A. But not on the phone recordings.

11 Q. Okay.

12 A. It says on the date of the loss he took
13 his son to school, to Terry Sanford, dropped him off
14 at approximately eight o'clock, drove straight to the
15 restaurant, opened D side doors, which would be the
16 -- the side closest to the -- the motorcycle shop,
17 went in to deactivate the alarm. The number one was
18 hard to push, may not have hit it hard enough, and
19 the alarm activated. The alarm company called. He
20 gave them their code and deactivated the alarm and
21 went about business, went to the table full of bread,
22 got in the office and ---

23 Q. --- What did he say about going to the
24 table full of bread?

25 A. You know, I don't -- I -- it says that,

1 but I don't recall exactly what he -- what he meant
2 on that. I don't know if he was telling me that he
3 moved something or not.

4 But I -- at -- at the time, in the
5 beginning I was not aware of any of the information
6 about the -- the bread being moved, having been
7 moved. That would have been something I would have
8 followed up on later after finding that out.

9 Q. It -- but you didn't follow up ---

10 A. --- No, I did not.

11 Q. --- On that. Right?

12 A. No, I did not.

13 Q. Okay.

14 A. He said he got ---

15 Q. --- Did you ever talk to Mr. Wiggins or
16 anybody else about it?

17 A. I did, yes.

18 Q. And what did you say to him?

19 A. And he said that they were unaware that it
20 -- that it -- how -- how it had been moved, that it
21 was just there.

22 Q. Okay. And you don't have any other
23 recollection of what you meant by went to table full
24 of bread.

25 A. I don't recall. I'm sorry.

1 Q. You can continue.

2 A. And then at the next page it says that he
3 left about 8:25 and the fire was discovered at 8:42.
4 It says through -- the fire was discovered through
5 the drive-thru window -- the window of the
6 drive-thru.

7 And then I had him show me where
8 everything was located in that corner. He describes
9 the bread rack, the bread table, the drive-thru
10 wireless headset, and the rack with plates, glasses,
11 and maybe some employee clothing.

12 Q. Did he tell you where he went after he
13 left the building?

14 A. If I recall, he said that he went to -- he
15 was going to go to the -- the bank. But he also
16 talked about going to JK's -- or to Pizza Palace.
17 Excuse me.

18 Q. He told you that?

19 A. It's not in my notes. I believe we
20 discussed it that day, that he had left at -- but I
21 -- I really thought that he said he went to the bank
22 first and that that was it. But I don't have that in
23 my notes.

24 Q. And then went to JK's -- or Pizza Palace
25 ---

1 A. --- Or Pizza Palace. Yes, ma'am.

2 Q. I'm sorry. Pizza Palace.

3 Okay, so you've read the EUO since then.

4 A. Uh-huh.

5 Q. What was different about his statement to
6 you and his testimony under oath at the EUO?

7 A. Well, there was some discussion in one of
8 the EUO's about his son being sick that day.

9 Q. Uh-huh.

10 A. And that was different than what he had
11 told me, because he said he took his son to school.
12 He also -- there was some discussion as it -- to
13 whether or not he had gone over to Sam's or not prior
14 to.

15 Q. And in the discussion with you during your
16 initial interview of Mr. Diamantopoulos, did he tell
17 you that he went to Sam's?

18 A. No.

19 Q. Okay, so when was the first time you
20 learned that he was saying that he went to Sam's?

21 A. In the EUO.

22 Q. In the EUO. Okay, and then in your -- in
23 his statement to you he said he went to the bank
24 first, then to meet his friend for coffee, which is
25 different from what he said ---

1 A. --- Well, he was on the way to go but he
2 didn't make it to the bank.

3 Q. Okay. He didn't make it to the bank
4 because of why?

5 A. Because he got a call about the fire.

6 Q. Okay. That he was on the way to the bank
7 is what he told you.

8 A. Uh-huh.

9 Q. And what is different about what he said
10 to you during the initial interview and what he said
11 under oath at the EUO?

12 A. My recollection is that he left and went
13 to get gas, didn't have his debit card with him. He
14 left there and he went making calls to find out
15 whether or not he was going to Pizza Palace or JK's
16 to go and have coffee with his friend.

17 Q. Did he ever mention to you during your
18 initial interview that he went to Pizza Palace?

19 A. No.

20 Q. No. Did he ever mention to you that he
21 was -- went to JK's during his initial interview with
22 you?

23 A. I don't recall if he did or not.

24 Q. Okay. The only thing you do recall about
25 that initial meeting was the bank. Is that correct?

1 A. Yes, ma'am.

2 Q. Okay. Did you ever tell anyone that the
3 statement given to you by Mr. Diamantopoulos was
4 different than the statement he said under oath?

5 A. We -- yeah, I talked about that with Mr.
6 Wiggins.

7 Q. And what did you tell him?

8 A. I said that there were some discrepancies
9 in his statements in the EUO's and in my conversation
10 with him.

11 Q. What else did you tell him?

12 A. I don't think I told him anything else
13 other than there were discrepancies.

14 Q. And what was his comments back to you?

15 A. I don't recall exactly what he said back
16 to me.

17 Q. Roughly, what did he say?

18 A. I don't remember. I -- I don't remember
19 what he said back.

20 Q. Okay. Has he ever discussed with you any
21 other different stories given by Mr. Diamantopoulos

22 ---

23 A. --- No, ma'am.

24 Q. --- About his whereabouts that morning?

25 A. No. I did discuss with him that he was at

1 Walmart and that had not been, you know, mentioned in
2 his statements.

3 Q. Have you ever been told that his story
4 that he gave under -- in the EUO was different than
5 even his testimony he gave in the deposition?

6 A. I haven't read the deposition. No, I
7 haven't been told that.

8 Q. That's what I want to understand.

9 A. Yeah.

10 Q. Has anyone told you? Has anyone talked to
11 you about it?

12 A. No, ma'am.

13 Q. Okay. And it's your testimony that you do
14 not remember anything that Mr. Wiggins said to you
15 about the discrepancies when you told him.

16 A. I would -- I -- I would be wrong if I told
17 you, because I just can't remember.

18 Q. Okay, that's fair.

19 Let's talk about you -- all your
20 conversations with Mr. Dowlat and what he told you.

21 A. I -- I've already said the only time that
22 -- that he was present was that -- that day and all
23 he did was tell me that he installed the camera
24 system and the micro -- the -- the menu boards and
25 the computer system for that.

1 Q. Okay. Anything else?

2 A. No.

3 Q. Well, you said earlier that he mentioned a
4 conversation ---

5 A. --- Oh, yes. I apologize. He mentioned
6 -- he was there the first day and he mentioned a
7 telephone conversation between he and Mr.
8 Diamantopoulos. He said that Mr. Diamantopoulos had
9 spoken to him over the phone while Mr. Lacy was
10 there. At least Mr. Diamantopoulos had indicated
11 that Mr. Lacy was there. All he recalls is is that
12 Mr. Diamantopoulos called him to discuss the camera
13 system.

14 Q. And what did Mr. Diamantopoulos want to
15 know from Mr. Dowlat?

16 A. How to recover data from it. That's my
17 understanding. And that's all that I know.

18 Q. Anything else?

19 A. No.

20 Q. Did he, Mr. Dowlat, speak with Mr. Lacy?

21 A. I don't know. All I know is is that --
22 that I was told that he heard Mr. Diamantopoulos
23 speaking to Mr. Lacy. But I -- I don't know that
24 that's accurate or not.

25 Q. But anything else about the conversation

1 with Mr. Dowlat that's important?

2 A. No, ma'am.

3 Q. You mentioned the surveillance system. I
4 want to know everything you have heard or discussed
5 with anyone regarding the surveillance system.

6 A. I was initially under the impression or
7 told that Mr. Lacy had recovered the DVR for the
8 surveillance system.

9 Q. Did -- were you told that he recovered the
10 DVR or recovered the hard drives?

11 A. The re -- the hard drives. I was told
12 that two hard drives were recovered.

13 Q. Okay, and who told you that Mr. Lacy had
14 recovered two hard drives?

15 A. Mr. Diamantopoulos.

16 Q. Did Mr. Diamantopoulos tell you anything
17 else about the recovery of those two hard drives?

18 A. That they -- that he -- they were later
19 did -- that they did not include the surveillance
20 system hard drive.

21 Q. Okay. Anything else?

22 A. No.

23 Q. Did Mr. Diamantopoulos tell you that there
24 were detectives from the Fayetteville Police
25 Department present at the scene who initially took

1 the two hard drives?

2 A. Yes.

3 Q. Okay, so tell me everything about that
4 topic of conversation.

5 A. I asked him if they had provided him with
6 a receipt and what they had given him and he said
7 that he had signed a receipt for the two hard drives
8 but he did not recall anything that included the DVR.

9 Q. And so Mr. Diamantopoulos told you that he
10 signed the receipt for the two hard drives.

11 A. Uh-huh.

12 Q. Correct?

13 A. Yes.

14 Q. And that the detectives took the two hard
15 drives.

16 A. Uh-huh.

17 Q. Correct?

18 A. Yes.

19 Q. And then did he tell you that Mr. Lacy got
20 the two hard drives from the Fayetteville Police
21 Department?

22 A. Yes.

23 Q. Did he tell you anything else about the
24 hard drives?

25 A. That they did not include what was on the

1 DVR, that they were for the POS system.

2 Q. Okay. Did he explain to you that those
3 hard drives were reviewed by a company to determine
4 what was on those hard drives?

5 A. That was my understanding, is that he knew
6 that at that time they had been reviewed and all that
7 was on them was the point-of-sale data.

8 Q. Okay, and what did he tell you about that?

9 A. I didn't go into depth with him about that
10 other than to know that the data from those two hard
11 drives had been transferred to something else.

12 Q. Did you ask to review those hard drives?

13 A. No.

14 Q. Did you ask to review the data from the
15 hard drives?

16 A. No. I don't know that I could have
17 understood it. I don't know anything about it.
18 So....

19 Q. Did you go with Mr. Diamantopoulos to the
20 police department to ask about the hard drives?

21 A. No.

22 Q. Do you know whether Mr. Diamantopoulos
23 went to the police department to ask about the hard
24 drives?

25 A. I don't know.

1 Q. Is there anything else you know about the
2 hard drives that I haven't asked you about?

3 A. Not that I'm aware of.

4 Q. Going further down your report, you state
5 that Mr. Diamantopoulos left the building and drove
6 to Sam's Club on 401 bypass, and after pulling into
7 the parking lot he decided not to get gas and then
8 drove to Pizza Palace to meet a friend for coffee.
9 Where did you get that information?

10 A. From the EUO's.

11 Q. Now we're getting to the topic you
12 mentioned earlier when we were looking at Exhibit 4.
13 There's a red circle around the protected area where
14 the wireless device was located on the wall. Explain
15 to me your theory regarding how there was a protected
16 area on the wall if the wireless device was the
17 source of ignition for this fire.

18 A. Why there's a protected area there?

19 Q. Uh-huh.

20 A. I don't know how it came apart. I don't
21 know whether or not the -- the PCB stayed on the wall
22 attached to the back half of this assembly or not.

23 Q. So are you saying the PCB could have
24 created a protective area?

25 A. That and its back cover on the back side.

1 There's a -- it's just clam shell. It has one side
2 and then a front side ---

3 Q. --- Uh-huh.

4 A. --- And then a PCB in the middle. I don't
5 know how it came apart. I mean, and -- and there's a
6 potential that something could have been left on the
7 wall for -- in longer duration than the fire.

8 Q. Okay, and when you say something else
9 could have been left on the wall, what are you
10 referring to? What ---

11 A. --- The back -- the back of ---

12 Q. --- Okay.

13 A. --- The assembly itself.

14 Q. What would the back of the wireless device
15 -- what would it have to have been made out of in
16 order to create a protected area?

17 A. I think the unit itself. I mean, if the
18 fire started elsewhere and created that pattern, it's
19 still the same -- same product. Whether there -- I
20 don't know that there was a plate behind it. I -- I
21 don't know if that's correct or not. All I know is
22 is that it's that product. If the fire attacked it
23 from the front side, it could leave a pattern. If
24 the fire originated there and it came apart, leaving
25 a portion of it on the wall, it could create that

1 pattern.

2 The shelves were right beside it. I don't
3 know how the shelves interacted with it once it --
4 once it was damaged by the fire. That's why it would
5 need to be examined further.

6 Q. Okay. I guess -- and maybe you've
7 answered it and I'm not clear on your answer.

8 What I want to know is every possible
9 scenario that -- or theory that you have that
10 supports your theory that there is a protected area
11 on the wall and that was where the fire started.

12 A. Again, I didn't say that is where the fire
13 stated.

14 Q. Right. I'm saying but if -- if -- let's
15 go with that theory. So your theory is the wireless
16 device caught on fire.

17 A. Okay.

18 Q. So explain to me every scenario that you
19 believe could support -- or theory that you believe
20 could support the hypothetical that this wireless
21 device was the ignition source, it was what caught on
22 fire, and it created this protected area on the wall.

23 A. Well, I will try and rephrase it from what
24 I've already said. What I said was is that its
25 appliance, the appliance itself ---

1 Q. --- Uh-huh.

2 A. --- Is on the wall. If it's attacked from
3 the outside, from somewhere else, it could create a
4 protected pattern.

5 Q. Yeah, I get that.

6 A. If it's on the wall and it comes apart on
7 the wall, in other words, the front falls off, and
8 the front is ignited, and it leaves remaining
9 material on the wall that stays there throughout the
10 longer time frame, you could get a protected area.

11 Q. Okay. So that I am clear with this
12 theory, so are you saying that in order for there to
13 be a protected area on the wall, that the wireless
14 device would have had to have fallen off the wall and
15 then caught on fire?

16 A. No.

17 Q. Okay, so your testimony is that the
18 wireless device could have caught on fire, created
19 this protected area on the wall, and then caught the
20 fuel source, the styrofoam and paper plates on fire.

21 A. What I'm saying is that we don't know
22 where the fire could have started inside the unit,
23 whether it's on the front side of the board or the
24 back side of the board. If it started on the front
25 side of the board and progressed to the front cover,

1 the front cover or portions of the front cover could
2 fall. It could leave por -- a portion of the
3 appliance on the wall, which could create a protected
4 area.

5 Q. And have you ran that theory by Mr. Stone?

6 A. I have.

7 Q. And what did Mr. Stone tell you about the
8 likelihood of that happening?

9 A. He said it's a possibility.

10 Q. Okay, it's a possibility.

11 A. Uh-huh.

12 Q. It's possible. Did he tell you the
13 likelihood?

14 A. I don't think we discussed the likelihood
15 one way or another.

16 MR. WIGGINS: When you get to a
17 breaking spot, we've got lunch here.

18 MS. DALY: Sure. Off the record.

19 (1:34-1:56 p.m. - Luncheon recess)

20 Q. Is it more likely than not that a
21 protected area on a wall would be created at the
22 ignition source of a fire?

23 A. It's -- it's more likely it that would
24 not.

25 Q. That it would not create a protected area?

1 A. That's right. Yes.

2 Q. Are you able to give a percentage of the
3 likelihood, like a 70 percent chance that it would
4 create a protected area or -- excuse me. That it
5 would not create a protected area or are you just
6 able to say it's more likely than not that it would
7 not create a protected area?

8 A. I can't say. I -- I don't feel like I can
9 give you a percentage.

10 Q. Okay. I believe you've already asked --
11 answered this question, but I would -- just want to
12 make sure that I've covered it.

13 Is it your opinion that the IQ wireless
14 device suffered some type of heat producing event and
15 catastrophic failure?

16 A. It's not my opinion that it did.

17 Q. Okay. And did you ever ask why you were
18 retained -- strike that.

19 Were you -- did you ever ask why you were
20 not retained earlier than November of 2012?

21 A. No, ma'am.

22 Q. Do you know whether there was another
23 expert who looked at the scene or the evidence prior
24 to you?

25 A. I don't know.

1 Q. I'd like to walk through Mr. Lacy's
2 report. Let's start with his opinions.

3 I'm going to ask you to read the first
4 opinion in Mr. Lacy's expert report and tell me
5 whether or not you disagree with it. And if you just
6 do disagree, I'd like to know the evidence that you
7 base your disagreement upon.

8 (Witness examined document)

9 A. Are you just talking about number one
10 right now?

11 Q. Correct.

12 A. No.

13 Q. You do not disagree?

14 A. No.

15 Q. I'd like you to read opinion number two
16 and tell me whether or not you agree with that
17 statement.

18 A. (Witness examined document) The only
19 thing -- the only thing in that opinion that I would
20 question, the last sentence says Mrs. Moon stated the
21 cameras had not been working from her arrival at the
22 restaurant on January 23rd, 2012, through her
23 departure on January 24th, 2012.

24 If I can recall correctly it was only the
25 monitor that she was aware wasn't working, not the

1 camera system.

2 Q. Did you interview Ms. Moon?

3 A. I did not, but that was from the EUO.

4 Q. Okay. And have you read her deposition
5 that was taken after the EUO?

6 A. No. I mentioned that already.

7 Q. Oh, sorry. So the -- so the only basis
8 that you are relying on to question that statement is
9 Ms. -- your recollection of Ms. Moon's examination
10 under -- under oath?

11 A. Yes, ma'am.

12 Q. Did you ever talk to anyone about whether
13 or not the surveillance system was working that day?

14 A. No, ma'am.

15 Q. Did you find it odd or interesting that
16 suddenly the monitors were not working on the day of
17 the fire?

18 A. I thought that it was odd.

19 Q. Did you talk to anybody about it being
20 odd?

21 A. I mentioned it to Mr. Wiggins.

22 Q. And what was that discussion?

23 A. That discussion was we don't have the
24 recording. I don't know whether they were working or
25 not.

1 Q. Okay. While we're on the topic of the
2 surveillance system, we were both present at the
3 inspection ---

4 A. --- Yes ---

5 Q. --- Of the evidence. There was a power
6 supply that was recovered from the scene. Correct?

7 A. Yes, ma'am.

8 Q. And that power supply was examined at the
9 office of John Cavarock. Correct?

10 A. Yes, ma'am.

11 Q. And during that examination it was
12 determined that the power supply that was examined at
13 the examination was unplugged at the time of the
14 fire. Correct?

15 A. Yes, ma'am.

16 Q. Do you have any evidence to refute that it
17 was unplugged?

18 A. Oh, no.

19 Q. Okay. So what have you discussed about
20 the unplugged power supply? With whom have you
21 discussed it with and any discussions that followed.

22 A. Immediately following the evidence exam I
23 contacted Trey McClean and Mr. Wiggins. Told them
24 that we had found a power supply that indicated that
25 it may have been for a -- a video camera system.

1 He indicated that it was unplugged and
2 appeared to be have been turned -- it was also turned
3 off. And I said we needed to find out what that was
4 all about.

5 And I got a return call stating that they
6 had spoken with Mr. Dowlat, and that that was not a
7 power supply for the system that he had provided.
8 But what -- but was more than likely an old component
9 left in the building. That the camera system that he
10 had installed has it -- had its own power supply.

11 Q. Did Mr. Dowlat inspect the actual power
12 supply?

13 A. No.

14 Q. What was his basis in saying that that was
15 to the old surveillance system?

16 A. The photographs.

17 Q. And what about the power supply that was
18 examined, was the determining factor that it was not
19 for the new surveillance system, it was for the old
20 surveillance system?

21 A. That the new surveillance system had its
22 own power supply. It was all self-contained.

23 Q. Anything else?

24 A. No, ma'am.

25 Q. Anything else -- any other discussions

1 regarding this power supply?

2 A. No. I -- I found a -- I used the model
3 number on it and found a photograph of one. And it
4 was made by COP USA. And I sent them a -- a -- a
5 screen shot or a -- a photograph of it from the
6 Internet that's all.

7 Q. And what did that show you?

8 A. That it ranged in between -- let's see
9 here. I'll tell you.

10 (Witness examined document)

11 A. Not much other than it was made by them
12 and it ranged -- the prices that I found in between
13 \$69, \$62 or \$80 a piece for those. It had an
14 18-channel multiple -- it was an 18-channel power
15 supply.

16 Q. And how did what you discovered prove that
17 the power supply that was recovered at the scene of
18 the fire was not the power supply for the new
19 surveillance?

20 A. Nothing that I discovered proved that. I
21 was just told that the one that was there was
22 self-contained and had its own power supply.

23 Q. All right. So other -- but anything that
24 you found didn't either prove that it was the power
25 supply to the new surveillance system or disproved

1 that it was the power supply to the surveillance
2 system?

3 A. No. There was a -- a -- just like with
4 the Ion IQ, there's documentation of what was
5 installed and it doesn't include a COP USA power
6 supply.

7 Q. Anything else?

8 A. No.

9 Q. Thank you. Have you ever been told what
10 happened to the actual surveillance system? Not the
11 hard drive. I'm talking about the actual
12 surveillance system.

13 A. The DVR?

14 Q. Yes, and the cameras and everything.

15 A. I have no idea what happened to it. I
16 asked about it and I was told that it was collected
17 by Mr. Lacy. However, it's not in the document -- or
18 any of the documentation or in the evidence, and so I
19 don't know what happened to it.

20 Q. Who told you that Mr. Lacy collected the
21 actual surveillance system?

22 A. Mr. Diamantopoulos said he had it in his
23 hand and that it was his understanding that when he
24 inspected it, they were collecting it. That's why he
25 had asked about how to retrieve the data off of it.

1 Q. Okay. And so that we're clear, did Mr.
2 Diamantopoulos tell you that Mr. Lacy took down the
3 DVR system that was melted up on the shelf, the
4 actual system, or did he tell you he had the hard
5 drive?

6 MR. WIGGINS: We'll I'll object to
7 melted.

8 There's no evidence it melted on the
9 shelf.

10 Q. (Ms. Daly) Have you seen the photographs
11 of the DVR system?

12 A. The one that's left on the shelf, yes.

13 Q. Yes. And was that melted?

14 A. Yes, ma'am.

15 Q. Okay. So you know what I'm talking about
16 when I say the melted DVR system that was up on the
17 shelf?

18 A. Yes.

19 Q. Okay. So did Mr. Diamantopoulos tell you
20 that Mr. Lacy took down the melted DVR system and had
21 that in his hands?

22 A. What he said was is that he had the DVR
23 component in his hands at the -- at the front desk or
24 the -- the -- where the registers were at the
25 restaurant. And he was talking on the phone with Mr.

1 Dowlat about how to recover the data.

2 Q. Okay.

3 A. That's what I was told.

4 Q. Okay. So he didn't specify whether or not
5 it was the hard drives from it or if it was the
6 system, or he just said the DVR system?

7 A. My understanding was that it was the DVR
8 component, meaning like your VCR.

9 Q. Uh-huh.

10 A. You have a VCR with the -- a disc drive in
11 it. It was the whole component.

12 Q. Okay. So it would have been that melted
13 system that was up on the shelf?

14 A. That was my understanding. Yes, ma'am.

15 Q. And that's what Mr. Diamantopoulos told
16 you at your initial investigation?

17 A. Initial -- initial interview. Yes, ma'am.

18 Q. Anything else you were told about their
19 surveillance system?

20 A. No.

21 Q. Were you told what happened to all the
22 cameras that were on and around the building?

23 A. I wasn't told anything about the cameras.

24 Q. Do you know what happened to them?

25 A. I didn't know anything did happen to them.

1 Q. Are they still inside the building?

2 A. There were quite a few of them still
3 there.

4 Q. Okay.

5 A. I don't know if they were all there.
6 There were still some there when I went.

7 Q. Okay. Anything else about the
8 surveillance system that you can recall that you
9 discussed with either Mr. Diamantopoulos, Mr. Wiggins
10 or anyone else associated with this case?

11 A. No. I think in my notes there's someplace
12 in there where I talked to Mr. -- I know we talked
13 about it already -- Chad Royal. He said that he
14 wasn't sure if he collected it or not. And there was
15 a comment from Mr. Lacy, I think, when we were at the
16 joint scene exam -- or evidence exam that's noted in
17 my notes.

18 And he said that he didn't know if
19 Detective House had it or not. He was unorganized
20 and he didn't know if it was still in their evidence
21 or not. He made that comment.

22 I don't know if that -- I don't recall
23 whether or not that's -- that -- that's what I have
24 in my notes, but I don't know whether he has it or
25 not, Mr. House or Detective House's -- they -- my

1 understanding provided all of the evidence that they
2 had.

3 Q. Anything else?

4 A. No.

5 Q. I'd like you to look at number three, the
6 opinion on Mr. Lacy's report.

7 (Witness examined document)

8 A. All right, what did you want me to answer
9 that -- on that one?

10 Q. Do you agree with the -- opinion three in
11 Mr. Lacy's report?

12 A. I agree that it could be that the fire
13 originated at floor level. But I do not agree that
14 it's the only possibility based on the patterns that
15 I observed.

16 Q. And when you say based on the patterns
17 that you observed, earlier you testified that there
18 was not enough data for you to determine the -- where
19 the fire originated.

20 A. Uh-huh.

21 Q. Is that what you're relying on?

22 A. That's -- that's what I'm relying on. And
23 when I say that, the patterns were not sufficient for
24 that determination. The patterns that remained were
25 not sufficient for that determination.

1 Q. Is one of the reasons why there is not
2 enough data for you to make that determination, is it
3 because the scene -- the fire scene has -- was
4 changed between January and November?

5 A. I've looked at the photographs and whether
6 or not they fully depict exactly what was there, I
7 don't know that -- that -- I don't know that the
8 photographs are clear enough for -- for me to have
9 made any other determination.

10 I've looked at them pretty extensively.
11 And I don't -- I don't believe that there was any
12 other pattern that was present at the time of the
13 first exam that was all that different from when I
14 looked at it.

15 Q. Have you reviewed the pictures located --
16 excuse me -- identified in Mr. Lacy's report under
17 opinion three?

18 A. I have reviewed all of the photos that I
19 was given.

20 Q. Okay. So let's walk through number four
21 together, and let's stop after the second sentence.

22 A. Okay. Do you mind if I hold onto that ---

23 Q. --- Sure ---

24 A. --- So I can read it better?

25 (Witness examined document)

1 A. Okay, I read the first sentence.

2 The pattern that he's referring to on the
3 aluminum cart, is that the one you're ---

4 Q. --- Yes.

5 A. Okay.

6 Q. It says the fire pattern on the side of
7 the wheeled aluminum storage rack indicates a fire
8 originating at floor level and spreading horizontally
9 and vertically in an expected manner.

10 What evidence do you have to contradict
11 that statement or to disagree with that statement?

12 A. Again, I don't know that there's enough
13 data to actually support that because the primary and
14 secondary fuel sources I can't identify, except for
15 the fact that we know we have foam at the top and
16 plastics along the shelf.

17 And once they burn and melt, we can have a
18 very high heat release rate fire at the base of the
19 cabinet which could create enough heat to melt that
20 cabinet at its base. And that would be my
21 explanation for that.

22 Q. Of why you disagree with that statement?

23 A. Uh-huh. Yeah. I don't -- it's possible.
24 What he's stating is possible. I don't believe that
25 there's -- that it's the only possibility based on

1 the fuel package.

2 Q. Is it more likely than not that the fire
3 pattern on the side of the wheeled aluminum storage
4 rack indicates a fire originating at floor level and
5 spreading horizontally and vertically in an expected
6 manner?

7 A. I do not believe that it's more likely
8 than not, no.

9 Q. Do you believe that it's about a
10 fifty-fifty shot chance?

11 A. It could go either way. Yes, ma'am.

12 Q. So if I -- if that sentence read it is my
13 opinion that there's a 50 percent probability that
14 the fire pattern on the side of the wheeled aluminum
15 storage rack indicates a fire originating at floor
16 level and spreading horizontally and vertical in an
17 expected manner, would you agree with that statement?

18 A. It's possible. I can't -- probable is
19 greater -- with a greater weight. And I don't know
20 that there's enough data to say that there's a
21 greater weight on that.

22 Q. Okay. I didn't say greater. I said 50
23 percent, so it would be equal.

24 A. It -- it could be either or, yes.

25 Q. Okay. So an equal?

1 A. Uh-huh.

2 Q. It's your opinion that ---

3 A. --- You -- you asked me if it was more
4 likely than not, and I don't think that it's more
5 likely than not.

6 Q. Right. I understand you said it's not
7 more likely than not. I said is it a 50 percent,
8 saying equal?

9 A. I would say that it's equal.

10 Q. All right. Mr. Lacy goes on to state that
11 the fire pattern progresses from the wheeled aluminum
12 storage rack to the stainless steel wall covering,
13 between the rear drive-thru window and the front
14 drive-thru window.

15 A. Okay.

16 Q. What evidence do you have that refutes
17 that fire pattern?

18 A. Can I read it real quick?

19 Q. Sure.

20 (Witness examined document)

21 A. If I understand what he's stating here,
22 he's stating that the fire progresses from the origin
23 to the vertical storage rack, aluminum storage rack,
24 and then continues down the stainless steel wall
25 covering.

1 Is that -- that's my understanding. If
2 that's correct then I agree with that.

3 Q. So you agree with the third sentence in
4 opinion four?

5 A. That the fire would progress from that
6 corner to the storage rack to the wall covering, yes.

7 Q. The next statement is had the fire
8 originated on the upper wall to the right of the rear
9 drive-thru window, the developing fire would not have
10 caused these patterns.

11 What evidence do you have to contradict
12 that opinion?

13 A. Like I said earlier, it's the fuel
14 package, orientation and the secondary fuel package.
15 And it's -- the heat development from that. It could
16 create the pattern that he's seeing and that is there
17 from an ignition source higher than floor level.

18 As far as evidence to support that, the
19 only evidence is is that there is an item there that
20 is a potential ignition source, and a fuel source
21 that's in close proximity. And I believe that it
22 could have originated anywhere on that -- anywhere in
23 that level.

24 Q. Okay. So that I'm clear, is it your
25 testimony that Mr. Lacy's finding that had the -- had

1 the fire originated on the upper wall to the right of
2 the rear drive-thru window, the developing fire would
3 not have caused these patterns?

4 Is it your opinion that he is wrong?

5 A. I'm saying that they could have created
6 those patterns, but it's also possible that they
7 wouldn't have created those patterns. I don't know
8 how it came apart.

9 I don't know -- all I know is is that we
10 have a fuel package that if it started up high, that
11 it could create a fire pattern that he's seeing.

12 I'm not saying that he's wrong. I'm
13 saying that it's a possibility that something else
14 could have happened.

15 Q. So is it accurate that you're not agreeing
16 or disagreeing with Mr. Lacy's finding?

17 A. Yes.

18 Q. Mr. Lacy states that a fire originating at
19 or near the ceiling would have caused drop-down fire,
20 and that did not occur here. Do you -- first, do you
21 agree that a fire originating at or near the ceiling
22 would cause drop-down fire?

23 A. Yes.

24 Q. Do you agree with Mr. Lacy's finding that
25 a fire originating in or near the ceiling would have

1 caused drop-down fire, and that did not occur here?

2 A. I don't think there's enough data to say
3 that. And the reason why is the shelves are slatted
4 and they were open, and there's plastics which grip.
5 And fall-down would not be kept in one level -- in
6 other words, on the top shelf. It would have
7 continued to fall and could -- it reached the floor.

8 Q. What evidence do you have to support that
9 it -- that the pattern was that it dropped down onto
10 the top rack and then continued to fall?

11 A. The evidence that I have is the fuel
12 package itself and the shelves themselves. The fuel
13 can drip through the shelves. There's a fire pattern
14 at floor level which is puddled plastics. That's
15 what they are. That's what was on the -- in the
16 shelves, and that would be the evidence that I have
17 that would support that.

18 Q. Anything else?

19 A. No.

20 Q. Okay. I'd like you to read opinion five
21 of Mr. Lacy's.

22 (Witness examined document)

23 Q. Is there anything that you disagree with
24 about opinion five?

25 A. I disagree with the fact that it's limited

1 -- limited energy. I don't know that there's enough
2 information to determine that if he doesn't know what
3 the -- what amount of energy that particular
4 appliance would produce if it was burning.

5 It doesn't have to ignite the fiberglass
6 reinforced wall panels to have a fire with other
7 secondary fuel package.

8 Q. And you're talking about the -- if it
9 would have fallen off and ---

10 A. --- Well, the -- they were right next door
11 to it or next to it -- the foam.

12 Q. The foam. Right?

13 A. The foam, or it could have fallen and
14 ignited other materials.

15 Q. So is it your theory that it could have
16 fallen off the wall and hit this fuel source, the --
17 you know, paper plates, the Styrofoam cups, or that a
18 fire shot out from this wireless device?

19 Like what is your theory of how -- if you
20 were -- if you were going to do a model of like, you
21 know, like a computerized model -- modeling of how
22 this fire started, what would be your -- this theory?

23 A. My first thought would be that if the --
24 if the Ion IQ ignited, that radiant heat may ignite
25 something next to it. That would be my first

1 thought.

2 My second thought would be that
3 potentially it could have fallen and ignited
4 something else. But I don't have enough information
5 to say either/or.

6 Q. So you disagree that the bay station
7 operates on a limited energy system?

8 A. No, it operates on a limited energy
9 system, but I don't believe that -- I can't testify
10 to whether or not a limited energy system can ignite
11 that material. And I don't think that Mr. Lacy is an
12 engineer either.

13 Q. Okay. So the bay station operates on a
14 limited energy system. You agree with that.
15 Correct?

16 A. Uh-huh.

17 Q. It is consistent that the limited energy
18 potential would not be sufficient to ignite the
19 fiberglass reinforced plastic wall panels as the
20 first fuel ignited. Do you agree with that
21 statement?

22 A. I don't know. I don't know how much
23 energy is produced by that particular appliance when
24 it burns.

25 Q. So you're neither agreeing or disagreeing

1 with the statement that the limited energy potential
2 would not be sufficient to ignite the fiberglass
3 reinforced plastic wall panels as the first fuel
4 ignited?

5 A. I don't know. You're right. I'm neither
6 agreeing or disagreeing.

7 Q. Do you agree that the heat of combustion
8 from a developing fire, which originated elsewhere,
9 would provide sufficient heat to ignite the
10 fiberglass reinforced plastic panels?

11 A. It depends on how much heat that the fuel
12 source produced. If only one cup ignited, probably
13 not. If a bunch of cups ignited, yes.

14 Q. Okay. How about the heat combustion from
15 this developing fire?

16 A. Which developing fire?

17 Q. The one at the scene of the fire. If it
18 did not start -- you saw the damage that this fire
19 created. And if it did not start at the wireless
20 device, was that fire -- that developing fire enough
21 that it would provide sufficient heat to ignite the
22 fiberglass reinforced plastic panels?

23 A. I think that at any point on that shelf
24 once it ignited and your fuel package was burning, it
25 would ignite the reinforced wall panels, yes.

1 Q. Do you agree with the statement that the
2 products of combustion are lighter than air, thus
3 rise in the atmosphere?

4 A. Yes.

5 Q. Do you agree that when a fire originates
6 at floor level, the products of combustion rise and
7 attack all items combustible or non-combustible?

8 A. Yes.

9 Q. Do you agree that this type of attack
10 results in a floor to ceiling pattern as is present
11 in this fire?

12 A. As long -- yes. As long as you have
13 burning material from floor to ceiling, you're going
14 to get that pattern.

15 Q. So a new statement. Had the fire
16 originated at the base station, the floor to ceiling
17 pattern that is present in this fire would not have
18 been present?

19 A. I disagree with that.

20 Q. Okay. So explain to me the evidence you
21 are relying on to disagree with that statement.

22 A. Had a fire originated on the top shelf or
23 in close proximity to the Ion IQ base station, that
24 would be your first or secondary fuel package. If
25 that secondary fuel package continued to burn and

1 drop down, you would have a -- the whole shelf would
2 ignite and you could create that pattern.

3 Q. Okay. But had the fire originated at the
4 base station, so had the fire originated -- that the
5 wireless device was the origin of the fire, is that
6 what you just referenced?

7 A. Uh-huh.

8 Q. Okay. So you're saying that the floor to
9 ceiling pattern that is -- actually, strike that.

10 Do you agree that there's a floor to
11 ceiling pattern that is present in this fire?

12 A. Yes.

13 Q. Okay. So you do agree with that?

14 A. Yes.

15 Q. Okay. So explain to me how the fire could
16 have originated at the base station and there be a
17 floor to ceiling pattern, the various scenarios,
18 unless it's just the two that you've already covered.
19 Just that it could have fallen off or radioactive --
20 what did you call it? Not radioactive.

21 MR. WIGGINS: I hope not.

22 MS. DALY: Strike that.

23 THE WITNESS: Radiant heat transfer.

24 Radiant heat or direct conductive transfer from the
25 base station could have ignited surrounding

1 combustibles.

2 Like surrounding combustibles, like the
3 foam products that were there, will burn readily and
4 they will puddle. They melt first and puddle. They
5 can drop combustible material to the floor which
6 would ignite other combustibles in close proximity.
7 That could create a floor to ceiling pattern.

8 It could also happen if a portion of the
9 Ion IQ fell down beside the shelves and ignited
10 combustible materials at floor level.

11 Q. (Ms. Daly) Any other theory?

12 A. No.

13 Q. Do you agree that the photographs of the
14 scene illustrate a shadow effect on the wall to the
15 right of the rear drive-thru window, indicating that
16 something was mounted on the wall at that location?

17 A. Yes. It was later identified as the base
18 station.

19 Q. Correct. Do you disagree with the
20 statement that the shadow effect on the wall was
21 attacked by a developing fire, and the presence of
22 that item protected the wall surface from further
23 damage?

24 A. That is possible, yes.

25 Q. Okay.

1 A. I don't disagree with that statement.
2 What I would say is is that I don't know how long
3 that item stayed on the wall. I don't know if it was
4 held there by the shelf. I don't know.

5 Q. Other than what you've already said to me
6 today, is there any other evidence that you have that
7 refutes Mr. Lacy's opinion that the base station was
8 attacked by a developing fire, and that's what caused
9 the protection -- protected wall surface from further
10 damage?

11 A. No.

12 Q. Take a moment and read opinion seven.
13 (Witness examined document)

14 Q. Okay, so does your scenario require the
15 heating and subsequent ignition of a primary fuel
16 development into open combustion, heat transfer to
17 secondary fuels, ignition of those secondary fuels,
18 and then a second phase of fire development that
19 would cause the fire patterns on the wheeled aluminum
20 storage rack and adjacent stainless steel wall
21 covering?

22 A. Yes.

23 Q. Do you agree with Mr. Lacy's finding that
24 there would have been insufficient time between Mr.
25 Diamantopoulos leaving the restaurant in the 8:20 to

1 8:25 range, and the fire being reported at 8:41 for
2 the ignition and development of both primary and
3 secondary fuel packages?

4 A. No, I -- I disagree with that.

5 Q. And what -- what are you relying on to
6 disagree with that finding?

7 A. Well, an open flame ignition source, which
8 is the theory of Mr. Lacy, developed this fire in
9 that timeframe. An open flame ignition at the ion IQ
10 base station could do the same thing.

11 I don't know what he's basing his
12 timeframe of 8:00 to 8:05.

13 Q. Before we get there, when you say there
14 could have been an open flame at the wireless ---

15 A. --- Uh-huh.

16 Q. --- Explain to me how this wireless device
17 could have had electrical failure that would have
18 created an open flame.

19 A. I can't tell you how it failed. I don't
20 know what the failure modes and mechanisms are of the
21 item.

22 Q. Okay.

23 A. If it failed, I would imagine that it
24 would ignite a standoff that's in close proximity or
25 touching the circuit board, which would in turn

1 ignite combustible materials.

2 And if that was occurring and it was on
3 fire, it would be an open flame.

4 Q. The modes of mechanisms that could have
5 produced this electrical failure, is that something
6 you would have to rely on Mr. Stone ---

7 A. --- Yes.

8 Q. --- To determine ---

9 A. --- Yes, ma'am.

10 Q. If Mr. Stone was unable to determine that,
11 the modes of mechanism that could have caused an
12 electrical failure in this wireless base system, what
13 evidence would you use to determine that there was an
14 electrical failure?

15 A. Well, if he was unable to that -- are you
16 -- okay, if -- are you saying if he's unable to
17 determine or he's able to eliminate it? Because if
18 he's unable to determine ---

19 Q. --- If he doesn't know the modes of
20 mechanism of this wireless device to even give an
21 opinion about the electrical components ---

22 A. --- Uh-huh ---

23 Q. --- Of this wireless device ---

24 A. --- Right ---

25 Q. --- So if he's not even able to do that,

1 what part of his opinion can you rely on in regards
2 to whether or not there was an electrical failure of
3 this wireless device?

4 A. I couldn't, and that's why my cause
5 determination would be undetermined.

6 Q. And that's because you've ruled everything
7 else out except for this wireless device. Is that
8 correct?

9 A. Yes, ma'am.

10 MS. DALY: God bless you.

11 MR. WIGGINS: Thank you.

12 Q. (Ms. Daly) The last statement says the
13 ignition would have needed to occur between 8:00 a.m.
14 and 8:05 a.m. in order for your scenario to be
15 plausible.

16 What evidence do you have that contradicts
17 Mr. Lacy's finding that the fire would have had to --
18 the ignition would have had to have started at 8:00
19 -- between 8:00 and 8:05 a.m.?

20 A. Well, we know it hadn't started at eight
21 o'clock because it wasn't there at 8:15. And we know
22 that it wasn't burning at 8:25 because the insured
23 says that he left then and it wasn't burning. So the
24 fire would have had to have developed between 8:25
25 and when it was discovered.

1 Secondly, from the timeframe to -- to
2 arbitrarily provide a timeframe of 8:00 to 8:05, I
3 don't know what he would base that on. He'd have to
4 know a lot more about the fuel package and the
5 ignition location and so forth to develop a fire -- a
6 -- a fire progression scenario that could actually
7 provide a timeframe like that.

8 Q. Anything else?

9 A. No, ma'am.

10 Q. Opinion eight. Do you have any evidence
11 to refute that finding?

12 (Witness examined document)

13 A. No. They said they looked at it and
14 eliminated it. I can't say because I don't know any
15 more than that.

16 Q. Opinion nine. Do you have any reason to
17 disagree with Mr. Lacy's finding in number nine?

18 (Witness examined document)

19 A. As far as their -- them saying that they
20 eliminated on January 26, 27th and 30th, that would
21 be up to Mr. Martini.

22 As far as November 16th through the 29th
23 -- and the 29th of November, I did not find any
24 source of ignition so I would agree with that.

25 Q. Number 10.

1 (Witness examined document)

2 A. I agree.

3 Q. Number 11. Do you agree with everything
4 found in that finding?

5 (Witness examined document)

6 A. I agree.

7 Q. Have you ever spoken to Mr. Cavarock
8 regarding his opinions in this case?

9 A. No.

10 Q. Do you know whether Mr. Cavarock believes
11 this fire was incendiary or electrical in nature?

12 A. I don't.

13 Q. Number 12.

14 (Witness examined document)

15 A. No, I agree.

16 Q. Number 13.

17 (Witness examined document)

18 A. I agree.

19 Q. Number 14.

20 A. That's what the -- the notes from Mrs.
21 Locklear and from Mr. Lacy's report indicate. I have
22 not interviewed them.

23 Q. You have not interviewed them?

24 A. No.

25 Q. Okay. Number 15.

1 (Witness examined document)

2 Q. Any reason to disagree with number 15?

3 A. No. I saw it in the photograph on January
4 30th. It was present.

5 Q. Number 16.

6 (Witness examined document)

7 A. The only thing that -- that I've noted
8 about this that's different is that I believe there
9 was a claim for damage, or that there were some
10 damaged electronic components at that point.

11 So as far as stating it didn't affect the
12 business, I don't know if that's accurate, but
13 otherwise, I agree.

14 Q. Is there anything that -- about that
15 incident that you believe impacted this fire?

16 A. No, ma'am. And I think we've talked about
17 17 already.

18 Q. So you agree with ---

19 A. --- I don't see the discrepancy because
20 I've been able to review the video now.

21 Q. Right.

22 A. Like I said earlier, the only thing I
23 disagree with on that is the inappropriate use of
24 process of elimination is when you don't have a
25 clearly defined origin area. And as I said, the

1 clearly defined origin area provided by Mr. Lacy is
2 floor level only, and I don't know that there's
3 enough data to support that.

4 Q. If Mr. Lacy relied on an electrical
5 engineer, in this case Henry Martini's finding that
6 there was not an electrical ignition source to this
7 fire, would that be appropriate?

8 A. Yes.

9 Q. Have you had an opportunity to review Mr.
10 Martini's expert report?

11 A. Yes, ma'am.

12 Q. I'm going to walk through his opinions. I
13 understand you're not an electrical engineer or a
14 mechanical engineer, but I would like to know if you
15 have any basis to contradict Mr. Martini's findings.

16 Let's start with number one.

17 (Witness examined document)

18 A. I agree.

19 Q. Number two.

20 A. I agree.

21 Q. Number three.

22 A. It would be up to Mr. Stone to discuss
23 that.

24 Q. Number four.

25 (Witness examined document)

1 Q. Let's go back to number three. Is that
2 because you're not qualified to render an opinion on
3 whether there was evidence of an electrical failure
4 identified in and around the area of fire of origin
5 that could have served as an ignition source for the
6 fire?

7 A. Yes, ma'am.

8 Q. Number four.

9 A. I would agree with that. Mr. Stone has
10 indicated he saw nothing.

11 Q. Number five.

12 A. I would agree with that.

13 Q. Number six.

14 A. Whether they were -- it's going to be up
15 to Mr. Stone to deal with that. They certainly were
16 not there on November of 2012.

17 Q. Do you have any evidence to contradict
18 number six?

19 A. That they were not eliminated, or that
20 they were eliminated?

21 Q. Right.

22 A. Like I said, it's going to be up to Mr.
23 Stone.

24 Q. Up to Mr. Stone, okay.

25 A. Right.

1 Q. I just want to make sure that you don't
2 have an opinion on that.

3 A. Huh-uh.

4 Q. So that the record is clear, do you have
5 an opinion on that?

6 A. About -- about whether ---

7 Q. --- About the finding in number six, that
8 the current circuit boards were eliminated, or is
9 that Mr. -- for Mr. Stone to opine?

10 A. We discussed this earlier about what steps
11 would have to be taken, and that's going to be up to
12 Mr. Stone. I can only tell you what I have
13 experienced in the past.

14 Q. Thank you. We will not go through that
15 again.

16 Number seven.

17 A. I would -- again, I think we've been
18 through this. My only disagreement for that is is
19 that when we talk about that protected area on the
20 wall, I don't know for sure how it came apart, and
21 whether or not there was a portion that stayed on the
22 wall through any timeframe during the fire that could
23 help create that pattern.

24 I do agree that it -- he -- he -- and my
25 statement is is that it's the only source of

1 electrical ignition that has not been eliminated.

2 That's my statement.

3 Q. Do you agree that a well defined area of
4 origin more likely than not will result in an area of
5 greater fire heat damage than a protected area?

6 A. We talked about that a few minutes ago
7 too, about whether or not I could give you a
8 percentage as to whether a protected area would, and
9 I can't.

10 Q. You said it's more likely than not, but
11 you can't give me a percentage?

12 A. It is more likely. On most occasions you
13 would expect that, yes.

14 MS. DALY: Let's go off the record.

15 (2:52-2:57 p.m. - recess)

16 Q. (Ms. Daly) Mr. Booth, do you know whether
17 Mr. Small was given the expert reports of Mr. Lacy
18 and Mr. Martini in this case?

19 A. I'm unaware.

20 Q. Were you taught during your training that
21 low voltage devices generally cannot be the ignition
22 sources for fires?

23 A. Earlier on, yes. But through I guess the
24 past seven or eight years I have been told otherwise.

25 Q. By?

1 A. Mark Cassell from LWG Consulting. His
2 comment to me was you have a mini Maglite in your
3 pocket and it's three volts of DC current, and it
4 produces -- the filament on the bulb produces 5,000
5 degrees. And that under the right circumstances
6 could cause a fire. And that that it would be a
7 concern when dealing with a low voltage piece of
8 equipment. But of course, I'm not qualified to
9 eliminate him. That's why I hire him or someone
10 else.

11 Q. Do you agree that low voltage devices
12 generally cannot be ignition sources for fires?

13 A. They're designed as such. Yes, ma'am.

14 Q. Would you agree that would be very rare
15 for a low voltage device to be the ignition source
16 for a fire?

17 A. I don't know that I can say that. A lot
18 of -- there are fires that are undetermined, lots of
19 them that are undetermined because items can't be
20 eliminated.

21 And it would be very possible that some of
22 those are from low voltage appliances that have been
23 thought of as impossible as ignition sources, and
24 which we may not know. And so I can't say whether
25 it's highly unusual or that it doesn't -- or it --

1 very rare.

2 Q. How many cases have you worked on in your
3 experience that relate to fire investigation?

4 A. Okay. Restate that, please.

5 Q. How many fire investigations have you been
6 a part of?

7 A. Approximately 1,500.

8 Q. And of those 1,500 ---

9 A. --- Uh-huh.

10 Q. --- Have you ever been involved in a fire
11 investigation where it was determined that a low
12 voltage device was the ignition source for the fire?

13 A. Well, 12 volts of DC is a lower voltage
14 and so, yes -- automobiles.

15 Q. Anything lower than that?

16 A. Not that I can recall.

17 Q. You said you found this one article
18 written by Mr. Small. Did you find any other
19 articles that were contrary to Mr. Small's opinion?

20 A. No. I found one other article that kind
21 of echoed the -- the studies that he's made, or that
22 he's had. Although, it's my understanding, and, of
23 course, I'm not in that circle, that there are very
24 few studies about low voltage equipment that -- like
25 the one he's done.

1 Q. Do you know whether Mr. Small's opinion
2 that low voltage devices can be the ignition source
3 of fires? Do you know whether that is an accepted
4 principle within the engineering field?

5 A. I don't know.

6 Q. A few wrap up questions. Have you ever
7 worked with any other attorney with the McCoy Wiggins
8 firm?

9 A. No.

10 Q. Is this the first case you've had with
11 them?

12 A. Yes, ma'am.

13 Q. After going through all the evidence in
14 this case, have you had any thoughts that Mr.
15 Diamantopoulos started this fire?

16 A. Like I said in the beginning, it was a
17 consideration from the beginning. I just don't know
18 that there's enough data to say either way.

19 And then we have two potential
20 possibilities that are equally weighted and they
21 should -- if that's the case, then it should be an
22 undetermined fire.

23 Q. Is it your opinion that it is more likely
24 than not that Mr. Diamantopoulos did not start this
25 fire?

1 A. No.

2 Q. Is it your opinion that the wireless
3 device started -- strike that.

4 Is it your opinion that it is more likely
5 than not the wireless device was the ignition source
6 for this fire?

7 A. No.

8 Q. Have you ever spoken to anyone, including
9 the attorneys in this case, regarding whether or not
10 Mr. Diamantopoulos was involved in the setting of
11 this fire?

12 A. Well, I mentioned to them that it was a
13 possibility, but other than that, no.

14 Q. Did they talk to you about whether or not
15 they considered it to be a possibility?

16 A. I think that -- that at the time we
17 discussed it I -- I mentioned that it -- they needed
18 to be -- in the beginning I told them that they
19 needed to be aware that if I felt like it was a set
20 fire, I was going to tell them that.

21 I also told them that -- that the
22 timeframes and the circumstantial information that
23 was there were -- -- were -- weren't great. And that
24 -- that it is a possibility that we have two possible
25 potentials.

1 Q. Can you rule out the fact that Mr.
2 Diamantopoulos started this fire?

3 A. No, ma'am.

4 MS. DALY: And I don't have any
5 further questions. Thank you.

6 THE WITNESS: Okay.

7 MR. WIGGINS: I have just a couple
8 questions and I'll be through.

9 EXAMINATION

10 BY MR. WIGGINS:

11 Q. Mr. Booth, you testified in this case
12 concerning the fire -- extensively concerning the
13 location of the Ion IQ in the restaurant. Is that
14 correct?

15 A. Yes, sir.

16 Q. And when you visited the restaurant for
17 the first time in what, November 2012?

18 A. Yes, sir.

19 Q. Was that -- was that Ion IQ present in the
20 -- in the restaurant?

21 A. No, sir.

22 Q. Did you ever learn or did anyone ever tell
23 you what happened to it?

24 A. No.

25 Q. And did you discuss that with -- with Mr.

1 Lacy?

2 A. Yes.

3 Q. And Mr. Lacy -- what did he tell you when
4 you talked to him about it?

5 A. He said that he didn't have it and he
6 asked whether or not I knew whether it was in the
7 area of origin or not.

8 Q. Which indicated he did not know whether or
9 not it was in the area of origin.

10 A. Well, it would seem that he didn't know
11 where it was.

12 Q. Okay. Did you ever discuss that with SBI
13 -- the SBI agent, Mr. Royal?

14 A. I did.

15 Q. Did he tell you whether or not he had
16 discussed it with Mr. Lacy?

17 A. He said that he had.

18 Q. And did he tell -- did he say that he told
19 Mr. Lacy where he found it?

20 A. Yes.

21 Q. And did he have photographs showing where
22 he found it?

23 A. He did.

24 Q. Did you review the photographs?

25 A. I did.

1 Q. And did you review those photographs at
2 his office -- or from his computer?

3 A. Yes.

4 Q. And did you recognize what the device was
5 when you saw it?

6 A. No, I did not.

7 Q. Did he -- did Mr. Royal, SBI Agent Royal
8 know what it was when he saw it?

9 A. No.

10 Q. At the time that you saw it is it your
11 testimony that neither you nor Agent Royal knew what
12 it was?

13 A. That's correct.

14 Q. And when did you first learn that it was
15 an Ion IQ communication device in the restaurant?

16 A. It was later on after receiving the
17 photographs from Mr. Lacy and Mr. Martini.

18 In seeing the item on the table, we were
19 able to -- with the understanding that that item was
20 an Ion IQ or one was in that area, we were able to
21 compare it with the photographs that were provided to
22 us and to the owner's manual, that they reasonably
23 appeared to be the same.

24 Q. When was the first time that you learned
25 that Mr. Lacy and Mr. Martini had looked at that Ion

1 IQ device and had ruled it out as an ignitable source
2 for this fire?

3 A. Well, their initial reports indicated they
4 had eliminated all electrical and mechanical sources
5 of ignition. However, I don't -- it's my
6 understanding they didn't know what it was until
7 after it was identified by I think it was Mr.
8 Diamantopoulos, and his -- was it -- in his
9 deposition was what was -- in one of the report.

10 Q. And you talked to Mr. Dowlat about it on
11 one occasion, did you not?

12 A. Yes, that's correct.

13 Q. And Mr. Dowlat explained to you how it
14 worked and what it was for?

15 A. Well, he told me that it was -- it was the
16 intercom for the drive-thru.

17 Q. Okay. Did he indicate to you that he had
18 installed that system for Mr. Diamantopoulos?

19 A. Yes.

20 Q. And was he able to give you, and did he
21 give you the receipt where it had been purchased by
22 him, and installed at the restaurant, that is the
23 Miami Subs restaurant?

24 A. He didn't give it to me, but it was in the
25 documents that were provided.

1 Q. You don't know the source of that?

2 A. Not right at the moment. I believe that
3 they were with Mr. Jezierski's documents, and would
4 have been part of what was provided to him during the
5 claims process.

6 Q. Is there -- is there a National Fire
7 Protection Association code that is applicable to
8 investigation of fires?

9 A. It's a guideline, yes.

10 Q. Some portions are accepted as being
11 gospel, have they not?

12 MS. DALY: Objection.

13 Q. (Mr. Wiggins) Well, you're familiar with
14 the fact that it's pretty much accepted in the
15 industry, is it not?

16 A. It's an accepted guide in the industry,
17 yes.

18 Q. And do all, or most all investigators,
19 origin and fire investigators, comply with -- with
20 that National Fire Protection Association guidelines?

21 MS. DALY: Objection to form.

22 Q. (Mr. Wiggins) If you know.

23 A. And -- and all of the fire investigators
24 that I know use it as a guideline.

25 Q. Okay. Did you read Mr. Lacy's report?

1 A. I did.

2 Q. Did he indicate that he followed the
3 National Fire Protection Association guidelines in
4 his investigation of this fire as the cause and
5 origin investigator?

6 A. It does say that on his report.

7 Q. Okay. Did he comply with those
8 provisions, in reference to the Ion IQ I have
9 referenced particularly to.

10 MS. DALY: Objection to form.

11 THE WITNESS: The only thing that I
12 have seen is that an item of interest that should be
13 considered was not collected as an item of the
14 evidence.

15 Q. (Mr. Wiggins) And would he -- would you
16 as an investigator, had you been the one who had
17 found this Ion IQ communication device, what would
18 you have done with it as an investigator?

19 A. I would have stored it.

20 Q. Would you have tagged it?

21 A. Yes.

22 Q. And you would have known that had you
23 identified it that somebody else may come behind you
24 and want to look at it to identify that device, and
25 determine whether or not it had anything to do with

1 the cause of the fire?

2 MS. DALY: Objection.

3 THE WITNESS: There are times when
4 items are sufficiently documented by photographs.
5 But then there are times when there are items that
6 cannot be sufficiently documented by one or two
7 photographs without doing a more thorough
8 examination.

9 If it is an item that I believe,
10 personally believe will take further examination
11 other than visual examination of field, I would
12 believe -- I would take it as evidence.

13 Q. (Mr. Wiggins) What if even you decided in
14 your own mind it was not a cause of the fire, what
15 would you have done as an investigator, as a cause
16 and origin investigator?

17 A. If it was something that I did not believe
18 could be easily examined and documented, it would be
19 -- and I would be concerned of an alternative theory,
20 then I would collect the item so that it could be
21 examined by anyone that might have an alternative
22 theory.

23 Q. Did you ever ask Mr. Lacy if he knew what
24 had happened to the Ion IQ system -- device?

25 A. He said that he didn't have it.

1 Q. And that was the first time that you were
2 aware of it was in November 2012?

3 A. The first time that ---

4 Q. --- That you were ---

5 A. --- Aware that he didn't have it?

6 Q. Right.

7 A. No. The first time I was aware that he
8 didn't have it was when I talked to him on the phone
9 about the evidence exam, and asked him for an
10 evidence list.

11 The comment that I made to him at the
12 joint scene exam on November 16th was that I asked
13 him if he placed the manufacturer of the headset on
14 notice. But in -- on April the 11th of 2013, at four
15 o'clock I called Mr. Lacy. And he called back and
16 advised that there was no protocol. He told me that
17 he wanted -- I told him that we wanted an evidence
18 list. And he advised he had plastic cups, debris
19 samples, and John Cavarock had branch circuitry and
20 receptacles.

21 I asked about the circuit board and the
22 SBI photographs, and he said he had -- he said no. I
23 asked if he knew if -- if it was from the intercom or
24 not -- he asked me that, if I knew if it was from the
25 intercom or not, and I said I wasn't sure because I

1 hadn't seen it, but it was in the SBI's photographs.

2 So that would have been April the 11th
3 when I first found out that it was not in his
4 possession.

5 Q. And was that your only discussion that you
6 had with Mr. Lacy concerning that device?

7 A. Concerning that device, yes.

8 Q. In developing the hypotheses concerning
9 the fire, Mr. Booth, in that process did you consider
10 anything other than the evidence that you find during
11 the course of your actual investigation on-site?

12 That is, do you consider any extraneous
13 materials or information other than what you're doing
14 as far as your investigation is concerned?

15 MS. DALY: Objection to form.

16 Q. (Mr. Wiggins) Do you understand what I'm
17 talking about?

18 A. I do. Once a cause and determination --
19 determination is made, other indicators are utilized
20 to support a cause determination. So after a -- I
21 would use physical evidence and evidence at the scene
22 and circumstances surrounding the incident to form an
23 opinion regarding the cause and origin of the fire.

24 The other information, circumstantial
25 information and so forth, is outside of the origin

1 and cause determination.

2 Q. And is it your testimony here today that
3 -- that based upon your investigation that you --
4 that you would have developed two hypotheses
5 concerning the origin of this fire?

6 A. Yes.

7 MS. DALY: Would you repeat that
8 question back?

9 (Next-Previous question was read back)

10 MS. DALY: Thank you.

11 Q. (Mr. Wiggins) And what were those -- what
12 would those two hypotheses have been?

13 A. The hypotheses would be that this was an
14 incendiary fire or that potentially an Ion IQ
15 failure.

16 Q. And, therefore, you would have -- you had
17 -- you would have made the decision that the cause
18 was undetermined -- could not be determined?

19 A. If the Ion IQ was in my presence and it
20 could be eliminated, potentially I would not have
21 made the same determination. Because we don't have
22 it to look at and it cannot be examined, then yes,
23 that would be my determination, that it was
24 undetermined.

25 MR. WIGGINS: That's all I have.

1 Thank you.

2 EXAMINATION

3 BY MS. DALY:

4 Q. You stated earlier that you would have
5 collected the base station.

6 Would you have collected the base station
7 in order for an engineer to examine it?

8 A. Yes, ma'am.

9 Q. Is there any discussion with Terry Lacy
10 that you have not told us about today?

11 A. No.

12 MS. DALY: I don't have any further
13 questions. Thank you.

14 MR. WIGGINS: Thank you very much.

15 THE WITNESS: Okay.

16 WHEREUPON,

17 at 3:19 o'clock p.m. the deposition was adjourned.

18

19

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1 CERTIFICATE OF TRANSCRIPT

2 I, Cassandra J. Stiles, Notary Public in
3 and for the County of Forsyth, State of North
4 Carolina at Large, do hereby certify that there
5 appeared before me the foregoing witness;

6 That the testimony was duly recorded by
7 me, reduced to typewriting by me or under my
8 supervision and the foregoing consecutively numbered
9 pages are a complete and accurate record of the
10 testimony given at said time by said witness;

11 That the undersigned is not of kin nor
12 associated with any of the parties to said cause of
13 action, nor any counsel thereto, and that I am not
14 interested in the event(s) thereof.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand this the 18th day of August, 2013.

17 Cassandra J. Stiles, CVR
18 Certified Court Reporter
19 Atlantic Professional Reporters
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21 Winston-Salem, NC 27116-1672

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CERTIFICATE OF OATH

I, Cassandra J. Stiles, Notary Public in
and for the County of Forsyth, State of North
Carolina at Large, do hereby certify that there
appeared before me the foregoing witness;

That the witness personally appeared
before me at the date, time and location hereon
captioned and was personally sworn by me prior to the
commencement of the proceeding in the matter hereon
captioned.

IN WITNESS WHEREOF, I have hereunto set my
hand this the 18th day of August, 2013.

Cassandra J. Stiles, CVR
Certified Court Reporter
Atlantic Professional Reporters
Post Office Box 11672
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WITNESS CERTIFICATION

I, STEVEN C. BOOTH, hereby certify:

That I have read and examined the contents of the foregoing testimony as given by me at the time and place hereon indicated, and;

That to the best of my knowledge and belief, the foregoing pages are a complete and accurate record of all the testimony given by me at said time, except as noted on the Attachment A hereto.

I have ___ have not ____ made changes/corrections _____

Steven C. Booth

I, _____, Notary Public for the County of _____, State of _____, hereby certify:

That the herein-above named appeared before me this the _____ day of _____, 19____, and;

That I personally witnessed the execution of this document for the intents and purposes as herein-above described.

Notary Public

My Commission Expires:

(SEAL)

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CERTIFICATE OF MAILING

I, Cassandra J. Stiles, CVR, do hereby certify that a true copy of the transcription of the matter hereon captioned was served on the party named below by the placement of said transcript copy in the United States Mail, Priority Mail delivery, with proper postage affixed, addressed as follows:

Steven C. Booth
Post Office Box 1227
Morehead City, NC 28557

This the 19th day of August, 2013.

Cassandra J. Stiles, CVR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:12-CV-00610-F

C O P Y

CITY GRILL HOSPITALITY GROUP, INC.,)
)
Plaintiff,)

vs.)

) D E P O S I T I O N

NATIONWIDE MUTUAL INSURANCE COMPANY,)
)
Defendant.)

-----)

HUNTER B. LACY, CFI

One West Fourth Street
Winston-Salem, North Carolina

Wednesday, August 21, 2013
10:03 o'clock a.m.

Atlantic Professional Reporters
Winston-Salem, NC 27116-1672

APPEARANCES OF COUNSEL

Richard M. Wiggins, Esq.
McCOY WIGGINS CLEVELAND & O'CONNOR, PLLC
202 Fairway Drive
Post Office Box 87009
Fayetteville, North Carolina 28304-7009

Rachel E. Daly, Esq.
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
One West Fourth Street
Winston-Salem, North Carolina 27101

OTHER APPEARANCES

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E X H I B I T S

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STIPULATIONS

Pursuant to notice and/or consent of the parties, the deposition hereon captioned was conducted at the time and location indicated before Cassandra J. Stiles, Notary Public in and for the County of Forsyth, State of North Carolina at Large.

The deposition was conducted for use in accordance with and pursuant to the applicable rules or by order of any court of competent jurisdiction.

Reading and signing of the testimony was requested prior to the filing of same for use as permitted by applicable rule(s).

1 The witness, HUNTER B. LACY, CFI, being
2 first duly sworn to state the truth, the whole truth
3 and nothing but the truth, testified as follows:

4 (10:03 o'clock a.m.)

5 EXAMINATION

6 BY MR. WIGGINS:

7 Q. Good morning again, Mr. Lacy.

8 A. Good morning.

9 Q. You and I just met again this morning --
10 Richard Wiggins -- I think maybe we met back in maybe
11 November of 2012.

12 A. Briefly, yes, sir.

13 Q. Very briefly at the Miami Subs Restaurant
14 in Fayetteville.

15 A. Yes, sir.

16 Q. Do you recall that?

17 A. Yes, sir.

18 Q. And you're here today for your expert
19 deposition.

20 You understand that?

21 A. Yes, sir.

22 Q. And you've had your deposition taken many
23 times.

24 A. Yes, sir.

25 Q. You know the drill.

1 A. Yes, sir.

2 Q. And the only thing I would say is, again,
3 remind you that if you're responding to a question,
4 just -- don't just shake your head pos -- yes, or
5 negatively, no, and answer ---

6 A. --- I understand.

7 Q. And if I ask a -- ask you a question that
8 you do not understand, please ask me to repeat it and
9 make myself more clear, and I'll be more than happy
10 to try to do that, because I, as most lawyers, do ask
11 questions sometimes that has -- is unintelligible.

12 A. Okay.

13 Q. Again, state your full name for the
14 record, please, sir.

15 A. Hunter B. Lacy, L-a-c-y, and I go by the
16 nickname of Terry.

17 Q. How did you come by the nickname, Terry?

18 A. In the mid fifties, a secretary at the
19 private school where my father worked basically
20 picked it, and it stuck for, you know, 58 -- well, 57
21 years or so.

22 Q. Well, very good. I was wondering, because
23 it had nothing to do with Hunter.

24 A. No, sir. Everybody in my -- all the males
25 in my family have nicknames.

1 Q. I see. I see.

2 Just give me a brief sketch of your
3 background, your work background, your educational
4 background?

5 A. In May of 1978 I graduated from
6 Gardner-Webb College, then, now University.

7 In August of 1978 I went to work for the
8 Shelby, North Carolina Fire Department as a
9 firefighter.

10 In November of 1978 I was promoted to fire
11 inspector and ---

12 Q. --- Let me ask you something. I've
13 wondered about this.

14 What is the difference between a fire
15 inspector and a fire investigator?

16 A. In small departments, the fire inspector
17 does everything -- fire prevention inspections,
18 public education and fire investigation.

19 Q. He does it all?

20 A. Yes, sir.

21 Q. Okay.

22 A. In larger departments -- Charlotte, for
23 example -- you have fire inspectors, fire educators,
24 fire investigators, so each one does the one item.
25 Fire inspectors do inspections, education --

1 educators do the education activities, investigators
2 do investigations.

3 In smaller departments, you typically --
4 one hat does all.

5 Q. I understand.

6 A. So anyway, November of '78 I become a fire
7 inspector in Shelby.

8 In September of 1979 I leave Shelby and go
9 to Charlotte as a fire inspector, but I -- my
10 situation was a little different.

11 I went in the door in Charlotte doing
12 about 50 percent fire inspection, 50 percent fire
13 investigation.

14 Novem -- I'm sorry. June of 1981 I become
15 an investigator, and basically since June of 1981 all
16 I have done is investigative activities.

17 Q. Okay.

18 A. In November of 1992 -- I'm sorry. June --
19 I don't know why I'm hung on November.

20 June of 1992 I left the Charlotte Fire
21 Department and went to work for Royal Insurance
22 Company as a fire investigator, and later as the
23 manager of the fire investigations group.

24 In 2003, the parent company of Royal
25 decided to exit the United States insurance market,

1 so in September of 2004 I was laid off.

2 Immediately transitioned to a company that
3 was then known as MJM Investigations, again, doing
4 fire investigation. Stayed there until 2007.

5 Went to a company called EFI Global doing
6 fire investigations.

7 In July of 2008 I went to Valentine
8 Associates doing fire investigations.

9 And March -- I'm sorry -- May of 2009 went
10 to work for Donan Engineering, stayed there until
11 July of this year, and I'm in the process of forming
12 my own company.

13 Q. What is the name of your company that
14 you're forming? Have you named it?

15 A. Paperwork is not at the North Carolina
16 Secretary of State's, but I believe it will be called
17 Investigative Resources Global.

18 Q. Investigative Resources Global?

19 A. Yes, sir.

20 Q. I noticed in your -- is this the latest CV
21 that I have, your -- that's attached to your federal
22 expert report?

23 Is that the last, most recent one?

24 A. At the time of the report -- and to be
25 very candid with you, I've not -- I've not updated it

1 since then, so yes, that probably is the most recent.

2 Q. Okay.

3 A. But that would have been in June or July
4 of this year.

5 Q. Okay.

6 A. So it's fairly accurate. It wouldn't have
7 been July. It probably would have been May or June,
8 but it's fairly accurate. I just forget the date on
9 the report.

10 Q. I noticed from your resume, or CV, that
11 you've testified in a good many lawsuits over the
12 course of your career.

13 A. Yes, sir.

14 Q. Both civil cases and in criminal cases.

15 A. Yes, sir.

16 Q. I noticed you've testified in -- you've
17 given expert testimony in about 25 criminal cases
18 over the course of your career.

19 A. Yes. Well, I don't know the exact number,
20 but yes, sir, a fair number of criminal cases.

21 Q. And that goes back to, what, in the 1980s?

22 A. 1982 would have been when Judge Forest
23 Ferrell qualified me as an expert on a 1981 fire.

24 Q. And do you remember the name of that case?

25 A. State of North Carolina versus Douglas

1 Hunt.

2 Q. Do you remember State of North Carolina
3 versus Vernon Damion Williamson?

4 A. Yes, sir.

5 Q. That was in 1985 also.

6 A. Yes, sir. But Hunt was before Williamson.

7 Q. That was the first one?

8 A. No, sir.

9 Q. I'm sorry. Hunt was....

10 A. If you're going -- if you have my CV in
11 front of you ---

12 Q. --- I do.

13 A. --- Look right ---

14 Q. --- I do.

15 A. Look right below court testimony, you'll
16 see a sentence or two.

17 Q. All right. I see. I see. I've got it.

18 That was UNC versus Douglas Hunt. State
19 of North Carolina versus Douglas Hunt.

20 A. That was when I was first qualified as an
21 expert, in the Douglas Hunt case.

22 Q. Okay.

23 A. Then Vernon Damion Williamson was a little
24 bit later.

25 Q. And in the testimony that you've given in

1 the criminal cases, has it always been on behalf of
2 the state, or has it been on both sides of the fence,
3 both ---

4 A. --- On behalf of the state.

5 Q. Okay, and these were all arson cases, I
6 suppose?

7 A. Yes, sir.

8 Q. And you did the investigation, the fire
9 investigation, on behalf of the state in those cases?

10 A. All with the exception of one.

11 Q. Okay.

12 A. There is a Haywood County case -- and
13 without looking at it I don't remember the name of
14 the defendant -- but there is a Haywood County, North
15 Carolina, case where I did the investigation for the
16 insurance company, and the state chose to subpoena me
17 as a witness in addition to the government
18 investigators as to the origin and cause of the fire.

19 It's listed on there, I would say,
20 sometime in the late '90s or early 2000s.

21 Q. And then you've also listed some civil
22 cases in which you've given expert testimony.

23 A. Yes, sir.

24 Q. And the first one you have listed is Helen
25 Threatt versus H.E. Hiers Estate?

1 A. Yes, sir.

2 Q. And was that a cause and origin case?

3 A. It was. And that investigation I
4 conducted as a employee of the Charlotte Fire
5 Department and was subpoenaed by the plaintiff to
6 testify for them.

7 Q. And then the next one you've listed is
8 Harrington versus A.G. Boone Company. That was '87.

9 Do you recall that case?

10 A. Yes, sir.

11 Q. Cause and effect?

12 A. Same scenario. Accidental fire. I worked
13 it for the Charlotte Fire Department, subpoenaed by
14 the plaintiff.

15 Q. And you were at that time a fire
16 investigator ---

17 A. --- Yes, sir.

18 Q. --- Not a fire....

19 A. Inspector.

20 Q. Inspector.

21 A. Correct.

22 Q. And then State of -- then you got one
23 listed, State of North Carolina versus Eugene White.

24 Was that a civil case?

25 A. No, sir.

1 Q. That was a criminal case?

2 A. No, sir. If you see in the docket number,
3 if it's CR it's criminal, if it's CV it's civil.

4 Q. I see, criminal. I got you.

5 And they just got listed in a separate
6 place here.

7 A. By the way, those are listed
8 chronologically, sir.

9 Q. I got you. Okay.

10 Then Collingwood versus Wood versus G.E.
11 Real Estate Equities, Superior Court. That's a CV
12 case.

13 A. Again, accid ---

14 Q. --- Cause and origin?

15 A. Accidental fire, worked it for the
16 Charlotte Fire Department, subpoenaed by the
17 Plaintiff.

18 Q. And then Commonwealth of Massachusetts
19 versus George M. Ploude, P-l-o-u-d-e.

20 That's a case ---

21 A. -- That is a criminal case.

22 I worked that fire for Royal Insurance,
23 and the district attorney's office in Massachusetts
24 subpoenaed me to testify for them.

25 Q. And then Sharon Logan versus Carlot --

1 Charlotte Housing Authority, civil case, and I guess
2 that was a cause and origin case also?

3 A. Yes, sir.

4 Q. And you testified on behalf of?

5 A. The defendant.

6 Q. And the last one you have listed here is
7 Kevin Wilson versus State Farm, and that, I guess,
8 was a cause and origin also?

9 A. Yes, sir. I was retained by State Farm in
10 Roanoke, Virginia, to do the origin and cause of a
11 fire and was -- subsequently testified for them.

12 Q. On behalf of State Farm?

13 A. At deposition and at trial for State Farm.

14 Q. Okay, other than the ones that you've
15 listed on your CV, do any other cases come to mind in
16 which you've testified as an expert ---

17 A. --- No, sir.

18 Q. --- As to fire and origin?

19 A. I'm -- I'm fairly certain that is a full
20 list.

21 Q. Okay.

22 A. And the reason I say that is because it's
23 something I've maintained through the years.

24 Q. Have you ever been disqualified as an
25 expert in any case in which you've been called to

1 testify?

2 A. No, sir.

3 Q. And every court that you've been asked to
4 testify in, you have qualified as an expert witness,
5 I take it?

6 A. Every time I have been submitted, I have
7 been qualified ---

8 Q. --- Okay.

9 A. --- As an expert.

10 And the only reason I say that is I have
11 probably testified in 200 matters as a fact witness.

12 Q. Okay.

13 A. Approximately 200.

14 Q. And that would not be as an expert fire
15 and origin investigator, I take it?

16 A. The 200 times would have been during my
17 career as a fire investigator, but for whatever
18 reason, I was testifying as a fact witness and not an
19 expert.

20 Q. I understand.

21 Since you've been involved with Donan, was
22 Nationwide a client of Donan on a regular basis?

23 MS. DALY: Objection to form.

24 MR. WIGGINS: Well, let me strike
25 that.

1 Q. (Mr. Wiggins) Was it a regular client of
2 Donan Engineering?

3 MS. DALY: Objection to form.

4 THE WITNESS: I'm going to be honest
5 with you. I don't know, simply because I did not,
6 and today do not know how to calculate how many
7 referrals they give the company.

8 Donan probably has 300 professional
9 employees east of the Mississippi. They're more
10 prevalent -- they've got one or two offices west, but
11 not much.

12 I have no idea how much work Donan got
13 from Nationwide.

14 MR. WIGGINS: Okay, let me ask it
15 this way.

16 Q. (Mr. Wiggins) How many cases do you
17 recall working on in which Nationwide was the
18 insurer?

19 A. I never counted. I probably did three to
20 four a month.

21 Q. And would that have been as a cause and
22 origin investigator?

23 A. Yes, sir.

24 Q. And would all of these cases have been in
25 instances where an adjuster or someone else

1 associated with Nationwide Insurance Company thought
2 there may be some question as to the cause and
3 origin?

4 MS. DALY: Objection to form.

5 THE WITNESS: In all cases they
6 retained me to identify the origin and cause of the
7 fire, and I would believe that on most all of those
8 occasions the adjuster did not know the origin and
9 cause of the fire when he called in the referral.
10 And the dollar value was such that they wanted to
11 know the origin and cause of the fire.

12 MR. WIGGINS: Okay.

13 THE WITNESS: I don't -- I mean, I
14 -- yeah, I'll leave it at that.

15 Q. (Mr. Wiggins) And would it be fair to say
16 that the cases that you worked on for Nationwide were
17 cases in which there may have been some question
18 about the cause and origin?

19 A. No ---

20 MS. DALY: --- Objection. Asked and
21 answered.

22 MR. WIGGINS: Pardon?

23 THE WITNESS: No, sir.

24 Q. (Mr. Wiggins) Explain that to me, then,
25 the difference.

1 If it would not be something they would --
2 you said they wanted to know the cause and origin of
3 the fire ---

4 A. --- Well ---

5 Q. --- Because of the dollar amount.

6 A. Okay, maybe I misunderstood ---

7 MS. DALY: --- Objection.

8 Mischaracterization of his testimony.

9 THE WITNESS: Maybe I misunderstood
10 your question.

11 When Nation -- I don't recall Nationwide
12 ever calling me, telling me they think they know the
13 cause of the fire and they want me to investigate it.

14 MR. WIGGINS: Okay.

15 THE WITNESS: What I almost always
16 got was I've got a fire, I need you to look at it.

17 MR. WIGGINS: Okay.

18 THE WITNESS: And when I would see
19 them at the scene, or wherever, they would basically
20 say I don't know what happened.

21 The adjusters are very hesitant to jump to
22 conclusions. They want evidence.

23 Q. (Mr. Wiggins) As a fire and origin
24 investi -- let me strike that again. Let me ask you
25 this.

1 Have you done any investigations on behalf
2 of Womble Carlyle?

3 A. No, sir.

4 Q. Has the methodology of fire and origin
5 investigation changed since you got into the business
6 in any particular significant way?

7 MS. DALY: Objection to form.

8 THE WITNESS: I don't know that I
9 have changed how I process a fire scene.

10 What I have seen change is the fuels
11 involved in the fire, so that necessitated some
12 changes.

13 As the recommended methodology has been
14 documented in books and articles, I realized I was
15 doing that in the '80s.

16 MR. WIGGINS: Uh-huh.

17 THE WITNESS: It just wasn't called
18 that.

19 What is now referred to as a scientific
20 method, I used prior to 1993 when it was -- when it
21 came out of the United States Supreme Court. But it
22 wasn't written anywhere then.

23 But when I saw it, I was kind of like
24 we've been doing that.

25 Q. (Mr. Wiggins) All right, that's what I

1 was getting at.

2 I've noticed that over the years that some
3 courts back in the early '80s were beginning not to
4 qualify C&A investigators as experts because they
5 were taking great liberties with their testimony.

6 Do you recall anything like that?

7 MS. DALY: Objection to form.

8 THE WITNESS: No, sir.

9 Q. (Mr. Wiggins) Okay, tell me about NFPA.
10 You're familiar with that?

11 A. Yes, sir.

12 Q. How does it fit into what cause and origin
13 investigators do?

14 How does it relate to what you do?

15 MS. DALY: Objection to form.

16 THE WITNESS: NFPA is the National
17 Fire Protection Association, and while the title is
18 national, it is international and it is the sole
19 organization of its type in the world.

20 They publish 350, 375 -- I haven't counted
21 them lately -- documents that comprise what is called
22 the National Fire Codes, and for the most part those
23 are the fire codes that are used throughout the
24 United States.

25 They publish two documents that are

1 directly connected with fire investigation, and then
2 a large number that are indirectly.

3 One of the documents is NFPA 921, which is
4 on the investigation of fires and explosions, and it
5 is a guideline -- in their own terminology, it is a
6 guide in their own terminology for the investigation
7 of fires.

8 NFPA also publishes NFPA 1033,
9 Professional Qualifications of Fire Investigator, and
10 it de -- it's essentially a job description for fire
11 investigators.

12 I was a member of the 921 committee in the
13 late -- mid to late '90s to 2004, and I'm currently a
14 member of the NFPA 1033 committee.

15 MR. WIGGINS: Okay.

16 THE WITNESS: Go ahead.

17 MR. WIGGINS: I'm sorry.

18 Q. (Mr. Wiggins) Do they have local chapters
19 of that?

20 A. No, sir.

21 Q. It's just a national organization?

22 A. Yes, sir.

23 Q. And it has membership?

24 A. It does.

25 Q. And you are a member of that organization?

1 A. I am.

2 Q. And have you served as an officer of the
3 NFPA?

4 A. I have not.

5 Q. I take it there are officers and directors
6 of that organization.

7 A. Yes, sir.

8 Q. But you've served on committees of that
9 organization?

10 A. Yes, sir.

11 Q. What committees have you served on during
12 the course of your career?

13 A. The NFPA 921 committee and the NFPA 1033
14 committee.

15 Q. And do you subscribe to that as being
16 somewhat of the standard that most and all cause and
17 origin investigators should adhere to?

18 MS. DALY: Objection to form.

19 THE WITNESS: I agree that it --
20 that 9 -- NFPA 921 details a preferred methodology.

21 Q. (Mr. Wiggins) Okay, and what I'm asking,
22 Mr. Lacy, is if an investigator falls below that
23 standard, would he be qualified as a qualified cause
24 and origin investigator?

25 A. Sure.

1 MS. DALY: Objection to form.

2 Q. (Mr. Wiggins) He would be?

3 A. Sure.

4 Q. And do any courts, to your knowledge, use
5 that NFPA 921 standard as any kind of a benchmark for
6 qualifying cause and origin experts?

7 MS. DALY: Objection to form.

8 THE WITNESS: No, sir.

9 Q. (Mr. Wiggins) Have you ever been asked by
10 a court if you were a member of the NFPA?

11 A. I honestly do not believe I've ever been
12 asked that question.

13 Q. Is there any other standards that are out
14 there that you are aware of in addition to the NFPA
15 Section 921 that prescribes -- proscribes methods and
16 means of cause and origin investigations?

17 A. No, sir.

18 Q. I noticed in your reports that you preface
19 your reports by saying that it was done in accordance
20 with 921.

21 A. Yes, sir.

22 Q. And so you do -- you, yourself, believe
23 that to be the standard in which you would conduct
24 your investigations?

25 A. Yes, sir.

1 Q. Have you taught any courses on behalf of
2 the NFPA?

3 A. I believe years ago I taught several NFPA
4 921 courses. They were not sponsored solely by the
5 NFPA. The NFPA was a partner.

6 Q. Have you written any articles and
7 submitted them to the NFPA for publication?

8 A. No, sir.

9 Q. There is a state -- is there a state
10 standard or -- strike that.

11 Is there any kind of a state qualification
12 in North Carolina for fire -- for cause and origin
13 investigators?

14 A. Yes, sir. The North Carolina State Fire &
15 Rescue Commission offers a certified fire
16 investigator program, and that's the only one -- I
17 mean, that's the only such program that I'm aware of
18 in North Carolina.

19 Q. And do you have to be licensed in North
20 Carolina to call yourself a qualified fire and origin
21 investigator?

22 A. Well -- no, sir, you don't.

23 Q. Do you think they should be?

24 MS. DALY: Objection.

25 THE WITNESS: I think the

1 qualification issue should be left up to the courts.

2 Certification can be handled by an agency
3 such as the fire and rescue commission, but actual
4 qualifications -- because I am a certified fire
5 investigator, but that doesn't mean that my comfort
6 level with investigating the fire on a aircraft
7 carrier is as high as it would be on a routine house
8 fire.

9 When you certify fire investigators,
10 you're not certifying them by types of fires. You're
11 certifying them by fires.

12 As far as the actual qualifications of an
13 individual investigator, I don't think you can
14 determine that until you know what type of fire it
15 is. That's the qualifications. And you used the
16 word, qualifications.

17 If you're going to certify investigators,
18 yeah, that's fine to certify as a fire investigator.

19 Q. (Mr. Wiggins) And you are a certified
20 fire investigator?

21 A. Yes, sir.

22 Q. And so that kind of brings us to why you
23 are here today, because you are a qualified fire
24 cause and origin investigator, and you were called to
25 investigate this fire, on behalf of Nationwide, at

1 Miami Subs Restaurant in Fayetteville, North
2 Carolina, on or about February 25th, 2012. Is that
3 correct?

4 A. I believe ---

5 MS. DALY: --- Objection to form.

6 Q. (Mr. Wiggins) On or about.

7 A. I believe it was January 25th.

8 Q. 25th, 2012?

9 A. Yes, sir.

10 Q. And who retained you in this case? Was it
11 Nationwide?

12 A. Zak Gurley is an adjuster with Nationwide.
13 Z-a-k G-u-r-l-e-y.

14 And on January 25th he called in the
15 assignment. It was given to me. I called him on the
16 25th, left a voice mail, and I believe I called Jimmy
17 on the 25th and left a voice mail.

18 Q. You're talking about Jimmy Diamantopoulos?

19 A. Yes, sir.

20 Q. And what did you tell Jimmy when you
21 called him?

22 A. I told him who I was by name and phone
23 number. Told him I'd been retained to investigate
24 the fire at Miami Subs and needed him to call me to
25 make arrangements to meet him there.

1 Q. And what was -- when you talked to Mr.
2 Gurley, do you recall what he told you he wanted you
3 to do?

4 What was the scope of your investigation?

5 A. The first thing he told me was that the
6 fire had been reassigned and was no longer his. But
7 otherwise, the conversation evolved around origin and
8 cause.

9 Q. And when you said origin and cause, that
10 -- tell me what that kind of assignment would
11 involve?

12 A. Identify where the fire originated and
13 identify the ignition source for the fire and
14 identify the classification of the fire.

15 Q. Okay. We talk about cause.

16 Is cause and ignition the same, synonymous
17 with each other, or is it different?

18 A. Different.

19 Q. Okay, how is it different?

20 A. Well, cause is the sequence of events that
21 brings the ignition source in contact with the fuel
22 source. A person leaving food on a stove would be a
23 cause.

24 Q. Okay.

25 A. The food on the stove would be the fuel.

1 The person failing to cut off the stove would be --
2 the ignition source would be the -- the burner on the
3 stove, and the person failed to cut it of.

4 Q. And the fuel source, then, would be what
5 was on the stove that got burned?

6 A. No, sir. The fuel, yes, sir. Yes, sir.

7 Q. That would be the fuel.

8 And so your duties as a qualified fire and
9 -- fire origin and cause investigator was to make
10 those determinations at the Miami Subs Restaurant.

11 You understood that when you were called?

12 A. Yes, sir.

13 Q. And you then called Jimmy.

14 And did you call anyone else or speak with
15 anyone else other than those two persons ---

16 A. --- No, sir.

17 Q. --- Before you came down to Fayetteville?

18 A. No, sir.

19 Q. And so the 25th -- the 26th you did come
20 to Fayetteville?

21 A. Yes, sir.

22 Q. And tell me what time you got there on
23 that day?

24 A. I think it was approximately at nine a.m.

25 Q. Okay, and you had arranged with Jimmy to

1 meet you there on that date?

2 A. On the 26th, on my way to Fayetteville, I
3 was able -- I got -- I was able to get up with Jimmy.
4 I had not spoken to him. I left Charlotte on the
5 26th not having spoken to Jimmy.

6 Q. Okay.

7 A. Got him on the phone on my way down.

8 I also spoke with Fayetteville Fire
9 Department, learned that the SBI was investigating.
10 I called the supervisor of fire investigations,
11 learned that Chad Royal was investigating, so I
12 called Chad.

13 Q. Okay.

14 A. And basically, number one, are you -- are
15 you finished with the scene, and he said he was. And
16 then I ---

17 Q. --- He -- which one, now?

18 A. Chad.

19 Q. Chad said he was?

20 A. Chad Royal said he was -- he had completed
21 his fire scene examination. He wanted to know what
22 time I was going to get there. I told him, and he
23 met me out there later.

24 Q. Okay. You seem to have known Chad prior
25 to this time.

1 A. No, sir.

2 Q. You did not?

3 A. No, sir.

4 Q. Did you know other SBI agents in
5 Fayetteville at that time?

6 A. I knew the supervisor -- his supervisor,
7 Lee.

8 Q. Okay, did you know any other of the
9 investigators from any of the departments, fire
10 department, police department, who had come on the
11 scene or had been on the scene in Fayetteville?

12 A. Of this fire?

13 Q. Yes, of this fire.

14 A. No, sir.

15 Q. And you were able to get hold of Jimmy and
16 Jimmy agreed to meet you there.

17 A. Yes, sir.

18 Q. At about nine o'clock?

19 A. Yes, sir.

20 Q. And he did meet you there?

21 A. He did.

22 Q. And he let you in?

23 A. He did.

24 Q. And who was there when you arrived at the
25 scene?

1 A. I believe just Jimmy.

2 Q. Okay, and no other investigator was there
3 at that time?

4 A. No, sir.

5 Q. The fire had been suppressed?

6 A. Yes, sir.

7 Q. Completely suppressed.

8 Was there any smoldering embers or smoke
9 or -- still visible at that time?

10 A. No, sir.

11 Q. And when you went in to the restaurant,
12 did Jimmy stay there or did he leave?

13 A. He stayed for a little while, then left
14 ---

15 Q. --- Okay.

16 A. --- Then came back.

17 Q. And did you have a conversation with Jimmy
18 about what had happened or got his version of what
19 happened?

20 A. Almost immediately after arriving, I
21 introduced myself to him.

22 I use an aluminum clipboard to write on.
23 I put it on the hood of my truck and interviewed him.

24 Q. And you told him that you were there on
25 behalf of Nationwide Insurance Company, did you not?

1 MS. DALY: Objection to form.

2 THE WITNESS: I don't know that I
3 repeated it when I met him on the scene, but I
4 definitely told him that in the voice mail on the
5 25th, and probably told him that in the telephone
6 conversation on the 26th.

7 MR. WIGGINS: Okay.

8 THE WITNESS: I don't know that I
9 told him again when I saw him in person.

10 Q. (Mr. Wiggins) And do you think he knew
11 what the purpose of your being there was?

12 A. I am comfortable I explained it to him. I
13 don't have any idea if he knew.

14 Q. Okay.

15 A. I mean, I'm just going to be very candid
16 with you. I don't know that part.

17 Q. I will say that Jimmy is a Greek and he
18 has an accent.

19 A. Yes, sir.

20 Q. And you learned that in speaking to Jimmy

21 ---

22 A. --- Yes, sir.

23 Q. --- It's sort -- sometimes difficult to
24 understand what he says. I understand that.

25 But he stayed there for a few minutes

1 after you arrived and he let you in?

2 A. Yes, sir.

3 Q. And you interviewed him there and took
4 down a statement.

5 And do you have your notes with you today
6 that you took?

7 MS. DALY: Mr. Wiggins, here are
8 four files and his notes are on these files as well.

9 MR. WIGGINS: Can I read them?

10 MS. DALY: Yes. Everything is on
11 here and all of the documents he produced in response
12 to your subpoena, sir.

13 MR. WIGGINS: Okay.

14 MS. DALY: Can we go off the record?

15 MR. WIGGINS: Yeah.

16 (10:37-10:42 a.m. - recess)

17 MR. WIGGINS: Back on the record.

18 Q. (Mr. Wiggins) Was there any -- was there
19 any information, Mr. Lacy, that you developed prior
20 to coming to Fayetteville other than what you've told
21 me about?

22 A. On the morning of the 26th, Special Agent
23 Chad Royal of the SBI told me he had not determined
24 the cause of the fire.

25 Q. And was that telephonically ---

1 A. --- It was.

2 Q. --- He told you that?

3 A. It was.

4 Q. Anybody else that you talked to to get
5 some background other than Mr. Royal -- Chad?

6 A. No. No, sir.

7 Q. Just to kind of wind that end of it up,
8 after this -- after your investigation ended, or
9 terminated, did you -- have you learned anything else
10 since the termination of your investigation that
11 would bear on this fire?

12 MS. DALY: Objection to form, and to
13 when you're referring to -- the end of the
14 investigation.

15 MR. WIGGINS: I'm referring to after
16 he completed his investigation, whenever that was.

17 THE WITNESS: No, sir.

18 Q. (Mr. Wiggins) Now, in preparation for
19 your testimony here today, Mr. Lacy, have you read
20 any depositions or articles?

21 A. Yes, sir. I've read, to my knowledge,
22 every -- I have reviewed transcripts of the
23 depositions that I've been provided.

24 Q. Okay.

25 A. And examination under oath.

1 Q. Okay.

2 A. I don't know that I've gotten them all,
3 but I've reviewed everything I've been given.

4 Q. Okay. Have you -- let me go through some
5 of the players here.

6 You've reviewed the EUO's of Jimmy
7 Diamantopoulos, have you not?

8 A. I have.

9 Q. You have reviewed the deposition of Jimmy
10 Diamantopoulos, have you not?

11 A. I have.

12 Q. Have you reviewed the deposition of Mrs.
13 Moon?

14 A. I have.

15 Q. Did you also interview Mrs. Moon?

16 A. I did.

17 Q. Yourself, you interviewed her?

18 A. I did.

19 Q. And did you review the deposition of Mr.
20 Lapene?

21 A. I did.

22 Q. Did you interview Mr. Lapene?

23 A. I did.

24 Q. And did you review or have you read the
25 deposition of Mr. Stone -- Steve Stone?

1 A. I have.

2 Q. And have you read and reviewed the
3 deposition of Steve Booth?

4 A. I have.

5 Q. You knew Steve Booth.

6 A. I did.

7 Q. You know Steve Booth.

8 A. I do.

9 Q. How long have you known Steve Booth?

10 A. Approximately 10 years.

11 Q. Is that from professional associations
12 that you've known him?

13 A. Yes, sir.

14 Q. And do you respect him as a -- as a cause
15 and origin fire investigator?

16 A. Yes, sir.

17 Q. And did you know Mr. Stone prior to this
18 particular case or have any contact with him?

19 A. I did not know him and have not had any
20 contact with him -- other contact with him.

21 Q. But you have reviewed the findings of all
22 the other experts in this case, and that would have
23 been Mr. Stone, Mr. Booth, I believe, and I believe
24 those are the only two that we've taken depositions
25 of.

1 A. Yes, sir.

2 Q. Over the years you've told me that you've
3 conducted and been conducting fire and origin
4 investigations since the early '80s.

5 Approximately how many fires have you
6 investigated over your career?

7 A. Approximately 3500.

8 Q. And have all of those been cause and
9 origin issues in those cases, or has there been some
10 other issues there?

11 A. Origin and cause.

12 Q. And I noticed that you've also been called
13 and have qualified as an expert in other
14 jurisdictions other than North Carolina also.

15 A. Yes, sir.

16 Q. What other states have you testified and
17 qualified as an expert in?

18 A. At trial, Massachusetts. And then have
19 been offered as an expert at deposition in Virginia,
20 Ohio, Tennessee and Florida and South Carolina. I
21 think that's it.

22 Q. Okay, have you participated in fires, test
23 fires, during the course of your career? I'm sure
24 you have.

25 A. Yes, sir.

1 Q. Is that something that fire investigators
2 do on a regular basis?

3 A. Yes, sir.

4 Q. What is the purpose of that?

5 A. To observe fire behavior.

6 I mean, there are some fires that are set
7 for training purposes, simply just to watch. No
8 particular concern as to what the fuel is or how it's
9 lit -- just to watch.

10 There are other fires that are set with a
11 specific scenario in mind, and you -- and again, you
12 -- you want to see what happens.

13 1986 or 1987, one or the other. It's been
14 a little while. I mean, we burned a couple of houses
15 in Shelby, and my purpose for being there was to
16 train police investigators from Charlotte.

17 So we went in, laid on the floor of the
18 room that was burning. Stayed as long as we could
19 just to -- so he could see a fire burning. So you do
20 it to document what occurs in any -- any fire
21 situation or in specific scenarios that you're
22 interested in.

23 Q. Over the course of your career, as you've
24 testified, you've participated in a good many arson
25 investigations, and are there patterns that you look

1 for in arson investigations that aren't peculiar to a
2 cause and origin or is it all the same?

3 A. You're looking for patterns in any origin
4 and cause investigation, not just arson. Any fire
5 investigation.

6 Q. What are the patterns that you look for in
7 a cause and origin investigation?

8 A. Well, you're looking for the development
9 of the fire at the origin, then spread of the fire,
10 ventilation patterns. I mean, that's what -- that's
11 what you're looking for.

12 Q. Okay, and if you see a fire that has
13 multiple origins, is that an indicator of some sort?

14 A. Yes, sir.

15 Q. Is that an ar -- is that an indicator of
16 arson?

17 A. Well, it's an indicator that the fire is
18 incendiary in nature.

19 Q. And what about -- what about finding
20 incendiary devices at a fire? That's also an
21 indicator, is it not?

22 A. Indicator that the fire is incendiary.

23 Q. And if there is -- if there is some type
24 of fuel present, or an incendiary material present,
25 that's the -- that's the -- I suppose also a gauge of

1 what you might find?

2 A. Well, understand that a fuel has to be
3 present for any fire to occur. So you -- I've got --
4 the fire investigator has to identify the fuel
5 involved in the fire on all fires ---

6 Q. --- Okay.

7 A. --- Whether they be accidental or
8 incendiary.

9 Q. That's a prerequisite?

10 A. I wouldn't say it's a prerequisite. I
11 would just say it's one of those items that you have
12 to identify prior to the conclusion of the
13 investigation.

14 Q. And do you also look for trailers?

15 A. Yes, sir.

16 Q. And explain what a trailer is.

17 A. A combustible material, whether it be a
18 liquid or a solid, that is used to spread the fire
19 unnaturally from one area to another.

20 Q. And anything else that you can think of
21 that are such indicators that we've just been talking
22 about?

23 A. No, sir.

24 Q. What about smoke? I'm interested in smoke
25 patterns, and you've talked about that.

1 That is an indicator of sorts, is it not?

2 MS. DALY: Objection to form.

3 THE WITNESS: Indicator of what?

4 MR. WIGGINS: Indicator of the
5 course and the flow of a -- of a flame.

6 THE WITNESS: Smoke is a byproduct
7 of all combustion, and the manner in which it flows
8 is of interest to the investigator.

9 Q. (Mr. Wiggins) Does smoke contain carbon
10 monoxide or carbon dioxide or other combustible
11 material?

12 A. Yes.

13 Q. Sometimes can that explode?

14 A. Yes.

15 Q. What happens if that catches an explosive
16 force? What happens in that kind of a fire?

17 MS. DALY: Objection to form.

18 THE WITNESS: It depends on the
19 scenario at the time that it occurs.

20 It can level a building, which is -- an
21 explosion is the most perfect form of combustion. Or
22 it can just -- the carbon monoxide can continue to
23 burn, so it can be ---

24 Q. (Mr. Wiggins) --- You mean, it can burn
25 by itself, that is the fuel source?

1 MS. DALY: Objection to form.

2 THE WITNESS: Only after a -- after
3 a fire is occurring elsewhere. But carbon monoxide
4 is combustible.

5 MR. WIGGINS: I see. I see.

6 THE WITNESS: Carbon dioxide is not.

7 Q. (Mr. Wiggins) Okay, are there other
8 combustible materials in smoke other than carbon
9 monoxide?

10 A. There are other gases, and some are
11 combustible, some are not.

12 Q. What produces those gases in smoke?

13 A. Fire as we know it, as we watch it -- if
14 you watch on -- if you see video on a television or
15 if you actually watch it in person, is actually
16 incomplete combustion, meaning not everything is
17 consumed by the fire.

18 In an explosion -- let me rephrase that.
19 An explosion is complete combustion.

20 Q. Okay.

21 A. Is perfect combustion.

22 So when you have incomplete combustion,
23 these fire gases, carbon monoxide -- carbon monoxide
24 and a host of others are produced. The more
25 incomplete combustion you have, the greater

1 production of gases. The less incomplete combustion,
2 the less production of gases.

3 Q. When you got to the Miami Subs Restaurant
4 and you -- after you interviewed Jimmy, you then went
5 into the restaurant to begin your investigation. Is
6 that not correct?

7 A. Yes, sir.

8 Q. And just walk me through what you did.

9 A. I walked in the side door. If you stood
10 on McPherson Church Road and looked at the front, it
11 would be the right side. And since I know we're
12 going there, drive-thru windows would be on the left
13 side.

14 Q. Okay.

15 A. Walked in the side door and just walked
16 around the interior of the restaurant, starting in
17 the seating area. And there was a little game room.
18 Walked through all of that.

19 Then wandered behind the cash registers,
20 then wandered in the line where the cooking equipment
21 was. Then came back out, went to my right. That led
22 me into the area where the rear drive-thru window was
23 located.

24 I don't think I immediately went toward
25 the rear door until we got it open and got a little

1 bit more light back there. That was the only area
2 that did not have windows.

3 I try not to walk around dark fire scenes,
4 because you don't know what's hanging from above ---

5 Q. --- Absolutely.

6 A. --- Or what the floor is.

7 Q. Absolutely.

8 A. So yeah, we -- once we got the rear door
9 opened, I went on down that hall from the drive-thru
10 window area to the rear door area.

11 Q. Okay.

12 A. But I just -- I -- I don't have -- I don't
13 take my note pad, I don't take my camera. I just
14 walk in and make observations.

15 Q. And when you -- so that we're on the same
16 page of music, when you talk about the front window
17 -- there were two drive-in windows ---

18 A. --- Yes, sir.

19 Q. --- At the Miami Subs Restaurant.

20 A. Yes, sir.

21 Q. And the front window would have been the
22 one that you subsequently identified as being the
23 source of the fire?

24 A. Sir, it may be a matter of semantics, but
25 I actually believe that's the rear drive-thru window.

1 Q. Okay. I just want to be sure we were
2 talking about the same window.

3 You think that's the rear ---

4 A. --- To me, that's the rear of the
5 building, so that's -- it's kind of confusing,
6 because it -- when you -- when you drive -- when you
7 go through the drive-thru process, it is the first
8 window you come to.

9 Q. That's what I was thinking.

10 A. But to me, it's at the rear of the
11 building.

12 Q. Okay. Well, yesterday we talked about
13 that as being the first window.

14 A. I think it's called window one.

15 Q. Okay, window -- let's call it window one,
16 then.

17 A. But to me, it's at the rear of the
18 building.

19 Q. So can -- for the purpose of our
20 discussions today can we call it window one ---

21 A. --- Yes, sir.

22 Q. --- So that we are on the same page of
23 music and we're not confusing each other.

24 A. That's fine.

25 Q. Okay. And I noticed in your drawings you

1 have -- you've identified that.

2 You've got -- you've got your notes before
3 you there?

4 A. Yes, sir.

5 Q. Okay, look at the drawings ---

6 A. --- Which one you got?

7 Q. The first one I have is ---

8 A. --- Okay, I've got that one in my hand.

9 Q. And you've got various numbers on this
10 sheet.

11 Tell me what that is.

12 A. The numbers inside the circles or the
13 squares indicate number of chairs.

14 Q. Okay, and that's all that's shown on this
15 -- on this particular sheet. Is that correct?

16 Just trying to give an outline of the
17 restaurant and where there's chairs and ---

18 A. --- And some -- couple measurements.

19 Q. Okay. And a couple -- I see the
20 measurements.

21 And then you've got Pepsi, coffee. Is
22 that what that is?

23 A. Tea and Pepsi.

24 Q. Tea and Pepsi.

25 A. That is the beverage bar.

1 Q. Okay.

2 A. To put it in perspective, sir, McPherson
3 Church would be at the top of the diagram.

4 Q. Okay.

5 A. Do you see where the word ---

6 Q. --- I do.

7 A. Do you see where the word, date, is?

8 Q. I do.

9 A. I didn't write McPherson ---

10 Q. --- I see.

11 A. --- But that would be the McPherson side.

12 The right side would be -- near where you
13 see 2.0, the right side would be the game room.

14 Q. Okay.

15 A. Then the bottom, if -- if something were
16 to be drawn below Pepsi, coffee, tea and Pepsi, the
17 next thing to draw would be the line where the cash
18 registers are.

19 Q. Okay, and would that be shown on the next
20 drawing that you have?

21 A. It is.

22 Q. Okay. And I see a sofa, table and ---

23 A. --- Love seat.

24 Q. --- And love seat, and I see measurements
25 on that.

1 Then you've got four -- you've got tables
2 and you've got four, four.

3 Is that the seating area there?

4 A. No. It's the number of chairs, or number
5 of people ---

6 Q. --- Number of chairs.

7 A. Number of people that -- and understand,
8 some of these are benches, so number of people who
9 could sit at that table.

10 Q. Okay, and then you've got a square in the
11 middle -- or rectangle in the middle, 13 by 10.

12 A. That's a pool table.

13 Q. Pool table.

14 And this is the game room that you had
15 referenced here earlier on?

16 A. Yes, sir.

17 Q. And the next drawing that you have is the
18 -- is the drive-thru.

19 Is that the drive-thru window shown in
20 this one -- in this drawing?

21 A. With all due respect, can you show me what
22 you're looking at.

23 Q. I'm sorry.

24 (Witness examined document)

25 A. Yes, sir. I have that drawing -- I have

1 that diagram in front of me.

2 At the top left corner you see a square
3 penetrating a vertical line.

4 Q. Okay.

5 A. You see the vertical line originating
6 under the word, case?

7 Q. I do.

8 A. Okay, come down about an inch.

9 Q. Okay.

10 A. And you see a square through -- around
11 that line?

12 Q. Uh-huh.

13 A. That is the number one drive-thru window.

14 If you come down on that wall near where
15 you see a CR ---

16 Q. --- Do you have it -- you don't have it
17 marked one on yours?

18 A. No, sir.

19 Q. Would you mark it on mine and put your
20 initial by it, just so I know where we're talking ---

21 A. --- Do you want me to mark ---

22 MS. DALY: --- Do you want it with
23 the red pen ---

24 MR. WIGGINS: --- Yeah. Oh, that.
25 Yeah.

1 MS. DALY: --- So that it shows up?

2 MR. WIGGINS: Yeah, please.

3 THE WITNESS: Do you want me to mark
4 number two?

5 MR. WIGGINS: Yes, please. We got
6 it down pat.

7 THE WITNESS: Okay.

8 (Witness marked document)

9 MR. WIGGINS: Thank you.

10 Q. (Mr. Wiggins) And you've got the first
11 drive-thru window shown there.

12 A. Yes, sir.

13 Q. And then behind that you've got a grill,
14 and that is the kitchen area?

15 A. Yes, sir. You see refrigerator, grill,
16 deep fat fryers, food prep, and then FF for french
17 fry.

18 Q. And please, again, draw on there where
19 McPherson Church Road would be in reference to that
20 drawing, and where Skibo Road would be in reference
21 to that drawing -- or 401 bypass.

22 A. Okay.

23 (Witness marked document)

24 Q. Thank you.

25 A. Uh-huh.

1 Q. And look -- look down, Mr. Lacy, where you
2 got beside 88.

3 Do you see that number?

4 A. Yes, sir.

5 Q. What does that have reference to?

6 A. That ice cream box is 88 inches across the
7 front ---

8 Q. --- Okay.

9 A. --- 88 inches wide.

10 Q. And 23 is the -- is the width of it?

11 A. Umm, 28.

12 Q. I'm sorry, 28.

13 And then above that you've got another
14 drawing of a -- I'm sorry. I can't read that.

15 A. The 28-by-31 box?

16 Q. Yes, sir.

17 A. That is a refrigerator -- refrigeration
18 box. It contains bottles of water and packs of salad
19 dressing.

20 Q. Okay, and then going back to where you've
21 marked the first drive-thru window to be, behind that
22 is the office. Is that not correct?

23 A. Correct.

24 Q. Okay, and that would be shown on your next
25 drawing, or would it be shown in your next drawing?

1 A. Hang on one second.

2 (Witness examined documents)

3 A. Yes, sir.

4 Q. Okay.

5 A. Well, let me see what you're looking at,
6 just so I can be sure ---

7 Q. --- Be sure we're ---

8 A. --- Yeah, we're looking at the same thing.
9 That is.

10 Q. That's good.

11 A. Yes, sir.

12 Q. And -- I'm sorry. Go ahead.

13 A. This shows the hallway going toward the
14 rear of the building, but it also includes the office
15 areas.

16 Q. Okay.

17 A. The -- right under the -- you see a number
18 36 at the top?

19 Q. I do.

20 A. That is the width of the drive-thru window
21 number one.

22 Q. Okay, and that's the one we've been
23 talking about.

24 A. Yes, sir. There's 22 inches between the
25 window and the wall.

1 Q. Okay.

2 A. Coming down the wall there's 70 and a half
3 inches between the exterior wall and the door to that
4 office. Then that office is 48 and a half inches
5 deep and 105 inches wide.

6 Q. Is there a door -- where you have 34.5, is
7 there a door there?

8 A. No, sir.

9 Q. Okay, and there is no door leading from
10 that area back into the office, then?

11 A. Not into the area that's 70 -- that's 48.5
12 inches deep and 105 inches wide.

13 Q. Okay.

14 A. There's one door leading into the area
15 that's 59.5 by 55.5.

16 Q. And what is that -- what is that area
17 there?

18 A. To me, they're both the office.

19 Q. Okay, was one more of a storage area than
20 the -- than the office area?

21 A. I do not know.

22 Q. Couldn't -- couldn't tell.

23 And then coming back, again, just get
24 orientation, would you write on here again in red,
25 show McPherson Church Road just so we'll know which

1 direction we are looking, and 401 bypass, or Skibo.

2 A. Okay.

3 (Witness examined document)

4 Q. What you've drawn on this, Mr. Lacy, the
5 bottom of this page you've shown McPherson Church
6 Road, and to the left of your drawing you've shown
7 Skibo Road. Is that correct?

8 And the ---

9 A. --- Whoa, whoa, whoa, whoa. May I have
10 that back?

11 Q. Yes. It's kind of difficult to get the
12 orientations on these things.

13 A. Hang on a minute.

14 (Witness examined document)

15 A. Yeah.

16 Q. The drive-thru window faces ---

17 A. --- No, hang on a minute. Hang on a
18 minute.

19 The drive-thru window faces ---

20 Q. --- Skibo.

21 A. --- Skibo.

22 Q. Uh-huh.

23 A. I'm comfortable with that.

24 Skibo and McPherson Church intersect, so I
25 guess I did actually -- I actually -- I did have it

1 right. I apologize.

2 Q. That's quite all right. Thank you.

3 So what we've got here is the number one
4 drive-thru window faces Skibo Road. Is that correct?

5 A. Yes, sir.

6 Q. And McPherson Church Road would be on the
7 -- would be at the left side of your drawing?

8 A. Yes, sir.

9 Q. On this drawing you do not show drive-in
10 window number two.

11 A. I do not.

12 Q. Okay, let's go to the next drawing, and
13 that would be this one.

14 Is that what you have?

15 A. Yes, sir.

16 Q. And that is a -- you're going to have to
17 tell me what this is.

18 A. Okay.

19 Q. Because I don't recognize this.

20 A. This is the ---

21 Q. --- I do. I do. This is the entrance?

22 A. No, sir, this is the rear -- rear hallway.

23 Q. Okay.

24 A. Pick up the last one we just worked on.

25 Q. Okay.

1 A. Lower left you'll see WH, water heater.

2 Q. I got that, yes.

3 A. Okay, orient that with the water heater on
4 this.

5 Q. I got it.

6 A. This is just an extension of the -- of
7 that area.

8 You see the door on the right-hand side
9 marked by 41 and a half inches. On the right-hand
10 side you see a door opening about midway, and you see
11 the number 41 ---

12 Q. --- 41.5.

13 A. That is the rear door of the -- of the
14 building.

15 Q. Okay.

16 A. This area that's 82 inches by 40 and a
17 half inches is where electrical panels are located,
18 and then the area that's 63 by 75 is storage.

19 The drive-in -- drive-thru window number
20 one would be continuing up the top of the....

21 Q. Drawing.

22 A. Drawing. So Skibo Road would be at the
23 top and ---

24 Q. --- Again, we'll write it on there just so
25 we'll know exactly where we are.

1 (Witness marked document)

2 A. And then -- and because this is just a
3 continuation of that other diagram, McPherson Church
4 is going to be on the left.

5 (Witness marked document)

6 Q. Okay, and then the next drawing is a -- it
7 looks like it's a drawing of the entire outer
8 perimeter of the building?

9 A. Correct.

10 Q. And this has somewhat the same numbers as
11 your earlier drawings except it's for the entire
12 perimeter of the building?

13 A. Correct.

14 Q. Then the next page you've got freezer on
15 exterior rear of building, depth 92.5, length 380.5.

16 Was this an enclosed freezer or was it a
17 free -- standalone?

18 A. This -- this is a freezer that is outside
19 of the envelope of the building, but you actually
20 enter it from that rear hall.

21 Q. Okay. Okay, now, going back to what we
22 were talking about earlier, you said you didn't walk
23 around that area.

24 You walked around everything we've looked
25 at here on your -- on your drawings.

1 A. Inside and outside.

2 Q. And without camera, without taking notes,
3 just making the walk.

4 A. Yes, sir.

5 Q. And you looked at all those areas?

6 A. Yes, sir.

7 Q. And what did you do next?

8 A. Photographed them.

9 Q. Okay, and what kind of a camera do you
10 use?

11 A. Digital.

12 Q. Is it a 3D digital camera?

13 A. It's not 3D, no, sir.

14 Q. And the purpose of that was to photograph
15 the entire fire scene as you observe -- as you were
16 observing it when you were walking through this
17 restaurant?

18 A. Yes, sir.

19 Q. And was there evidence of fire suppression
20 when you walked through the building?

21 A. No direct evidence of fire suppression,
22 but I knew the fire had been suppressed.

23 Q. Okay, and after you began taking
24 photographs -- and I think I have -- how many
25 photographs did you take? Do you recall?

1 A. Sir, I never counted them. I would say,
2 all told, probably close to a thousand.

3 Q. Did you use all -- you didn't develop the
4 whole thousand and furnish them to counsel, did you?

5 MS. DALY: Objection to form.

6 MR. WIGGINS: If you know.

7 THE WITNESS: Well, they're digital
8 photographs, so I did not print them all, but I have
9 provided all of them to counsel.

10 Q. (Mr. Wiggins) On a tape, on a ---

11 A. --- On a CD.

12 Q. On a CD. Okay.

13 Some of them I want to show you and just
14 you and I discuss here for a few minutes and -- just
15 to kind of, again, get oriented.

16 I'm going to show you -- I think I've
17 already marked these as Plaintiff's Exhibit Number
18 94.

19 MS. DALY: Mr. Wiggins, before we
20 get into that, may we take a five-minute comfort
21 break?

22 MR. WIGGINS: Oh, yeah, sure.

23 MS. DALY: Thank you.

24 MR. WIGGINS: Sure.

25 (11:14-11:19 a.m. - recess)

1 Q. (Mr. Wiggins) Mr. Lacy, I'm going to show
2 you what's been marked as -- for identification as
3 the Plaintiff's Exhibit Number 94 and ask if you can
4 -- I think this is one of your photographs -- if you
5 can, identify that.

6 (Witness examined document)

7 A. Yes, sir.

8 Q. And what is this?

9 A. It is a photograph of drive-thru window
10 one, which you see the light showing through the
11 window on the left center of the photograph.

12 Q. I do.

13 A. The wall to the right of that where you
14 see the electrical boxes mounted in a conduit running
15 ---

16 Q. --- I do.

17 A. --- Is a wall of the office area. And
18 then on the left side is the remains of the bread
19 cart.

20 Q. Okay. Now, tell me what material the wall
21 was made of, if you know.

22 A. Fiberglass reinforced panels.

23 Q. Okay, and is that a flammable material, in
24 your opinion?

25 A. No, sir.

1 Q. The bread cart that you see in this
2 photograph, it's all folded together?

3 A. No, sir. Those are trays ---

4 Q. --- I see.

5 A. --- That were inside the bread cart.

6 Q. Okay.

7 A. Stacked inside, and so -- and they
8 remained stacked after the fire.

9 Q. Okay. You took this photograph at an
10 angle looking toward -- looking toward number one
11 drive-thru window?

12 A. Mr. Wiggins, I'm not going to say for sure
13 that I took this photograph.

14 I will agree that it is a photograph of
15 the fire scene, and I took a whole lot of similar
16 photographs ---

17 Q. --- Okay.

18 A. --- But I -- I'm not going to swear to you
19 ---

20 Q. --- That you took this one?

21 A. --- That this is my photograph.

22 Q. I understand.

23 A. But I recognize it as a photograph of the
24 interior of the fire scene.

25 Q. And is this what you saw -- what I'm

1 getting at, really, is what -- is this what you saw
2 the first day you were on site?

3 A. Yes, sir.

4 Q. Okay, and that's fairly representative of
5 what you saw?

6 A. Yes, sir.

7 Q. I show you what has been previously marked
8 for identification as Plaintiff's Exhibit Number 97,
9 Mr. Lacy, and ask if you can identify that
10 photograph.

11 And again, I don't know whether you took
12 this. I thought you did, but you may not have.

13 A. Well, first, Mr. Wiggins, I'm not going to
14 deny taking it, but before I say that I did take it,
15 I would obviously like to compare it to my
16 photographs.

17 Q. Okay.

18 A. But it is representative of the fire
19 scene.

20 Q. Okay, and tell me what this scene is
21 looking at.

22 A. I'm looking straight on at drive-in --
23 drive-thru window number one. You see the broken-out
24 glass?

25 Q. I do.

1 A. That's the bread cart to the left and the
2 wall to the office to the right.

3 Q. Okay, and are those trays to the bread
4 cart on the left lower part of this photograph?

5 A. Yes, sir.

6 Q. Okay, let me show you what has been marked
7 for identification as Plaintiff's Exhibit Number 114
8 and ask if you can identify that photograph, Mr.
9 Lacy.

10 A. Yes, sir.

11 Q. And what is this representative of?

12 A. Okay, first, the manner in which it's
13 labeled is upside down.

14 Q. I understand that. I see it is.

15 A. Okay, so if you've got the exhibit label
16 in the lower left, it is the -- it's a photograph of
17 the office wall like -- orient it like this, sir.

18 Q. Okay.

19 A. Yes, sir. It is a photograph of the
20 office wall.

21 You see a little bit of drive-thru window
22 number one on the left side of the photograph right
23 above the label, and then you see the door to the
24 office.

25 Q. Okay.

1 A. And you've got the ceiling above it.

2 Q. And I see a lot of wiring in that ceiling.

3 Do you know what that wiring went to,
4 where all that housing was for -- what it -- what
5 that housing was for?

6 A. A substantial amount of it was
7 communication or sound equipment. Was not
8 electrical.

9 Q. And can you identify in this photograph
10 what has later become identified as a protected area
11 on the wall next to the drive-in window?

12 A. Yes, sir. You see it on the left side of
13 the photograph just to the right of the portion of
14 the window that's illustrated in the photograph.

15 Q. Okay, and did you pay any attention to
16 that on the day that you were there doing your
17 initial investigation?

18 A. By all means.

19 Q. Okay, did you note it somewhere in your
20 notes?

21 A. I did.

22 Q. Okay, and ---

23 A. --- Well....

24 Q. I'm sorry. Go ahead.

25 A. I don't know that I wrote it down.

1 I use my photographs as some manner of
2 documenting some items. I don't necessarily write
3 down everything but I take a picture of it.

4 Q. And you had measured the distance from
5 that window to the angle of the wall there, had you
6 not?

7 A. Okay, is angle of the wall ---

8 Q. --- You -- the ---

9 A. --- The same thing as corner?

10 Q. Right. The corner. I'm sorry. Yeah.

11 A. No, no problem. I just want to be sure,
12 again, we're on the same page.

13 Q. Right, right.

14 A. Yes, sir, I have.

15 Q. And that's in the notes that we just
16 looked at earlier. That is ---

17 A. --- It's in the diagrams, yes, sir.

18 Q. In the diagrams.

19 I believe -- and just so we're -- go back
20 and look at that and let's see what it was.

21 (Witness examined documents)

22 Q. Do you have it?

23 A. Yes, sir.

24 Q. What is that?

25 A. It's 22 inches.

1 Q. Not quite two feet.

2 A. Correct.

3 Q. Two inches short of two feet. Is that
4 correct?

5 A. One -- one -- one foot 10 inches.

6 Q. Okay, and all of this -- most of this
7 wiring you see in the ceiling there, you said, goes
8 to the audio equipment in the office?

9 Was that what that would have been?

10 A. First, I saw very little that would be
11 considered branch circuit electrical wiring.

12 Q. Okay.

13 A. I would believe that most of it would be
14 audio, video, or some other type of communication
15 equipment.

16 Q. Okay. Now, I see in this photograph the
17 entire ceiling was gone. Is that ---

18 A. --- Yes.

19 Q. --- What you saw when you went there?

20 A. Yes, sir.

21 Q. What kind of ceiling was in that building,
22 Mr. Lacy?

23 A. A drop-in ceiling, also called a false
24 ceiling, with panels that drop into a tray.

25 If you see this, where I'm running my ---

1 Q. --- I do. I see that.

2 A. Okay, that is the framing for the drop-in
3 ceiling.

4 Q. Okay, and what was that drop-in ceiling
5 made of?

6 A. Celo -- well, celotex.

7 Q. Is that highly flammable?

8 A. The finish on it is not, because of the
9 health department requirements. It will smolder more
10 than it will burn.

11 Typically what happens is after it gets
12 hot, and then wet from firefighter -- fire
13 suppression hoses, it just crumbles.

14 Q. Okay, and when you went there -- I'm
15 sorry. I have a cold that I can't quite shake.

16 When you went there did you see all of
17 that celotex material on the floor?

18 A. In this area -- in other words, if this
19 photograph extended on down to the floor, that floor
20 area was reasonably clean from where S -- SBI Special
21 Agent Royal had examined the floor. I saw piles of
22 debris in which I believe celotex debris was located.

23 Q. Okay, and it had not been completely
24 consumed by fire? Let me strike that.

25 You tell me what degree of fire had

1 consumed that celotex material.

2 MS. DALY: Objection to form.

3 THE WITNESS: No, it had not been
4 totally consumed, and in -- probably very little of
5 it had been consumed.

6 As I mentioned earlier, the heat from a
7 developing and spreading fire damages the integrity
8 of the celotex panel. Water from fire suppression
9 hoses destroys the integrity of the celotex panel,
10 and typically it then just falls to the floor and
11 becomes a mushy gray material.

12 Q. (Mr. Wiggins) And you observed some of
13 that mushy gray material when you were there on the
14 26th of January?

15 A. Yes, sir.

16 Q. I show you what has been marked for
17 identification as Plaintiff's Exhibit Number 112, Mr.
18 Lacy, and again ask you if that is something you can
19 identify and speak to.

20 (Witness examined document)

21 A. Yes, sir. That is the ceiling in the rear
22 hall.

23 Q. And -- I'm sorry. Go ahead.

24 A. You see some wall surface on the bottom
25 left of the photograph, and that is the wall to the

1 office.

2 Q. And there is a chain to the right portion
3 of the photograph.

4 Do you see that chain?

5 A. Yes, sir.

6 Q. What does that extend to?

7 A. I do not recall.

8 Q. And there is a fluorescent light in this
9 photograph.

10 A. Yes, sir.

11 Q. And was that photo -- was that -- did you
12 observe that fluorescent light at the time of your
13 initial visit to the restaurant?

14 A. I did.

15 Q. How many of those lights were in the area
16 where window number one was located?

17 A. I believe it would have been these two
18 lights that are in this photograph.

19 Q. Okay.

20 A. I mean, that would have been -- they would
21 have been directly in front of the window, and I
22 believe that was it.

23 Q. Okay, and I see some material hanging down
24 just to the lower left of the fluorescent lighting.

25 Do you see that?

1 A. Yes, sir.

2 Q. Would that be the celotex material we
3 spoke about earlier ---

4 A. --- It would.

5 Q. --- Some of it?

6 A. It would.

7 Q. I show you what I've marked as Plaintiff's
8 Exhibit Number 115, Mr. Lacy, and ask if you can
9 identify and speak to that photograph.

10 (Witness examined document)

11 A. Sir, I believe it is a fluorescent light
12 fixture.

13 Q. Okay, and is it on -- do you know where it
14 is located in this photograph?

15 A. No, sir.

16 Q. But it's typical of all the fluorescent
17 lighting system you saw in the restaurant?

18 A. Yes, sir.

19 Q. I show you what has been marked as
20 Plaintiff's Exhibit Number 95 and ask if you can
21 identify that photograph.

22 (Witness examined document)

23 A. Yes, sir. That is the left rear corner of
24 the restaurant.

25 Shown in the upper left-hand corner of

1 this photograph is drive-thru window number one.

2 Q. Okay.

3 A. Shown in the bottom left corner is a
4 portion of the wheeled bread cart.

5 And then, shown on the upper right-hand
6 corner of the photograph is the wall to the office.

7 Q. And it is no longer there. It's gone.

8 A. Correct.

9 Q. And is part of that wall lying on the
10 floor?

11 A. It is.

12 Q. And had it partially been consumed by
13 fire?

14 A. I don't know that it had been consumed by
15 fire, but it had been partially damaged by fire. I
16 believe firefighters pulled the rest of it down.

17 Q. Okay, and do you know what that black
18 thing is in the lower part of the photograph?

19 A. I believe it's a cash register drawer.

20 Q. Okay, could you identify where that cash
21 register drawer had been prior to the fire?

22 A. No, sir.

23 Q. I show you what has been marked for
24 identification as Plaintiff's Exhibit Number 108 and
25 ask if you can identify and speak to this photograph.

1 (Witness examined document)

2 A. I don't know what that is.

3 Q. I think what -- are you talking about the
4 writing on this?

5 A. Yeah. I mean, I -- I -- I haven't looked
6 at it hard, but I'm seeing handwriting, some of which
7 I can't recognize.

8 Q. Okay. This is handwriting -- I -- let me
9 represent to you what it is.

10 That's the handwriting of Chad Royal, I
11 believe.

12 MS. DALY: I'm not certain.

13 Q. (Mr. Wiggins) I had asked -- this is
14 where he talked about identifying and -- and found
15 the printed circuit board, Mr. Lacy.

16 And then to the left he has got where he
17 placed the electric -- the circuit board.

18 A. Okay, this is a wall -- the floor area
19 underneath drive-thru window number one.

20 Q. Okay.

21 A. I would prefer not to make any comment on
22 the words written on it.

23 Q. I don't want you to ---

24 A. --- Okay.

25 Q. --- Make any comment about that. I just

1 wanted you to comment on the ---

2 A. --- Because I'll be honest with you, I
3 don't -- I can't read the words.

4 Q. Okay. What I want you to look at is the
5 debris that's in that pile to the right lower part of
6 that photograph.

7 A. Yes, sir.

8 Q. Was that representative of what you saw on
9 the first walk-through that you made of the
10 restaurant?

11 A. No, sir, that debris had been removed.

12 Q. Do you know -- did you ask anyone who had
13 removed it?

14 A. Chad Royal told me he had.

15 Q. Okay.

16 A. And he pointed to me the pile in which he
17 moved it to.

18 Q. Okay, and where did he move it to?

19 A. Utilizing the position in which he was
20 standing to take this photograph, it would be about
21 two feet to his left.

22 Q. Okay.

23 A. In -- going back toward the front of the
24 restaurant.

25 Q. And that's what you found when you went

1 there? Is that true?

2 A. Found what?

3 Q. That you found this material moved to a
4 different location ---

5 A. --- Yes, sir.

6 Q. --- According to what you were told by Mr.
7 Royal.

8 A. Yes, sir.

9 Q. SBI Agent Royal.

10 A. Yes, sir.

11 Q. And did you ask him what he had found in
12 this area, if anything?

13 A. I -- I -- I don't recall if I posed a
14 question to him in that manner, no, sir.

15 Q. Okay, and did he tell you that he had
16 found or discovered anything of interest in that
17 pile?

18 MS. DALY: Objection to form.

19 THE WITNESS: At some point on
20 January 26 or January 27 he told me that he had found
21 some printed circuit boards and had placed them on
22 the counter toward the front of the restaurant.

23 MR. WIGGINS: Okay.

24 THE WITNESS: I don't know where the
25 printed circuit boards came from exactly, but looking

1 at them, observing heat damage, part -- observing the
2 heat damage that they sustained, I'm comfortable they
3 came from this area.

4 MR. WIGGINS: Okay.

5 THE WITNESS: But where they were
6 exactly, I do not know.

7 Q. (Mr. Wiggins) Okay, I'll represent to
8 you, again, Mr. Lacy, this is his handwriting. He
9 said I placed the electric circuit boards in this
10 location.

11 Do you see there?

12 A. (No response)

13 Q. Did he ever tell you he had done that?

14 A. No, sir.

15 Q. Okay, one other thing.

16 He did tell you, though, that he had found
17 this in the debris pile just below and to the right
18 of the drive -- number one drive-thru window.

19 A. Told me he found what?

20 Q. These printed circuit boards.

21 A. I don't recall his explanation as being
22 that detailed.

23 Q. Okay. Just so I understand exactly, he
24 told you that he had found the printed circuit boards
25 in that area.

1 Is that what it was?

2 A. Yes, sir.

3 Q. Okay. I show you what has been marked for
4 identification as Plaintiff's Exhibit Number 103 and
5 ask if you can identify that photograph.

6 A. I've got two other ones.

7 Q. I'm sorry.

8 A. No, that's okay. I just realized -- that
9 is the wall surface in the office.

10 Q. What is that box in the lower right
11 portion of the photograph?

12 Do you see that?

13 A. I do not know.

14 Q. And the wiring -- all of this wiring that
15 you see here you have identified as being in the
16 office? Is that correct?

17 A. Yes, sir.

18 Q. Okay. And then this flat material in the
19 middle of the photograph, do you know what that is?

20 A. Not specifically, no.

21 Q. And do you know what this wiring
22 controlled in that -- particularly in the office?

23 MS. DALY: Objection to form.

24 THE WITNESS: I do not.

25 Q. (Mr. Wiggins) Okay, I show you what I've

1 marked as the Plaintiff's Exhibit Number 99 and see
2 if you can identify that photograph.

3 (Witness examined document)

4 Q. That may be pretty close to one I've shown
5 you earlier.

6 (Witness examined document)

7 Q. Is that the drive-in window number one to
8 the right there that I'm looking at here?

9 A. I don't believe so.

10 Q. Okay, then maybe I got disoriented.

11 Do you recognize this photograph at all?

12 A. I believe this is the opening from the
13 rear wall -- rear hall into the office area.
14 However, I'm not real sure.

15 Q. Okay.

16 A. I think the photograph that you just saw
17 -- showed me -- and I don't know the number of them
18 -- 114 -- 163 -- I'm sorry -- 163 would have been
19 taken further to the left -- further to the right.

20 Q. Okay.

21 A. But I'm -- but in all honesty, I would
22 like -- I did not take this photograph, so I would
23 like to examine other photographs to tell you exactly
24 where it is. But I believe it's the opening from
25 that rear hall into the office.

1 If that -- if that is the case, the
2 drive-thru window is to the left of this photograph.

3 Q. Number one drive-thru window?

4 A. Yes, sir.

5 Q. Again let me show you what has been marked
6 as Plaintiff's Exhibit Number 98, and this is similar
7 to one you've identified earlier, but just a
8 different photograph.

9 Do you -- can you identify that
10 photograph?

11 A. Yes, sir. This is the floor area just
12 inside drive-thru window number one, and it shows the
13 rolling -- or the rolled aluminum bread cart to the
14 left. You see the cash register drawer. Right under
15 the 98 label you see the wall.

16 And this photograph was taken before
17 Special Agent Royal conducted his fire scene
18 examination.

19 Q. Okay, and this was before he had moved the
20 debris to a different location. Is that correct?

21 A. Yes, sir.

22 Q. And I think you further identified that it
23 was moved from the top of where this photograph is to
24 a location back this side of the bread cart.

25 Is that -- do you have any ---

1 A. --- I'm not real sure what you mean by
2 this side.

3 Q. I'm sorry. I'm sorry. The lower part of
4 the bread cart in this photograph.

5 A. I believe the debris was moved to what
6 would be the lower left corner of the photograph.

7 Q. The lower -- and when I say this side, I
8 mean, as I'm looking at it here, this side of that
9 bread cart right here that you've identified.

10 A. Yes, sir. If you run a little bit lower
11 and a little bit to your left of the photograph, that
12 would be where the debris went.

13 Q. Did Special Agent Royal tell you that he
14 had bagged any of that material?

15 A. He did not.

16 Q. Did you learn that he had bagged any of
17 that material?

18 A. I did not.

19 Q. Did you bag any of that material?

20 A. I did not.

21 Q. I show you what has been marked as the
22 Plaintiff's Exhibit Number 110, and I'll represent to
23 you this is a photograph I know that was taken by
24 Chad Royal.

25 Can you identify that photograph?

1 (Witness examined document)

2 A. This is going to be the wall and floor
3 area underneath drive-thru window number one. On the
4 left-hand side you see what is the right rear corner
5 of the wheeled aluminum bread cart.

6 Q. And do you recognize the object that's
7 leaning against the wall in the center of this photo
8 ---

9 A. --- In all honesty, sir, the debris is not
10 -- well, the photograph ---

11 Q. --- Yes.

12 A. --- Is not detailed enough, and I cannot
13 zoom in on it to recognize -- to conclusively
14 identify what it is.

15 Q. Okay, do you have an idea what it is?

16 A. I see a shape that is consistent with a
17 printed circuit board.

18 Q. Okay.

19 A. But that's all I -- that's the only way I
20 can describe it.

21 Q. Okay. And I see dark spots on the top of
22 that object, whatever it is, dark areas in the top,
23 dark areas to the lower side, and it seems to be of a
24 gray or grayish-blue color.

25 Do you see that?

1 MS. DALY: Objection to the form of
2 the question, to the statement.

3 Q. (Mr. Wiggins) Do you see the coloring in
4 that photograph?

5 (Witness examined document)

6 A. To an extent, yes.

7 Q. Okay.

8 A. Any -- any black that we're looking at on
9 those items leaning against the wall could be debris
10 or the result of incomplete combustion, sooting and a
11 lack of total burning.

12 Q. I show you what has been marked as Exhibit
13 Number 113 and ask if you can identify that.

14 And I'll represent to you that's just a
15 closeup of the prior photograph that you looked at.

16 A. Okay, the exhibit label is placed in an
17 incorrect location.

18 Q. It is.

19 A. Okay.

20 Q. It is.

21 A. I still -- I still see something that I
22 believe to be a printed circuit board, but
23 insufficient detail to -- to describe it any further.

24 Q. Okay. Do you see those grooves on the --
25 on that ---

1 A. --- Yes, sir.

2 Q. --- Instrument, whatever it is?

3 A. Yes, sir.

4 Q. And you see screw -- I see screws on that
5 -- on that board.

6 Do you see that?

7 A. Okay, I'm not real sure what you're
8 referring to as board.

9 Q. Well, I'm just calling it the board ---

10 A. --- Okay.

11 Q. --- Because -- yeah.

12 A. Yes. I see one on the right side and I
13 see two on the left side and I see one in the middle
14 and one on -- and two toward the bottom.

15 Q. Are you familiar with printed circuit
16 boards?

17 A. In a general sense.

18 Q. Have you ever had an occasion to take a
19 printed circuit board from plastic housing on any
20 kind of device and look at it?

21 A. No, sir.

22 Q. Okay.

23 MR. WIGGINS: Do you have that?

24 MS. DALY: Uh-huh.

25 Q. (Mr. Wiggins) I show you what has been

1 marked for identification as Exhibit Number 92.

2 We are going to a different area now, Mr.
3 Lacy -- and ask if you can identify that photograph.

4 A. It is a photograph of the front counter,
5 to the -- I guess, left center you see a drink
6 machine dispenser.

7 Q. Uh-huh.

8 A. And that is for drive-thru window number
9 two.

10 Q. Okay.

11 A. On the left-hand side of the photograph
12 you see a metal frame that I believe is actually the
13 drink dispenser for the main dining room.

14 Remember earlier in one of my diagrams we
15 had Pepsi, tea, coffee, Pepsi?

16 Q. Correct.

17 A. I think that's in that same -- that's that
18 same row.

19 Then right dead in the middle of the
20 photograph is a computer tower.

21 Q. Okay, and was that computer tower in that
22 location when you first went to the restaurant on
23 January the 26th, 2012?

24 A. It was.

25 Q. And did you make any effort to examine

1 that CPU?

2 A. I examined the exterior of it, yes, sir.

3 Q. Did you look to see if there were any hard
4 drives in that CPU?

5 A. They had been removed.

6 Q. Did you observe that on your own or did
7 someone like Agent Lacy tell you they had been
8 removed?

9 A. I observed it on my own.

10 Q. Did anybody later tell you who had removed
11 them?

12 A. Fayetteville Police Department.

13 Q. Who told you that?

14 A. Special Agent Royal.

15 Q. And did you have an occasion at some point
16 to meet Detective House ---

17 A. --- I did.

18 Q. --- Of the Fayetteville Police Department?

19 A. I did.

20 Q. And did Special Agent Royal tell you that
21 he had taken possession of those items?

22 A. Who is he?

23 Q. Mr. House, Detective House.

24 A. Yes, sir.

25 MS. DALY: It is almost noon.

1 Can we go off record?

2 MR. WIGGINS: Sure.

3 (11:54 a.m.-12:45 p.m. - Luncheon recess)

4 Q. (Mr. Wiggins) Mr. Lacy, when we dropped
5 off we were talking about some of the photographs and
6 identifying those ---

7 A. --- Yes, sir.

8 Q. --- Before the lunch break. I'm just
9 going to show you Exhibit Number 107 and ask if you
10 can identify that document.

11 A. Yes, sir. These are the two hard drives
12 removed from the computer towers that were
13 illustrated in an earlier photograph.

14 Q. Okay, and did you finally obtain -- excuse
15 me -- obtain possession of these hard drives?

16 A. I did.

17 Q. And you obtained those from the --
18 Detective House ---

19 A. --- I did.

20 Q. --- Of the Fayetteville Police Department.
21 And after you learned that Mr. House had
22 taken these hard drives, did you contact him about
23 that, about the hard drives?

24 MS. DALY: Objection to form.

25 MR. WIGGINS: You can answer if you

1 know.

2 THE WITNESS: No. I'm -- I'm trying
3 to remember exactly how it played out. He was at the
4 fire -- he came to the fire scene. Let me backtrack.

5 Chad Royal had told me that House had
6 them. House then came to the fire scene. I asked
7 him what he was going to do with them. And to the
8 best of my knowledge, his answer was I don't know.
9 And I asked him if he would voucher them over to me
10 and allow me to have them examined. He said yes. He
11 said that would be a great idea.

12 And I think it was more the tone of his
13 voice than what he said. I then asked him why. And
14 he said his IT people had told him it would be months
15 before they could look at them and he didn't want to
16 wait months. And I just said I'm comfortable I can
17 get it done faster.

18 Q. (Mr. Wiggins) Did he tell you or give you
19 any indication of what he thought was contained on
20 the hard drives?

21 A. Yes. From the very beginning I
22 understood, and I believe he understood, and I
23 believe Chad Royal understood it contained video
24 files from the surveillance cameras.

25 Q. Okay. After you obtained -- when you --

1 I'm sorry. Strike that.

2 When you obtained these files, did you
3 sign a evidence receipt form for Detective House?

4 A. I did.

5 Q. Acknowledging you had received these
6 documents?

7 A. I did.

8 Q. I mean -- I'm sorry -- these hard drives?

9 A. Yes, sir.

10 Q. Did you ever deliver those back to
11 Detective House?

12 A. I did not.

13 Q. Has he ever requested you deliver them
14 back to him?

15 A. He did not.

16 Q. Did he ever -- did Detective House ever
17 have any further conversation with you in reference
18 to these hard drives after you signed the receipt to
19 take possession of them?

20 A. Not that I recall.

21 MR. WIGGINS: Excuse me. Do you
22 have a copy? Did I give you that?

23 Q. (Mr. Wiggins) I show you what has been
24 marked as Plaintiff's Exhibit Number 100 and ask if
25 you can identify that photograph.

1 A. It's a photograph of the office. As you
2 go in the door from the rear hallway, this would be
3 the office to the right.

4 Q. Okay, and was that the operating office as
5 you observed it for the restaurant?

6 A. Well, there were two rooms. One would be
7 the one illustrated in the photograph. The other
8 room would be behind the photographer. I don't know
9 the exact purpose of each room. But between those
10 two rooms, they constituted the office.

11 Q. And on the top -- you see the top -- the
12 door has been demolished or partly demolished. Do
13 you see that?

14 A. Yes, sir.

15 Q. Was that done during the fire suppression
16 activities or was it fire damage? Could you tell?

17 A. That is a -- that's a fire pattern ---

18 Q. --- Okay.

19 A. --- On the door.

20 Q. What are the dark areas there, Mr. Lacy,
21 on this photograph? Does it have any significance at
22 all?

23 A. Dark areas where?

24 Q. I'm sorry. On the door, above the door.

25 A. That's smoke staining.

1 Q. Okay, and is this -- these lines by the
2 left margin of the photograph, is that also smoke
3 staining?

4 A. It is.

5 Q. Okay. In the upper right-hand corner of
6 this photograph is a machine of some description.

7 Do you recognize that?

8 A. I now know that to be the DVR on which the
9 video files for these surveillance cameras were
10 recorded.

11 Q. Okay. Do you see the wiring coming out of
12 the ceiling panel going to that DVR?

13 A. I see some wiring. I do not see where it
14 connects to the DVR simply because of the angle of
15 the photograph.

16 Q. Okay.

17 A. But I see some wiring.

18 Q. Okay. And to the right of that DVR do you
19 see another device of some description?

20 A. Is that the device that's hanging down at
21 a 45-degree angle?

22 Q. No. I'm sorry. I'm -- which one are you
23 speaking of now? Let's be sure.

24 Okay, what have you identified as the DVR?

25 A. This right here.

1 Q. Okay. Yeah, with the thing hanging down.

2 A. I have no idea what that is.

3 Q. Okay. And, then, the machine to the left
4 of the DVR, do you recognize that?

5 A. I do not know what that is, sir.

6 Q. Did you ever examine it during any of your
7 investigation?

8 A. It was taken as evidence in November of
9 2012 and examined in Raleigh in April of 2013.

10 Q. Okay, and was that at Mr. Cavaroc's
11 laboratory in Raleigh?

12 A. It was.

13 Q. And do you know who took possession of
14 this?

15 A. Mr. Cavaroc.

16 Q. Okay. And Mr. Cavaroc was the engineer
17 representing the Public Works Commission of the city
18 of Fayetteville?

19 A. He was.

20 Q. Did you know Mr. Cavaroc prior to this
21 occasion?

22 A. I did.

23 Q. Have you worked with him before?

24 A. Yes.

25 Q. And I also -- I see some wiring going to

1 that device, now, from this photograph. But you
2 didn't examine that either, I take it.

3 A. That wiring would have been examined in
4 Raleigh in April. But, no, I did not examine it at
5 the fire scene in January.

6 Q. Okay. Was that wiring taken and was it
7 present at the conference that was held in Mr.
8 Cavaroc's laboratory in 2013?

9 A. It was.

10 Q. When you examined the office, Mr. Lacy,
11 was there personal items of Jimmy Diamantopoulos in
12 the rest -- in the office? Do you recall any of
13 those items?

14 A. I'm not real sure what would be
15 characterized as personal. I mean, I -- there were
16 -- there were furnishings and personal property,
17 business personal property in the offices. But I'm
18 not real sure if I know what was personal and what
19 was not.

20 Q. Okay. Did you see any photographs in the
21 office?

22 A. I do not remember.

23 Q. Okay. Hockey stick?

24 A. I do remember seeing a hockey stick.

25 Q. Okay.

1 A. That -- that....

2 Q. I show you what has been marked as Exhibit
3 101, which is a -- it's just a closeup of what I just
4 showed you. And, again, on the upper left-hand --
5 right-hand corner of this photograph is what you have
6 previously identified as the DVR. Is that correct?

7 A. Yes, sir.

8 Q. And then to the left of that is the audio
9 system that was taken by Mr. Cavaroc.

10 A. I did not specifically remember it was the
11 audio system. But, yes, that item was taken by Mr.
12 Cavaroc.

13 Q. And it was present at the examination that
14 was conducted at his laboratory in Raleigh.

15 A. It was.

16 Q. And that part of that DVR system that's
17 hanging down, you don't -- you didn't -- you don't
18 recognize what that is?

19 A. No, sir.

20 Q. Was that the position that it was in when
21 you saw it ---

22 A. --- Yes, sir.

23 Q. --- When you were in the restaurant in
24 January the 26th, 2012?

25 A. Yes, sir.

1 Q. And did you also photograph this item?

2 A. Yes, sir.

3 Q. Had you ever seen a DVR system like this
4 before?

5 MS. DALY: Objection to form.

6 THE WITNESS: Not that I'm aware of.

7 MR. WIGGINS: Okay.

8 Q. (Mr. Wiggins) You -- when you saw this,
9 did you know what it was?

10 A. No, sir.

11 Q. Did you inquire of Jimmy what it was?

12 A. No, sir.

13 Q. Did you ever have any discussions at all
14 with Jimmy concerning this DVR?

15 MS. DALY: Objection to form.

16 THE WITNESS: Indirectly, yes.

17 MR. WIGGINS: Okay.

18 THE WITNESS: On January 26th,
19 January 27th, and let's include January 30th, the
20 following Monday, Detective House, Special Agent
21 Royal, and I had multiple conversations regarding the
22 surveillance system and the cameras. We all thought
23 -- and I thought because they told me -- but we all
24 thought ---

25 Q. (Mr. Wiggins) --- Well, wait a minute.

1 Be specific in ---

2 MS. DALY: --- No. Let him finish
3 his answer.

4 MR. WIGGINS: Well, when he's
5 talking about they, I just want to be sure who they
6 are.

7 THE WITNESS: Okay. Both Special
8 Agent Royal and Detective House told me individually
9 and I believe jointly that the video files for the
10 camera surveillance system were on the computer for
11 which -- or from which Detective House had removed
12 the hard drives and subsequently vouchered over to
13 me. I never in my mind imagined that the item that I
14 have identified in Exhibit 100 and 101 was a DVR.

15 MR. WIGGINS: Okay.

16 Q. (Mr. Wiggins) And when did you first
17 learn that it was the DVR?

18 A. I'm going to say January or February 2013.

19 Q. Okay.

20 A. I don't remember the -- the specific date.

21 Q. Okay.

22 A. But it was well after -- it was after we
23 were at the scene in Fayetteville in November.

24 Q. You read Jimmy Diamantopoulos' deposition.

25 A. Yes, sir.

1 Q. And do you recall what he said in the
2 deposition about this DVR and a conversation with you
3 concerning the DVR?

4 A. I'm afraid you've got to be more specific.

5 Q. Okay. Do you recall him saying that on
6 January the 26th he received a phone call from you
7 asking that you meet him at the Miami Subs
8 restaurant?

9 A. Okay, that's correct.

10 Q. And did you do that? Did you actually
11 call him on -- do you recall him -- calling him on
12 that morning?

13 A. Okay, if you remember, I testified earlier
14 that on my way to Fayetteville on January 26th I
15 called him. I had left him a voice mail on the 25th.
16 He did not call me back. I called him on the 26th on
17 my way to Fayetteville. And we did not discuss the
18 DVR in that conversation. That was the conversation
19 where we -- where I confirmed that he could meet me
20 at Miami Subs to let me in.

21 Q. Okay. Now, on Friday, January the 27th,
22 did you call Jimmy at 9:22 a.m.?

23 A. I very well may have but I do not recall.

24 Q. Okay. And what is your telephone number?

25 A. 7 -- well, the number that I would have

1 used to call him on would have been 704-284-2658.

2 Q. Okay. Do you know whose number
3 704-677-2787 would be?

4 A. Read that off to me again.

5 Q. Okay. 704-677-2787. And it says ---

6 A. --- May I confer with Ms. Daly?

7 Q. Sure.

8 MS. DALY: Can we go off record?

9 MR. WIGGINS: Off record.

10 (1:01-1:01 p.m. - recess)

11 THE WITNESS: That is the phone
12 number of Mike Austin of Nationwide Insurance.

13 Q. (Mr. Wiggins) And is he -- does he live
14 in Mooresville, North Carolina?

15 A. I thought he lived in Huntersville or the
16 Cornelius area. But he lives approximately 25 miles
17 north of Charlotte. That would include Huntersville,
18 Cornelius, Davidson, and Mooresville.

19 Q. Do you have any idea why he would have
20 been calling Jimmy Diamantopoulos on January 27th,
21 2012?

22 A. Yes, sir. That is the date that Mike
23 Austin came to the Miami Subs fire scene. I do not
24 know the substance of the conversation. But he would
25 have arrived in Fayetteville at approximately 10:30.

1 And it could have been a -- well, I -- I'm not going
2 to speculate on the conversation.

3 Q. Okay. Were you there when he arrived?

4 A. I was.

5 Q. And the purpose of his coming to the
6 restaurant was to consult with you concerning your
7 investigation.

8 A. No, sir.

9 Q. It was not that purpose. What was the
10 purpose?

11 A. To meet with Mr. -- with Jimmy.

12 Q. Okay, and did you meet with Jimmy along
13 with Mike Austin?

14 A. I met with Jimmy individually. I did not
15 meet with Jimmy and Mike.

16 Q. Okay. Did you ever learn what the subject
17 of the conversation was between Mike and Jimmy?

18 A. I probably know what one subject was.

19 Q. Okay, and what was that?

20 A. That the -- the case was being transferred
21 from Mike Austin to Mike -- to -- one moment, please.

22 Q. Jezierski?

23 A. Yes, sir. Thank you. Mike -- but I was
24 trying to remember his first name. Is it Mike?

25 Q. Yeah, Mike Jezierski.

1 A. Okay. Mike -- it was -- Mike Austin -- on
2 Thursday the file was transferred from Zak Gurley to
3 Mike Austin.

4 Q. Okay.

5 A. On late Thursday -- on Thursday morning it
6 was transferred. On late Thursday afternoon or
7 Friday morning it was determined that it was going to
8 be transferred to Mike Jezierski. And Mike Austin
9 decided to drive to Fayetteville to tell Jimmy that,
10 as opposed to telling him on the phone, drive to
11 Fayetteville and tell him in person.

12 Q. And what time of the day on the 27th did
13 he arrive?

14 A. Approximately 10:30.

15 Q. Okay, and was Jimmy there then or did he
16 come later?

17 A. I believe he was there.

18 Q. Okay, and was anyone else there besides
19 you and Jimmy when he arrived?

20 A. Special Agent Royal would have been there.
21 And I believe representatives of the agent, the
22 insurance agent arrived before Mr. Austin. I don't
23 recall if Mr. Takis was there. I think that's it.

24 Q. Okay. And in any event, going back to the
25 deposition of Jimmy Diamantopoulos, he said he

1 recalled on the morning of the 27th that you came to
2 him with the DVR in your hands and that you asked him
3 what it was. Did that ever happen?

4 A. No, sir.

5 Q. Did you ever have any conversation, to
6 your recollection, with Jimmy concerning that DVR?

7 A. No, sir.

8 Q. Did you ever hear Jimmy call and talk to
9 Bob Dowlat about downloading any information from the
10 DVR surveillance system?

11 A. No, sir.

12 Q. Did Jimmy ever give you the telephone
13 number of Bob Dowlat whom he said you could call to
14 get information on how to download the video system?

15 A. No, sir.

16 Q. Did you ever have a convers -- did you
17 ever hear Jimmy in a conversation with Bob Dowlat
18 asking him about downloading, again, the information
19 from the DVR system?

20 A. No, sir.

21 Q. You have read the deposition of Jimmy
22 Diamantopoulos and you recall that his testimony was
23 in opposition to what you've just testified to.

24 A. Yes, sir.

25 MS. DALY: Objection to form.

1 THE WITNESS: Yes, sir.

2 Q. (Mr. Wiggins) Is that correct?

3 A. Yes, sir.

4 Q. But then, again, you're telling me today
5 that that conversation never occurred.

6 A. Yes, sir, I am.

7 Q. When you were at the restaurant, Mr. Lacy,
8 did you see the cameras that were positioned
9 throughout the interior and exterior of the Miami
10 Subs restaurant?

11 A. I did.

12 Q. And did you count them?

13 A. I don't ever believe I counted all of
14 them, no, sir.

15 Q. Okay. Was there one in the area where the
16 -- what you and I have previously identified as
17 drive-thru window number one?

18 A. I never saw one. So I don't know for
19 sure.

20 Q. Okay. On the 27th of January when you
21 were there -- and we're -- I'm jumping back again
22 now. When you -- we talked about it this morning
23 when you initially walked through the restaurant you
24 did that without a camera, without making any notes.
25 Is that correct?

1 A. Yes, sir.

2 Q. Then you came back. And then what did you
3 do?

4 A. Photographed it.

5 Q. Okay, and those were the photographs that
6 you've identified earlier that are attached to your
7 deposi -- to your federal report -- or some of those
8 are attached to your federal report.

9 A. Okay, those -- the photographs that I have
10 identified both in my May 2012 report to Nationwide
11 and in my federal report contain photographs taken on
12 January 26, January 27th, and possibly January 30th.

13 Q. Okay.

14 A. So I don't want to limit it to just the
15 26th.

16 Q. Okay.

17 A. All three dates.

18 Q. All right, but you did take some of the
19 photographs on January the 26th.

20 A. Without -- I probably took the majority on
21 the 26th.

22 Q. Okay, and some of those photographs have
23 been attached to your -- either your letter of May
24 2012 or your federal report in 2013.

25 A. Yes, sir.

1 Q. After you photographed the restaurant,
2 then what did you do?

3 A. I believe that's when I started taking
4 measurements of the seating area and the game room,
5 working from the front toward the back.

6 Q. Okay.

7 A. And, yeah, we went through the cooking
8 area, the areas containing drive-thru windows one and
9 two, and the back hall, measured that freezer that
10 was kind of like an offset of the building, and then
11 began looking at fire patterns.

12 Q. Okay, and when did you start -- what time
13 of day did you start looking at the fire patterns?

14 A. I don't remember, sir.

15 Q. Okay. And again referring back to Jimmy
16 Diaman -- the deposition of Jimmy Diamantopoulos, as
17 I recall his testimony, Mr. Lacy, he said that on the
18 26th of January, that late in the afternoon that he
19 was there with you and that you were -- was walking
20 through the restaurant and that you showed a -- shown
21 a -- had a flashlight and you showed a flashlight on
22 the circuit board at the location where Agent Royal
23 had placed it. Do you recall him saying that?

24 A. No, sir.

25 Q. Okay. Did you -- do you recall that being

1 in his deposition?

2 A. Not off the top of my head.

3 Q. Okay.

4 A. No, sir.

5 Q. Did that ever happen?

6 A. No, sir.

7 Q. Did you ever walk through the restaurant
8 with a flashlight with Jimmy?

9 A. I'm sure I did.

10 Q. Okay, but you have no recollection of
11 having looked at a circuit board that was lying
12 against the wall below the window of takeout window
13 number one?

14 A. No, sir. I remember the circuit board as
15 already being on a counter top.

16 Q. On -- when you completed your -- when did
17 you -- what did you complete on the first day that
18 you were there?

19 Again, I'm having it -- relating it to
20 your origin-and-cause investigation.

21 A. Some interviews ---

22 MS. DALY: --- Objection to form.
23 You can answer.

24 THE WITNESS: Some interviews, most
25 of the photography, most of the diagraming was done

1 on the 26th, most if not all, and some of the
2 examination of the fire patterns.

3 MR. WIGGINS: Okay.

4 Q. (Mr. Wiggins) And we've talked some about
5 the fire -- somewhat about fire patterns earlier.
6 But in an origin-and-cause investigation you develop
7 hypotheses, do you not?

8 A. Yes, sir.

9 Q. And is fire patterns a hypothesis that you
10 look at or you develop along in your -- with your
11 investigation?

12 MS. DALY: Objection to form of the
13 question.

14 THE WITNESS: I use fire pat -- fire
15 patterns in my evaluation of the fire patterns to
16 assist in the development of the hypothesis but the
17 fire patterns are not the hypothesis itself.

18 MR. WIGGINS: Okay.

19 Q. (Mr. Wiggins) They aid -- they sometimes
20 can aid the hypothesis, can they not?

21 A. Yes, sir.

22 Q. And you realize and understand that
23 sometimes fire patterns can fool an investigator, can
24 they not?

25 MS. DALY: Objection to form.

1 Q. (Mr. Wiggins) As you've experienced in
2 your career.

3 MS. DALY: Objection to form.

4 THE WITNESS: Sometimes, yes.

5 MR. WIGGINS: Okay.

6 Q. (Mr. Wiggins) And what time did you leave
7 the restaurant on the 26th?

8 A. Approximately six p.m.

9 Q. This would be in January, so it would have
10 been getting dark at six p.m.

11 A. It was -- it was dark.

12 Q. It was dark.

13 And you came back on the following day?

14 A. Yes, sir.

15 Q. And did you notify Nationwide that you
16 were going to go back to the restaurant on the
17 subsequent day of January the 27th?

18 A. I don't remember.

19 Q. Okay. Did you -- what -- typically when
20 you are given an assignment by in this case
21 Nationwide, do you quote a budget for an O&E -- a --
22 an origin-and-cause investigation?

23 A. No, sir.

24 Q. Would you have been authorized to go back
25 on a second day without notifying Nationwide?

1 A. Yes, sir.

2 Q. As part of the scope of your
3 investigation?

4 A. Yes, sir.

5 Q. And you did return on the 27th of January.

6 A. I'm sorry. I did not understand.

7 Q. You under -- you returned on the 27th of
8 January.

9 A. Yes, sir, I did.

10 Q. And, again, what time did you arrive on
11 the 27th?

12 A. I think it was about 10 o'clock.

13 Q. Okay, and Jimmy was there to let you in?

14 A. He was.

15 Q. Had you called him and asked him to do
16 that?

17 A. No, sir. I think we reached that
18 agreement on the afternoon of the 26th before I left.

19 Q. Okay, and was there anyone else at the
20 restaurant when you arrived about 10 o'clock on the
21 27th?

22 A. I think Special Agent Royal was already
23 there.

24 Q. Okay, and was he doing any work that you
25 could observe when you got there?

1 A. No, sir.

2 Q. Had you previously arranged for Detective
3 Royal to be present on the 27th?

4 A. Not specifically.

5 Q. Okay. He just happened to show back up on
6 that date?

7 A. When I spoke to him on the 26th, he said
8 he wanted to come back out to the fire scene and I
9 said fine. I don't know that we had another
10 conversation about the 27th.

11 Q. Okay. At that point in time Agent Royal
12 -- SBI Agent Royal had determined the fire to be one
13 undetermined.

14 A. Yes, sir.

15 Q. And that had also been the conclusion that
16 had been assigned by the Fayetteville police
17 department -- I mean, the Fayetteville fire
18 department.

19 A. I don't know that they had made a
20 determination on the 27th.

21 Q. Okay. At some point you became aware that
22 they did, did you not?

23 MS. DALY: Objection to form.

24 THE WITNESS: Only by review of the
25 fire report.

1 MR. WIGGINS: Okay.

2 Q. (Mr. Wiggins) Did you review the fire
3 report?

4 A. I did.

5 Q. And did it determine the fire at the Miami
6 Subs restaurant to be undetermined?

7 A. That's what the fire report shows, yes,
8 sir.

9 Q. Okay, and did you look at the police
10 report filed by Detective House?

11 A. Yes, sir.

12 Q. And did it also classify the fire as being
13 undetermined?

14 A. I don't remember a specific sentence, but
15 in a general sense, yes.

16 Q. Now, when you went back on the 27th, and
17 with Detective -- SBI Agent Royal being present, did
18 you and he jointly continue the investigation?

19 A. We did.

20 Q. And what did you do on that day?

21 A. I spent most of the 27th either
22 interviewing employees or working in the area of
23 drive-thru window number one.

24 Q. Okay. Now, I have your notes that we have
25 identified early on, and I'm not going to mark these

1 because I don't have them -- I can't mark them as an
2 exhibit because I can't let them go right now. But
3 you have notes in here of their interviews, do you
4 not?

5 A. Yes, sir.

6 Q. Look at the -- do you have this before you
7 here, the one with Jimmy Diamantopoulos at the top?

8 A. Yes, sir, I do.

9 Q. Okay, and what is -- what was the day that
10 you wrote this?

11 A. January 26th.

12 Q. Okay. I'm sorry but I -- is it on here
13 and I'm ---

14 A. --- No, sir, it's not.

15 Q. Okay. I'm sorry. I didn't -- probably
16 didn't see it.

17 The managers you have identified on here
18 as being Tori Moon, James McDonald, and Joel
19 somebody?

20 A. Yes, sir.

21 Q. You interviewed Tori Moon?

22 A. I did.

23 Q. And did you interview James McDonald?

24 A. I do not believe so.

25 Q. Okay. Then on -- the next one we have is

1 Lewis Hardin Construction. Was he there on the 26th
2 or 27th of January? Is it noted on your report here?

3 A. His presence on the fire scene is not
4 noted. The notation in my notes is because he
5 renovated the building in 2010.

6 Q. Okay. Do you know why he was there?

7 A. Why he was there when?

8 Q. I'm sorry. Maybe I'm misunderstanding.

9 Is this the result of an interview that
10 you had with Lewis Hardin?

11 A. No, sir. This is page two of the
12 interview notes of Jimmy.

13 Q. I'm sorry. Okay, he told you that Lewis
14 Hardin had renovated the restaurant in 2010.

15 A. '10.

16 Q. And he gave you the cost of that, I take
17 it, here?

18 A. Yes, sir.

19 Q. And there's a claim filed with State Farm.

20 A. Yes, sir.

21 Q. And some other miscellaneous information
22 that you obtained from him on that date. Correct?

23 A. Yes, sir.

24 Q. Okay. And then the next one you have is
25 John Pavlikianidis -- is a guess. Is that correct?

1 A. John. His last name starts with a P.

2 Q. Okay. And there's no interview notes
3 here. He was the maintenance man, you've got here.

4 A. Yes, sir.

5 Q. And you conducted no interview with him.

6 A. No, sir.

7 Q. And then you got Mrs. Moon next, Victoria
8 Moon.

9 A. Yes, sir.

10 Q. You did interview her.

11 A. I did.

12 Q. And is this the notes from your interview
13 with her?

14 A. It is.

15 Q. And was this done on the 27th of ---

16 A. --- 20 -- 26th.

17 Q. 26th of January?

18 A. Yes, sir.

19 Q. She said that she worked for Miami Subs
20 before. When she said before, was that -- means
21 prior to a reopening in 2011?

22 A. She worked for Miami Subs in Florida
23 before she moved to North Carolina. She worked at
24 Miami Subs before the vandalism claim. She worked at
25 other stores during the renovation and then worked at

1 Miami Subs after it reopened.

2 Q. Okay. And she gave you a synopsis of the
3 damage that had been sustained by the restaurant as a
4 result of the vandalism claim that was made back in
5 2010?

6 A. Yes, sir.

7 Q. She said business was good. She gave you
8 the deposits, average deposits. Is that what she
9 gave you there?

10 A. Yes, sir.

11 Q. And said she had no personal problems.

12 A. No, sir, that's not what she said.

13 Q. I'm sorry.

14 A. No personnel problems.

15 Q. I'm sorry. No personnel problems. I'm
16 sorry -- and then the date. And then next is the
17 hours of operation when she operated the restaurant
18 from 00 -- from, I guess, midnight to four o'clock
19 a.m.?

20 A. That is a reference to when they have law
21 enforcement officers on the property.

22 Q. Okay. Is the next page continuing your
23 interview with Mrs. Moon?

24 A. It is.

25 Q. And did you talk to her about the

1 surveillance system -- the monitoring system for the
2 surveillance system?

3 A. I did. And I believe that comes up on the
4 27th.

5 Q. Okay. Was that a separate interview with
6 Mrs. Moon?

7 A. Yes, sir.

8 Q. And is it in -- contained in your reports
9 here, too?

10 A. Yes, sir, it is.

11 (Witness examined document)

12 A. Go to a page that has 10-30-11 across the
13 top.

14 Q. Okay, I got it.

15 A. That is the continuation of my interview
16 with Tori.

17 Q. Okay.

18 A. And this -- this part of the interview
19 occurs on the 27th.

20 Q. Okay, and I see the note that she made
21 here. The only thing that is different -- I -- the
22 only thing different is that cams were off.

23 A. Yes, sir.

24 Q. Was she talking about the monitoring
25 systems?

1 MS. DALY: Objection to form.

2 MR. WIGGINS: If you know.

3 THE WITNESS: Tori and others,
4 meaning employees, Raven, Joseph, Duenes, all made
5 the observation the cameras were off.

6 MR. WIGGINS: Okay.

7 THE WITNESS: In reading transcripts
8 in the intervening months I've come to understand
9 that maybe the cameras were on but the monitor in the
10 office was off.

11 MR. WIGGINS: Okay.

12 THE WITNESS: But in January of
13 2012, if I wrote cams, they told me cam -- and that's
14 my abbreviation.

15 MR. WIGGINS: I understand.

16 THE WITNESS: They told me cameras,
17 because, now, I -- if -- if they had said monitors, I
18 would have written monitors or mons -- m-o-n-s.

19 MR. WIGGINS: Right.

20 THE WITNESS: Because I'll
21 abbreviate at the drop of a hat. But if they said --
22 if I wrote cams, they said cameras.

23 MR. WIGGINS: Okay.

24 Q. (Mr. Wiggins) And -- but you did come to
25 understand that there were two monitors in the

1 restaurant, did you not?

2 MS. DALY: Objection to form.

3 MR. WIGGINS: Well, let me strike
4 that.

5 Q. (Mr. Wiggins) Did you ever see the two
6 monitors in the restaurant?

7 A. In the restaurant or in the office?

8 Q. Well, I think one was in the restaurant
9 and one was in the office.

10 A. I was aware of a monitor in the office.

11 Q. Okay.

12 A. I was not aware of a monitor in the
13 restaurant.

14 Q. Okay. So that day -- that is, the 27th --
15 you spent most of the day, then, interviewing various
16 persons. Is that....

17 A. Like I say, most of the day. But I spent
18 some time.

19 Q. Okay, and those persons that you
20 interviewed was -- Paul McKinnon was one, was he not?

21 A. I don't recall interviewing Mr. McKinnon.

22 Q. Okay. He picked up -- he's the guy that
23 picked up the trash.

24 A. Yes, sir.

25 Are you looking at a page with his name

1 across the top?

2 Q. I am. I am.

3 A. That is a continuation of my interview of
4 Tori.

5 Q. Okay.

6 A. So I -- no, I don't think I've talked to
7 him.

8 No, this is a -- this is a continuation of
9 the interview with Tori.

10 Q. Okay. And you asked -- you were asking
11 her about the finances of the restaurant, were you
12 not, in the ---

13 A. --- I think I was asking her more about
14 procedures. I mean, obviously I did, because
15 somewhere -- I mean -- well, I've asked her about
16 both, how things -- who did what, how things were
17 handled. And dollar amounts did come up, yes.

18 Q. Did you ever talk to Jimmy about any of
19 these issues that you discussed with Mrs. Moon?

20 A. No, sir.

21 Q. And, then, the last page of your interview
22 of Mrs. Moon, it says Jimmy does not always what?

23 A. Arm.

24 Q. System in a.m.?

25 A. Yes, sir.

1 Q. Okay, and do you know what she had
2 reference to when she was speaking about that?

3 A. Yes, sir. Let me look back at one other
4 thing before I answer.

5 (Witness examined document)

6 A. Tori opens on Saturday and Sunday. She
7 works Monday to Thursday nights, off on Friday, opens
8 on Saturday and Sunday. When she comes in on
9 Saturday and Sunday the alarm system is typically --
10 let me rephrase that. She found the alarm system
11 typically off, meaning not armed.

12 And in response to a question she said
13 when Jimmy comes in and gets the deposit and leaves
14 he does not activate the system.

15 Q. That's in the a.m.

16 A. Yes, sir. So that's my statement there.
17 Jimmy does not always arm system in a.m.

18 Q. Okay. And, then, the notation just below
19 that says wiring for old equipment was present.

20 A. Yes, sir.

21 Q. What was that in reference to?

22 A. Video surveillance and alarm system.

23 Q. Okay. And Mrs. Moon told you that.

24 A. Yes, sir.

25 Q. There has been some talk and some

1 testimony by other witnesses, Mr. Lacy, that said the
2 -- there was a plug in the office unplug -- un --
3 pulled out, that was not plugged in for an old video
4 system. Do you recall that?

5 A. I do not recall seeing a cable that was
6 not plugged in at the scene. I do recall
7 observations and statements made in April of this
8 year that the old system was not plugged in.

9 Q. And, then, the statement just below that
10 was no new equipment at first window. What was that
11 in reference to?

12 A. No new equipment was installed at the
13 first drive-thru window during the renovations.

14 Q. Okay, and did Mrs. Moon tell you that?

15 A. Yes, sir.

16 Q. And did she not mention to you that there
17 was this Ion IQ system present at that window which
18 was electrically operated?

19 A. No, sir, she did not.

20 Q. Did you ask her about that?

21 A. No, sir.

22 Q. The next interview you had was with Joseph
23 Owens. Would that be ---

24 A. --- No, sir.

25 Q. --- What I'm looking at correctly?

1 A. Well, that's not the next interview. But
2 the last page of my notes is an interview of Joseph
3 Brandon Duenes -- D-u-e-n-e-s.

4 Q. Okay, and this was also on the 27th of
5 January?

6 A. Yes, sir.

7 Q. He was the assistant manager?

8 A. Yes, sir.

9 Q. He talked about financial issues, behind
10 on payroll. Do you recall that?

11 A. Yes, sir.

12 Q. Owes four checks as of 1-30-12?

13 A. Yes, sir.

14 Q. Normal payday is Monday, did not pay him
15 on January 23rd?

16 A. Yes, sir.

17 Q. He has check on 1-16-12, didn't cash it.
18 Is that what he says?

19 A. No. That is my notes of Jimmy told him
20 not to cash it.

21 Q. Okay. Paid \$600 to produce man, and then
22 under that it has got approximately \$3,100. What
23 does that mean? What is that in reference to?

24 A. The cost of the delivery was \$3,100.
25 Jimmy had \$2,500 cash. Mr. Duenes paid -- gave Jimmy

1 600. So Jimmy -- Mr. Duenes -- Duenes' 600 and
2 Jimmy's 2,500 totals 3,100, which was paid to the
3 produce man.

4 Q. Okay. And then he goes on to say that
5 Friday before the fire that he paid, cut back on,
6 dumpster removed two months ago.

7 A. Can ---

8 Q. --- That ---

9 A. --- Can I ---

10 Q. --- That was told ---

11 A. --- Can I explain that?

12 Q. Sure.

13 A. On the Friday before the fire the natural
14 gas service was cut off for nonpayment of a bill.
15 Mr. D. -- or Jimmy ran to Natural -- Piedmont Natural
16 Gas, paid it. They came back out and cut it back on.
17 That's all the deals with the natural gas service.

18 Q. Okay.

19 A. A separate issue, part of the same
20 conversation, the dumpster had been removed two
21 months ago.

22 Now, if you will go back a couple of pages
23 in my notes to where you saw Mr. McKinnon's name --
24 well, it's in my notes of the interview of Tori.

25 Q. Mr. McKinnon's name. I see it.

1 A. All right, hang on. You -- you got to it
2 faster than I did.

3 Mr. McKinnon was being paid by cash by
4 Jimmy to pick up the trash. And that's where you see
5 the note picked up trash at 0700. And that happened
6 to be on the day of the fire.

7 Q. Okay. That is, Paul McKinnon that picked
8 up the trash at the restaurant at seven o'clock on
9 the day of the fire.

10 A. Yes, sir. And then that's his phone
11 number.

12 Q. Did he tell you how long he had been doing
13 that?

14 A. Several months.

15 Q. In your conversations with Jimmy did you
16 discuss with Jimmy his financial situation ---

17 A. --- Not any ---

18 Q. --- As he observed it?

19 A. No, sir.

20 Q. And did you ever ask Jimmy anything about
21 his finances directly?

22 A. I did not.

23 Q. Did you ever learn that Jimmy had paid to
24 Riddle, Joe Riddle, his lessor, \$6,000 the night
25 before the fire?

1 MS. DALY: Objection.

2 THE WITNESS: I think I became aware
3 of that when I started looking at transcripts.

4 MR. WIGGINS: Okay.

5 Q. (Mr. Wiggins) But not before?

6 A. And I think the easiest way to identi --
7 to answer the question is I learned about it in 2013,
8 but not in 2012.

9 Q. Okay, and did you also learn in 2013 that
10 the week before the fire that he had paid to Mr.
11 Riddle \$6,000 towards his taxes for 2011?

12 A. I remember seeing that in the transcript.

13 Q. The hard drives that you recovered from
14 Detective House, you took possession of those.

15 A. Yes, sir.

16 Q. And you took those back to Char -- to your
17 office in Charlotte.

18 A. Yes, sir.

19 Q. And you subsequently had discussions with
20 Nationwide representatives in reference to those hard
21 drives, did you not?

22 A. I did.

23 Q. And you subsequently downloaded the
24 information on those hard drives.

25 MS. DALY: Objection to form.

1 THE WITNESS: I did not.

2 Q. (Mr. Wiggins) Did you ---

3 A. --- I -- I took them to a third-party
4 vendor, instructed him to copy the hard drives to an
5 external hard drive and examine the external hard
6 drive, examine the copy and tell me what was on it.

7 Q. Okay, and did that actually happen?

8 A. It did.

9 Q. And you obtained permission from
10 Nationwide to pay for getting that done?

11 A. Actually Nationwide paid him.

12 Q. Directly?

13 A. I -- he -- the vendor forwarded the
14 invoice to me. I forwarded the invoice to Mike
15 Jezierski.

16 Q. Okay, and did the downloaded information
17 -- was that furnished to your office?

18 A. It was.

19 Q. It was?

20 A. Yes, sir.

21 Q. And did you then download it to see what
22 was on the hard drive?

23 MS. DALY: Objection to form.

24 Q. (Mr. Wiggins) What was downloaded -- I'm
25 sorry. I misstated that -- what was downloaded from

1 the hard drive.

2 MS. DALY: Objection to form.

3 THE WITNESS: The two hard drives
4 turned out to be identical. One was a mirror image
5 of the other.

6 Q. (Mr. Wiggins) Would it have been a backup
7 ---

8 A. --- Yes, sir.

9 Q. --- To the other?

10 A. Yes, sir. I instructed the vendor to copy
11 them to the hard drive, to the external hard drive.
12 I did plug the external hard drive into my laptop and
13 I looked at the files. I did not look at the files
14 on the hard drives removed from the computers. I
15 looked at the files on the external hard drive which
16 was the copy.

17 Q. Okay, and this would have been information
18 from the POS system in the restaurant.

19 A. Yes, sir.

20 Q. And that's what you determined it to be.

21 A. Yes, sir.

22 Q. And it was a recording or a recordation of
23 the monies that went through the cash register
24 through the POS system?

25 A. Yes, sir.

1 Q. And did you furnish that information to
2 Mike Jezierski?

3 A. What I told Mike was there were no files
4 on the hard drive of investigative value to me.

5 Q. Okay.

6 A. And -- and -- and I specifically said no
7 video files. And I said there's nothing on there of
8 value to me.

9 Q. Okay, and did you furnish the other
10 information to Mike Jezierski that you had downloaded
11 from that hard drive?

12 MS. DALY: Objection to form.

13 THE WITNESS: I'm not real sure I
14 understand what you mean by furnished other
15 information.

16 Q. (Mr. Wiggins) Well, the information that
17 was then -- that you looked at, that you reviewed,
18 did you ever furnish that on to Jezierski?

19 A. The only thing I furnished to Mr.
20 Jezierski was the oral explanation that I just
21 summarized. It's POS files, nothing of any value.

22 Q. Okay. Did you tell him that it was
23 information that had to do with the financial monies
24 that came into the restaurant through the POS system?

25 A. I think I said POS. I don't know that I

1 said financial records of monies. I just think I
2 said it's POS system files.

3 Q. Okay, and what did you do with the
4 information after you looked at it?

5 A. Umm, nothing.

6 Q. And you still had it in your office ---

7 A. --- Well, it's -- when it's in my office,
8 it's in evidence storage. And it's still there today
9 as far as I know.

10 Q. Okay. At Donan.

11 A. Let me qualify that. At some point we
12 provided -- I shipped a -- I had the external hard
13 drive copied and shipped to Scott Brown. And I
14 forget what Mr. Brown told me he was going to do with
15 it but I think it was to provide it to Jimmy.

16 Q. Okay.

17 A. Then we received a request from Womble
18 Carlyle to return the hard drives to you.

19 Q. And that was in 2013?

20 A. That was within the last month.

21 Q. Okay.

22 A. And maybe like within the last two or
23 three weeks.

24 Q. All right.

25 A. I can't remember the exact date. I know

1 where there's an e-mail that would tell me they have
2 been shipped. But I remember that it was your law
3 firm because we were originally given a P.O. box and
4 I said UPS won't go to a P.O. box, I need a street
5 address, and an attorney in this firm got me a street
6 address.

7 Q. Okay.

8 A. So the -- the actual hard drives that were
9 taken by Detective House, vouchered over to me, are
10 no longer in my possession.

11 Q. Okay. Now, you wound up with your
12 interviews on the 27th of January?

13 A. Yes, sir.

14 Q. And did you form any conclusions or form
15 any hypotheses as to how this fire had occurred as of
16 that time?

17 A. No, sir.

18 Q. Did you have any thoughts about what was
19 the cause and origin of this fire at that time?

20 A. On the 26th and 27th -- I can combine the
21 two dates -- I was comfortable with the origin.
22 Sometime on the 27th -- and I cannot be more
23 specific. I don't recall what time exactly -- I
24 called Henry Martini, who's an electrical engineer
25 with Donan, and as is typical of my conversations

1 with Henry, I probably said what are you doing on
2 Monday. And he probably replied nothing. I said can
3 you meet me in Fayetteville.

4 Q. Okay. He is an employee of Donan, is he
5 not?

6 A. He is.

7 Q. And he is an electrical engineer and is
8 employed by Donan.

9 A. He is.

10 Q. And he's a full-time employee of Donan --
11 at Donan.

12 A. He is.

13 Q. He is not independent.

14 A. Correct.

15 Q. And you called him and asked him to meet
16 you at the restaurant on Monday.

17 A. Yes, sir.

18 Q. And do you typically -- when you have need
19 for an engineer or someone who has greater expertise
20 in a particular area than you do, do you typically
21 try to do -- use someone in-house?

22 MS. DALY: Objection to form.

23 THE WITNESS: No, sir. I use
24 someone I'm comfortable with.

25 MR. WIGGINS: Okay.

1 Q. (Mr. Wiggins) And as far as engineers are
2 concerned, in this instance did you feel comfortable
3 in using Mr. Martini rather than someone independent
4 and outside of Donan?

5 A. I did ---

6 MS. DALY: --- Objection to form.

7 THE WITNESS: I did.

8 MR. WIGGINS: You did.

9 THE WITNESS: And do.

10 MR. WIGGINS: And do.

11 Q. (Mr. Wiggins) And upon reflection would
12 it not have been better to have gotten an independent
13 engineer to assist you in your -- in this
14 investigation?

15 MS. DALY: Objection.

16 THE WITNESS: I saw and even today
17 see no reason to hire any electrical engineer other
18 than Henry Martini.

19 MR. WIGGINS: Okay.

20 Q. (Mr. Wiggins) Henry had only been --
21 Henry Martini had only been at the firm for a short
22 time prior to this fire, had he not?

23 A. 17, 18 months.

24 Q. Okay, yeah. And you had been there for

25 ---

1 A. --- Well ---

2 Q. --- Several years.

3 A. Two and a half years.

4 Q. Two and a half years.

5 A. So he's almost a year and a half. I'm two
6 -- so I've been there a year longer, yeah.

7 Q. Okay.

8 A. Yeah, okay.

9 Q. And -- but you were not in the same area
10 as he was with the company.

11 A. I ---

12 MS. DALY: --- Objection to form.

13 THE WITNESS: I work out of
14 Charlotte and he works out of Green -- Charlotte,
15 North Carolina. He works out of Greenville, South
16 Carolina.

17 MR. WIGGINS: Okay.

18 Q. (Mr. Wiggins) And -- go ahead.

19 A. And so you understand, that is within the
20 same Donan region. Geographically Donan is divided
21 into regions. South Carolina, North Carolina, and
22 Virginia is one region.

23 Q. Okay.

24 A. So we were within the same Donan group.

25 Q. Do you have electrical engineers on the --

1 on your staff in Charlotte?

2 A. No, sir.

3 Q. Are all the electrical engineers with
4 Donan in Greenville, South Carolina?

5 A. No, sir.

6 Q. Where are they?

7 A. There's one in Mocksville, one -- well,
8 there is a position in Nashville. That position is
9 currently -- well -- well, let's just say there's a
10 position in Nashville. It was vacant. I can't tell
11 you if it was vacant in January 2012.

12 There's an electrical engineer in
13 Columbus, Ohio. There's an electrical engineer in
14 Louisville, Kentucky. There is an electrical
15 engineer in Cincinnati. There is an electrical
16 engineer in South Bend, Indiana. There's an
17 electrical engineer in one of the Illinois offices.
18 Right off the top of my head I can't remember which
19 one.

20 Q. Had you used other engineers from Donan
21 other than Henry Martini?

22 A. No, sir.

23 Q. You asked Henry to meet you there on
24 Monday.

25 A. Yes, sir.

1 Q. And he did meet you there on Monday.

2 A. He did.

3 Q. And when I was talking to him yesterday, I
4 thought you all were in the same office in Charlotte.
5 But that's not true, is it?

6 A. No, sir.

7 Q. I was mistaken if I assumed that.

8 So you -- he drove in from Greenville.
9 You drove in from Charlotte.

10 A. Yes, sir.

11 Q. And met at the restaurant. Did you all
12 have any other conversations about this fire other
13 than to just ask -- asking him to meet you there on
14 Monday?

15 A. No, sir.

16 Q. Did you -- you did not give him any
17 thoughts that you had as to the cause of this fire.

18 A. No, sir.

19 Q. You told him that you wanted him to be
20 present to rule out any electrical issues or problems
21 that might be a contributing factor to this fire.

22 A. No, sir.

23 Q. You didn't tell him that.

24 A. No, sir.

25 Q. What did you tell him?

1 A. Go back to -- and I know this sounds
2 funny. But I probably prefaced the whole
3 conversation -- I don't even identify myself. I dial
4 his phone number. He answers. I say what are you
5 doing on Monday. He recognizes my phone number. He
6 recognizes my voice. He obviously answered nothing.
7 I probably told him I'm at a restaurant fire in
8 Fayetteville. I need you to look at the electrical
9 service.

10 Q. Okay, and he did. He came and did that.

11 A. Yes, sir.

12 Q. On Monday.

13 A. And may I continue?

14 Q. Sure.

15 A. I probably never told him Miami Subs,
16 meaning the name. I probably never mentioned City
17 Grill Hospitality. I probably never mentioned Jimmy.
18 I know I didn't mention his last name. I probably,
19 as is the pattern, e-mailed him over the weekend what
20 we call our field pages that had all that
21 information. It had the project number, the date of
22 loss. I e-mailed it to him over the weekend so when
23 he gets ready to leave his house on Monday morning he
24 has got an address of 552 North McPherson Church
25 Road.

1 Q. Okay.

2 A. And that's all I -- and -- and -- and you
3 have to understand. This is our pattern.

4 Q. Did you get permission from Mike Jezierski
5 to obtain the services of Mr. Martini?

6 A. I believe I ran it by Mike Austin, because
7 by then I had not spoken to Mike Jezierski, and got
8 authorization.

9 Q. Okay, and did he ask you for a budget for
10 that cost?

11 A. No, sir.

12 Q. In any event, on Monday you met again at
13 the restaurant. What time did you get there?

14 A. Nine to 10 a.m.

15 Q. And was he there ---

16 A. --- Probably 10, because Henry had a
17 further drive than I did. So....

18 Q. And when you got there was there anyone
19 else at the restaurant besides you and Mr. Martini?

20 A. Not that I recall.

21 Q. And was -- did -- how did you get into the
22 restaurant?

23 A. I had made arrangements with Jimmy to meet
24 us.

25 Q. Okay, and he did meet you there on the ---

1 A. --- He did.

2 Q. And was there anyone else who came to the
3 restaurant on that Monday, the 30th of January, other
4 than you and Mr. Henry Martini?

5 A. Mike Jezierski came on that day.

6 Q. Okay. Did you know he was coming?

7 A. Yes. I think I learned that late Friday
8 afternoon.

9 Q. Okay.

10 A. Detective House was supposed to come but I
11 do not believe he did.

12 Q. Okay.

13 A. Special Agent Royal came late on the
14 afternoon.

15 Q. Okay, and when you and Mr. Martini got
16 there did you have any further respons -- had you --
17 was there anything further that you needed to do for
18 your cause -- origin-and-cause investigation?

19 A. No, sir.

20 Q. Had you essentially completed your
21 investigation as of that time?

22 A. I don't think it would be accurate to say
23 I had completed it. But I was at a point where I
24 needed him to look at some light fixtures, the
25 printed circuit boards that we've discussed

1 previously today, and some wiring that was all placed
2 on a counter and I had held it there for him to
3 examine. And that's what I wanted him to do.

4 And I think what we did ultimately was
5 walked inside and I pointed that out to him and
6 walked off and let him go do his own.

7 Q. And did you do anything else yourself on
8 that day other than meet him there and let him do
9 what he was going to do?

10 A. I recall photographing the unfinished
11 portion of a porch or an addition on the McPherson
12 Church Road side of the restaurant. I realized, I
13 think, over the weekend I had not measured that.

14 And by the way, I do recall the name of
15 one other person who was present there.

16 Q. And who was that?

17 A. Fire Investigator Scott Hume -- H-u-m-e --
18 who is with Donan. He is a fire investigator in
19 Raleigh and he is a new -- at that time he was a new
20 investigator and he was just there observing.

21 Q. When you had gone -- when you had been at
22 the restaurant on either the 26th or the 27th you had
23 collected samples from the floor and determined there
24 weren't any accelerants in the restaurant?

25 A. I collected those samples on January 27th,

1 shipped them off to the lab on -- let me check, but I
2 believe it's the 28th.

3 (Witness examined document)

4 A. Yes, sir, I shipped them to the lab on the
5 28th.

6 Q. Okay, and you got a response on the --
7 February the 5th or thereabouts?

8 A. February -- yeah, I probably got a verbal
9 phone -- a verbal call on the 5th. Correct.

10 Q. And told you that there were no
11 accelerants ---

12 A. --- Yes, sir.

13 Q. --- Present.

14 A. Yes, sir.

15 Q. And I was going to see if I had a
16 photograph of that.

17 In your photographs -- I don't have one
18 here. I'm sorry.

19 Mr. Lacy, what I was going to show you was
20 a -- was that table with the circuit boards on it and
21 have you identify where it was. But it was -- was it
22 out in the restaurant area?

23 A. Yes, sir.

24 Q. And ---

25 A. --- Let me look right here.

1 Q. Do you have a photograph of it?

2 MS. DALY: Sure. Let me....

3 MR. WIGGINS: Yeah. It'd help me
4 just kind of....

5 MS. DALY: Can we go off the record
6 just a moment.

7 MR. WIGGINS: Sure.

8 (1:56-1:59 o'clock p.m. - recess)

9 THE WITNESS: That's not to say I
10 didn't take a picture of it. That's just to say I
11 did not include it in my report.

12 MR. WIGGINS: Okay.

13 Q. (Mr. Wiggins) Let's identify that as
14 being -- and we -- because we introduced the report
15 of Mr. Martini yesterday during his deposition. So
16 what you identified now is photograph number 33 ---

17 A. --- 33 ---

18 Q. --- That's contained in the report of
19 Henry Martini. Would that be the -- the date of that
20 would be?

21 A. May 23rd, 2012.

22 Q. Okay. That was his first report to
23 Nationwide.

24 A. Yes, sir.

25 Q. I got you. Okay, so we've identified --

1 and that's -- now, is that the -- is that where that
2 circuit board was when you first saw it?

3 A. Yes, or very close.

4 Q. Okay.

5 A. And the reason I say that is Special Agent
6 Royal had put some items near the cash registers. I
7 may have moved them a few inches or a few feet,
8 because I kind of lined stuff up there for Henry to
9 look at.

10 Q. Okay.

11 A. It would -- it's closer to where it is in
12 this picture than anything else.

13 Q. Was there anything else that you had lined
14 up on that table for Henry to look at?

15 A. Some wiring and ---

16 Q. --- Where did the wiring come from?

17 A. In the area of origin.

18 Q. Okay.

19 A. Some -- most of which was found by Special
20 Agent Royal. But I think I added a piece or two to
21 it.

22 Q. Okay.

23 A. Then I had four fluorescent light fixtures
24 that we found on the floor in the area of origin and
25 I placed them at the front of the restaurant for

1 Henry to look at.

2 Q. Okay, and did you see Henry Martini
3 examine or look at the circuit boards?

4 A. I did.

5 Q. And did he -- did -- what did you see him
6 do?

7 A. Visually examine them and take phot --
8 photographs of them and look -- flip them over in his
9 hands.

10 Understand. I didn't -- I wasn't standing
11 there the entire time.

12 Q. I understand.

13 A. If I would walk by or do something, I'd
14 see he's looking at them.

15 Q. Okay. What other items were on the table
16 other than the wiring and the circuit boards?

17 A. I believe that would be it.

18 Q. Okay, and were the fluorescent light
19 fixtures in a general area?

20 A. Yes, sir.

21 Q. And who had moved them and put them there?

22 A. The fluorescent light fixtures, I moved
23 them.

24 Q. You moved them from the area of origin to
25 the area that has been identified as -- in photograph

1 33 of Henry Martini's deposition -- report in 2012,
2 May of 2012.

3 A. Only thing I would change would -- the
4 fluorescent fixtures are illustrated in photograph
5 31.

6 Q. Okay.

7 A. Not 33 -- 31 of his May 2012 report to
8 Mike Jezierski.

9 Q. Okay. Now, after you saw him look at the
10 circuit boards, did you see him look at anything
11 else?

12 A. Yes, sir.

13 Q. What else did you see him look at?

14 A. I don't remember the exact order, but he
15 looked at the -- he examined all the electrical
16 components in the area of origin.

17 Q. Okay, and that is -- that would be in a
18 different place from where the plate was located in
19 photograph 33.

20 A. Yes, sir.

21 Q. And when you say he examined the wiring in
22 the area of origin, what would he have done in
23 reference to that examination?

24 A. Photographed it, visually examined it.
25 And in this case, although he -- although he doesn't

1 do that on every fire scene we work, he made some
2 notations on the electrical boxes located in the area
3 of origin.

4 Q. I believe there were three electrical
5 boxes in the area of or -- three other ones. Is that
6 right -- correct?

7 A. Yes, sir. And he labeled them as one,
8 two, and three.

9 Q. Okay. And he -- on those electrical boxes
10 he showed some tripped -- some of the tripped -- the
11 word escapes me. He -- some of them were tripped.
12 Some of the switches were tripped in the boxes.

13 A. Okay. Now, understand when I say
14 electrical boxes I'm talking about junction boxes,
15 electrical outlet boxes in the area of origin.

16 Q. Okay. You aren't talking about the ---

17 A. --- I'm not talking about electrical
18 panels.

19 Q. --- Electrical panels. You aren't talking
20 about those.

21 A. No, sir.

22 Q. Okay. They're more than three electrical
23 panels.

24 Q. Okay.

25 A. But there are three electrical boxes in

1 the area of origin. Photograph 20 of that same
2 report illustrates elec -- what he identified as
3 electrical box one. And I don't think there's any
4 real system to his -- which one is one and which one
5 is two.

6 Photograph 22 identifies receptacle two.
7 And photograph 24, again, of his May 2012 report,
8 identifies receptacle three. That is -- he does that
9 simply so that a year later, two years later, five
10 years later, if somebody says what outlet are you
11 talking about, he can say I'm talking about
12 receptacle one.

13 Q. Now, did you tell -- or did Mr. -- well,
14 strike this. Let me start over again.

15 Did Mr. Martini ask you where the circuit
16 board came from?

17 A. I'm sure he did.

18 Q. Okay, and what did you -- what would you
19 have told him, or what do you recall telling him?

20 A. Area of origin.

21 Q. And did he tell you what that circuit
22 board was for?

23 MS. DALY: Objection to form.

24 THE WITNESS: Did Mr. Martini?

25 MR. WIGGINS: Tell you that.

1 THE WITNESS: No, sir.

2 Q. (Mr. Wiggins) Did you tell him what that
3 circuit board was for?

4 A. I didn't know. And I don't think he knew.

5 Q. And did you go and ask Jimmy
6 Diamantopoulos what it was?

7 A. No, sir.

8 Q. Do you know whether or not Mr. Martini
9 went and asked Jimmy ---

10 A. --- I do not.

11 Q. --- Diamantopoulos what it was?

12 A. --- I do not know.

13 Q. Is it your understanding that Mr. Martini,
14 when he did his investigation, did not know exactly
15 the location of that circuit board?

16 MS. DALY: Objection.

17 THE WITNESS: I do not know.

18 Q. (Mr. Wiggins) Do you know whether or not
19 Mr. Martini -- well, let me put this in the
20 affirmative.

21 You do know from your testimony just now
22 that he did know that it came from the area of origin
23 of the fire as you had identified it.

24 A. Yes, sir.

25 Q. Did it ever occur to you at that point,

1 Mr. Lacy, that it might have been an item that could
2 or might have been a cause of the fire?

3 MS. DALY: Objection to form.

4 THE WITNESS: No, sir.

5 Would you please repeat -- repeat the
6 question.

7 Q. (Mr. Wiggins) Did it ever occur to you at
8 that point in time, when you first knew that it came
9 from the place of origin or the area of origin of the
10 fire, that it might or could have been an item that
11 could have started or caused the fire?

12 MS. DALY: Objection to form.

13 THE WITNESS: No, sir.

14 Q. (Mr. Wiggins) Did you see Mr. Martini
15 examine the fluorescent lights that you had produced
16 and carried to the front of the restaurant?

17 A. If you are talking about the fluorescent
18 light fixtures, yes.

19 Q. Yeah, I'm talking about the fixtures, yes.

20 And do you recall what he did in reference
21 to those fixtures?

22 A. Looked -- looked at the connectors where
23 the bulbs are plugged in or inserted and looked at
24 the ballast and looked at any electrical cables that
25 supplied electrical service to the fixture.

1 Q. Okay. Have you ever investigated a fire
2 that was caused by a defect in the ballast of a
3 fluorescent lighting system?

4 A. Yes, sir.

5 Q. Do you know that the only way to really
6 test for a defect in the ballast, which is a item
7 that controls heat going to the light, or a
8 transformer, I suppose, for a lack of a better word,
9 can only be examined by taking it apart and
10 determining if there's any defects in that system?

11 MS. DALY: Objection to form.

12 THE WITNESS: I'm not aware that
13 that's the only way, no, sir.

14 Q. (Mr. Wiggins) But that's the usual way,
15 is it not?

16 MS. DALY: Objection to form.

17 THE WITNESS: I examined the light
18 fixtures. I saw no fire patterns on the four that I
19 stacked out front or the two that remained in the
20 ceiling that you showed me photographs of earlier. I
21 saw no evidence that the fire had originated in any
22 of those fluorescent light fixtures.

23 Not only did I examine the fixtures
24 themselves, but there was no evidence that the fire
25 originated at ceiling height anywhere in that

1 restaurant.

2 Q. (Mr. Wiggins) Okay, back to my original
3 question, the best and most efficient way of
4 determining if there's any defect in the ballast
5 would have been to have them examined laboratorially
6 by an in-depth examination, would it not?

7 MS. DALY: Objection to form.

8 THE WITNESS: Sir, part of your
9 answer is correct. However, if there is such a
10 defect, you are going to see it on the exterior of
11 the housing of the ballast and the fixture. You're
12 going to see a distinct burn pattern that tells me as
13 a fire investigator the original heat came from this
14 light ballast.

15 MR. WIGGINS: Okay.

16 THE WITNESS: Now, I can interpret
17 that pattern. Then I need an electric engineer such
18 as Mr. Martini to conduct the examination that you're
19 talking about. And I -- I don't dispute what you're
20 talking about. But you're talking about step three
21 of a four-or-five-step process. And steps one and
22 two involves an observation at the fire scene that
23 warrants step three occurring.

24 No such observation occurred. And the
25 observations were to the contrary. No evidence

1 occurred that the fire originated at the ceiling.
2 And there was significant evidence that the fire
3 originated at the floor underneath the drive-thru
4 window number one.

5 Q. (Mr. Wiggins) But you're going to yield
6 to the opinion of Mr. Martini in reference to whether
7 or not there was any defect in a ballast that might
8 or could have caused the fire.

9 MS. DALY: Objection.

10 THE WITNESS: My statement is that I
11 am going to testify that I saw no patterns on any of
12 six fixtures indicative of a fire originating at a
13 light fixture. And I asked Mr. Martini to examine
14 them.

15 MR. WIGGINS: Okay.

16 THE WITNESS: That's -- that's what
17 -- that's my testimony.

18 MR. WIGGINS: Okay.

19 Q. (Mr. Wiggins) And he pretty much
20 confirmed what your opinion was in reference to those
21 fluorescent fixtures.

22 A. Yes, sir.

23 Q. Did he tell you that he agreed with your
24 assessment of the fixtures and that they in his
25 opinion would or could not have been the cause of the

1 fire?

2 A. I don't know that he said -- he ever told
3 me he agreed with me. I'm comfortable he told me
4 they didn't cause the fire.

5 Q. Okay. Was there anything else that Mr.
6 Martini was called upon to examine on that date that
7 he met you there, on the 30th of January 2012?

8 A. Well, my sole purpose for Mr. Martini's
9 involvement in this investigation from January 20 --
10 January 30th through to date is to examine electrical
11 service and components.

12 Q. And you would yield to any assessment that
13 he made in reference to those components?

14 A. Yes, sir.

15 Q. And he would be the source that you would
16 have relied upon to give you his opinion as to
17 whether or not there was anything in any of those
18 components that could have been an ignition source of
19 this fire.

20 A. Yes, sir.

21 Q. When did he complete his investigation of
22 those items on that Monday, the 22nd -- the 30th of
23 January?

24 A. I don't recall what time but two, three
25 o'clock.

1 Q. Okay.

2 A. It would have been in the afternoon.

3 Q. Okay. So the items that you recall that
4 he looked at was basically -- the items that he
5 looked at would have been the circuit boards. Is
6 that correct?

7 A. Yes, sir.

8 Q. And let me ask you this. Did he point out
9 anything to you in reference to those circuit boards
10 during the course of his investigation?

11 A. No, sir.

12 Q. The next thing he looked at was the
13 wiring. And that wiring was taken from, again, the
14 area where you had identified the origin of the fire.
15 Is that correct?

16 A. Yes, sir, with one explanation.

17 Q. Okay.

18 A. I don't know the order exactly that he
19 identified things in.

20 Q. Okay.

21 A. I mean, that he examined these items.

22 Q. Okay.

23 A. I just know he was in that part of the
24 store for several hours.

25 Q. Did he have any -- did he make any

1 comments to you about the wiring?

2 A. Did not cause the fire.

3 Q. He made that comment to you.

4 A. Yes, sir.

5 Q. And did he identify the wiring that he
6 said could not -- or did not cause the fire?

7 A. No, sir, not to me, anyway.

8 Q. Other than -- we talked about the
9 fluorescent light fixtures, was there anything else
10 that he examined that you can recall on the day that
11 he was there?

12 A. The electrical pon -- components that
13 remained in the office wall adjacent to drive-thru
14 window number one.

15 Q. Okay. The electrical components would
16 have been the electrical boxes?

17 A. Labeled one, two, and three.

18 Q. One -- labeled one, two, and three.

19 A. In photos 25, 23, and 20.

20 Q. Okay.

21 A. In his May 2012 report.

22 Q. Okay, and that was the report that was
23 made to Nationwide ---

24 A. --- Yes, sir.

25 Q. --- Insurance Company.

1 A. Yes, sir.

2 Q. Is there anything else that you asked him
3 to look at electrically on that date?

4 A. No, sir.

5 Q. After that examination you had a
6 discussion with Mr. Martini as to his findings, I
7 take it.

8 A. I don't recall any conversations after
9 January 30th. I know he told me on the 30th he saw
10 no evidence that the fire was electrical.

11 Q. Okay. That's what I'm getting at. He
12 told you that after he completed his investigation.

13 A. On the 30th.

14 Q. On the 30th.

15 A. Yes, sir.

16 Q. And did you have any further conversations
17 with Mr. Martini after that in reference to that
18 issue?

19 MS. DALY: Objection to form.

20 THE WITNESS: Well, yes.

21 MR. WIGGINS: Okay.

22 Q. (Mr. Wiggins) When was that?

23 A. Sometime in November when we were no --
24 when we were contacted. I had conversations with Mr.
25 Booth and Mr. Cavaroc. I'm trying to think who else

1 I talked to -- but that led to our going back to
2 Miami Subs in November of 2012.

3 Q. Okay. After you -- after the conversation
4 with Mr. Martini in 2 -- in January 30th of 2012,
5 then did you send an e-mail to Michael Jezierski in
6 reference to your findings?

7 A. I wrote a letter to Mr. Jezierski. I may
8 have attached that letter to an e-mail. But the
9 substan -- the substantive information was in a
10 Microsoft Word document, not in an e-mail.

11 Q. I had asked this earlier, but just to get
12 it into the record, Mr. Lacy, this is a letter that
13 we earlier identified which is Exhibit -- Plaintiff's
14 Exhibit Number 35, that said that there were no
15 accelerants in the sample that you had sent to the
16 lab. Is that correct?

17 A. Okay, I -- it is the e-mail. I would
18 question the exhibit number. I don't know -- I
19 cannot read the second digit of the number that
20 begins with three.

21 Q. Okay. But that's what it is.

22 A. It's the e-mail, yes, sir. I'm not going
23 to agree to the exhibit number. I'm going to agree
24 it's an e-mail from me to Mr. Jezierski saying the
25 lab analysis was negative.

1 Q. Let me show you what has been marked as
2 the Plaintiff's Exhibit Number 36 and ask if you can
3 identify ---

4 A. --- And -- okay.

5 (Witness examined document)

6 A. Yes, sir. This is the letter that I sent
7 to Mr. Jezierski. And as I mentioned earlier, it
8 very well may have been attached to an e-mail but the
9 e-mail would have just simply said see the attached
10 letter. The substantive information would have been
11 in Microsoft Word, not in an e-mail.

12 Q. Okay. And the substance of this letter is
13 that you had completed your fire scene invest --
14 examination of the Miami Subs restaurant at 552 North
15 McPherson Church Street. The electrical engineer,
16 Henry Martini, PE, examined the fire scene on January
17 the 30th and concluded that after examination the
18 fire was not the result of a failure of the
19 structural or electrical components or of an
20 appliance in the building. Is that true?

21 A. Yes, sir.

22 Q. And you base the -- that information, I
23 take it, upon what Mr. Martini had told you after his
24 examination?

25 A. Yes, sir.

1 Q. And you wrote this letter after having
2 known that the circuit boards were found in the or --
3 in the area of origin of this fire.

4 A. Yes, with an explanation.

5 Q. Okay.

6 A. May I explain?

7 Q. Sure. Oh, yeah, sure.

8 A. I wrote this letter after know -- after
9 knowing that the circuit boards -- circuit boards were
10 found in the area of origin and Mr. Martini had
11 examined the circuit boards and found no evidence of
12 their involvement in the fire.

13 Q. But shouldn't you have reported that to
14 Nationwide for them to make the substance -- the
15 significance of that determination?

16 MS. DALY: Objection to form.

17 THE WITNESS: Nationwide is relying
18 on me and Mr. Martini to make that determination.

19 Q. (Mr. Wiggins) Well, you knew that the
20 letter that you were writing to Nationwide Insurance
21 Company was going to be used by them either to deny
22 or to pay this claim, did you not?

23 A. No, sir.

24 Q. You did not know that?

25 A. No, sir.

1 Q. You did not know that they were relying
2 upon your examining -- your cause-and-origin -- your
3 origin-and-cause investigation to make the
4 determination of whether to pay or deny the claim?

5 A. The original ---

6 MS. DALY: --- Objection to the
7 form.

8 THE WITNESS: The original
9 conversation with Mike Jezierski about this letter
10 has to deal with the second paragraph.

11 MR. WIGGINS: Okay.

12 THE WITNESS: His concern was were
13 the government investigators completed with the
14 examination of the fire scene and the structure.
15 That was the -- he and I had a phone conversation
16 probably on February -- well, it says in February
17 1st. His main -- well, no, I won't say main. His
18 number one concern, primary concern was are the
19 government investigators finished.

20 Then I think he asked me has the
21 electrical engineer looked at it. So I summarized
22 everything that Henry and I did in the first
23 paragraph. I summarized what the government
24 investigators did in the second paragraph.

25 This letter I am very comfortable was not

1 to be used as a basis for pay or deny.

2 Q. (Mr. Wiggins) Let me show you what has
3 been marked as Exhibit Number 37, and you may or may
4 not recognize that document, Mr. Lacy. It's entitled
5 Commercial, slash, Farm Property Large Loss Report.

6 (Witness examined document)

7 A. I saw it on -- among other documents
8 forwarded to me by this law firm, but I've never read
9 it in detail.

10 Q. Okay. Look on the second page of this
11 document where it says facts of loss.

12 Do you see that?

13 A. Yes, sir.

14 Q. And there it says the fire started in the
15 area of the kitchen, slash, rear hall of the
16 restaurant.

17 Did you agree with that statement, or do
18 you agree with that statement?

19 A. Yes, sir.

20 Q. And then the next statement is the fire
21 consumed the shelf rack of plastic plates, styrofoam
22 containers, boxes and plastic bags.

23 A. Yes, sir.

24 Q. You agree with that statement?

25 A. Yes, sir.

1 Q. And it says the fire burned up the wall
2 and damaged the ceiling tiles. And we've discussed
3 that.

4 And you, I take it, agree with that?

5 A. Yes, sir.

6 Q. There is possible heat damage to the bar
7 joists that support the roof.

8 Did you make that assessment when you did
9 your investi ---

10 A. --- I made that observation. I'm not a
11 structural engineer, but I would confirm that's
12 correct.

13 Q. And the remainder of the building suffered
14 severe smoke damage.

15 Would that be a true statement? You would
16 agree with that?

17 A. Yes, sir.

18 Q. The contents, including the equipment,
19 furniture, small ware, table wares, food were also
20 damaged by the severe smoke.

21 Is that also a correct statement?

22 A. Yes, sir.

23 Q. And the health inspector ordered all
24 food-handling equipment needs to be replaced.

25 Was that information you obtained from a

1 -- one of the public officials?

2 A. I have no idea.

3 Q. You never talked to anyone about that --
4 one of the health inspectors about that?

5 A. No, sir.

6 Q. And the exterior EIFS system suffered only
7 minor smoke damage in the area around the drive-in
8 window.

9 Would that be a true statement? You would
10 agree with that?

11 A. Yes.

12 Q. And then it says, according to the verbal
13 report from the origin-and-cause investigator -- and
14 that would have been identifying you, would it not?

15 A. Yes, sir.

16 Q. The origin of the fire is in the area
17 that's next to the rear drive-in -- and we've
18 identified it as the first in our conversation today.

19 A. Yes, sir.

20 Q. Is that correct?

21 A. Yes, sir.

22 Q. First drive-in window near the front wall
23 of the office. And then it says the cause of the
24 fire is incendiary in nature.

25 Is that what you told Mr. Jezierski on or

1 about the 1st of February 2012?

2 A. Yes, sir.

3 Q. And then in the next bracket down it talks
4 about expert consultants. It says -- checks yes, and
5 said we hired Donan Electrical Engineer Henry Martini
6 to assist with the determination of the cause of the
7 fire by excluding electrical.

8 You see that?

9 A. Do I see it?

10 Q. Yeah.

11 A. Yes, sir, I do.

12 Q. And the budget for the investigation is
13 \$2,500.

14 You have no knowledge of that, I take it?

15 A. I have no knowledge of any of the budgets
16 that are set under experts and consultants.

17 Q. Okay. You never had anything to do with
18 that at all or any input into that?

19 A. No, sir.

20 Q. The plastic plates that you had reference
21 to, the shelf rack of plastic plates, styrofoam
22 containers, boxes and plastic bags, was that in the
23 information given to you by Mrs. Moon?

24 A. I believe so.

25 Q. Well, did anybody else ever tell you

1 anything about the location of the styrofoam plates,
2 the plastic cup -- cups and the styro -- and -- I'm
3 sorry -- and the plastic knives, forks, etcetera?

4 A. My only hesitation is to see if Raven
5 mentioned it.

6 (Witness examined documents)

7 A. No, that probably came from Ms. Moon.

8 Q. Okay, and where did Mrs. Moon tell you
9 that those devices, those plastic cups, the styrofoam
10 plates, the knives and forks and the cellophane
11 containers were located?

12 A. On the shelf to the right of drive-thru
13 window number one.

14 Q. Okay, and that would have -- would that
15 have been in the vicinity where you've now come to
16 realize and know that was the location of the Ion IQ
17 communication device in the restaurant?

18 A. Yes, sir.

19 MS. DALY: Object to the form.

20 Q. (Mr. Wiggins) Just to go back just for a
21 moment, Mr. Lacy, to a conversation we talked about
22 early on -- this is Exhibit 42.

23 Is this invoice that you had reference to
24 concerning the Seagate hard drives that were....

25 (Witness examined document)

1 A. Yes, sir.

2 Q. And this a -- data recovery was 250
3 gigabytes. Do you see that?

4 Then it has got a total of 1,370, and then
5 ES -- USB 135, total 1,505.

6 And this, you said, was paid by Mr.
7 Jezierski.

8 A. Yes.

9 Q. It's not -- didn't come through you, did
10 it?

11 A. The invoice came to me and I forwarded it
12 to Mr. Jezierski for payment.

13 Q. And then the next page of this is a data
14 recovery evaluation directed to you -- I'm sorry --
15 from you to Jezierski. Is that correct?

16 A. Yes.

17 Q. And this is dated 3-7-2012, and again, you
18 say there's approximately 13 gigabytes of data
19 recovered, when it actually was 250 gigabytes, was it
20 not?

21 MS. DALY: Objection to form.

22 THE WITNESS: All right, Mr.
23 Wiggins, go back to the invoice.

24 MR. WIGGINS: I got it. Okay.

25 THE WITNESS: The hard drives are

1 250 gigabytes in size.

2 MR. WIGGINS: I got you. Okay.

3 THE WITNESS: There's only 13 gig on
4 -- on one of the hard drives.

5 You see where, under miscellaneous, Mr.
6 Stone put not necessary?

7 MR. WIGGINS: I do.

8 THE WITNESS: Remember my telling
9 you earlier that they only copied one of the hard
10 drives because they were ---

11 MR. WIGGINS: --- One was a backup.

12 THE WITNESS: One was -- they're --
13 they're -- one was an image of the other.

14 MR. WIGGINS: I understand.

15 THE WITNESS: So it's a 250-gig hard
16 drive that contained 13 gig of data.

17 MR. WIGGINS: Okay.

18 THE WITNESS: So they only copied 13
19 gig.

20 MR. WIGGINS: Okay.

21 Q. (Mr. Wiggins) And then that was sent --
22 that was sent to you by Marvin Stone of Rewave Data
23 Recovery.

24 A. What was sent to me?

25 Q. Those -- the -- well, what he sent to you

1 was the zip files for your review. You got those?

2 A. Yes ---

3 MS. DALY: --- Objection to form.

4 THE WITNESS: Yes, sir. And I got
5 the external hard drive that's referenced on the
6 invoice as costing \$135.

7 MR. WIGGINS: Okay.

8 Q. (Mr. Wiggins) Again, just to kind of tie
9 down the conclusion of that, Mr. Lacy, let me show
10 you what I've marked as Exhibit -- Plaintiff's
11 Exhibit Number 44.

12 This is a e-mail from Jezierski to Harold
13 Snyder. You see that?

14 A. Yes, sir.

15 Q. Did you get a copy of this?

16 A. No, sir.

17 Q. He says, anyway, I talked with the O&C
18 investigator.

19 That would have been you, I take it?

20 A. Yes, sir.

21 Q. Who has the hard drive. He said that the
22 programs in the hard drive looks like a new computer
23 hard drive. There were no video files.

24 You told me that earlier and that you told
25 him that.

1 A. Yes, sir.

2 Q. In fact, there are no, quote, normal, end
3 quote, data files that you would expect to see on a
4 computer that was used for several weeks -- da, da,
5 da, da, or it was wiped clean and the original
6 software reinstalled.

7 What is he talking about there? Do you
8 know?

9 (Witness examined document)

10 A. I -- you said original software, and I
11 don't see -- oh, there it is, original starting
12 software.

13 Q. Uh-huh.

14 (Witness examined document)

15 A. All right, what Mr. Jezierski is saying is
16 -- and this is what I told him to some extent.

17 There are no video files. I told him
18 that.

19 Q. Uh-huh.

20 A. There are no normal data files that you
21 would expect to see on a spreadsheet that was used
22 for several weeks, begin parenthesis, Word docs,
23 spreadsheets, etcetera, end parenthesis.

24 That's the extent of what I told him.

25 Q. Okay.

1 A. Then, apparently, I told him that I was
2 going to check with the technician to see what his
3 thoughts are, but I can tell you at this point my
4 thought was we're done with the hard drives.

5 Q. But the hard drives never were wiped
6 clean, were they? They had ---

7 A. --- No, sir.

8 Q. --- They had data on them?

9 A. Yes, sir.

10 Q. Now, after you left the restaurant on the
11 30th, you had completed your investigation at that
12 point, Mr. Lacy.

13 Would that be a true statement?

14 A. Yes, sir.

15 Q. And you had concluded at that point in
16 time that this fire was an incendiary fire?

17 A. Yes, sir.

18 Q. And go back to one of my earlier questions
19 -- had you ever developed any kind -- well, let me
20 strike that.

21 Had you given any consideration to the
22 fact that the circuit board that was found in the
23 area of origin of this fire might have had anything
24 to do with the fire?

25 MS. DALY: Objection to the form of

1 the question.

2 THE WITNESS: Not after Mr. Martini
3 told me that he saw no evidence of the fire
4 originating at the printed circuit board.

5 Q. (Mr. Wiggins) Should not that circuit
6 board have been submitted to someone like Mr. Cavaroc
7 to ident -- to have been examined microscopically or
8 x-rayed to determine whether or not there was any
9 defects in that system ---

10 MS. DALY: --- Objection.

11 Q. (Mr. Wiggins) --- Prior to making that
12 call?

13 MS. DALY: Objection to the form of
14 the question.

15 THE WITNESS: As far as examining a
16 printed circuit board, I would believe Mr. Martini
17 would possess the same skills as Mr. Cavaroc.

18 Q. (Mr. Wiggins) He did not examine it by
19 x-ray at the scene, did he?

20 A. No, sir.

21 Q. He did not remove any parts from the
22 circuit board during the course of the examination,
23 did he?

24 A. Not that I'm aware of.

25 Q. He did not, nor did you, tag and -- to

1 preserve that circuit board, did you?

2 A. No, sir.

3 MS. DALY: Objection to form.

4 Q. (Mr. Wiggins) And would it not have been
5 your responsibility to have collected any evidence,
6 any physical evidence at the scene of the fire, and
7 preserved that for future examination by anyone else
8 coming behind you and Mr. Martini to have looked at
9 that to make any determination about the cause of
10 this fire?

11 MS. DALY: Objection to the form of
12 the question.

13 THE WITNESS: It would have been my
14 responsibility, number -- that's number one.

15 Number two, we left those items there for
16 whoever came after us.

17 Q. (Mr. Wiggins) Did you tag, though -- did
18 you tag the ---

19 A. --- No, sir.

20 Q. --- Circuit board ---

21 A. --- I only tag what I remove.

22 Q. And you removed several things from the
23 restaurant, did you not?

24 A. Yes, sir.

25 Q. You removed the can that had the gas

1 written on it?

2 A. Before I get too far I'm going to check my
3 notes.

4 Q. Okay.

5 (Witness examined document)

6 A. Yes, sir.

7 Q. What else did you remove?

8 A. Four plastic Pepsi cups six and a half
9 inches tall.

10 Q. Where did you find those?

11 A. In the -- under the counter -- I guess
12 you'd call it a food prep counter.

13 But I was told that cups of this --
14 similar cups were found on that metal rack, and then
15 six plastic, tan-colored 10-inch diameter plates,
16 likewise, same location where I secured them from,
17 but plates very similar to that were on that metal
18 shelf.

19 Q. Were they styrofoam plates?

20 A. No, sir, these were plastic.

21 Q. Plastic.

22 A. On that shelf were styrofoam and plastic
23 plates.

24 Q. Okay.

25 A. Then the gas can, as you mentioned, which

1 is actually an eight-liter plastic container labeled
2 gas, originally it was a fruit drink mix container,
3 but someone had written gas on it -- fire debris
4 sample from -- from the floor area under the first
5 drive-thru window.

6 Those are the four items I secured from
7 the fire scene. Then I had the two hard drives
8 vouchered over to me by Detective House.

9 Q. Now, you say it would have been your
10 responsibility to have tagged and preserved any
11 physical evidence that was of any significance in the
12 fire.

13 Is that ---

14 MS. DALY: --- Objection.

15 Q. (Mr. Wiggins) Would that be true?

16 MS. DALY: Objection to form and
17 mischaracterization of his testimony.

18 THE WITNESS: Well, it would be my
19 responsibility to identify, collect, tag, secure and
20 store any evidence removed from a fire scene.

21 MR. WIGGINS: Okay.

22 THE WITNESS: That's number one.

23 Other items of value that were left at the
24 scene would not have been tagged.

25 MR. WIGGINS: Okay.

1 THE WITNESS: All right, I -- you --

2 I tag ---

3 Q. (Mr. Wiggins) --- What is ---

4 A. --- I tag ---

5 Q. --- Why ---

6 A. --- I tag only what I take.

7 Q. Okay, and why did you not consider it to
8 be prudent to have tagged and preserved the circuit
9 board that was found in the area of the -- of the
10 fire?

11 A. There is a line ---

12 MS. DALY: --- Objection.

13 THE WITNESS: There is a line of
14 thought that items of value can be left at the fire
15 scene if the fire scene can be secured, and this one
16 certainly could.

17 Mr. -- I mean, Jimmy was able to lock the
18 doors. We went back there in November and found the
19 doors locked exactly how they were being locked in
20 January and February when I was there.

21 NFPA 921 actually contains a sentence or
22 two about leaving those items at the scene for other
23 parties to examine. We had no idea who was coming
24 behind us.

25 Q. (Mr. Wiggins) But you knew, or suspected,

1 that somebody would be coming behind you, did you
2 not?

3 A. No, sir.

4 MS. DALY: Objection to form.

5 Q. (Mr. Wiggins) Did you not think that?

6 MS. DALY: Objection to the form.

7 THE WITNESS: No, sir. I have
8 probably -- well, no. I'll just leave it at that.
9 No, sir.

10 Q. (Mr. Wiggins) Let me show you what I've
11 marked as Plaintiff's Exhibit Number -- 123....

12 (* Exhibit 123 was marked *)

13 Q. And ask if you can identify that document.
14 (Witness examined document)

15 MR. WIGGINS: I'll give it to her
16 since she doesn't....

17 THE WITNESS: Yes, sir.

18 Q. (Mr. Wiggins) And in both of your reports
19 that you filed ---

20 A. --- Okay, this is a portion of the
21 document. This is not the entire document.

22 Q. I understand.

23 A. Okay.

24 Q. But what have you got there in your hand?

25 A. I have the cover sheet. I do not have

1 pages one through 16.

2 Q. Okay.

3 A. I do not have pages 18 through 109. I do
4 not have pages 110 through -- I'm sorry -- 111
5 through 130.

6 So I mean, there's a substantial portion
7 of the document missing.

8 Q. Look on the third page, Mr. Lacy, it says
9 11.35.1 -- 3.5.1, responsibilities of investigator.

10 Do you see that?

11 A. Yes.

12 Q. And it says there the responsibility of
13 the investigator or anyone who handles or examines
14 evidence -- and you did in fact handle or examine
15 this evidence, did you not?

16 A. Yes, sir.

17 Q. Is evidence preservation and scope of
18 responsibility carried -- varies according to such
19 factors at the investigator's jurisdiction, whether
20 he or she is a public official or private sector
21 investigator, whether criminal conduct is indicated,
22 and applicable laws and regulations.

23 However, regardless of the scope and
24 responsibility of the investigator, care should be
25 taken to avoid destruction of the evidence.

1 You agree with that, do you not?

2 MS. DALY: Objection to form.

3 THE WITNESS: Yes, sir.

4 Q. (Mr. Wiggins) And look at chapter 15,
5 which is on page 134. It's got documentation of the
6 investigation.

7 A. Okay.

8 Q. And 15.1.1 states that the goal in
9 documenting any fire or explosion investigation is to
10 accurately record the investigation through media
11 that will allow investigators to recall and
12 communicate their observations at a later date.

13 You did that, did you not?

14 A. Yes, sir.

15 Q. And it also says, under 1.1.2, thorough
16 and accurate documentation of the investigation is
17 critical, because it's from this compilation of
18 factual data that investigative opinions and
19 conclusions can be supported and verified.

20 You agree with that, do you not?

21 A. Yes.

22 MS. DALY: Object.

23 Q. (Mr. Wiggins) And you did that. You made
24 notes ---

25 A. --- Yes, sir.

1 Q. --- That could be -- you took photographs.

2 All of those things could be verified by
3 anybody coming behind you, could they not?

4 A. Yes, sir.

5 Q. Okay.

6 A. And let me explain my answer further, if I
7 may.

8 Q. You may.

9 A. I agree with what is said in 15.1.2. I
10 would also call your attention to 11.3.5.

11 You mentioned 11.3.5.1. Removal of those
12 items from the fire scene could also result in
13 another party -- because on January 30th I had no
14 idea who might be coming behind us -- another party
15 alleging spoliation.

16 Q. You're talking about 11.3.5?

17 A. Point one.

18 Q. And then at ---

19 A. --- I'm sorry. 11.3.5.

20 Q. Spoliation of evidence.

21 A. Yes.

22 Q. And generally do you take care to avoid
23 that kind of an issue or a problem?

24 MS. DALY: Objection to form.

25 THE WITNESS: Yes, sir. And the

1 common way to avoid that problem is you leave the
2 evidence at the scene until other parties can look at
3 it.

4 If I remove it from the scene, parties
5 have alleged, albeit unsuccessfully, that -- they've
6 alleged evidence spoliation.

7 Q. (Mr. Wiggins) In 16.1, Mr. Lacy, we've
8 got physical evidence, 16.1. It says, during the
9 course of any fire investigation, the fire
10 investigator is likely to be responsible for
11 locating, collecting, identifying, storing, examining
12 and arranging for testing of physical evidence. The
13 fire investigator should be thoroughly familiar with
14 recommended and accepted methods of processing such
15 physical evidence.

16 And one in 16.3 says preservation of the
17 fire scene and physical evidence, and it says every
18 attempt should be made to protect and preserve the
19 fire scene and as intact and undisturbed as possible
20 with the structure, contents, fixtures and
21 furnishings remaining in their pre-fire locations.

22 You agree with that, do you not?

23 A. Yes, sir.

24 Q. And of course, in this case Mr. -- in this
25 particular instance the SBI agent had removed or had

1 reconstructed some of the fire scene prior to your
2 arrival?

3 A. Yes.

4 Q. And it says that the fire -- the entire
5 fire scene should be considered the physical evidence
6 and should be preserved and protected.

7 And you generally would try to do that?

8 A. Yes, sir. And that's why we left the
9 printed circuit boards there, in case anybody else
10 came in behind us and wanted to look at them.

11 Q. Well, wouldn't it have been better to have
12 protected the circuit boards if you had taken them in
13 your possession, tagged them, identified them and
14 stored them, and told -- made known to anyone who
15 wanted to come look at them that you had them in your
16 possession for them to examine and look at?

17 MS. DALY: Objection to form.

18 THE WITNESS: That is one way of
19 looking at it. However, if we do that, you open
20 yourself up to a spoliation claim for removing them
21 from the scene.

22 Q. (Mr. Wiggins) Look at 16.5.7 entitled
23 Collection of Appliances or Small Industrial
24 Equipment. @@

25 Do you see that, Mr. Lacy? That's on page

1 ---

2 A. --- Yes.

3 Q. --- 151. Whenever an appliance or other
4 type of equipment is believed to be part of the
5 ignition scenario, it is recommended that the fire
6 investigator have it examined or tested. Appliances
7 must be collected as physical evidence to support the
8 fire investigator's determination that the appliance
9 was or was not the cause of the fire. Do you ---

10 A. --- Okay, I have a problem with the first
11 sentence.

12 Q. Okay. Do you have a problem with any part
13 of that?

14 A. The first sentence I do.

15 Q. Okay. What first sentence do you have a
16 problem with?

17 A. Whenever an appliance or other type of
18 equipment is believed to be part of the ignition
19 scenario.

20 Q. Okay.

21 A. PCB -- that printed circuit board was not
22 part of the ignition scenario.

23 Q. Well, it could have been, could it not?

24 MS. DALY: Objection to form.

25 THE WITNESS: Not by our

1 determination.

2 MR. WIGGINS: Okay.

3 Q. (Mr. Wiggins) But it could have been by
4 someone else's determination, couldn't it?

5 MS. DALY: Objection to form.

6 THE WITNESS: Mr. Martini came in
7 and examined it, said it was not involved in the
8 ignition -- not -- not -- was not the ignition source
9 for the fire.

10 Q. (Mr. Wiggins) He could have been wrong
11 about that, couldn't he?

12 MS. DALY: Objection.

13 THE WITNESS: Based upon the skills,
14 his training, and the accuracy of prior
15 investigations, I trust Henry Martini immensely.

16 Q. (Mr. Wiggins) Well, I trust him, too, Mr.
17 Lacy. But he could have been wrong ---

18 MS. DALY: --- Objection to form.

19 Q. (Mr. Wiggins) --- Couldn't he?

20 A. I don't believe he was.

21 Q. He told me yesterday that the best way to
22 have determined whether or not there was any defect
23 in this PCB board, this printed circuit board would
24 have been to submit it to Mr. Cavaroc's laboratory to
25 examine it.

1 MS. DALY: Objection. Complete
2 mischaracterization ---

3 Q. (Mr. Wiggins) --- Would you agree?

4 MR. WIGGINS: Maybe I did misunder
5 ---

6 MS. DALY: --- Mischaracterization
7 of ---

8 MR. WIGGINS: --- Maybe I did mis
9 ---

10 MS. DALY: --- Mr. Martini's ---

11 MR. WIGGINS: --- He did say that.

12 MS. DALY: No, he did not.

13 MR. WIGGINS: Would not you agree
14 with that? Well, tell me what he said.

15 MS. DALY: Objection.

16 MR. WIGGINS: Well, Rachel, tell me
17 what he said.

18 MS. DALY: Mr. Martini said ---

19 MR. WIGGINS: --- Yeah.

20 MS. DALY: --- That it would not
21 have been -- that the -- what he did was exactly what
22 needed to be to determine whether or not there was an
23 electrical source of ignition on that PC board.

24 MR. WIGGINS: He said he made that
25 determination but he said that the best thing would

1 be ---

2 MS. DALY: --- No, he did not.

3 Q. (Mr. Wiggins) Would not the best system
4 to have been to -- the best thing to have done was
5 submit this to a laboratory to test it to see whether
6 or not it was a possibility that it could have
7 contributed to this fire, Mr. Lacy?

8 MS. DALY: Objection to form.

9 THE WITNESS: If Mr. Martini had
10 come to me on January 30th, 2012 and said we need to
11 get this x-rayed, I would have said okay. He didn't.
12 He came to me and told me the PC -- the printed
13 circuit boards are not involved in the ignition of --
14 as the -- not involved in the fire, damaged as a
15 result of the fire, not involved in the fire.

16 The wiring that was placed on the surface
17 beside the printed circuit boards, I examined it.
18 It's not involved in the fire. The fluorescent light
19 fixture ---

20 Q. (Mr. Wiggins) --- Wait. Who said he
21 examined it?

22 A. Mr. Martini examined it.

23 Q. He told me he didn't examine it.

24 A. Well ---

25 MS. DALY: --- Objection.

1 Mischaracterization of testimony.

2 MR. WIGGINS: Well, what did he say,
3 Rachel?

4 MS. DALY: I think Mr. Martini's
5 testimony will speak for itself ---

6 MR. WIGGINS: --- Well, he said he
7 couldn't find it.

8 MS. DALY: --- In his deposition.

9 MR. WIGGINS: He didn't recall ever
10 seeing it is what I recall he said.

11 THE WITNESS: Well, Mr. Wiggins,
12 it's in a photograph that he included in his report.

13 MR. WIGGINS: Okay.

14 THE WITNESS: I believe he examined
15 it.

16 MR. WIGGINS: Okay.

17 Q. (Mr. Wiggins) If he did not examine it,
18 then what would your answer be?

19 MS. DALY: Objection to form.
20 Examined it. What are you referring to when you say
21 it?

22 MR. WIGGINS: I'm talking about the
23 electrical source for the PCB board.

24 MS. DALY: Objection to form.

25 THE WITNESS: Okay, the wiring that

1 I'm talking about is the wiring that was placed on
2 the counter near the cash registers, and Mr. Martini
3 examined it.

4 MR. WIGGINS: Okay.

5 Q. (Mr. Wiggins) Do you know what wiring
6 that was?

7 A. No, sir.

8 Q. Okay. I'm talking ---

9 A. --- That was -- that ---

10 Q. --- I talking about the wiring for the PCB
11 board.

12 A. Okay, that would have been in the wall
13 behind the sheet rock beside drive-through window
14 number one.

15 Q. Okay. Did you see it?

16 A. No, sir.

17 Q. Did you examine it?

18 A. No, sir. The fire did not originate at
19 that height.

20 Q. Okay. Again, my question, Mr. Lacy, was
21 Mr. Martini could have been -- could have made an
22 error in his assessment, could he not?

23 MS. DALY: Objection.

24 Q. (Mr. Wiggins) Even though you have great
25 confidence in his ability, we all make mistakes, and

1 he could have made a mistake, couldn't he?

2 MS. DALY: Objection to form of the
3 question.

4 THE WITNESS: If he made some
5 mistake, as you suggest, he -- he makes a mistake on
6 an -- on a component that is not in the area of
7 origin of the fire. It is above the area of origin.
8 And it also -- photographs also illustrate that that
9 component was not involved in the origin of the fire
10 but was attacked by a developing fire.

11 So the big issue about whether or not he
12 could have made a mistake kind of -- not kind of ---

13 Q. (Mr. Wiggins) --- You think it's
14 irrelevant.

15 A. Yes, sir.

16 MS. DALY: Objection to form.

17 MR. WIGGINS: Okay.

18 Q. (Mr. Wiggins) All the evidence that you
19 ever collected, Mr. Lacy, in reference to the
20 location of the styrofoam plates, the plastic plates,
21 the plastic cups, and the cellophane in which those
22 cups were encased were on the top shelf of the drying
23 rack in and near drive-in window number one.

24 A. I don't know that all of those items were
25 on the top shelf. They were on shelves.

1 Q. I think Mrs. Moon said they were on the
2 top shelf and that there -- others were reserved for
3 drying plates. Do you recall that?

4 A. Yes, sir. And I thought some of the
5 plates that I took as evidence in item four -- I'm
6 sorry -- item three could have been lower.

7 Q. Okay.

8 A. They may have been -- honestly, the plates
9 I took were not the ones that were on that shelf and
10 drying. They were identical to what was on that
11 shelf and drying. So I took it that those -- some of
12 those items would be lower.

13 Q. Did anyone ever tell you that they were in
14 any other place than on that shelf, on that drying
15 rack?

16 A. What are you characterizing as they?

17 Q. I'm talking about anybody that you
18 interviewed.

19 A. But what items were anywhere else?

20 Q. Those styrofoam plates, those plastic
21 plates, those plastic cups, and the cellophane in
22 which they were encased.

23 A. I saw some other items down that hall, the
24 rear hall of the restaurant. But it's my
25 understanding they were on this shelf.

1 Q. Okay.

2 A. And when I say shelf I'm talking about the
3 whole unit, all shelves.

4 Q. Okay. And my question was did anyone ever
5 tell you that they were located any other place other
6 than on that drying rack in or an area where you've
7 identified as the area of the fire.

8 A. No, sir.

9 Q. Let's talk about the point of origin, the
10 area of origin for just a moment. You've said that
11 the location of this Ion IQ was not within the area
12 of origin of this fire.

13 A. Correct.

14 Q. Now, area of origin and point of origin
15 are two different things, are they not?

16 A. Yes.

17 Q. Point of origin means the exact spot where
18 this fire located -- was located, or might have been
19 located. Is that correct?

20 MS. DALY: Objection to form.

21 THE WITNESS: It is a term that's
22 used differently by different people. But typically
23 point is more specific than area.

24 MR. WIGGINS: Okay.

25 Q. (Mr. Wiggins) And area can be a pretty

1 large area, could it not?

2 A. In the eyes of the beholder, sir.

3 Q. Could not the area of this -- origin of
4 this fire have been anywhere within the area of the
5 shelf of this -- top shelf of this drying rack and
6 the floor of this restaurant?

7 A. No, sir.

8 Q. Why do you say that?

9 A. The damage to the floor of the area just
10 inside the drive-through window number one, the
11 damage to the rolled aluminum cart, and the identi --
12 observation, identification, and documentation of the
13 protected area pattern on the wall to the right of
14 the drive-through window number one.

15 Q. Okay. Now, going back for just a moment
16 to what I was just -- we were just talking about,
17 collection of this data, collection of the physical
18 evidence. And you said you agree with this paragraph
19 except for the first paragraph. And that -- the
20 first sentence says whenever an appliance is believed
21 to be part of the ignition scenario.

22 And would not that have been part of the
23 ignition scenario either to rule in or to rule out
24 the ignition source of this fire?

25 MS. DALY: Objection to form.

1 THE WITNESS: Mr. Martini examined
2 it and eliminated it. It was excluded as a potential
3 ignition source.

4 Q. (Mr. Wiggins) And then in 16.5.7.1, where
5 practical, it says, the entire appliance or item of
6 equipment should be collected intact as physical
7 evidence. This includes any electrical power cords
8 or fuel lines supplying or controlling it.

9 And that power cord was not collected, was
10 it, Mr. Lacy?

11 A. Okay, 16.5 ---

12 MS. DALY: --- Objection to the form
13 of the question.

14 THE WITNESS: --- .7.1 hinges on the
15 first sentence of 16.5.7, whenever an appliance or
16 other type of equipment is believed to be part of the
17 ignition scenario. If the appliance or other type of
18 equipment is not believed to be part of the ignition
19 scenario, 16.5.7.1 does not apply.

20 MR. WIGGINS: Okay.

21 Q. (Mr. Wiggins) And that's your answer and
22 you stick by it.

23 MS. DALY: Objection.

24 THE WITNESS: Sir, from January
25 30th, 2012 -- let me backtrack. January 26 and

1 January 27th I saw fire patterns that indicated to me
2 the fire did not originate anywhere other than the
3 floor below drive-through window number one. On
4 January 30th Mr. Martini eliminated the multiple
5 electrical components in the area of drive-through
6 window number one.

7 Q. (Mr. Wiggins) That ---

8 A. --- Based on my observation of fire
9 patterns, Mr. Mar -- Martini's exclusion of the
10 electrical components, I determined the fire was not
11 electrical in nature.

12 Q. Okay. If that determination had been
13 erroneous, though, the elec -- the circuit boards
14 should have been further investigated and looked at
15 by a -- in a laboratory setting. Is that not true,
16 Mr. Lacy?

17 MS. DALY: Objection to form.

18 THE WITNESS: I don't understand the
19 question at all.

20 MR. WIGGINS: Okay.

21 Q. (Mr. Wiggins) I'm saying that if --
22 you're saying that you made that determination, that
23 Mr. Lacy made that -- that Mr. Martini made that
24 observation. Is that correct?

25 MS. DALY: Objection to form.

1 THE WITNESS: I made what
2 determination?

3 Q. (Mr. Wiggins) You made -- you -- based
4 upon the statements to you from Mr. Martini that the
5 circuit boards were not defective and did not --
6 would -- could not have served as the ignition source
7 for this fire, you then based your opinion on the
8 area of origin of this fire as being the floor of the
9 Miami Subs restaurant and not anyplace else.

10 A. No, sir.

11 MS. DALY: Objection.

12 Q. (Mr. Wiggins) That's not correct?

13 A. No, sir.

14 Q. What did you base it on then?

15 A. I based the identification of the area of
16 origin on fire patterns on January 26 and 27th before
17 Mr. Martini examined it. Then we had all this
18 evidence, and I said look at it.

19 Q. What is the area of origin as you've
20 identified it for this fire?

21 A. Underneath the window, underneath
22 drive-through window number one, on the floor.

23 Q. Okay. How -- over what period -- over
24 what surface of the floor?

25 MS. DALY: Objection to form.

1 THE WITNESS: I'm not going to say
2 right up against the wall underneath the window, but
3 within one tile of the window, which is about four
4 inches, extending probably to 18 to 24 inches away
5 from the window.

6 Q. (Mr. Wiggins) And I take it it's your
7 testimony that you never considered even after
8 learning that -- well, let me strike that.

9 You never, until you completed your
10 investigation, ever learned of the exact location of
11 the circuit board. Is that correct?

12 A. Correct.

13 Q. And you only learned about that, I
14 believe, after you read the depositions of Mr.
15 Diamantopoulos.

16 A. To be honest with you, I don't remember
17 whose deposi -- whose -- we -- whose transcript it
18 was I read.

19 Q. Okay, but you read it somewhere.

20 A. Yes, sir.

21 Q. And my question, then, would have been had
22 you known that this PCB, printed circuit board had
23 been located right next to where Mrs. Moon has
24 identified those styrofoam cups, those plastic cups,
25 styrofoam plates, and the cellophane encasing those

1 items was located, would that have changed or had
2 anything to do with your opinion about the ignition
3 source for this fire.

4 MS. DALY: Objection to form.

5 THE WITNESS: No, sir.

6 Q. (Mr. Wiggins) And, again, that's based
7 upon the opinion of Mr. Martini that the printed
8 circuit boards were not defective.

9 A. No, sir.

10 Q. Okay. What -- straighten me out then.

11 A. The area of origin -- let me rephrase
12 that. I identified the area of origin at floor level
13 on the 27th, if not the 26th, but most definitely by
14 the time I left the fire scene on January 27th, 2012,
15 as at floor level underneath drive-through window
16 number one. I based that on the damage to the
17 wheeled aluminum cabinet. I based that on the damage
18 to the wall underneath the drive-through window. And
19 when I say wall I'm talking about the vert -- the
20 vertical wall surface.

21 I based that on the presence of the fire
22 pattern or -- I don't want to say the fire pattern --
23 on fire patterns indicating that the fire originated
24 below the area in which I subsequently learned the IQ
25 Ion device was mounted. The fire originated below

1 that area, passed through that area vertically, and
2 kept going to the ceiling.

3 I also observed a fire pattern spreading
4 behind the wheeled aluminum cart going toward
5 drive-through window number two.

6 Q. How do you explain that?

7 A. By the fire originating at the floor.
8 That pattern is totally inconsistent with the fire
9 originating at the IQ Ion device. The damage to the
10 fibreglassed, reinforced panel that shows a protected
11 pattern is totally inconsistent with the fire
12 originating at the IQ Ion panel -- and I call it
13 panel -- device or item. The damage to the wheeled
14 aluminum cart is not consistent with the fire
15 originating at the IQ Ion item.

16 Q. Going back for just a moment, what do you
17 consider -- when we're talking about the area of
18 origin, you say we are not talking about the point of
19 origin. Is that correct?

20 MS. DALY: Objection.

21 Q. (Mr. Wiggins) Are we talking about two
22 different things, Mr. Lacy?

23 A. It's -- in my mind the words are
24 synonymous. There are a lot of people who will say a
25 big circle can be an area, a small circle can be a

1 point. I -- I believe the fire originated at floor
2 level underneath the window. If one wants to call
3 that the area, so be it. If someone wants to call
4 that the point, so be it.

5 When I think of a differ --
6 differentiation between area of origin and point of
7 origin, I am thinking that if I identified the area
8 of origin as the back of the restaurant, the back
9 half of the restaurant, behind the cash registers,
10 more generalized than what I have testified to today
11 -- but when I'm talking about an area that is 22
12 inches wide and no more than 35 inches -- I'm sorry
13 -- 22 inches deep and no more than 35 inches wide.

14 Q. Two by two by three?

15 A. Roughly, yeah. When -- when I'm talking
16 about that area -- I'm going to be honest with you.
17 You can call that an area of origin. You can call
18 that a point of origin. You're not going to get any
19 objection from me.

20 The fire did not originate up the wall.
21 The fire originated on the floor. The fire spread
22 vertically exactly like I would have expected that
23 fire to spread. It spread horizontally exactly like
24 that fire -- like I would have expected that fire to
25 spread. It produced a protected pattern on the wall

1 where the IQ Ion device was located as the fire
2 pattern passed through that area headed to the
3 ceiling.

4 Q. I understand that's what you've testified
5 to and that's what you've written in your reports.

6 Did you ever develop any kind of a
7 hypothesis that the Ion IQ device could or might have
8 been a heat source for ignition of this fire ---

9 MS. DALY: --- Objection.

10 Q. (Mr. Wiggins) --- Ignition -- initially
11 ---

12 A. --- Maybe ---

13 Q. --- At this point?

14 MS. DALY: Objection to the form of
15 the question.

16 THE WITNESS: Maybe for 90 seconds,
17 until I looked on the morning of the 26th, or maybe
18 the afternoon of the 26th. Let's just say on the
19 26th -- briefly, until I saw that fire pattern and
20 said, okay, it didn't originate up there.

21 Now, understand, on the 26th I didn't know
22 about the IQ Ion.

23 MR. WIGGINS: I understand.

24 THE WITNESS: I didn't know what was
25 on the wall. But I've got a black pattern -- let me

1 rephrase that. I've got a black protected area on
2 the wall that is in the middle of a fire pattern
3 originating at floor level, rising to the ceiling.
4 And once it hits the ceiling it goes horizontal,
5 exactly like the way I would have expected it to do.

6 Then I see the damage to the wheeled
7 aluminum cart. Then I see the fire patterns going
8 toward drive-through window number two.

9 On the afternoon of the 27th I realized
10 that the grout from the tile -- when I got down there
11 to take my sample, I realized that grout had taken a
12 lot of heat, and it was structurally unstable. Now,
13 I don't want to mean -- when I say unstable, I don't
14 want to mean it's explosive. But it wasn't worth
15 grout anymore. Two foot away the grout's fine. Two
16 foot behind me is fine. Two foot to the left of me
17 is fine.

18 Understand, I'm on my knees looking at the
19 drive-through window, office wall to my right,
20 wheeled cabinet to my left. And in this one area
21 I've got grout that is substantially fire damaged.

22 MR. WIGGINS: Okay.

23 THE WITNESS: Had the combustibile
24 items on the metal shelf fallen to the floor during
25 the fire, I wouldn't have had this kind of damage, or

1 I would have had damage that was three foot by six
2 foot, not 22 inches by 35 inches. But right here
3 I've got localized damage to the grout.

4 I've got a pattern to the wheeled aluminum
5 cart right here. I've got a fire pattern on the wall
6 below the drive-through window number one that starts
7 two, three inches off the floor and goes the entire
8 height of that room. It originates below and passes
9 through.

10 And when I say it, I mean the fire pattern
11 -- originates below and passes through the height of
12 the IQ Ion device and goes on to the ceiling.

13 I look at the pattern on the wheeled
14 aluminum cart. I look at the pattern on the wall
15 going toward drive-through window number two. They
16 are no way, underlined, bold font, all caps, no way
17 consistent with a fire originating at IQ Ion.

18 Then on Monday I have Mr. Martini examine
19 them. Other than knowing that I'm back here in the
20 left rear corner near drive-through window number
21 two, I don't tell him anything more. He look ---

22 MR. WIGGINS: --- Okay.

23 THE WITNESS: He looks at it and
24 says it's not involved in the fire.

25 Somewhere along the way you asked me if I

1 should have called Mr. Cavaroc, Dr. -- yeah, John
2 Cavaroc. I don't think so. I think Henry Martini is
3 capable of examining the PC board, the wiring, and
4 the fluorescent fixtures. And he and I have worked
5 fires where he has told me you got a problem here,
6 this caused the fire.

7 We do work for both property adjusters and
8 liability adjusters. If he tells me it did not cause
9 the fire, I believe him. If he tells me it did cause
10 the fire, I believe him. If he tells me he doesn't
11 know, I believe him. If I didn't believe him on any
12 one of those three items, I wouldn't use him.

13 MR. WIGGINS: I understand.

14 Q. (Mr. Wiggins) When you left the PCB on
15 the shelf, as you've testified, did you tell Jimmy or
16 anyone else that you were leaving them there for any
17 purpose, you were leaving them in their custody?

18 MS. DALY: Objection to the
19 characterization that you say he left on the shelf.

20 THE WITNESS: No, sir.

21 Q. (Mr. Wiggins) When you went back there in
22 November of 2012, they were gone, weren't they?

23 A. As was a whole lot of stuff in that
24 restaurant.

25 Q. Okay.

1 A. Not just PC boards and fluorescent light
2 fixtures, tables, cash registers, steel, stainless
3 steel tables, cooking appliances. It was all gone.

4 Q. All missing. All missing.

5 A. Gone.

6 MS. DALY: Let's take a break.

7 MR. WIGGINS: Sure.

8 (3:21-3:29 p.m. - recess)

9 MR. WIGGINS: Back on the record?

10 THE WITNESS: Yes, sir.

11 Q. (Mr. Wiggins) Mr. Lacy, I'm going to show
12 you what has been marked for identification as the
13 Plaintiff's Exhibit 46B and ask if you can flip
14 through that and identify that.

15 (Witness examined document)

16 A. Yes, sir. These are the photographs, 119
17 of them, that were attached to my report to Michael
18 Jezierski dated May 21st, 2012.

19 Q. And what was the purpose of this report to
20 Michael Jezierski?

21 A. It was requested by Scott Brown, and if he
22 identified a purpose, I don't know. I have just done
23 this work long enough to know at some point in time
24 most of my clients want a -- want a report prepared
25 to summarize my investigation.

1 Q. And you said, at your request, beginning
2 on January the 26, 2012, the fire scene examination
3 was conducted.

4 That's when you began your examination,
5 was it not?

6 A. Yes, sir.

7 Q. And it really wasn't Mike Jezierski who
8 did that. It was someone else.

9 Mike Austin, I believe you said?

10 A. Actually, Zak Gurley.

11 Q. Zak Gurley.

12 A. But in all honesty, sir, this is a -- this
13 is template language. I don't type at your request
14 beginning on January 26, 2012. That is pre-filled
15 in.

16 So if your is Nationwide's, it's okay. If
17 it's Mr. Jezierski -- no, you're right. It was
18 actually Zak Gurley.

19 Q. Doesn't matter.

20 A. And at the end of the day, it does not
21 matter to me.

22 Q. It doesn't matter. It doesn't matter to
23 me, either.

24 A. Okay. Okay.

25 Q. Just thought it was kind of odd ---

1 A. --- Well, I'll be honest with you, I
2 didn't realize it till just now.

3 Q. And then contained in this report is a
4 background of your investigation, which is on the
5 second page of this letter -- report.

6 A. Yes, sir.

7 Q. And then you talk about the statements
8 given to you Sean Berry of Security Central about
9 Jimmy going to the restaurant and entering the wrong
10 access code and having to change -- get that changed.

11 Do you recall that?

12 A. Yes, sir.

13 Q. And then you talk about your conversations
14 with Zachary Scott Lapene, and said Mr. Lapene had
15 heard certain things about payroll checks that were
16 bouncing and the natural gas services being
17 terminated recently.

18 Do you recall that?

19 A. Yes, sir.

20 Q. And then the next page is Ms. Moon had
21 said she paid in cash to other employees, and that
22 they were currently owed two weeks salary.

23 You talk about a dumpster was removed
24 several months ago because Mr. Diamatopoulos not
25 being paid the bill. And electrical service had been

1 in arrears for several months totalling \$3,000. Mrs.
2 Brown's had a lot of trouble cashing payroll checks.

3 All of this was information that was not
4 germane to your determination of the cause and origin
5 of this fire, was it?

6 MS. DALY: Objection to form.

7 THE WITNESS: No, sir. They were
8 statements that just came up during my interviews of
9 these employees.

10 Q. (Mr. Wiggins) It had nothing to do with
11 your cause and origin ---

12 A. --- I mean, it's not ---

13 MS. DALY: --- Objection to form.

14 THE WITNESS: It's not evidence of
15 the origin and cause of the fire, no.

16 Q. (Mr. Wiggins) And you did not consider it
17 to be such ---

18 A. --- No, sir.

19 Q. --- Did you?

20 A. No, sir.

21 MS. DALY: Objection to form.

22 Q. (Mr. Wiggins) And it would have been
23 improper under 921 to make that determination?

24 MS. DALY: Objection to form.

25 Q. (Mr. Wiggins) That is, to make a

1 determination of cause and origin based upon hearsay
2 statements from other persons about someone's
3 financial ---

4 A. --- Correct.

5 Q. --- Condition.

6 A. As soon as you said financial, I -- I
7 agree with you. I just wanted to hear what -- but
8 no, you're right.

9 Q. Okay.

10 A. I'm looking at physical evidence, fire
11 evidence.

12 Q. Exactly.

13 And in the next page you state that -- you
14 go on to say some other examples of that same thing
15 and the PWC matter.

16 And then you go on to talk about the
17 Fayetteville Fire Department having been called and
18 what they found.

19 And you said Firefighters Handford and
20 Hagan saw ceiling tiles falling near the drive-thru
21 window and were able to extinguish a fire burning on
22 the floor near the drive-thru window with minimal
23 water.

24 Jones stated that the owner arrived at the
25 scene early in the fire.

1 Do you recall that?

2 A. Yes, sir.

3 Q. And that was part of the report that you
4 made on the -- in May -- well, in May 21, 2012.

5 And then you said after the subsequent
6 investigation and conversation with Mr. Martini,
7 Royal identified the fire as incendiary in nature.

8 That was based upon his conversation with
9 you that Mr. Martini had ruled out all electrical
10 sources and appliances as a source of this -- as an
11 incendiary source of this fire? Is that correct?

12 MS. DALY: Objection to form.

13 THE WITNESS: Ruled out all ---

14 MR. WIGGINS: --- Electrical ---

15 THE WITNESS: --- As an incendiary
16 source?

17 THE WIGGINS: At -- well, all -- I'm
18 sorry.

19 All electrical appliances and/or equipment
20 that could have been a cause of this fire.

21 THE WITNESS: Mr. Martini did
22 eliminate all of that, yes.

23 Q. (Mr. Wiggins) He told that -- you then
24 told that to Special Agent Royal, did you not?

25 A. To be honest with you, I don't know if I

1 told him or if Special Agent Mart -- I mean, if Mr.
2 Martini -- or if all three of us were standing there
3 and had a conversation -- either Martini or Lacy
4 related to Royal.

5 Q. And based upon that, you're now aware that
6 Agent Royal then changed his classification of this
7 fire from undetermined to incendiary?

8 A. Yes, sir.

9 Q. And you go on to say that -- stated the
10 fire scene -- you talk about the fire scene
11 examination was conducted, utilizing recognized and
12 accepted procedures and practice for fire
13 investigation as outlined in 2011 edition of NFPA.
14 We talked about that.

15 And I -- I've shown you some of the guides
16 for fire and explosion investigation from 921, have I
17 not?

18 A. Yes, sir.

19 Q. And we've talked about that.

20 A. Yes, sir.

21 Q. And then you talk about the study that you
22 made, and that -- on the next page, that is, page
23 five -- you talk about alterations did not impact --
24 that is, Royal's rearrangement of the fire scene did
25 not impact your investigation.

1 And that would be a true statement, would
2 it not?

3 A. Hang on a minute.

4 Q. You see where I'm talking about?

5 A. All right, now, I'm looking at page eight.

6 Q. I'm sorry, page eight. I'm sorry.

7 A. Okay. No, I just wanted to be with you
8 all -- you said page five.

9 Q. I'm sorry.

10 A. Yeah, page eight, third paragraph. The
11 alterations did not impact my ability to form an
12 opinion as to the origin and cause of the fire.

13 Q. Correct. And then you say in the last
14 paragraph, the right -- the rear drive-thru window
15 was not in active use, thus no electrical appliances
16 were located in that area. No electrical, mechanical
17 or otherwise heat-producing equipment was located in
18 that area.

19 You now know, you did not know then, that
20 there was electrical equipment that -- that there was
21 heat-producing equipment in that area?

22 A. Yes, sir.

23 Q. And you then say Special Agent Royal moved
24 a lot of the debris from that area near the rear
25 drive-thru window. Examination of debris, again,

1 revealed no evidence of value.

2 And although you then knew that he had
3 removed the circuit board from that area, you
4 determined that that did not reveal any evidence of
5 value?

6 A. The -- I mentioned to you earlier today,
7 he moved the debris from in front of the drive-thru
8 window to over almost in front of the wheeled
9 aluminum cart. I went through the debris on the
10 floor.

11 Q. You never saw it ---

12 MS. DALY: --- Let him finish
13 answering his question.

14 THE WITNESS: I went through ---

15 MS. DALY: --- The first question.

16 THE WITNESS: --- The debris on the
17 floor. There was no -- there was nothing of any
18 value remaining in the debris on the floor.

19 The printed circuit boards had already
20 been moved to the table.

21 Q. (Mr. Wiggins) As you first saw it?

22 A. Yeah, as we discussed.

23 Q. Okay.

24 A. But there was nothing left on the floor of
25 any value.

1 Q. And that's what you meant by this
2 statement?

3 A. Yes, sir.

4 Q. And then you say examination of the area
5 under the rear drive-thru window revealed no evidence
6 of an ignition source.

7 That was a statement that you also made?

8 A. Correct.

9 Q. And you made that statement not knowing at
10 the time that the printed circuit board was located
11 in the area where you subsequently learned that it
12 was placed?

13 MS. DALY: Objection to the form of
14 the question.

15 THE WITNESS: Correct.

16 Q. (Mr. Wiggins) And then in the last page,
17 page 10, the ignition source of the fire is an
18 unidentified open flame device that is based on the
19 following facts.

20 Exclusion of electrical, mechanical and
21 otherwise heat-producing equipment in the area of the
22 origin of the fire.

23 And number two, an open-flame device is
24 the only competent ignition source available to
25 complete the ignition sequence for this fire.

1 That was your conclusions, I take it, Mr.
2 Lacy?

3 A. Yes, sir.

4 Q. And let me ask you about that.

5 The ignition source is unknown. The open
6 -- you say an open flame, but you don't know what the
7 ignition source was when you say an open flame, do
8 you?

9 MS. DALY: Objection to form.

10 THE WITNESS: I am -- when I say an
11 unidentified open flame device, I am referring to the
12 flame from a cigarette lighter, the flame from a
13 struck match, the flame from an appliance that we
14 could use to light a charcoal grill. I'm talking
15 about the flame produced by a lit plumber's torch.
16 An open flame.

17 Q. (Mr. Wiggins) Did you find any evidence
18 of any of those devices at the scene?

19 A. No, sir.

20 Q. And you made the determination of an open
21 source fire without finding any such device at the
22 scene?

23 A. Correct.

24 Q. And then you say an open flame device is
25 the only competent ignition source available.

1 And that means that you had excluded at
2 that point any known electrical devices in the area,
3 including all of the things we've talked about here
4 today. The fluorescent light -- lights in the
5 restaurant, the printed circuit board, the electrical
6 outlets in that area, all of those things had been
7 eliminated by Mr. Martini?

8 A. Yes, sir.

9 Q. And that's what you base your decision
10 upon. Is that correct?

11 A. Yes, sir.

12 Q. And would this have been based upon what
13 is known as the process of elimination of causes of
14 fires?

15 MS. DALY: Objection to form.

16 THE WITNESS: A portion of it is,
17 yes.

18 Q. (Mr. Wiggins) Okay, and is that also
19 known as the negative corpus theory?

20 A. Negative corpus and process of elimination
21 are two different things.

22 Q. Okay, tell me about that.

23 A. Negative corpus is -- the best example --
24 well, an example of negative corpus is you have a
25 vacant house that no one's living in. There's no

1 electrical service, and it has no gas service, no
2 fuel oil service and it catches on fire. And an
3 investigator says it has to be intentionally set.

4 He doesn't know where it originated, other
5 than within the four exterior walls, above the floor
6 and below the ceiling. But because there's no
7 electrical, no mechanical, none of this, none of
8 that, it's got to be incendiary.

9 Process of elimination where you have a
10 well-defined area of origin, and in my mind, at 22
11 inches deep and 35 inches wide, at floor level, I
12 have a well-defined area of origin. I don't have --
13 I don't have a competent ignition source within that
14 well-defined area of origin.

15 Beyond that evidence, I have the movement
16 of a wheeled aluminum storage rack from near the --
17 what we've been calling drive-thru window number two.
18 I don't say it in here, but the conversation you and
19 I have had, moving it from drive-thru window number
20 two near -- closer to drive-thru window number one --
21 after four a.m. on January 24th and before
22 approximately 8:40 a.m. on January 24th.

23 Q. How do you know it was not moved by fire
24 fighters who had entered the restaurant?

25 A. Because the fire patterns on the side tell

1 me that it was in the location that I first observed
2 it in at the time of the fire.

3 Q. And you can ---

4 A. --- May I continue with ---

5 Q. --- Oh, I'm sorry.

6 A. --- With my answer?

7 Q. I'm sorry. Go ahead.

8 A. I also have evidence that Mr. -- or Jimmy,
9 Mr. D., however you want to -- whatever you want to
10 call him, the owner -- entered the restaurant at
11 8:15, received a phone call from the alarm company at
12 8:17, and depending upon what sequence of events you
13 utilize, left the restaurant between 8:25 and 8:35.

14 We have a fire reported at 8:41. I
15 observed flames venting out the window of drive -- of
16 drive-thru -- out of the glass of the window of
17 drive-thru number one at 8:43. We have Mr. -- we
18 have Jimmy passing in front of Walmart and we've got
19 firefighter -- at 8:45 -- and we got fire fighters
20 arriving at 8:46.

21 Utilizing all of that evidence as part of
22 process of elimination, and 921 allows it, I
23 determined the fire is incendiary.

24 Q. You talk about 941. Are you talking
25 941.18?

1 A. I'm talking about 841, not 940 ---

2 Q. --- 921.

3 A. Oh, 921.

4 Q. 921, 86.5. Is that what you're talking
5 about?

6 A. 8.6.5?

7 Q. 18.6.5.

8 A. Uh-huh. Okay, 18, yes, sir.

9 Q. And this talks about the inappropriate use
10 of the process of elimination.

11 Do you see that?

12 A. Yes, sir.

13 Q. And that's what you emphasized in your
14 response in your expert report made in 2013, June of
15 2013?

16 A. Yes, sir.

17 Q. And you say that ---

18 A. --- Excuse me. Oh, expert -- yes, sir.
19 Yes, sir.

20 Q. And this says the process of determining
21 the ignition source for a fire by eliminating all
22 ignition sources known -- found, known or believed to
23 have been present in the area of origin, and then
24 claiming such methodology is proof of an ignition
25 source for which there is no evidence of its

1 existence, is referred to by some investigators as
2 negative corpus.

3 Negative corpus has typically been used in
4 classifying fires as incendiary, although the process
5 has also been used to characterize fires --
6 classified as accidental.

7 This process is not consistent with a
8 scientific method, is inappropriate, and should not
9 be used because it generates an un-testable
10 hypotheses and may result in incorrect determinations
11 of the ignition source and first fuel ignited.

12 Any hypothesis formulated by the casual
13 factors -- that is fuels -- first fuel, ignition
14 source, ignition sequence, must be based on facts.
15 These facts are derived from evidence, observations,
16 calculations, experiments, and the law of science.
17 Speculative information cannot be included in the
18 analysis.

19 Do you agree with that statement there?
20 Is that what you -- do you adhere to that?

21 A. Okay, beginning with the process of
22 determining the ignition source and going through the
23 phrase first fuel ignited, that deals with negative
24 corpus.

25 Q. Okay.

1 A. Beginning at any hypothesis formulated for
2 the causal factors must be based on facts, that is
3 process of elimination.

4 Process of elimination is allowed,
5 negative corpus is not.

6 Q. Okay.

7 A. There is a difference between the two.

8 Q. Some investigators use it synonymously, do
9 they not?

10 MS. DALY: Objection.

11 Q. (Mr. Wiggins) You know that, don't you,
12 Mr. Lacy?

13 MS. DALY: Objection.

14 Q. (Mr. Wiggins) That some use it
15 interchangeably.

16 A. Yes.

17 Q. And it's often used interchangeably by
18 fire investigators?

19 A. Incorrectly.

20 Q. Incorrectly. But you make a
21 differentiation between the two.

22 A. Yes, sir.

23 Q. And this section prohibits, as you've
24 suggested, a negative corpus theory for developing
25 the period for the -- for the fire -- or the cause

1 and origin of a fire.

2 A. Yes, sir.

3 Q. And it does not, in your cal -- in your
4 estimation, prevent process of elimination?

5 A. Correct.

6 Q. And what do we mean by -- what do you mean
7 by process of elimination?

8 A. In -- in all honesty, sir, it's probably
9 not the best title, but it's what the industry has
10 established.

11 When an investigator looks at a vacant
12 house fire that does not have electrical service and
13 says incendiary, that's negative corpus. He's not
14 examined the electrical components.

15 When an investigator or an engineer does
16 in fact examine electrical components and has a
17 well-defined area of origin and has facts that
18 support an incendiary fire, all of which supported an
19 incendiary fire -- not just one of those items -- all
20 of which support an incendiary fire, you may -- I
21 mean, that's process of elimination. You've got to
22 start with a well-defined area of origin.

23 If I did not have information that the
24 wheeled aluminum cart had been moved, if I did not
25 have information that Jimmy had left the restaurant

1 immediately -- well, not immediately, but in the
2 minutes preceding the fire -- discovery of the fire
3 -- I may have done something different.

4 But the bottom line, sir, is that evidence
5 -- evidence was presented to me by a -- with a
6 competent source, independent source, and I felt and
7 still feel to this day that it -- it supported an
8 incendiary fire cause.

9 Q. We've established that you did not know
10 what the ignition source of this fire was beyond
11 speculation.

12 MS. DALY: Objection.
13 Mischaracterization of his testimony.

14 Q. (Mr. Wiggins) You said open flame.
15 You don't know what kind of an open flame
16 it was.

17 A. No, sir.

18 Q. And you do not know -- what was the first
19 fuel ignited in this fire?

20 A. Probably the shrink wrap, or plastic
21 wrapping around the cellophane -- cellophane --
22 around the urethane products.

23 Q. Okay, and the only evidence you have with
24 their location is on or about the top shelf as given
25 to you by Mrs. Moon?

1 MS. DALY: Objection to form.

2 THE WITNESS: Mrs. Moon never said
3 top shelf. She just said they were stored on that
4 shelving.

5 Q. (Mr. Wiggins) Do you have any evidence or
6 did you develop any evidence that there were in any
7 other place at any time during ---

8 A. --- It would have ---

9 Q. --- The investigation.

10 A. It would have been awfully easy to move
11 them from a top shelf to the floor.

12 Q. I know it would have been easy to have
13 moved them, Mr. Lacy, but I'm asking you do you have
14 any evidence that it was moved.

15 A. No, sir.

16 Q. And then 18 -- look at 18.6.5.1, and it
17 says cause undetermined.

18 In the circumstance where all hypothesized
19 fire causes have been eliminated -- and that's where
20 we talked about, process of elimination ---

21 A. --- Okay.

22 Q. --- And the investigator is left with no
23 hypothesis that is -- that is evidenced by the facts
24 of his investigation, the only choice for the
25 investigator is to opine that the fire cause, or

1 specific casual factors -- causal factors, remains
2 undetermined. It is improper to base hypotheses on
3 the absence of any supporting evidence.

4 Do you agree with that statement?

5 A. Yes, sir.

6 Q. That is, it is improper to opine a
7 specific ignition source that has no evidence to
8 support it even though all other hypothesized sources
9 were eliminated.

10 Do you agree with that statement?

11 A. I agree with the statement as its
12 contained in 921. It's not applicable to this
13 investigation.

14 Q. Okay, why is not applicable to this
15 investigation?

16 A. Go back up to the first sentence of
17 18.6.5.1.

18 In the circumstances where all
19 hypothesized fire causes have been eliminated and the
20 investigator is left with no hypothesis that is
21 evidenced by the facts of the investigation.

22 Q. Okay.

23 A. I've got evidence, facts of investigation,
24 that indicate the fire is incendiary and not
25 accidental, not undetermined, not natural. Four fire

1 causes. Incendiary, accidental, undetermined,
2 natural.

3 I've got facts of the investigation that
4 indicate the fire is incendiary.

5 Q. Is not what you're saying, Mr. Lacy,
6 trying to prove a negative?

7 That is, a lay investigator could say I'm
8 going to rule out everything else except incendiary,
9 call the fire incendiary, and say prove me wrong?

10 A. No, sir.

11 Q. That couldn't happen?

12 A. Not in this case. I'm not going to say it
13 can't happen. I'm saying it's not happening in this
14 case.

15 Q. I understand you're saying it's not
16 happening in this case.

17 But I'm just saying that when you use the
18 process of elimination or a negative corpus, whatever
19 you want to call it, you're winding up by saying, you
20 know, we can't determine the cause of this fire, so
21 therefore, we're saying it's incendiary, prove me
22 wrong.

23 Doesn't that happen?

24 MS. DALY: Objection.

25 THE WITNESS: I don't know. It

1 didn't happen here. That is not the case here, sir.

2 Q. (Mr. Wiggins) And you're saying the fact
3 that you're relying upon is the timing factor of
4 Jimmy being in the restaurant, the timing factor of
5 flames being seen in and near the restaurant at 8:41
6 a.m., and the fact that the cart was moved from a
7 point where Mrs. Moon said it was, at or near
8 drive-thru window number two, nearer to drive-in
9 window number one.

10 Is that what you're saying?

11 A. Yes, sir.

12 Q. What is the significance, Mr. Lacy, of
13 having moved -- or the cart being moved from window
14 number one down near window number two?

15 A. To obstruct the visibility of -- of the
16 fire from the exterior of the restaurant.

17 The wind -- when you moved the cart where
18 it was moved, it obstructed, or blocked may be a
19 better word, vision through drive-in window number
20 two.

21 And if you stood on McPherson Church Road
22 or in the front of the restaurant in a straight line
23 from drive-in window number one to McPherson Church
24 Road, it -- it blocked that vision. Fire could be
25 set on the floor.

1 Remember the side of the cart is damaged,
2 not the front. So it's set underneath the window,
3 but the window is partially blocked by the wheeled
4 aluminum cart, the window being that of drive-in
5 window number one.

6 And then -- and I went in the restaurant
7 and stood -- and when I draw a -- basically a
8 diagonal line from the left rear toward the right
9 front, when I get in that diagonal line, I can't see
10 the origin of the fire because of the cart.

11 If the cart is moved back up to where it
12 is closer to drive-in window number two, you could
13 see the area of origin.

14 Q. Is it your testimony you could have seen
15 into the -- into the window from McPherson Church
16 Road back to the location of this window number one
17 in the daytime and have seen someone in the
18 restaurant?

19 Is that what you're saying?

20 A. Well, the way I -- I didn't go outside and
21 look through.

22 Q. Okay.

23 A. I -- where I -- I stood in the restaurant
24 and realized, even in the restaurant, you couldn't
25 see the origin on the floor underneath drive-in

1 number -- drive-thru window number one.

2 Q. Okay.

3 A. So if you can't ---

4 Q. --- Going back ---

5 A. --- If you can't see it from inside the
6 restaurant, you're not going to be able to see it
7 from outside.

8 Q. So your theory is that it would have been
9 -- have blocked and provided refuge for someone
10 trying to set a fire in the restaurant?

11 A. First, I agree with the first part of your
12 statement. I don't agree with the second part.

13 I agree that it was moved to block the
14 visibility, not so much of a person but of
15 development of the fire.

16 Q. Okay.

17 A. Development and spread of the fire.

18 Q. Did it ever -- did you ever wonder or
19 think about the fact that this fire occurred in or
20 about 20 minutes till nine o'clock in the morning at
21 the intersection of McPherson Church Road, Skibo
22 Road, which had traffic on those two roads, which
23 were the busiest of the day -- and those are the two
24 busiest roads in Fayetteville -- why someone would
25 set fire to a restaurant at that time of the day

1 rather than in the middle of the night?

2 MS. DALY: Objection to form.

3 THE WITNESS: I've -- I've been
4 investigating fires approximately 35 years, and I
5 have been involved with the pro -- profiling of fire
6 setters. And one of the things that I learned
7 through that is, yes, there are some distinct
8 characteristics that you can profile. But there's
9 always kind of that wild hair that happens and you
10 can't explain it.

11 But in answer -- to answer your question,
12 it is an odd time of day. Other than what I observed
13 on January 26 and 27 and January 30 -- I mean, I
14 don't know that that's the busiest intersection in
15 Fayetteville, but it is a -- two busy roads.

16 MR. WIGGINS: And ---

17 THE WITNESS: --- But let me add
18 this, and this -- this came to my mind. I'm not
19 trying to cut you off. It just popped in my mind.

20 That is more justification for moving
21 something to block vision because you've got two busy
22 roads.

23 If you -- if you've got two country roads
24 and you're not worried about somebody driving down
25 there or sitting at intersections waiting for lights

1 to turn green, you don't need to move a cart to block
2 it. But if you do have that, you do need to move a
3 cart to block it

4 Q. (Mr. Wiggins) Did you find, Mr. Lacy, any
5 incendiary fire indicators in this restaurant when
6 you did your investigation?

7 MS. DALY: Objection to form.

8 THE WITNESS: Well, certainly the
9 owner leaving the property in a period of a few
10 minutes before discovery of the fire is an indicator
11 of an incendiary fire.

12 The movement -- and typically textbooks
13 say structural component, but the movement of the
14 wheeled aluminum cart would be an indicator of an
15 incendiary fire. Those are the two that I considered
16 in my investigation towards -- that resulted in the
17 identification of an incendiary fire.

18 There are multiple other indicators of an
19 incendiary fire that I did not use in hypothesizing
20 that the fire was incendiary. But those are the two
21 that I used.

22 Q. (Mr. Wiggins) That comes to your mind
23 now?

24 A. Yes. Well, it came to my mind in January.
25 Not now, but in January.

1 Q. Did you ever know how many -- or did you
2 determine from Mrs. Moon or from Jimmy the number of
3 these styrofoam shelves, plastic cups, and -- and
4 plates were on that -- on those shelves -- on that
5 drying shelf?

6 A. Okay, please re -- please restate the
7 question.

8 Q. Did you ever determine from Mrs. Moon or
9 from Jimmy, or any other source, for that matter, the
10 number of styrofoam plates, the number of plastic
11 cups and/or plates and/or plastic utensils that were
12 on that drying shelf?

13 A. No, sir.

14 Q. Let me just show you very quickly -- I'm
15 not going to spend much time with this, and we'll be
16 through pretty quickly here -- what I will call
17 Exhibit Number 124, and ask you if you can identify
18 this document.

19 (* Exhibit 124 was marked *)

20 (Witness examined document)

21 A. Yes, sir. This is my report dated June
22 28, 2013.

23 Q. And did you attach photographs to this
24 report to Ms. Daly, dated June 28, 2013?

25 A. Not -- I didn't do a photo log like I did

1 with the May 2012 report.

2 What I did is refer to photo numbers in
3 opinions three and six. And those -- these photo
4 numbers are on the CDs that you received this
5 morning, and I think they're under a file labeled
6 Lacy Photo report two -- I mean, Lacy report two,
7 number two, photos.

8 Q. Okay.

9 A. And all of these digital images that you
10 see, like on page five and on page four, you see
11 where I've listed digital images?

12 Q. Okay. Yeah.

13 A. They're in a specific folder on one of
14 those CDs that you were given this morning.

15 Q. Okay.

16 A. I did not do a separate photo log.

17 Many of these same photos are in my May
18 2012 report, but they're detailed here.

19 And there are two additional photos under
20 item number 15 -- opinion 15 on page seven.

21 Q. Did you include a copy -- a photo of the
22 circuit board that was located by you or Mr. Martini
23 on the shelf that you said -- where it was placed?

24 A. No, sir, because Mr. Martini included a
25 photograph of that in his May 2012 report, so I

1 didn't go back and duplicate it.

2 Q. Is essentially the only difference between
3 this report to Mrs. Daly, which is, again, dated June
4 28, 2013, and the one dated May 2012, is the
5 inclusion of the information concerning the base
6 station -- Ion IQ base station for the restaurant
7 drive-thru communication system?

8 MS. DALY: Objection to form.

9 THE WITNESS: Okay. All right,
10 pages one, two and three and the top paragraph on
11 page four are somewhat identical to my May 2012
12 report. I don't identify opinions as -- in the May
13 2012 report as I do in this report.

14 Q. (Mr. Wiggins) This is more extensive? Is
15 that what you're saying?

16 A. Yes. And then, beginning on page eight it
17 talks about information reviewed and considered, and
18 interviews conducted, depositions reviewed, previous
19 depositions. Then compensation, qualifications,
20 exhibits, all of that -- I mean, none of that is
21 included in the May 2012 report but is included in
22 this report.

23 Q. And on paragraph 15 -- you see that?

24 A. I'm flipping back there. One second.

25 (Witness examined document)

1 A. Yes, sir.

2 Q. And it says any video recording equipment
3 on a shelf in the office was still in that location
4 on January 30th, 2012.

5 That was not in your original report, was
6 it? That's added to this report?

7 A. Yes, sir.

8 Q. And that's because you became aware of
9 that existence during -- between the time you
10 completed your investigation and the time you wrote
11 this report?

12 A. Well, item number ---

13 MS. DALY: --- Objection to the
14 form.

15 THE WITNESS: Item number 15 is in
16 there because I read in Mr. -- I mean, in Jimmy's --
17 in one of the transcripts -- but right now, off the
18 top of my head, I don't remember if it was EUO or
19 deposition -- that he saw me remove it from the
20 building on January 26, and I didn't.

21 Q. (Mr. Wiggins) But that's -- what I'm
22 saying, that's new.

23 A. Yes, sir.

24 Q. And then -- and then I see that you had
25 added the information about the Ion IQ in this report

1 in some detail which was not mentioned in the earlier
2 report.

3 A. Correct.

4 Q. Other than that, the reports that you
5 filed are essentially the same and you had made the
6 same arguments about the cause and origin of the fire
7 supported in this report as you did the first report?

8 A. Yes, sir.

9 Q. One more thing I want to talk about ---

10 A. --- Okay, that's fine.

11 Q. --- And we'll be finished up here.

12 I show you what I'm going to mark as --
13 and I only have one of these, so I'm going to have to
14 -- this has already been introduced as an exhibit --
15 it's Langham & Associates report -- expert -- federal
16 report to Mr. Lacy.

17 Have you he read that report?

18 A. Who authored it?

19 Q. The author of this was Steven Booth.

20 A. Yes, sir.

21 Q. Let me show it to you, and I have not --
22 I'm sorry.

23 A. That's all right.

24 Q. Have not put the attachments to that
25 because the only thing basically it was was the Ion

1 -- all the information about the Ion IQ system.

2 A. Okay.

3 Q. And very quickly, look at page one of this
4 report, in summary of cause and origin, did you read
5 that?

6 A. Okay, I'm looking at that. I'm seeing
7 that as numbered page two.

8 Q. Page two is correct.

9 A. Okay.

10 Q. And ---

11 A. --- I see the paragraph.

12 Q. Right. Summary of cause and origin, and
13 the -- would you read that paragraph and see whether
14 you disagree or agree with that.

15 A. You want me to read it out loud?

16 Q. No, you can just read it to yourself.

17 (Witness examined document)

18 A. Okay, I've read it.

19 Q. Do you agree or disagree with anything
20 that Mr. Lacy has stated in that paragraph?

21 MS. DALY: Objection to the form.

22 THE WITNESS: I don't believe Mr.
23 Lacy stated anything in the ---

24 MR. WIGGINS: --- I'm sorry.

25 THE WITNESS: --- Paragraph.

1 MR. WIGGINS: I'm sorry. It's
2 getting late in the afternoon. Excuse me.

3 THE WITNESS: It's all right.

4 MR. WIGGINS: Mr. Booth....

5 MS. DALY: Do you want him to go
6 sentence by sentence and tell you whether or not he
7 agrees or disagrees?

8 MR. WIGGINS: Well, if -- if he can
9 just tell me whatever it is he can testify ---

10 THE WITNESS: --- Mr. Booth opines
11 that the cause would be undetermined. I opined that
12 the cause would be incendiary.

13 Q. (Mr. Wiggins) And that's two different
14 things, and he ---

15 A. --- Well, I mean, that's the lump sum. In
16 other words ---

17 Q. --- That's the bottom line?

18 A. Yeah. I mean, there's one or two things
19 in the middle that I may not agree with, but it all
20 leads to he's undetermined, I'm incendiary.

21 Q. And the point of all of this, Mr. Lacy, is
22 that reasonable minds will reach different
23 conclusions. Is that not correct?

24 MS. DALY: Objection.

25 THE WITNESS: After reviewing Mr.

1 Booth's deposition -- and I think he was deposed last
2 Friday, and I -- and I looked at his deposition on --
3 his transcript on Monday.

4 I don't know if Mr. Booth knew everything
5 on May 30th that he knew on August 16th, two and half
6 months in there, so I'm -- I'm not going to say that
7 two reasonably minded individuals can reach separate
8 opinions. Where I'm going to be -- go more specific
9 is a person who knows less information than another
10 might read -- might reach a different opinion.

11 Q. (Mr. Wiggins) He's basing his conclusions
12 on the fact that he did not have an opportunity, nor
13 did any investigator on behalf of the property -- the
14 -- Jimmy Diamatopoulos, to examine the Ion IQ system.

15 A. Okay.

16 Q. And therefore, he cannot rule that out as
17 a possible source.

18 Do you understand that?

19 A. Yes, sir. But I believe in his transcript
20 from last Friday's deposition, he does talk about two
21 possible hypotheses, one of which is incendiary, one
22 of which is accidental involving the IQ Ion.

23 And as the time frame between Mr. --
24 between Jimmy's departure from the building lessens
25 with the discovery of the fire, it is a greater

1 likelihood that Mr. -- that Jimmy set the fire or was
2 in the building when the fire was set as opposed to
3 the fire being accidental.

4 He doesn't say anything in here about
5 that, because I don't know that Steve knew all of the
6 time frame information on May 30th that he knew on
7 July 16th.

8 Q. But assume that he did know the time frame
9 information, Mr. Lacy, at the time that he gave his
10 deposition, there would still be a difference between
11 his opinion and your opinion, would there not?

12 A. Yes.

13 Q. And I know, as you have seen from his
14 deposition, that Mr. -- that Mr. Booth respects your
15 opinion, and likewise, I take it, you respect his
16 opinion?

17 MS. DALY: Objection to the form.

18 THE WITNESS: Yes.

19 Q. (Mr. Wiggins) Is there any other factors
20 other than -- any other factors, Mr. Lacy, other than
21 what we've discussed in your report, that you're
22 going to testify to upon the trial on this matter to
23 the jury that influenced your opinion that this fire
24 was incendiary in nature?

25 A. That's not listed in this report?

1 Q. Not -- right, that's not listed in that
2 report.

3 A. No, sir.

4 MS. DALY: Objection to form.

5 MR. WIGGINS: I think that's all I
6 have.

7 MS. DALY: Thank you.

8 I don't have any questions.

9 THE WITNESS: Did you say you do or
10 don't?

11 MS. DALY: I don't.

12 THE WITNESS: Okay.

13 MR. WIGGINS: I think I'm tired.

14 WHEREUPON,

15 at 4:19 o'clock p.m. the deposition was adjourned.
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1 CERTIFICATE OF TRANSCRIPT

2 I, Cassandra J. Stiles, Notary Public in
3 and for the County of Forsyth, State of North
4 Carolina at Large, do hereby certify that there
5 appeared before me the foregoing witness;

6 That the testimony was duly recorded by
7 me, reduced to typewriting by me or under my
8 supervision and the foregoing consecutively numbered
9 pages are a complete and accurate record of the
10 testimony given at said time by said witness;

11 That the undersigned is not of kin nor
12 associated with any of the parties to said cause of
13 action, nor any counsel thereto, and that I am not
14 interested in the event(s) thereof.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand this the 31st day of August, 2013.

17 Cassandra J. Stiles, CVR
18 Certified Court Reporter
19 Atlantic Professional Reporters
20 Post Office Box 11672
21 Winston-Salem, NC 27116-1672

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CERTIFICATE OF OATH

I, Cassandra J. Stiles, Notary Public in
and for the County of Forsyth, State of North
Carolina at Large, do hereby certify that there
appeared before me the foregoing witness;

That the witness personally appeared
before me at the date, time and location hereon
captioned and was personally sworn by me prior to the
commencement of the proceeding in the matter hereon
captioned.

IN WITNESS WHEREOF, I have hereunto set my
hand this the 31st day of August, 2013.

Cassandra J. Stiles, CVR
Certified Court Reporter
Atlantic Professional Reporters
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Winston-Salem, NC 27116-1672

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WITNESS CERTIFICATION

I, HUNTER B. LACY, CFI, hereby certify:

That I have read and examined the contents of the foregoing testimony as given by me at the time and place hereon indicated, and;

That to the best of my knowledge and belief, the foregoing pages are a complete and accurate record of all the testimony given by me at said time, except as noted on the Attachment A hereto.

I have ___ have not ____ made changes/corrections _____

Hunter B. Lacy, CFI

I, _____, Notary Public for the County of _____, State of _____, hereby certify:

That the herein-above named appeared before me this the _____ day of _____, 19____, and;

That I personally witnessed the execution of this document for the intents and purposes as herein-above described.

Notary Public

My Commission Expires:

(SEAL)

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CERTIFICATE OF MAILING

I, Cassandra J. Stiles, CVR, do hereby certify that a true copy of the transcription of the matter hereon captioned was served on the party named below by the placement of said transcript copy in the United States Mail, Priority Mail delivery, with proper postage affixed, addressed as follows:

Hunter B. Lacy, CFI
c/o Gemma L. Saluta, Esq.
One West Fourth Street
Winston-Salem, NC 27101

This the 3rd day of September, 2013.

Cassandra J. Stiles, CVR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:12-CV-00610-F

C O P Y

CITY GRILL HOSPITALITY GROUP, INC.,)
)
Plaintiff,)

vs.)

) D E P O S I T I O N

NATIONWIDE MUTUAL INSURANCE COMPANY,)
)
Defendant.)

-----)

L. HENRY MARTINI, P.E.

One West Fourth Street
Winston-Salem, North Carolina

Tuesday, August 20, 2013
10:12 o'clock a.m.

Atlantic Professional Reporters
Winston-Salem, NC 27116-1672

APPEARANCES OF COUNSEL

Richard M. Wiggins, Esq., and
James A. McLean, III, Esq.
McCOY WIGGINS CLEVELAND & O'CONNOR, PLLC
202 Fairway Drive
Post Office Box 87009
Fayetteville, North Carolina 28304-7009

Rachel E. Daly, Esq.
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
One West Fourth Street
Winston-Salem, North Carolina 27101

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E X H I B I T S

Name	Offered By	Identified
Deposition Exhibit 46A	Plaintiff	69
Deposition Exhibit 46B	Plaintiff	108

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STIPULATIONS

Pursuant to notice and/or consent of the parties, the deposition hereon captioned was conducted at the time and location indicated before Cassandra J. Stiles, Notary Public in and for the County of Forsyth, State of North Carolina at Large.

The deposition was conducted for use in accordance with and pursuant to the applicable rules or by order of any court of competent jurisdiction.

Reading and signing of the testimony was requested prior to the filing of same for use as permitted by applicable rule(s).

1 The witness, L. HENRY MARTINI, P.E. being
2 first duly sworn to state the truth, the whole truth
3 and nothing but the truth, testified as follows:

4 (10:12 o'clock a.m.)

5 EXAMINATION

6 BY MR. WIGGINS:

7 Q. Good morning, Mr. Martini. Again, I'm
8 Richard Wiggins. We just met. I think we met about
9 last November at the site in Fayetteville. Is that
10 correct?

11 A. Yes.

12 Q. You're here today for us to take your
13 deposition as an expert.

14 Do you understand that?

15 A. Yes.

16 Q. This isn't going to be a completely
17 arduous exercise for you this morning, and just want
18 to find out your findings and what you did in
19 relation to this fire that occurred back in January
20 24th, 2012.

21 You understand that?

22 A. Yes.

23 Q. Have you had your deposition taken before?

24 A. Yes, I have.

25 Q. Many times?

1 A. A few.

2 Q. A few times. So you understand the drill.

3 The only thing I would just say very
4 briefly is, if you want to take a break any time,
5 please let me know or let Rachel know and we'll be
6 glad to accommodate you. This isn't a -- a relay
7 race of any kind, and we've got plenty of time to get
8 this done.

9 A. My last -- my last one was 10 hours, so...

10 Q. This will not be 10 hours, I can assure
11 you.

12 And again, it's so easy to shake your head
13 affirmatively rather than saying verbally yes or no,
14 and if you'll make sure you answer verbally to every
15 question.

16 And if I ask a question and you don't
17 understand what I'm asking, please ask me to repeat
18 it, because, unfortunately, I have a habit of asking
19 questions sometimes that don't make good sense even
20 to me.

21 Just so we're on the same sheet of music,
22 is that okay? Is that fair?

23 A. Sure.

24 Q. Very good.

25 Where do you -- where do you live, Mr.

1 Martini?

2 A. I live in Greenville, South Carolina.

3 Q. Okay, and you're associated with Donan?
4 Is that correct?

5 A. Yes, that's correct.

6 Q. And what is the -- what is the legal name
7 of that company?

8 A. Donan Engineering Company, Incorporated.

9 Q. And where is it -- where is the main
10 office or the home office of that company?

11 A. It's based out of Louisville, Kentucky.

12 Q. And do they have more than one office, I
13 take it?

14 A. Yes.

15 Q. And how many offices does Donan have?

16 A. I don't have the specific number in my
17 head.

18 Q. But many offices around the country?

19 A. Mostly located in the eastern half of the
20 country at this time.

21 Q. Okay, and how long have you been with
22 Donan?

23 A. Umm, will be three years in October.

24 Q. Okay, and before that what were you doing?

25 A. I worked for Unified Investigations.

1 Q. And what did you do with Unified
2 Investigations?

3 A. Same type of work.

4 Q. Engineering-type work?

5 A. Yes.

6 Q. And go ahead and give me your educational
7 background as you can recall it.

8 A. Sure. I attended the University of
9 Central Florida in Orlando, Florida, from -- do you
10 want time periods as well?

11 Q. Yes, please.

12 A. 1976 through 1981. Bachelor of science in
13 engineering with a major in electrical engineering.

14 Q. Okay.

15 A. I'll just progress up from there.

16 Q. Sure.

17 A. My first job after that was with
18 Underwriter's Laboratories in Tampa, Florida, their
19 Tampa office. That was from 1981 to 1986. I was one
20 of their project engineers evaluating products to
21 their standards, and did some work with standards
22 writing as well.

23 Q. Okay.

24 A. Following that I did some consulting work
25 for manufacturers seeking to obtain UL approval on

1 their products.

2 I worked for a company, Engineering
3 Assessments, in the late eighties for a couple of
4 years. That was my first work in the forensic field.

5 Following that I worked in Jacksonville,
6 Florida, for nine or 10 years with the Hunter
7 Lighting Group, which was the lighting division of
8 the Hunter Fan Company, as their engineering manager.

9 Q. Hunter what kind of company -- fan?

10 A. Lighting.

11 Q. Lighting company?

12 A. Lighting was one of the products I worked
13 at -- I dealt with at -- at UL.

14 Q. Okay.

15 A. And so I was in charge of all their
16 product safety evaluations and submittals, ULCSA, and
17 quality control, both on the receiving end and
18 manufacturing end, addressing any problems that came
19 up. Addressed problems that reported from the field
20 with their products, and a little bit in the product
21 design aspect as well with regards to safety.

22 Q. Okay.

23 A. That takes us up through 1999.

24 Following that I went to work with
25 Applications Engineering Group in Atlantic Beach,

1 Florida, doing forensic work full time.

2 Q. And then Donan?

3 A. Applications Engineering Group was '99
4 through 2009, nine -- nine years -- and then a couple
5 years with Unified and then Donan.

6 Q. Okay, UL Laboratories, that was in
7 Florida?

8 A. Yes.

9 Q. And you were testing similar products for
10 safety issues?

11 Is that what you were doing?

12 A. The majority of my work was in the fan and
13 lighting group, not the product groups.

14 Q. Is the CV that's attached to your latest
15 report, is that current?

16 A. It's current. It doesn't go back -- that
17 far back as what we covered just now.

18 Q. Okay.

19 A. But ---

20 Q. --- Pretty current ---

21 A. --- It's otherwise current.

22 Q. In preparation for your testimony today,
23 have you read any documents, any type of depositions
24 or anything in preparation?

25 A. Depositions I was provided are -- were

1 listed in my report. The only -- I've looked at two
2 since then, which was Mr. Stone's and Mr. Booth's.

3 Q. And when did you read Mr. Booth's
4 deposition?

5 A. That would have been last night.

6 Q. Okay, and did you talk to anyone in
7 preparation for your deposition here today -- Mr.
8 Lacy or anyone in connection with Donan?

9 A. I saw Mr. Lacy yesterday, and we didn't
10 discuss really anything about the case. We -- we met
11 here for a pre-deposition meeting.

12 Q. And that was yesterday?

13 A. Yes.

14 Q. When you came to work for Donan, was Mr.
15 Lacy already there?

16 A. Yes, he was.

17 Q. And how long had he been with -- with
18 Donan?

19 A. I don't recall his exact start date.

20 Q. Do you know what his title is with Donan?

21 A. Other than fire investigator, no.

22 Q. Who is your immediate supervisor?

23 A. Michael Spensieri.

24 Q. Is he an engineer also?

25 A. Yes.

1 Q. Is his -- is the organization of Donan
2 divided in separate compartments, such as
3 investigation, origin and cause, investigation,
4 engineering, etcetera, etcetera?

5 A. Just during this year they -- they split
6 the engineering and fire investigation groups.

7 Q. And so prior to that it was all
8 integrated? Would that be correct?

9 A. Yes.

10 Q. Okay, and do you know when Mr. Lacy came
11 to work for Donan?

12 A. I don't specifically recall that.

13 Q. Is he your supervisor in any respect
14 whatsoever?

15 A. Mr. Lacy?

16 Q. Uh-huh.

17 A. No.

18 Q. Does he work in a separate area now at
19 Donan from where you work at Donan?

20 A. Well, again, he would have worked under
21 the fire investigation group, and I'm on the -- in
22 the engineering group.

23 Q. Okay, and what is your background as far
24 as fire investigations is concerned?

25 A. I've been investigating fires or assisting

1 in fire investigations for coming up on 15 years.

2 Q. Okay, in all the jobs that you've had, has
3 that been one of the duties that you've been involved
4 in?

5 A. All the jobs?

6 Q. Or most of the jobs.

7 A. Well, in my previous work I was working on
8 the product design and manufacturing side on product
9 issues.

10 And then on the forensic side I'm working
11 on the other end of the spectrum, after the product
12 has failed, trying to figure out why it failed.

13 And so my career has probably been split
14 roughly half and half between the two.

15 Q. When you were working on products trying
16 to determine what caused them to fail, what kind of
17 products were they?

18 A. Caused them to fail?

19 Q. Yeah. You were -- you said that one of
20 the things that you did in some of the jobs that you
21 held was determine what products might have failed or
22 what caused them to fail.

23 MS. DALY: Objection to form.

24 Q. (Mr. Wiggins) Do you understand what I'm
25 asking?

1 A. Well, it -- it sounds kind of vague to me,
2 but we can break it down.

3 Q. Okay. Okay, what I'm asking is you said
4 that you had worked in the electrical field in
5 examining appliances or electrical items that might
6 have failed. Is that correct?

7 A. Yes.

8 Q. And part of that -- part of your job was
9 to determine why they failed.

10 A. Yes.

11 Q. And I was asking what kind of products did
12 you examine to determine what might have caused its
13 failure.

14 A. Okay. In the -- taking it back to UL, we
15 -- we tested products basically for safety issues and
16 fire issues, seeing that they had met our
17 requirements. So that's not specifically looking at
18 products that had failed, but seeing if it holds up,
19 and if it does fail, why.

20 Looking at why something has failed is
21 typically on the forensic side, and in that case it's
22 been everything you can imagine -- if it's electrical
23 in nature, appliances, components, you name it, I've
24 probably seen it over the years.

25 Q. Okay, and household -- household

1 appliances you looked at, I guess, over the years ---

2 A. --- Oh, yeah.

3 Q. --- That might have failed ---

4 A. --- Yes.

5 Q. --- From as small as a computer to as
6 large as a refrigerator, I suppose?

7 A. Sure. My wife is afraid to leave anything
8 plugged in at this point.

9 Q. Okay. The depositions that you said that
10 you reviewed was the deposition of Dimitrios
11 Diamantopoulos. Is that correct?

12 A. Yes.

13 Q. Mr. Zachary Lapene -- do you recall that
14 deposition?

15 A. Not specifically, but if I put it down, I
16 read it.

17 Q. He was the guy who had the motorcycle shop
18 ---

19 A. --- Oh, yeah, uh-huh.

20 Q. --- Next to the Miami Sub's building.

21 A. Yes.

22 Q. Deposition of Mr. Dowlat Sh Ahi, do you
23 remember that one?

24 A. He installed the surround system?

25 Q. Right.

1 A. Uh-huh.

2 Q. And the videos of Jimmy Diamantopoulos,
3 volumes one and two, do you recall reading those?

4 A. Yes.

5 Q. And then the examination under oath of
6 Victoria Moon, she was the night manager at Miami
7 Subs.

8 A. Yes.

9 Q. Do you recall that?

10 A. Yes.

11 Q. And the examination of Takis Michalos, do
12 you recall that one? He was one of the owners of the
13 Miami Subs franchise.

14 A. Yes.

15 Q. The photographs you said you looked at was
16 all the photographs of the property, the fire scene,
17 laboratory examination.

18 And when you speak of laboratory
19 examination, that was the one that was done in
20 Raleigh? Is that correct?

21 A. Yes.

22 Q. And the compensation rate you say is 165
23 per hour for engineering work and 225 per hour for
24 deposition-trial testimony.

25 Have you billed Nationwide for your

1 services to this point in time?

2 Do you know what they -- and do you know
3 what they are?

4 MS. DALY: Objection to form.

5 THE WITNESS: I bill ---

6 Q. (Mr. Wiggins) --- Have you billed them?

7 A. I -- I bill my time on a daily basis, but
8 beyond that I don't know anything else about it.

9 Q. Do you bill it through -- you bill it
10 through Donan?

11 A. Yes.

12 Q. And they would have been the ones who
13 would have billed for your work? Is that correct?

14 A. That is correct.

15 Q. Do you know what they've bill for your
16 work for this -- to this point in time?

17 A. I do not.

18 Q. One of the -- you've listed in your CV
19 your continuing education courses you've taken, and
20 one of those is in 2006, Principles of Electrical
21 Fires by Vytenis Babrauskas, PhD, Central Texas Fire
22 Investigator Association, annual conference, Austin,
23 Texas.

24 Do you recall that conference?

25 A. Yes.

1 Q. Tell me about Mr. Babrauskas.

2 Do you consider him to be an expert in the
3 field?

4 A. I do.

5 Q. Have you taken other courses that he might
6 have taught over time?

7 A. I wish there were more to take.

8 Q. Okay.

9 A. But no, I haven't.

10 Q. Is he somewhat considered the preeminent
11 authority in that -- in that field?

12 MS. DALY: Objection to form.

13 THE WITNESS: Yes. He's done a lot
14 of work related to electrical causation of fires.

15 Q. (Mr. Wiggins) And have you ever submitted
16 any articles for his review or done any writing that
17 he has looked at?

18 A. No.

19 Q. Have you written any articles relative to
20 your field?

21 A. No.

22 Q. Pardon?

23 A. No.

24 Q. And you've also listed courses, taught in
25 electrical and gas appliance inspections in 2003, and

1 in 2005, electrical and gas appliance inspections.

2 Has that been somewhat an area that you've
3 become interested in over the years?

4 A. Well, it's what I do.

5 Q. Pardon me? That's what you do?

6 A. That's what I do.

7 Q. Well, electrical and gas appliance
8 inspections particularly is what I'm asking.

9 MS. DALY: Objection to form.

10 THE WITNESS: That -- that course
11 covered part of what I do. Basically, the appliance
12 portion in it was for fire investigators and
13 insurance adjusters.

14 Q. (Mr. Wiggins) And do you work with
15 insurance adjusters on a regular basis in your work?

16 A. Yes.

17 Q. When did you first learn about the fire at
18 the Miami Subs Restaurant in Fayetteville, North
19 Carolina?

20 A. I don't know that I would know the
21 specific date, but typically what happens is Mr. Lacy
22 would contact me to check my availability for a given
23 fire that he's -- he's investigating, and then we set
24 up a mutually agreeable date and time and we meet.

25 Q. Are you qualified as an origin -- origin

1 and cause investigator?

2 A. Actually I am, yes.

3 Q. You are.

4 And do you have the same expertise in that
5 area as Mr. Lacy would have?

6 A. I don't specifically do origin and cause
7 work. The reason I invested the time to learn that
8 aspect of it is to make sure that I have to build a
9 -- look at a -- a fire scene in the big picture.

10 So if you bring me a handful of things
11 that were from a fire scene, and I pick up one and I
12 say, yeah, it looks like it may have caused the fire.
13 Well, if it turns out it was from two rooms away, you
14 know, I have to -- I -- I like to be able to
15 understand what -- what they know and what they're
16 seeing and be able to question them if I -- I think
17 ---

18 Q. --- Okay.

19 A. --- You know, I just need to be able to
20 understand it. That's why I got that.

21 Q. Okay. This fire occurred on January the
22 24th of 2012, and Mr. Lacy, I think, was contacted
23 maybe on at least a day after that, maybe the 25th,
24 26th of 2012.

25 MS. DALY: Objection to the form of

1 the question.

2 Q. (Mr. Wiggins) Do you recall talking to
3 Mr. Lacy about this fire on or about that period of
4 time?

5 A. If I remember correctly, I believe he
6 called me from the scene. He -- he did his
7 investigation and he called me and said, I need you
8 to come look at some things at this -- this fire
9 loss, when are you available, and then went from
10 there.

11 Q. And do you know what -- do you have any
12 notes that would indicate what date that was?

13 A. I believe he -- I'd say he called me from
14 his first time out there.

15 Q. Do you have -- did you make any notes of
16 your investigation when you went to the scene on the
17 30th of January, 2012?

18 A. Sure.

19 Q. Do you have those notes with you?

20 MS. DALY: Mr. Wiggins, they're
21 being copied right now.

22 MR. WIGGINS: Okay.

23 MS. DALY: Apparently -- can we go
24 off the record?

25 Thank you.

1 (10:32-10:45 a.m. - recess)

2 Q. (Mr. Wiggins) Mr. Martini, I -- excuse
3 me, I've got a piece of candy in my mouth.

4 You were retained on or about the 30th of
5 January 2012? Is that correct?

6 A. Yes. Like I say, it would have been
7 probably a few days earlier when Mr. Lacy called me.

8 Q. I'm sorry?

9 A. It would have been a few days prior when
10 Mr. Lacy first contacted me.

11 Q. Okay, and after Mr. Lacy contacted you,
12 were you contacted by anybody from Nationwide?

13 A. No.

14 Q. Did you ever talk with anyone from
15 Nationwide?

16 A. (No response)

17 Q. Again, let me -- let me to back.

18 In reference to your being retained to --
19 as an engineer to conduct an examination of the Miami
20 Subs building in Fayetteville.

21 A. In reference to being retained, no.

22 Q. Okay, and when was the first day you went
23 to Fayetteville to visit the Miami Subs building?

24 A. Around January 30th.

25 Q. Of 2012?

1 A. 2012, yes.

2 Q. Okay, who was there when you -- did you go
3 -- I'm going to strike that.

4 Did you go with Mr. Lacy or did you go by
5 yourself?

6 A. Mr. Lacy was present.

7 Q. And did he drive you to Fayetteville or
8 did you drive him to Fayetteville?

9 A. We met there.

10 Q. You met there, so you didn't come
11 together?

12 A. No.

13 Q. Who else was there when you got to the
14 Miami Subs building?

15 A. I believe -- I believe the owner let us
16 in, and I believe someone from Nationwide was there
17 just surveying the scene, I think, doing inventory
18 and such.

19 Q. Do you recall anyone else there?

20 The SBI agent, was he there?

21 MS. DALY: Objection to form.

22 Are you talking about when he arrived?

23 Q. (Mr. Wiggins) When you arrived.

24 A. Mr. Royal -- he -- he showed up later in
25 the day.

1 Q. Okay.

2 A. At the end of the day.

3 Q. And was there anyone there from the
4 Fayetteville Police Department?

5 A. Not that I recall.

6 Q. At what time of day did you arrive there
7 at the Miami Subs building?

8 A. I believe that would have been probably
9 about nine o'clock.

10 Q. And was Mr. Lacy there when you got there?

11 A. Yes, I believe he was.

12 Q. And what did you understand precisely your
13 assignment to be in reference to being retained by
14 Nationwide Insurance Company?

15 A. My assignment was to identify all
16 potential electrical sources of ignition for the fire
17 and to determine if any of those played a role in
18 causing the fire.

19 Q. And was it also your obligation to rule
20 out any items that you thought would not have been a
21 cause of the fire?

22 MS. DALY: Objection to form.

23 THE WITNESS: Sure. I mean, that's
24 part of the process. Identify it, examine it and
25 rule it in or rule it out, or undetermined.

1 Q. (Mr. Wiggins) Okay, and what was Mr.
2 Lacy's role in reference to this fire at the Miami
3 Subs Restaurant?

4 A. Primarily his -- his task was to identify
5 the origin of the fire, where the fire started.

6 Q. And let me just -- I want to be clear
7 about this.

8 That was not your obligation or your duty.
9 Is that correct?

10 A. That is correct.

11 MS. DALY: Thank you.

12 MR. WIGGINS: Is that it?

13 MS. DALY: Yes, sir.

14 MR. WIGGINS: Thank you.

15 MS. DALY: You're welcome.

16 Q. (Mr. Wiggins) And you would -- would you
17 defer to Mr. Lacy for any of the investigation that's
18 related to the origin or cause of this fire?

19 MS. DALY: Objection to form.

20 Q. (Mr. Wiggins) Except for the particular
21 electrical area that you were involved in.

22 A. Yes.

23 Q. And did you attempt to perform the same
24 duties that he would have performed as an origin and
25 cause investigator in this fire?

1 MS. DALY: Objection to form.

2 THE WITNESS: No.

3 Q. (Mr. Wiggins) And was his ---

4 A. --- At least as far -- as far as
5 determining the area of origin?

6 Q. Yes, the area of origin.

7 A. Okay. Yeah, same answer.

8 Q. And the scope of your duties in reference
9 to your investigation would have been electrical
10 issues to rule out those matters that might have or
11 could have caused a fire by use or by malfunction of
12 electrical -- electrical issue?

13 MS. DALY: Objection to form.

14 THE WITNESS: That's correct.

15 Q. (Mr. Wiggins) I have your notes before me
16 here and I would have the same problem with these
17 that Rachel had with those of Mr. Booth in trying to
18 read them.

19 A. I understand that.

20 Q. At the top of the page you've got a number
21 36-12010020-0. What is that?

22 Is that some kind of identifying number?

23 A. That would be our company's file number.

24 Q. Okay, and below that you have a -- I take
25 it it's a date. Is it 6 -- I can't....

1 A. That's an '05.

2 Q. I'm sorry?

3 A. I think that's an '05 -- 6-05 -- 0-5.

4 Q. Is that a date?

5 A. Yes.

6 Q. Okay, and what does that date reference?

7 A. That's the date I would have made the
8 notes or sketches that are applicable.

9 Q. Is this -- now, let's see, where would the
10 first note be? Have I got this backwards? Does it
11 start at the very back?

12 Is that the first notes you made?

13 A. I think the first -- or the earliest notes
14 that you're going to find in here are dated November
15 29th.

16 Q. Okay.

17 A. I did make some sketches on January 30th.
18 I was not able to locate them, and I recreated them
19 on the 29th.

20 Q. I'm sorry. What page would that be on?
21 The second page I see a ---

22 A. --- All right.

23 MS. DALY: It's the second page.

24 THE WITNESS: Anything with 11-29.

25 MR. WIGGINS: Okay.

1 MS. DALY: And they continue for
2 several drawings.

3 Q. (Mr. Wiggins) Okay, so all of these notes
4 would have been made on 11-29? Is that correct, Mr.
5 Martini?

6 A. The ones with that date, yes.

7 Q. Let's see, 11-29, 11-29, and then the
8 third page, Mr. Dowlath -- Bob Dowlath notes, when were
9 they made? I do not -- I don't see a date on there.

10 A. Yeah, some of those were just when I was
11 reviewing depositions or EUO's. They're just -- just
12 some notes.

13 Q. And then the next is 4-17-13. That would
14 have been this year. Is that correct?

15 A. Yes.

16 Q. And then the next page, where we talk
17 about the IME, Ion IQ, do you see that page?

18 A. Yes.

19 Q. And that was made -- those notes were made
20 in what -- on what date? Do you recall?

21 A. Not specifically. That's kind of a
22 running -- looking for details on the wireless
23 device, and then some notes about a deposition, and
24 then more notes where I contacted the manufacturer.

25 Q. Okay.

1 A. There's a date next to that of 6-17-13.

2 Q. And that would have been -- that would
3 have been more than a year after the fire. Is that
4 not correct?

5 A. Correct. This was in the last few months
6 leading up to today.

7 Q. And then the -- that next page is 11 --
8 you've got a date on it 11-29-2012, and it has a
9 drawing on there.

10 Was that when you visited the Miami Subs
11 building in November of 2012?

12 A. Yes.

13 Q. Okay, and then beside that it's got
14 another date, 10-23-09.

15 What is that?

16 A. It says Miami Subs filed a claim against
17 PWC for surge damage to various equipment.

18 Q. Okay, and then April the 19th, 2010, Miami
19 Subs report....

20 A. Reported break-in, theft, vandalism,
21 etcetera.

22 Q. And then it's got to May 31, 2011.

23 A. Renovation.

24 Q. Renovation. Okay.

25 A. And then fire in January.

1 Q. And then there's a drawing on this page
2 also, and this -- the electrical room, the office of
3 the Miami Subs building -- is that what this is?

4 (Witness examined document)

5 A. Yeah, that's an overview of where power is
6 coming in from the transformers near the building,
7 underground feed to the outside panel into the
8 electrical room and the office. Just general
9 orientation.

10 Q. And then the next page is a continuation
11 of that same investigation or visit that you made to
12 Miami Subs on 11-29-2012?

13 (Witness examined document)

14 A. That's my review of the breaker panels in
15 their electrical room.

16 Q. And this was done on November 29th, 2012?

17 A. Yes.

18 Q. And again there is a sketch, and this
19 shows the main panels, electrical panels, of the
20 Miami Subs building, and it's got CB Panel A -- C --
21 well, turned this upside down here -- CB panel C, CB
22 panel B.

23 And there were -- those were all located
24 in different locations in the building. Is that
25 correct?

1 A. The panels?

2 Q. Yeah, the panels. Yes.

3 A. They were located within the area that's
4 sketched.

5 (Witness examined document)

6 A. This is the layout of the electrical
7 panels, the circuit breaker panels. That's what CB
8 is.

9 Q. Okay.

10 A. That was a layout of those four panels --
11 five panels in that room.

12 Q. And this is the rear -- you've got it
13 here, rear entrance?

14 A. Rear exterior walls ---

15 Q. --- Walls.

16 A. --- Side exterior wall.

17 Q. I -- I just can't get oriented.

18 Where is the wall where the panel C and B
19 is located? Where are they?

20 A. If you look at it -- if you look at it
21 this way, rear exterior wall. I think, if you're
22 looking at the -- compare that to the previous
23 sketch.

24 Q. Okay.

25 A. So that the rear -- if I can lean over --

1 the back of the building, what I would have called a
2 rear exterior wall ---

3 Q. --- Okay, I got you. Okay.

4 A. There's a wall here.

5 Q. I understand.

6 A. So that -- that's the orientation. This
7 is just a closer view of -- of that.

8 Q. And then on this next page, this panel C
9 and B would be the exterior wall also?

10 A. That would be the -- the front side.

11 Q. Right here?

12 A. Yes.

13 Q. Inside the building?

14 A. Yes.

15 Q. Okay, now I understand.

16 A. Such that if you take this -- this now is
17 in the same orientation as that.

18 Q. Okay. And then the next entry date is
19 4-17-13, and this says joint lab inspections of
20 collected evidence, and it says on the back, evidence
21 collected in -- can't read the next word.

22 A. I see evidence collected in -- in January
23 by Lacy.

24 Q. Okay. By Lacy.

25 And then there's one through seven. Is

1 this the evidence that was collected by Mr. Lacy that
2 was delivered to the PWC engineer in Raleigh in April
3 of 2013?

4 A. Yes.

5 Q. And that would have been a sample -- I'm
6 sorry. Again, I can't read -- can you read....

7 A. Yeah. A sample can.

8 Q. X-rayed for -- again....

9 (Witness examined document)

10 A. X-rayed from above can and probably side,
11 and I left out side.

12 Q. Okay.

13 A. John Cavaroc x-rayed the can prior to us
14 opening it.

15 Q. Who did?

16 A. John Cavaroc.

17 Q. And then the next entry is -- I can't read
18 -- the ups?

19 A. Cups.

20 Q. Cups.

21 A. Three is plates.

22 Q. Okay.

23 A. Four is plastic container labeled gas.

24 Q. Okay.

25 A. Five and six were the hard drives, and

1 then number seven was the cloned copies of the
2 drives.

3 Q. Okay, and let's go back and look at these
4 as you've given them to me.

5 The sample can, that was a can that was
6 just found in the restaurant by Terry Lacy?

7 Is that what -- what that is?

8 A. No, that was a can of debris that he
9 collected.

10 Q. And what -- would that have been debris
11 that was found at or about the place where he
12 identified the area of origin of the fire?

13 A. Yes.

14 Q. And did you yourself investigate or look
15 at that material?

16 A. We -- we all did.

17 Q. And how did you -- how did you examine it,
18 by what means?

19 A. First it was x-rayed, and then we all
20 looked at the x-rays. And then we began with opening
21 the contents, spread it on the table, everybody had
22 the opportunity to sift through it and look at it.

23 Q. Tell me about x-rays.

24 Is that a common form of investigating
25 various items found in a fire to determine any

1 defects or any problems there might have been with a
2 -- with an item?

3 A. It's the first step because it's
4 non-destructive.

5 And often -- and after the residue of a
6 fire, frankly sometimes we just end up with a big
7 melted blob. And rather than spending three days
8 chipping away at it, the easiest thing to start with
9 is just take an x-ray and see if there's anything
10 worthwhile inside to -- to take a closer look at.

11 Q. And that would have been the material that
12 is item number one there that Mr. Cavaroc x-rayed?

13 A. Yes.

14 Q. And did it reveal anything of interest?

15 A. No.

16 Q. Could you identify what it was?

17 A. I'd have to look at my photos to see
18 specifically what was in there. There's nothing
19 remarkable.

20 Q. And then number two was cups, number three
21 was plates.

22 Were these cups and plates non-consumed by
23 fire?

24 A. Correct.

25 Q. And do you know where they came from --

1 where Mr. Lacy obtained those from?

2 A. I think that was all photographed and
3 documented, yes.

4 Q. Okay, did you have photographs showing
5 those cups or those plates?

6 A. When they were collected or at the lab?

7 Q. At the lab.

8 A. Yes.

9 Q. And then next is a plastic container of
10 gas with a gas label on it.

11 That was also looked at and examined by
12 everyone who was present there at that examination?

13 A. Correct.

14 Q. And what was the interest in that can?

15 A. Just unusual to find a can labeled gas in
16 a restaurant.

17 Q. Was there -- was there in fact gas in the
18 can when you looked at it or had it be emptied out?

19 A. It was empty.

20 Q. And was there any gas residue in the can?

21 A. Not that I recall.

22 Q. And then you got hard drive -- two hard
23 drives, and they were brought there by Mr. Lacy to
24 the meeting with Mr. Cavaroc?

25 A. Yes.

1 Q. And had those hard drives been downloaded,
2 to your knowledge?

3 MS. DALY: Objection to form.

4 THE WITNESS: The information I had
5 was that they were copied, not downloaded.

6 Q. (Mr. Wiggins) They were copied?

7 A. Yes.

8 Q. When you mean copy, what do you have
9 reference to?

10 MS. DALY: Objection to form.

11 THE WITNESS: Cloned. In other
12 words, anything other than cloning may alter the
13 contents, so....

14 Q. (Mr. Wiggins) And these were not the
15 original hard drives that were recovered from the
16 Miami Subs Restaurant, but were copies of those hard
17 drives?

18 MS. DALY: Objection.

19 Q. (Mr. Wiggins) Is that what you're saying?
20 I just want to be sure I understand what
21 you're saying.

22 A. I'm saying five and six were the originals
23 and number seven was the copy.

24 Q. Do you know where the originals were?

25 A. When?

1 MS. DALY: Objection to form.

2 MR. WIGGINS: Pardon?

3 THE WITNESS: When?

4 MR. WIGGINS: At the time of this
5 examination when you and Mr. Cavaroc met up in
6 Raleigh.

7 THE WITNESS: Do I know where they
8 were?

9 MR. WIGGINS: Yes, or do you know
10 who had them.

11 MS. DALY: Objection to form.

12 THE WITNESS: Well, Mr. Lacy brought
13 them to the inspection.

14 Q. (Mr. Wiggins) he brought the copies to
15 the inspection?

16 MS. DALY: Objection to form.

17 MR. WIGGINS: Well, I'm just trying
18 to be sure I understand.

19 Q. (Mr. Wiggins) Did he bring the originals
20 that he had obtained from the Miami Subs Restaurant
21 to this meeting with Mr. Cavaroc, or did he bring
22 copies of those -- of those hard drives that he had
23 obtained from the Miami Subs Restaurant?

24 MS. DALY: Objection to form.

25 THE WITNESS: Both.

1 Q. (Mr. Wiggins) He brought both of them?

2 A. Yes, sir. That's why five and six -- hard
3 drive number seven is external drive imaged from five
4 and six.

5 Q. And were both of those examined at the
6 time that you met with Mr. Cavaroc in Raleigh?

7 A. Only visually.

8 Q. And was any effort made to download any of
9 the information that might have been on either of
10 these hard drives?

11 MS. DALY: Objection to form.

12 THE WITNESS: Not at that time, no.

13 Q. (Mr. Wiggins) And number seven, it's --
14 I'm sorry -- you'll have to read that to me. I
15 can't....

16 A. External drive imaged from number five and
17 six, which is five and six above, and then Seagate
18 one terabyte.

19 Q. Was that just identifying the hard drives
20 that you identified in five and six?

21 MS. DALY: Objection to form.

22 THE WITNESS: Number seven is a --
23 is one hard drive that contains the cloned two hard
24 -- clones of the two hard drives, namely five and
25 six.

1 Q. (Mr. Wiggins) And were they produced at
2 the examination at Mr. Cavaroc's laboratory by Mr.
3 Lacy?

4 MS. DALY: Objection to form.

5 THE WITNESS: They were brought in,
6 made available for inspection.

7 Q. (Mr. Wiggins) By Mr. Lacy?

8 A. Yes.

9 Q. Then below that, again, Safe Labs....

10 A. Evidence.

11 Q. Evidence -- and this is items that were
12 not brought by either you or Mr. Lacy to the meeting
13 at Mr. Cavaroc's lab. Is that correct?

14 A. That is correct.

15 Q. And the first one there is an electric
16 power....

17 A. Meter.

18 Q. Meter -- and do you know who produced that
19 at the meeting?

20 A. Mr. Cavaroc.

21 Q. And do you know who Mr. Cavaroc was
22 retained by?

23 A. The electric utility company, PWC.

24 Q. In Fayetteville?

25 A. Yes.

1 Q. And number two, again, please read that.

2 A. I'm sorry.

3 Q. I'm sorry.

4 A. Receptacle number one and connected
5 wiring.

6 Q. And then no....

7 A. No evidence of electrical failure.

8 Q. Okay, and do you know where that came
9 from?

10 A. That was the rear wall adjacent to the
11 rear drive-thru window.

12 Q. And that would have been the furthest wall
13 away from the window?

14 A. Actually, to make this easier, if we pull
15 out my sketch -- one of my November 29 sketches, it
16 -- it shows that back area and the receptacle.
17 They're labeled.

18 Q. Is it further back in your notes or
19 further up?

20 A. I don't know. That will give us something
21 to reference.

22 Q. You've drawn the rear drive-in window on
23 this sketch. Is that correct?

24 A. Yes.

25 Q. And then the wall that you're referencing

1 here in number two would be the wall furthest away
2 from the window.

3 Would that be the one that we're talking
4 about?

5 A. So -- so that wall that you're seeing the
6 receptacles on, that is the wall to the rear of the
7 rear drive-thru window, front to back in the store,
8 and is the wall between the rear drive-thru area.
9 And the office area is on the other side.

10 Q. Okay, at the top of that drawing, Mr.
11 Martini, you've got JC evidence number two?

12 A. Correct.

13 Q. And what is that referencing there?

14 A. That's indicating -- that -- that
15 correlates to the list that we're going through.

16 JC is John Cavaroc, evidence number two.
17 So that -- that would be evidence that he took as
18 number two. And then number three is labeled as
19 well.

20 Q. And what -- what is that box drawing that
21 he has there -- or that you have there?

22 A. That's a junction box.

23 Q. And that junction box was located, again,
24 on one of the walls in the area where the drive-thru
25 window is located?

1 A. That junction box is actually above
2 ceiling level.

3 Q. Above ceiling -- above ceiling level?

4 A. Yes.

5 Q. Then number three is receptacles number
6 two and three and branched wiring. Is that correct?

7 A. Let's see number three.

8 Receptacles is number two and three and
9 connected wiring. No evidence of electrical failure.

10 Q. And is that numbered correspondingly on
11 your drawing?

12 A. Yes.

13 Q. And that's two and three that's on your
14 drawing? Is that also correct?

15 A. Yes.

16 Q. And did everybody who was present concur
17 in that analysis, that there was no problems to that
18 electrical wiring?

19 A. I heard nothing to the contrary.

20 Q. That was your conclusion, was it not?

21 A. Yes.

22 Q. Then number four was....

23 A. Oh, it's Onkyo receiver.

24 Q. Okay.

25 A. Looks like audio equipment.

1 Q. And what does that have reference to in
2 reference to the drawing?

3 A. That was removed from the office area if
4 it's not on this drawing.

5 Q. What is an Onkyo receiver?

6 A. Onkyo is a brand name. Receiver is the
7 audio receiver.

8 Q. A radio?

9 A. You can call it that.

10 Q. Okay. I don't -- I didn't know what it
11 was.

12 A. It's basically a combination -- radio and
13 amplifier is a receiver.

14 Q. Okay.

15 A. That's a short....

16 Q. Was it a -- was it an item that played
17 music in the restaurant?

18 A. Yes. Yes, it is.

19 Q. And that would have been number four.

20 And where is number four on the drawing?

21 A. It's not. Number four is only electrical
22 items in ---

23 Q. --- Okay.

24 A. --- In the area of origin.

25 Q. Who brought the Onkyo receiver to the

1 meeting, if you can recall?

2 A. Mr. Cavaroc. That was one of the items he
3 collected.

4 Q. Had you ever seen it before?

5 A. It was up on the shelf above the desk in
6 the office.

7 Q. Had you seen it when you were there on the
8 30th of January 2012?

9 A. Yes.

10 Q. Did you see anything else on that shelf
11 when you were there on January 30, 2012?

12 MS. DALY: Objection to form.

13 Q. (Mr. Wiggins) Relating to any kind of
14 electrical equipment.

15 A. Well, he had -- he had a number of items
16 on the shelves. I'd have to look at the photo to
17 give you a list of what was there.

18 Q. Okay. We'll look at it in just a moment.
19 But was ---

20 A. --- I mean, audio equipment is -- his
21 computer was there. His DVR recorder was up high. I
22 didn't really pay attention to it.

23 Q. Okay.

24 A. It wasn't really my area of focus.

25 Q. Did you take photographs of that yourself,

1 or did someone else take photographs of that area?

2 A. I took some area -- some photographs of
3 the office area, but I focused on the other end
4 closer to the fire.

5 Q. And was the wiring that -- that ran to the
6 Onkyo receiver also brought to the meeting?

7 A. Are you referring to the connected power
8 supply?

9 Q. Connected power supply, yes.

10 A. I believe so.

11 Q. And is it also noted on your notes here?

12 A. Well, on the notes it covers the receiver,
13 and there was a -- kind of a speaker distribution box
14 that was, I believe, on top of that -- kind of a
15 five-channel distribution box so they could take the
16 output on the receiver and send it to multiple pairs
17 of speakers throughout the restaurant.

18 Q. And did anyone observe any issues --
19 electrical issues -- with that Onkyo receiver?

20 A. No.

21 Q. Or any of the wiring that was connected to
22 that receiver?

23 A. No.

24 Q. The next item is electronics.

25 A. Electronics and cords from office wall.

1 Q. And then you've got in parens ---

2 A. --- This is the backside of drive-thru
3 wall.

4 Q. Okay, and what kind of electronics was
5 recovered and brought to the meeting?

6 A. Basically we -- he collected everything on
7 that wall. Mostly his data -- data cables. It was a
8 big mess.

9 Q. Burned?

10 A. Yes. Heat damaged.

11 Q. Heat damage?

12 A. Yeah.

13 Q. And was any other electronic equipment
14 brought to the meeting by Mr. Cavaroc?

15 A. There's some things further down.

16 Q. Number six is a....

17 A. Originally I wrote alarm panel, and then
18 drew a line through that when we actually determined
19 what it was. And then -- plus a UPS, uninterruptible
20 power supply, from the south wall of the office.

21 The alarm panel -- what we originally
22 thought was an alarm panel was -- turned out to be a
23 power supply particularly used for surveillance
24 cameras.

25 Q. And did Mr. Cavaroc bring that to the

1 meeting?

2 A. Yes.

3 Q. Did he bring the DVR to the -- to the
4 meeting?

5 A. No.

6 Q. Do you recall seeing that DVR when you
7 were at the restaurant on January the 30th, 2012?

8 A. Yes.

9 Q. Did you ever see it after you were there
10 on January 30th, 2012?

11 A. No.

12 Q. Okay. When you said the PS-18 DC10-A,
13 what is that? Not plugged into UPS.

14 What does that have reference to, please.

15 A. That is the surveillance camera power
16 supply.

17 When we looked at that we determined that
18 it had not -- was not plugged in, not connected to
19 power ---

20 Q. --- Okay.

21 A. --- At the time of the fire.

22 Q. Okay, and do you know where that came
23 from?

24 A. It was on the shelves above the office
25 desk.

1 Q. And did all of the wiring that went into
2 that DVR -- was that brought to the meeting with Mr.
3 Cavaroc?

4 MS. DALY: Objection to form.

5 Q. (Mr. Wiggins) To your knowledge.

6 A. The wiring that went to the missing DVR?

7 Q. Uh-huh.

8 MS. DALY: Objection to form.

9 THE WITNESS: I don't believe that
10 was collected.

11 MR. WIGGINS: Okay.

12 THE WITNESS: There would have been
13 secondary cables connected to it. I don't think we
14 collected that.

15 Q. (Mr. Wiggins) That was not something that
16 any -- in any event, that you collected when you were
17 there?

18 A. I did not collect that.

19 Q. Okay, let's go on to number seven.

20 The next page is a monitor, south wall of
21 the office.

22 (Witness examined document)

23 Q. Is that what is written there?

24 A. Yes.

25 Q. And beside that you've got AC ERV 173?

1 A. It's a brand and model number.

2 Q. And what is that -- what does that have
3 reference to?

4 A. Just a video monitor from the office.

5 Q. And were there more than one video monitor
6 in the -- in the building?

7 MS. DALY: Objection to form.

8 THE WITNESS: In the building, yes.

9 Q. (Mr. Wiggins) That you saw?

10 A. Yes.

11 Q. Okay, did you see the other one at Mr.
12 Cavaroc's lab in Raleigh or just the one that you've
13 got noted here in number seven?

14 A. Just the one from the office.

15 Q. Do you know why the other one was not
16 collected?

17 A. The other ones I remember seeing, some in
18 the kitchen area, I don't recall if they were even
19 there at the later inspection -- site inspection.

20 Q. Number eight, again, printer. Is that
21 what that word is?

22 A. Printer, yeah. Southwest wall of office.
23 HP is the brand.

24 Q. Hewlett Packard?

25 A. Yes.

1 Q. And was the wiring collected also to that
2 printer?

3 A. Yes.

4 Q. And was it present at Mr. Cavaroc's lab?

5 A. Yes.

6 Q. And was that inspected by everyone and
7 nothing was found particularly wrong with that?

8 A. That's correct.

9 Q. Number nine?

10 A. Number nine says bank deposit book.

11 Q. Okay, what was the significance of that,
12 Mr. Martini, if you know?

13 A. It was found in the office. I'm not sure
14 why it was collected.

15 Q. Number 10, debris from between....

16 A. Drive-thru windows ---

17 Q. Drive-thru windows.

18 And was that collected in cans or some
19 other source for storage?

20 A. If I remember correctly, it was in a bag.

21 Q. And do you know who collected that debris
22 that was there?

23 A. Mr. Cavaroc.

24 Q. And was that also viewed by x-ray?

25 A. I don't recall specifically. If -- if it

1 was, I'd have photos of the x-rays in my -- in my
2 photos.

3 Q. Number 11 is wiring?

4 A. Small gauge.

5 Q. Small gauge and....

6 A. End of fluorescent tube.

7 Q. End of fluorescent tubes.

8 And they came from the fluorescent wiring
9 in the restaurant?

10 A. Mr. Cavaroc retrieved those from a debris
11 pile near the rear drive-thru window.

12 Q. And number 12?

13 A. Outlet wall plate.

14 Q. And ---

15 A. --- He retrieved that from the same area.

16 Q. And that was inspected and was found not
17 to have been defective in any way that you could
18 determine. Is that correct?

19 A. That's correct.

20 Q. The notes that you have here on the HME
21 Ion IQ, they were made sometime after the meeting
22 that you had in Raleigh with Mr. Cavaroc?

23 A. Yes.

24 Q. Do you know about what date they would
25 have been made? Is there anything on -- strike that.

1 Was there anything on this document that
2 would indicate about what day it was made?

3 A. I've got a June 17th date in the
4 lower-left column, so it would have been somewhere
5 within a week of that -- in the week prior.

6 Q. Was that the first time, Mr. Martini, that
7 you knew what the make or model of the communication
8 system that was present in the restaurant for the
9 take-out window that had been looked at early on by
10 you?

11 A. I was made aware of make and model, what
12 -- what that was through my reading of EUO's or
13 depositions.

14 Q. Okay.

15 A. Correct.

16 Q. And that would have been sometime in 2013?

17 A. Yes.

18 Q. The next page on your notes you have --
19 you have information concerning Bob Dowlat, Creative
20 Computers.

21 Did this come from his deposition or did
22 you have a conversation with him directly?

23 A. From his deposition.

24 Q. And would this also have been made
25 sometime in 2013 when you reviewed his deposition?

1 A. Yes.

2 Q. The next page you've got a CD labeled
3 Class File 103.

4 And I'm sorry, the last word is....

5 A. PDF.

6 Q. PDF. And what does that have reference
7 to?

8 A. Those were CD's provided by counsel for me
9 to review. Just information.

10 Q. And next is 157 photos.

11 Were they furnished to you by counsel for
12 you to review?

13 A. Yes.

14 Q. And then you've got two photos later, N&M,
15 0417 shows the DVR still in place.

16 Do you see that?

17 A. Yes.

18 Q. And what -- what reference -- what photos
19 do you have reference to there?

20 A. Okay, let's go back up to page 157 of this
21 -- was that a complaint?

22 Photo -- photo identified as NWM 01415
23 shows receptacle with my paint marking. Two photos
24 later, NWM 01417, shows the DVR still in place.

25 Q. And then in complaint number 13 it states

1 Lacy met with Jimmy two days after the fire and then
2 removed the DVR.

3 You see that?

4 A. Yes.

5 Q. Where did you find -- where did you obtain
6 that information?

7 A. It's one of the complaint documents.

8 Q. Furnished to you by counsel?

9 A. Yes.

10 Q. And then you got first fire call, and then
11 another fire -- I'm sorry.

12 A. First fire call 8:41 a.m. Smoke through
13 drive-thru window.

14 Q. 8:43, is that --

15 A. --- Yeah. Smoke from front door.

16 Next line, cycle shop puts truck in lot
17 8:30 to 8:35.

18 Q. Okay.

19 A. Surveillance camera system installed by
20 Creative Computers. Micros POS, drive-thru speaker
21 system, and then EUO, Jimmy volume one, volume two.
22 Tavis (sic) Michalos, Victoria Moon.

23 Q. Was this -- was this -- would have been
24 when you read those depositions?

25 A. Correct.

1 Q. And then the next thing I have here is
2 dated 11-29-12, and these are drawings of electrical
3 panels.

4 Is that what that would be?

5 A. Yes.

6 Q. And you've got X'd out on some of them and
7 lines drawn.

8 What is that? What does that indicate?

9 A. X's indicate a blank. In other words, no
10 circuit breaker was in that slot.

11 The vertical lines indicate a double or a
12 triple-pole breaker, meaning all three or -- two or
13 three are tied together. The letter T indicates
14 tripped.

15 Q. Is there any significance to a circuit
16 breaker having been tripped?

17 MS. DALY: Objection as to form.

18 THE WITNESS: Not other than the
19 circuit was compromised by the fire and tripped.

20 Q. (Mr. Wiggins) And would that be what you
21 would expect to find in any building fire, that it
22 would trip breakers in the -- in the circuit breaker?

23 A. Yes.

24 Q. Let's go back to the day that you went to
25 the restaurant.

1 Again, you met Jimmy there. He let you
2 into the restaurant -- is that correct -- Jimmy
3 Diamantopoulos?

4 A. I believe he's the one that let us in.

5 Q. Okay. And you got there about nine
6 o'clock in the morning, I think you said.

7 And when you got there, just give me
8 generally what you saw or what you found when you
9 arrived at the restaurant.

10 A. I did a -- just a quick walk-through and
11 then I proceeded to do my documentation.

12 Q. Had you talked to anyone prior -- prior to
13 your going to the restaurant in preparation for your
14 review of the electrical systems in the restaurant?

15 A. The discussion I would have had with Mr.
16 Lacy would have consisted of, you know, the fire by
17 the rear drive-thru window area, and there's some
18 electrical components I need -- looked at.

19 Q. And did he give you any assessment of what
20 he had found or what he thought on his prior visits
21 to the restaurant?

22 A. Other than what I just said, no.

23 Q. Did you know that he had been to the
24 restaurant on January the 26th and January the 27th
25 of 2012?

1 A. Yes.

2 Q. And did he -- he had no discussion with
3 you about what he had found and what his thoughts
4 were about the cause of the fire?

5 A. Until I did my work, he didn't have a
6 cause.

7 Q. Did he have any discussion with you about
8 any thoughts that he had about the cause of the fire?

9 A. Not that I recall.

10 Q. And when you went there, you said Mr. --
11 in addition to Mr. Lacy being there and Jimmy being
12 there, the SBI agent was there?

13 A. Later.

14 Q. What time of day did he get there?

15 A. It was towards the end of the day,
16 five-ish.

17 Q. And did you have discussions with him?

18 A. Right.

19 Q. And did he give you the benefit of his
20 investigation?

21 A. I don't recall what he may have said. I
22 just recall giving him the result of my findings.

23 Q. Did you ask him for what his findings
24 were?

25 MS. DALY: Objection. Asked and

1 answered.

2 THE WITNESS: I don't recall.

3 Q. (Mr. Wiggins) Did you ever learn from him
4 or from Mr. Lacy that he had determined that -- he
5 had made a determination the fire was not to be --
6 could not be determined?

7 MS. DALY: Objection to form.

8 THE WITNESS: No, I don't recall.

9 Q. (Mr. Wiggins) Did you have any
10 discussions with Mr. Lacy in reference to the
11 findings of anyone else other than himself?

12 MS. DALY: Objection to form.

13 THE WITNESS: I'm not sure I
14 followed that.

15 Q. (Mr. Wiggins) Did Mr. Lacy ever tell you
16 that he had had -- that he had found -- he had talked
17 to the SBI agent who investigated the fire, or to the
18 policemen who had investigated the fire, the police
19 department, and tell you what their findings were?

20 MS. DALY: Objection to form.

21 Are you talking about on that day?

22 MR. WIGGINS: On that day.

23 MS. DALY: Okay.

24 THE WITNESS: On that day, I don't
25 recall. I -- I've read things since then, so I don't

1 want to confuse that.

2 MS. DALY: Can we take a five-minute
3 restroom break? Is this a good time?

4 MR. WIGGINS: Sure.

5 (11:38-11:45 a.m. - recess)

6 MR. WIGGINS: Okay, back on the
7 record.

8 Q. (Mr. Wiggins) Mr. Martini, when you went
9 to the restaurant on the 30th of January of 2012,
10 what was the first thing that you did?

11 A. Like I said, I did a walk-through of the
12 interior, and then I went outside and proceeded with
13 my exterior photos and diagram.

14 Q. Are those photos that you have referenced
15 to on the -- on the documents you provided to counsel
16 today to give to us?

17 A. Yes.

18 Q. All of them are on that hard drive?

19 A. Yes.

20 Q. And after you did that did you go back
21 into the restaurant?

22 A. Yes.

23 Q. And when you went back into the restaurant
24 what -- what did you then do?

25 A. My typical method is to start with where

1 the power is supplied from the exterior -- i.e.,
2 transformer to the property, any property -- what I
3 call follow the power into the -- the meter and the
4 interior circuit breaker panels, and then into the
5 area of -- of interest.

6 Q. And when you were looking at the circuit
7 panels and the wiring, what were you looking for?

8 A. Any signs of unusual damage.

9 Q. And I know that in a fire wiring is
10 extensively damaged, is it not, in most cases?

11 MS. DALY: Objection to form.

12 THE WITNESS: Depending on its
13 relative location to the fire, yes.

14 Q. (Mr. Wiggins) And severity?

15 A. Yes.

16 Q. And did you find severely damaged wiring
17 in the area where this fire was identified as having
18 begun by Mr. Lacy?

19 A. Yes.

20 MS. DALY: Objection.

21 Q. (Mr. Wiggins) And as you observed that
22 wiring, was it charred, burned wiring?

23 MS. DALY: Objection to form.

24 THE WITNESS: The -- well, the most
25 severe damage would have consisted of the insulation

1 having melted or burned off.

2 Q. (Mr. Wiggins) And I noticed in some of
3 the photographs there was wiring hanging down from
4 the ceiling.

5 Do you recall that?

6 A. Yes.

7 Q. And what kind of wiring was that?

8 A. There was a mixture of data cables, some
9 electrical wiring.

10 Q. Okay.

11 A. Electrical wiring typically was -- it was
12 contained within metallic conduit, so any -- any
13 hanging wiring was not electrical service cable.

14 Q. And the hanging wiring was not in -- was
15 not in aluminum conduit?

16 A. Correct.

17 Q. And did you observe any beading -- beading
18 on any of those connections of that wiring?

19 A. No.

20 Q. What is the significance of beading?

21 A. Beading indicates electrical activity, and
22 -- and it also indicates that the conductor was
23 energized at the time of failure.

24 Q. And did you -- did you look at those --
25 that wiring for identification of any such beading

1 when you made your investigation?

2 A. Not the wiring inside the conduit at the
3 time, no.

4 Q. But the hanging down wiring, did you
5 observe -- look at that for any beading?

6 A. Yes.

7 Q. What about all the circuits that you
8 previously identified that you looked at on that
9 date, did you look at those for any types of beading?

10 A. The wiring that was inside the conduit?

11 Q. In the conduit.

12 A. Those would have been looked at at the lab
13 exam. We had to pull those out, and I -- I didn't do
14 that at the scene.

15 Q. And where was the majority of the wiring
16 located that you looked at on that date?

17 A. In the area -- well, basically my -- my
18 sketch covered it, but in the area of the drive-thru
19 -- rear drive-thru window.

20 Q. And was that the area where Mr. Lacy
21 identified to you to have been what he thought the
22 origin of the fire was?

23 A. Yes.

24 Q. And that would have been in at about the
25 wall where the drive-thru window was -- that the

1 first -- what we call the first drive-thru window at
2 the -- at the Miami Subs Restaurant?

3 A. First as in the first window you come to
4 as you drive around?

5 Q. Right. When you come around, right.

6 A. Yeah.

7 Q. Is that -- would that be correct?

8 A. Yes.

9 Q. And you had mentioned in your report that
10 you saw that there was fluorescent lighting in that
11 area. Is that correct?

12 A. Yes.

13 MS. DALY: Objection.

14 Q. (Mr. Wiggins) And how many electrical
15 fluorescent lighting panels did you observe there?

16 A. The suspended ceiling was gone at that
17 point in that back area. Whatever lighting fixtures
18 had been -- originally in place were not -- no longer
19 in place.

20 There was a -- there were four or five of
21 my photographs which show a number of fluorescent
22 fixtures that were -- had been collected, and -- and
23 set up for me to look at.

24 Q. Where were they collected and set up for
25 you to look at them?

1 A. Before or after?

2 Q. At the time you were there. Where were
3 they when you were -- well, let me strike that.

4 Where were they when you first saw those
5 electrical fluorescent lighting systems?

6 MS. DALY: Objection to form.

7 THE WITNESS: Did you say
8 fluorescent fixtures or ---

9 MR. WIGGINS: --- Fluorescent
10 lighting fixtures.

11 THE WITNESS: They were lined up
12 along the front counter. It -- it's what my -- my --
13 my photographs show.

14 Q. (Mr Wiggins) Did someone identify to you
15 that those fluorescent lighting fixtures had been
16 removed from the area where the drive-thru window was
17 to a different area?

18 A. Yes. They were identified as being
19 somewhere in that area. No -- nobody could identify
20 which one went specifically where. But they all had
21 heat damage, so I knew they were from -- generally
22 from that area.

23 Q. And who told you that? Do you recall?

24 MS. DALY: Objection to form.

25 THE WITNESS: Mr. Lacy would have

1 told me that, that the state investigator had
2 collected those, I believe.

3 Q. (Mr. Wiggins) And when he said state
4 investigator, would that have been ---

5 A. --- Mr. Royal.

6 Q. --- Mr. Royal?

7 A. Yes.

8 Q. And did you look at those fluorescent
9 lighting systems there where they were when you saw
10 them?

11 A. Yes.

12 Q. Did you look at the ballasts?

13 A. Yes.

14 Q. And did you examine the ballasts?

15 A. Visually, yes.

16 Q. And did you take them -- did you dissect
17 them. or take them apart?

18 A. I did not.

19 Q. A ballast is simply a system within a
20 fluorescent lighting system that regulates the heat
21 to the -- to the light, does it not?

22 A. It regulates voltage.

23 Q. Regulates voltage. Sort of the
24 transformer? Would that be a correct ---

25 A. --- Yes.

1 Q. --- Description of it?

2 A. Yes, exactly.

3 Q. And did you take any of those ballasts
4 apart to look at them to see if there were any
5 defects in them at all?

6 MS. DALY: Objection to form.

7 THE WITNESS: While I was there?

8 MR. WIGGINS: While you were there.

9 THE WITNESS: That would -- to
10 answer your question, no, and also, that would not be
11 a task I would do on-site.

12 Q. (Mr. Wiggins) And was it subsequently
13 done in a laboratory at some point?

14 A. No.

15 Q. Was there any other items that you looked
16 at after you looked at the -- the fluorescent
17 lighting systems?

18 MS. DALY: Objection to form.

19 THE WITNESS: I looked at -- other
20 than the electrical components in that area, near the
21 origin, which we've already talked about -- we're
22 saying that's done. Right? Okay.

23 Fluorescent fixtures, and then the -- Mr.
24 Royal had collected some debris that was on the
25 counter in the kitchen area that I looked at as well.

1 Q. (Mr. Wiggins) Now, the debris that you
2 looked at, was that identified in your report in the
3 overall view of that on my photograph 33?

4 A. (No response)

5 MR. WIGGINS: I thought I brought
6 more than one, but I guess maybe I didn't.

7 Oh, here I got it. I'm sorry.

8 Let me tell you what I -- -- I think we
9 previously marked this as 46, but I'm going to call
10 this 46A. Is that okay if I do that?

11 (* Exhibit 46A was marked *)

12 Q. (Mr. Wiggins) Do you recognize that
13 document, Mr. Martini?

14 A. Yes.

15 Q. Is that your first report that you made to
16 Nationwide Insurance Company?

17 A. Yes.

18 Q. And is this the photograph -- some of the
19 photographs that you took at the time you were there?

20 A. Yes.

21 Q. And I've asked you about some things that
22 you previously identified.

23 Number one is on the outside of the
24 building that the -- that panel device there, you see
25 on the second page, photograph number three?

1 A. Okay.

2 Q. Now, that's the electrical -- outside
3 electrical panel to the restaurant?

4 Is that what that is?

5 A. Yes.

6 Q. And that was examined in November of 2012,
7 was it not?

8 A. Yes.

9 Q. And this photograph was taken by you at
10 that -- on that date?

11 MS. DALY: Objection to form.

12 Q. (Mr. Wiggins) That is, in November 2012?

13 A. These are my January 30th photos.

14 Q. I'm sorry. January 30 photos.

15 You went back -- I remember going back
16 there, and you were there on November -- in November
17 of 2012, and the PWC was there and they opened that
18 box. Do you recall ---

19 A. --- Yes.

20 Q. Were you there on that occasion?

21 A. I was.

22 Q. And this is the box that they opened on
23 that date?

24 A. It is.

25 Q. And everybody took photographs of the open

1 box and found no issues with the electrical
2 components in that -- in that electrical box?

3 Would that also be true?

4 A. That is correct.

5 Q. And the next photographs would be the main
6 service panels that you and I looked at and talked
7 about early on, and you identified as being panels A,
8 B and C. Is that also correct?

9 A. Yes, it is.

10 Q. And some of these, you said, were tripped,
11 and you identified those that were tripped on your
12 drawing that you have talked to me about earlier. Is
13 that true?

14 A. Yes.

15 Q. And the next photograph, number 16, is the
16 view from -- from the hallway toward the rear
17 drive-thru service area, rear drive-thru windows
18 boarded up, and that's the area that we've identified
19 as being what Mr. Lacy identified to you as being the
20 ---

21 MS. DALY: --- Are you referring to
22 photograph 16?

23 MR. WIGGINS: Sixteen.

24 MR. DALY: Okay. Thank you.

25 MR. WIGGINS: Correct. I'm sorry.

1 Photograph 16 as being the area of
2 original of the fire.

3 MS. DALY: Objection to form.

4 THE WITNESS: Is that a question?

5 MR. WIGGINS: Yeah. The question
6 was did Mr. Lacy identify that to you as being the
7 area of origin of the fire.

8 MS. DALY: Objection to form.

9 THE WITNESS: Yes.

10 Q. (Mr. Wiggins) And I've asked you about
11 these receptacles one, two and three, and you also
12 identified those on your drawing that we looked at
13 earlier on. Is that correct?

14 A. Yes.

15 Q. The wiring that we're looking at -- look
16 at photograph number 27, and the Bates stamp is
17 01845.

18 You see that, Mr. Martini?

19 A. I do.

20 Q. And was that the wiring that you
21 identified earlier that we were asking about located
22 in the ceiling area where it -- where Mr. Lacy
23 identified to you where he thought the origin of the
24 fire was?

25 A. Yes.

1 Q. And did you examine that wiring?

2 A. I did.

3 Q. I see a chain hanging down in that
4 photograph.

5 Do you see that?

6 A. Yes.

7 Q. And is that a chain that would have held
8 the lighting system, or do you know what that is?

9 A. That is not holding the lighting system.
10 Probably have to look at some other -- other photos.
11 Looks more like a shelf bracket or something.

12 Q. Okay.

13 A. Can't quite tell completely from that
14 photo.

15 Q. But the top of this photograph shows a
16 fluorescent light, does it not?

17 A. Yes.

18 Q. And again, photograph 28 and 29, Bates
19 stamp number 1848 is, again, the ceiling area in the
20 area where the origin of the fire was identified by
21 Mr. Lacy?

22 A. Yes.

23 Q. And then photograph number 32, Bates
24 stamped 1848, that's identifying the fluorescent
25 fixtures in the hallway near the rear drive-thru

1 service area.

2 And that's the one you were -- you and I
3 were talking about earlier. Is that also correct?

4 A. In photograph 27, yes.

5 Q. Photograph number 33, Bates stamp number
6 1849, is identified as miscellaneous items recovered
7 from the rear drive-thru service area.

8 Do you see that?

9 A. Yes.

10 Q. And did you talk to Mr. Lacy about these
11 items?

12 A. To the extent that I was informed that
13 they were collected from that area in back.

14 Q. Did he tell you what it was?

15 A. No.

16 Q. Did you talk to Chad Royal about these
17 items?

18 A. Only to the extent that they didn't find
19 any evidence of a failure.

20 Q. Did you know what it was when you looked
21 at it?

22 A. What was?

23 Q. Did you know what this was in -- you've
24 got miscellaneous items recovered.

25 Do you know what the miscellaneous items

1 were?

2 MS. DALY: Objection to form.

3 Q. (Mr. Wiggins) At the time that you first
4 looked at it on January 30th, 2012.

5 A. What they all were?

6 Q. Yes.

7 A. Okay. Various pieces of wiring, printed
8 circuit boards, some melted mass of something.

9 Q. And did you know where these circuit
10 boards came from?

11 A. Not specifically.

12 Q. Did you talk to Mr. Lacy and ask him where
13 they came from?

14 MS. DALY: Objection to form.

15 THE WITNESS: Sure. I was told
16 somewhere in that area.

17 MR. WIGGINS: Okay.

18 THE WITNESS: It was found -- all
19 this was found in the debris in that area.

20 Q. (Mr. Wiggins) And did you talk to Mr.
21 Royal about these items, these miscellaneous items?

22 A. Other than informing him that I found no
23 evidence of a failure, I don't -- I don't think so.

24 Q. And did Mr. Lacy tell you where the --
25 where it was found in the area where the fire, as he

1 identified it, began?

2 MS. DALY: Objection. Asked and
3 answered.

4 THE WITNESS: Just that it was from
5 that area.

6 Q. (Mr. Wiggins) Did you ever ask him
7 specifically where it came from?

8 MS. DALY: Objection. Asked and
9 answered.

10 THE WITNESS: In other words, no, he
11 didn't point to a spot on the floor and say it came
12 from there, no. He just -- it was from that area.

13 Q. (Mr. Wiggins) Did you have any curiosity
14 about where it came from?

15 MS. DALY: Objection.

16 THE WITNESS: I'm always curious
17 where everything comes from on a fire scene, but
18 sometimes that's not answered.

19 Q. (Mr. Wiggins) Did you ask if it were --
20 if it was some kind an appliance that had been
21 located in that area?

22 A. No.

23 Q. Did you have any -- did any question arise
24 in your mind as to where it might have been?

25 A. Well, I knew it was from that area based

1 on the amount of damage.

2 Q. Okay, but nobody ever told you where it
3 was situated or anything else about it. Is that what
4 you're saying?

5 MS. DALY: Objection.

6 THE WITNESS: That's my
7 recollection, yes.

8 Q. (Mr. Wiggins) Did you make any notes
9 about this item that you had?

10 A. No.

11 Q. Did you read the report that I furnished
12 to counsel that was written by James Small?

13 A. Yes.

14 MS. DALY: Actually, so that the
15 record is clear, are you talking about the letter
16 that you've sent us?

17 MR. WIGGINS: Yes.

18 MS. DALY: You just said a report.
19 We have a letter.

20 MR. McLEAN: Can we go off the
21 record for one minute.

22 (12:05-12:06 p.m. - recess)

23 Q. (Mr. Wiggins) Let me show you, Mr.
24 Martini, what is a report dated August 15, 2013, to
25 Trey McLean from Kodiak Fire & Safety Consulting.

1 Have you ever seen this before?

2 A. No.

3 Q. Do you know who James Small is?

4 A. Yes.

5 Q. How do you know him?

6 A. From an article that was referenced.

7 Q. And was that article furnished to you by
8 counsel?

9 A. Actually, no. I had that from before.

10 Q. How did you obtain a copy of that article
11 written by James Small?

12 A. I don't remember who sent that to me. I
13 got -- I got that sometime ago, I mean, possibly a
14 year or two ago unrelated to this case.

15 Q. And had nothing to do with this matter
16 that we're talking about here today?

17 A. That's correct.

18 Q. Have you ever talked to Jim Small?

19 A. I have not.

20 Q. And are you familiar with the article that
21 you just showed me that you have read and are
22 familiar with?

23 A. Yes.

24 Q. And the basis of that article had to do
25 with 24 volt or less appliances and potential for

1 fire in those appliances ---

2 A. --- Yes.

3 Q. --- Printed circuit boards?

4 Is that -- would that be an accurate
5 description of it?

6 A. Pretty good.

7 Q. Have you ever done any studies on -- on
8 printed circuit boards yourself on this -- in any
9 respects whatsoever in relation to its potential for
10 fire?

11 MS. DALY: Objection to form.

12 THE WITNESS: Study other than
13 related to investigating fires?

14 MR. WIGGINS: Yes.

15 THE WITNESS: No.

16 Q. (Mr. Wiggins) And do you recall the
17 occasion of your having to become familiar with the
18 article written by James Small?

19 A. It was not sent to me in conjunction with
20 any particular case I was working on.

21 Q. Okay.

22 A. It was just information that somebody
23 passed along to me.

24 Q. Have you read that article again recently
25 in preparation for your testimony in this -- this

1 particular case?

2 A. I did reread it, yes.

3 Q. And do you have any thoughts with what the
4 findings of Jim Small was in that article?

5 MS. DALY: Objection to form.

6 THE WITNESS: Well, what specific
7 finding?

8 MR. WIGGINS: Well ---

9 THE WITNESS: --- He's opening --
10 he's just raising awareness in what he's doing. And
11 as far as findings go, he's got one -- one particular
12 case study that he's written about all the way
13 through.

14 I think it should be kept in mind that the
15 type of failure that he's discussing on a circuit
16 board level can happen. More often than not, the
17 result is that the particular appliance stops
18 working. There's no reason to think that anytime
19 there's a failure on a board -- at board level,
20 you're going to end up with a fire, because we'd have
21 everything blowing up around us. Okay?

22 So first thing that would typically happen
23 is that an item would stop working. There's no
24 indication that this wireless equipment had any kind
25 of operational problems.

1 The only one that he's -- when they show
2 something has gone to failure is in his figure six,
3 and that shows very specific damage to the board.
4 You've got a hole in the board, you've got edges of
5 the board missing.

6 Q. (Mr. Wiggins) Is the article that you're
7 referring to, is it entitled Class 2 Transformers and
8 Plastic Enclosed Printed Circuit Boards, a
9 Potentially Perilous Combination?

10 A. No.

11 Q. Is the one that you have called Low
12 Voltage, the Incomplete Ignition Source Dispelling
13 the Myth?

14 A. Yes.

15 Q. And you're familiar with the article?

16 A. That one, yes.

17 Q. Okay, and his -- I guess his conclusions
18 -- it's not really specific conclusions.

19 Well, he has a conclusion at the very last
20 page of his article, and it says conclusion, the
21 proliferation of consumer electronics in the home and
22 the ever-increasing and never-ending push to
23 miniaturize them continues to introduce new
24 challenges for the fire investigative community.

25 The utilization of manufacturing processes

1 are increasingly more difficult to control from a
2 cleanliness perspective, and the drive to reduce
3 hazardous substances such as formerly effective fire
4 retardant agents in PCB's are continuing to create
5 the, quote, perfect storm, end quote, with respect to
6 printed circuit board ignition.

7 You see that in the article?

8 A. Yes.

9 Q. And do you agree with that or disagree
10 with that?

11 MS. DALY: Objection to form.

12 THE WITNESS: I agree in general.

13 Q. (Mr. Wiggins) And it says, furthermore,
14 the management of these critical process parameters
15 required to ensure reliable and safe operation of
16 printed circuit boards in the hands of the consumer
17 continues to be overwhelming challenging -- challenge
18 for many companies sourcing product from contract
19 manufacturers in the Pacific Rim.

20 Do you see that?

21 A. Yes.

22 Q. Do you agree with that or disagree with
23 that statement?

24 MS. DALY: Objection to form.

25 THE WITNESS: Well, I wouldn't use

1 as many adjectives, but in general, I agree.

2 Q. (Mr. Wiggins) And then next paragraph he
3 says, for investigators who wish to improve their
4 accuracy in identifying the root causes of the fires
5 they investigate, virtually all electronic devices in
6 the area of origin, and in parens, and the area of
7 interest, end parens, must be considered as potential
8 ignition sources, period.

9 Do you agree or disagree with that
10 statement?

11 MS. DALY: Objection to form.

12 THE WITNESS: I agree.

13 Q. (Mr. Wiggins) Devises geographically
14 remote from the area of origin, comma, even those
15 located in the compartment completely unaffected by
16 fire, comma, must also be considered if connected to
17 such devices via data cable, comma, coax or like
18 wiring, period.

19 Do you agree or disagree with that
20 statement?

21 MS. DALY: Objection to form.

22 THE WITNESS: Agree.

23 Q. (Mr. Wiggins) And then the next point he
24 makes in the next paragraph, he says, no longer is it
25 acceptable to turn a blind eye to products that are

1 arbitrarily considered to be, quote, low voltage, end
2 quote.

3 Do you agree or disagree with that?

4 MS. DALY: Objection to form.

5 THE WITNESS: Agree.

6 Q. (Mr. Wiggins) And then he says, no longer
7 is it acceptable to ignore devices formerly believed
8 to be incapable of developing enough heat to initiate
9 a fire.

10 Do you agree or disagree with that
11 statement?

12 MS. DALY: Objection to form.

13 THE WITNESS: Agree.

14 Q. (Mr. Wiggins) And then, no longer is it
15 acceptable to apply conventional compartment fire
16 development principles to small-scale electronic
17 assemblies and devices.

18 Do you agree or disagree with that
19 statement?

20 MS. DALY: Object to form.

21 THE WITNESS: Agree.

22 Q. (Mr. Wiggins) When you look at this --
23 this circuit board that you've identified in
24 photograph -- photograph number 33, did you examine
25 the contents of that board for any carbonization on

1 any of the components of the board?

2 A. Well, there were no components left on the
3 board at that time.

4 Q. Could you see any carbonization on any of
5 the points of the board?

6 A. That type of damage would have been masked
7 by the fire.

8 Q. The question is you did not find any. Is
9 that correct?

10 A. That's correct.

11 Q. Did you look for any?

12 A. I looked for any specific damage, any
13 specific localized damage on the board on both sides.

14 Q. And even in your report on May 23rd, 2012
15 -- do you have that before you there?

16 You do -- I'm sorry. It's in the back
17 part of the photographs that you have.

18 (Witness examined documents)

19 A. Okay.

20 Q. This was written to Michael Jezierski on
21 May 23rd, 2012. Is that correct?

22 A. Is that a question?

23 Q. It's a question.

24 A. Yes.

25 Q. And did you write this in conjunction with

1 the report written by Mr. -- by Mr. Lacy?

2 MS. DALY: Objection to form.

3 THE WITNESS: I'm not sure what you
4 mean by in conjunction with.

5 Q. (Mr. Wiggins) Did you and he consult each
6 other when you wrote your report as opposed to when
7 he wrote his report?

8 A. No. I was asked to prepare a short report
9 on my findings, and I did.

10 Q. And my question was did you consult with
11 Terry Lacy about his report that was -- that
12 pre-dated your report prior to writing your -- this
13 report?

14 MS. DALY: Objection to form.

15 THE WITNESS: I don't believe so.

16 Q. (Mr. Wiggins) Did you and he have any
17 discussions about your findings prior to your writing
18 this report?

19 A. Well, he knew about my findings the day I
20 was out there.

21 Q. Yes, yes, the day you were out there.

22 A. I said I discussed my findings with him
23 when I was out there on the 30th.

24 Q. Prior to writing this report, or
25 immediately prior to writing this report, did you

1 have any discussions with Terry Lacy?

2 A. I ---

3 MS. DALY: --- Objection to form.

4 THE WITNESS: Sorry.

5 Not that I recall.

6 Q. (Mr. Wiggins) Did you review any report
7 that was written by Terry Lacy prior to your writing
8 this report?

9 A. No.

10 Q. Did you know that Terry Lacy did not
11 mention in his report this circuit board that he
12 found at or near the location of what he had found to
13 be the origin of the fire?

14 MS. DALY: Objection.

15 Mischaracterization.

16 You can answer.

17 THE WITNESS: Did I know he didn't
18 have it in his report?

19 Q. (Mr. Wiggins) Did you know he did not
20 contain any mention of this circuit board in his
21 report, that he found at or near the location of the
22 origin of the fire, or is that ---

23 MS. DALY: --- Objection.

24 THE WITNESS: I guess I didn't see
25 his report.

1 Q. (Mr. Wiggins) You didn't see his report?

2 A. Right.

3 Q. Have you read his report to this day?

4 A. I've seen his most recent one. I don't --
5 I probably read the other one at some point.

6 Q. If I represent to you that he made no
7 mention of the circuit board in his report, would
8 that refresh your recollection?

9 MS. DALY: Objection.
10 Mischaracterization.

11 THE WITNESS: No.

12 Q. (Mr. Wiggins) Would not refresh your
13 recollection?

14 A. No.

15 Q. Did you have any discussion with Mr. Lacy
16 about whether or not he included any reference to the
17 circuit boards that you've identified in your
18 photographs in his report to Nationwide Insurance
19 Company?

20 MS. DALY: Objection.

21 THE WITNESS: I'm sorry. Say that
22 again, please.

23 Q. (Mr. Wiggins) Did Mr. Lacy -- did you
24 ever have any discussion with Mr. Lacy about whether
25 or not he included any reference to the circuit

1 boards that he found in the area of the location of
2 the fire?

3 A. No.

4 Q. Did you ever ask him if he had mentioned
5 that in his reports?

6 A. No. I would have considered that an
7 electrical issue that he would have just deferred to
8 me.

9 Q. Now, you did not make any mention of a
10 circuit board in your report, did you?

11 MS. DALY: Objection to form.

12 THE WITNESS: The last sentence in
13 the body would have covered that.

14 MR. WIGGINS: Wait, wait, wait. I'm
15 sorry.

16 Which -- which page are you on?

17 THE WITNESS: Page three, last
18 paragraph. Paragraph starting with four drop-in
19 fluorescent fixtures. Last -- I'm right there.

20 MR. WIGGINS: I got you. Okay.

21 THE WITNESS: Yeah, last sentence,
22 miscellaneous debris recovered from the floor around
23 the area of fire origin was inspected with no
24 evidence of electrical failure found.

25 Photograph 33 is referenced, and that's

1 the one that shows the items on the counter, so that
2 sentence covered all those items.

3 Q. (Mr. Wiggins) Miscellaneous debris
4 recovered from the floor around the area of the fire
5 origin was inspected with no evidence of electrical
6 failure found.

7 And that was referenced, the -- to the
8 miscellaneous items identified and recovered from the
9 rear drive-thru service area, photograph 33?

10 Is that what you're saying?

11 A. Yes.

12 Q. But nowhere in your report to Nationwide
13 Insurance Company do you mention the printed circuit
14 board, do you, Mr. Martini?

15 MS. DALY: Objection to form.

16 THE WITNESS: It's covered in that
17 last sentence.

18 Q. (Mr. Wiggins) Well, my question was --
19 and you mentioned it -- did you say printed circuit
20 board was found in the area of the fire?

21 MS. DALY: Objection to form.

22 THE WITNESS: Not in detail, no.

23 Q. (Mr. Wiggins) Do you not think now, upon
24 reflection, that that should have been something that
25 you should have reported to Nationwide Insurance

1 Company in the first instance in this report?

2 MS. DALY: Objection.

3 Mischaracterization of his testimony.

4 THE WITNESS: I feel I did cover it
5 in my report.

6 Q. (Mr. Wiggins) Well, how did you cover it?

7 How did you -- how did you -- other than
8 what you just told me, is there anything else that
9 would have been -- put someone on notice that there
10 was printed circuit board in that area that was
11 electrically powered?

12 MS. DALY: Objection.

13 THE WITNESS: I don't know what your
14 question is.

15 Q. (Mr. Wiggins) Was this printed circuit
16 board electrically powered in some fashion?

17 A. Well, we know that now.

18 Q. Did you know it then?

19 A. I assumed it was.

20 Q. Okay, and did you go and look where the
21 power source of that circuit board was?

22 MS. DALY: Objection to form.

23 THE WITNESS: Not having known where
24 it came from specifically, no.

25 Q. (Mr. Wiggins) Okay, and so the answer is

1 you never looked to see if there was a source,
2 electrical source, for that printed circuit board?

3 MS. DALY: Objection to form.

4 THE WITNESS: I looked at -- let's
5 say, given where we know it is now, I looked in that
6 area and the exterior end of the office area. I
7 looked at everything I could see. If the power
8 supply cord was in that area, I would have seen it.
9 If it wasn't, I didn't.

10 Q. (Mr. Wiggins) Is it possible that you
11 missed seeing the power cord to the printed circuit
12 board?

13 MS. DALY: Objection to form.

14 THE WITNESS: Not knowing what
15 condition it was in after the fire, it's possible.

16 Q. (Mr. Wiggins) You knew that Nationwide
17 Insurance Company was going to rely upon your report
18 in determining whether or not to -- whether or not to
19 either approve this loss for payment or whether they
20 were going to deny the loss for payment?

21 MS. DALY: Objection to form.

22 THE WITNESS: Typically I am looking
23 at a fire scene for subrogation purposes.

24 What the case eventually turns into, I'm
25 not aware of when I'm out there, and it's -- it's

1 really not my concern. My goal is to do what I'm
2 tasked to do.

3 Q. (Mr. Wiggins) But you knew that
4 Nationwide was going to rely upon your report in
5 whatever decisions they made in relation to this,
6 whatever it was, did you not?

7 MS. DALY: Objection to form.

8 THE WITNESS: Yes.

9 Q. (Mr. Wiggins) And it would have been
10 important for you to identify everything in the area
11 where this fire began that might have something to do
12 -- or might be a heat source where the fire might
13 have begun.

14 MS. DALY: Objection to form.

15 THE WITNESS: Yes. I did that.

16 Q. (Mr. Wiggins) Did you tag this printed
17 circuit board and identify it in any way when you
18 looked at it?

19 MS. DALY: Objection to form.

20 THE WITNESS: No.

21 Q. (Mr. Wiggins) Why didn't you do that?

22 A. Why didn't I do what?

23 Q. Why didn't you tag it and identify it in
24 some fashion?

25 MS. DALY: Objection.

1 THE WITNESS: Everything that I
2 examined on January 30th, including the items on the
3 table there, the miscellaneous items we're talking
4 about, wiring and the receptacles, etcetera,
5 everything was examined and photographed. Some of it
6 was sketched. And then I left it all in place for
7 any possible future inspections by any other
8 interested parties.

9 Q. (Mr. Wiggins) You said that you conducted
10 this investigation in accordance with -- and I
11 believe in your report you said Section 921 of the
12 NFPA, did you not?

13 A. Yes.

14 Q. And do you know what -- do you know what
15 those sections contain?

16 Are you familiar with those sections?

17 A. I'm somewhat -- I'm familiar with 921,
18 yeah.

19 Q. And one of the things 921 requires an
20 investigator to do is to tag and to identify and
21 preserve any physical evidence that's found in the
22 scene of a fire, is it not?

23 MS. DALY: Objection.

24 Q. (Mr. Wiggins) Well, you know that, don't
25 you?

1 MS. DALY: Objection.

2 Mischaracterization.

3 You can go ahead and answer.

4 THE WITNESS: Yes. And I also know
5 that preserving the scene as intact as possible for
6 any other investigators is just as important. But
7 items were all left in place and the restaurant was
8 secured when we left.

9 Q. (Mr. Wiggins) And -- but nothing was
10 identified or tagged. Is that your testimony ---

11 MS. DALY: --- Ob ---

12 Q. (Mr. Wiggins) --- To your knowledge?

13 MS. DALY Objection.

14 THE WITNESS: Correct.

15 Q. (Mr. Wiggins) Did Mr. Lacy ever tag or
16 identify any evidence that was identified that was
17 recovered from the scene?

18 A. Yes.

19 Q. What did he tag and identify?

20 A. Anything he would have collected.

21 Q. Pardon?

22 A. Anything he would have collected.

23 Q. Did you ever look at it prior to going to
24 Mr. Cavaroc's office -- lab in Raleigh?

25 A. No.

1 Q. 921 also requires that any evidence found
2 at the scene be sent to a lab for identification or
3 examination, does it not?

4 MS. DALY: Objection. It's a
5 mischaracterization.

6 THE WITNESS: Anything that he
7 collected was taken to a lab.

8 MR. WIGGINS: Pardon?

9 THE WITNESS: Anything that Mr. Lacy
10 collected was taken to a lab.

11 Q. (Mr. Wiggins) Well, this was not taken to
12 the lab, was it? This circuit board was not taken to
13 the lab?

14 A. It was not collected.

15 Q. He should have collected it, shouldn't he?

16 MS. DALY: Objection.

17 THE WITNESS: Like I stated before,
18 anything I looked at I left in place for any other
19 parties to look at.

20 Q. (Mr. Wiggins) My question was, Mr. Lacy,
21 as the primary investigator on this fire, should have
22 tagged and collected the circuit boards for further
23 identification and evidence, should he not?

24 MS. DALY: Objection.

25 THE WITNESS: If we collected the

1 circuit boards, then I would have had to collect
2 everything else that I looked at, and that would have
3 -- we would have then later been accused of
4 expoliation of evidence or spoiling the scene, so....

5 Q. (Mr. Wiggins) Well, once -- this is
6 paragraph 1610 of what you just identified as what
7 you complied with 921.

8 MS. DALY: Do you have a copy of
9 that so he can read along with you?

10 MR. WIGGINS: Don't have a copy of
11 it.

12 The only thing I can do is read it to you,
13 Mr. Martini.

14 Q. (Mr. Wiggins) It says -- this is 1610 --
15 examination, testing of physical evidence.

16 Once collected, physical evidence is
17 usually examined and tested in a laboratory or other
18 testing facility. Physical evidence may be examined
19 and tested to identify its chemical composition to
20 establish its physical properties to determine its
21 conformities or lack of conformity to certain legal
22 standards to establish its operation, inoperation or
23 malfunction to determine its design sufficiency or
24 deficiency or other issues that would provide the
25 fire investigator with an opportunity to understand

1 and determine the origin of the fire, a specific
2 cause of the fire, the contributing factors to a fire
3 spread or other responsibility for a fire.

4 Are you familiar with that section of 921?

5 MS. DALY: Can you show it to him so
6 he can -- if you're going to ask questions about it.

7 THE WITNESS: 1610?

8 MR. WIGGINS: 1610.

9 THE WITNESS: Okay.

10 (Witness examined document)

11 THE WITNESS: Okay.

12 Q. (Mr. Wiggins) You did not send this to a
13 laboratory to be tested or mark and tag it to be sent
14 to a laboratory, did you?

15 A. Yeah, I talked about ones collected.

16 Q. Pardon?

17 A. I discussed this evidence that is being
18 collected.

19 Q. Well, didn't you collect this or didn't
20 someone from your company collect it?

21 MS. DALY: Objection.

22 Q. (Mr. Wiggins) From Donan -- didn't Mr.
23 Lacy collect it?

24 MS. DALY: Objection.

25 Mischaracterization.

1 THE WITNESS: I'm not aware of him
2 collecting it.

3 Q. (Mr. Wiggins) Who told you -- who told
4 you where it came from?

5 A. Mr. Lacy did.

6 Q. Did he say that he got it there?

7 MS. DALY: Objection to form.

8 Got it where?

9 MR. WIGGINS: From the area where he
10 determined the origin of the fire to have begun.

11 MS. DALY: Objection. Asked and
12 answered.

13 THE WITNESS: Actually, I believe
14 Mr. Royal collected it.

15 MR. WIGGINS: Okay.

16 THE WITNESS: If I remember -- if I
17 remember the depositions correctly.

18 Q. (Mr. Wiggins) Do you remember him telling
19 you that, or is that just what you read from the
20 depositions?

21 MS. DALY: Objection to the form.

22 THE WITNESS: Mr. Royal was not
23 present when I looked at that earlier in the day.

24 I don't remember specifically if Mr. Lacy
25 told me he got it from there or Mr. Royal collected

1 it from there.

2 Q. (Mr. Wiggins) It would have been a good
3 idea, would it not, from your experience, to have had
4 this circuit board examined in a laboratory setting,
5 as the other evidence, to determine if there were any
6 defects in it, wouldn't it?

7 MS. DALY: Objection.

8 THE WITNESS: If it had been there
9 later to collect, that's what would have been the
10 process, yes.

11 Once I -- once I left the scene, the scene
12 was secured and not under my direction, so....

13 Q. (Mr. Wiggins) Did you develop or were you
14 asked to develop any kind of hypotheses as to how
15 this fire might have begun?

16 A. I'm only asked to examine electrical --
17 essential electrical sources of ignition and
18 determine if any of those played a role in the cause
19 of the fire.

20 Q. And did you develop any hypotheses based
21 upon that examination by you of electrical equipment?

22 A. My findings are that there's no electrical
23 source of ignition for this fire.

24 Q. When you did your investigation, were you
25 aware of the drying rack that was located adjacent to

1 the window -- the drive-in window number one at the
2 Miami Subs Restaurant?

3 MS. DALY: Objection to form.

4 THE WITNESS: Are we talking about
5 the steel rack?

6 MR. WIGGINS: The steel rack.

7 THE WITNESS: Yes.

8 Q. (Mr. Wiggins) And it's a drying rack, I
9 think, they were calling it.

10 A. Oh, yeah.

11 Q. Is that correct?

12 A. Yes.

13 Q. And did you inquire of anyone what was
14 stored on that rack?

15 A. I believe I was told -- like I said, it
16 was a drying rack for cups and plates and whatever.

17 Q. Did anyone identify to you that on that
18 rack was also these plastic cups, these styrofoam
19 cone, plates, and the wrappers, the cellophane
20 wrappers around these cups?

21 MS. DALY: Objection to form.

22 THE WITNESS: That may have been
23 mentioned. I don't know.

24 Q. (Mr. Wiggins) Was that anything that you
25 would have been interested in in making your

1 investigation?

2 A. I haven't seen sparks come from plastic
3 cups.

4 Q. And you saw some of those plastic cups at
5 Mr. Cavaroc's lab when you went there, did you not?

6 A. Yes.

7 Q. And did anybody then talk about where
8 those cups or those styrofoam plates came from?

9 A. The ones that Mr. Lacy collected?

10 Q. Right. Mr. Lacy brought to the....

11 A. I don't remember specifically. He made
12 his evidence list. It may state where those were
13 collected from.

14 Q. You now know from reading the depositions
15 that this HME -- this Ion IQ communicative device was
16 located about six and a half feet above the floor to
17 the right of the drive-thru window, do you not?

18 MS. DALY: Objection.

19 THE WITNESS: Yes.

20 Q. (Mr. Wiggins) And as a matter of fact,
21 you could see that by virtue of the fact that there
22 was a place on the wall that was not blacked out by
23 smoke or fire -- could you not -- could you not
24 identify that?

25 MS. DALY: Objection to form.

1 THE WITNESS: Yes.

2 Q. (Mr. Wiggins) Did you identify that
3 physically, yourself, or did you see it by photos?

4 A. I saw it when I was there. I didn't know
5 the significance of it till later.

6 Q. And at the time you were there, you did
7 not know the location of the HME Ion system --
8 communication system, did you?

9 A. That's correct.

10 MS. DALY: Let's go off the record
11 for a moment.

12 (12:36-1:31 p.m. - recess)

13 MR. WIGGINS: Everybody ready?
14 Back on the record.

15 Q. (Mr. Wiggins) Mr. Martini, just going
16 back for a second on a subject we were speaking about
17 earlier, and that is the -- the preservation of
18 physical evidence.

19 You said that you did not mark the circuit
20 boards. Obviously you did not do that. Do you know
21 whose responsibility that might have been?

22 MS. DALY: Objection to form.

23 THE WITNESS: Typically, evidence,
24 in my experience, is marked when it's collected.

25 Q. (Mr. Wiggins) And would the collector of

1 this evidence -- in your opinion, would it have been
2 -- I'm sorry -- would it have been Terry Lacy or Chad
3 -- Chad Royal?

4 MS. DALY: Objection.

5 MR. WIGGINS: If you know.

6 MS. DALY: Objection to the form.
7 It's a statement.

8 THE WITNESS: You're asking me if it
9 would have been the proper person to ---

10 MR. WIGGINS: --- Yes, who is the
11 proper person to -- to have collected and identified
12 and protected the physical evidence.

13 That is, in this particular case, we're
14 talking about the circuit boards.

15 MS. DALY: Objection to the form of
16 the question, to the statement.

17 THE WITNESS: Either Mr. Lacy or I
18 could have collected them once we were sure that all
19 potential interested parties were -- were done with
20 the scene.

21 Q. (Mr. Wiggins) And again, I'm going to
22 show you this paragraph here, and it's -- this is in
23 chapter 16 of 921 of the NFPA rules, which you said
24 that you adhere to and -- now, let me show you what
25 is 16.1 and read that and see if you agree with that

1 statement and if this is what generally you do.

2 (Witness examined document)

3 A. Okay, is there a question on that?

4 Q. Yeah. Whose responsibility is it to
5 collect and protect, preserve physical evidence?

6 MS. DALY: Objection to the form.

7 THE WITNESS: I'll say the fire
8 investigator is likely to be responsible.

9 MR. WIGGINS: Okay.

10 THE WITNESS: Doesn't say he is.
11 It's not his sole responsibility.

12 Q. (Mr. Wiggins) And in that case you would
13 have been one of the fire investigators?

14 MS. DALY: Objection to the form.

15 THE WITNESS: We're getting into
16 nuances of fire investigator. I'm an electrical
17 engineer, but assisting my fire investigator.

18 Q. (Mr. Wiggins) So you had been insist --
19 you had been assisting Terry Lacy ---

20 MS. DALY: --- Objection to the
21 form.

22 Q. (Mr. Wiggins) --- The origin and cause
23 investigator.

24 MS. DALY: Objection to the form.

25 THE WITNESS: Yes. And typically,

1 if we were collecting evidence, he may be collecting
2 evidence pertinent to him, I may be collecting
3 evidence pertinent to me. You know, it's not --
4 there's no hard and fast division of labor.

5 Sometimes I help their investigators
6 collect evidence and sometimes they help me.

7 Q. (Mr. Wiggins) What are the methods that
8 you're familiar with that can be used to identify and
9 protect evidence from destruction?

10 A. Say it again, please.

11 Q. What are the methods that you're familiar
12 with that are typically used by fire investigators to
13 protect it from destruction?

14 A. In particular?

15 MS. DALY: Objection to the form.

16 MR. WIGGINS: Physical evidence ---

17 THE WITNESS: --- To protect it from
18 destruction?

19 MR. WIGGINS: Yes.

20 MS. DALY: Objection to form.

21 THE WITNESS: Well, one is to secure
22 the premises, and if -- we're talking about evidence
23 that's not yet collected or about to be collected?

24 MR. WIGGINS: Already is collected.

25 THE WITNESS: If it's about to be

1 collected -- well, if it's collected, it's stored in
2 bags, boxes, cans, whatever, and stored in a secured
3 location.

4 Q. (Mr. Wiggins) The circuit boards were not
5 stored in a safe location, were they?

6 MS. DALY: Objection to form.

7 THE WITNESS: The restaurant was
8 secured when I left.

9 Q. (Mr. Wiggins) But no other -- no other
10 means of protecting it were utilized, to your
11 knowledge?

12 MS. DALY: Objection to form.

13 THE WITNESS: They were left as I
14 found them.

15 Q. (Mr. Wiggins) And you found them on the
16 table?

17 A. Yes.

18 Q. Do you have any idea who would have had
19 any -- well, strike that.

20 Do you now know that those circuit boards
21 were no -- are no longer in existence, or they cannot
22 be found.

23 Do you know that?

24 A. Yes.

25 Q. Do you know who would have had any motive

1 to remove or take those circuit boards?

2 A. I was not aware of anything like that.

3 Q. Have you ever heard anyone, referring to
4 Mr. Lacy, speculate as to how they got missing?

5 MS. DALY: Objection to form.

6 THE WITNESS: I didn't understand.

7 Q. (Mr. Wiggins) Did any -- did you ever
8 have any conversation with Mr. Lacy about how he
9 thought they might have gotten missing?

10 A. No. We showed up in November, and it was
11 gone, along with -- along with most of the place.
12 Same time the DVR was discovered missing.

13 Q. I'm sorry? The DVR?

14 A. That's the same date the DVR was
15 discovered missing, so a number of things had
16 disappeared.

17 MR. WIGGINS: Was that -- excuse me.
18 Let me just find -- what was that -- 46?

19 MR. McLEAN: 46A?

20 MR. WIGGINS: 46B.

21 MR. McLEAN: Go off the record a
22 second.

23 (1:39-1:41 p.m. - recess)

24 (* Exhibit 46B was marked *)

25 Q. (Mr. Wiggins) Can you identify that

1 document, Mr. Martini?

2 A. Yes. It's my report.

3 Q. And what's the date of that report?

4 A. June 28, 2013.

5 Q. And at whose request did you prepare that
6 report?

7 A. Rachel Daly.

8 Q. Okay, and is she counsel for Nationwide
9 Insurance Company?

10 A. Yes.

11 Q. And this document was prepared as an
12 expert report to counsel. Is that correct?

13 A. Yes.

14 Q. And this document says you examined the
15 fire scene at 552 North McPherson Church Road,
16 Fayetteville, North Carolina, on January 30th, 2012.

17 And that was -- that was contained in your
18 original report that had been made back in May of --
19 on May 23rd, 2012.

20 And then you added November 16th, 2012,
21 November 29th, 2012.

22 Those were the other two dates that you
23 were at the scene? Is that correct?

24 A. Yes. Yes, sir.

25 Q. What was the purpose for you being there

1 on November 16th and November 29th, 2012?

2 A. November 16th is when PWC was put on
3 notice, I believe, and so we were -- we were notified
4 of -- John Cavaroc was representing PWC and was going
5 to the site that day. We were notified that he would
6 be present, so we wanted to be present as well.

7 Q. And was the fire -- was that evidence
8 examined at John Cavaroc's office on April the 17th,
9 2013?

10 MS. DALY: Objection to form.

11 THE WITNESS: Mr. Cavaroc collected
12 evidence on November 29th.

13 Q. (Mr. Wiggins) And when was it examined in
14 his office -- at his laboratory?

15 A. April 17th ---

16 Q. --- And you were present ---

17 A. --- 2013.

18 Q. And you were present at that meeting?

19 A. Yes, I was.

20 Q. And the bottom of that page says that the
21 fire -- says that the electrical supply to the
22 building did not cause or contribute to the fire.
23 The electrical supply is intact. There was no
24 physical evidence which indicates change or failure
25 to that supply. And there were no reported

1 electrical problems preceding the fire.

2 That was contained in your original
3 report, was it not?

4 A. I don't have that in front of me, but --
5 well, in so many words, yes, it's covered.

6 Q. And then, dropping down in the second page
7 of your report that was made in June 28th, 2013, on
8 number three you've got no evidence of electrical
9 failure was identified in or around the area of the
10 fire origin that could have served as ignition source
11 to the fire. And in your original report this
12 appears in the summary of the conclusion section.

13 Why did you change that back into the
14 section as an opinion?

15 MS. DALY: Objection.

16 THE WITNESS: I don't understand
17 your question.

18 Q. (Mr. Wiggins) Well, in the first report
19 that you made, if you look at it -- do you have the
20 first report in front of you?

21 A. I do.

22 Q. It was -- on the last page you had that as
23 a -- as a summary of conclusion.

24 You see that?

25 A. Yes.

1 Q. You say no evidence of electrical failure
2 was identified in or around the area of the fire
3 origin that could have served as ignition source for
4 the fire, and -- but in this report you put it in a
5 different section. Why was that?

6 MS. DALY: Objection.

7 MR. WIGGINS: It's under your
8 opinions now.

9 MS. DALY: And so that it's clear
10 for the record, on the June 28th were referencing his
11 federal -- the expert report ---

12 MR. WIGGINS: --- Correct.

13 MS. DALY: --- In compliance with
14 the federal rules ---

15 MR. WIGGINS: --- Correct.

16 MS. DALY: --- Versus just the
17 letter prior to litigation.

18 MR. WIGGINS: Correct.

19 MS. DALY: You can answer if you
20 understand.

21 THE WITNESS: It qualifies them both
22 -- I don't....

23 MR. WIGGINS: I'm sorry?

24 THE WITNESS: I mean, there's no --
25 there's no heading for conclusions in the federal

1 report.

2 MR. WIGGINS: Okay.

3 THE WITNESS: Just statement of
4 opinions.

5 Q. (Mr. Wiggins) When you wrote this report
6 did you know where the area of the fire origin was
7 that could have served as ignition source for the
8 fire?

9 MS. DALY: Which report? The
10 federal expert report?

11 MR. WIGGINS: Yeah, the federal
12 expert report.

13 MS. DALY: Okay.

14 THE WITNESS: You're asking me, when
15 I wrote the federal expert report, did I know where
16 the origin of the fire was located?

17 MR. WIGGINS: Right.

18 THE WITNESS: Yes.

19 Q. (Mr. Wiggins) Okay, and did you know when
20 you wrote the federal report where the Ion IQ
21 communication device was located?

22 A. Yes. Based on our testimony, yes.

23 Q. And did you write this report with the
24 knowledge of its location -- that is, the location of
25 the Ion IQ communication device -- at the time this

1 report was written?

2 MS. DALY: Objection. Asked and
3 answered.

4 THE WITNESS: You're asking me if I
5 knew where it was installed when I wrote the report?

6 MR. WIGGINS: Yes.

7 THE WITNESS: Where it was
8 originally installed?

9 MR. WIGGINS: Where it was
10 originally installed.

11 THE WITNESS: Yes.

12 Q. (Mr. Wiggins) And you didn't know that
13 when you wrote the report to Nationwide Insurance
14 Company back in 2000 -- June of -- May of 2012.

15 A. That's correct.

16 Q. And in this report you talk about, in
17 paragraph six on the second page, a base station
18 reported to be part of the HM -- Electronics, Inc.,
19 HME, Ion IQ drive-thru audio system was reported to
20 have been installed on the wall near the top right
21 corner of the rear drive-thru window.

22 That's what you learned after you wrote
23 the initial report in May of 2012?

24 A. That's correct.

25 Q. And you only learned this through reading

1 the depositions of Jimmy Diamantopoulos and others
2 who have talked about the location of that system?

3 A. Yes.

4 Q. And you never learned about that either
5 from Terry Lacy, nor did you learn about it from Chad
6 Royal?

7 MS. DALY: Objection to the form.

8 THE WITNESS: Was that a question?

9 MR. WIGGINS: That's a question.

10 THE WITNESS: That's correct.

11 Q. (Mr. Wiggins) And it says, inspection --
12 then you go on down in the middle of that section,
13 you say, inspection of the recovered printed circuit
14 board revealed no evidence of electrical failure,
15 which would have been indicated by localized and
16 isolated heat damage to the printed circuit board
17 material.

18 And we talked about it earlier, and you
19 said you saw nothing to the naked eye that would
20 indicate any problem with that circuit board.

21 Is that your testimony?

22 A. Yes.

23 Q. The circuit board was heavily damaged, was
24 it not, Mr. Martini?

25 MS. DALY: Objection to the form.

1 Q. (Mr. Wiggins) It was heavily damaged,
2 wasn't it?

3 A. It was heavily ---

4 MS. DALY: --- Objection to the
5 form.

6 THE WITNESS: Heavily heat damaged,
7 yes.

8 Q. (Mr. Wiggins) And the plastic casing on
9 that had been completely dissolved and burned away,
10 had it not?

11 A. It was not recovered, so I'm assuming it
12 was.

13 Q. There was no cover on the circuit boards
14 when you saw it. No plastic covering at all.

15 A. That's correct.

16 Q. And you recovered one large, by
17 comparison, circuit board, and two small circuit
18 boards?

19 A. I didn't recover anything. I was ---

20 Q. --- Well, I'm sorry -- that you saw on the
21 -- on the shelf that you looked at when you were
22 there?

23 A. Yes.

24 Q. And I think we've already established you
25 made no notes as to exactly what you saw on that day.

1 Is that correct?

2 A. Correct.

3 Q. But you just recalled now, having gone
4 back some time afterwards, that you saw no localized
5 isolated heat damage to that printed circuit board?

6 MS. DALY: Objection to the form and
7 mischaracterization of his testimony.

8 Q. (Mr. Wiggins) Well, you straighten me
9 out.

10 A. Well, so in other words, if I had seen
11 something noteworthy, I would have made a note of it.

12 Q. But I think we've already established that
13 in order to determine whether or not there is any
14 malfunction or any damage to that circuit board, it
15 should have been examined by x-ray in a laboratory
16 setting, should it not?

17 A. No, it ---

18 MS. DALY: --- Objection.

19 THE WITNESS: We did not ---

20 MS. DALY: --- Mischaracterization
21 of his testimony.

22 Q. (Mr. Wiggins) We did not establish that?

23 A. No.

24 Q. What would be the correct way of
25 determining with some degree of certainty whether or

1 not there was any damage to that circuit board that
2 could have caused or generated heat have been
3 sufficient to have caused the fire?

4 A. To have generated heat sufficient to cause
5 the fire, you would see that damage with the naked
6 eye with a thorough examination.

7 Q. You would not have -- what do you base
8 that upon?

9 A. Experience, and including the report that
10 you guys are referring to about the low voltage which
11 causes a fire.

12 When they show a circuit board that fails
13 to the point of causing a fire, they -- they have
14 photos of damage, you know, including holes in the
15 board, pieces of the board missing. I would expect
16 to find the circuit traces melted apart.

17 I mean, in that report they talk about
18 electrical activity consuming copper traces. You
19 know, I didn't see any of that.

20 Q. Did you make any notes of that when you
21 looked at the board?

22 A. No.

23 Q. And did you not notice any holes in that
24 board when you looked at it?

25 A. There were no holes ---

1 Q. --- There were no holes?

2 A. --- From localized heat damage, no.

3 Q. If Mr. Small said that he saw holes in
4 that circuit board, would he be wrong about that?

5 MS. DALY: Objection to form.

6 THE WITNESS: I don't know what he's
7 seen.

8 Q. (Mr. Wiggins) If he said he saw holes in
9 that board, would he be -- would you disagree with
10 him?

11 MS. DALY: Objection to form.

12 THE WITNESS: Depends on what kind
13 of holes he seen.

14 Q. (Mr. Wiggins) If he saw -- if he -- on
15 that board he saw dark spots that would have
16 indicated that there were areas on that board that
17 could have been -- that could have been caused by --
18 let me read exactly what he said to be sure I'm not
19 mischaracterizing.

20 MS. DALY: And we'll make a general
21 ongoing objection to anything referencing Mr. Small.

22 MR. WIGGINS: Trey, do you have that
23 report?

24 MR. McLEAN: Small?

25 MR. WIGGINS: Yeah. I know where it

1 is. I'm sorry. I think I know where it is.

2 Did I mark it -- did I mark that letter
3 that I got from James Small this morning? Did we
4 have it marked?

5 MS. DALY: No.

6 MR. McLEAN: No, not to my
7 knowledge. I don't think you did. I don't think
8 it's been produced this morning.

9 Let's go off the record a second.

10 (1:55-1:57 p.m. - recess)

11 Q. (Mr. Wiggins) In the report of Mr. Small,
12 he says if any of the dark areas contained carbonized
13 material, they represent sites of possible competent
14 ignition.

15 Would you agree or disagree with that, Mr.
16 Martini?

17 MS. DALY: Objection.

18 THE WITNESS: Say that again.

19 MR. WIGGINS: Okay.

20 Q. (Mr. Wiggins) Mr. Small, when he looked
21 at the photographs, the digital photographs that were
22 taken by you of the circuit board, his comments to
23 that was as follows.

24 If any of the dark areas -- which you
25 identified was on the -- on your photograph --

1 contained carbonized material, they represent sites
2 of possible competent ignition.

3 MS. DALY: Objection.

4 Q. (Mr. Wiggins) Would you agree or disagree
5 with that?

6 A. Neither one.

7 Q. Okay, on photograph number two you have --
8 he says if any of the dark four circled areas -- and
9 I'll show you this in a minute -- contain carbonized
10 material, the photograph depicts points of ignition,
11 the ignition may or may not have been a competent
12 ignition source.

13 Would you agree or disagree with that?

14 A. Let me see that.

15 (Witness examined document)

16 MS. DALY: Objection to the form.

17 THE WITNESS: Well, what's not clear
18 to me is when he says it depicts points of ignition,
19 is that ignition from within the board or ignition
20 due to attacking fire?

21 MR. WIGGINS: I'm sorry?

22 THE WITNESS: Is it points of
23 ignition on the board due to the board failure or
24 attacking fire? That's not clear to me.

25 Q. (Mr. Wiggins) In either case, what would

1 be your answer to that?

2 MS. DALY: Objection to form.

3 THE WITNESS: I disagree until I
4 have a better idea what he's trying to say.

5 Q. (Mr. Wiggins) And in photo number three
6 of his report he says, photo three -- and I'll show
7 you this in just a moment.

8 If any of these 14 nylon standoffs (sic)
9 are, quote, thermally, end quote, near an ignition
10 source on the PCB, they will often allow the ignition
11 source to prove itself a competent ignition source.

12 I ask if you agree or disagree with that
13 statement?

14 MS. DALY: Objection.

15 THE WITNESS: I mean, I think
16 they're all just general statements.

17 MR. WIGGINS: Pardon?

18 THE WITNESS: These are general
19 statements -- often allow. It depends on the flame
20 rating of the nylon.

21 Q. (Mr. Wiggins) Do you know what the flame
22 rating of the nylon was?

23 A. I do not.

24 Q. Okay. And the last photograph he had was
25 photo ---

1 A. --- Just for the record, I did talk to the
2 manufacturer and I asked them for flame ratings, but
3 they wouldn't give it to me.

4 Q. Photo number four depicts an area -- he
5 says in his notes depicts an area of the printed
6 circuit board that could have contained a competent
7 ignition source.

8 And he has circled the top of that board
9 and the location where it was found, apparently by
10 either Mr. Lacy or Mr. Royal.

11 MS. DALY: Objection.

12 THE WITNESS: Again, I have to go
13 back to the big picture here.

14 The first -- first sign of a printed
15 circuit board failing in an appliance would be if the
16 appliance stops working or it malfunctions in some --
17 some manner. There's no report of that, even up to
18 four a.m. that morning, so there's no indication of
19 any ongoing or developing electrical failure within
20 that device.

21 And to reach a point where we have enough
22 material involved to produce a fire, you're going to
23 -- you're going to end up with a hole in the board
24 just like their report shows, and we don't have that,
25 either.

1 Q. (Mr. Wiggins) Suppose that it had just
2 generated excessive heat and would have been near an
3 ignition source -- to wit, cellophane....

4 MS. DALY: Objection.

5 MR. WIGGINS: Or a first load. I'm
6 sorry, a first load.

7 MS. DALY: Objection.

8 THE WITNESS: Again, there's no --
9 there's no evidence of a small scale or large scale
10 failure in that device.

11 Q. (Mr. Wiggins) And would not you have had
12 to examine that in an x-ray setting or in a
13 laboratory setting by x-ray to determine exactly
14 whether or not there was any damage to that circuit
15 board or not?

16 MS. DALY: Objection. Asked and
17 answered.

18 THE WITNESS: No.

19 Q. (Mr. Wiggins) You do not think so?

20 A. No.

21 Q. And you think your casually looking at it
22 when you made the examination, not knowing where it
23 was or where it came from, was sufficient to make a
24 determination that it could not have been the source
25 of -- could not have been an ignition source in this

1 fire?

2 MS. DALY: Objection.

3 THE WITNESS: I don't treat any part
4 of my work casually.

5 Q. (Mr. Wiggins) Well, you didn't know where
6 it came from, did you?

7 MS. DALY: Objection.

8 Mischaracterization of his testimony.

9 THE WITNESS: It's irrelevant. I
10 still looked at it.

11 MR. WIGGINS: Pardon?

12 THE WITNESS: I still inspected it
13 and I still examined it, both sides.

14 Q. (Mr. Wiggins) Okay, when you say you
15 examined it, did you pick it up and look at it or
16 just look at it visually?

17 A. I picked it up and looked at it.

18 Q. Okay.

19 A. I would have had to have looked at both
20 sides.

21 Q. And beyond just a visual examination you
22 made no other examination of it?

23 MS. DALY: Objection.

24 THE WITNESS: That's correct.

25 Q. (Mr. Wiggins) But in the ordinary course

1 of events, had you known at the time that this
2 circuit board came from the exact location or pretty
3 near the location where Mr. Lacy identifies being the
4 area of the source of this fire, which would you not
5 have sent it to a laboratory to have it examined?

6 A. The process ---

7 MS. DALY: --- Objection.

8 THE WITNESS: --- Would have evolved
9 to what we did on November 29th. It would have all
10 been collected then.

11 MR. WIGGINS: Okay.

12 THE WITNESS: That was the intent,
13 leave it there for all parties and then collect it
14 later.

15 Q. (Mr. Wiggins) No other person, to your
16 knowledge, ever confirmed your findings about the
17 circuit board, did they?

18 MS. DALY: Objection.

19 THE WITNESS: I'm not aware of
20 anyone.

21 Q. (Mr. Wiggins) Why did you feel compelled,
22 Mr. Martini, to make a detailed statement about the
23 Ion IQ device in your second report -- expert report
24 -- and did not make it in your initial report?

25 MS. DALY: Objection to form.

1 THE WITNESS: I think we already
2 covered that. In my first report I wasn't aware what
3 it was.

4 Q. (Mr. Wiggins) And then you also, in the
5 last page of your report, said the Class II supplies
6 are energy limited and intended primarily to provide
7 power to the low voltage electrical devices. The
8 energy limiting characteristic of the Class II power
9 supply intend to minimize fire entering, initiation
10 potential or provide acceptable protection from
11 electrical shot -- shock.

12 I notice that you did not go further and
13 say that Class II power supplies never can be the
14 source of a fire ignition, did you?

15 MS. DALY: Objection to form.

16 THE WITNESS: That's correct.

17 Q. (Mr. Wiggins) Okay, are you now aware
18 that sometimes that they can be a ignition source?

19 MS. DALY: Objection to form.

20 THE WITNESS: Am I now aware?

21 MS. DALY: Mis ---

22 Q. (Mr. Wiggins) --- Were you then aware
23 that -- were you then aware that it could be the
24 source of -- an ignition source?

25 A. I've always been aware.

1 Q. You read last night the deposition of
2 Steven Booth, did you not?

3 A. Yes.

4 Q. And he said that he could not rule out
5 this Ion IQ communication device as being a source of
6 the fire.

7 Do you recall him saying that?

8 MS. DALY: Objection to form.

9 THE WITNESS: Yes.

10 Q. (Mr. Wiggins) And he said the reason was
11 because the only thing that he knew was that the
12 plastics had been identified as being on the shelf
13 very near the Ion IQ.

14 Was that what you recall him saying?

15 MS. DALY: Objection.

16 THE WITNESS: That's what he said,
17 and he's -- he's basing his entire theory on the
18 styrofoam being near.

19 You know, we've already had one example of
20 -- per Ms. Moon -- is that her name?

21 MR. WIGGINS: Mrs. Moon.

22 THE WITNESS: Yeah, Mrs. Moon -- she
23 had said that the -- the bread cart was -- had been
24 moved since she left at four in the morning, so
25 nothing to say that any of these other materials

1 didn't get moved as well. So I don't think we can
2 base locations of where she last saw things as a
3 statement of fact.

4 Q. (Mr. Wiggins) Is there any other
5 statement that you've read from any source, from any
6 person, any deposition, that would indicate there was
7 any styrofoam products, any plastics of any sort,
8 anywhere than on the top shelf of that drying rack?

9 MS. DALY: Objection.

10 THE WITNESS: Those were the
11 statements from the last person that saw it, the last
12 employee.

13 Q. (Mr. Wiggins) And would not be -- would
14 not that be the best evidence, in your opinion, of
15 where the location of those items were at the time of
16 the fire?

17 MS. DALY: Objection.

18 THE WITNESS: Well, the bread cart
19 moved and nobody seems to know how it moved, so....

20 Q. (Mr. Wiggins) I don't understand what the
21 bread cart has to do with it.

22 What did -- how does that ---

23 A. --- It's an example of how things changed
24 from the last time an employee left the building.

25 Q. But there had been firemen in that

1 building, had there not, prior to that time -- prior
2 to anybody seeing the change in the bread cart?

3 MS. DALY: Objection.

4 THE WITNESS: Firemen had been in
5 there, yes.

6 Q. (Mr. Wiggins) Okay, and they could have
7 moved it, couldn't they?

8 MS. DALY: Objection.

9 THE WITNESS: Not based on the fire
10 patterns.

11 Q. (Mr. Wiggins) They couldn't have moved
12 the bread cart?

13 MS. DALY: Objection. Asked and
14 answered.

15 THE WITNESS: To the window?

16 MR. WIGGINS: No, no.

17 Q. (Mr. Wiggins) When they went in to
18 suppress the fire, couldn't they have moved the bread
19 cart?

20 MS. DALY: Objection. Asked and
21 answered.

22 THE WITNESS: From the front window
23 to the back window?

24 MS. DALY: Objection to the form.

25 Q. (Mr. Wiggins) Who said it was moved from

1 the front window to the back window? Do you recall?

2 A. Ms. Moon.

3 Q. And to be sure I understand what you're
4 saying, you're saying that if the bread cart were
5 moved -- were moved from the spot where Mrs. Moon
6 said it was to a different spot at or about the time
7 of the fire, then the styrofoam plates and the
8 plastic cups and the plastic knives and plastic forks
9 could have also been moved?

10 Is that what you're saying?

11 MS. DALY: Objection to form.

12 THE WITNESS: I'm saying that's
13 possible.

14 Q. (Mr. Wiggins) Is there any evidence that
15 that happened, that you are aware of?

16 A. No.

17 Q. And had you believed that those items were
18 on the shelf at the time of the fire, and had you
19 known that this Ion IQ was on the wall within six
20 inches of where those items were located, would you
21 not, then, not been able to rule out the Ion IQ as a
22 potential source of this fire?

23 MS. DALY: Objection to form.

24 THE WITNESS: My ruling out of the
25 Ion IQ wireless device was not based on proximity to

1 other materials.

2 Q. (Mr. Wiggins) Okay, but if it had been --
3 I'm saying if it had been -- is it possible for that
4 device to have overheated and set fire to the
5 plastics encasing those items?

6 MS. DALY: Objection to form.

7 THE WITNESS: Not without leaving
8 some evidence of having done so.

9 Q. (Mr. Wiggins) What evidence would you
10 have been looking at to find out that they did do so?

11 A. Well, we've already covered that. You
12 know, specific localized damage to the printed
13 circuit board.

14 Q. And you would be, then, discounting the
15 findings of Mr. Small when he looked at the circuit
16 board photographs?

17 MS. DALY: Objection.

18 THE WITNESS: He spoke in general --
19 I'm sorry, what?

20 MS. DALY: Objection to make it
21 clear that -- one, object to Mr. Small -- anything
22 about Mr. Small, and make it clear that Mr. Martini
23 was not provided a report from Mr. Small.

24 MR. WIGGINS: You can go ahead and
25 answer.

1 THE WITNESS: Well, I don't know
2 what else is in -- is in the report that you might be
3 referring to.

4 Q. (Mr. Wiggins) The mythology (sic) that
5 was used by Mr. Lacy was a process of elimination to
6 determine the source of this fire. Is that correct?

7 MS. DALY: Objection.

8 Will you repeat back that question,
9 please.

10 (Next-previous question was read back)

11 MS. DALY: Thank you.

12 Same objection.

13 MR. WIGGINS: You can go ahead and
14 answer.

15 THE WITNESS: I'll let Mr. Lacy
16 address that.

17 Q. (Mr. Wiggins) Did he ever talk to you
18 about that, how he determined the cause of this fire?

19 A. I'm not -- I'm aware of what he's doing,
20 but I'll let him discuss that.

21 Q. And do you know that he classified this
22 fire as an incendiary fire?

23 A. Yes.

24 Q. Did he tell you that back on the 30th of
25 January, 2012, that it was his belief it was an

1 incendiary fire?

2 A. January 30th? I don't recall.

3 Q. Okay.

4 A. It was still under investigation at that
5 point.

6 Q. Was it still under investigation on
7 February 22nd, 2012?

8 A. I thought we were talking about January
9 when I was there.

10 Q. What about February the 22nd, 2012?

11 A. I don't know what the significance of that
12 date is.

13 Q. On January the -- February 22nd, 2012, Mr.
14 Lacy wrote a letter to Michael Jezierski in which he
15 said, per our conversation of February the 1st, 2012,
16 I have completed the fire scene examination of the
17 Miami Subs restaurant at 552 North McPherson Church
18 Road, Fayetteville, North Carolina. Electrical
19 engineer Henry Martini, P.E. -- that's you, is it
20 not?

21 A. Yes.

22 Q. Examined the fire scene on January the
23 30th, 2012.

24 And that's correct, is it not?

25 A. Yes.

1 Q. And concluded that the -- after that
2 examination, that the fire was not a result of the
3 failure of the structural electrical components of an
4 appliance in the building. This fire is incendiary
5 in nature.

6 Do you recall that? Do you remember that?

7 A. I was not ---

8 MS. DALY: --- Objection.

9 THE WITNESS: I was not copied on
10 that.

11 Q. (Mr. Wiggins) Did he talk to you about
12 this?

13 A. No.

14 Q. Did you authorize him to say to Michael
15 Jezierski of Nationwide Insurance Company that the
16 fire was not the result of the failure of the
17 structural electrical components of an appliance in
18 the building?

19 MS. DALY: Objection to form.

20 THE WITNESS: That's what I informed
21 him on the 30th.

22 Q. (Mr. Wiggins) You advised him of that on
23 the 30th of January, 2012?

24 A. When I finished my inspection, yes.

25 Q. And was all of the investigation of the

1 fire complete at that point in time, to your
2 knowledge?

3 A. My initial scene examination was
4 completed.

5 Q. Did you write any letter to Mike -- to Mr.
6 Jezierski in reference to that matter?

7 A. I did not.

8 Q. So that I'm fairly clear about this, Mr.
9 Martini, what you would be testifying to a jury in
10 this case is that, in your opinion, the Ion IQ system
11 did not fail and could not have been the source of
12 ignition for this fire.

13 Is that your testimony?

14 A. That's correct.

15 Q. Is it also your testimony that the ballast
16 of the fluorescent light system could not have been
17 the source of this fire -- could not have been an
18 ignition source for this fire?

19 A. That's correct.

20 Q. And is it your testimony that none of the
21 wiring in the building could have been a source of
22 ignition for this fire?

23 A. That is correct.

24 Q. Were you involved in taking any samples
25 from the fire scene to determine if there were any

1 accelerants present?

2 A. I was not.

3 Q. Were you aware that it had been done by
4 someone on behalf of Donan?

5 A. Yes.

6 Q. And would that have been Mr. Lacy?

7 A. Yes.

8 Q. And do you know -- did you ever learn that
9 -- the results of that?

10 A. At some point I did hear that the results
11 were negative.

12 Q. Did Mr. Lacy ever discuss with you the
13 results of the information that was on the -- on the
14 hard drives that were taken from the restaurant?

15 A. At some point I was told it was point of
16 sale information. I don't remember who told me.

17 Q. Did Mr. Lacy tell you that?

18 MS. DALY: Objection. Asked and
19 answered.

20 THE WITNESS: Like I said, I don't
21 know. I don't remember who told me.

22 MR. WIGGINS: Okay, I think we're
23 about through. Let me just check this.

24 Go off the record.

25 (2:21-2:23 p.m. - recess)

1 MR. WIGGINS: One more thing and I'm
2 through.

3 Q. (Mr. Wiggins) In looking at the circuit
4 board that you included in your second report, Mr.
5 Martini, you said that the circuit board -- the color
6 on the circuit board was uniform, which would
7 indicate that the fire was uniform. Is that correct?

8 MS. DALY: Objection.

9 It was included in both reports.

10 MR. WIGGINS: Okay, I took this from
11 the rec -- I took this from the last report.

12 MS. DALY: Okay.

13 THE WITNESS: You asked me if the --
14 if my saying that the heat damage to the printed
15 circuit board was uniform ---

16 MR. WIGGINS: --- Correct.

17 THE WITNESS: --- Does that imply
18 that the fire was uniform?

19 MR. WIGGINS: Yes.

20 Q. (Mr. Wiggins) You explained -- you were
21 saying earlier on that this fire was uniform across
22 the circuit board, did you not?

23 A. I said the heat damage.

24 MS. DALY: Objection.

25 MR. WIGGINS: The heat damage to the

1 board was uniform.

2 Q. (Mr. Wiggins) I want to know what you're
3 speaking about when you say that -- from that
4 photograph.

5 A. The board material was evenly burned off
6 and any coatings that they put on the board is
7 uniformly burned off.

8 In other words, the heat damage does not
9 extend deeper into the board at any particular place
10 -- i.e., no holes or openings.

11 Q. Okay, what are the dark spots that are
12 identified on that board -- that I can see on the
13 board?

14 MS. DALY: Objection.

15 THE WITNESS: It's just board
16 material.

17 Q. (Mr. Wiggins) What kind of board
18 material?

19 A. Printed circuit boards are a laminate
20 material of -- well, it depends on what that
21 particular manufacturer used. Generally it's like
22 layers of glass fiber coated with various materials.

23 Q. What is the dark spot that I'm pointing to
24 right here?

25 A. That's a -- I believe that was a piece of

1 debris that was laying on the board.

2 Q. Do you know that's what it was, or was it
3 something else?

4 A. I'm pretty sure that's what it was. I
5 would have moved it to look at -- look at it in
6 greater detail.

7 Q. Okay.

8 A. Just like the other smaller boards are
9 laying on it, but that's just as I found it.

10 MR. WIGGINS: I believe that's all I
11 have.

12 MS. DALY: Let's go off the record.

13 (2:27-2:30 p.m. recess)

14 MS. DALY: I don't have any
15 questions.

16 Thank you.

17 MR. WIGGINS: Thank you.

18 WHEREUPON,

19 at 2:30 o'clock p.m. the deposition was adjourned.

20

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1 CERTIFICATE OF TRANSCRIPT

2 I, Cassandra J. Stiles, Notary Public in
3 and for the County of Forsyth, State of North
4 Carolina at Large, do hereby certify that there
5 appeared before me the foregoing witness;

6 That the testimony was duly recorded by
7 me, reduced to typewriting by me or under my
8 supervision and the foregoing consecutively numbered
9 pages are a complete and accurate record of the
10 testimony given at said time by said witness;

11 That the undersigned is not of kin nor
12 associated with any of the parties to said cause of
13 action, nor any counsel thereto, and that I am not
14 interested in the event(s) thereof.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand this the 29th day of August, 2013.

17 Cassandra J. Stiles, CVR
18 Certified Court Reporter
19 Atlantic Professional Reporters
20 Post Office Box 11672
21 Winston-Salem, NC 27116-1672

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CERTIFICATE OF OATH

I, Cassandra J. Stiles, Notary Public in
and for the County of Forsyth, State of North
Carolina at Large, do hereby certify that there
appeared before me the foregoing witness;

That the witness personally appeared
before me at the date, time and location hereon
captioned and was personally sworn by me prior to the
commencement of the proceeding in the matter hereon
captioned.

IN WITNESS WHEREOF, I have hereunto set my
hand this the 29th day of August, 2013.

Cassandra J. Stiles, CVR
Certified Court Reporter
Atlantic Professional Reporters
Post Office Box 11672
Winston-Salem, NC 27116-1672

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WITNESS CERTIFICATION

I, L. HENRY MARTINI, P.E., hereby certify:

That I have read and examined the contents of the foregoing testimony as given by me at the time and place hereon indicated, and;

That to the best of my knowledge and belief, the foregoing pages are a complete and accurate record of all the testimony given by me at said time, except as noted on the Attachment A hereto.

I have ___ have not ____ made changes/corrections _____

L. Henry Martini, P.E.

I, _____, Notary Public for the County of _____, State of _____, hereby certify:

That the herein-above named appeared before me this the _____ day of _____, 19____, and;

That I personally witnessed the execution of this document for the intents and purposes as herein-above described.

Notary Public

My Commission Expires:

(SEAL)

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CERTIFICATE OF MAILING

I, Cassandra J. Stiles, CVR, do hereby certify that a true copy of the transcription of the matter hereon captioned was served on the party named below by the placement of said transcript copy in the United States Mail, Priority Mail delivery, with proper postage affixed, addressed as follows:

L. Henry Martini, P.E.
c/o Gemma L. Saluta, Esq.
One West Fourth Street
Winston-Salem, NC 27101

This the 31st day of August, 2013.

Cassandra J. Stiles, CVR

Exhibit M

June 3, 2013

Mr. Richard M. Wiggins, Esq.
Law Office of McCoy Wiggins Cleveland & O'Connor PLLC
P.O. Box 87009
Fayetteville, NC 28304

Re: City Grill Hospitality Group, Inc. vs. Nationwide Mutual Insurance Company
(US District Court, Eastern District, Western Division, Civil Action
No. 5: 12-CV-00610-F)

Dear Mr. Wiggins,

As requested, I am writing to provide a brief written summary of my findings and opinion in this matter in accordance with the assignment provided on 11 April 2013. The findings and opinion provided are based upon research of the available literature and technical specifications for the HME® IonIQ™ Wireless Drive-Thru Audio System installed at the loss structure at the time of the fire, participation in the 17 April 2013 joint destructive examination of evidence collected from the loss structure and retained in custody by Donan Engineering Company and SAFE Laboratories and Engineering Corporation, and review of photographs provided by Mr. James McLean III, Esq. on your behalf.

Significant findings from review of available literature for the HME® IonIQ™ Wireless Drive-Thru Audio System are summarized below:

The primary components of the system consist of 1) a communication base station with an external electrical power supply 2) rechargeable battery powered communication head sets and 3) a battery charging station with an external electrical power supply.

Review of the base station literature and technical specifications established the following significant information: The base station nominal physical dimensions are 9.75 inches height, 13 inches width and 3.5 inches depth. The maximum weight is 3.25 pounds. The voltage input from the external electrical power supply is 24 VDC +/- 2.5 V. The AC current input is 2.5 Amperes maximum. The exterior housing is manufactured from a plastic material. The front panel contains a single user interface display, which occupies an estimated 25 percent of the front panel surface. Two metal external male thread antennae connectors are integral to the housing upper right corner.

Review of the battery technical specifications established the headset batteries to be 3.6V Lithium ion.

Review of the battery charger technical specifications established the following significant information: The charger nominal dimensions are 7.6 inches length, 4.6 inches width and 2.6 inches depth. The weight is 1.5 pounds. The voltage input from the external electrical power supply is 16.5VAC.

Significant findings and observations from the joint destructive examination performed 17 April 2013 at SAFE Laboratories and Engineering Corporation located at 7424 ACC Boulevard in Raleigh, NC are summarized below:

Examination and documentation of a total of eighteen (18) individually packaged and identified exhibits was performed. The exhibits were comprised of six (6) collected from the loss structure by Mr. Terry Lacy of Donan Engineering Company Inc., and twelve (12) collected from the loss structure by Mr. John Cavaroc of SAFE Laboratories and Engineering Corporation. In addition to Mr. Lacy, Mr. Cavaroc, and myself, Mr. L. Henry Martini of Donan Engineering Company Inc., Mr. Steve C. Booth of Langham & Associates Inc., and Ms. Rachel E. Daly, Esq. of Womble Carlyle Sandridge & Rice were also in attendance.

Examination of the electrical wiring and components contained within the exhibits presented did not reveal any discernible evidence of a potential fire causing failure or defect. All of the thermal damage displayed by the exhibits was visually consistent in appearance with origination from exposure to externally applied heat as a result of the fire.

Inspection of the electrical components, wiring and circuit boards contained within the exhibits presented did not identify any that were either visually or dimensionally consistent with the HME® IonIQ™ Wireless Drive-Thru Audio System base station, base station subassemblies/circuit cards, battery charger or external power supplies documented within the available literature for the system.

Review of the photograph provided by Mr. McLean identified as "Photograph 33: Miscellaneous items recovered from rear drive-through service area." revealed the following significant observations:

The photograph provided was contained within a .PDF document. The raw .JPEG file that was used to generate the .PDF document was not provided, thus limiting the ability to perform a detailed examination and analysis.

None of the items visible in the photograph were consistent with any of the exhibits presented for joint destructive examination on 17 April 2013. Specifically, the physical dimensions, geometric shapes and apparent degrees of thermal damage and oxidation

June 3, 2013

depicted in the photograph were distinctly different from any of the items contained within the exhibits presented.

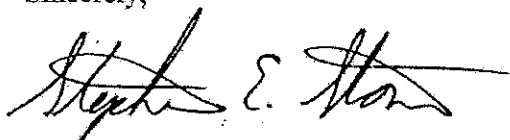
The second item from the left in the photograph is visually consistent in appearance with a base containing multiple circuit boards, comprised of a single large board and several smaller boards. The item appears to display significant thermal damage. The estimated physical dimensions of the item based on the size relative to the table and documents visible in the photograph, as well as the number, size and shapes of the circuit boards are generally consistent with those of the HME® IonIQ™ Wireless Drive-Thru Audio System base station.

Review of supplemental photographs provided by Mr. McLean contained in a .PDF file labeled as "Martini Photographsbn" revealed the following significant observations:

Photograph sheets "MWM04742" and "MWM04743" contain front and back images of the circuit boards visible in photograph 33 discussed above. The boards were noted to display severe thermal damage. Close examination of the photographs established that the size, shape, component layout and number of boards evident are consistent with those of the HME® IonIQ™ Wireless Drive-Thru Audio System base station.

If you have any questions, or I may be of assistance in another matter, please do not hesitate to call.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen E. Stone". The signature is fluid and cursive, with a large initial "S" and "E".

Stephen E. Stone, PE

STEPHEN EDWARD STONE, P.E.

Stone Engineering Incorporated

P.O. Box 2368

Morehead City, NC 28557

QUALIFICATIONS

Twenty-nine years experience; Military Aircraft Propulsion Engineer; Maintenance Engineering, Design Engineering and Failure Analysis of aircraft engine systems and related components.

Seventeen years experience; Forensic analysis of marine, automotive, residential and industrial structures, systems and components.

Professional Engineer, licensed in North Carolina

U.S. Coast Guard Licensed Master, Steam or Motor Vessels of not more than 100 gross tons near coastal waters, with commercial towing endorsement

USMC AV8B Harrier Aircraft Licensed Maintenance Ground Turn-up Operator; (1988 to 2012)

EDUCATION

B.S. Mechanical Engineering (June 1984)

Virginia Polytechnic Institute & State University

Blacksburg, Virginia

EXPERIENCE

Principal Engineer, Stone Engineering Incorporated
Morehead City, NC (1999 to present)

Develop and execute comprehensive failure modes and effects based analysis, test and investigation programs for mechanical systems and components in support of product liability investigations. Perform forensic engineering failure analysis of marine, automotive, residential and industrial machinery, systems, structures and components following material failure for determination of cause. Perform engineering analysis and accident reconstruction of similar systems and components following involvement in fire or explosion to identify potential causal failures or defects. Utilize innovative technology and investigative techniques to ensure cost effective and timely solutions. Extensive experience in communicating complex engineering issues and providing persuasive argument to broad and diverse audiences. Qualified expert witness in mechanical engineering, mechanical systems analysis, and accident reconstruction, US District and Superior Courts.

STEPHEN EDWARD STONE, P.E.

EXPERIENCE (continued)

Failure Analyst, Langham & Associates Incorporated,
Morehead City, NC (1996 to 1999)

Performed failure analysis of marine, automotive, residential and industrial machinery, systems and components following material failure for determination of cause. Performed engineering analysis of similar components following involvement in fire to identify potential fire causing failures or defects.

Chief Design Engineer, F35 Aircraft Joint Program Office (JPO)
Short Take-off and Vertical Landing (STOVL) Propulsion System
Propulsion and Power Division
Naval Air Systems Team

Naval Aviation Depot, MCAS Cherry Point, NC (2010 to present)
Provide technical leadership to JPO engineering team responsible for completion of design, development, verification, production and fleet support of F35B STOVL aircraft variant propulsion system. Provide direct technical leadership and oversight of development and execution of Failure Modes and Effects Analysis and Root Cause Corrective Action (RCCA) investigations of system and component failures experienced during development, validation testing, production and fleet operation to ensure appropriate design mitigation and air worthiness. Provide technical oversight with airworthiness signature authority for STOVL propulsion system to support F35B flight test program.

Senior Engineer, In-Service Engineering,
Short Take-off and Vertical Landing (STOVL) Aircraft
Propulsion, Propulsion and Power Division
Naval Air Systems Team

Naval Aviation Depot, MCAS Cherry Point,
North Carolina (2006 to 2010)

Established as resident Navy subject matter expert for In-Service Engineering issues pertaining to STOVL Gas Turbine Engine Propulsion Systems. Performed and directed engineering investigations of assigned systems, engines and related internal components involved in accidents or safety significant malfunctions. Routinely tasked to support Blue Ribbon Panel Design Reviews and lead complex RCCA failure investigations to achieve appropriate design and operational mitigation.

STEPHEN EDWARD STONE, P.E.

EXPERIENCE (continued)

**Senior Engineer, In-Service Engineering,
Engine Controls and Diagnostics**

Propulsion and Power Division
Naval Air Systems Team
Naval Aviation Depot, MCAS Cherry Point,
North Carolina (1995 to 2006)

Established as resident Navy expert for In-Service Engineering issues pertaining to Gas Turbine Engine Controls and Diagnostic Systems. In addition to collateral program specific duties assigned, provide expertise in resolution of complex engine and engine control system performance and response characteristics for any U.S Navy aircraft program as required. Developed and fielded IR Thermography based diagnostic ground test program for STOVL propulsion system performance degradation. Completed Naval Aviation Selected Passenger Program, obtaining flight time in AV8B, T45, EA6-B and F/A-18 aircraft.

Lead Engineer, Engine Controls and Diagnostics

U.S. Navy T45 and U.S.M.C AV-8B Harrier Jet Programs
Naval Aviation Depot
MCAS Cherry Point, North Carolina
(1987 to 2006)

Final technical authority for all Maintenance Engineering aspects for assigned systems and components. Performed and/or technically managed Engineering Investigations for aircraft and engines experiencing engine transient performance, handling or response related discrepancies. Both of assigned aircraft programs are single engine high performance jet aircraft. Majority of investigations performed were flight safety significant, involving skills ranging from in-depth electrical and mechanical systems analysis to detailed forensic accident reconstruction and failure analysis. Lead investigating engineer in over 20 aircraft mishap investigations. Active participant in initiation, review and approval of design changes to assigned systems and components. Extensive experience in development of failure modes and effects based analysis in support of safety assessments, reliability centered maintenance plans and design verification test programs. Co-developed data logging system for AV-8B Digital Engine Control System to allow non-intrusive engine and control system performance analysis of aircraft in field.

STEPHEN EDWARD STONE, P.E.

EXPERIENCE (continued)

Entry Level, progressing to Journeyman Aerospace Engineer
Naval Aviation Depot

MCAS Cherry Point, North Carolina
(1984 TO 1987)

Assigned to U.S.M.C AV-8B Harrier Jet Program as a Propulsion Engineer. Provided Engineering support to fleet activities and Depot. Performed Engineering Investigations on discrepant engines and components returned from service. Acquired training and experience on build, test and maintenance support of turbofan, turboshaft, turboprop and turbojet gas turbine engines and related components. Developed extensive experience in engine build, machine and weld repair shop practice through development of variety of repair procedures for damaged engine hardware and components. Gained significant exposure to development and interpretation of X-ray, magnetic particle and fluorescent penetrant nondestructive inspection techniques.

**AWARDS/
COMMENDATIONS**

1995 Recipient of Naval Aviation Propulsion Award
(Fliedner Trophy) for Individual Engineering Excellence

Certificate of Commendation

Commanding General, 2ND Marine Air Wing
Fleet Marine Force, Atlantic

"...for exceptional performance of duty while conducting the
Engineering Investigation of class A mishap of AV-8B 162727..".
Awarded May, 1992.

NAVAIR Research and Engineering Associate Fellow, inducted
August 2007

2008 Recipient of Kerry Dale Award for Outstanding
Achievement or Contribution to Aviation Safety in VSTOL Flight
Training, Presented by RDML Eastberg 25 June 2008

AFFILIATIONS

American Society of Mechanical Engineers

REFERENCES

Available upon request

TESTIMONY RECORD

DATE	EVENT	CASE TITLE	NUMBER	COURT JURISDICTION	LOCATION	CLIENT
11/9/10	Trial	John Dalton D/B/A J & E Salvage vs. Iron Ax, Inc	05-CVS- 1633	Superior Court	Onslow County, NC	Plaintiff

Case No: C-1302-01
Client: Mr. Richard M. Wiggins

Enclosure 1

Stone Engineering Incorporated Fee Schedule

Rate of compensation for all engineering work performed is \$175.00 per hour.

Rate of compensation for travel time is \$87.50 per hour.

Mileage rate for distance traveled from Morehead City NC office to job location and return is \$0.60 per mile.

Lodging, meals and other expenses as required are invoiced at cost.

Case No: C-1302-01
Client: Mr. Richard M. Wiggins

Enclosure 2

Service Retainer Agreement

This signed agreement confirms that Stone Engineering Incorporated has been retained by the undersigned (Customer) to provide consulting engineering, investigative or diagnostic services. The nature and scope of the services to be provided by Stone Engineering Incorporated shall be agreed upon between the parties prior to the acceptance of assignment and commencement of any work.

The undersigned hereby acknowledges that he or she has the authority to retain Stone Engineering Incorporated to provide the aforementioned services, and this retention has been made with the full consent of his or her law firm, company or client. The undersigned further acknowledges that payment shall be made in a timely manner in accordance with the following terms and conditions:

- 1) Payment in full is due within 30 days of the invoice date. Delinquent accounts are charged an additional administrative service expense of \$40.00 and 1.5 % each month of the amount past due. The Customer will be charged a \$50.00 fee in addition to any bank charges incurred for each check returned unpaid. The Customer agrees to pay all costs of collection whatsoever, including reasonable attorney's fees and court costs.
- 2) Customer assumes liability as principal for payment of any invoice rendered in connection with the services performed for or on behalf of the Customer.
- 3) Dependent upon the scope and nature of work requested, Stone Engineering Incorporated may require an advance retainer from the Customer as a condition of acceptance for an assignment. The amount of retainer will be determined by Stone Engineering Incorporated based upon a preliminary estimate of labor, travel costs and materials required to successfully perform the requested services. In the event that actual costs exceed the value of the initial retainer, Customer assumes liability for the full outstanding balance. In the event that actual costs are less than the value of the initial retainer, Stone Engineering Incorporated will refund the balance to the Customer within 30 days of file closure.
- 4) Exhibits accepted into custody of Stone Engineering Incorporated on behalf of the Customer will be placed in secure commercial storage upon completion of final report unless written disposition instructions authorizing either return or disposal have been provided by the Customer. In cases where the exhibit has been accepted into custody of Stone Engineering Incorporated indefinitely pending arrangement by the Customer of a future joint examination with other interested parties, the exhibit will be placed into secure commercial storage upon receipt. Commercial storage is provided based upon 100 cubic foot unit storage volume increments, invoiced at quarterly intervals.

5) Stone Engineering Incorporated provides secure commercial storage of exhibits as a convenience to the Customer, and accepts no liability for inadvertent loss, damage, theft or destruction arising from fire or natural disaster.

6) Infrared inspections and radiometric measurements performed are valid for the prevailing conditions at the time of inspection, and may be subject to errors associated with adverse environmental conditions or unknown structural and material anomalies. While Stone Engineering Incorporated shall apply due diligence and standard of care in identification and diagnosis of thermal anomalies detected through the inspection performed, no warranty is either expressed or implied concerning the accuracy of the inspection results or the presence of physical or material defects.

7) Stone Engineering Incorporated and the Customer agree that any disputes arising out of this agreement or the services or testing provided by Stone Engineering Incorporated will be governed pursuant to the laws of the State of North Carolina. The parties specifically waive any objection to, and hereby consent to, jurisdiction and venue in the courts of Carteret County, North Carolina.

By my signature below, I confirm that I have read and understood the above Service Retainer Agreement, and that I agree to abide by the stated and implied conditions for retaining the services of Stone Engineering Incorporated in this matter.

Firm/Company: McCoy Messer P.C.
Business Address: 202 Foying Pl.
City: Fayetteville State: NC Zip Code: 28305
Phone Number: 910-483-8104 Fax Number: 910-483-0094
Printed Name: James McLean Title: Member Manager
Signature: [Signature] Date: 4-12-13

for the firm

Please return completed form to:

Stone Engineering Incorporated
P.O. Box 2368
Morehead City, NC 28557
Fax: 252 247-9258



Stone Engineering, Inc.

P.O. Box 2368
 Morehead City, NC 28557
 Tax ID: 56-2111746

Invoice

Date	File Number
6/3/2013	C-1302-01

Bill To
McCoy Wiggins Cleveland & O'Connor PLLC

Claim Number	Due Date
	7/3/2013

Description	Quantity	Rate	Amount
Research of HME IonIQ drive through system components per request of Trey McLean e-mail of 20 May 2013 to identify design and construction features and technical specifications 22 May 2013.	2	175.00	350.00
Comparison of items shown in "Photograph 33 Miscellaneous items recovered from rear drive-thru service area" supplied via e-mail from Trey McLean 23 May 2013 with exhibit photographs taken during destructive examination of 17 April 2013 and with base station technical specifications downloaded from HME for the purposes of identification of items shown in photograph 33 provided.	1	175.00	175.00
Review of Lacy and Martini photographs submitted 31 May 2013. 2 June 2013.	2	175.00	350.00
Preparation of letter summary of findings and associated Federal Rule 26 data 3 June 2013.	5	175.00	875.00
Total			\$1,750.00

Exhibit L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:12-CV-00610-F

C O P Y

CITY GRILL HOSPITALITY GROUP, INC.,)
)
Plaintiff,)
)
vs.)
)
NATIONWIDE MUTUAL INSURANCE COMPANY,)
)
Defendant.)
-----)

D E P O S I T I O N

STEPHEN EDWARD STONE

202 Fairway Drive
Fayetteville, North Carolina

Friday, July 19, 2013
1:37 o'clock p.m.

Atlantic Professional Reporters
Winston-Salem, NC 27116-1672

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1 The witness, STEPHEN EDWARD STONE, being
 2 first duly sworn to state the truth, the whole truth
 3 and nothing but the truth, testified as follows:
 4 (1:37 o'clock p.m.)
 5 EXAMINATION
 6 BY MS. DALY:
 7 Q. My name is Rachel Daly, and I have been
 8 retained by Nationwide in this matter.
 9 Have you had your deposition taken before?
 10 A. Yes, I have.
 11 Q. Just a few things.
 12 If you need a break, let me know. The
 13 only thing that I ask is that you answer the question
 14 that's on the table.
 15 Other than that, if you don't understand
 16 my question, please let me know and I'll rephrase it.
 17 A. Okay.
 18 Q. Will you state your full name for the
 19 record.
 20 A. Stephen Edward Stone.
 21 Q. You provided us a copy of your CV. Is
 22 this your most up-to-date CV?
 23 A. It is.
 24 Q. Generally speaking, have you ever been
 25 disciplined by any professional board?

Page 7

1 A. No.
 2 Q. And have you ever been terminated from a
 3 position?
 4 A. No.
 5 Q. Have you ever been laid off from a
 6 position?
 7 A. No. Of course we're going through
 8 sequestration and furloughs right now, right, the
 9 government. Fridays are furlough days for 11 weeks,
 10 but that's not a layoff. That's a furlough.
 11 Q. Let's talk about your current position.
 12 It states that you are the principal
 13 engineer for Stone Engineering, Incorporated.
 14 A. Yes.
 15 Q. And do you have any other employment other
 16 than being the principal engineer at Stone?
 17 A. Yes.
 18 Q. What is your other employment?
 19 A. I'm employed with the government.
 20 Q. Okay, and what do you do for the
 21 government?
 22 A. In my current position, I'm the STOVL,
 23 S-T-O-V-L, chief engineer for the F-35B aircraft
 24 program.
 25 Q. And what are your duties on a day-to-day

Page 8

1 basis?
 2 A. I -- I lead the -- the technical team, the
 3 engineering team responsible for design, validation,
 4 qualification, of the STOVL propulsion system for
 5 that aircraft.
 6 Q. And what is the STOVL?
 7 A. I'm sorry. It's short takeoff and
 8 vertical landing.
 9 Q. Are you more in an administrative role at
 10 this point in your career, supervising others?
 11 A. No. It's very much a hands-on design
 12 validation effort.
 13 Q. What else do you do in that position on a
 14 day-to-day basis?
 15 A. Well, let's see. We're running a very
 16 aggressive flight test program, so on any given day
 17 I'm looking at airworthiness issues, signing the
 18 flight test letters, the things that we need to do to
 19 be able to go from flight testing the aircraft,
 20 progressively pushing out the envelope until we can
 21 verify the full flight test envelope.
 22 So airworthiness is a big part of what I
 23 do, as well as leading the design and validation
 24 effort on the STOVL system.
 25 I also, as you'll see in the CV, we've got

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1 aircraft fielded now so we're just standing up the
 2 in-service engineering aspects of that, so I'm also
 3 helping to lead that effort through the expansion of
 4 limits, technical repairs and all that. It all sort
 5 of funnels back to me on the STOVL system for the
 6 overall technical responsibility.
 7 Q. In that position, how often do you have to
 8 look at a product to determine whether or not there
 9 was an electrical failure that caused a fire?
 10 A. In that particular application, not very
 11 often. We have -- well, actually, not at all,
 12 because we haven't had any electrical fires in the
 13 F-35B in a propulsion system.
 14 Q. So in your entire time in that position
 15 you've never looked at a product to determine whether
 16 or not there was an electrical failure that caused a
 17 fire?
 18 A. On the F-35B propulsion system, which I've
 19 been involved with since 2010, yes, ma'am, that's
 20 correct.
 21 Q. What were you involved in prior to 2010?
 22 A. Prior to that point I was the senior
 23 in-service engineer for the Navy for STOVL
 24 propulsion.
 25 Q. And how long were you in that position?

Page 10

1 A. I believe -- I'll just check my CV here.
 2 I believe I started that position in 2006,
 3 and then I transitioned out of that in 2010 to take
 4 up the chief engineering position on the F-35 STOVL
 5 system.
 6 Q. And during that period of time, the
 7 2006-2010, how often were you looking at a product to
 8 determine whether or not there was an electrical
 9 failure that caused a fire?
 10 A. The only times I would have done that
 11 would have been during aircraft accident
 12 investigation, of which I did quite a few working on
 13 a STOVL platform. Unfortunately, we crashed a few of
 14 those.
 15 So you're always looking back through the
 16 wreckage, trying to work out sequence of events for
 17 -- as you started to lose systems -- in-flight fires,
 18 I've looked at stuff for that, too, in that position.
 19 That's probably the gist of it there.
 20 Q. How many did you look at? You said quite
 21 a few.
 22 Is that three, five, what ---
 23 A. --- Oh, that's probably -- let's see.
 24 As a senior in-service engineer from 2006
 25 to 2010, probably more than five, less than 15,

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1 somewhere in that ballpark. Because as the senior
 2 in-service engineer, even if the other guys were
 3 doing the investigation, I would still ultimately get
 4 rolled in for oversight.
 5 Q. So does that mean you would not have
 6 actually physically looked at the evidence yourself?
 7 You would have looked over somebody else's
 8 end product of their determination of the incident or
 9 ---
 10 A. --- No, typically I would be wading
 11 through parts.
 12 A big part of that is reconciling all of
 13 the damage in failures that you have and work that
 14 back to what you believe the most probable cause was.
 15 So it's a lot of systems and things you have to work
 16 through.
 17 Q. And you believe there could have been
 18 upward to 15 crashes during that four-year period of
 19 time?
 20 A. No, let's drop that down to 10. There
 21 were probably under 10. So between five and 10 is
 22 probably right for that four-year period.
 23 Q. Prior to that period of time what were you
 24 doing?
 25 A. Let's see, before that I was the

Page 12

1 in-service engineering engine controls lead for the
 2 Navy.
 3 Q. And that's from 1987 to 2006?
 4 A. From 1995 to 2006. I was the senior
 5 in-service engineer for that time period. Prior to
 6 that, the period you referred to, '87 to 2006, would
 7 have been just the lead engineer for the T45 and the
 8 AV8. I was dual-added for part of that. That may be
 9 part of the confusion.
 10 As I picked up the new in-service
 11 engineering lead position, I also held the previous
 12 as well.
 13 Q. Let's do 1995 through 2006.
 14 How often were you looking at a product
 15 failure to determine whether there was an electrical
 16 failure that caused a fire?
 17 A. Again, it would just go back really to the
 18 aircraft mishap investigations. But the exact
 19 numbers, I don't have.
 20 I mean, I was involved with the Harrier
 21 program for 26 years, so -- you know, I've looked at
 22 a lot of crashed Harriers. I don't know exactly how
 23 many between '95 and 2006.
 24 Q. Okay.
 25 A. I'd have to go back and pull out my

Page 13

1 records.
 2 Q. And other than crashes during that period
 3 of time, would there have been any other scenario
 4 when you would have been looking at a product to
 5 determine whether there was an electrical failure
 6 that caused a fire?
 7 A. An actual fire in the aircraft, no.
 8 Electrical failures, yes, but not fires.
 9 Q. Since 1987 what would you approximate the
 10 amount of crashes you worked on during your career
 11 with the government?
 12 A. Well, really, it would go back to 1984.
 13 Q. Okay, 1984....
 14 A. That's when I actually started with them.
 15 Q. In crashes where you're looking at a
 16 product to determine whether or not there was a -- an
 17 electrical failure that caused a fire?
 18 A. I don't know a number off the top of my
 19 head.
 20 And again, this is -- the context of this
 21 would be looking at all of the wreckage, working back
 22 through all the failed harnesses and components, and
 23 trying to understand -- reconcile the damage that you
 24 see.
 25 For instance, lots of times there are

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1 post-impact fires, so you're always having to look
 2 through that stuff to rule it out. But -- I don't
 3 know -- certainly more than 20. And it also spans
 4 other programs, too.
 5 I've done other aircraft accidents as well
 6 -- other platforms, F4's, T45's, things like that, so
 7 it's quite a bit of exposure to forensic analysis.
 8 Q. So would you say more than 20, less than
 9 30?
 10 A. No. Probably less than about 60 or so
 11 would probably be a conservative number, over my
 12 entire career.
 13 Q. In conjunction with your position with the
 14 government, it appears that you have your own company
 15 as well, Stone Engineering?
 16 A. I do.
 17 Q. What types of companies typically hire you
 18 in that role?
 19 A. Predominantly insurance companies.
 20 Occasionally I'll get a case through a
 21 lawyer, or rarely, although it does occur, I'll have
 22 a case directly from, you know, the general public.
 23 Q. And what types of cases do you work on in
 24 your capacity as the engineer for Stone Engineering?
 25 A. A lot of failure analysis, some accident

Page 15

1 reconstruction, some involvement with, you know, fire
 2 investigations.
 3 And really, from that perspective, more of
 4 a product liability, defect analysis perspective.
 5 Q. So since 1999 how often have you been
 6 retained to look at a fire investigation?
 7 A. It's probably something on the order of
 8 about 25 percent of my business.
 9 Q. Okay, so in a given year, approximately
 10 how many fire scene investigations do you do?
 11 A. It -- it varies year to year.
 12 Q. Okay, let's talk about this year.
 13 Other than this case, how many fire
 14 investigations are you doing?
 15 A. This is the only one I have open at the
 16 moment. I just finished one earlier. I'd say I've
 17 probably done three or four this year.
 18 Q. Last year, how many did you work on, not
 19 including the three to four you just ---
 20 A. --- I don't know.
 21 Q. --- Accepted this year?
 22 A. I'd have to look at my records.
 23 Q. Can you give me a general idea? Are we
 24 talking three to four, 20?
 25 A. Probably three to four range.

Page 16

1 I mean, I obviously, you know, work
 2 full-time for the government, and I try not to become
 3 overly busy, so I can have some family time. So I
 4 deliberately keep this to a reasonable, manageable
 5 level.
 6 Q. Have you given testimony in any of those
 7 cases involving fire investigation?
 8 A. For this year?
 9 Q. No, in any of yours, since 1999.
 10 A. Yes.
 11 Q. Do you recall the names of those cases?
 12 A. No.
 13 Q. Were they located in Fayetteville?
 14 A. I'd have to look at my records to see.
 15 Q. Do you keep records regarding the types of
 16 cases you work on?
 17 A. I keep a -- a testimony log, and then it
 18 just rolls -- of course, according to Rule 26, for
 19 truncating it to four years. Right? But I keep
 20 records.
 21 Q. Do you actually keep records of the type
 22 of investigation you were performing and...
 23 A. I keep a record by case file number that I
 24 can then look at and see what the subject was on it,
 25 and then without having to go back and pull my

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1 reports and my case files, I can tell from that what
 2 the nature of the work was.
 3 Q. When you are hired to do a fire
 4 investigation, do you typically go to the scene of
 5 the fire?
 6 A. Not always. Maybe 50 percent of the time,
 7 if that.
 8 Q. And if you're not at the scene of the
 9 fire, how do you generally go about conducting your
 10 fire investigation?
 11 A. I actually conduct a fire loads and
 12 effects based analysis on the items generated from
 13 the fire scene by the cause and origin investigators.
 14 So they bring that to me with a very specific
 15 question about, you know, we think this might have
 16 potential, you know, if you see any evidence of fire
 17 causing failures or defects.
 18 And then I work the protocols with the
 19 other parties as necessary and align on inspection
 20 requirements and go from there. So I don't get into
 21 the discussion of the fire vectors and the patterns
 22 on the wall and all that. I focus strictly on the
 23 hardware or the components.
 24 Q. So you are not qualified to determine the
 25 origin of the fire. Is that correct?

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1 A. Within a room or a structure, no.
 2 Q. And you are not qualified -- strike that.
 3 How often do you do your investigation
 4 based solely on photographs?
 5 A. Never. But I always have the hardware,
 6 the evidence, in my possession, and I execute a full
 7 failure modes and effects analysis on that component
 8 and then drive an appropriate investigation, and then
 9 use the evidence to rule in or rule out supporting or
 10 refuting evidence as necessary.
 11 In fact, I'm looking for the failure
 12 effect, which, in this case, would be a fire causing
 13 failure or defect. But never off of photographs.
 14 Q. When were you retained for this case?
 15 A. The 11th of April, 2013.
 16 Q. And who contacted you?
 17 A. Trey McLean.
 18 Q. And what did Mr. McLean tell you about the
 19 case?
 20 A. Really, what we discussed was my role in
 21 it. He said that there was some evidence that had
 22 already been collected from the fire scene, and that
 23 there was a joint examination that was going to take
 24 place on the 17th of April, I believe it was.
 25 So very specifically he asked me to go

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1 participate in that joint examination, look
 2 specifically for evidence of a fire causing failure
 3 or defect in the exhibits provided, and then to
 4 support the investigation from that point forward if
 5 any more hardware evidence came up.
 6 Q. Anything else?
 7 A. A brief overview of the nature of the
 8 fire, that it was in a restaurant, just some of the
 9 general things.
 10 He also put me in touch with Steve Booth,
 11 who was the cause and origin investigator. So of
 12 course Steve gave me some background, which really
 13 pertained to where the evidence came from.
 14 Q. Okay, let's stick with what Mr. McLean
 15 talked to you about.
 16 Other than going to the evidence exam,
 17 what else was your role in this investigation?
 18 A. Well, I was told that this one particular
 19 component, that there was an HME Ion IQ wireless
 20 device that was there. I was asked to look and see
 21 if it was there, and then to -- you know, to
 22 determine if I could rule it in or out as a potential
 23 contributor or cause.
 24 Q. And he told you this on the initial
 25 contact with you?

Page 20

1 A. No. I would say that probably flowed over
 2 a couple of days. We talked a couple of times,
 3 spanning the period from the 11th through to the
 4 17th, from the time I was retained right up until we
 5 went. So it was over that time frame.
 6 Q. Anything else mentioned to you besides the
 7 wireless device?
 8 A. Not that I recall.
 9 Q. Were you asked to look at any of the items
 10 that were at the -- the exam to determine whether or
 11 not there was an electrical failure with any of the
 12 other items?
 13 A. Yes. I was asked to look at all of the
 14 evidence that was there, so I looked at everything
 15 that was made available to me.
 16 Q. And you said you had talked to Steve
 17 Booth.
 18 A. I did.
 19 Q. Did you previously know Mr. Booth?
 20 A. Yes.
 21 Q. Did you work with Mr. Booth at some point
 22 prior to this case?
 23 A. Not in the same company. I mean, he works
 24 for Langham & Associates. I rent office space from
 25 them, so we're co-located, so I've worked other cases

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1 with Mr. Booth as well as other investigators from
 2 Langham & Associates.
 3 Q. How many times have you worked with Mr.
 4 Booth?
 5 A. I'd have to check my records.
 6 Q. Give me an approximation.
 7 A. Somewhere between five and 10, maybe,
 8 ballpark.
 9 Q. Have you ever worked a fire investigation
 10 with Mr. Booth?
 11 A. Yes.
 12 Q. Were all of those fire investigations that
 13 you've worked with Mr. Booth?
 14 A. Yes.
 15 Q. Have you ever worked with any attorney
 16 from McCoy Wiggins prior to this case?
 17 A. Not that I recall.
 18 Q. And to date, have you ever been to the
 19 scene of the fire?
 20 A. No.
 21 Q. Have you ever asked to go to the scene of
 22 the fire?
 23 A. No.
 24 Q. You provided an invoice with your expert
 25 report.

Page 22

1 Do you have a copy of that invoice with
 2 you?
 3 A. No, ma'am.
 4 Q. It states that you researched the HME ion
 5 IQ drive through system components.
 6 What did you do to research?
 7 A. I researched them online, trying to get
 8 basic design specifications for the unit, as well as
 9 the -- you know, the physical dimensions so that I'd
 10 be able to recognize the hardware from that, or the
 11 sub-components, as the case may be, if it was there
 12 to be examined on the 17th.
 13 Q. Did you contact the company directly?
 14 A. No.
 15 Q. Anything else, besides doing online
 16 research?
 17 A. No, that was it.
 18 Q. It states that you reviewed the
 19 photographs from Mr. Lacy and Mr. Martini.
 20 Were you ---
 21 A. --- Yes. The ones that were made
 22 available to me, yes, I did.
 23 Q. Approximately how many were made available
 24 to you?
 25 A. I don't recall. I've got a full CD of

Page 23

1 everything that's been made available to me. I can
 2 find that if I need to.
 3 Q. Well, that's one thing that I noted that
 4 your report was deficient, is that the Federal Rules
 5 require you to list everything you reviewed and you
 6 were provided, and you did not do that.
 7 Did you bring a list of those materials
 8 and documents today?
 9 A. I brought all of the materials and
 10 documents today. I made a full CD of everything that
 11 I reviewed.
 12 Q. Let's mark this as an exhibit.
 13 (* Exhibit 1 was marked *)
 14 Q. It's been marked as Exhibit 1.
 15 Is there a page, table of contents on
 16 Exhibit 1, or is it simply just the documents?
 17 A. Those are simply just the documents
 18 individual files, like Martini photographs, etcetera,
 19 etcetera, that were provided to me.
 20 Q. Other than what's been listed on this
 21 invoice, have you done anything else in regards to
 22 this case?
 23 A. Let me check my notes.
 24 (Witness examined documents)
 25 A. Yes, I reviewed -- I guess there were

Page 24

1 supplemental reports that were just made available to
 2 me last night from Mr. Martini and Mr. Lacy. They
 3 didn't make them available. They came, of course,
 4 through counsel, but I did review those.
 5 Q. And you received those last night?
 6 A. I did.
 7 Q. And have you spoken to anyone from McCoy
 8 Wiggins regarding the expert reports?
 9 A. Yes.
 10 Q. And when did you speak with them?
 11 A. A little bit last night, and then very
 12 briefly today.
 13 Q. Okay, we'll go through that in detail
 14 later.
 15 A. Okay.
 16 MS. DALY: Before we do anything
 17 else, if we can go off the record for a few minutes.
 18 (2:02-2:08 p.m. - recess)
 19 Q. (Ms. Daly) You mentioned having
 20 discussions with Steve Booth leading up to the exam,
 21 evidence exam.
 22 What else do you recall discussing with
 23 Steve Booth?
 24 A. He gave me some of the background of the
 25 fire from his cause and origin investigation. He did

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1 tell me that apparently everyone seemed to be in
 2 general agreement with the general area of the fire
 3 and that the -- the exhibits that we were going to
 4 look at had all been recovered from that immediate
 5 area of origin for the most part.
 6 So we talked through, you know, where that
 7 evidence came from, the condition of the fire scene.
 8 He walked me through his photographs that he had
 9 taken as well.
 10 Q. Did he walk you through anybody else's
 11 photographs?
 12 A. I don't recall. I don't believe I
 13 actually had any photographs available other than
 14 from Booth to start with.
 15 I mean, from the time frame of 11 through
 16 17 April, so....
 17 Q. I'm talking about between April 11th, when
 18 you were retained, and April 17th.
 19 A. Yes.
 20 Q. The evidence exam.
 21 A. Yes.
 22 Q. So, to focus on that time period, anything
 23 else you recall from Steve Booth?
 24 A. Not anything that I thought was of
 25 substance to the work I was going to do.

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1 Q. That's kind of a vague answer and not very
2 helpful.

3 A. Okay. Sorry.

4 Q. Let's focus on the origin of the fire.
5 What did he tell you about the origin of the fire?

6 A. As I recall, it was in the corner next to
7 the drive-thru window, and we walked through the
8 photographs just of that very quickly.

9 And again the focus of the discussion we
10 had was on -- the context was, you know, here's this
11 -- here are the exhibits they recovered, here are the
12 receptacles they've recovered, here's the drive-thru
13 window and so on.

14 Q. Did Mr. Booth, when looking at the
15 pictures, show you where he believed the origin of
16 the fire was located?

17 A. Loosely. I mean, he put it generally in
18 that corner.

19 Q. Okay.

20 A. I guess the right-hand corner if you're
21 facing the drive-thru window on the side of the
22 building.

23 Q. How close to the floor did he put the
24 fire?

25 A. I don't recall.

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1 Q. Did he point to you on the fire where he
2 believed it started?

3 A. We were talking over the phone.

4 Q. Excuse me.
5 Okay, so he walked through the pictures
6 with you over the phone?

7 A. Over the phone, yes, ma'am.

8 Q. So did you have a copy as well as he had
9 his own copy, or did he literally just tell you what
10 his photos showed?

11 A. No. He actually uploaded the photos for
12 me in Dropbox and I could pull them down so we could
13 both look at the photos and talk through them
14 together.

15 Q. So when he was talking to you about the
16 origin of the fire, what exactly -- where did he tell
17 you other than it was in the drive-thru window area?

18 A. We had specific photographs that we were
19 going through, and there were quite a few of them, so
20 -- you know, I don't recall specifically exactly
21 where he's placing the origin.

22 And again, my focus was on looking at the
23 physical evidence available on the 17th.

24 Q. So is the origin of a fire relevant to
25 your part of the investigation?

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1 A. Only in the sense -- from the work that I
2 would do with it, to define the failure modes and
3 effect -- the effect that I'd be driving to look for.

4 I mean, the cause and origin investigators
5 have isolated x amount of exhibits for evidence that
6 they have pulled from the area of origin that through
7 their expertise they've narrowed down to.

8 In my case, I would drive the failure
9 modes and effects analysis for the effect of
10 potential fire causing failure or defect, and then I
11 would start looking at all the plausible modes or
12 mechanisms the particular exhibit or piece of
13 evidence we're talking about might have, and then
14 start looking at what supporting or refuting evidence
15 I would need from an investigative perspective on
16 that exhibit to be able to converge on probable or
17 improbable.

18 Q. Okay, so other than the general area of
19 origin, did Steve Booth tell you anything else about
20 where this fire started?

21 A. Well, he told me that -- I guess that the
22 client -- that there was some question, you know,
23 that people were suspecting involvement potentially.

24 Q. And what did he tell you about that?

25 A. That was really the gist of it.

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1 Q. Did he tell you about any interviews that
2 were conducted?

3 A. No. We didn't get in to any of that.

4 Q. Did Steve Booth tell you whether or not he
5 suspected the client, Mr. Diamontopoulos, caused the
6 fire?

7 A. No, he did not, because again, it would
8 have no bearing on what I would be doing.

9 Q. Okay.

10 A. The evidence is what it is.

11 Q. When Mr. Booth mentioned to you that there
12 was suspicion regarding whether Mr. Diamontopoulos
13 set the fire, who did he tell you thought that Mr.
14 Diamontopoulos set the fire?

15 A. Well, he had told me that -- I guess that
16 his insurance company, that there was some dispute
17 over the cause of the fire, so I'm assuming that
18 that's who is suspecting him.

19 Q. Did Mr. Booth ever mention Mr.
20 Diamontopoulos by name?

21 A. Yes, because that's actually the client.
22 I mean, that's the name, you know, of the client that
23 I guess is your client, but we're working for Mr.
24 Wiggins, and so yes, I have heard that name. He's
25 talked about that.

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1 He's talked about some time lines and
 2 things about the evening of the fire, so I have heard
 3 that name from Mr. Booth.
 4 Q. Okay, but I have a specific question.
 5 Did he ever mention Mr. Diamontopoulos as
 6 the suspect who set the fire?
 7 A. That was what I understood the suspicion
 8 to be.
 9 Q. Did he tell you why there was suspicion
 10 surrounding Mr. Diamontopoulos?
 11 A. I know he's referred to a time line that,
 12 you know, he was there the evening of. I guess he
 13 was the last person that was there that evening, so.
 14 Q. Are you talking about the morning of the
 15 fire?
 16 A. The -- prior to the fire, he was the last
 17 person in the restaurant, was my understanding.
 18 Q. Did he go through the time line with you?
 19 A. No, not in great detail.
 20 I mean, he mentioned a couple of minutes
 21 at Walmart or whatever, and just kind of talked
 22 through it, but we didn't -- we didn't spend any
 23 great detail on the time line because, again, it
 24 would have no bearing on the context of the work I
 25 was doing.

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1 Q. So, for your purposes, the cause of the
 2 fire, of whether or not someone set the fire, has no
 3 bearing on what your -- of your determination?
 4 A. That's correct.
 5 I mean, I specifically was asked to look
 6 at the evidence for evidence of fire causing failure
 7 defects and to be able to comment on this particular
 8 item, this HME IQ wireless transmitter, as to whether
 9 there's sufficient evidence for me to be able to rule
 10 it in or rule it out, so....
 11 Q. Let's go back to the time line.
 12 So Mr. Booth walked through the time line
 13 with you from the time that Mr. Diamontopoulos was at
 14 the store and the time the fire started. Is that
 15 correct?
 16 A. No, that's not correct.
 17 Q. Okay.
 18 A. He didn't walk through the time line with
 19 me in any sense of accuracy. He just said there was
 20 some time line that placed him at the restaurant
 21 prior to, he was looking at all of that.
 22 Q. Prior to the fire?
 23 A. Yes, ma'am.
 24 Q. And then you mentioned Walmart. What did
 25 he tell you about Walmart?

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1 A. He told me that -- in part of that
 2 conversation that apparently there was some video of
 3 his vehicle at a certain time that can help to fill
 4 in points.
 5 But again, we didn't spend a lot of time
 6 on that because it's not helpful to me.
 7 Q. But it was background information given to
 8 you. Correct?
 9 A. Yes, ma'am.
 10 Q. And so you did have a discussion with Mr.
 11 Booth regarding this information?
 12 A. In no great detail, but yes.
 13 Q. Okay, I understand it wasn't in great
 14 detail, but I'm trying to get the details of the
 15 conversation.
 16 A. Right.
 17 Q. So other than the couple of minutes that
 18 -- at Walmart, what else did he tell you about the
 19 background information of this case?
 20 A. I really don't recall anything else
 21 specific.
 22 Q. Okay, was any financial issues surrounding
 23 the business mentioned to you by Steve Booth?
 24 A. Yes. I think that was mentioned on the
 25 17th, on or right before.

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1 Q. Tell me about that discussion.
 2 A. Well, not just -- just that there were
 3 financial issues, and, of course, on the 17th part of
 4 the -- part of the evidence that had been recovered
 5 were actually like -- I don't think they were bank
 6 statements. It was more like deposit slips and
 7 things like that. So it was really in the context
 8 of, you know, why would that be an interest?
 9 Q. And what did Mr. Booth tell you about the
 10 financial condition of Miami Subs?
 11 A. Only that there were issues. We didn't go
 12 into great detail.
 13 Q. So did he just say they were having
 14 financial problems with no details?
 15 MR. WIGGINS: Objection.
 16 MS. DALY: You can answer.
 17 MR. WIGGINS: You can answer.
 18 THE WITNESS: I don't know if he put
 19 it that way, but that yes, there were financial
 20 issues, financial concerns.
 21 MS. DALY: Okay.
 22 THE WITNESS: The exact words I
 23 don't recall, because again, that's not relevant to
 24 what I'm doing.
 25 Q. (Ms. Daly) Did you walk away from that

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1 discussion with the impression that there were
 2 financial problems with the company?
 3 MR. WIGGINS: Objection.
 4 MS. DALY: And you can answer.
 5 MR. WIGGINS: Answer it if you can.
 6 THE WITNESS: Yes.
 7 Q. (Ms. Daly) Did he talk to you about the
 8 fact that there were no dumpsters located on the
 9 property?
 10 A. No.
 11 Q. Did he talk to you about the IRS visiting
 12 Mr. Diamontopoulos the week of the fire?
 13 A. No.
 14 Q. Did he tell you about numerous employees'
 15 checks bouncing the months leading up to the fire?
 16 A. No.
 17 Q. Did he mention any financial issue
 18 specifically?
 19 A. Not that I recall.
 20 Q. Leading up to the evidence inspection, do
 21 you recall any other discussions you had with Mr.
 22 Booth?
 23 A. No, I don't.
 24 Q. Other than Mr. McLean and Mr. Booth, did
 25 you have any other discussions with anyone between

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1 April 11th and April 17th about ---
 2 A. --- Not that I recall.
 3 Q. --- This case?
 4 A. No.
 5 Q. Did you do any evidence review of any type
 6 of documents or photographs other than walking
 7 through Mr. Booth's photos between 11th -- April 11th
 8 and April 17th?
 9 A. Can I check my notes real quick?
 10 Q. Sure.
 11 A. Okay.
 12 (Witness examined documents)
 13 A. No.
 14 Q. Let me go ahead and mark your notes, Mr.
 15 Booth (sic), as Exhibit 2.
 16 (* Exhibit 2 was marked *)
 17 Q. Other than the notes that you have
 18 provided to us, do you have any other notes in this
 19 case?
 20 A. No.
 21 Q. Looking at Exhibit 2, there's a date,
 22 April 11, 2013, and it states, case review with Steve
 23 Booth following receipt of assignment.
 24 The case review with Steve Booth, are you
 25 -- what are you referencing in that statement?

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1 A. Only that I talked to Steve Booth on the
 2 11th about this case.
 3 I know that he and Mr. McLean had talked
 4 about whether or not to retain me, about whether or
 5 not they were going to retain an engineer. I believe
 6 Steve may have even given me a heads-up that I might
 7 be getting a call. So it was really just a -- a very
 8 brief background review.
 9 Q. Do you recall now anything additional that
 10 you spoke to Mr. Booth about other than what we've
 11 just spoken about ---
 12 A. --- No.
 13 Q. --- In the last few minutes? You have
 14 written, intercom system installed directly above
 15 point of fire origin. Origin area not in dispute.
 16 Who told you about the intercom and the
 17 origin?
 18 A. Booth.
 19 Q. The next statement just discusses about
 20 Mr. Wiggins, the attorney requesting service/client.
 21 Have you had any issues being paid for
 22 your services in this case?
 23 A. No.
 24 Q. And have the checks come directly from
 25 McCoy Wiggins?

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1 A. I believe so, yes.
 2 Q. Who told you about the April 17th joint
 3 exam?
 4 A. It could have been either Steve Booth or
 5 Trey, because after I got the assignment we swapped
 6 several emails and several phone calls to make sure
 7 that we honed in on exactly what my role was going to
 8 be in this.
 9 Q. Were you told that your role was limited
 10 in this case to looking at the evidence at the
 11 inspection on April 17th?
 12 A. No. It's -- the initial part of the
 13 assignment was to go participate in that joint
 14 examination and then to support, you know, further
 15 findings and discussion as appropriate.
 16 Q. Okay. I understand what you did at the
 17 evidence inspection. You mentioned support further
 18 findings.
 19 Have there been any other further findings
 20 that you've given opinion about since April 17th?
 21 A. Only in discussion of this -- this one
 22 ion, this HME wireless set.
 23 Q. Other than that, anything else?
 24 A. No.
 25 Q. Why have you never gone to the fire scene?

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1 A. Because there is no need for me to go
 2 within the context of what it is that I'm doing.
 3 You know, if the exhibits -- they've
 4 already been pulled out as they were and made
 5 available on the 17th, and this -- this other device,
 6 the wireless headset device, is no longer there, no
 7 longer available, there wouldn't be much use for me
 8 to go to the fire scene after it's already been
 9 disturbed.
 10 Q. Were you ---
 11 A. --- Oh, sorry.
 12 Q. No, go ahead, please.
 13 A. And since there were no potential fire
 14 causing failures or defects in the things that I did
 15 look at on the 17th, again, there would be no reason
 16 for me to go back there.
 17 Now I'll just add to that, that if I felt
 18 the need to go back there, I would have made the
 19 request and gone.
 20 MS. DALY: Let's take a five-minute
 21 break.
 22 (2:25-2:31 p.m. - recess)
 23 Q. (Ms. Daly) Okay, so we finished
 24 discussing everything you did between April 11th and
 25 April 17th, the evidence exam. Is that correct?

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1 A. Yes.
 2 Q. So let's talk about your evidence exam on
 3 April 17th.
 4 In your notes you have listed six items on
 5 page one of seven, six items you examined.
 6 A. Yes.
 7 Q. And under that it states -- can you read
 8 into the record your handwriting at the bottom
 9 paragraph on page one.
 10 A. Sure. It says x-ray inspection of debris
 11 in paint can using low load portable system.
 12 Operator is not NDI certified as an x-ray
 13 inspector. NDI being non-destructive inspection.
 14 Q. And the inspector you are referring to is
 15 John Cavarock? Is that correct?
 16 A. That's correct.
 17 Q. Upon the completion of your inspection of
 18 these six items listed on page one, was there any
 19 evidence of potential fire causing failure or defect?
 20 A. No.
 21 Q. So after you -- what was your conclusion
 22 after inspecting these six items?
 23 A. I was just really acknowledging that they
 24 were there, like the six plastic Pepsi cups.
 25 Somebody took the time to collect them. I just

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1 acknowledged that I saw them there, and that we as a
 2 group, that's what we looked at. And also that those
 3 originated from Mr. Lacy, and that the other items in
 4 those six, there were no fire causing failures or
 5 defects.
 6 There was nothing notable there.
 7 Q. And the x-ray -- x-ray inspection of
 8 debris in paint can.
 9 A. Yeah. The discussion around that was that
 10 Mr. Cavarock was proposing just x-raying the contents
 11 of that can. I didn't know what was in that can, and
 12 having spent a lot of time looking at x-rays and
 13 non-destructive techniques, the type of x-ray machine
 14 you have, the qualification of the operator, whether
 15 he's level one, two, three certified and so on, goes
 16 directly to the confidence in what you see portrayed
 17 on the screen in the x-ray.
 18 So once I found out that he didn't have
 19 any certification as a non-destructive inspector, I
 20 only had to push to have the can physically opened at
 21 the end of our inspection. So that was a note to
 22 myself just to say that I want to see what's in the
 23 can.
 24 Q. Okay, and did you get to see what was in
 25 the can?

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1 A. I did.
 2 Q. And what was your conclusion after you got
 3 to see what was in the can?
 4 A. It was mostly just debris. There was
 5 nothing noteworthy in there, at least for the
 6 purposes or the context of what I was doing.
 7 Q. Was there any discussion between you and
 8 Mr. Booth or Mr. Cavarock regarding any of these six
 9 items that you haven't discussed with me already?
 10 A. No.
 11 Q. Did you ever have a discussion with Mr.
 12 Wiggins or Mr. McLean or any attorney on behalf of
 13 the plaintiff in this case regarding any of those six
 14 items?
 15 A. No.
 16 Q. Page two of your notes. It says second
 17 set of evidence collected by John.
 18 Are you referring to John Cavarock?
 19 A. I was.
 20 Q. Okay.
 21 A. To be honest, at that point I didn't
 22 recall his name, so I just said John, but that's John
 23 Cavarock.
 24 Q. Let's walk through the items that you
 25 reviewed at this evidence inspection.

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1 Item one ---
 2 A. --- Was the electrical meter, service
 3 meter that John had pulled from the -- the
 4 restaurant.
 5 And also -- these are also -- the way
 6 these are laid out, they follow with the layout of my
 7 photos. I took quite a few photos during my exam,
 8 so....
 9 Q. Okay.
 10 A. It's a very brief meter, but it calls my
 11 attention back to my photos, which we'll see quite a
 12 few of the meter, for example.
 13 Q. Okay. Thank you.
 14 A. Okay.
 15 Q. Was there anything significant with the
 16 meter?
 17 A. No.
 18 Q. Was there any evidence of potential fire
 19 causing failure or defect in the meter?
 20 A. We didn't open it, but no.
 21 Q. Items two and three, you have conduits and
 22 receptors -- receptacles, excuse me.
 23 A. Receptacles, right.
 24 Q. Tell me about your findings with the
 25 conduit and receptacles.

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1 A. There were no findings. There was
 2 unremarkable, no fire causing failures or defects.
 3 Q. I'm going to get you to read your
 4 handwriting under that. It says item two.
 5 A. Okay, it says conduit/branch circuit
 6 removed from wall between office area at first
 7 drive-thru window.
 8 Q. Continue reading, please.
 9 A. Beneath that is receptacle box with
 10 remnants of plugs attached was surface mounted to
 11 office wall.
 12 Q. And what significance does that have to
 13 you?
 14 A. Just giving me the orientation of where it
 15 was and that it was on the surface of the wall.
 16 Q. And this paragraph that says item two in
 17 it ends with attached was surface to the office wall.
 18 A. Mounted?
 19 Q. Mounted to the office wall.
 20 Are you referencing the items two and
 21 three that you previously noted?
 22 A. Ah, yes. And really, you know, again,
 23 this was the first time I'd seen this evidence.
 24 As you know, since you were there, it was
 25 all bagged and tagged, so I'm relying on Mr. Cavarock

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1 and the descriptions, or the brief descriptions that
 2 were on his tags identifying the origin.
 3 Q. Right. And you're relying on Mr.
 4 Cavarock's identification because you were not at the
 5 evidence collection. Correct?
 6 A. That's correct.
 7 And also Mr. Booth, because there was
 8 quite a bit of discussion amongst the engineers as we
 9 were doing this, clarifying points of origin from
 10 where these parts came from and so-on. So.
 11 Q. And was Mr. Booth and Mr. Cavarock ever in
 12 disagreement over where any of these items were?
 13 A. There was discussion more so for
 14 clarification, but no, I wouldn't say disagreement,
 15 no.
 16 Q. What does your next sentence state?
 17 A. Receptacle with blue number one, in
 18 quotes, was located adjacent to drive-thru.
 19 Q. And go ahead and continue reading the next
 20 paragraph, please.
 21 A. Partial disassembly of number one
 22 receptacle revealed essentially uniform thermal
 23 damage with no obvious ohmically induced distress.
 24 Q. And what is the significance with that
 25 finding?

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1 A. No evidence of a potential fire causing
 2 failure or defect within that.
 3 Q. The next is the junction box.
 4 A. Yes.
 5 Q. What does it state in the parentheses?
 6 A. Parentheses, it states reportedly
 7 installed in ceiling.
 8 Q. And did you examine the junction box?
 9 A. I did.
 10 Q. And what did you find?
 11 A. The paragraph below states, uniform
 12 thermal damage, no ohmic -- it's the symbol for ohms
 13 -- ohmic distress. Removal of conduit.
 14 Q. Before you go on, what's the significance?
 15 A. No electrical distress, no ohmically
 16 induced heating.
 17 Q. All right, so go ahead and continue,
 18 please.
 19 A. Removal of conduit, parentheses, blue zip
 20 tie, is the way it was identified ---
 21 Q. --- Right.
 22 A. --- As an exhibit.
 23 So removal of conduit, blue zip tie, to
 24 expose three solid copper conductors to one of two
 25 branches to top of junction box revealed uniform

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1 thermal damage with no -- the symbol for ohms -- no
 2 ohmically induced distress. And it also says below
 3 that uniform oxidation.
 4 Q. So again, what is the significance of that
 5 finding ---
 6 A. --- No evidence of ---
 7 Q. --- To you?
 8 A. --- Electrical distress or potential fire
 9 causing failure or defect.
 10 Q. On page three, can you read the first
 11 paragraph.
 12 A. Okay, it says side flex conduit
 13 terminating at duplex with remnants of plugs still
 14 retained. Exhibits evidence of aluminum alloying
 15 right at side of box body.
 16 Q. What was your findings?
 17 A. Okay. There was some -- some localized
 18 deformation of the copper conduit that's the result
 19 of a eutectic melting process where it's effectively
 20 contaminated the copper with molten aluminum to form
 21 new alloy, and that's the reason that I believe the
 22 distortion is there.
 23 It is not indicative of electrical
 24 distress or any potential fire causing failure or
 25 defect. It simply explains the apparent melting and

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1 deformation localized.
 2 Q. Go ahead and read the next paragraph.
 3 A. Removal of steel conduit with blue zip tie
 4 revealed no localized thermal damage or, the symbol
 5 for ohms, or ohmically-induced distress.
 6 Q. Again, the significance of that finding?
 7 A. No evidence of electrical distress or
 8 potential fire causing failure or defect.
 9 Q. Please read into evidence the next
 10 statement. And I apologize I'm making you read
 11 these, but there's no way in the world I'm going to
 12 be able to go back and read your handwriting. But no
 13 one could read mine, either.
 14 A. I understand.
 15 Removal of steel conduit from bottom of
 16 junction box, parentheses, yellow zip tie, revealed
 17 uniform thermal damage with no ohmic, symbol again,
 18 ohms symbol, no ohmically induced distress.
 19 Q. And what is the significance of that
 20 finding?
 21 A. No evidence of electrical distress or
 22 potential fire causing failure or defect.
 23 Q. What does the next paragraph state?
 24 A. Decision not to expose conductors within
 25 steel conduit connected to receptacle number one due

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1 to consensus that receptacle box was in the wall.
 2 Q. So why was that decision made?
 3 A. Because the -- as installed, the box was
 4 recessed into the wall, so it was protected from the
 5 fire.
 6 Q. Were you in agreement?
 7 A. I was.
 8 Q. What does the last paragraph on page three
 9 state?
 10 A. Orange zip tied segments of conduit was
 11 attached to junction box but was empty.
 12 So I'm just making the point that there
 13 was one section of conduit that was -- there's
 14 nothing in it, so no wires to look at.
 15 Q. Anything else significant ---
 16 A. -- No.
 17 Q. -- About that piece of evidence?
 18 A. (Witness indicated negatively)
 19 Q. Okay. If you could read into evidence the
 20 next paragraph, on page four.
 21 A. Disassembly of duplex junction box with
 22 remnants of plug revealed essentially uniform thermal
 23 damage, parentheses, minimal, with combustible
 24 materials present and existing only superficial
 25 melting of plastic and discoloration.

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1 Q. What was the significance of your finding?
 2 A. Again, no electrical distress. Some
 3 localized thermal -- thermal damage, but it was
 4 superficial in nature, and consistent with exposure
 5 to fire rather than from within the junction box as a
 6 source of heat.
 7 Q. The next paragraph, item three.
 8 A. Item three, branch circuit. It says three
 9 duplex receptacle outlets, branch circuit conductors,
 10 slash, raceways, removed from service entrance, east
 11 corner of building.
 12 Q. And did you find any fire causing failure
 13 or defect in item three?
 14 A. No.
 15 Q. Please continue reading.
 16 A. Okay. Parentheses -- in parentheses under
 17 that paragraph was the number two and number three as
 18 they were identified were located near the origin in
 19 wall to the right.
 20 Q. You can continue reading.
 21 A. Okay. Disassembly of receptacle marked as
 22 number two, in quotes. Minimal thermal damage,
 23 combustible materials intact.
 24 No evidence of localized thermal damage
 25 or, the symbol for ohms, ohmically-induced distress.

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1 Q. Again, the significance of that is that
 2 there was no potential fire causing failure or
 3 defect?
 4 A. That's correct.
 5 Q. Please continue reading.
 6 A. Disassembly of receptacle marked as three,
 7 in quotations, similar thermal damage to number two,
 8 in quotations. No evidence of localized damage or,
 9 the ohm symbol again, ohmically-induced distress.
 10 Q. And what was the significance?
 11 A. No electrical distress, no fire causing
 12 failures or defects in the exhibit.
 13 Q. And what is the next?
 14 A. Disassembly of unmarked receptacle located
 15 in, quotation marks, office.
 16 Q. And what does the last sentence state?
 17 A. Similar thermal damage as in number two
 18 and number three above.
 19 Q. And again, does that mean that there was
 20 no potential fire causing failure or defect?
 21 A. Yes.
 22 Q. Items one through three that we just
 23 discussed that were taken by John Cavarock, were
 24 there any discussions between you and Mr. Cavarock
 25 regarding those items?

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1 A. Not specifically between us, but there was
 2 just general discussion during the course of this
 3 that we were talking about where the exhibits came
 4 from.
 5 There was some clarification, those sort
 6 of things, but nothing of significance to my
 7 findings.
 8 Q. How about with you and Mr. Booth? Did you
 9 explain to Mr. Booth -- first -- strike that.
 10 Is Mr. Booth an electrical engineer?
 11 A. No.
 12 Q. Is he an engineer?
 13 A. No.
 14 Q. So when you were looking at items one
 15 through three, did you discuss your findings with Mr.
 16 Booth?
 17 A. I did that day. As to whether or not we
 18 stopped after item three or after every item and, you
 19 know, had a caucus, no, we didn't. I mean, we just
 20 pressed through the inspection.
 21 Q. I understand that. I'm talking about at
 22 any point in time, did you discuss items one through
 23 three with Mr. Booth?
 24 A. Oh, after the 17th?
 25 Q. Yes. Or on or after.

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1 A. Sure.
 2 Q. And what did you tell him?
 3 A. That there were no -- there's no evidence
 4 of a fire causing failure or a defect within any of
 5 those items examined.
 6 Q. And would you agree with me that Mr. Booth
 7 would have to rely on your expertise as the
 8 electrical engineer to determine whether or not there
 9 was an electrical failure ---
 10 A. --- Well, I'm a ---
 11 Q. --- That caused the fire?
 12 A. --- Mechanical engineer ---
 13 Q. --- Right.
 14 A. --- With a lot of experience looking at
 15 electrical things, but yes, he would rely on me for
 16 the engineering opinion.
 17 Q. Right. And that would be appropriate ---
 18 A. --- Yes.
 19 Q. --- For him to rely on you. Is that
 20 correct?
 21 A. For the engineering opinion, yes.
 22 Q. Right. Okay, let's talk about item four,
 23 the DVR and switch.
 24 I'm going to get you to read the next two
 25 sentences because I can't read it.

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1 MR. WIGGINS: Page five.
 2 THE WITNESS: Yeah.
 3 MR. WIGGINS: Thank you.
 4 THE WITNESS: I lost it there.
 5 It says beneath the statement DVR and
 6 switch, it says, secondary exterior fire damage.
 7 Q. (Ms. Daly) And what does that mean?
 8 A. That the thermal damage exhibited by the
 9 DVR and the switch was consistent with exposure to
 10 heat externally rather than internally.
 11 Q. Uh-huh.
 12 A. And that it's secondary.
 13 Q. And what does the next statement say?
 14 A. The next line says -- that says MFG --
 15 that's abbreviation for manufacturer's details in
 16 photos.
 17 Q. And what's the significance about your
 18 finding with the DVR and the switch?
 19 A. There was no evidence of a potential fire
 20 causing failure or defect. It was -- all the damage
 21 was as a result of exposure to the fire.
 22 Q. There was, during that examination, a
 23 power supply that went to the DVR system, and there
 24 was a point where everyone stopped and you and Mr.
 25 Booth stepped away, and I believe Mr. Booth made a

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1 phone call at that time and the two of you stepped
 2 outside and had a discussion.
 3 Do you recall what that discussion was
 4 about?
 5 A. No. A power supply?
 6 Q. Right. A plug.
 7 A. Yes, I do recall that.
 8 Q. And ---
 9 A. --- The discussion was whether or not the
 10 plug was -- was -- that the item was plugged in at
 11 the time of the fire ---
 12 Q. --- And what was your finding?
 13 A. That that particular cord was not.
 14 Q. Was not plugged into the wall ---
 15 A. --- That's right.
 16 Q. --- At the time of the fire. And how were
 17 you able to determine that?
 18 A. By essentially uniform patterns of
 19 oxidation and discoloration from exposure to the
 20 heat. If it had been plugged in, you would have seen
 21 non-uniform patterns.
 22 Q. Tell me everything you recall about the
 23 discussion with Mr. Booth regarding that plug.
 24 A. That was really the gist of it, the fact
 25 that the plug wasn't plugged in, and I guess there

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1 was some discussion as to whether this was the --
 2 part of the video security -- part of the security
 3 system or not.
 4 Q. Where were you told that this item was
 5 found?
 6 A. I don't recall.
 7 Q. And when you and Mr. Booth talked, did Mr.
 8 Booth tell you the significance of the fact that the
 9 surveillance equipment was unplugged at the time of
 10 the fire?
 11 A. Only that if this was, in fact, the -- the
 12 video system, that that was strange, or abnormal,
 13 noteworthy.
 14 Q. Did you make a phone call after that item
 15 was inspected on that date?
 16 A. No.
 17 Q. Did Mr. Booth?
 18 A. I don't know.
 19 Q. Did he tell you that he called anyone
 20 after finding that piece of evidence?
 21 A. I don't recall specifically.
 22 Q. Do you recall Mr. Booth's reaction to the
 23 plug?
 24 A. Surprise. I think that was not a finding
 25 he was expecting if that was in fact the security

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1 system video.
 2 Q. And you keep saying if.
 3 A. Well, I understand ---
 4 Q. --- Was there ever any evidence that it
 5 wasn't?
 6 A. Not presented on the 17th. I was told at
 7 a later date that that wasn't, that that was an old
 8 system.
 9 But again ---
 10 Q. --- That it was an old surveillance
 11 system?
 12 A. Or part of one, yes. But again, it has no
 13 bearing on ---
 14 Q. --- I understand that.
 15 A. --- My part in this.
 16 Q. --- But I still want to know everything
 17 that's been told to you.
 18 A. I understand. But I don't want you to
 19 understand that I'm not listening all that hard when
 20 I'm hearing it because it doesn't have any bearing on
 21 what I'm doing.
 22 Q. I understand. So let's stick with the
 23 17th.
 24 A. Okay.
 25 Q. Anything else you can recall Mr. Booth

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1 saying to you about the plug that was not plugged
 2 into the wall?
 3 A. Well, I mean, he -- he thought it was
 4 important. He thought it was relevant.
 5 You know, he certainly wanted to -- to
 6 document that and to make sure that he understood it.
 7 As to how he was going to use that and how it fits
 8 into his investigation, I don't know.
 9 Q. All right, I understand.
 10 Were you ever told that there was evidence
 11 that on the day of the fire the surveillance system
 12 had been turned off, according to witness statements?
 13 A. I do know that the statement was made that
 14 it was not operating, but I don't recall. It may
 15 have even -- I may have even read that in a report.
 16 Q. Okay.
 17 A. It may have been in Mr. Lacy's report, but
 18 I've also heard that.
 19 Q. From Mr. Booth?
 20 A. I believe so.
 21 Q. How about from the attorneys?
 22 A. No, I don't recall that.
 23 Q. I appreciate you sticking to the day of
 24 the August 17th, however, right now I would like to
 25 talk about any discussions you have had after August

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1 17th with anyone about the DVR system and the plug
 2 that was inspected on April 17th.
 3 So is it clear what I -- the topic of
 4 discussion I want to stick to?
 5 A. Yes.
 6 Q. Okay, so let's ---
 7 A. --- I see where you want to go. I'm
 8 just....
 9 Q. Okay, so let's first start with Mr. Booth.
 10 A. Okay.
 11 Q. What discussions have you had with Mr.
 12 Booth about the plug that was not plugged into the
 13 wall that you discovered at the April 17th
 14 examination?
 15 A. Only what I've already told you that we've
 16 already gone over.
 17 Q. If you don't mind -- and I apologize. I'm
 18 not trying to ask a question you're already answered.
 19 I must have missed it.
 20 So exactly what was said to you about the
 21 DVR system and the plug to that DVR system?
 22 A. That he was surprised when that was found.
 23 Q. Right.
 24 A. Now, I understand from the discussions
 25 that we've had since then that that's an old system,

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1 that there was another system, a newer system, a
 2 replacement.
 3 Q. So let's be clear.
 4 Mr. Booth told you that there were two
 5 systems, two surveillance systems located on the
 6 property at Miami Subs on the date of the fire?
 7 A. No. What he's told me -- or my
 8 understanding of what he said was that what we had
 9 there was part of an older system, that a newer
 10 system had been installed. So that doesn't mean
 11 there are two up and running systems.
 12 Q. I understand.
 13 A. That's not what I'm trying to imply,
 14 so....
 15 Q. I understand that.
 16 A. Okay.
 17 Q. But you are implying that there was an
 18 older system just left in place in addition to this
 19 newer system?
 20 A. That's my understanding.
 21 Q. Okay.
 22 A. But again, I wouldn't hold to that because
 23 ---
 24 Q. --- I understand.
 25 A. --- To get clarification.

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1 Q. I understand. And Mr. Booth told you
 2 that?
 3 A. That's my recollection, yes.
 4 Q. And who told Mr. Booth that there was this
 5 old system and new system at the property?
 6 A. I don't know. As the cause and origin
 7 investigator, he's doing a lot more legwork, you
 8 know, working the background more so than I am, so --
 9 but I don't know.
 10 Q. So he never told you how he found out that
 11 information?
 12 A. No.
 13 Q. Anything else that you recall that Steve
 14 Booth told you about the DVR system?
 15 A. No.
 16 Q. Have you had a discussion with anyone
 17 else, other than Mr. Booth, regarding the DVR system?
 18 A. No.
 19 Q. Did you have a discussion with Mr.
 20 Cavarock?
 21 A. Not that I recall, no.
 22 Q. Did you have a discussion with anyone from
 23 McCoy Wiggins?
 24 A. Only that there was no evidence of a fire
 25 causing failure or defect, which is what I was there

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1 to look for.
 2 Q. I understand.
 3 Anything about the DVR system specifically
 4 that you recall discussing with anyone from McCoy
 5 Wiggins?
 6 A. No.
 7 Q. Item five.
 8 A. Okay. Electronics and cords removed from
 9 southwest wall of office. Assorted electronic
 10 components, power supplies and apparent routers with
 11 secondary fire damage consistent with exposure to
 12 external -- and I've got q with a dot over it for
 13 heat rate, heat flux, or just external heat.
 14 Two circuit boards loose in debris appear
 15 to be remnants of router not believed to be part of
 16 communication system, slash, headsets.
 17 Q. How did you determine that it was not
 18 believed to be part of the communication system
 19 headsets?
 20 A. The -- the makeup of the boards, the
 21 physical size, was inconsistent.
 22 Q. Anything else besides the physical size?
 23 A. Also the makeup of the boards. I mean, it
 24 was clear that they -- they had LAN interfaces that
 25 would be part of a cable system for a router. It

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1 looked consistent with the router.
 2 I believe Mr. Cavarock stated he thought
 3 they were router components as well as sort of a
 4 consensus as we went through the components, for
 5 where they came from and generally what the
 6 identification was, right down to trying to find
 7 manufacturers, identifiers, and so on on the stuff.
 8 Q. Were you able to find manufacturer
 9 identifiers?
 10 A. On some components, but not on certainly
 11 the circuit boards.
 12 Q. Right. Anything else?
 13 A. No.
 14 Q. And what significance?
 15 A. Again, it was all exposure to -- the
 16 thermal damage was a result of the exposure to
 17 externally applied rather than internally or
 18 ohmically-generated heating. So no fire causing
 19 failures or defects apparent.
 20 Q. Item six.
 21 A. Okay, that says alarm panel and URS
 22 removed from ---
 23 Q. --- What does URS stand for?
 24 A. I'd have to look at my photos to get a
 25 good look at what I abbreviated there.

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1 Q. You can continue reading.
 2 A. Oh, okay. I didn't know if you wanted me
 3 to look at photos.
 4 Q. No.
 5 A. Okay. All right, so removed from
 6 southwest wall of office.
 7 And then beneath that it says actually
 8 determined to be the power supply for the security
 9 camera system.
 10 Trace of power ---
 11 Q. --- Is that what we've been discussing
 12 today?
 13 A. That's what we were discussing earlier
 14 rather than ---
 15 Q. --- In reference to item four?
 16 A. --- DVR and switch, yes. Yeah.
 17 Q. Please continue.
 18 A. So it says trace of power cord, two power
 19 strip, established the camera system was unplugged,
 20 not powered, and cord blades were oxidized,
 21 discolored, consistent with the exposure to fire in
 22 the unplugged state.
 23 Power switch housing for camera system was
 24 compromised by thermal damage resulting in release of
 25 one contact and the actuating spring, making switch

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1 position indeterminate.
 2 Q. Did you find any evidence of potential
 3 fire causing failure or defect in item six?
 4 A. No.
 5 Q. And have we exhausted anything else you
 6 recall about the plug?
 7 A. Yes, we have.
 8 Q. Item seven.
 9 A. It says monitor removed from southwest
 10 wall. It says unremarkable.
 11 Q. Again, any evidence of potential fire
 12 causing failure or defect?
 13 A. No.
 14 Q. Item eight.
 15 A. HP printer. And below that it says
 16 secondary thermal damage. And then, again, below
 17 that it says unremarkable.
 18 Q. Again, any evidence of potential fire
 19 causing failure or defect?
 20 A. No.
 21 Q. Item nine.
 22 A. Item nine was a deposit ticket book, and
 23 then for me, again, underneath that it says
 24 unremarkable.
 25 Q. How about item 10?

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1 A. It says debris pile items recovered
 2 between drive-thru windows. And beneath that it says
 3 monitor, keyboard and molten slag with two, quotation
 4 mark, D cell batteries.
 5 Q. Were you able to determine where the two D
 6 cell batteries came from, other than the pile of
 7 debris?
 8 A. No.
 9 Q. What actual instrument they came from ---
 10 A. --- No.
 11 Q. --- At the time of the fire?
 12 And was there anything significant about
 13 item 10?
 14 A. No.
 15 Q. And again, was there any potential fire
 16 causing failure or defect?
 17 A. No.
 18 Q. You have a telephone number on the back of
 19 page six, 301-620-6758.
 20 A. Okay.
 21 Q. Can you tell me whose number that is?
 22 A. That's probably one of my engineers up at
 23 Pax River, which has nothing to do with this case. I
 24 just wrote down a telephone number somewhere I
 25 shouldn't have.

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1 Q. And are you the only engineer from your
 2 company who has reviewed any of the evidence in this
 3 case?
 4 A. Yes.
 5 Q. Item 11.
 6 A. End of fluorescent tube and strands of
 7 wire.
 8 Q. Did you find anything significant about
 9 item 11?
 10 A. No.
 11 Q. Was there any potential fire causing
 12 failure or defect in item 11?
 13 A. No.
 14 Q. Item 12.
 15 A. Cover plate receptacle.
 16 Q. Again, any potential fire causing failure
 17 or defect?
 18 A. No. This was literally just the cover
 19 plate for a receptacle, so -- but no.
 20 Q. Any evidence on that that there was ---
 21 A. --- No.
 22 Q. --- Any type of failure?
 23 And what does your next paragraph say?
 24 A. The word underlined is Lacy's, and it
 25 refers back to Terry Lacy's evidence, and it says,

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1 item one, paint can opened and sifted. Nothing
 2 remarkable.
 3 Q. And nothing remarkable, does that mean
 4 there was no potential fire causing failure or
 5 defect?
 6 A. Nothing that I could see that was there.
 7 I mean, it was -- I know others probably took samples
 8 and things like that, but from my perspective, no.
 9 Q. And tell me your conclusions?
 10 A. It says no evidence of a potential fire
 11 causing failure or defect within the evidence
 12 available in the exhibit provided, or exhibits
 13 provided. There's an S in there.
 14 Item two is no evidence of remnants of
 15 reported headset intercom system within exhibits
 16 provided.
 17 Q. Before we continue further into your
 18 notes, why did you review the photos of Booth, Mr.
 19 Lacy and Mr. Martini?
 20 A. At which time? Just in general?
 21 Q. In general.
 22 A. Well, specifically there was a question as
 23 to the whereabouts of this headset or the remains of
 24 it, and so I went through certainly Martini's
 25 photographs and Lacy's photographs looking for any

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1 evidence that there might be something there.
 2 Q. And did you find evidence of the remnants
 3 of the headset?
 4 A. The headsets, no, but of the circuit
 5 boards for the...
 6 Q. Base station?
 7 A. The base station, yes.
 8 But I was actually pointed to those by Mr.
 9 Booth, I think, and Mr. McLean. They -- you'll see
 10 in the notes that come up.
 11 Q. And that was after your evidence
 12 inspection on April 17th?
 13 A. Yes. As far as when the photographic
 14 evidence of the remains of the base station appeared,
 15 yes.
 16 Q. Of the circuit boards?
 17 A. Yes.
 18 Q. Is that what you're referring to?
 19 A. Yes, ma'am.
 20 Q. I wanted to get your opinion regarding the
 21 evidence inspection.
 22 After inspecting all of the evidence that
 23 was present on April 17th, 2013, did you find any
 24 evidence of a potential fire causing failure or
 25 defect at that inspection?

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1 A. No, I did not.
 2 Q. Let's look at the last page of your notes.
 3 There's not a page number on it.
 4 It starts of with Troy McLean, phone call
 5 May 17th, 2013.
 6 A. Yes.
 7 Q. Can you tell me -- are these your notes of
 8 your understanding from the phone call that you had
 9 from -- with Mr. McLean?
 10 A. They are. It was really just a case
 11 status for, you know, how I maintain my file, just so
 12 I know where I left it.
 13 Q. Okay, will you read to me that paragraph.
 14 A. It says Trey McLean, phone call 5-17-13.
 15 No need for report at this time.
 16 I provided synopsis of findings and
 17 observations during destructive exam on 4-17. Quote,
 18 no evidence of potential fire causing failures or
 19 defects within evidence presented for examination,
 20 end quote. Excuse me.
 21 Trey was going to try and locate technical
 22 specifications for the transmitter in question for
 23 analysis to identify potential fire causing failures
 24 or defects.
 25 Q. And when he's talking about the

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1 transmitter, is he referring to the base station?
 2 A. Really of the whole system.
 3 Q. The whole system.
 4 A. And I was asking for that, because I would
 5 use that to drive my failure modes and effects
 6 analysis if it was going to be pursued.
 7 Q. Did he locate the technical
 8 specifications?
 9 A. He located pretty much a brochure on the
 10 item which then gave me the model number and so-on.
 11 Then I was able to do additional research to find the
 12 information I needed, or some of the information I
 13 needed.
 14 Q. You said some of the information you
 15 needed.
 16 What information were you able to find?
 17 A. What I found was just very basic operating
 18 characteristics, you know, so many volts, so many
 19 amps. It's big, you know, in terms of size, weight,
 20 basic operating characteristics.
 21 And then I was also able to find a couple
 22 of manuals, one for this as well as one for a similar
 23 system for the batteries, just to get a feel for the
 24 construction of the battery charger and the base
 25 station itself.

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1 Q. What were you not able to find that you
 2 needed?
 3 A. I certainly would have liked, if I were
 4 going to derive that sort of analysis to identify
 5 plausible failure modes and mechanisms in the unit,
 6 then I would need to see the basic drawings or
 7 schematics for the circuit cards so I could identify
 8 component level board failures, that would be of
 9 interest.
 10 Q. And without that information are you able
 11 to -- strike that.
 12 Would you have needed that information to
 13 provide any more of an expert opinion on the base
 14 station?
 15 A. No. I could take what I have and I could
 16 still generate a high level of failure modes and
 17 effects analysis, but it wouldn't go to the
 18 individual component ---
 19 Q. --- Did you do that?
 20 A. No, I did not.
 21 Q. And why did you not do that?
 22 A. Because at this time -- the purpose of
 23 doing that analysis would be to then identify
 24 supporting and refuting evidence within the evidence
 25 to, you know, drive each one of the plausible modes

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1 or mechanisms to ground or convergence.
 2 I don't have any evidence to evaluate, so
 3 -- an analytical analysis on its own isn't really
 4 much help. It just tells you about the design. You
 5 need the artifact to actually close the loop on it.
 6 Q. During your research on this specific base
 7 station, the HME Ion IQ wireless drive-thru audio
 8 system, did you find any evidence during your
 9 research that there had been any type of
 10 manufacturing defect in this product?
 11 A. No.
 12 Q. Did you find any evidence that there had
 13 been a design defect in this product?
 14 A. No.
 15 Q. Did you find any evidence of any
 16 electrical failures with this HME Ion IQ wireless
 17 audio system?
 18 A. No.
 19 Q. Did you have a discussion with Mr. McLean
 20 or Mr. Wiggins after April 17th, 2013?
 21 A. Well, yes. Perhaps you're referring to
 22 May 17th, after May 17th?
 23 Q. Yes.
 24 A. Okay.
 25 Q. I apologize. I misspoke. Yes.

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1 Did you have a conversation between May
 2 17th, 2013, and May 29, 2013, with either Mr. McLean
 3 or Mr. Wiggins?
 4 A. I don't have notes on it. We may have
 5 exchanged emails, because a lot of the communication
 6 has been through email ---
 7 Q. --- Okay.
 8 A. --- As well.
 9 Q. You have provided to me two emails.
 10 Have there been any other emails besides
 11 the two emails?
 12 A. I would expect so, yes.
 13 Q. Will you provide all of the emails either
 14 you have received or sent to Mr. Wiggins to provide
 15 to me at the close of this deposition?
 16 A. Sure, yes.
 17 Q. Okay, and on the record, will you state
 18 that you will not delete any communications from your
 19 computer?
 20 A. Yes.
 21 Q. So the next documented communication you
 22 have is an email dated May 29th, 2013, from Mr.
 23 McLean?
 24 A. Yes.
 25 Q. I'll marked it as Deposition Exhibit 3.

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1 (* Exhibit 3 was marked *)
 2 Q. Do you recall having a discussion with Mr.
 3 McLean prior to him sending this May 29th email?
 4 A. I don't recall.
 5 Q. Did you have any discussions with Mr.
 6 Booth prior to you writing your report, between the
 7 evidence exam on April 17th and May 29th?
 8 A. I don't recall specifically, although I
 9 would expect we probably did have conversations over
 10 that span.
 11 Q. Did you ever talk to Mr. Booth about the
 12 contents of your report?
 13 A. Not beyond what I've already conveyed here
 14 today in terms of my findings and opinions.
 15 Q. In the email dated May 29th from Mr.
 16 McLean, he asks you, could you also say that it is
 17 possible that the circuit boards were represented in
 18 the picture number 33 in Martini's report?
 19 Do you see that question posed to you?
 20 A. I do.
 21 Q. Did Mr. Booth or Mr. McLean show you the
 22 photograph 33?
 23 A. Yes.
 24 Q. And prior to them showing you photograph
 25 33 of those circuit boards, did you find that photo

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1 on your own?
 2 A. No. I -- up until Mr. McLean provided
 3 that photo -- and this may very well be the email
 4 that they provided. I don't know. You'll see the
 5 email chain when you see them.
 6 But I have not seen that photo before.
 7 That -- and so then we went through a series of
 8 exchanges about quality of the photo, because it
 9 really is a poor quality PDF versus a raw image,
 10 which normally people exchange.
 11 Q. Have you ever asked for the raw image?
 12 A. Yes, multiple times.
 13 Q. Who did you ask?
 14 A. Back through Trey McLean. And you'll
 15 probably see that in that exchange.
 16 Q. And did Mr. McLean tell you that he had
 17 ever asked for the raw picture?
 18 A. He -- yes. He said ---
 19 Q. --- What did he say?
 20 A. --- He was going to look for it.
 21 Q. Okay.
 22 A. That he was going to try to -- he's going
 23 to make the request and get that for us. I think
 24 what he had sent me actually was buried in a power
 25 point slide the first time around, and...

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1 Q. And did he ever provide you a clear
 2 picture?
 3 A. The next thing I got was a blown-up
 4 version of the original just on a power point slide,
 5 but it wasn't -- it didn't have any better fidelity
 6 or granularity to it. It was just a bigger blow up.
 7 He tried. Somebody tried. But it wasn't what I
 8 needed.
 9 Q. Did you tell him it's not what I need to
 10 make the determination, can you get me a better
 11 quality ---
 12 A. --- Yes.
 13 Q. --- Picture?
 14 A. I asked for better quality.
 15 Q. Okay. And have you received anything from
 16 Mr. McLean or anyone from McCoy Wiggins since then?
 17 A. I'd have to go back and look at my email
 18 files, but eventually I did get photographs, and then
 19 they're also in Mr. Martini's report. I was able to
 20 see what he had there as well, so....
 21 Q. Were those photos clearer than the ones
 22 you had originally received?
 23 A. A little bit, but not much. But it's
 24 enough to where you can make it out.
 25 At this point, you know, we were still

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1 going through the -- the effort of trying to pin down
 2 exactly which version of the Ion IQ this was, what
 3 the circuit boards really ought to look like, you
 4 know, the actual dimensions and so on. So I was
 5 certainly having difficulty concurring that I could
 6 positively identify that image as an image of those
 7 boards at that time.
 8 Q. Can you read to me your last paragraph on
 9 your last page of notes?
 10 A. Supplemental reports from Martini and Lacy
 11 of Donan Engineering provided for review, 7/18/13, in
 12 advance of 7/19/13 deposition.
 13 My preparation for the deposition was
 14 completed last night.
 15 Q. Exactly how many hours did you spend
 16 preparing for the deposition?
 17 A. Total about five. I had reports to review
 18 that I wasn't aware of.
 19 Q. And we'll get to those reports in a
 20 moment.
 21 So that I understand your opinions in this
 22 case, is it your opinion that there was not an
 23 electrical failure at Miami Subs on January 24, 2012?
 24 A. No.
 25 Q. So is it ---

1 A. --- Well, wait. No, that's not my
 2 opinion.
 3 Q. So let's break that down.
 4 A. Okay.
 5 Q. Have you found any evidence to date that
 6 there was an electrical failure at Miami Subs on
 7 January 24th, 2012?
 8 A. No, I have not.
 9 Q. So even though you have not found any
 10 evidence of an electrical failure, is it your opinion
 11 that there was an electrical failure at Miami Subs on
 12 January 24, 2012?
 13 A. No.
 14 Q. So tell me exactly what is your opinion
 15 regarding the evidence that you have reviewed,
 16 including photographs, any of the items that you've
 17 seen regarding any evidence of failure at Miami Subs?
 18 A. It's my opinion that for the items that
 19 were made available to me for examination on the 17th
 20 that there is no evidence of a potential fire causing
 21 failure or defect within those items.
 22 It's my understanding that the Ion ---
 23 Q. --- I'm going to stop you right there
 24 before you go further.
 25 A. Okay.

1 Q. And you went through hundreds of photos
 2 and reviewed those and you found no evidence of an
 3 electrical failure that could have caused the fire at
 4 Miami Subs on January 24, 2012?
 5 A. Yes.
 6 Q. Is that correct?
 7 A. That is correct.
 8 Q. Is there anything else you reviewed that
 9 you used to eliminate any other type of electrical
 10 failure at Miami Subs?
 11 A. I'm not sure what you mean by anything
 12 else that I used.
 13 Q. Any other documents ---
 14 A. --- Are you asking me documentation ---
 15 Q. --- Yes.
 16 A. --- Or calculations or analysis ---
 17 Q. --- Did anybody show -- you mentioned a
 18 Power Point. That's the first time ---
 19 A. --- Oh, okay.
 20 Q. --- I've heard of a Power Point. So did
 21 someone do a Power Point presentation to you of this
 22 fire scene?
 23 A. Oh, okay. No. That was simply one slide
 24 that had this one image. I think it was 33, whatever
 25 it was we just talked about earlier. That's all that

1 Q. You specifically limit it to the items
 2 that you reviewed on April 17th.
 3 You've also been provided hundreds of
 4 pictures. Is that correct?
 5 A. Yes.
 6 Q. Going through those hundreds of pictures
 7 that were taken at the scene, did you find any
 8 evidence of a fire causing failure or defect?
 9 A. No.
 10 Q. Any other, either photographs, documents,
 11 anything, items that you've reviewed?
 12 Have I covered everything that you've
 13 reviewed, then, to determine that there is no
 14 evidence that you have seen that there was an
 15 electrical failure at Miami Subs?
 16 A. Okay. I'm not really sure I'm
 17 understanding where you're going with that question.
 18 Q. Well, you said that in the actual evidence
 19 the items -- let's call that the items you inspected
 20 ---
 21 A. --- Yes.
 22 Q. --- On April 17th, there was no evidence
 23 of an electrical failure that could have caused a
 24 fire. Correct?
 25 A. That's correct.

1 was there.
 2 Q. Okay.
 3 A. It was just on a PowerPoint slide ---
 4 Q. --- Okay.
 5 A. --- But there wasn't a full PowerPoint.
 6 Q. Okay, so anything else other than the
 7 items, the photographs, anything else that you
 8 reviewed or items that you held in your hand that you
 9 used to determine there was not electrical failure at
 10 Miami Subs on January 24, 2012?
 11 A. No. There wasn't anything else that I
 12 used to do that.
 13 Q. Do you want a five-minute break? We've
 14 been going for another hour.
 15 A. I'm good.
 16 Q. Okay. Your report spends a significant
 17 time, as well as your invoice, on this Ion IQ
 18 wireless drive-thru audio system.
 19 Were you ever shown at the scene where
 20 this wireless system was located prior to the fire?
 21 A. In -- I've never been to the scene, but in
 22 the photographs of the scene it's my understanding it
 23 was in the upper right corner by the drive-thru
 24 window.
 25 And I've since also seen that -- I don't

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1 know if it's Martini's or Lacy's report -- I believe
 2 it's Martini's -- actually has it highlighted as
 3 well. So I'm aware of where it was.
 4 Q. And do you dispute that that was the
 5 location where it was located?
 6 A. No.
 7 Q. Is the location of where it is located
 8 relevant to your analysis?
 9 A. Only in the sense that we now have the
 10 evidence that it had substantial thermal damage, and
 11 it was at or within the area of origin.
 12 And it was not available for -- for me to
 13 take a look at on the 17th, so it's relevant in the
 14 sense that there's something there that's
 15 electrically energized that I am unable to -- to --
 16 to exclude.
 17 Q. And are you qualified to determine whether
 18 or not the location of this audio box and where it
 19 was located, of the fire pattern that it would have
 20 caused if it, the actual audio box, was the ignition
 21 source for the fire?
 22 A. No.
 23 (* Exhibit 4 was marked *)
 24 Q. I'm handing you what I've marked as
 25 Exhibit 4.

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1 Is it your testimony to a reasonable
 2 degree of certainty that the item located in
 3 photograph 33, that is the second item from the left,
 4 is the circuit boards from the HME Ion IQ wireless
 5 device?
 6 A. Yes.
 7 Q. Tell me how you determined that that item
 8 was from the audio system base station?
 9 A. By the approximate length and width
 10 dimensions that were inferred, I guess, from the
 11 other images and the document.
 12 Also by the general construction or the
 13 layout number of boards. It looked to be visually
 14 consistent with what I would expect for the base
 15 station.
 16 Q. So, at trial, is it your understanding
 17 that one of your purposes is to tell the jury that,
 18 in your opinion, this circuit board came from the
 19 audio system?
 20 A. I will certainly tell them it is
 21 consistent with the audio system.
 22 Q. Okay.
 23 A. Yes.
 24 Q. Okay, and do you plan to testify under
 25 oath, that to a reasonable degree of certainty, that

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1 it's from the audio system?
 2 A. Yes.
 3 Q. Have you ever spoken to Mr. Martini
 4 regarding his exam of those circuit boards?
 5 A. No.
 6 Q. Have you ever talked about -- to Mr. Booth
 7 regarding his exam of those circuit boards?
 8 A. To my knowledge Mr. Booth has not had the
 9 opportunity to examine those boards. So that's my
 10 understanding.
 11 Q. And do you know what happened to the
 12 circuit boards?
 13 A. I do not.
 14 Q. Were you ever told what happened to
 15 anything that was located at Miami Subs after the
 16 completion of the investigation in January of 2012?
 17 A. Well, I was told that Mr. Lacy had taken
 18 into custody the exhibits that he had collected, and
 19 then later Mr. Cavarock had done his inspection, at a
 20 much later date, and had taken exhibits into custody
 21 as well.
 22 So my understanding was that all of the
 23 exhibits were taken into the custody of either one of
 24 those two gentlemen.
 25 Q. And how about all the other -- I mean,

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1 there was a great -- you've walked through the
 2 evidence that was collected. Obviously, there was a
 3 great number of things located in a restaurant.
 4 Were you ever told what happened to all
 5 the other items in the restaurant?
 6 A. No.
 7 Q. Did you ever ask?
 8 A. Well, I mean, no, because normally you
 9 wouldn't worry too much about the things that were
 10 not in the immediate area of origin or of interest to
 11 the origin, so no, the rest of the things in the
 12 restaurant, no.
 13 Q. How about the ballast to the fluorescent
 14 lights?
 15 A. No.
 16 Q. Is there any evidence that the fluorescent
 17 lights were an electrical -- had electrical failure
 18 and caused the fire?
 19 A. No, but they were not available to me,
 20 either.
 21 Q. Well, neither was the audio system, and
 22 you've, you know, mentioned the audio system here
 23 today.
 24 So I'm asking you whether or not someone's
 25 mentioned the fluorescent lights, either Mr. Booth or

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1 the attorneys for the plaintiff.
 2 A. I've seen it in -- I guess it's Martini's
 3 report where he did talk about it on the scene, but
 4 no.
 5 Q. Do you have any intention on testifying to
 6 the jury that any component of the fluorescent
 7 lighting caused this fire?
 8 A. No.
 9 Q. So we have your first opinion is that the
 10 circuit boards were components of the base station.
 11 Is that correct?
 12 A. Yes.
 13 Q. Okay. So the next opinion, actually
 14 observation, I should say, stated in your June 3rd,
 15 2013, report states the boards were noted to display
 16 severe thermal damage.
 17 Do you see that?
 18 A. I'm sorry. Which paragraph are you on?
 19 Q. The last page ---
 20 A. --- Yes.
 21 Q. --- Of your report.
 22 A. Yes, I see that.
 23 Q. Other than that one statement, the boards
 24 were noted to display severe thermal damage, did you
 25 find anything else of significance in reviewing the

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1 photos of the circuit boards?
 2 A. No. I mean, the quality of the image
 3 doesn't really support further -- further assessment.
 4 Q. And that's what you were referring to
 5 earlier whenever you asked your attorneys to provide
 6 you with a better quality photo?
 7 A. Exactly.
 8 Q. And you're still waiting for that photo?
 9 A. If there is one, yes.
 10 Q. So when you state that there was severe
 11 thermal damage, tell me what you mean by that
 12 statement.
 13 A. The combustible materials on the board
 14 appear to be consumed.
 15 Surface mounted components appear to be
 16 gone, for the most part. Looks like it's down to
 17 substrate and maybe heat sink material.
 18 What little bit of combustible material
 19 that is there looks like there's carbonaceous residue
 20 for the most part.
 21 So severe thermal damage, consumption of
 22 combustible materials. Potential melting,
 23 degradation of the -- you know, the circuit path and
 24 substrate.
 25 I really don't have enough detail in the

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1 photo to get beyond other than the fact that -- other
 2 than the fact that it has obviously seen a lot of
 3 heat.
 4 Q. Anything else?
 5 A. No.
 6 Q. So is it your opinion, to a reasonable
 7 degree of certainty, that there was an electrical
 8 failure with the base station?
 9 A. No.
 10 Q. Okay. Is it your opinion, to a reasonable
 11 degree of certainty, that there was an electrical
 12 failure with the power supply to the base station?
 13 A. No. That's not my opinion.
 14 Q. I'm trying to walk through these so I can
 15 get exactly what your opinion is.
 16 So do you have any evidence that there was
 17 a potential fire causing failure or defect with this
 18 base station?
 19 A. No.
 20 Q. So if you were called to the stand today
 21 to testify to a jury regarding this base station,
 22 what is your opinion to a reasonable degree of
 23 certainty?
 24 A. That the condition of that or the
 25 potential contribution of that to the fire is

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1 indeterminate. There simply isn't -- I don't have
 2 any evidence to look at, and I can't tell from the
 3 images that I've been given. So I can't -- I can't
 4 effectively rule it out.
 5 I can't reproduce the methodology or the
 6 findings of Mr. Martini because I don't have access
 7 to it.
 8 MS. DALY: Let's take a five-minute
 9 break.
 10 (3:44-3:53 p.m. - recess)
 11 Q. (Ms. Daly) You reviewed the expert reports
 12 from Terry Lacy and Henry Martini. Is that correct?
 13 A. Yes.
 14 (* Exhibit 5 was marked *)
 15 Q. I am showing you what has been marked as
 16 Exhibit 5, the report of Mr. Martini. I'd like to
 17 walk through that report with you.
 18 The first opinion is that the electrical
 19 supply to the building did not cause or contribute to
 20 the fire. Do you have -- do you agree with that
 21 finding?
 22 A. I didn't inspect that.
 23 Q. So do you have any evidence to refute Mr.
 24 Martini's finding that the electrical supply to the
 25 building did not cause or contribute to the fire?

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1 A. No.
 2 Q. Did anybody prevent you from going to the
 3 building at Miami -- the Miami Subs building to
 4 determine whether or not the electrical supply to the
 5 building contributed to the fire?
 6 A. No, but it was my understanding that the
 7 exhibits, some of it had already been removed, but
 8 there was no need for me to go there.
 9 Q. Opinion number -- did you make any
 10 comments to any -- anybody, Mr. Booth, the attorneys
 11 from McCoy Wiggins, or anyone else regarding opinion
 12 one in Mr. Martini's report?
 13 A. Was that the opinion we just covered?
 14 Q. Yes. If you want to look at it, it's
 15 right in front of you.
 16 A. Okay. Thank you.
 17 Q. Oh, you're welcome.
 18 A. So what page are you on?
 19 Q. Number one.
 20 A. And your question?
 21 Q. Did you discuss opinion number one with
 22 anyone?
 23 A. No.
 24 Q. And so the record is clear, do you have
 25 any evidence to disagree with the statement that the

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1 electrical supply to the building did not cause or
 2 contribute to the fire?
 3 A. No.
 4 Q. The second opinion is that the electrical
 5 service from the electric meter to the circuit
 6 breaker panels located within the building did not
 7 cause or contribute to the fire.
 8 Do you agree with Mr. Martini's finding?
 9 A. I did not inspect any of that, other than
 10 the meter, but I have no reason to dispute it.
 11 Q. Number 3. No evidence of electrical
 12 failure was identified in and around the area of fire
 13 origin that could have served as an ignition source
 14 for the fire.
 15 Do you have any evidence to disprove Mr.
 16 Martini's opinion number 3?
 17 A. I have no evidence to refute that, no.
 18 Q. Number four, the electrical components
 19 consisting of wiring and receptacles that are located
 20 within the structure and the area of fire origin at
 21 the rear drive-thru window did not cause or
 22 contribute to the fire.
 23 Do you have any evidence to refute Mr.
 24 Martini's opinion?
 25 A. No.

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1 Q. Number five, the fluorescent fixtures
 2 installed in the suspended ceiling at or near the
 3 area of fire origin did not cause or contribute to
 4 the fire.
 5 Do you have any evidence to refute Mr.
 6 Martini's finding?
 7 A. No.
 8 Q. Before we get to number six and number
 9 seven, do you have -- other than the theory on this
 10 audio system, do you have any other theories you have
 11 given to anyone, Mr. Booth, the attorneys from McCoy
 12 Wiggins, of any possible electrical failure that
 13 could have caused the fire?
 14 A. I don't have a specific theory on this
 15 system. I simply don't have the evidence to be able
 16 to evaluate the condition of that or the contribution
 17 of it, so I don't have a working theory of this
 18 particular part failed first and then subsequently
 19 resulted in, you know, ignition and so on.
 20 Q. Let's put aside anything to do with the
 21 base station.
 22 A. Okay.
 23 Q. Do you have any other possible theories?
 24 A. No.
 25 Q. And in regards to the base station, am I

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1 correct in understanding that you don't have a
 2 workable theory as to how the fire was caused by this
 3 base station?
 4 A. That's correct.
 5 Q. If you would look at photograph 33 and 34
 6 that are both found on Exhibit 4.
 7 First, have you seen any other photographs
 8 of the PCB's?
 9 A. Yes. In Mr. Martini's report that I
 10 reviewed last night, I believe he had front and back
 11 views of the boards, where this is just pretty much a
 12 one-sided view.
 13 (* Exhibit 6 was marked *)
 14 Q. I'm handing you what's also been marked as
 15 Exhibit 6.
 16 Paragraph -- excuse me, photograph 35, is
 17 that the photograph you're referencing?
 18 A. Yes.
 19 Q. Were you ever given these three
 20 photographs prior to you writing your report? I know
 21 you were given photograph 33 because you referenced
 22 it.
 23 How about 34 and 35?
 24 A. Certainly not 35. It doesn't look
 25 familiar. I think what I saw was 33 and then

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1 eventually 34.
 2 Q. When you say eventually 34, what do you
 3 mean by eventually 34?
 4 A. Let me look back at the email that we
 5 referred to earlier where I believe this was actually
 6 -- no, I think it was only 33 initially.
 7 Q. And that was provided by the attorneys who
 8 have retained you. Correct?
 9 A. That's correct.
 10 Q. From the photographs you reviewed, so look
 11 at 33, 34, and 35.
 12 Is there any evidence of localized or
 13 isolated heat damage to the print circuit board
 14 material?
 15 A. The photographs are not adequate for me to
 16 say.
 17 Q. So do you have any evidence that there was
 18 localized or isolated heat damage to the print
 19 circuit boards?
 20 A. No.
 21 Q. Have you ever spoken to Mr. Martini
 22 regarding his inspection of these boards?
 23 A. No.
 24 Q. Did you ask Mr. Martini at the evidence
 25 inspection on April 17th anything about the PCB's?

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1 A. No. To be honest, I was expecting them to
 2 be there.
 3 I mean, because all the evidence had been
 4 collected, so I expected it was going to -- that we'd
 5 probably find them there as we sorted through.
 6 Q. And when you didn't, did you ever ask Mr.
 7 Martini, the other electrical engineer, or the
 8 electrical engineer on site?
 9 A. No.
 10 Q. And am I correct you're not an electrical
 11 engineer?
 12 A. Mechanical.
 13 Q. You're mechanical?
 14 A. That's correct.
 15 Q. But my question is are you an electrical
 16 engineer?
 17 A. No.
 18 Q. Do you have any evidence to refute Mr.
 19 Martini's finding that the heat damage to the printed
 20 circuit board is uniform and consistent with an
 21 external source of heat?
 22 A. No, I don't have any evidence to support
 23 that.
 24 Q. Do you have any evidence to refute it?
 25 A. No. I can't tell with these images with

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1 any real degree of certainty. So within the limited
 2 capability with what's presented here, I mean, I have
 3 no evidence to support or refute his comments.
 4 Q. If you were working with an electrical
 5 engineer at your firm -- do you have anybody else
 6 that works at your firm or are you the only engineer?
 7 A. Just me.
 8 Q. Do you ever work with electrical engineers
 9 ---
 10 A. -- Umm ---
 11 Q. -- On cases?
 12 A. No. Do you mean do I subcontract one or
 13 hire one or consult one?
 14 Q. Or on the same case, if an attorney has
 15 retained you and retained an electrical engineer.
 16 A. I have done, yes, now that I think about
 17 it.
 18 Yes, there have been cases where, I mean,
 19 they've had quite a few engineers ---
 20 Q. --- Right.
 21 A. --- On all one side of a case.
 22 Q. --- Correct.
 23 A. --- As a large team working together. So
 24 in those cases, yes.
 25 Q. And if you were brought in as the

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1 mechanical engineer and you have an expert on the
 2 same side as you that's brought in as the electrical
 3 engineer, what would be your role typically in that
 4 case as the mechanical engineer?
 5 A. Well, as -- from my experience and
 6 background, I would imagine it would be looking
 7 together at these things and talking about it and
 8 sharing an opinion.
 9 Q. And if that electrical engineer was
 10 actually on site and had the item in hand and
 11 inspected the item in hand and made a determination
 12 versus you reviewing the photograph and making a
 13 determination, which opinion would you rely on, yours
 14 or the electrical engineer's that had the item in
 15 hand?
 16 A. When it comes to non-uniform patterns of
 17 damage, oxidation, melting, things like that, I would
 18 rely on mine.
 19 Q. Okay.
 20 A. My observations. But if I was there with
 21 him on site, we'd be discussing it.
 22 Q. Okay, so you would be able to rely on your
 23 opinion based on a photograph.
 24 You would rely more heavily on your
 25 opinion based on a photograph than you would rely on

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1 an electrical engineer who actually had an item in
 2 hand ---
 3 A. --- No. I'm sorry.
 4 Q. --- Doing a determination ---
 5 A. --- I misinterpreted your -- I
 6 misunderstood your question. I missed the photograph
 7 part. I thought we were there together.
 8 Q. No.
 9 A. Okay.
 10 Q. So it's the exact same scenario that we
 11 have here, where you have an actual -- an electrical
 12 engineer who was on site who inspected the PCB's and
 13 made a determination, would you rely on that opinion
 14 more than you would rely on your own opinion based on
 15 photographs?
 16 A. I wouldn't within the context of what I
 17 was asked to do in this case, you know, can I rule
 18 this in or out? I don't have the physical evidence
 19 to be able to do that. I'd have to rely on someone
 20 else's interpretation.
 21 And even though Mr. Martini may be a fine
 22 electrical engineer, I don't know, I'm not going to
 23 rely on his interpretation of thermal damage,
 24 oxidation patterns, and so on.
 25 Q. Would you want anyone else's, other than

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1 your own?
 2 A. If I was asked to form an opinion and rule
 3 it in or rule it out, no, I would -- I would go with
 4 mine.
 5 Q. And in your opinion ---
 6 A. --- And what he provides should be
 7 reproducible by others. Right?
 8 Q. Right. And your opinion in this case is
 9 you have no evidence either way?
 10 A. Yes.
 11 Q. When did you learn that these PCB's
 12 potentially came from the audio system?
 13 A. At or about the time that is in that email
 14 exchange where Mr. McLean had actually sent me an
 15 image, because these images were not made available
 16 to me early on. So up until that time I didn't know
 17 that we had them in custody, or someone had them.
 18 Q. Do you know who identified the photos to
 19 Mr. McLean?
 20 A. No, I don't.
 21 Q. Before I go further, on page three of Mr.
 22 Martini's report you have written notes in the bottom
 23 right-hand corner.
 24 Please read those notes.
 25 (Witness examined documents)

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1 A. Okay. I've underlined certain text there
 2 and in the margin.
 3 Would you like me to read those notes?
 4 Q. Yes, please.
 5 A. There's a bracket that refers back to the
 6 underlined section, and it says secondary severe
 7 thermal damage exposing substrate and heat sink
 8 material. Don't know what surface mounts and other
 9 components look like. Needs a micro exam to support
 10 or refute hypothesis.
 11 Q. What is a micro exam?
 12 A. Microscopic, or in this case, macroscopic,
 13 five to 50x magnification, just to be able to go over
 14 it.
 15 Q. Before we go to number seven, do you have
 16 any evidence to refute anything stated in finding
 17 six?
 18 A. No.
 19 Q. Did you discuss item six with anyone?
 20 A. No, because I only got this last night at
 21 about, what, six o'clock. Actually, I did. We
 22 talked for maybe five minutes this afternoon when I
 23 got here.
 24 Q. Well, you told me earlier that you talked
 25 to the attorneys last night and you talked to them

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1 today ---
 2 A. --- Yes.
 3 Q. --- About the reports.
 4 A. Yes.
 5 Q. Okay, so what did you talk about regarding
 6 the reports?
 7 A. Still that I -- I don't have any evidence
 8 that I can point to that would allow me to rule this
 9 in or rule it out. So it still, to me, is an
 10 open-ended question.
 11 Q. Anything else?
 12 A. No.
 13 Q. So, did they ask you questions back? That
 14 took about 20 seconds. So what else was discussed on
 15 the conversation last night and today?
 16 A. Well, the conversations last night were
 17 really more focused on getting the reports to me so I
 18 could do the review. And ---
 19 Q. So did you talk to them after the review?
 20 A. No.
 21 Q. Okay, so you only talked ---
 22 A. --- And that's what we did briefly ---
 23 Q. --- To them before the review?
 24 A. --- Here today.
 25 Q. Okay.

1 A. Yes.
 2 Q. And other than how to get the reports to
 3 you was there anything discussed in that conversation
 4 prior to you receiving the reports?
 5 A. No, not really.
 6 Q. And then in your discussion today?
 7 A. Very brief summary of an opinion, the same
 8 one I just gave you, that I really can't tell, even
 9 though these -- they have more photos here, they are
 10 a little bit better than what I had gotten earlier.
 11 Still, for me to be able to conclusively
 12 rule out plausible modes or mechanisms with it, you
 13 either need the exhibit, right, to stack up against
 14 the analytical assessment, or you need better
 15 documentation of it, which Mr. Martini may very well
 16 have. It's just not available to me.
 17 Q. Prior to you coming here today, did you
 18 ever ask your attorneys to ask me or anyone on
 19 Nationwide's side to bring to you any additional
 20 photographs?
 21 A. Certainly in the time frame that the email
 22 refers to where image 33 came to me, we had
 23 discussions back and forth about, you know, gee, this
 24 is a PDF image.
 25 I think I even allude to that in my

1 Q. In looking at photograph 16, do you agree
 2 that that was a protected area?
 3 A. Yes, it appears to be.
 4 Q. Generally speaking, do you agree that a
 5 well-defined area of fire origin would result in an
 6 area of greater fire or heat damage rather than a
 7 protected area?
 8 A. That would make sense, yes. I guess I
 9 would -- I want to add to that, though, that
 10 depending upon where the actual point of origin
 11 within a device that's mounted there actually is,
 12 right.
 13 Q. So get -- explain to me any theory you may
 14 have of how this base station had an electrical
 15 failure and caused -- strong enough to cause the
 16 fire.
 17 How did it create a protected area if it
 18 was the actual electrical component that caught on
 19 fire?
 20 A. Well, again, this is Mr. Booth's idea, but
 21 ---
 22 Q. --- And we've already established that.
 23 A. Yeah.
 24 Q. But you don't have any evidence refuting
 25 that this is where ---

1 summary letter here, about it just being a low
 2 quality ---
 3 Q. --- Uh-huh.
 4 A. --- PDF image. Right?
 5 But yes, I mean, I did make those requests
 6 and they said they were going to -- going to ask for
 7 it. But I never did get anything further to look at,
 8 or a better quality to look at. Put it that way.
 9 Q. Okay, let's turn to page four, and it's
 10 finding seven, marked Mr. Martini.
 11 (* Exhibit 7 was marked *)
 12 Q. I'm going to show you what is marked as
 13 Exhibit 7. Do you -- strike that.
 14 First, have you ever read Mr. Booth's
 15 report?
 16 A. I have not.
 17 Q. Have you been provided a copy of Mr.
 18 Booth's report?
 19 A. I have not.
 20 Q. In Mr. Booth's report he states that the
 21 protected area on the wall is the location where the
 22 base station was installed.
 23 Do you agree with Mr. Booth?
 24 A. That's my understanding, that that's where
 25 it was installed. I have no reason to dispute it.

1 A. --- Yeah.
 2 Q. --- The base station was located.
 3 Correct?
 4 A. Correct.
 5 Q. Okay. So I want you -- what I'm asking
 6 from you as the mechanical engineer, give me your
 7 theories on how it could have come about that the
 8 base station, the electrical components of the base
 9 station, caught on fire, was the point of origin, and
 10 caused a protected area on the wall where it was
 11 mounted.
 12 A. Okay. I guess off the top of my head,
 13 right? You don't know what ---
 14 Q. --- Well, you knew -- being ---
 15 MR. WIGGINS: --- Well, let him
 16 answer, Rachel.
 17 Objection.
 18 MS. DALY: I agree. Go ahead.
 19 MR. WIGGINS: Okay.
 20 THE WITNESS: I don't know which
 21 part of the base station, right, is actually up
 22 against that back surface.
 23 For all I know of the base station, since
 24 I haven't seen one taken apart, there could very well
 25 be a metal backing plate that could have been there.

1 And then the circuit boards and the rest of the
2 component could have melted and fallen away. For all
3 I know, that -- that -- that pattern is a metal base
4 plate.

5 I don't know what the internal design
6 features of this are. All I have to look at are
7 remains of circuit cards. Where the rest of the base
8 station is, I don't know. If there's a metal base
9 plate on the back of that, then you may very well be
10 looking at that. So I don't know.

11 Q. (Ms. Daly) Anything else other than if
12 there's a metal base plate there's a possibility that
13 could have provided a protected area?

14 A. Without knowing where within the unit a
15 failure has occurred, and then how that would
16 actually compromise the integrity of the housing
17 holding this up -- and again, without the details of
18 the design constraints for the design features of
19 this -- but I could visualize losing just the lower
20 part of the base station.

21 I mean, I don't know how this is going to
22 come apart. It depends on where within the confines
23 of the housing you start the ignition or start the
24 fire, and then how that thing then comes apart.

25 But, you know, I understand where you're

1 that.

2 Q. Other than if there was a metal base
3 plate, or I believe you mentioned if something in the
4 bottom of this audio system fell to the ground and
5 caught on fire, any -- any other theory you could
6 think of that would have caused a protected area as
7 opposed to what you would generally find ---

8 A. --- Well ---

9 Q. --- If that was the point of origin?

10 A. Just to be clear, before -- I'm just
11 saying that I don't know how this housing would
12 necessarily come apart as, you know, depending on
13 where you start the fire.

14 But no, I don't have any other thoughts as
15 to how you would leave a protected area behind this
16 unit and still have that be the point of origin.

17 Q. Generally, whenever you've gone into fire
18 scenes ---

19 A. --- Yes.

20 Q. --- Is the point of origin the most
21 damaged area at a fire scene?

22 A. Well, typically that's where your highest
23 heat intensity is or seems to be in the ones that
24 I've been on, yes.

25 Q. Have you ever seen the point of origin

1 going, but I'm not sure that I necessarily need to
2 defend the pattern on the wall for the focus of what
3 I'm actually looking to do. I feel like this is more
4 Mr. Booth and the cause and origin guys that would
5 ---

6 Q. --- So are you saying that the pattern of
7 fire on the wall is not within your expertise?

8 A. No. I'm saying that ---

9 Q. --- Because I thought you said earlier you
10 would have -- you would look at yours over an
11 electrical engineer's when you're looking at patterns
12 of fire.

13 A. You didn't say on the wall. At that time
14 we were talking about temper, discolorations,
15 oxidation patterns, and damage on a circuit board.
16 That's different than showing me a soot stain on a
17 wall.

18 Oxidation, temper, discolorations, are
19 definitely different things.

20 Q. Okay, so for the shadows and the pattern
21 on the wall you would not give an opinion as an
22 expert to the jury?

23 A. No. I wouldn't necessarily ---

24 Q. --- Okay.

25 A. I would not give them opinion defending

1 provide a protected area and there be a higher fire
2 and heat damage located somewhere else?

3 A. I don't know so much about it being a
4 protected area, but depending on the fuel loads in
5 the room after the fire initiates, I have seen higher
6 intensities elsewhere.

7 Q. If there's like a ventilation system
8 somewhere?

9 A. Sure. I mean, or if there's something
10 that's highly combustible in another part of the room
11 that catches large fuel loads, you get higher heat
12 intensities.

13 Q. Did you have a discussion with anyone
14 regarding this protected area?

15 A. Steve Booth told me that he saw that that
16 was there.

17 Q. And what did he tell you about it?

18 A. After the 17th. It would have been well
19 after.

20 Q. What did he tell you about it?

21 A. Oh, I'm sorry. I thought you said when.

22 Q. Oh, no. That's okay.

23 A. Okay. Just simply that there was a
24 protected pattern on the wall.

25 Seems to be pretty much reciprocal to the

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1 dimensions of the base of the unit, so suspects that
 2 pretty well confirms where it was installed.
 3 Q. Did you ever have a conversation with Mr.
 4 Booth about it being unusual that there would have
 5 been a protected area of the wall at the point of
 6 origin?
 7 A. No.
 8 Q. Did the two of you discuss anything about
 9 that, other than the fact that it was a protected
 10 area?
 11 A. Relative to...
 12 Q. Anything, I want to know any conversation
 13 you've ever had regarding this point of origin.
 14 A. No. I mean, the only -- the only
 15 discussions we've had have been focused on really
 16 making sure that they understood or -- you know,
 17 they're making sure that I knew what -- what this
 18 component was and helping me get to the
 19 manufacturer's information, discussing whether or not
 20 there was enough evidence given as close proximity to
 21 the point of origin to be able to rule it in or rule
 22 it out as a potential cause, and recognizing that we
 23 have nothing but photos, you know, could you
 24 conclusively, you know, work through what we do have
 25 to be able to say one way or another.

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1 Q. Do you agree that the fact that this was a
 2 protected area makes it less likely that the audio
 3 system was the point of origin of the fire?
 4 A. No. What this tells me is that there was
 5 something there to give you that protected area and
 6 it's likely going to be the back of the unit. As far
 7 as what the back of the unit is, whether that's a
 8 metal base plate or plastic housing or what, I don't
 9 know.
 10 So without knowing the construction of the
 11 box, where within the box you think the fire may have
 12 started and occurred, and then how you would
 13 subsequently degrade or lose the integrity of the
 14 box, no. All that tells me is that that's a
 15 protected area on the wall.
 16 Q. And you've never purchased one of these
 17 audio systems to do any type of destructive testing?
 18 A. No.
 19 Q. Have you ever purchased one to take it
 20 apart to determine the specifications ---
 21 A. --- No.
 22 Q. --- Of the design?
 23 A. We discussed it, but we did not do that.
 24 Q. Do you have any intentions on doing this
 25 before trial?

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1 A. Not that I'm aware of, no.
 2 Q. And without doing that, are you able to
 3 testify to a reasonable degree of certainty the
 4 specifications of this audio system?
 5 A. You mean the board level specifications
 6 that would allow a detailed failure modes and effects
 7 analysis?
 8 Q. Yes.
 9 A. No.
 10 Q. Are you aware of any screws or holes from
 11 the screws found in the protected area of the wall?
 12 A. No.
 13 Q. Do you know how this was mounted on the
 14 wall?
 15 A. Just a minute. Let me think.
 16 When Booth and I talked about this, he
 17 actually did tell me that it was mounted on the wall
 18 using screws, but I don't recall whether the screws
 19 were there or not.
 20 And as for your question just now, I have
 21 seen in the images -- I think it was in Martini's
 22 report that shows the back side of the base unit, and
 23 it shows four holes, I believe, for a screw mount
 24 location.
 25 Q. Did you speak with anybody regarding Henry

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1 Martini's finding in number seven?
 2 A. No.
 3 Q. Do you have any evidence to refute any of
 4 the statements found in Martini's Exhibit 7 -- excuse
 5 me, finding seven?
 6 A. No. Recognizing also, of course, that I
 7 haven't seen Mr. Booth's report to see the context of
 8 what he's saying, but no.
 9 Q. On page five of Mr. Martini's report, at
 10 the bottom right-hand corner, can you read to me what
 11 you have written.
 12 A. It says, extensive secondary damage may
 13 have destroyed primary patterns. This should have
 14 been recovered.
 15 Q. And what are you referring to in that
 16 statement?
 17 A. Well, there was obviously extensive
 18 thermal damage to this device that was in the area of
 19 the origin, and that what Mr. Martini is talking
 20 about here are the heat damage.
 21 And the point I'm making is that this
 22 thing has been exposed to a lot of secondary heat
 23 damage as a result of the fire, and so it's hard to
 24 infer, certainly from pictures, primary versus
 25 secondary potentially. It could potentially mask

1 some of the primary thermal patterns.
 2 So I'm saying it should have been
 3 recovered so that we could get a better look at this
 4 under magnification and get better -- better
 5 photographs, which, again, he may have. But for me,
 6 I need more than that.

7 Q. Is it your opinion that Mr. Martini could
 8 not make this finding, or is it your opinion that you
 9 can't make this finding on the photographs?

10 A. It's my opinion that I cannot reproduce
 11 his finding. I cannot look at his photographs and
 12 concur with his observation.

13 Q. Is it your opinion, though, that Mr.
 14 Martini made the wrong determination based on his own
 15 inspection of the actual item?

16 A. No. I'm not opining that he made the
 17 wrong observation. I just simply don't know his
 18 background and ability to infer thermal patterns and
 19 oxidation patterns and so on. It's something you
 20 need to look at to be able to draw your own
 21 conclusion. I should be able to ---

22 Q. --- But you're not saying his conclusion
 23 is wrong. Is that correct?

24 A. That's correct.

25 Q. So on page six you have handwritten notes.

1 A. I do, yes.

2 Q. And do you agree with the statement, the
 3 energy loading characteristics of a class two power
 4 supply are intended to minimize fire initiation
 5 potential and provide acceptable protection from
 6 electric shock?

7 A. I do, and it's that last sentence that my
 8 comments in the margin are really geared towards.

9 Q. But you do agree with that statement?

10 A. I do, yeah.

11 Q. You said that you also reviewed Mr. Lacy's
 12 report.

13 A. I did.

14 Q. It's still in your file, I believe, if you
 15 want to take a look at it.

16 A. Sure.

17 Q. I did not note any notes taken on Mr.
 18 Lacy's. Am I correct?

19 A. Yes. That's correct. It was more
 20 informational than anything, my read of it was.

21 Q. And Mr. Lacy is a fire scene investigator.
 22 Correct?

23 A. Yes.

24 Q. And you are not. Is that correct?

25 A. That's correct.

1 Will you read those to me, please.

2 A. Sure. It's in reference to the class two
 3 power supply comments that he's got in his reports,
 4 and I said that class two -- you know, class two
 5 assumes dry indoor use, non-hazardous locations.

6 NEC, national electrical code. But it
 7 comes from -- straight from that. There are some
 8 caveats on class two and their ability to
 9 successfully minimize the potential for a fire.

10 Q. And why did you take those notes? What's
 11 the significance?

12 A. The area it's installed in, certainly
 13 there is potential for it to have been contaminated.

14 I mean, just because he says it's class
 15 two, that doesn't mean that it can't cause a fire.

16 There are some caveats that are called out
 17 in the NEC. You know, it's got to be indoors, it's
 18 got to be dry, non-hazardous locations. You don't
 19 want to contaminate the thing because of -- the
 20 boards and components are exposed.

21 Q. Do you agree with his two sentences in
 22 this paragraph that begins, class two power supplies
 23 are energy limited and are intended primarily to
 24 provide power to low voltage electrical devices?
 25 Do you agree with that statement?

1 Q. Is there anything contained in Mr. Lacy's
 2 report that you have evidence to refute?

3 A. No.

4 Q. Did you discuss Mr. Lacy's report with
 5 anyone?

6 A. No.

7 Q. Is the cause and origin of a fire outside
 8 of your expertise?

9 A. The -- the cause and origin investigation,
 10 yes.

11 Q. Is outside of your expertise?

12 A. Yes. My focus is strictly in the defect
 13 investigation, product liability, failure analysis.

14 Q. Let me go back to Mr. Lacy's report, and
 15 on page five, number seven, is it outside of your
 16 expertise to comment on whether or not the theory put
 17 forth by Mr. Booth is plausible?

18 A. I haven't seen Mr. Booth's report to know
 19 his theory.

20 Q. Reading number seven, the -- the subject
 21 matter and the opinion in number seven, is that
 22 outside of your expertise?

23 A. No.

24 Q. It's not outside your expertise?

25 A. No. I mean, I've got quite a -- quite a

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1 bit of background in heat transfer. Certainly the
 2 heat transfer aspects of that, combustion is basic
 3 mechanical engineering.
 4 Q. And have you ever discussed -- and that
 5 was not included in your expert report. Correct?
 6 A. That's correct.
 7 Q. And is that outside of the scope of your
 8 testimony in this case?
 9 A. Yes.
 10 Q. Okay. And at trial do you have any
 11 intention on testifying regarding heat transfer,
 12 whether or not the theory set forth in finding seven
 13 is plausible?
 14 A. Based on what's on the table today, no.
 15 If we come back with a specific failure
 16 mode or mechanism that's plausible up inside of this
 17 box, for example, and start talking about heat
 18 transfer characteristics for how you can communicate
 19 that out through the box, then yes, if that were
 20 asked.
 21 Q. Okay.
 22 A. And if the information was made available
 23 to me to form basis.
 24 Q. But that was not included in your expert
 25 report?

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1 A. It's not. I don't have the information in
 2 front of me today to -- to do that.
 3 Q. Do you have any opinions other than what's
 4 contained in your expert report?
 5 A. No.
 6 MS. DALY: I don't have any other
 7 questions.
 8 Thank you for your time.
 9 THE WITNESS: Okay.
 10 MR. WIGGINS: I have no questions.
 11 WHEREUPON,
 12 at 4:44 o'clock p.m. the deposition was adjourned.
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1 CERTIFICATE OF TRANSCRIPT
 2 I, Cassandra J. Stiles, Notary Public in
 3 and for the County of Forsyth, State of North
 4 Carolina at Large, do hereby certify that there
 5 appeared before me the foregoing witness;
 6 That the testimony was duly recorded by
 7 me, reduced to typewriting by me or under my
 8 supervision and the foregoing consecutively numbered
 9 pages are a complete and accurate record of the
 10 testimony given at said time by said witness;
 11 That the undersigned is not of kin nor
 12 associated with any of the parties to said cause of
 13 action, nor any counsel thereto, and that I am not
 14 interested in the event(s) thereof.
 15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand this the 12th day of August, 2013.
 17 Cassandra J. Stiles, CVR
 18 Certified Court Reporter
 19 Atlantic Professional Reporters
 20 Post Office Box 11672
 21 Winston-Salem, NC 27116-1672
 22
 23
 24
 25

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1 CERTIFICATE OF OATH
 2 I, Cassandra J. Stiles, Notary Public in
 3 and for the County of Forsyth, State of North
 4 Carolina at Large, do hereby certify that there
 5 appeared before me the foregoing witness;
 6 That the witness personally appeared
 7 before me at the date, time and location hereon
 8 captioned and was personally sworn by me prior to the
 9 commencement of the proceeding in the matter hereon
 10 captioned.
 11 IN WITNESS WHEREOF, I have hereunto set my
 12 hand this the 12th day of August, 2013.
 13 Cassandra J. Stiles, CVR
 14 Certified Court Reporter
 15 Atlantic Professional Reporters
 16 Post Office Box 11672
 17 Winston-Salem, NC 27116-1672
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